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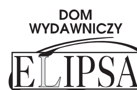

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KEY ELEMENTS OF THE CRIMINAL LAW CONFLICT SYSTEM, WITH SPECIAL REFERENCE TO SPANISH CRIMINAL LAW

ANTONIO OBREGÓN GARCÍA*

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Abstract

Criminally relevant conduct often falls under several criminal precepts, regulating as many criminal notions as possible, and it is necessary to decide whether all, some or only one of them could be applicable. This phenomenon, termed 'conflict', occurs when a subject's actions with criminal relevance are, wholly or partially, subsumed under different criminal precepts. To definitively classify the punishable act, it is then necessary to take a further step, which can be considered conclusive, and determine the precept or precepts applicable to the act. Hence, this paper analyses the meaning, content, and application of the conflict of laws and conflict of rules.

Keywords: Spanish Criminal Code, conflict of laws, conflict of rules

I. THE CONFLICT OF LAWS SYSTEM

1. THE CONFLICT OF LAWS PHENOMENON AS A SYSTEM

According to our theory of a criminal offence,[1] legal classification of an act with the features of a crime, as well as determining and quantifying the criminal liability it generates, should be complemented by an analysis of its essential structural elements (criminal illegality and culpability), other factors presupposing such liability (such as

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1 Obregón García, A., Gómez Lanz, J., *Derecho Penal. Parte General: Elementos básicos de la teoría del delito*, Madrid, 2023, passim.

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changing circumstances) and, where necessary, exceptional charges (e.g., punishable preparatory acts and attempts, participation, recklessness, and criminal liability of legal persons). However, criminally relevant conduct frequently can be subsumed under several criminal precepts, regulating as many criminal notions as possible, and it is necessary to decide whether all, some or only one of them could be applicable. This phenomenon, termed 'conflict', occurs when a subject's actions with criminal relevance are, wholly or partially, subsumed under different criminal precepts. To definitively classify the punishable act, it is then necessary to take a further step, which can be considered conclusive, and determine the precept or precepts applicable to the act. This question is fundamental in the so-called theory of conflicts of criminal law and is crucial for legal qualification of the act(s) committed and assessing the accrued criminal liability. Resolving this conflict can be as significant as typifying the criminal conduct in practice.

Legal doctrine, however, has traditionally overlooked this significant section of criminal theory, often examining it in a segregated, superficial, and insufficient manner. The theory of conflict of laws (or rules or precepts), whose status is branded 'rudimentary' by Gracia Martín[2] and even more harshly as 'unparalleled chaos', has, until recently, suffered from neglect in both Spanish and international scientific doctrine. This has started to be remedied thanks to various studies, including those by Sanz Morán,[3] Castelló Nicás,[4] Suárez López,[5] Escuchuri Aisa,[6] Matus Acuña,[7] Roig Torres,[8] Carranza Tagle,[9] Carnevali Rodríguez and Salazar Zenteno.[10] While its development has often been restricted to the field of the theory of criminal law, in terms of determining and interpreting applicable law, its connection with the theory of conflict between crimes (generally a corollary of the legal theory of crime) is verifiable, though not always highlighted. We posit that, following the valuable contributions that have recently favoured the progress of the theory of conflict in criminal law, this link should be clearly established. Moreover, we argue for its connection with the theory of punishment, particularly in determining a penalty, thus presenting a profoundly *inter*disciplinary issue.

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[2] Gracia Martín, L., 'Prólogo', in: Escuchuri Aisa, E., *Teoría del concurso de leyes y de delitos. Bases para una revisión crítica*, Granada, 2004, pp. XV–XVI.

[3] Sanz Morán, A., *El concurso de delitos. Aspectos de política legislativa*, Valladolid, 1986.

[4] Castelló Nicás, N., *El concurso de normas penales*, Granada, 2000.

[5] Suárez López, J.M., *El concurso real de delitos*, Madrid, 2001.

[6] Escuchuri Aisa, E., *Teoría del concurso de leyes y de delitos. Bases para una revisión crítica*, Granada, 2004.

[7] Matus Acuña, J.P., 'Los criterios de distinción entre concurso de leyes y las restantes figuras concursales en el código penal español de 1995', *Anuario de Derecho Penal y Ciencias Penales*, 2005.

[8] Roig Torres, M., *El concurso ideal de delitos*, Valencia, 2011.

[9] Carranza Tagle, H.A., *Introducción al concurso de delitos*, Montevideo, 2011.

[10] Carnevali Rodríguez, R., Salazar Zenteno, C., 'El principio de alternatividad como cláusula de cierre dentro del concurso de leyes', *Revista De La Facultad De Derecho*, 2020, No. 49; Carnevali Rodríguez R., Salazar Zenteno, C., 'El delito de producción de material pornográfico infanto-juvenil en Chile. Especial atención al bien jurídico protegido y algunos problemas concursales', *Revista de la Facultad de Derecho y Ciencias Políticas*, 2022, Vol. 137, No. 52.

The analysis of this issue usually conducted under two different topics, which, in addition, belong to areas other than the General Section of Criminal Law. On the one hand, there are conflicts of rules or criminal laws, in which the solution involves applying a single concurrent precept. This study is normally left to the theory of criminal law. On the other hand, there are so-called as 'conflicts between crimes', in which several infractions can be identified and therefore multiple penal rules could be applied. These conflicts are traditionally considered a corollary of the theory of crime, although due to their specific penological regime, they also impact the theory of punishment. In the first case, the issue of conflict is viewed as a mere question of determining the applicable criminal law. This has led to some denying the status of genuine conflict, which is why part of the doctrine refers to them as 'apparent conflicts of law'.[11] In the second case, the conflict theory focuses on the legal regime for determining the extent of criminal liability resulting from the commission of multiple crimes and how liability should be demanded for them.

In our opinion, however, this separation is improper, as both scenarios rest on the same premise: a multitude of concurrent rules in a specific factual case, an idea affirmed by the Spanish Criminal Code, which necessitates the joint handling of both conflict types. Evidence of this is the numerous instances where the main dogmatic difficulty lies in deciding whether the conflicts arising are one of precepts or crimes (some examples of cases of undoubted practical relevance include: the conflict between attempted homicide and intentional injuries inflicted; between an omission of the duty to assist and homicide or injuries; between falsehoods and fraud; between crimes against road safety and crimes of harmful outcomes supervening from these…). Consequently, we aim to present a holistic view of criminal conflict, which, while undeniably consistent with the Spanish Criminal Code, we believe can be adapted to any system where this issue is not explicitly regulated or is based on the same foundation, as it rests on general principles underpinning Criminal Law. Concurrently, we will attempt to illustrate its explanation by applying it to various practical examples, which we hope can be used to assess the theory's consistency.

2. SIGNIFICANT PROMINENCE OF THE CONFLICT PHENOMENON

As predicted, the phenomenon of conflict arises with overwhelming frequency: it is rare that an act of criminal nature is not encompassed within more than one criminal precept. However, the considerable expansion that Criminal Law has undergone in recent decades, and the legislative techniques used in the classification of conduct, progressively less refined and more inclined towards casuistry, have heightened the issue of conflict and the complexities in addressing it.

Several factors contribute to this peak in conflicts. As we stated, the excessive expansion of Criminal Law, quantitatively, increases conflicts: logically, the more types of crime, the greater the likelihood of conflict issues arising. However, from

[11] Gimbernat Ordeig, E., 'Concurso de leyes, error y participación en el delito', *Anuario de Derecho Penal y Ciencias Penales*, 1992, pp. 837–838.

a qualitative point of view, this phenomenon is also enhanced, as new types of crime often deviate from the standard of crimes based on outcomes and damage; we typically encounter crimes with greater complexity, overlapping with other types of crime. Examples include crimes involving omission, increasingly prevalent in the criminal corpus; the proliferation of aggravated or attenuated subtypes, especially the former; complex crimes that include differentiated typologies, such as the case of aggravated homicide in Article 138.2.b) CC; or the creation of types derived from classics, such as a significant number of financial crimes arising from fraud. This connection between new types of crime and existing ones is an inevitable source of conflict problems and, as we pointed out, discrepancies.

3. LEGAL REGULATION AND COMPONENTS OF THE SPANISH CONFLICT OF LAWS SYSTEM

In the precepts concerning application of criminal law, the Spanish Criminal Code contains a rule (Article 8) that outlines the conflict phenomenon and aims to control it.[12] The legislator thus provides a method, whose ultimate goal, like any issue seeking to determine the seriousness of criminal liability, is to achieve proportionality:

(a) Firstly, Article 8 of the Criminal Code defines the concept of conflict: as any case that includes one or more acts "liable to be defined pursuant to two or more provisions" of the Criminal Code.

(b) It then establishes the rules of preferential application: Articles 73 to 77 of the Criminal Code, which are typically identified as the rules concerning conflicting offences, and which presuppose that the act or acts committed constitute or comprise two or more criminal offences.

(c) Next, when the conflict cannot be categorised as a conflict between crimes, it prescribes a series of subsidiary rules: the four rules of Article 8 CC, which correspond to what is called conflicts between rules or laws (since, there is only one infringement, only one of the conflicting rules can be applicable).

(d) Finally, it establishes an internal dependence relationship between the rules relating to the conflict of precepts: this is resolved, prima facie, by referring to the first three rules defined in Article 8 of the Criminal Code (known as the relationships of specialty, subsidiarity, and absorption), which are aimed at determining the principle capable of encompassing the entire illegality of the act. But "in the absence of the above criteria", the rule that provides for the application of the most serious criminal precept (often referred to as the alternativity rule) is observed.

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[12] Article 8 of the Criminal Code states that "Acts liable to be defined pursuant to two or more provisions of this Code and not included in Articles 73 to 77 shall be punishable by observing the following rules: 1. A special provision shall have preferential application rather than a general one; 2. A subsidiary provision shall be applied only if the principal one is not, whether such a subsidiary nature is specifically declared or when it may tacitly be deduced; 3. The widest-ranging or complex penal provision shall absorb those that punish offences committed therein; 4. Failing the preceding criteria, the most serious criminal provision shall exclude those punishing the act with a minor punishment".

This order of precedence, derived from the content of Article 8 of the Criminal Code, is based on the principle of a comprehensive assessment of the facts, a reflection of the principle of proportionality,[13] according to which the severity of the penalty must correspond to the gravity of the unlawful act (and its perpetrator), as well as to the degree of culpability. The sentencing implications in the event of a conflict are that it must strive to cover as much of the illegality of the conduct as possible. If the act constitutes two or more infractions, which must be considered to fully evaluate this illegality, it is necessary to initially address the conflict between crimes. However, if the act cannot primarily be considered as constituting two or more offences – which will be clarified below, due to the meaning and requirements of the *non bis in idem* principle[14] – it is necessary to verify if just one of the precepts covers the entire scope of the act's illegality, making it the applicable precept (satisfying the principle of proportionality fully), and if not, it is necessary to apply the precept that covers the most illegality (thereby satisfying the principle of proportionality as much as possible).

Therefore, the rules relating to the conflict of offences are applied first; followed by the rules of specialty, subsidiarity, and absorption; and, finally, the rule of alternativity. These represent three successive steps to address the issue of conflict, guided in every case by the ultimate goal of proportionality. In the first two cases, this goal is fully achieved, and in the third, it is achieved as much as possible (although some doctrinal[15] sects argue the principle of comprehensive fact assessment prevails over the non bis in idem principle).

4. CRITERIA FOR DISTINGUISHING BETWEEN A CONFLICT OF OFFENCES AND A CONFLICT OF RULES

In broad terms, to apply the procedure for the conflict system outlined by the legislator in Article 8 CC (which, as we have mentioned, we believe can be adapted to any system governed by the aforementioned principles, namely, non bis in idem and proportionality), it is necessary to clarify the essential moment of this system: when the rules of conflict between offences apply or, conversely, those of conflict between precepts.

As explained, the grounds for applying the conflict rules pertaining to conflict of offences is the assertion of the existence of more than one infringement. This assumption requires, at least, two conditions: one positive, the plurality of typical actualities (the acts must be subsumed under several types), and one positive-negative, the plurality of infringements, which, in the majority doctrine's view,

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[13] Aguado Correa, T., *El principio de proporcionalidad en Derecho Penal*, Madrid, 1999; Cuerda Arnau, M.L., 'Aproximación al principio de proporcionalidad', in: *Derecho penal*, *Estudios jurídicos en memoria del Profesor Dr. D. José Ramón Casabó Ruiz*, Valencia, 1997.

[14] de León Villalba, F.J., *Acumulación de sanciones penales y administrativas. Sentido y alcance del principio "non bis in ídem"*, Barcelona, 1998.

[15] Escuchuri Aisa, E., 'El concurso de leyes en el contexto legislativo reciente. Algunas reflexiones en torno al principio de alternatividad', in: Pozuelo Pérez, L., Rodríguez Horcajo, D., *Concurrencia delictiva: la necesidad de una regulación racional*, Madrid, 2022, pp. 97–98.

implies the absence of a violation of the non bis in idem principle. The first condition is necessary for a genuine conflict, which serves as a starting point; therefore, the second condition is where issues arise.

Since Constitutional Court ruling 2/1981 of 30 January (RTC 1981/2), the Spanish Constitutional Court has acknowledged that the *non bis in idem* principle is part of the fundamental right to the principle of criminal legality in criminal and penal matters. This principle, according to the Court ruling, prohibits imposing two sanctions in cases where the subject, the act, and the basis are identical. However, as García Albero elaborates,[16] the impossibility of imposing a double penalty for the same act on the same grounds is materially linked to the prohibition of a double assessment of that act. The non bis in idem principle not only implies that two sanctions cannot be imposed for the same act, but also that the same component cannot be evaluated twice, impacting legal classification and, ultimately, sentencing.

5. FINAL FRAMEWORK FOR RESOLVING THE CONFLICT ISSUE

In summary, the outline of the process for resolving the conflict phenomena would be as follows:

(a) Conflicts arise when the act (or set of acts) under prosecution can be subsumed under several penal precepts.
(b) The resolution to the conflict issue must aim at covering the maximum possible illegality of the act (the principle of full assessment of the act, correlating with the principle of proportionality).
(c) Under all circumstances, the *non bis in idem* principle prevents the same act, or part of an act, from being punished or declared illegal more than once.
(d) Where it is not possible to fully assess the act without violating the non bis in idem principle, both this principle and other principles informing criminal law oblige us to reject any solution that implies punitive excess, thereby necessitating the choice of the solution closest to a full assessment of the act, even if it does not fully cover it.

The assumptions from the previous segment are translated, according to Article 8 CC, into the following procedure when facing a conflict issue:

(a) Once the existence of a conflict is confirmed, priority is given to addressing the conflict of crimes, ensuring a complete assessment of the act.
(b) If the classification of the conflict between crimes violates the non bis in idem principle, it's necessary to consider whether the legal classification of the act can be altered in such a way that, while fully assessing it, punitive excess is avoided.
(c) If it is not possible to avoid punitive excess in the legal classification of a conflict of crimes, the conflict should be treated as rule-based.

[16] García Albero, R., *"Non bis in idem" material y concurso de leyes penales*, Barcelona, 1995, pp. 228–229.

(d) In the event of a conflict of precepts, the first three rules of Article 8 CC (specialty, subsidiarity, absorption) are prioritized, which typically ensure that the applicable rule covers the entirety of the act's illegality.
(e) Finally, if it is not possible to identify one of the aforementioned relationships, the rule of alternativity applies; this allows for the most comprehensive assessment of the act possible, even if it is not complete.

II. CONFLICTS OF CRIMES

Respecting the principle of proportionality, conflicts of crimes must be examined before conflicts of precepts, following the priority order established in Article 8 CC. Traditionally, non-legal terminology categorises conflicts between crimes as ideal and real. These terms are almost unanimously adopted in doctrine. Additionally, a third type of criminal conflict is often referenced, known as 'the medial conflict'. A special case, continuous crimes, may also be included in this list, a category initially construed by case law and consolidated in the Criminal Code. In fact, this is essentially the inverse of the combination of crimes, as it involves a plurality of infractions treated by regulations as a single, continuous, offence.

1. TYPES OF CONFLICTS OF CRIMES

A conflict of crimes occurs when a subject commits two or more infractions that have not been prosecuted, and whose joint evaluation and application do not violate the *non bis in idem* principle.

If the plurality of infringements originates from a single act, the conflict is termed *ideal*;[17] if the individual carries out several actions constituting two crimes, then it is considered *real*.

This happens, for example, in the case of an assault on a law enforcement officer resulting in an injury requiring medical or surgical treatment (an ideal conflict of crimes involving assault – Article 550 CC – and injury – Article 147 et seq. CC). In this instance, although only one event has taken place, it is not sufficient to apply solely the crime of causing injury (Articles 147 et seq. CC), as the disruption of public order would go unpunished; nor can it be punished only as an assault (art. 550 CC), as the assault on the officer's health would be disregarded. If the aim is to punish the entire spectrum of illegality of the act, it is necessary to apply both precepts, through a conflict of crimes.

A third type of conflict, termed *medial* or *teleological*, is commonly differentiated. This occurs when a person commits one crime as a means to committing a different one (e.g., falsifying a commercial document of Article 392 CC as a means to deceive another person and make a profit, to their detriment, which constitutes the crime

[17] Cuello Contreras, J., 'La frontera entre el concurso de leyes y el concurso ideal de delitos: la función de la normativa concursal', *Anuario de Derecho Penal y Ciencias Penales*, 1979, p. 73.

of fraud in Article 248 CC). From a material perspective, this is a genuine case of conflict (as there are multiple distinct actions), but the Criminal Code assigns it a particular legal regime (Article 77.3 CC).

As mentioned earlier, the Criminal Code also includes continuous crime (Article 74 CC) among other conflicts of crimes. This is where a plurality of criminal actions or omissions is considered a single criminal offence when it fulfils a series of characteristics.

2. REAL CONFLICT

As has already been indicated, a real conflict occurs when a plurality of acts constitutes a plurality of crimes. This is regulated by Articles 73, 75, and 76 CC.

Article 73 CC sets the basic principle of the legal regime of real conflict as the rule of *Material accumulation of sentences*: all the relevant penalties are imposed for the diverse offences. As a general rule (Article 73 CC), the sentences imposed are served simultaneously, if possible according to their nature and effects (for example, it is possible to do this when there is a custodial sentence and a pecuniary one, but not when there are two custodial sentences). If simultaneous compliance is not possible, as a subsidiary rule (Article 75 CC), the order of their respective severity shall be followed (for which Article 33 CC must be taken into account), starting with the most severe.

Article 76 of the Criminal Code establishes limits to the principle of material accumulation, referred to by legal doctrine as the principle of legal accumulation.[18] The first limit is that the maximum effective sentence to be served by a convict may not exceed triple the time imposed for the most serious of the penalties incurred. The second limit imposes that the maximum may not exceed twenty years although, exceptionally, this limit may be exceeded.

3. IDEAL CONFLICT

A conflict is considered ideal when a single act constitutes two or more criminal offences, such as the example previously mentioned of a conflict between the crime of injury and the crime of assault. The legal regulation is encapsulated in the first two sections of Article 77 CC.

The main dogmatic issue raised by the ideal conflict is defining what a 'single fact' means, a characteristic precondition for this type of conflict. Traditionally, "unity of fact" was equated with "unity of action", addressing the concept of action in its literal sense. For instance, the case of someone planting a bomb (action) and intentionally killing several people (multiple typical material outcomes) would be deemed an ideal conflict scenario (ideal conflict of as many intentional homicides as

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[18] Cuerda Riezu, A., *Concurso de delitos y determinación de la pena. Análisis legal, doctrinal y jurisprudencial*, Madrid, 1992.

deaths have been caused). More recently, however, much doctrine (e.g. Roig Torres)[19] has deviated from that traditional understanding and proposed incorporating the concept of fact into the types of material outcome, implying that when *various material outcomes* are typically produced by *a single action*, this gives rise to *multiple facts* (therefore, in the bomb example above, causing multiple fatalities, the legal classification should be that of a *real* conflict of intentional homicides).

This thesis, which has eventually found resonance in the jurisprudence of the Spanish Supreme Court, significantly reduces the scope of evaluation of the ideal conflict, since it will tend to apply only in cases where there are two or more *legal outcomes* (two or more violations of legal rights) but only one (or no) material outcome (the clearest example would be where, as indicated above, injuries to an agent of the authority constitute the crime of causing injury in ideal conflict with the crime of assault).

As for the legal-penological regime of the ideal conflict, Article 77.2 CC applies, instead of the principle of material accumulation, the so-called principle of *exasperation* or, more accurately, *aggravated single penalty* or *absorption with aggravation*: a single but aggravated penalty is imposed. Specifically, according to Article 77.2 CC, the upper half of the penalty for the most severe crime is imposed. However, there is a limit on the duration of the sentence: it cannot exceed the sum of the penalties that would have been imposed if all the offences were punished separately. In other words, either the penalty of the upper half of the most serious crime is imposed or the regime of accumulation of the penalties corresponding to each of the infractions committed is followed, the most benign penalty being the one selected.

4. MEDIAL CONFLICT

A medial conflict is defined in Article 77.1 CC as the case in which one crime is the necessary means for committing another[20] (as in the paradigmatic case of the commission of a crime of falsehood of Articles 390 CC et seq. to facilitate the deception forming part of the crime of fraud under Article 248 CC).

Traditionally, the sentencing regime of the ideal conflict had been applied, but Organic Law 1/2015, of 30 March provided a specific formula,[21] in these cases: a higher penalty will be imposed than that which would have corresponded, in the specific case, for the most severe offence, but without exceeding the sum of the specific penalties that would have been imposed separately for each of the criminal acts. Within these limits, the judge will determine the sentence according to the criteria expressed in Article 66 of the Criminal Code, and, in any case, without exceeding the limits of the terms provided for in Article 76 of the Criminal Code.

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[19] Roig Torres, M., *El concurso…*, op. cit., pp. 19, 136, 148.

[20] Joshi Jubert, U., 'Unidad de hecho y concurso medial de delitos', *Anuario de Derecho Penal y Ciencias Penales*, 1992, passim.

[21] Obregón García, A., 'La reforma de la penalidad del concurso medial regulada en el artículo 77.3 del Código Penal', in: Bustos Rubio, M., Abadías Selma, A., *Una década de reformas penales*, Barcelona, 2020.

5. CONTINUOUS CRIME

A continuous offence consists of several acts, which, although in principle constituting as many criminal offences, are considered a single criminal act. Thus, for example, the domestic worker who over fifty days pockets over ten euros a day from the house where they are employed would be committing a continuous crime of theft under Article 234.1 CC, or the estate agency that sells flats to several individuals without intending to actually build them, would be committing a continued crime of qualified fraud under Article 250 CC.

Continuous offences are regulated by Article 74 of the Criminal Code. That provision sets forth the following requirements for an offence to be evaluated as such:[22]

(a) Objective: the execution of a plurality of actions or omissions that infringe upon one or more subjects.
(b) Subjective: the actions must result from a preconceived plan or the conscious use of an objectively identical situation.

The subjective element gives a unitary meaning to the plurality of acts committed by the subject and, therefore, allows the whole to be considered a single infringement.

(c) Normative: the actions or omissions must violate the same penal precept or precepts of a similar nature (in accordance with the legal right protected by those precepts).
(d) Negative: Criminal continuity cannot be applied in offences affecting eminently personal legal rights (for example, life or health), except for infringements against sexual freedom, indemnity and honour affecting the same passive subject or victim. In these cases it is possible to apply the category of continuous crime if it is relevant according to the nature of the act and the precept violated.

If the aforementioned requirements are met, and a continuous crime is found to exist, the penalty corresponding to the upper half of the most serious offence is imposed. The judge may raise the penal framework to the lower half of the higher penalty in degree (Article 74.1 CC).

The continuous crime was initially conceived as a pietistic institution.[23] Despite its association with the judicial discretion characteristic of pre-codification times, it firmly took root in case law practice, which led to the continued use of this category in modern times, even before being regulated by the Criminal Code. This legal institution was not formally introduced to the body of law until 1983. Nonetheless, in its current legal regulation the consequence of appreciating a continuous crime, compared to the regime that would be applicable if this concept did not exist (that of the real conflict of crimes), is not always beneficial for the defendant, and may even be harmful in many cases.

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[22] Caruso Fontán, V., *Unidad de acción y delito continuado*, Valencia, 2018.
[23] Obregón García, A., Gómez Lanz J., *Derecho Penal…*, op. cit., p. 315.

III. CONFLICT BETWEEN CRIMINAL RULES

The legal doctrine debates whether the expressions 'conflict of rules' and 'conflict of laws' are equivalent or whether it is more correct to use one or the other exclusively. In practice, they are mostly used interchangeably. In recent years, the doctrine specializing in the theory of conflict seems to favour the phrase 'conflict of laws'.[24] However, 'conflict of rules' is so deeply embedded that its use is possibly equally admissible and may even be preferred.

As indicated in the first paragraph of this subject, a conflict of rules, according to Article 8 CC, is subsidiary to the combination of offences. It is characterised by selecting from the set of coexisting rules, the one ensuring maximum (and, if possible, complete) coverage of the illegality of conduct with criminal relevance. To properly select this rule, Article 8 CC provides a set of criteria guiding this choice.

It should be borne in mind that, under Article 9 CC, Article 8 CC is also applicable to special criminal laws. Therefore, conflicts between special criminal laws, and between special and common criminal laws, are governed by the rules contained in Article 8 CC.

1. THE CONCEPT OF CONFLICT OF CRIMINAL RULES

The conflict between criminal rules or laws occurs when an act falls under two or more penal precepts, but the assessment of a combination of crimes having been ruled out, only one of those precepts is effectively applied, displacing the For instance, as mentioned above, if one person kills another with malice aforethought, either Article 138 CC (homicide) or Article 139 CC (murder) might apply. However, in reality, the latter prevails, because applying both infringements would clearly lead to a breach of the *non bis in idem* principle, and murder captures more of the illegality of the act than homicide (for it includes not only killing a person but also malice).

As stated earlier, the fact that one rule of the coexisting rules prevails over the others leads most who consider this doctrine to term this conflict of rules as an 'apparent' conflict of laws. Nevertheless, it is important to note that, all things being equal, in these cases there is also a genuine conflict, as far as the factual assumption is subsumed by several different rules, which may have an effect on the determination of the penalty (as demonstrated later regarding the relationship of alternativity) or even on the legal classification itself.

2. DIFFERENT RELATIONSHIPS BETWEEN CRIMINAL RULES

Article 8 of the Criminal Code conflicts between criminal rules. Except for rule 4, which is subsidiary to the others,[25] it cannot be categorically stated that the enumeration in Article 8 CC is in priority order. However, the doctrine emphasises

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[24] Escuchuri Aisa, E., *Teoría…*, op. cit., pp. 67–68.
[25] Castelló Nicás, N., *El concurso…*, op. cit., p. 189.

the pre-eminence of the rule of specialty, not only because it appears first in the precept but mainly because, to a certain extent, it forms a criterion inspiring the others.

A) Specialty relationship

This relationship occurs when one law (*special*) adds or incorporates one or more features into the basic components of another law (*general*). If both rules are in conflict, the special law displaces the general one.

Such is the case of the relationship between homicide and murder: homicide contains the components of 'killing' and 'a person'; murder includes the same and, in addition, malice, price, cruelty, or the intent to facilitate the commission of another crime or prevent its discovery.

This relationship is frequently established between a basic offence and a qualified one or an attenuated offence caused by the former. A clear example of this is found in Article 163 CC: the first paragraph contains the basic offence, Article 163.2 CC a privileged offence and Article 163.3 CC a qualified one.

B) The relationship of subsidiarity

This relationship consists of a law (*subsidiary*) that is applicable only in cases where no other criminal law applies (*principal, primary, or preferred*). Rule 2 of Article 8 CC determines that, if this is the relationship between the rules, the principal law excludes the subsidiary law.

Examples of a relationship of subsidiarity are typically cited between authorship (Article 28 CC), which would be the main rule, and complicity (Article 29 CC), which would be a subsidiary rule, as well as between consummation and attempt. However, in the latter case, most authors understand that there is a relationship of absorption. Other cases can be added (although the doctrine generally does not consider them as a relationship of subsidiarity), for example, the relationship between a transitory mental disorder as an excuse and a fit of rage as a mitigating factor (the mitigating circumstance only applies when a defence cannot be upheld), or the relationship between the aggravating factors of malice (Article 22.1 CC) and abuse of power (Article 22.2 CC), since the aggravating factor of malice is appreciated when the active subject uses means that *annul* the victim's defence, while abuse of power is contemplated when the victim's defence is only *weakened*.

C) The relationship of absorption

In this relationship, the illegality punishable by a criminal law (*the absorbing law*) covers, within its meaning, the illegality of another act covered by another criminal law (*the absorbed law*). The rule resolving this conflict of precepts is that the absorbing law excludes the absorbed law.

Most of the doctrine attributes to this relationship the conflict existing between the types of injury and the coexisting types of danger. An example of absorption could also be the relationship between robbery, the seizure of movable assets using forcible means, defined in Article 237 et seq. CC and the crime of damage. Some of the typical forms of robbery using forcible means (described in art. 238 CC) involve

damage (for example, forcing doors or windows, breaking open cabinets, etc.), which, in general, are understood to be absorbed by robbery. Similarly, the relationship between the minor crime of ill-treatment in Article 147.3 CC and all offences requiring violence as a means of commission (such as robbery with violence in Articles 237 and 242 CC, extortion in Article 243 CC, etc.) is usually considered absorption.

D) The relationship of alternativity

Rule 4 of Article 8 of the Criminal Code establishes that, where two or more criminal precepts are in conflict to classify an act, and neither the rules relating to the coexistence of offences (Articles 73 to 77 CC), nor the rules known as specialty, subsidiarity, and absorption, are applicable, the most serious penal precept will exclude the precepts that punish the act with a lower penalty. This is commonly called the "relationship of alternativity" and it is the relationship established between laws in conflict under this rule. However, this expression, which has no legal projection, is questioned by doctrine. Sometimes it is referred to by describing the content of its consequence (applying the "precept which imposes a higher penalty").

This rule's predecessor is found in Article 68 CC-1944/1973, the only rule that, since 1944, expressly regulated conflict of laws in the Spanish Criminal Code Criminal Code. Nevertheless, it did not cease to arouse doctrinal opinions contrary to its existence and content (for example, Rodríguez Ramos).[26] Despite the legislator being aware since 1995 of the severe doctrinal criticisms that its predecessor had deserved, it's important to note that the principle of alternativity, in addition to being the sole principle with roots in our regulatory tradition, has been upheld in the Criminal Code. This legislative persistence should make us think, at least from a dogmatic perspective, that this rule is not dispensable in the system of conflict designed for the criminal law corpus.

According to the doctrine shared by the majority, the legal effect of rule 4 of Article 8 CC would be limited to: (a) correct cases in which the legislator commits technical errors when classifying behaviour (such as failing to express preferential order of application when there is a conflict between two different qualified concepts of the same basic concept, as was the case with the crimes of parricide and murder in the previous Criminal Code, both concepts being qualified regarding homicide, or, in the current Criminal Code, with the qualified types of damage in Articles 263.2 and 265 CC). (b) Resolving hypothetical cases of identity, that is, in the words of Gimbernat Ordeig,[27] those where "the two qualifications in conflict cover, not different behavioural aspects, but, exhaustively, all the legal-criminally relevant data".

In our view, it is necessary to recognise an additional scope of application of the alternativity relationship.

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[26] Rodríguez Ramos, L., 'Error reduplicado en la regulación del concurso de leyes', *Actualidad Jurídica Aranzadi*, 19-2-1998, Vol. VIII.

[27] Gimbernat Ordeig, E., 'Algunos aspectos de la reciente doctrina jurisprudencial sobre los delitos contra la vida', *Anuario de Derecho Penal y Ciencias Penales*, 1990, p. 437.

As we have stated, when the conflict between offences is ruled out, it is necessary to examine the applicability of the first three rules of Article 8 of the Criminal Code (specialty, subsidiarity, and absorption). All of them have the same criterion as their starting point (hence their equal status in the system): a rule is considered preferred regarding other coexisting rules (because it is special, principal, broader, or more complex). In other words, it is a precept that fully includes, in one way or another, the remaining precepts with which it is in conflict. However, determining this preference isn't always feasible since the preconditions for qualifying one of the precepts as special, principal, broader, or complex are not met.

This phenomenon occurs, in our view, when two rules contain common elements but differ from each other in their special elements, and the factual situation contains all the elements (both the common and the special elements of each rule). In schematic terms, the conflict would be described as follows: the fact covers the legally relevant elements A, B, and C; one of the precepts includes elements A and B, and another includes elements A and C. The inclusion of element A in both provisions, if that element significantly affects the legal right, precludes the application of a conflict of crimes due to a breach of the non bis in idem principle. However, neither of the rules is special, and unless a relationship of subsidiarity or absorption can be recognised (which is difficult when the provisions have common and special areas), applying one of them must necessarily be rejected.[28]

Thus, for example, if an individual seizes a movable asset belonging to another for profit against the will of its owner by applying force to objects and also using intimidation, the act cannot constitute two offences (robbery by forcing objects and robbery with intimidation), even though no criminal law includes all the relevant elements of the case (there is no autonomous concept of "robbery with intimidation and applying force to things"). This would mean accepting the existence of two robberies (of two attacks on property) when, obviously, only one can be considered to have been committed. But, also, as has been indicated, one of the rules in conflict cannot be identified as preferred, since neither of the two types of theft typified by Article 237 CC can be considered special, principal, or broader.

Therefore, rule 4 of Article 8 CC acquires validity precisely in these cases of interference (referred to by some Italian legal doctrine theorists as 'bilateral or reciprocal specialty', and which we could also call imperfect specialty). In these cases, the precepts in conflict describe a substantial part of the fact without completely covering all its components.

Let us examine other examples closely.

Although the wealth of facts that can occur in reality does not lend itself to definitive categorisation, we believe that at least the following groups of cases can be addressed by this rule:

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[28] Obregón García, A., 'Los llamados concursos de leyes en relación de alternatividad: sentido y contenido de la regla 4ª del artículo 8º del Código Penal', *Revista ICADE*, 2008, No. 74, p. 79.

(i) A first set, which doctrine usually directs towards the principle of alternativity (except when it considers that a conflict of crimes must be apprehended),[29] consists in the coexistence of several qualified concepts – or of several *sui generis* crimes – deriving from the same basic concept. The described scheme is clearly met: the common zone A is defined by the elements that make up the basic type, while the special elements of each coexisting criminal legal concept (B and C) will be constituted by the incidental elements that differentiate the qualified type from the basic one; these elements, obviously, are different from each other because they are different qualified types.

(ii) Secondly, the relationship of conflict between a principal offence in the degree of attempt and the corresponding subsidiary offence in a degree of consummation (for example, attempted homicide in competition with consummated injuries), conflicts that normally continue to reside in the principle of subsidiarity (again: unless an ideal combination of crimes is apprehended), or between a qualified type in the degree of attempt and the corresponding basic type in the degree of consummation. In all of them the abovementioned scheme may be appreciated: the common element (or common elements) defined by the partial – but substantial and relevant – coincidence in the typical action of the qualified type and the basic or the principal and then the subsidiary, while the special elements correspond, on the one hand, to the typical element that reveals the consummation of the type (subsidiary, basic) and, on the other, with the particular will to consummate the type (main, qualified).

(iii) Similarly, hypothetical situations arising in irregular cases where there is a relationship between the typification of danger and the correlation of injury (for example, between the crime of omission of a duty of care of Article 195 CC and the crime of homicide or injuries committed by omission: between forgery of a private document of Article 395 CC and fraud in Articles 248 and 249.2 CC; or between crimes against road safety and crimes with a supervening harmful outcome (except as provided in Article 382 CC)), can also be included in alternativity (although they could be considered as very close to the cases above). In these cases, it may happen that, if the rule by which the type of injury displaces the type of danger is applied (most of the doctrine, as indicated, understands that this is a relationship of absorption), this could give rise to a 'sentencing paradox', since danger is sometimes associated with a more severe punishment than injury (this could easily be the case, where the latter constitutes a misdemeanour). This erratic outcome is an indication that the relationship must in reality be defined as one of alternativity, usually motivated because danger may additionally affect other legal rights which injury does not (without it being possible to classify it as a conflict of crimes because danger and injury to the same legal right would be punishing twice, a partial *bis in idem* and sometimes minimal, but in any case, significant).

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[29] Mir Puig, S., 'Sobre la relación entre parricidio y asesinato', in: De la Cuesta, J.L., Dendaluze, I., Echeburúa, E. (eds), *Criminología y Derecho penal al servicio de la persona: libro-homenaje al Prof. Antonio Beristain*, San Sebastián, 1989, p. 830.

Unlike the other criteria listed in Article 8 of the Criminal Code, applying the rule of alternativity implies, in principle, that there will be dissatisfaction resulting from explicitly admitting that part of the illegality of the act (which corresponds to the special elements covered only by the displaced provision) will not be covered by the precept applied (that of a greater penalty), with the consequent disturbance in compliance with the principle of full assessment of the fact. However, at least this rule ensures that the greatest possible amount of illegality is covered.

Moreover, it is not too audacious to propose that one way of compensating for the fact that the (il)legality of the act is initially incomplete is to take into account when determining the penalty – within the criminal framework associated with the most serious provision – those elements of the displaced provision that are not contained in the applicable provision (as aggravating factors or, more precisely, factors increasing the severity of the object assessed and, consequently, of the penalty).

As mentioned above, rule 4 of Article 8 CC does not typically receive doctrinal favour.[30] However, having analysed its meaning in the manner set out above, it is not unjustifiably burdensome on the defendant, but rather is essential to complete the system of conflict as a closing clause for the latter and one which seeks to achieve proportionality in the 'amount' closest to fairness, without punitive excesses. In other words, to resolve those hypothetical cases that have been raised in detail, there is no better alternative than what is called alternativity.

IV. CONCLUSION

The progressive expansion of Criminal Law, in its various manifestations, has heightened the importance of criminal conflicts. As new criminal offences proliferate, it is challenging to imagine a factual situation that would not fall under several criminal rules. Therefore it is necessary to determine which, if any of these rules are applicable.

The problem of resolving conflict has often been addressed based more on intuition than according to logically founded criteria. However, in the case of Spanish Criminal Law, the Criminal Code provides a series of fundamental elements that compose a system. Compliance with this system allows us to resolve any case involving the coexistence of several rules. allows us to resolve any case involving the coexistence of several rules. However, since this system is inspired by general principles of Criminal Law, widely accepted in the European and Latin American legal environment, it is possible to consider it may be valid for any system where these principles are recognised.

Specifically, the system for resolving conflicts must start by reconciling the two principles that constitute a guide and limit to the *ius puniendi*: on the one hand, the principle of proportionality, which calls for a full assessment of the act and its consequent conversion into an extension of the penalty, and on the other, the *non bis in idem* principle, which prevents assessing the same fact, or part of the same act,

[30] Aguado Correa, T., 'Nuevas tendencias jurisprudenciales en las relaciones entre los delitos de tráfico de drogas y contrabando', *Revista de Derecho Penal y Criminología*, 2000, No. 5, p. 260.

twice, for the purpose of determining the appreciable offences and the penalty to be imposed. The rules for resolving conflict derive from applying both principles, which, in summary, must seek to ensure that any determination of the applicable rules covers as much of the illegality of the punishable act as possible, but without producing punitive excesses resulting from duplicate assessments of the facts.

Thus, two essential conflict mechanisms appear: one, the conflict of crimes, an expression with which we identify the operation of accumulation of infractions (of the rules describing them), aiming to cover the entire illegality of the act. And another, the conflict of rules (or laws), a phrase we use to designate the operation of delimitation of the applicable norm, which covers the greatest possible illegality of the act, when accumulating rules is not legitimate because it breaches the *non bis in idem* principle.

The system is supplemented by the rules for determining the relevant penalties to address the gravity of the acts with a precise extension of the penalty, in the case of conflict of crimes, and with the rules aimed at identifying precisely the specifically applicable precept, in the case of a conflict of rules. In all instances, an elementary rule must always be adhered to, namely that the penalty resulting from the conflict may not be below that which would have been imposed for the most serious coexisting offence, nor may it exceed the sum of the penalties for all the coexisting offences. Perhaps, in order to avoid those inconsistencies that sometimes occur when we are setting rules that are intended to be more precise, it is this elementary rule that should be enshrined as a fundamental criterion for imposing a penalty where there is conflict, leaving room for judicial discretion for the final determination of the exact penalty, in light of all the circumstances of the case.

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THE ATTACK ON THE PROTECTED LEGAL INTEREST: A CRIMINALISATION PRINCIPLE AND AN ELEMENT OF THE CRIMINAL OFFENCE?

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Abstract

This paper analyses the role played by the notion of legal interest as a criterion for decisions on criminalisation and, according to some scholars, as an element of criminal offence. First, the analysis tallies the impact of legal interest on criminal policy, focusing on the correlation between this concept's definition and underlying political theories. Subsequently, the article explores difficulties of using legal interest as an interpretative canon to determine whether the offender's deed can be deemed materially unlawful.

Keywords: criminal law, protected legal interest, theory of criminalisation, material unlawfulness, teleological interpretation

1. INTRODUCTION

In criminal law discussions, the term 'protected legal interest' is employed with either a descriptive or a normative meaning. In the descriptive sense, the term signifies legal interests protected under specific positive criminal law. Conversely, the normative usage denotes legal interests that, from a specific criminal policy perspective, warrant protection under criminal law.

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A possible approach to criminal theory, one I subscribe to despite it not being the sole or predominant viewpoint,[1] maintains that the principal object of criminal theory is positive criminal law. Its main function is to systematically expound the content of criminal legislation. From this perspective, a legal interest's significance arises from its consideration under criminal law, irrespective of the political opinion on its legal protection or the lack of protection extended to other interests. Hence, of prime importance in a theoretical context is the range of interests deemed protected by the prevailing criminal law.

This does not detract from the value of the argument regarding conditions legitimising the extension of criminal protection to a particular interest, whether we approach this question from an axiological or consequentialist standpoint. However, it is prudent to temper expectations raised by this proposal, as various historical, geographical, and social factors impact this issue. Hence, it is arguably whimsical to compile a definitive, exclusive list of interests warranting criminal protection, independent of a specific legal system. However, a compelling argument can be made for constitutionally based protection of certain interests within a particular legal system, even in the absence of explicit constitutional mandates for criminal protection.

Evaluating interests legally protected in most criminal law systems allows us to conceptualise 'legal interest' as an aspect of reality meriting criminal protection, given it conveys legal value.[2] This concept, therefore, possesses a material dimension (the 'legal interest' is, in this regard, a thing) and a value dimension (what defines such a thing as a legal interest is what the law considers valuable).

This value does not need to possess features allowing its classification as a subjective right. Indeed, the heart of legal interests recognised by traditional criminal law (individuals' life, health, freedom, property, or good name) can be characterised as subjective rights attributed to a person (a person who would be tantamount to the material substratum of such legal interests). As I will mention later, under liberal criminal law, the primary criterion for criminalising behaviour involves an attack on this category of individual interests recognised as subjective rights. However, in current criminal law – expanded and incrementally closer to communitarian postulates and assumptions – the value dimension of legal interest extends beyond the subjective right to include interests not strictly considered personal rights. This applies to collective interests like road safety and public order, and individual interests such as life or health of foetuses or animals, whose holders are not consistently recognised as legal subjects by legal systems. In fact, under current criminal law, academics typically associate the decision to legally protect subjective rights with their 'social' dimension rather than their value to their holders.[3] Therefore, this contemporary notion of legal interest comprises not only individual interests but also collective or diffuse interests.[4]

[1] Cf. Silva Sánchez, J.M., 'Los tres ámbitos de la dogmática jurídico-penal', *Indret*, 2019, No. 4, passim.

[2] Mir Puig, S., *Derecho Penal. Parte General*, Barcelona, 1998, p. 136.

[3] Ibidem, p. 137.

[4] This last category would include interests of a supra-individual nature whose holders do not correspond to the group of citizens as a whole, but to an undefined and changing subgroup

As discussed below, a significant controversy in this debate relates to the autonomy of these supra-individual interests. From a communitarian standpoint, a social view of the human being supports the independent protection of such interests: separate and autonomous protection is needed to fulfil the constitutional mandate to promote conditions for genuine freedom and equality of individuals and groups.[5] This protection also guarantees security and confidence in the effective operation of social institutions and safeguards socially weaker groups.[6] In contrast, the liberal perspective sees this type of legal interest as an artificial construct intended to mask a substantial expansion of State intervention in criminal matters. In this context, Hassemer's well-known proposal to confine the acceptability of criminal protection of supra-individual interests to cases where they appear 'functionalised from the individual legal rights perspective' is noteworthy.[7]

This paper's initial aim is to assess the impact of the concept of legal interest in the criminal policy debate, specifically, the significance of this notion in establishing or supporting a particular theory of criminalisation. Furthermore, the analysis extends to the potential impact of this concept on the legal theory of crime, due to the widespread proposal to include the attack on the legal interest as an implicit element in the criminal offence.

2. CRIMINALISATION OF CONDUCT AND THE PROTECTION OF LEGAL INTERESTS

Criminalisation theory can be defined as the segment of criminal law philosophy that determines which behaviour should be punished and how the punishment should be administered.

The dominant view posits that any theoretical formulation regarding the first of these two tasks entails deciding which interests deserve protection under penalty and the intensity of their protection. Thus, evaluating the interest affected by the conduct is crucial in delineating which behaviour should be punished and which should not.[8]

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thereof. These individuals become holders of such an interest due to the position they occupy in the scenario of a given social relation. This would be the case, among others, of consumer rights or workers' rights (Pérez-Sauquillo Muñoz, C., *Legitimidad y técnicas de protección penal de bienes jurídicos supraindividuales*, Valencia, 2019, p. 53 and f.).

[5] Gracia Martín, L., 'La modernización del derecho penal como exigencia de la realización del postulado del estado de derecho (social y democrático)', *Revista de Derecho Penal y Criminología*, 2010, No. 3, p. 63.

[6] Corcoy Bidasolo, M., *Delitos de peligro y protección de bienes jurídico-penales supraindividuales*, Valencia, 1999, p. 208.

[7] Hassemer, W., 'Rasgos y crisis del Derecho Penal moderno', *Anuario de Derecho Penal y Ciencias Penales*, 1992, XLV, No. 1, p. 248.

[8] This is not, however, the only possible perspective. Systemic functionalism is a particularly successful proposal that dispenses with the idea of the legal interest as a legitimising basis for criminalisation. As is well known, functionalism affirms that such interests are only protected as a by-product of a criminal law whose mission is to uphold the identity of society, and the latter's self-testing (Jakobs, G., *Sociedad, norma y persona en una teoría de un Derecho penal funcional*, Madrid, 1996, p. 18 et seq.)

In the broadest sense, the usual formulation of limiting principles that legitimise *ius puniendi* addresses this question. However, this response is remarkably vague, unsurprisingly, as it stems from a discussion about fundamental principles. This vagueness is particularly apparent in the criteria aimed at demarcating the conduct warranting criminal intervention; often, these standards merely provide very generic guidelines based on wide-ranging concepts such as necessity, limitation of criminal law protection to legal interests, or subsidiarity.

This relative lack of specificity makes these principles easy to support, and thus, their acceptance by scholars is extensive. Despite this, the significant scholarly agreement on these ultimate axioms (usually associated with the constitutional context arising from the characterisation of the State as a social and democratic State under the rule of law) cannot hide the fact that, just as this framework allows for a plurality of public policies inspired by diverse normative political theories, it also accommodates several criminalisation proposals influenced by the aforementioned political theories.

In my opinion, the focus on the type of legal interests for which protection is primarily sought constitutes one of the main factors that allow us to distinguish essentially liberal theories from primarily communitarian theories.

Within liberal theories, the foundation for criminalisation rests on the normative premise that individual freedom has primacy in the 'negative' sense; that is, one has the freedom to act without interference from the State or others.[9] The further recognition of pluralism as the most reasonable model of social organisation encourages us to postulate the broadest possible scope of negative freedom, allowing each individual to pursue their purposes and prioritise the values they choose. Naturally, in a pluralistic society, conflicts arise due to the diversity of goals and values that guide individual conduct, making the assertion of unlimited scope for the exercise of freedom impossible within an organised social group.

In liberalism, the material legitimacy of State intervention in these conflicts is based precisely on its guarantee that all citizens enjoy a higher degree of freedom to act than they would if there were no intervention at all (that is, a degree of liberty superior to what would exist in a 'natural state'). This entails renunciation of a potentially unlimited exercise of one's private autonomy in exchange for establishing a framework to maximise such freedom in conflict with others. From a metaethical viewpoint, this position would be supported not only by deontological rationality but also by the teleological rationality of utilitarianism; both traditions, as is well known, are present in the original foundation of this political theory.

In my opinion, this maximisation entails, at the very least:

(a) Reserving punitive intervention for instances where individual freedom or other individual rights are infringed or endangered due to the actions of third parties. Therefore, the attack on goods and rights shapes the guiding principle for criminalisation in liberalism, prioritising injury to the legal interest as the paradigm for incrimination, to the detriment of alternatives such as duty

[9] Berlin, I., *Liberty*, Oxford, 2009, p. 216.

infringement and criminal offences based on mere willingness to cause harm (such as impossible attempts).[10]

(b) Basing legal interests on a factual substratum functionally linked to the exercise of individual freedom. These must be individual interests or – when necessary and exceptionally – well-defined supra-individual interests that can be directly traced back to individual interests. The harm principle – a crucial guideline of incrimination – is primarily defined as damage to or endangerment of individual interests.[11]

(c) Ensuring the state's neutrality regarding citizens' moral convictions, i.e., what constitutes the 'good' or a 'good life'. This would then prohibit paternalistic and perfectionist criteria when selecting legal interests that warrant criminal law protection. In a liberal order, the criminalisation process must reflect moral values, but immorality does not per se justify incrimination. The State's neutrality does not suggest a morally sceptical or relative standpoint. On the contrary, it implies a theory of political morality that emphasises values such as rational autonomy, dignity, and freedom.[12] The liberal order depends on society members sharing normative commitments and developing rules and attitudes that reflect them, such as the fundamental value of freedom, the teleological link between the legal order and the prevention of harm and injury to others, or the restraint in seeking to impose one's idea of the good upon others.[13]

Therefore, liberal criminal theory establishes guidelines to sacrifice the minimum possible freedom necessary to guarantee the greatest possible freedom for all. A feasible method to determine whether the outcome is suitable from a liberal perspective would focus on its potential recognition by citizens who consider their interests regardless of the role they may eventually play[14] (either as potential victims or offenders).[15]

The communitarian perspective on criminalisation differs significantly.

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[10] Of course, stating that harm to others is a relevant reason for criminalising conduct does not imply that it is sufficient, as there may be moral and practical costs of criminalisation that justify, even in the presence of harm, not incriminating the conduct.

[11] By contrast, within the systemic functionalist model referred to above, the harm principle ceases to be a criterion of criminalisation and is replaced – at least to some extent – by a model based on the breach of duty. The latter conception is linked, in a clear communitarian way, with the existence of prior institutions that define the subject's status, with an idea of a homogeneous community and with the detriment to duties of supportive behaviour towards others. Sánchez--Vera Gómez-Trelles, J., *Delito de infracción de deber y participación delictiva*, Madrid, 2002, p. 183 et seq., thus expressly links offences of breach of duty with positive duties that he claims to derive from the principle *neminem laedere* and that he builds upon a moral concept of positive freedom that goes beyond liberalism (op. cit., p. 141).

[12] Dworkin, R., 'Liberalism', in: Sandel, M. (ed.), *Liberalism and its critics*, New York, p. 77, and Husak, D., *Philosophy of Criminal Law*, New Jersey, 1987, p. 244.

[13] Jacobs, J., 'Criminal Justice and the Liberal Polity', *Criminal Justice Ethics*, 2011, Vol. 30, Issue 2, p. 176.

[14] Alcácer Guirao, R., 'Los fines del Derecho penal. Una aproximación desde la filosofía política', *Anuario de Derecho Penal y Ciencias Penales*, 1998, LI, pp. 539.

[15] Cf. Silva Sánchez, J.M., '¿Directivas de conducta o expectativas institucionalizadas? Aspectos de la discusión actual sobre la teoría de las normas', in: *Modernas tendencias en la ciencia del Derecho Penal y en la Criminología*, Madrid, 2001, p. 566 et seq.

First, communitarianism supports a reformulation of the harm principle as a standard of incrimination. As mentioned above, liberalism confines this criterion to causing harm to other individuals' property and rights. On the other hand, the most fervent communitarian thought supports the legal protection of the prevailing moral convictions of the community without any restrictions other than what legislators may decide.[16] The enforcement of this shared moral horizon – which sometimes reflects the prevailing morality and sometimes results from the addition of minority morals – together with assigning a pedagogical function to current criminal law, is revealed in the punitive emphasis on the motivation of criminal offences (it also manifests as a readiness to punish the very expression of divergent moral opinions).

Even in the more moderate – and widespread – versions of communitarianism, a different articulation of the harm principle can be found. This version also advocates for the extension of the scope of what is criminally sanctioned to conduct that affects elements beyond individual rights. However, the reasons offered here are not built on prevailing moral convictions but on social and economic aspects. This is the case, for example, of (i) assigning to citizens 'promoting powers' that obligate them to perform additional services to safeguard the state's ability to operate or to guarantee the primary conditions of personal existence[17] or (ii) certain conditions of the social distribution of such individual rights that, from a communitarian perspective, are structurally vital to society.[18]

As indicated above, the most notable example of this perspective is expanding criminal protection to supra-individual interests regardless of their immediate or indirect connection with individual rights. Creating these supra-individual interests also runs the risk of incurring a certain artifice that, in some cases, can obscure the fact that they are abstractions founded on individual interests.[19]

The emphasis on collective interests is tied to another significant manifestation of the communitarian approach, namely the widespread criminalisation of abstract danger.[20] Undoubtedly, the incrimination of merely dangerous conduct is not far removed from a liberal theory of criminalisation, albeit with a decidedly restricted role given how it can exponentially expand the scope of state intervention.[21]

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16 Thus, Devlin, P., *The enforcement of morals*, Indianapolis, 2009, p. 12 et seq., affirms the impossibility of setting theoretical limits to the state's power to legislate against immorality, which (in this model) is consistent with the importance attributed to the communion of values for the preservation of society.

17 Pawlik, M., 'El delito, ¿lesión de un bien jurídico?', *InDret*, 2016, No. 2, p. 11.

18 In this sense, for example, Pettit, P., Braithwaite, J., 'Not Just Deserts, Even in Sentencing', *Current Issues in Criminal Justice*, 1993, Vol. 4, Issue 3, p. 203, connect the public character of the harm not only with the affectation of the victim's 'domain', but with the general distribution of domain in society.

19 This is evident when scholars specify that the supra-individual interest must be understood as a 'spiritualised' or 'institutionalised' interest, only protected to the extent that it refers, more or less immediately, to genuine individual legal interests. Actually, the supra-individual interest is, in many cases, nothing more than an objectifying construction of a situation of danger for the individual interests of an indefinite plurality of subjects.

20 Hassemer, W., *Rasgos y crisis…*, op. cit., p. 241 et seq.

21 Husak, D., *Overcriminalization*, Oxford, 2008, p. 159 et seq.

This criminalisation technique – a paradigm of new risk prevention – involves criminalising conduct that either does not necessarily pose an actual danger to individual interests or generates a risk that is insufficient to justify state intervention. The reduced harmfulness of abstract danger to individual rights supports the identification of vague supra-individual interests as legally protected interests.[22] Communitarianism accepts the legitimacy of the criminalisation of abstract danger even where such danger does not refer to an individual interest but a supra-individual one.[23] An extreme version of the enlargement of the harm principle, also promoted by communitarianism,[24] is the proposal for incriminating cumulative offences, where the actual danger to the legal interest (which, in the most significant examples of this type of offence, is already a supra-individual interest) only materialises through the theoretical accumulation of countless individual actions that are insignificant on their own.

3. THE ATTACK ON THE PROTECTED INTEREST AS AN ELEMENT OF THE CRIMINAL OFFENCE (THE DOCTRINE OF 'MATERIAL UNLAWFULNESS')

As explained earlier, the notion of 'protected legal interest' is central to the argument on criminalisation and, thus, shapes the focus of the State's criminal policy. However, the significance of this concept in the discussion regarding criminal law does not end here; its presence in the theoretical discourse impacts the debate on critical issues such as the structure of the criminal offence.

Among various areas where this concept impacts criminal law theory, this paper concentrates on the proposed integration of the attack on the legal interest as an 'element' of the criminal offence. This proposal relates to the doctrine – somewhat endorsed by scholars and case law, albeit not universally[25] – that argues for a distinction between an act's formal and material unlawfulness. The former attributes an action as a consequence of its correspondence to the legal definition of the offence. In contrast, the latter requires, beyond that correspondence, an attack (or even a relevant attack) on the protected legal interest. When this doctrine of

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[22] Naturally, the problems disappear when the reference to the legal interest as a basis for justifying criminal intervention is dispensed with. Thus, for systemic functionalism, the criminalisation of abstract danger is legitimised insofar as it can be argued that social identity involves the guarantee of the expectation of not having to take into account conduct that only abstractly refers to the result (Jakobs, G., *Society, norm and person…*, op. cit., p. 43 ff.).

[23] Gómez Martín, V., 'Libertad, seguridad y sociedad del riesgo', in: *La política criminal en Europa*, Barcelona, 2004, p. 78. It is undeniable that the scholars who support these positions are determined to set up guaranteeing standards in the construction of these criminal offences. Still, it is also clear that they do not object to advancing state intervention.

[24] Schünemann, B., '¿Ofrece la reforma del Derecho penal económico alemán un modelo o un escarmiento?', *Jornadas sobre la 'Reforma del Derecho Penal en Alemania*, Consejo General del Poder Judicial, Madrid, 1991, p. 36 et seq.

[25] Cf. for example, Orts Berenguer, E., González Cussac, J.L., *Compendio de Derecho Penal. Parte general*, Valencia, 2022, p. 234, as well as the Sentencia de la Sala 2ª del Tribunal Supremo español de 21 de junio de 2003, RJ 2003/4362.

material unlawfulness is articulated by incorporating the attack on the legal interest into the criminal offence (as if it were an element of the legal definition), it typically promotes a general cause of exemption from criminal liability applicable to cases where the offence's legal definition is uncontested, but the attack on the legal interest is deemed non-existent or insufficient.[26]

The practical implementation of this doctrine typically invokes standards such as the principle of minimum intervention and the principle of insignificance. The argument states that without an attack (or a sufficiently severe attack) on the legal interest, there is no basis for imposing a criminal sanction, even if the action formally complies with the legal stipulation. Although labelled as a technical argument, it could also be considered political because it depends on the influence of rather vague political principles that are not thoroughly constitutionalised. Advocating that such principles should guide criminal policy does not imply that they should play a role in interpreting the law. The need for interpretation arises from semantic indeterminacy; the meaning of the law (not the political decision behind it) needs clarification. The legislator has already decided the extent of intervention deemed appropriate, despite the ambiguity in the legal expression of such a decision.[27]

Despite these concerns, one of the most popular approaches to implementing the doctrine of material unlawfulness relies on a specific method of interpretation (i.e., the teleological interpretation). This method reduces the scope of the legal definition of the criminal offence in cases where the interpreter deems the level of attack on the protected legal interest to be insufficient.

The teleological interpretation doctrine posits that legislative provisions should be interpreted in light of their intended purpose. It is thus connected with the functional aspect of the context in which a legal statement is made. As Wróblewski noted, formulating universally acceptable functional guidelines for interpretation is a controversial and challenging task.[28] However, I believe that the essential core of teleological interpretation aligns well with one of Wróblewski's proposed functional guidelines, specifically directive DI1-11, which links the meaning of a legal rule to the institution's pursued purpose.[29]

This reference to the institution's purpose is often associated with notions such as the 'aim', the 'spirit' or the 'intent' of the law. According to the traditionally dominant interpretive ideology, these criteria are of central importance.[30] Within

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[26] In the field of economic criminal law, see Martínez-Buján Pérez, C., *Derecho Penal Económico y de la Empresa*, Valencia, 2022, p. 428.

[27] Adjustment of criminal law to the harm principle is required to further a reasonably delimited criminal law. However, such adjustment is not a valid criterion for ascertaining the semantic probability of a given understanding of an indeterminate legal term or statement. As Larsen, P., 'Entre la estética intelectual, el arbitrio de los jueces y la seguridad jurídica', *Indret*, 2015, No. 3, p. 20 et seq., has pointed out, its lack of legal and constitutional enshrinement means that its application by case law is uneven and even haphazard, which leads to a proliferation of different decisions for very similar cases.

[28] Wróblewski, J., *Constitución y teoría general de la interpretación jurídica*, Madrid, 1985, p. 45 ff.

[29] Wróblewski, J., *Constitución…*, op. cit., p. 50 et seq., and idem, *The Judicial Application of Law*, Dordrecht, 1992, p. 106.

[30] Cf. Larenz, K., *Metodología de la Ciencia del Derecho*, Barcelona, 1966, p. 263 et seq., and, in the field of criminal law, Cuello Calón, E., *Derecho Penal. Volume I, General Part, Volume 1*, Barce-

the framework of this interpretative ideology, such expressions ('purpose', 'spirit', 'will') are metaphorical, drawing a tacit comparison of the law's intent with the legislator's intent. However, resorting to metaphors creates ontological difficulties when identifying the law's purpose, spirit, or intent, entities deemed distinct from legislative intent by teleological interpretation. Therefore, questions arise about what constitutes the purpose of the law, how is it recognised, and where is it stated? Which purposes of their creators are sufficiently relevant to be attributed to the law as its intention? What identification criteria allow us to declare with certainty that the purpose of the law has been discovered?

According to the prevalent version of the teleological interpretation doctrine, the recognised purpose of criminal law is to protect an interest; hence, the protected legal interest becomes key to resolving the uncertainty posed by any semantic indeterminacy in the legal definition of a criminal offence.[31] Maurach and Zipf assert that interpreting criminal law – and thereby understanding it – is impossible without the guidance of the protected legal interest.[32]

If one accepts the premise that the purpose of any legal provision defining a criminal offence is to protect a specific interest,[33] then this protective aim to protect such interest would indeed form part of the functional context of the legal provision. As a result, it could be incorporated into an interpretive argument.

However, it must be acknowledged that determining the specific interest protected by a legal provision defining a criminal offence is often controversial. Suppose there are strong contextual arguments supporting the decision, or the legislator expressly states the purpose of the legal provision. Even in these cases, the argument is susceptible to critique, as stating that the purpose of a given legal provision is to protect a specific interest does not clarify the intensity, degree, form, exceptions, or circumstances of the legal protection of that interest. Acknowledging that the legal provision's purpose is to protect a specific interest does not necessarily support any particular inference regarding the form and degree that protection should take. Specifically, it cannot be assumed that the legal provision aims for the greatest, best, or most effective protection of the interest.

Why is this important? Because semantic indeterminacy – and therefore, the need for interpretation – usually stems from the absence of a precise boundary

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lona, 1980, p. 216. Under the Spanish legal system, it is common to attribute the reception of this guideline to Article 3.1 of the Civil Code and its indication of the need to interpret the norms 'fundamentally taking into account their spirit and purpose'. The adverb 'fundamentally' in this provision seems to support the thesis of its centrality as an interpretative criterion.

[31] Cobo Del Rosal, M., Vives Antón, T.S., *Derecho Penal. Parte General*, Valencia, 1999, p. 118; Gimbernat Ordeig, E., *Concepto y método de la ciencia del derecho penal*, Madrid, 1999, pp. 87 f.; Jescheck, H.-H., *Tratado de Derecho Penal. Parte General*, Granada, 1993, p. 149; Luzón Peña, D.M., *Curso de Derecho Penal. Parte General I*, Madrid, 1996, pp. 169 f.; Mezger, E., 'Tratado de Derecho Penal', *Revista de Derecho Privado*, Madrid, 1955, pp. 138 f.; Mir Puig, S., *Introducción a las bases del Derecho Penal. Concepto y Método*, Barcelona, 1976, p. 139 et seq. and 312 et seq.

[32] Maurach, R., Zipf, H., *Criminal Law. Parte General*, Buenos Aires, 1994, p. 150 et seq. and in particular p. 339.

[33] The acceptance of this assumption is not a given; for instance, it is objected to by systemic functionalism, as discussed in the previous section.

for the degree of protection of the interest established by the law. Identifying the protected legal interest can become quite problematic, but interpretative issues more commonly relate to defining the exact level of protection legally provided.

At this juncture, the reasoning strategy involved in teleological interpretation, in my view, reverses the relevant process of argumentation. Only the terms the law uses to describe criminal offence can delimit the scope of the legal protection of the interest. Accepting that the legal provision's purpose is to protect an interest allows only one inference: the law aims to protect the interest to the exact extent determined by the legal provision's wording. Therefore, the definition of the type of attack on the legal interest required to classify the action as a criminal offence is a legislative decision expressed in the very wording of the legal provision. It cannot be modified or replaced by a description of the protected legal interest.

Teleological interpretation becomes circular at this stage, as the only proper criterion for determining the characteristics of the protection established by the legal provision is the same legal provision requiring interpretation. Identifying the interest whose protection constitutes the legal provision's purpose according to this doctrine depends precisely on how said provision describes the criminal offence. As Nuvolone[34] and Pagliaro[35] have pointed out, the *ratio legis* is discovered exclusively through interpreting the legal provision. Therefore, it is paradoxical to set the *ratio legis* as an interpretive criterion, essentially switching the *prius* for the *posterius*.

Therefore, teleological interpretation involves a certain fallacy. The interpretative standard is an element (the degree of protection of the legal interest) whose definition depends on the terms by which the legal provision describes the criminal offence. These terms, by hypothesis – since we are dealing with a matter of interpretation rather than isomorphy – are not clear. This situation implies that we are simultaneously stating that the description of the criminal offence is unclear (as it requires interpretation) and that it is clear (as it allows identifying the degree of the legal interest protection). The simultaneous assertion of both clarity and vagueness of the legal terms results in a discernible paradox.

Despite these issues, Spanish criminal law scholars wholeheartedly acknowledge the primacy of this version of teleological interpretation. However, I believe the consequences of this doctrine should be contested. As explained earlier, teleological interpretation can lead to practical aporias, as recognising a legal provision's purpose results in an never-ending circular reference between the protected legal interest and the description of the criminal offence within the legal provision. There is a significant risk that teleological interpretation ends up identifying the law's purpose with the interpreter's individual construction, or the purpose the interpreter believes the law should pursue. As Guastini emphatically states, appealing to the will of the law as something distinct from the legislator's (relatively) concrete will is often a tactic used to circumvent, disregard, or disrupt the legislative bodies' legal policy, replacing it with the policy supported by the interpreter.[36] Thus, when applying this doctrine,

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[34] Nuvolone, P., *Il possesso nel Diritto Penale*, Milan, 1942, p. 55 et seq.

[35] Pagliaro, A., *Principi di Diritto Penale. Parte generale*, Milan, 2000, p. 78 et seq.

[36] Guastini, R., 'Técnicas interpretativas', *Revista jurídica de Castilla-La Mancha*, 1993, No. 19, p. 9 et seq.

identifying both the protected legal interest and the degree of protection dispensed by the law usually results from a purely subjective opinion. By hypothesis, this opinion cannot be based on the legal provision itself since the provision is vague in some relevant aspect. In such situations, legal interpretation becomes a process governed by the interpreter's preferences regarding criminal policy.

The consequences are particularly severe when applying this technique results in a teleological reduction of the legal provision's scope. This usually happens when, for reasons related to the supposed purpose of the law (for instance, when the attack on the protected legal interest is considered insufficiently severe), the legal provision is not applied in a case where it should be applied according to the provision's wording. Despite the widespread acceptance of this practise – allegedly interpretative – by the Spanish Constitutional Court (since STC 237/2005 of 26 September), the Spanish Supreme Court (since the STS of 20 June 2006, RJ 2006/5184), and the majority of Spanish scholarship, I believe there are grounds to contest its legitimacy.

First, it is uncertain whether this can be appropriately qualified as an interpretative activity. This is certainly not the case when the legal provision is explicit, which is the usual instance of teleological reduction. Because of reasons allegedly connected to the purpose of the law, one of the standard cases covered by the legal provision is excluded – hence, the consideration of the outcome as a reduction. In my view, this does not qualify as an interpretative activity because, by definition, there would be no contextual reasons supporting the dismissal of an understanding of the legal provision considered a standard case. Instead, this would qualify as an activity of semantic legislation – a restriction of the semantic range of the legal statement subject to interpretation – and thus, it is not part of the set of functions assigned to a scholar or a judge.[37]

As stated, some logical problems arise when the protected legal interest is placed as the primary interpretative canon. These problems can only increase when this controversial criterion is not employed to tackle the contentious meaning of a legal provision but to exclude the application of a well-defined provision to a standard case. Although this is a classic scholarly approach to the issue, I believe this strategy cannot be considered a distinct instance of interpretative activity since it is ultimately grounded on a subjective political opinion about the degree of protection merited by a particular legal interest.

4. CONCLUSION

The concept of legal interest presents definite advantages in the criminal policy argument. Despite its limitations, this concept defines the boundaries of the discussion. In particular, it enables fine-tuning criminal policy according to the underlying political theory one supports. However, its impact on legal theory should be assessed with greater caution. As shown, the doctrine of material unlawfulness (one of the primary embodiments of that impact) not only strains

[37] Cf. García Amado, J.A., '¿Interpretación judicial con propósito de enmienda? Acerca de la jurisprudencia sobre el artículo 133 del Código Civil', *La Ley*, 2001, Vol. V, p. 1675.

the Rule of Law but also raises objections of a logical nature and incites recourse to subjective decisions when dealing with issues of semantic indeterminacy of the legal provisions.

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THE PARADOX OF DEMOCRATIC STRENGTHENING: CRIMINALISATION OF POLITICAL TERRORISM AS A LEGAL DISCREDITING MECHANISM

ALEXIS COUTO DE BRITO*
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Abstract
This article explores the Brazilian legal system in light of recent proposals to amend the anti-terrorism law, a move amplified by the country's political instability, which culminated on 8th January 2023, when supporters of the former president invaded government buildings on the pretext of contesting election results. The essay examines whether these amendment proposals align with the principles of our constitutional democracy and their potential to foster genuine democratic reinforcement.

Keywords: terrorism, democracy, democratic rule of law, constitutional principles

INTRODUCTION

The escalating occurrence of authoritarian events worldwide seems to have prompted reflections on the capacity of current legislation to safeguard the stability of the Rule of Law and Democracy. In Brazil, this debate gained relative prominence among

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scholars and the general public after the events of 8 January 2023. On that day, supporters of the former President Bolsonaro invaded and destroyed the Planalto Palace, the Executive branch's headquarters, and the Brazilian Supreme Court.

While media outlets are quick to label the incident as a terrorist act, Brazilian anti-terror legislation would not categorise these coup acts as such, unlike other international instruments. Indeed, these acts would not even be considered an attempt to commit a terrorist act.

Considering these events and genuine concerns about the proliferation of anti-democratic movements intent on discrediting the electoral process, there is a call to amend Law 13.260/16 – the Brazilian anti-terror legislation – to punish acts of violence driven by political convictions. This amendment proposal is not unprecedented; it was first introduced during Bolsonaro's government via bill 732/2022. This bill proposed incorporating "violent actions with political or ideological aims, intending to incite social or generalised terror" as a motive to commit terrorism. It currently awaits evaluation by the Constitutionality and Justice Committee of the Federal Senate.

This essay, therefore, aims to assess whether such intentions might be valid within our legal system, and the extent to which they meet the objectives of its current advocates: preventing anti-democratic movements and bolstering democracy along with its defence mechanisms.

To accomplish this study's aim, we will examine the specifics and objectives of the existing Brazilian anti-terror legislation and the relevance of the reasons cited by the proponents of its modification. This analysis will take into account the criminal principles informing the Brazilian legal system, with the goal of determining the feasibility of the criminal typification of the acts committed on 8th January 2023.

1. ANTI-TERRORISM LAW IN BRAZIL: ITS CHARACTERISTICS AND THE LEGITIMACY OF THE CALLS FOR AMENDMENT

Unlike many international laws,[1] the Brazilian anti-terrorism law – Federal Law No. 13, 260/16 – enacted on March 16, 2016, offers a restricted definition of terrorism, along with a list of acts potentially classified as this crime. Article 2 states that:

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[1] "Broadly, there are three types of definition regime. In the United States, definitions appear to have been devised to deal with particular problems, and while FISA-type definitions predominate, other definitions govern important areas of counterterror laws. In the United Kingdom and Australia, there is a general definition of terrorism, which governs virtually all contexts in which it is relevant that »terrorism« is involved. The post-9/11 Canadian and New Zealand definitions have similarly general application. However, there is one important difference. Like the UK and Australian definitions, they include a general definition of terrorism, which resembles those definitions in both structure and content. However, following the precedent set by the Terrorist Financing Convention, Canada also defines terrorist activity to include activities falling within a number of specified offences that implement Canada's obligations under terrorism conventions. New Zealand's definition is similar to Canada's, except that it defines terrorism to include offences against the conventions, rather than by reference to pre-existing or concurrently created offences designed to implement New Zealand's obligations under the conventions. There is overlap between the categories, but there will be acts that are terrorist only because they either constitute a convention offence or fall within the general definition. The inclusion of offences

"Terrorism consists of the acts outlined in this article, committed by one or more individuals, for reasons of xenophobia, discrimination or prejudice based on race, colour, ethnicity or religion, intended to provoke social or generalised terror, endangering people, property, public peace or public safety."[2]

This national legislation also details the means through which terrorism can be practised, as specified in Article 2 § 1º:

I – Use or threat to use, transport, store, possess or carry explosives, toxic gases, poisons, biological, chemical, nuclear substances or other means capable of causing harm or promoting mass destruction.

IV – Sabotage or seize, with violence, serious threat to the person or using cybernetic mechanisms, total or partial control, even temporarily, of communication or transport means, ports, airports, railway or bus stations, hospitals, nursing homes, schools, sports stadiums, public facilities or places where essential public services operate, energy generation or transmission facilities, military facilities, oil and gas exploration, refining and processing facilities and banking institutions.

V – An attempt against the life or physical integrity of a person.[3]

Brazil's legislature is believed to have succumbed to international pressure, notably from the United States with its prominent 'war against terror' agenda. Consequently, Brazil chose to construct a symbolic instrument to declare support for this political arrangement, despite potential framing of these acts under different crime categories, such as organised criminal offence.

In this context, introducing a subjective limitation in the current definition of terrorism could be seen as a victory for social organisations. In early 2016, they

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against the conventions within the definition is also a feature of several US definitions, including that of the INA (which is predicated on offences against some of the conventions) and the definition of a »federal crime of terrorism« (whose elements include commission of one or more specified federal offences, which include those against laws giving effect to conventions). Despite these differences, definitions typically include a number of elements. All include a »harm« element, which defines the physical or economic harm that terrorism entails (or, possibly, threatens). Most include an »intended purpose« element (which limits »terrorism« to acts done with the intention that they will produce particular results); and many include a »motivation« element (not generally found in US legislation, but an aspect of the general definitions in the other four jurisdictions)" (Douglas, R., 'What Is Terrorism?', *Law, Liberty, and the Pursuit of Terrorism,* 2014, pp. 46–61. *JSTOR*, https://doi.org/10.2307/j.ctt1gk08gq.8, accessed on 23 February 2023.

[2] The original: "O terrorismo consiste na prática por um ou mais indivíduos dos atos previstos neste artigo, por razões de xenofobia, discriminação ou preconceito de raça, cor, etnia e religião, quando cometidos com a finalidade de provocar terror social ou generalizado, expondo a perigo pessoa, patrimônio, a paz pública ou a incolumidade pública."

[3] The original: "I – usar ou ameaçar usar, transportar, guardar, portar ou trazer consigo explosivos, gases tóxicos, venenos, conteúdos biológicos, químicos, nucleares ou outros meios capazes de causar danos ou promover destruição em massa; IV – sabotar o funcionamento ou apoderar-se, com violência, grave ameaça à pessoa ou servindo-se de mecanismos cibernéticos, do controle total ou parcial, ainda que de modo temporário, de meio de comunicação ou de transporte, de portos, aeroportos, estações ferroviárias ou rodoviárias, hospitais, casas de saúde, escolas, estádios esportivos, instalações públicas ou locais onde funcionem serviços públicos essenciais, instalações de geração ou transmissão de energia, instalações militares, instalações de exploração, refino e processamento de petróleo e gás e instituições bancárias e sua rede de atendimento; V – atentar contra a vida ou a integridade física de pessoa."

expressed concern that the proposed legislation might frame social movements themselves.

As previously highlighted in another study,[4] debates in the Brazilian Congress since 5 January 2015 indicate that opponents of the project were worried about an overly broad and flexible concept of terrorism, allowing the persecution of political dissidents, particularly leftist supporters. The original project criminalised the generic conduct of "attacking democratic institutions gravely"[5] and the exceptions contained in the rule would not prevent the initiation of a criminal proceeding or the mere classification of the act as a blatant offence.[6]

On the other hand, proponents argued that it was necessary to respond to external pressures, which have intensified post 9/11. Additionally, they maintained that destructive actions under the guise of legitimate social demands would be socially discouraged through tightening of the legislation.

The language used by supporters appears to evoke the spectre of right-wing neorealism, which has long influenced the ideas of a segment of the Brazilian population and the legislature.

At that time, Federal Law 7717/83, known as the National Security Law, was still in force. This law embodied the ideas mentioned and the political agenda of the military dictatorship that began in Brazil in 1964. The law has been heavily criticised since its inception, as its enactment was supposedly due to an alleged institutional crisis, rooted in anti-democratic and totalitarian beliefs, thereby creating the so-called 'Revolutionary Criminal Law' as Cláudio Heleno Fragoso termed it.[7]

Following appeals from jurists who for years had shown the absolute incompatibility of The National Security Law with the Brazilian Constitution of 1988, it was repealed on 1 September 2021, with the introduction of Law 14.197/2021. This new law incorporated crimes against the democratic rule of law under Title XII

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[4] Brito, Couto de, A., Moraes, da Silva, J., 'Terrorismo Interno: Breves considerações sobre a legitimidade de criminalização de movimentos sociais', *Revista Latino-Americana de Criminologia*, Brasília, 2021, Vol. 1, No. 2.

[5] The original: "atentar gravemente contra as instituições democráticas".

[6] § 2 The provisions of this article do not apply to the individual or collective behaviour of individuals involved in political manifestations, social, union, religious, class, or professional category movements, driven by social or demanding purposes, aimed at challenging, criticising, protesting or supporting, with the aim of defending constitutional rights, guarantees, and freedoms, without prejudice to the criminal classification outlined in the law.

[7] In his own words: There is a current national awareness of the urgent need to rework the security law, subjecting it to the fundamental requirements of defending the State in a freedom regime. The National Security Law emerged at a time of institutional crisis, as an expression of a supposedly revolutionary criminal law, inspired by the military, which aimed to incorporate a deeply anti-democratic and totalitarian doctrine into the law. We are now living in new times. The President of the Republic repeatedly pledged his word, and his vigorous action aligns with it, towards the redemocratisation of the Country. The National Security Law appears as an aberration, a dead and putrid body in the fresh atmosphere that the Nation breathes. Civil society, through its most representative bodies, rejects this infamous law. Authorised government representatives publicly declare that the law needs to be revised and Congress is studying its reformulation. (Fragoso, H.C., 'Para uma interpretação democrática da Lei de Segurança Nacional', *Jornal O Estado de S. Paulo*, São Paulo, pp. 34–34, 21 April 1984). In the same sense: http://www.fragoso.com.br/wp-content/uploads/2017/10/20171002195930-nova_lei_seguranca_nacional.pdf.

of the Federal Criminal Code. Among the newly created crimes are "the violent abolition of the democratic state of law", 'the coup d'Etat', political violence, and espionage.

Even though the invasions and depredations carried out on 8th January 2023, could be classified as some of these newly listed crimes, the political instability amplified following President Luís Inácio Lula da Silva's victory sparked public debate on the need to modify anti-terror legislation, to make it possible to reach political extremists. Some defended the appropriateness of the current legislation, despite the clear violation of legality principles, arguing that "discrimination, xenophobia or prejudice based on race, colour, ethnicity, and religion" essentially defines terrorism in Brazil. This argument also embraces the concept of 'preparatory acts' to commit acts of terrorism.[8]

Supporters of legislative change, on the other hand, argue that the current political landscape differs significantly from that of 2016. They claim that the emergence of terrorist cells over the last six years and the growth of extremist groups could significantly boost anti-democratic movements. They also contend that the current definition of terrorism is at odds with international treaties and guidelines on the matter. The latter argument underpinned another bill aiming to alter the current law – PL 83/2023 – presented by Senator Alessandro Vieira (PSDB-SE):[9]

> Finally, it is worth noting that the inclusion of political motivation within the legal text is consistent with international treaties acknowledging political motivation, such as the International Convention on the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Acts of Nuclear Terrorism. These were internalised in Brazil by Decree No. 4.394 of 26 September 2002, Decree No. 5.640 of 26 December 2005, and Decree No. 9.967 of 8 August 2019. All these documents stipulate that each State Party is obliged to adopt the necessary measures, including the formulation of domestic legislation, to ensure that under no circumstances can terrorist acts be justified on the grounds of political, philosophical, ideological, racial, ethnic, religious biases or any other similar nature. These acts should be suppressed with penalties appropriate to their severity.[10]

Important to note is that unlike recent bills seeking to broaden the scope of Law 13.260/16, this bill is not a result of demands from extreme right-wing parties.

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[8] For example: https://www.olharjuridico.com.br/noticias/exibir.asp?id=50609¬icia=lei-antiterrorismo-pode-ser-invocada-no-episodio-dos-ataques-ocorridos-em-brasilia-especialista-responde&edicao=2.

[9] Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=9248770&disposition=inline.

[10] In the original: "Por fim, destaque-se que a inclusão da motivação política vai na mesma linha de tratados internacionais preveem a motivação política, a exemplo da Convenção Internacional sobre a Supressão de Atentados Terroristas com Bombas, da Convenção Internacional para Supressão do Financiamento do Terrorismo e da Convenção Internacional para a Supressão de Atos de Terrorismo Nuclear, internalizadas no Brasil pelos Decreto nº 4.394, de 26 de setembro de 2002, Decreto nº 5.640, de 26 de dezembro de 2005 e Decreto nº 9.967, de 8 de agosto de 2019. Todas estipulam que cada Estado Parte deve adotar as medidas necessárias, incluindo a adoção de legislação interna, que assegurem que os atos terroristas não possam ser em nenhuma circunstância justificados por considerações de natureza política, filosófica, ideológica, racial, étnica, religiosa ou outra similar e sejam reprimidos com penas compatíveis com sua gravidade."

Instead, a social democratic party, deemed more moderate, presented it with support from popular left-wing voices under the pretext of increasing punishment – or protection – against future extremist acts inspired by speeches that question the legitimacy of the current government. Regarding the applicability of the Law, various media sources have conveyed the primary explanations[11]:

> "Between 2010 and 2018, 81 investigation procedures were opened. From 2019 to 2021, another 107 inquiries were initiated under legislation established during the dictatorship era (1964–1985). Given this, the Congress decided to repeal the NSL (National Security Law), replacing it with the Law for the Defense of Democracy and the Rule of Law, which was approved in May 2021 by the House of Representatives and the Senate. Under the new law, criticising any of the three powers (executive, legislature, and judiciary) is no longer considered a crime. However, ten new offences were added to the Federal Penal Code, including coup d'état, undermining freedom of speech, political violence, abrupt abolition of the democratic state, interruption of the electoral process, and mass misleading communication, which refers to the spread of fake news that could impact the electoral process. Gustavo Sampaio, a professor at the Department of Public Law at Fluminense Federal University in Brazil, explained how the repeal of the National Security Law safeguards freedom of speech and the potential applications of the new law in countering recent attacks on democracy and elections."

However, the law's intention seems to echo the discourse once promoted by extreme right-wing parties but reformulated with different terminology. It perpetuates social insecurity as a basis for extending the scope of criminal figures (crimes), overlooking the constitutional guarantees of the Brazilian Federal Constitution of 1988.

Despite the bill's core reflecting a legitimate social concern – the rising number of groups inciting the destabilisation of democratic institutions and spreading hate speech – it exemplifies how fear can be exploited to expand criminal law coverage to the greatest number of situations. In this regard, the state's criminal law continues to be idealised as a final resort (*ultima ratio*) to counter all social adversities and risks, even the most minor. It is seen as a magical solution to increasingly complex social practices that, in reality, require diverse solutions beyond the punitive state intervention. Quadrado's observation on this topic is notable[12]:

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[11] Sampaio, G., 'Por que o Congresso revogou a Lei de Segurança Nacional?', *O Globo*, 2021, available at: https://oglobo.globo.com/podcast/por-que-congresso-revogou-lei-de-seguranca-nacional-1-25151832, accessed on 23 February 2023.

[12] In the original: "O discurso do ódio, atualmente amplificado pelas redes sociais digitais, ganha projeção a partir da ação de haters speech (Rosenfeld, 2001, p. 02). Os haters speech são sujeitos que propagam mensagens preconceituosas, geralmente contra as minorias sociais tendo como base o racismo, as diferenças religiosas, étnicas ou de nacionalidade. Rosenfeld (2001, p. 03) realiza importante distinção do ponto de vista conceitual circunscrevendo o fenômeno em hate speech in form e hate speech in substance. Para o autor, como hate speech in form podemos classificar aquelas manifestações odiosas, ao passo que o hate speech in substance se refere à modalidade velada do discurso do ódio. Para Santos e Silva (2016, p. 05), o discurso do ódio é a "prática social que reutiliza da linguagem e da comunicação para promover violência aos grupos, classes e categorias, ou ainda, a sujeitos que pertencem a estas coletividades, sendo algo que pode estar relacionado ao desrespeito à diferença e à identidade." In: Quadrado Carvalho, J.,

> "Hate speech, currently amplified by digital social networks, gains its significance through hate speakers (Rosenfeld, 2001, p. 2). Hate speakers are subjects who spread prejudiced messages, usually against social minorities, on the basis of race, religion, ethnicity or national origin. Rosenfeld (2001, p. 3) makes an important distinction from a conceptual point of view, distinguishing hate speech 'in form' and hate speech 'in substance'. According to the author, hate speech in form consists in hateful manifestations, while hate speech in substance refers to the veiled mode of hate speech. According to Santos e Silva (2016, p. 5), hate speech is a social practice that reuses language and communication to promote violence against groups, classes, and categories, or even individuals who belong to these communities, which could be related to disrespect towards difference and identity".

In Brazil, more than twenty bills are currently pending in Congress, each intending to modify the existing anti-terrorism legislation. These bills aim either to adhere to international body regulations or to enhance domestic security.

Current data reveals that 67% of projects proposing changes to the Anti-Terrorism Law were introduced during Bolsonaro's administration between 2019 and 2021, which is a concerning increase. PSL, the party that elected the former president, proposed the most bills aiming to revise the current legal text, with a total of eleven, compared to four by PR (another political party), and three by PSDB, who ranked third.

It can be observed that the bill presented in 2023, like those introduced before the current presidential election, is rooted in the belief that punitive measures are more effective than investing in social programs to combat crime. This mindset harkens back to the national security movement and right-wing neorealism with its 'law & order' slogan. This slogan, extensively propagated as an output of US criminal policy from the 1980s, also anticipates contemporary punitive rage, aimed at more rigorous application of Criminal Law with stiffer penalties.[13]

Ferreira da Silva, E., 'Ódio e intolerância nas redes sociais digitais', *Revista Katálysis*, 2020, Vol. 23, No. 3, pp. 419–428.

[13] "Due to the significant concern with the increase in crime and in response to society's wishes, the movement called Law and Order emerged in the United States in the 1970s. This ideological movement proposes Maximum Criminal Law, that is, it suggests an application of Criminal Law to as many cases as possible, leading to more severe penalties. Such a proposal would make the population believe that Criminal Law could be the solution to end crime, or if not, reduce it. (…) From this perspective and inspired by society's aspirations, the Law and Order movement proposes a reformation of Criminal Law, and this ideology has spread to several countries to institute not only more severe penalties, but also a stronger criminal and more rigid executions. For the defenders of Law and Order, the adage "human rights for human rights" is perfectly aligned with the policy of "Zero Tolerance, in the sense that human rights must prioritise honest people to live free from crime". In the original: "Em razão de tamanha preocupação com o aumento da criminalidade e em busca de respostas aos anseios da sociedade, surgiu nos Estados Unidos, na década de 1970, o movimento chamado Law and Order, ou "Lei e Ordem". O aludido movimento ideológico propõe o Direito Penal Máximo, ou seja, sugere um alargamento da incidência do Direito Penal, fazendo com que penas mais severas sejam aplicadas, na mesma perspectiva de que as penas já existentes sejam agravadas. Tal proposta faria com que a população acreditasse que o Direito Penal é a solução para acabar com a criminalidade, ou senão, reduzi-la. (…) Nessa perspectiva e inspirados pelas pretensões da sociedade, o movimento Law and Order propõe uma reformulação no Direito Penal, sendo que tal ideologia se expandiu para vários países a fim de instituir não somente penas mais gravosas, como também uma execução penal mais fortalecida e rígida. Para os defensores do Law and Order, o brocardo "direitos humanos para humanos

The attempt to symbolically apply Criminal Law is evident from a straightforward reading of the bill's rationale, as presented by Senator Alessandro Vieira. Although the aforementioned conducts perpetrated on 8th January could be categorised under different types of offences, the author of the bill built his argument on a purely semantic issue to expand the current Article 2 of the anti-terror law:

> The attack on 'Praça dos Três Poderes' on 8 January and recent attacks on power transmission towers prompted the media and population to label the individuals responsible as terrorists. However, although the term 'terrorism' holds a political meaning in addition to a legal one, with different interpretations globally, the conducted acts do not constitute terrorism under Brazilian criminal law. (…) The perpetrated acts comply with law requirements one and three, but the second was not present, as they were not performed due to xenophobia, discrimination or prejudice based on race, colour, ethnicity and religion; they cannot be considered terrorist acts. This conclusion arises from the principle of strict legality among Criminal Law principles, which prohibits the use of analogy. From the reasons listed by the anti-terrorism law, political motivation cannot be deduced, even with extensive interpretation. Hence, there is a need to amend the law to include these other circumstances.

While achieving these objectives directly conflicts with the Brazilian Federal Constitution, it simultaneously distorts the original purpose, nurturing authoritarianism instead of constraining it. As for the constitutional violations, it is important to acknowledge that the subsidiary protection of legal interests or even the containment of the State's punitive power is displaced as the core purpose of criminal law by the need to satisfy the interests of international organisations. Under these conditions, the law itself loses its legitimacy as a mechanism for resolving major social conflicts and instead becomes a tool to be wielded according to the whims of the country's foreign policy.

In the absence of concrete evidence and reasons genuinely justifying legislative changes – especially those seeking to broaden punishment scope, the State's mandated legitimacy will be undermined, and the guarantees and social safeguards defended since Beccaria's era may be compromised, especially regarding events that, as noted previously, may already have legal classification. For this reason, agreeing with Muñoz Conde,[14] among others, is imperative:

> "The Rule of Law's inherent fundamental rights and guarantees, especially those of a material criminal nature (principles of legality, minimum intervention and culpability) and criminal procedure (right to presumption of innocence, judicial protection, not to testify against oneself, etc.), are non-negotiable premises of the Rule of Law's essence. If its repeal is allowed, even in extreme and serious specific cases, dismantling the Rule of Law must also be admitted. Under these circumstances, the legal system becomes a purely technocratic or functional system, devoid of any reference to a system of values, or worse, referring to any system, even if unjust, as long as its proponents have the power

direitos" coaduna-se exatamente com a política da "Tolerância Zero, no sentido de que os direitos humanos devem primar às pessoas honestas e livres de criminalidade" (Duarte Tavares, M.H., Curi Cherem, V.F., 'Os influxos do Movimento Law and Order e The Broken Windows Theory no Brasil', *Revista Liberdades*, São Paulo, Vol. 19, pp. 35–44, May 2015).

[14] Muñoz Conde, F., 'De Nuevo sobre el »Derecho Penal del Enemigo«', *Revista Penal*, 2005, No. 16, pp. 133–134.

> or strength to enforce it. Law understood in this manner becomes pure State Law, in which the law is subject to the interests that the State or forces controlling or monopolising its power determine at any given moment."[15]

The objective seems to be the creation of versatile wording, capable of being applied to those expressing their political stance against the established power, potentially allowing the law to label them as 'terrorists'. The pivotal question is: what criteria permit case-by-case differentiation to avoid a clear violation of the Constitutional Principle of Legality? In essence, how do we distinguish between an overstep of the right to free speech and a blatant terrorist act, as defined by law? When does the transportation of 'means capable of causing damage' for 'political reasons' evolve into a terrorist act that can be classified under Article 2, § 1, I of Law 13.260/16? Dissenha and Gauragni provide a potent perspective on this issue[16]:

> "How do we address those unwilling to accept the pluralism so vital for democracy, like religious or political fundamentalists resorting to extreme terrorist acts? When these limits are not enough, it is necessary to surpass them by establishing new ones. Here is where the exception penalty appears as a natural demand of strict tolerance. The conventional punitive system serves well to protect society against risks arising from the democratic system itself, but falls short when providing adequate solutions for external threats. As the tolerant and inclusive ideals of democracy cannot prevent external agents from infiltrating the system, finding solutions to counteract them becomes vital, especially since they cannot be assimilated due to their intolerance. Amid the need for freedom of speech and the demand for system security to ensure tolerance, there exists a »structural tension, but not a dialectical one, as it is incapable of producing a synthesis« (Pavarini, 2007, p. 8). This tension inevitably results in the demand for an exceptional Criminal Law, designed specifically to address these enemies."

Evidently, the wording proposed in Bill 83/2023 does not offer satisfactory responses to these societal concerns and could not do so, considering its intentional – and, in our understanding, illegitimate – level of abstraction. The permission granted in § 2, as in the original anti-terror law bill, does not resolve the issue either, a fact already demonstrated by legislative representatives during Congressional debates pre-2016[17]:

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[15] In the original: "Los derechos y garantías fundamentales propias del Estado de Derecho, sobre todo las de carácter penal material (principios de legalidad, intervención mínima y culpabilidad) y procesal penal (derecho a la presunción de inocencia, a la tutela judicial, a no declarar contra sí mismo, etc.), son presupuestos irrenunciables de la propia esencia del Estado de Derecho. Si se admite su derogación, aunque sea en casos puntuales extremos y muy graves, se tiene que admitir también el desmantelamiento del Estado de Derecho, cuyo Ordenamiento jurídico se convierte en un ordenamiento puramente tecnocrático o funcional, sin ninguna referencia a un sistema de valores, o, lo que es peor, referido a cualquier sistema, aunque sea injusto, siempre que sus valedores tengan el poder o la fuerza suficiente para imponerlo. El Derecho así entendido se convierte en un puro Derecho de Estado, en el que el derecho se somete a los intereses que en cada momento determine el Estado o la fuerzas que controlen o monopolicen su poder."

[16] Dissenha, R.C., Guaragni, G.V., 'Os Limites da Democracia: A Tolerância Restrita e a Criminalização do Terrorismo', *Revista Direitos Culturais*, Santo Ângelo, 2019, Vol. 14, No. 34, pp. 165–186.

[17] de Brito Couto, A., Moraes da Silva, J., 'Terrorismo Interno: Breves considerações sobre a legitimidade de criminalização de movimentos sociais', *Revista Latino-Americana de Criminologia*, Brasília, 2021, Vol. 1, No. 2, p. 5.

> Under paragraph 2 of Article 2, activities of social, union as well as religious and classist movements shall not be considered terrorist acts. However, it cannot prevent someone's persecution, since one could be prosecuted and later, potentially not convicted by the justice system. This is what is happening with these citizens who have been incarcerated for 3 months.

It is discernible, therefore, that an additional objective with the proposed law alteration is ostensibly "to keep society under control," beginning with a flawed concept of social safety and political homogeneity. As a result, the judiciary is granted discretion to categorise which groups fall under the 'terrorist' label and which under the 'protester' label, exemplifying a criminal law model predicated on the author's characteristics. Hence, Fernández Abad makes a valid point[18]:

> "Briefly, in its effort to rule the future through a theoretical framework operating amid ignorance and uncertainty, the »discourse on radicalisation« contributes to constructing a present-day reality marked by the existence of a category of people who, due to their professed ideology, vulnerable situation, or frequent company, are considered potentially dangerous, justifying the implementation of measures and tools primarily aimed at their control and potential neutralisation. This not only provides the foundation for highly harmful and discriminatory policies – which, in itself, is already a concerning issue, especially from a human rights respect perspective – but also becomes real in its effects. This epistemological framework creates conditions suitable for the feelings of injustice and disaffection, identified as some of the main factors fuelling these rapidly spreading processes. In these terms, rather than serving as the basis for effective crime-fighting policies, it appears reasonable to consider that the productive effects derived from the »discourse on radicalisation« contribute to perpetuating the issue itself."

Regardless, it is clear that the outcome of this strategy deviates significantly from the initial intention behind the bill's design. This ultimately fuels democratic destabilisation, rather than strengthening democratic institutions as initially intended. The extreme vagueness and broad latitude of the legal text, besides generating legal uncertainty, could potentially flip the law's application, not as a tool to contain

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18 In the original: "En definitiva, en su intento de gobernar el futuro a través de un cuerpo teórico que opera en un marco caracterizado por el desconocimiento y la incertidumbre, el »discurso sobre la radicalización« contribuye a crear una realidad en el presente que está marcada por la existencia de toda una categoría de personas que, ya sea por la ideología que profesan, la situación de vulnerabilidad en la que se encuentran o las compañías que frecuentan, son consideradas como potencialmente peligrosas, lo que justifica la puesta en marcha de medidas e instrumentos que, en esencia, están orientados a su control y eventual neutralización. Esto, por su parte, no solo sirve de base para la formulación de políticas que resultan altamente lesivas y discriminatorias – lo que, en sí misma, ya es una cuestión preocupante desde una perspectiva que enfatice el respeto a los derechos humanos – sino que, volviéndose real en sus efectos, este marco epistemológico genera las condiciones adecuadas para que se extiendan rápidamente los sentimientos de injusticia y desafección que, desde el mismo, han sido señalados como una de las causas principales que nutren estos procesos. En estos términos, más que servir de base para la articulación de políticas eficientes en la lucha contra este fenómeno, parece razonable pensar que los efectos productivos que se derivan del »discurso sobre la radicalización« contribuyen a perpetuar la existencia de esta problemática." In: Abad, C.F., 'El »discurso sobre la radicalización« como base para gobernar un futuro incierto. Una aproximación crítica a su naturaleza performativa y los efectos que se derivan de su existencia', *Indret*, 2022, No. 1, p. 359.

extremists, but as a mechanism to intimidate protesters, particularly in the hands of potential authoritarian governments. It is crucial to remember that a crime should not be conceived for the present moment only, but should also consider power alternation and the dynamism of contemporary societies.[19]

What is being advocated here is not the practice of unrestricted freedom, implying that the destruction that took place on 8th January was in compliance with constitutional guarantees and thus justified in itself. Instead, it has been highlighted that these incidents, at least theoretically, could fall under other criminal categories, rendering any legislative intervention in this situation redundant. Furthermore, we believe the Brazilian legislator was successful in adding a subjective limitation to the concept of terrorism, making it more suitable to meet the Brazilian legal system's realities and needs.

Contrary to the bill author's intention, international guidelines, particularly Directive (EU) 2017/541 of the European Parliament and of the Council,[20] do not advocate for the outright criminalisation of potentially severe actions committed due to political beliefs. In reality, these regulations not only respect individual dignity and fundamental rights but also provide clear delineations for classifying actions as terrorism, such as threatening a government.[21]

> 2. The purposes referred to in paragraph 1 are the following: (a) to seriously intimidate a population; (b) unduly compel a public authority or an international body to perform or abstain from an act; (c) seriously destabilise or destroy a country or an international organisation's fundamental political, constitutional, economic or social structures.

2. CRIMES AGAINST THE DEMOCRATIC RULE OF LAW IN THE LIGHT OF INDIVIDUAL FREEDOMS

Having discussed the necessity for a legal change, we will now analyse the 8th January events according to the criminal figures incorporated into the Brazilian Penal Code via Law 14,197 of 2021.

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[19] Mir Puig offers a sensible critique: "Some people think that the future Penal Code that Parliament has to approve must be justified as a more effective Code that puts an end once and for all with all insecurity in our midst. The new Code that young people need in a still fragile Spanish Democracy should not find so much its specific difference with the current Code of Dictatorship in a greater effectiveness, as in a more refined subjection to the limits that democratic demands impose on mere repressive effectiveness. The increase in public safety must be sought through another path, through an appropriate social policy. This path is, like every democratic path, more challenging, but it is also the only one that leads to long-term solutions." (Mir Puig, S., *El Derecho Penal en El Estado Social y Democrático del Derecho*, Barcelona, 1994, p. 128.).

[20] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541.

[21] "2. Los fines a que se refiere el apartado 1 son los siguientes: (a) intimidar gravemente a una población; (b) obligar indebidamente a los poderes públicos o a una organización internacional a realizar un acto o a abstenerse de hacerlo; (c) desestabilizar gravemente o destruir las estructuras políticas, constitucionales, económicas o sociales fundamentales de un país o de una organización internacional."

Of the nine articles created by the law, at least two could potentially apply to the events. First, Article 359-L, which covers the crime of abrupt abolition of the democratic rule of law:

> Article 359-L. Attempting, through violence or serious threat, to abolish the democratic rule of law, hindering or limiting the exercise of constitutional powers:
> Penalty – imprisonment, from 4 (four) to 8 (eight) years, besides the penalty corresponding to the violence.

Secondly, Article 359-M, which covers for the crime of coup d'état:

> Article 359-M. Attempting overthrow, via violence or serious threat, the legitimately constituted government:
> Penalty – imprisonment, from 4 (four) to 12 (twelve) years, in addition to the penalty corresponding to the violence.

Following the 8th January incident, the Ministry of Justice and Public Security established an email address for reporting terrorist acts. In total, 102,407 messages were received, indicating the involvement of over 50,000 individuals and 14,600 organisations.

Despite this, the legal provisions seem to lack a technical precision that, although not entirely undermining their use, obstructs their compatibility with the interpretative guidelines of contemporary criminal doctrine. The main example of this theoretical gap is the description of a conduct in its attempted form, when the creation of a consummated danger crime was essentially intended, whereby a tangible risk to the legitimately constituted government and the exercise of constitutional powers would materialize as a result of the consummated action.

Despite these obstacles and the interpretative effort required by the legal wording for judges to identify the legal interest to be protected in specific cases, the main reflection imposed by these Articles lies in the possibility – or lack thereof – of applying the permission contained in Article 359-T to the events that occurred on 8th January 2023:

> Article 359-T. Criticising constitutional powers, press activity or the claim of constitutional rights and guarantees through marches, meetings, strikes, gatherings, or any other form of political demonstration with social aims does not constitute a crime, as laid out in this section.

Notably, the issue, apart from necessitating a case-by-case analysis of the acting agents' intentions – which could have been a distortion of public institutions or even the takeover by the candidate they were backing – might be resolved by identifying the overstepping of constitutional freedoms, among them, freedom of speech.

Under the current Brazilian constitutional regime, formed as a social-democracy, we no longer refer to national or State security, but rather to security itself, which can only be understood as legal security. Subversion, nowadays, is interpreted as the subversion of democracy, in demagoguery or tyranny, as Montesquieu's purest expression of corruption of the political system. Political representatives must be

directly and freely elected, even if they pose a threat to the nation due to their lack of political expertise and commitment to citizenship. Society and the State are not static, and therefore the constitutional text contains many political programmes to be activated for future generations. Therefore, it seems that nothing in the current political scenario justifies the application of an outdated legal diploma that centres on propagating an ideology that no longer seeks to protect the State as a distinct entity, akin to the Leviathan, but rather should aim to recognise that the State only exists due to a legal relationship formed between each and every citizen.[22]

Thus, those considered 'misfit' can no longer be excluded but must be incorporated into the populace. Relevant here is a challenge posed by Torres del Moral: "The classic question of whether one must grant freedom to the enemies of freedom, democracy must provide an affirmative response, only to immediately clarify it: freedom for all, but not to jeopardise the very democracy that acknowledges their freedom and guarantees their rights."[23]

The proposed legal amendment – especially Article 359-L – introduces a fresh political context into pre-existing offences such as damage, injury or homicide, which must always be scrutinised meticulously. The events of 8th January 2023 were unique, strongly influenced by the circumstances and the hostile political atmosphere that had been cultivated.

In such instances, the criminalisation of the event would be justified, but the concern is that the created crime type will remain applicable even after the aforementioned incidents, and the ambiguity of the phrase "preventing or restricting the exercise of constitutional powers" could enable a broad interpretation to any form of violence that could impact one of the political powers.

It is akin to suggesting that there might be a chance of giving 'national security' law and mindset might be given a makeover, ostensibly making it appear more democratic, but ultimately maintaining the same objectives of persecution as in the past. At this point, it is worth mentioning the cautious observations of Lola Anyar de Castro on the concept of security. According to the author, the term 'security' is a problematic in the field of Critical Criminology for several reasons: (a) it recalls connotations of 'national security' in Latin America, where this phrase often related to the 'law and order' movement, used as a tool to suppress social protests; (b) authoritarianism has frequently been justified in the name of pursuing security; (c) 'common sense theories' often associate insecurity with delinquency in the lower-classes.

Moreover, the author contended that security – which can only be understood as a citizen's safety – is a right necessary for people to enjoy their other rights.[24] Given all these factors, it seems that the supposed security might once again be aiming to curtail freedom.

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22 de Brito Couto, A., 'Movimentos sociais e a segurança nacional', *Boletim Ibccrim*, 2014, Vol. 22, pp. 3–5.

23 Torres Del Moral, A., 'Terrorismo y Princípio Democrático', *Revista de Derecho politico*, 2010, No. 78, p. 156.

24 de Castro Anyar, L., *Criminología de los Derechos Humanos. Criminología axiológica como política criminal*, Buenos Aires, 2010, pp. 150–151.

CONCLUSION

The paradox of defending against extreme acts of violence while preserving fundamental guarantees presents itself as one of the greatest dilemmas of modern criminal policy.

Over the past seven years or so, Brazilian society has witnessed the emergence of political groups aiming at destabilising the State, either by questioning the legitimacy of the electoral process or by orchestrating the disruption of democratic institutions. This complex phenomenon culminated on 8th January 2023, when supporters of the losing presidential candidate invaded government buildings, refusing to accept the election results.

The demand for punitive strengthening through legislative changes emerged as an immediate response to this episode, particularly to allow for the classification of similar incidents as terrorism, something previously impossible given the narrow semantic confines of our current anti-terror legislation.

Even though such demands may originate from an alleged fortification of the democratic rule of law, which exhibits greater punitive stringency against its antagonists, the examination of the repercussions implied by these demands suggests that the outcome somewhat conflicts with principles established by the Brazilian Federal Constitution of 1988. Furthermore, it indicates that the ends sought by these amendments seem to echo those pursued by representatives during the authoritarian period (1964–1985), when they proposed bills to amend the anti-terror law.

In a context where it is still possible to legally classify these acts under existing criminal figures in our legislation, expanding the normative range strongly suggests the use of a symbolic Criminal Law, which ultimately contributes to the erosion of democracy as it fosters legal uncertainty and the potential intimidation of legitimate social protest.

Countries with a recent history of democracy, like Brazil, must perpetually guard against authoritarianism, not only the kind propagated by its citizens, but also the type sanctioned, even if inadvertently, by the State itself.

Therefore, the fortification of the democratic rule of law and its institutions does not depend on a punitive movement that broadens the scope of laws or legislative innovation. Instead, it relies on constant vigilance in safeguarding fundamental rights and guarantees. The solution, under these circumstances, rests in the equilibrium between punishing those who overstep the boundaries of exercising their individual freedoms and preserving freedoms through lawful restraint of the State's punitive power.

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COMPLIANCE AND ITS CONTRIBUTIONS TO SAFETY AT WORK

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Abstract

Labour compliance is essential to protect workers' rights and promote sustainable, responsible and effective business development. It necessitates continuous preparation of preventive compliance reports on occupational risks, usually requiring studies and their timely updates, risk analysis, training-oriented resource management, and training of workers and managers. Greater self-regulation, such as compliance, can help mitigate risk of penal sanctions for individuals who fail to comply with risk prevention regulations, seriously endangering health and safety at work. A robust and effective compliance programme in this area aims to ensure legal and contractual obligations are met, particularly with respect to protecting the life and health of workers. Compliance can also bolster company success, minimise reputational damage for corporations, avoid payment of hefty fines and suspension of permits and licenses that would halt operations, among others.

Keywords: compliance, safety and health at work, responsibilities, company, employer, workers

1. INTRODUCTION

Preventing occupational accidents is important not only to protect the life and health of workers, but also to allow organisations with effective occupational health and safety systems to save money and achieve their development objectives. Work accidents and occupational diseases violate worker rights, negatively impact the corporate charter goals, and affect corporations' development. Each year sees

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fatalities and injurie among workers due to occupational accidents and diseases, with over 2.78 million deaths and 374 million non-fatal injuries occurring in the workplace. These result in an average of four days of work absenteeism.[1] Cost impact the economic, social and personal lives of workers, particularly affecting their lives, health and integrity because of non-compliance with occupational health and safety regulations. The highest rate of related deaths in this area stems from occupational diseases rather than occupational accidents. Labour accidents produce an economic impact of approximately 3.94 percent of the global Gross Domestic Product annually.[2]

The violation of workers' rights thrives in a labour market which is marked by lack of preventive measures and characterised by precariousness, informality, and emerging risks, intensifying workplace dangers and occupational accidents. On the other hand, violence and harassment at work also affect worker health and safety, as well as organisations' productivity and reputation. Proof of this, in June 2019, at the ILO Centenary Conference, the Violence and Harassment Convention (No. 190) and its accompanying Recommendation (No. 206) were adopted, highlighting the prohibition and prevention of workplace violence and harassment due to their global consequences.[3]

In this context, occupational risks, technological advances, and evolving market demands have prompted a shift in productive relationship conditions. The facts demonstrate that observing measures aimed at promoting health and safety at work is increasingly recognised as a valuable asset for companies. The Covid-19 pandemic underscored the importance of prevention and control measures to protect those involved in labour relations from exposure to this biological risk, and the necessity to adopt measures preventing new infections.[4]

Exposure to the virus in the workplace and its impact on workers underscore the need to prioritise company health and safety management, based on risk assessment and the adoption of preventative and protective measures. These include implementing strict work protocols, sanitary measures, adequate and sufficient personal protective equipment, job design, work organisation, preventative training, and surveillance of the workers' health.[5] Furthermore, worker participation and

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1 OIT, *Seguridad y salud en el trabajo frente a la pandemia*, 2020, available at: https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/briefingnote/wcms_742469.pdf.

2 Available at: https://www.ilo.org/global/topics/safety-and-health-at-work/lang--es/index.htm.

3 According to official data from the Spanish Ministry of Labour, "between January and April 2021, 176,624 work accidents with leave and 176,522 without leave were recorded. The sectors of economic activity with the highest accident rates are manufacturing industry and construction. Despite a decrease in productive activities and the rise of teleworking, the number of occupational accidents greatly exceeds the cases of the previous year. Accidents with sick leave increased by 16.9% and accidents without sick leave by 8.5%. However, those that resulted in the death of the worker were slightly reduced. There were 176 fatal accidents, eight fewer than in the same period in 2020. Most of the victims were between 45 and 59 years of age at the time of death." Available at: https://cronicaglobal.elespanol.com/vida/aumentan-accidentes-laborales-pesar-teletrabajo-nprs_511581_102.html.

4 OIT, *Seguridad y salud*…, op. cit.

5 Ibidem.

cooperation and/or that of their representatives in managing this risk, particularly through bipartite instances of social dialogue in companies or collective bargaining are some of the crucial aspects in this regard. In this scenario, the importance of compliance arises as an effective tool in preventing and delimiting corporate and individual criminal responsibilities.[6]

II. THE CRIMINAL PROTECTION OF SAFETY AND HEALTH AT WORK AND ITS PREVENTIVE RELEVANCE

Crimes related to workplace safety and health presuppose criminal law barriers protecting life and health of workers as an essential assumption of the right to decent and safe work.[7] Protection in this area aims to avoid occupational risks by adopting necessary preventative measures in various productive activities.[8] The legally obligated party is liable if he/she fails to provide workers with the safety measures necessary for them to carry out their work safely and with the least possible risk. Consequently, this safeguard is not limited to the rights of each individual worker, but rather covers the interests of a group of workers who carry out their productive work in a particular workplace.[9]

Taking into account the above, the lack of safeguards will include cases such as failure to provide appropriate sanitary and environmental conditions, lack of a general plan for the occupational hazards prevention, non-compliance with measures related to the toxic and polluting substances treatment, absence of effective actions against harassment, failure to provide biosecurity measures, lack of training, or failure to update safety measures, among others.[10]

For example, the norm provided for in Article 316 of the Spanish Penal Code penalises omissive conduct which consists of failing to provide necessary means for workers to carry out their activity with the safety and health measures required by labour regulations.[11] Those legally obliged within the framework of their functional powers, or assumed by an effective delegation, must provide specific

[6] Ramírez Barbosa, P.A., Ferré Olivé, J.C., *Compliance, Derecho penal corporativo y buena gobernanza empresarial*, Bogotá, 2019.

[7] Hortal Ibarra, J., *Protección penal de la seguridad en el trabajo*, Barcelona, 2004.

[8] Ramirez Barbosa, P.A., *El delito contra la seguridad y salud en el trabajo. Análisis dogmático de los artículos 316 y 317 del Código Penal español*, Madrid, 2007.

[9] The typical conduct of this crime, in its wilful modality, is described in Article 316 of the Criminal Code (Código Penal, CP), which penalises creating a danger or serious risk to the life, health, or physical integrity of workers by not providing them with the necessary means to ensure health and safety at work.

[10] Article 317 CP punishes the typical conduct described in Article 316 CP when carried out with serious negligence, which implies a breach of the duty of care due to the lack of all provisions required of the guarantor of the safety and health of workers, but without awareness of danger.

[11] The measures consist of both material and immaterial ones. The latter include education, information, training and updating of the worker.

and appropriate safety measures for each job, suitable in risk control and in the development of workers' productive activities.[12]

The duty of persons bound by extra-criminal regulations or by the assumption of organisational duties through delegation must focus on facilitating the required measures to prevent damage and avoid dangers at work, even if their conduct does not entirely eliminate accidents or diseases at work.[13] The extent of the unjust damage caused by an offence relating to specific danger is determined by verifying the breach of any specific obligations, as long as a risk to the safety and/or health of workers arises, even if ultimately no damage is produced.[14]

As this constitutes a blank criminal type, non-observance of occupational risk prevention regulations is required, mainly the Occupational Risk Prevention Law and other legal provisions, as a necessary assumption of breach of the obligation to protect health and safety at work. The consequent omission must entail a danger to the life or health of affected workers.

This implies that the omissive conduct of the person responsible for adopting safety measures generates a danger that could have been avoided or prevented, had they adequately provided the means at their disposal. Obligated parties are those in managerial or command functions within a corporation, whether superior, intermediate, or basic execution. They exercise such functions both by regulatory and factual obligations, and, therefore, must comply with and enforce regulations to ensure work is conducted under safe conditions.[15]

The aforementioned legal measure is addressed to those legally obliged in this area, including administrators or managers who fail to adopt the required measures. Article 318 CP provides that, if the typical conduct is attributed to a legal person, criminal responsibility falls not only on administrators but on any person responsible or aware of the facts, even temporarily.[16]

Therefore, as provided by Law 1/2015 of 30 March measures such as the suspension of activities, premises and establishments closure, the prohibition of future activities during which the crime was committed, facilitated, or concealed may be imposed. Similarly, the judicial authority may order disqualification from obtaining subsidies and public aid, contracting with the public sector, and enjoying tax or Social Security benefits and incentives, and may even order judicial intervention to safeguard the rights of workers or creditors.[17]

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[12] Ramirez Barbosa, P.A., *El delito contra…*, op. cit., p. 153 et seq.

[13] De Vicente Martinez, R., *Seguridad en el trabajo y Derecho penal*, Barcelona, 2001.

[14] Ramirez Barbosa, P.A., *El delito contra…*, op. cit., p. 129 et seq.

[15] Meini, I., *Responsabilidad penal del empresario por los hechos cometidos por sus subordinados*, Valencia, 2003.

[16] TS 162/2019 of 26 March 2019, Criminal liability of legal persons, where it is highlighted that it is impossible in crimes against workers (Article 318 CP).

[17] STS, Sala de lo Social 58, 19 January 2021, the criminal conviction of the company manager does not prevent the imposition of an administrative sanction on the legal person for violating the regulations on occupational risk prevention. The decision states that: "the principle »non bis in idem« has not been infringed, because the triple subjective, factual, and fundamental identity required for the application of said principle does not coincide between the criminal and administrative sanctions. Consequently, the criminal conviction of the company manager as the perpetrator of a crime against the workers' rights and another of injuries due to serious

III. DELIMITATION OF RESPONSIBILITIES IN SAFETY AND HEALTH AT WORK

The Spanish Law No. 31/1995 of 8 November 1995 on Occupational Risk Prevention stipulates that every employer is obliged to guarantee the safety and health of workers when they perform their tasks for that employer. To this end, every employer should prevent occupational risks by implementing measures necessary for this purpose.[18]

The omission in this crime can be intentional when the active party is aware of their obligation to prevent risks, by providing and making available necessary safety measures, yet deliberately decides not to carry it out, thereby seriously endangering the life or health of workers. The omission will be considered imprudent when the breach of obligations to provide security measures, did not account for the degree of danger its absence caused, nor did it condone it.[19]

The necessity for criminal intervention in this crime is justified considering data from the International Labor Organization, which highlights that "every 15 seconds, a worker dies from a work-related accident or disease" and, in that same interval of time, "every 15 seconds, 153 workers have a work-related accident". Which means that every day 6,300 people die as a result of occupational accidents or work-related diseases. The impact on Human Rights is evident, and despite the existence of multiple regulations of various natures, this serious problems persists.[20]

On a regulatory basis, crimes against workplace safety and health do not imply direct liability of the legal person, and their occurrence requires the existence of common rights and obligations to promote safe work with effective measures to prevent occupational hazards, in accordance with the constitutional norm of Article 40.2 of the Spanish Constitution, the laws on the prevention of occupational risks, and other implementing legislation.[21]

It is crucial to identify and verify the type of legal and factual activities assigned to the people within the business structure. The fundamental step is to determine competence against the duty to provide appropriate workplace safety

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negligence, does not prevent the company from being imposed a sanction for the infringement of the regulations on occupational risk prevention".

[18] Law 31/95 of 8 November 1995 on Occupational Risk Prevention imposes a series of obligations on the employer and the worker to guarantee safety and health at work. Article 42 of the that Law provides that "failure to comply with their obligations in the prevention of occupational risk area by employers gives rise to administrative responsibilities, and so, where appropriate, to criminal and civil responsibilities for damages which can be derived from such non-fulfilment".

[19] Relevant regulations include the Royal Legislative Decree 5/2000 of 4 August 2000, which approves the revised text of the Law on Infractions and sanctions in the social order; Royal Legislative Decree 2/2015, of 23 October 2015, approving the consolidated text of the Workers' Statute Law and Royal Legislative Decree 8/2015 of 30 October 2015 approving the text recast of the General Law of Social Security. Additionally, there are sector-specific regulations related to safety and health at work that are pertinent to its assurance.

[20] Ramirez Barbosa, P.A., *El delito contra…*, op. cit., p. 156 et seq.

[21] Lascuraín Sánchez, J.A., 'La prevención penal de los riesgos laborales: cinco preguntas', in: Carbonell Mateu, J.C. (coord.), Dykinson, S.L. (ed.), *Estudios penales en homenaje al profesor Cobo del Rosal*, Madrid, 2006, pp. 568–573.

and health measures, and if the breach of said obligation was the causative factor in endangering workers' life and health. Within this protective scope, it is important to define the functions that may be performed by manufacturers, suppliers and importers, promoters, technical architects, or prevention delegates, among others, who are not directly charged with the duty to ensure the protection of the workers' rights, but who contribute to the maintenance of specific safety measures in the workplace, either by virtue of special powers mandated by the Law, or by specific acts resulting from business decentralisation.

Failure to provide safety instruments at work implies not providing workers with material means, which may coincide with a breach of the information, control, and training duties, related to prevention of situations endangering the legal rights of the worker. Nevertheless, it is pertinent to establish the scope of the 'medium', and the existence of a link between the failure to observe workplace safety instruments, and the danger to the workers' interests. This also requires determining the extent to which the omission of the particular safety measure contributes to the creation of the typical risk.[22]

Non-compliance with occupational risk prevention policies, which endangers the life and health of workers, must be a result of an intentional or reckless failure to fulfil the company's safety duties, by those legally or factually responsible, who are assigned such duties. This includes the protective scope of criminal law. The commission of a crime can be tied to deficient business policies in occupational risk prevention, insufficient budget allocation for risk mitigation actions, deficiencies in delegation, transferring security obligations to the employer, the undue Updating of the provisions for detecting risks that lead to occupational accidents or business indifference.[23]

The prevention and protection of occupational safety and health should be formulated from the design of the corporate project, highlighting the importance of an effective compliance programme in preventing workplace accidents. It is, therefore, necessary to implement good governance policies for anticipating risks that may affect workers. This requires carrying out an initial evaluation of inherent work-related risks and its periodic update as exogenous and endogenous circumstances of each productive sector change. In addition, the compliance elements can reinforce corporate objectives such as the adoption of information and training measures covering, inter alia, the actual extent of risks arising from work, and strategies to prevent, mitigate, and address them once they occur, considering the companies' peculiarities, their corporate purpose, number of employees and hazardous nature of the assigned tasks.[24]

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[22] "Compliance and safety management begins with your senior management team. It's their voice and actions that make safety a priority. It's one of the key components of business development. Without a safe and healthy workforce, it's difficult to move forward. Productivity and the future often take a front seat. But don't put worker safety aside. If you want to see success all around, safety compliance management should certainly be a focus". Available at: https://www.safetybydesigninc.com/safety-compliance-services-company-management/.

[23] Ramírez Barbosa, P., Ferré Olivé, J.C., *Compliance, Derecho Penal Corporativo…*, op. cit., p. 50 et seq.

[24] Lascuraín Sánchez, J.A., 'La delegación como mecanismo de prevención y de generación de deberes penales', in: AA.VV., *Manual de Cumplimiento Penal en la Empresa*, Valencia, 2015, p. 172.

IV. THE SIGNIFICANCE OF COMPLIANCE IN WORKPLACE RISK PREVENTION

Introducing compliance programmes to prevent risks that may affect the safety and health of workers, starts with the commitment of senior business management and a recognition of the importance of compliance management in this area as a key factor for successful work. There are both legal and ethical obligations aimed at guaranteeing that productive activities are carried out safely and are timely updated in response to the endogenous and exogenous risks of each productive activity. Additionally, workplace safety can affect a company's reputation and be one of the deciding factors for customers to choose its products or services over those of its competitors. The priority is to foster a culture of occupational health and safety compliance that reinforces the protection of the essential rights of workers in all companies.

Compliance aimed at preventing occupational accidents involves more than just the absence of unforeseen risks. It signifies a substantial commitment to make occupational health and safety one of the focal points of every activity carried out. When a company prioritises safety compliance, its managers design key indicators and strategic objectives, which are then integrated into compliance programmes, thereby fostering good corporate governance.

Once there is a clear vision of what a safe work environment will entail, alongside measurable objectives to determine progress, the implementation of specific actions for the prevention, control, mitigation, and handling of occupational risks will be effective in the company's organisational culture. Conversely, the lack of such measures has a negative impact on the development and management of social objectives. Health and safety compliance directly affects the realisation of the corporate social purpose and productivity in the company. Good compliance measures can reduce overhead costs and foster a healthier organisational culture required for sustainable success.[25]

An effective compliance program should: (a) Implement specific actions that ensure workers have an adequate system in their workplaces. (b) Possess information systems and real-time risks reporting in response to the individual needs of each company. (c) Consider the company characteristics, the endogenous and exogenous risks to the business activity, including the specific location, number of workers, capacity building and training systems. (d) Allocate financial resources and budget for health and safety compliance that must be adequate to achieve an authentic culture of risk prevention at work. (e) Maintain measures aimed at training, informing, and supporting all company members and related third parties in health and safety matters as a strategic priority. (f) Conduct assertive and regular communication with workers regarding business changes, risk updates, regulatory and contractual developments relevant to the prevention and assurance of workplace safety and health, among others.

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[25] Ramírez Barbosa, P.A., Olivé Ferré, J.C., *Compliance, Derecho Penal Corporativo…*, op. cit., p. 160 et seq.

In this area, it is advisable to conduct continuous audits that can either be internally led or carried out by an external security consultant. Compliance measures regarding safety should aim to avoid complex reporting systems, inadequate training, and workload overflows that, despite the intention of observation, imply inefficiency in their implementation. This implies that workers have sufficient time to fulfil any reporting requirements, or that the security team is adequate, hence the level of compliance and willingness to comply must then be articulated. This leadership is only possible if top management considers health and safety compliance a priority in their activities.

Compliance procedures are integrated with continuous monitoring, directed towards risk assessment, measures adopted, and their progress. The evaluation and supervision can stimulate implementation of additional measures, if required, and the consolidation of an organisational culture of compliance with workplace safety and health. The above should be complemented by periodic reviews and evaluations of changes and business policies for risk management and productivity levels, allow the implementation of any additional measures if needed.[26]

An effective and business development-oriented compliance programme in the field of occupational health and safety must include in its structure a Code of Ethics that includes specific actions against workplace and sexual harassment, and other elements aimed at promoting ergonomics at work. Occupational risk prevention models and internal complaint channels will yield positive results for the company, but more importantly, a tangible protection of the fundamental legal rights of workers as subjects of special protection.[27]

V. CONCLUSIONS

Compliance in the area of occupational health and safety encompasses a wide array of laws, regulations, and standards aimed at preventing occupational accidents, imposing duties on various public and private market players. These actions entail measures to prevent dangerous situations for workers' fundamental rights due to non-compliance with provisions on safety measures, and to avoid occupational deaths and diseases.

[26] The crime against safety and health at work involves determining within the company who is assigned the duties in Occupational Risk Prevention. These individuals can be integrated into the business compliance system and be subject to supervision. The Compliance Officer role does not eliminate the responsibility of the person legally obliged to provide the workplace safety and health measures, and the occupational risk prevention delegate. In particular, the prevention technician is responsible for prevention in terms of occupational risk prevention; the prevention delegate represents workers with specific functions in the field of occupational risk prevention; and the compliance officer supervises regulatory compliance in all areas of the company, including observance of the Law 31/1995 on Occupational Risk Prevention and the regulations that develop its provisions.

[27] Ramírez Barbosa, P.A., Olivé Ferré, J.C., *Compliance, Derecho Penal Corporativo*…, op. cit., p. 160 et seq.

Labour compliance is essential to protect workers' rights and promote sustainable, responsible and effective business development. It necessitates continuous preparation of preventive compliance reports on occupational risks, usually requiring studies and their timely updates, risk analysis, training-oriented resource management, and training of workers and managers.

Greater self-regulation, such as compliance, can help mitigate risk of penal sanctions for individuals who fail to comply with risk prevention regulations, seriously endangering health and safety at work. It is necessary to develop Transparency and Business Ethics Programmes and similar instruments with a preventive focus as effective mechanisms preventing crimes against workers' rights, despite the lack of legal person responsibility in this sector in countries like Spain.

A robust and effective compliance programme in this area aims to ensure legal and contractual obligations are met, particularly with respect to protecting the life and health of workers.

Compliance can also bolster company success, minimise reputational damage for corporations, and avoid payment of hefty fines and suspension of permits and licenses that would halt operations, among others. It is essential to fortify compliance actions in defence of the life and health of workers by detecting, prosecuting, and effectively penalising individuals responsible for failing to provide the necessary security means to prevent workplace accidents, whether due to fraud or recklessness. When criminal and/or administrative responsibilities have been established, there must be appropriate, practical, and effective sanctions to deter others from causing similar harm.

Additionally, building a labour compliance programme in risk prevention serves as a helpful instrument in preventing crime and serious administrative offences in this area, alongside effective internal accounting controls and adequate risk management, followed by policies and updated procedures tailored to the corporation. These should be backed by the supervision of those responsible for protecting workers' legal assets.

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ADMISSIBILITY OF REOPENING CASSATION AND REOPENING PROCEEDINGS CONCLUDED WITH A DECISION DISMISSING THE EXTRAORDINARY APPEAL MEASURE

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Abstract

The article is aimed at examining the admissibility of reopening cassation and reopening proceedings concluded with a decision to dismiss the extraordinary appeal measure.

To this end, the article explores provisions on proceedings reopening (Articles 540 and 542 § 3 CCP), with particular focus on the term 'court proceedings concluded with a final decision' used by the legislator, and juxtaposes this with provisions on cassation appeal (concerning terms used in Article 521 of the Code of Criminal Procedure – 'a final decision concluding court proceedings' and 'a final court decision concluding the proceedings', and on prohibition of the so-called super-cassation, which has not been transferred to the institution of reopening of the proceedings). The author also analyses Supreme Court practice over the last twenty-odd years and reflects on historical changes to criminal procedure at the turn of the 21th century with regard to the institutions of annulment of court decisions and reopening of the proceedings.

Keywords: cassation appeal, reopening of the proceedings, annulment of a court decision

Chapter 56 of the Code of Criminal Procedure ('CCP') stipulates the possibility of reopening (at a party's request, and in legally specified cases – also *ex officio*)[1] court proceedings concluded with a final decision. This article aims to investigate whether both cassation proceedings and reopening proceedings concluded with a decision

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1 Cf. Article 542 § 3 CCP.

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to remand the case to a lower court for further proceedings can be deemed court proceedings concluded with a final decision.

Before proceeding into the main part of the analysis related to the interpretation of Article 540 and Article 542 § 3 CCP concerning proceedings that can be reopened and, at the same time, decisions that can be challenged by a motion to reopen the proceedings, it is necessary to recall historical changes that the institution of reopening underwent both when the new CCP entered into force in 1998 and throughout the subsequent quarter century. Nevertheless, the study's purpose is not to conduct a comprehensive analysis of determining the class of judgements that can be challenged with this type of extraordinary appeal measure, but rather to ascertain whether a Supreme Court decision dismissing a cassation appeal (including manifestly ill-founded appeals), dismissing a motion for reopening of the proceedings, and refusing to admit such a motion on the grounds it is manifestly ill-founded, can constitute a final decision concluding court proceedings.

The 1969 Code of Criminal Procedure provided that reopening is possible when court proceedings were concluded with a final decision, and the current CCP echoed this provision (Article 540 § 1). Initially, three grounds for reopening proceedings existed: *propter falsa* (Article 474 § 1 (1) of the 1969 CCP), *propter nova* (Article 474 § 1 (2) (a) (b) of the 1969 CCP) and absolute grounds for reversing a judgement (Article 474 § 2 in conjunction with Article 388 of the 1969 CCP). On 17 October 1997 (less than a year before the 1997 Code of Criminal Procedure entered into force) additional grounds for reopening were adopted – *propter decreta*. However, at that time *propter decreta* referred solely to final decisions based on a legal act that was deemed unconstitutional by the Constitutional Tribunal (Article 474 § 1 (3) of the 1969 CCP).

The 1997 Code of Criminal Procedure preserved the institution of reopening proceedings, but made significant changes to the grounds for this extraordinary appeal measure. Initially, the 1997 CCP offered three grounds for reopening proceedings: *propter falsa* (Article 540 § 1 (1) of the 1997 CCP), *propter nova* (Article 540 § 1 (2) (a) (b) (c) of the 1997 CCP) and *propter decreta* (Article 540 § 2 and § 3 of the 1997 CCP). Compared to the previous legal status, the first listed ground remained unchanged, while the other two saw modifications. However, these modifications do not significantly impact the fundamental issue of the admissibility of reopening of cassation or reopening proceedings. It is noteworthy, that the scope of *propter decreta* was expanded – apart from certain Constitutional Tribunal judgements that could form grounds for reopening proceedings, *propter decreta* now also covers decisions issued by an international body (court) acting under an international agreement ratified by the Republic of Poland (Article 540 § 3 of the 1997 CCP).

Under the new Code of Criminal Procedure, the absolute grounds for reversing a judgement no longer constitute grounds for reopening. This change results from introducing an institution for annulment of court decisions in that legal act, covering some of the former absolute grounds for reversing a judgement (cf. Article 101 § 1 (1–7) of the 1997 CCP[2]).

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[2] These grounds corresponded to the absolute grounds for reversing a judgement which are now included in Article 439 § 1 of CCP: point 1 (in part), point 2 (in part), points 5–8, point 9

In the subsequent years the institution of reopening the proceedings underwent transformations, sometimes significant, linked, on the one hand, to the abolishment of the institution for annulment of court decisions (in 2003),[3] and on the other hand, to the introduction of entirely new grounds for reopening (Articles 540a and 540b CCP, in force since 1 July 2003);[4] modifications were also made to *propter decreta* grounds as defined in Article 540 § 2 CCP.[5]

From the perspective of the issue analysed, the most consequential changes were brought about by the abolishment of the institution of annulment. This abolishment led to an expansion of the catalogue of absolute grounds for reversing a judgement,[6] with a corresponding extension of the grounds for reopening the proceedings, as an additional premise, based explicitly on the defects denoted in Article 439 § 1 CCP,[7] was added to the catalogue. Unlike the provisions of the 1969 Code of Criminal Procedure, the absolute grounds for reversing a judgement can now only be invoked as the grounds for reopening ex officio.[8] Nonetheless, Article 9 § 2 CCP gives grounds for highlighting the issue, enabling a party to request that the court take action ex officio. By introducing an expanded catalogue of absolute grounds for reversing a judgement in place of the repealed institution of annulment, and concurrently making them grounds for reopening of the proceedings, the legislator sought to maintain the eliminating function performed by the institution of annulment, allowing – ex officio – the removal from legal circulation of a decision afflicted by severe defects, without the need for a cassation appeal (including an extraordinary cassation appeal), the lodging of which – in accordance with the principle of complaint – relies on the appellant's willingness and awareness.

Due to the transformation of the grounds for annulment of court decisions into considered only *ex officio* grounds for reopening proceedings related to absolute grounds for reversing a judgement (although not all of them), it is crucial to emphasise that within the institution of annulment it was permissible to annul a decision dismissing a cassation appeal, even though initially in Article 101 § 1 CCP the legislator used a vague term, causing difficulties in unequivocally determining

(in part – only in the scope of Article 17 § 1 (8) of the CCP). It also involved narrowing the catalogue of absolute grounds for reversing a judgement (cf. Article 439 § 1 of the CCP as enacted).

[3] See: Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness, and the Act on the protection of classified information (Journal of Laws No. 17, item 155).

[4] See: Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness, and the Act on the protection of classified information (Journal of Laws No. 17, item 155).

[5] Act of 16 July 2009 amending the Act – Code of Criminal Procedure (Journal of Laws No. 144, item 1178), amending the Code of Criminal Procedure as of 19 September 2009.

[6] Cf. Article 439 § 1 CCP. in the version in force from 1 July 2003.

[7] Cf. Article 542 § 3 CCP. in the version amended by the Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness, and the Act on the protection of classified information (Journal of Laws No. 17, item 155).

[8] Cf. The resolution of the panel of seven judges of the Supreme Court of 24 May 2005, I KZP 5/05.

to which decisions it pertained[9] (in earlier literature, before the resolution of the entire Criminal Chamber of the Supreme Court of 9 October 2000, I KZP 37/00, it was pointed out that the term related to judgements dismissing the cassation appeal[10]), and it was permissible to annul a decision dismissing a motion to reopen proceedings.[11] The decision of 22 September 1999, II KZ 68/99, is all the more significant because it was based on the legal status which did not explicitly provide for the possibility of annulment of a court decision dismissing a cassation appeal or a motion to reopen proceedings. In that case, it was the essence of the institution of annulment and the characteristics of the cassation and reopening proceedings that were decisive in permitting the institution of annulment to be applied to the reopening of cassation and reopening proceedings. The decision's rationale noted that *the institution of annulment does not apply to court decisions which, though not incidental by nature, do not rule on the merits of the case, but only obstruct the admissibility of the hearing. This assertion is based on the premise that in the discussed context, the term 'merits of the case' should be interpreted strictly – as an issue concerning the accused's criminal liability, or another issue to be resolved by separate proceedings (e.g. proceedings regarding compensation for wrongful conviction, reopening proceedings, cassation proceedings). Of course, one can reasonably argue that each proceeding has its own merits. For instance, the merits of proceedings initiated by a complaint against the prosecutor's decision not to initiate an investigation (Article 306 CCP) pertain to the legitimacy of the refusal, the merits of proceedings initiated by the prosecutor's motion to extend pre-trial detention (Article 263 § 2 CCP) concern the legitimacy of this motion, and the merits of the hearing scheduled before the trial (Article 339 CCP) may concern the admissibility determination of court proceedings. However, all these issues are incidental (ancillary) to the fundamental issue, which in all these cases is the criminal liability of the accused*.

Furthermore, it was even allowed (although this view was expressed before the amendment of Article 101 § 1 CCP, introduced on 1 September 2000) to declare the annulment of a decision concerning the invalidation of a judgement.[12] In the approving commentary on this judgement, it was explicitly stated that *the annulment*

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[9] See: Gostyński, Z., in: Bratoszewski, J. et al., *Kodeks postępowania karnego. Komentarz*, Warszawa, 1998, theses 7–10 to article 101.

[10] See. Zabłocki, S., *Nowela k.p.k. z dnia 20 lipca 2000 r. Komentarz*, Warszawa, 2000, LEX/el., 2022, theses 12–13 to article 101 – the author excluded, however, the possibility to declare invalidity of a decision to leave the motion for reopening unconsidered – this resulted from the modifications made to Article 101 § 1 of the CCP, in which the legislator explicitly indicated which types of judgements this special institution applies to, in order to remove doubts regarding the overly broad scope of decisions that could be declared invalid.

[11] See: Supreme Court decisions of 22 September 1999, II KZ 68/99, and of 4 November 2002, III KO 51/00.

[12] Cf. Supreme Court decision of 8 June 1999, IV KO 39/99 (cf. Supreme Court decision of 13 June 2001, IV KO 73/99; different standpoint – Supreme Court decision of 4 November 2002, III KO 51/00). As of that date, the content of Article 101 § 1 of the CCP was modified; until then it provided that a decision (without further specification of the type of decisions it concerned) was void by operation of law; as of that date, the content of Article 101 § 1 of the CCP was modified; until then it provided that a decision (without further specification of the type of decisions it concerned) was void by operation of law; from that date judgements, summary judgements, as well as decisions closing the way to issuing a judgement, judgements on conditional discontinuance of the proceedings or precautionary measures, decisions dismissing a motion for reopening

judgement may be invalid regardless of the accuracy of the substantive ruling on the annulment of the contested judgement. For this reason, a motion for annulment of a decision of both the Court of Appeal and the Supreme Court, issued following the consideration of a motion for annulment, should be considered admissible. However, such a motion must be based on the grounds for annulment referring to the decision on the annulment issued by the Court of Appeal or the Supreme Court.[13]

The aforementioned considerations, made solely as a reminder of the historical conditions that underlie the introduction of Article 542 § 3 CCP, allow us to surmise that the historical interpretation of this provision not only does not hinder the adoption of a thesis on the admissibility of reopening of cassation and reopening proceedings (including proceedings concluded with a dismissal of the extraordinary appeal), but it also seems to strongly confirm such a presumption. (Changes to the criminal procedural law in this regard will be discussed in the further part of this analysis).

Most of the commentaries on the Code of Criminal Procedure present a convergent view in support of the opinion that it is inadmissible to reopen cassation or reopening proceedings that concluded with a decision dismissing a cassation appeal or a motion to reopen respectively. It has been emphasised that it is impossible, either at the request of a party or *ex officio*, to reopen the reopening proceedings that were previously concluded with a final court decision dismissing a party's motion, or with a final court decision stating there are no grounds for reopening *ex officio*, This is because the **merits** of such proceedings are not criminal liability or other incidental issue unrelated to the proceedings concerning that liability, but the existence of grounds for reopening the proceedings, in a situation where the issue of criminal liability has already been resolved by a final court decision.[14] Only J. Matras highlights that the issue of reopening the reopening proceedings concluded with a decision dismissing the motion for reopening on the grounds of absolute grounds for reversing a judgement is debatable.[15]

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of the proceedings and issued pursuant to Article 420 § 1 or 2 of the CCP, could be invalid by operation of law.

[13] Wędrychowska, E., *OSP*, 1999, No. 11 (following the amendment to Article 101 § 1, the Supreme Court ruled out the possibility of declaring invalidity of a decision on annulment of a court decision – Decision of 4 November 2002, III KO 51/00).

[14] Grajewski, J., Steinborn, S., in: Paprzycki, L.K. (ed.), *Kodeks postępowania karnego. Komentarz,* Warszawa, 2015, LEX/el., 2022, thesis 2 to article 54. – with reference to the decision of the Supreme Court of 20 May 2010., V KO 47/10. Such a standpoint, with reference to this decision, was also taken by W. Grzeszczyk (*Kodeks postępowania karnego. Komentarz,* Warszawa, 2014, LEX/el., 2022, thesis 1 to Article 540). See also: Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks postępowania karnego. Komentarz*, Legalis, 2020, thesis 9 to Article 540 and the Supreme Court decision of 8 February 2011, cited therein, III KO 99/10 and Zabłocki, S., in: Bratoszewski, J., Gardocki, L., Gostyński, Z., Przyjemski, S., Stefański, R., Zabłocki, S., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2004, Vol. III, p. 648, and Hofmański, P., Sadzik, E., Zgryzek, K., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2012, Vol. III, Legalis, 2022, thesis 3 to Article 540.

[15] Matras, J., in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX/el., 2022, thesis 4 to Article 540 CCP; similarly – the Supreme Court in the decision of 18 December 2019, II KZ 50/19.

Monographs and scientific articles, on the other hand, entertain the possibility of reopening of cassation or reopening proceedings.[16] Authors point out that the linguistic interpretation of Articles 540 § 1 and 542 § 3 CCP does not yield unambiguous and conclusive results – the legislator in particular did not specify what type of court proceedings the articles refer to. However, the absence of such restriction, specifically, the lack of a formula that would confine the range of court proceedings only to those in which criminal liability is decided, strongly suggests that the material scope of proceedings in this regard is broader. Indeed, the legislator did not employ a formula that could indicate that the articles pertain solely to the main court proceedings (e.g. court proceedings in a criminal offence). Therefore, since the legislator has not made any reservations leading to the exclusion of ancillary proceedings, it cannot be inferred. The doctrine of criminal procedure has developed several classifications of court proceedings.[17] The most fitting views seem to be those which suggest that reopening of proceedings is admissible in those cases which have been concluded with a final decision on criminal liability, or those in which the trial's **merits** have been decided, even if they do not pertain to the issue of criminal liability, and even the incidental ones, i.e. those occurring outside the main course of the trial, provided they have an autonomous nature relative to the main proceedings, and are therefore not connected with them. The scope of the reopening will also cover certain ancillary proceedings, on the assumption, however, that they are autonomous from the main course of the trial and may, therefore, be the subject of a separate motion for reopening. However, this will not apply to proceedings which are not autonomous and are closely tied to the **merits** of the proceedings.[18] S. Śliwiński pointed out – based on the provisions of the 1928 Code of Criminal Procedure in its version in force in the 1950s – that the provisions on the reopening of proceedings refer primarily to proceedings concluded with a final decision, regardless of whether it was issued in ordinary or special proceedings. Concurrently, he advocated that the reopening of proceedings should apply to any judgement, order or decree that conclusively ended the proceedings in general, or at least concluded a certain stage of the proceedings.[19]

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[16] See: Samochowiec, J., 'Przedmiot wznowienia postępowania z mocy art. 474 k.p.k.', *Problemy Prawa Karnego*, 1978, No. 4, p. 69; Biłyj, M., Murzynowski, A., *Wznowienie postępowania karnego w PRL w świetle prawa i praktyki*, Warszawa, 1980, p. 61; Szumiło-Kulczycka, D., 'Prawne warunki dopuszczalności wznowienia postępowania sądowego', in: Gaberle, A., Waltoś, S. (eds), *Środki zaskarżenia w procesie karnym. Księga pamiątkowa ku czci prof. Zbigniewa Dody*, Warszawa, 2000, p. 224; Kalinowski, P., 'Derogacja przez Trybunał Konstytucyjny podstawy normatywnej orzeczenia sądu karnego jako przesłanka wznowienia postępowania – uwagi na tle orzecznictwa Sądu Najwyższego', in: Hofmański, P. (ed.), *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej*, Warszawa, 2014, p. 245.

[17] Cf. Szumiło-Kulczycka, D., op. cit., pp. 215–221; Kosonoga, J., 'Prawomocne orzeczenie kończące postępowanie sądowe w rozumieniu art. 540 § 1 k.p.k.', in: Kosonoga, J. (ed.), *Studia i Analizy Sądu Najwyższego. Przegląd Orzecznictwa za rok 2017*, Warszawa, 2018, pp. 521–524 and the sources cited in both works.

[18] See Kosonoga, J., op. cit., p. 522; Biłyj, M., Murzynowski, A., op. cit., p. 59; Szumiło-Kulczycka, D., op. cit., pp. 219–220.

[19] Śliwiński, S., *Wznowienie postępowania karnego w prawie Polski na tle porównawczym*, Warszawa, 1957, p. 230.

The type of court proceedings to be finally concluded by a court decision can also be inferred from the grounds for reopening. However, it should be clearly emphasised that due to the diversity of the premises (Article 540 § 1 (1) (2), § 2 and § 3, Article 540a, Article 540b and Article 542 § 3 CCP), this cannot be done in a general way encompassing all the premises simultaneously, since each of them pertains to a distinct procedural situation or a different defect in the decision. Particularly, **the subject matter of court proceedings** to which the *propter nova* premise (the second premise listed in § 1 of Article 540 CCP) applies, cannot be extended to the subject matter of court proceedings to which other premises may apply.[20] This is due not only to the different nature of the grounds for reopening (in factual and legal terms), but above all to the content of the first part of Article 540 § 1 and Article 542 § 3 CCP. In none of these editorial units did the legislator use any term that would narrow the subject matter of court proceedings only to the main course of criminal proceedings, i.e. to the issue of criminal liability (criminal court proceedings, court proceedings in a criminal offence, etc.). Instead, the legislator used phrases indifferent from this point of view: 'court proceedings' and 'proceedings'.

When interpreting Articles 540 § (1–3) and 542 § 3 CCP as to the scope of proceedings that may be reopened, we cannot overlook the provision on the extraordinary cassation appeal: Article 521 § 1 CCP. Cassation appeal, although an extraordinary appeal measure, performs different functions (except perhaps in the scope of the absolute grounds for reversing a judgement that form the grounds for the appeal: Article 523 § 1 CCP, and adjudication by the cassation court: Article 536 CCP) than reopening of proceedings, this distinction is most clear in the separate grounds for appeal (aside from the defects specified in Article 439 § 1 CCP). While the cassation appeal serves only a controlling purpose, reopening of proceedings, in principle, aims to serve a rehabilitative and corrective purpose. The cassation appeal is strictly historical in nature (it can only be based on defects that transpired during the proceedings), whereas reopening of proceedings has a mixed nature – it is both historical and prospective (on the one hand, it is based on new elements – reopening based on *propter nova*, *propter decreta*, Article 540a CCP and uncovering of past events that could have influenced the decision – *propter falsa*, and on the other hand, it can be based on defects that arose during the proceedings: Article 542 § 3 CCP).

Nevertheless, despite the differences in the functions of these extraordinary appeal measures and the objectives of the proceedings initiated by them, it is important to remember, when interpreting Article 540 and Article 542 § 3 CCP, that both institutions are located in the same section of the Code of Criminal Procedure (Section XI), which should further solidify the rule prohibiting homonymous interpretation. This prohibition, rooted in the presumption of the legislator's rationality, disallows the attribution of divergent meanings to phrases within a particular act or branch of law. Bearing this in mind, it is noteworthy that Article 521 CCP allows for an extraordinary cassation appeal against any

[20] Cf. also Kosonoga, J., op. cit., pp. 523–524.

final decision concluding court proceedings.[21] In relation to the cassation appeal, and formerly the extraordinary review, it was and still is recognised that a final decision concluding court proceedings (within the meaning of Article 521 CCP in its original version, as well as Article 463 § 1 of the 1969 CCP) is such a decision which legally precludes the possibility of further ordinary instances, and not any proceedings at all,[22] whereby the concept of court proceedings encompasses not only the proceedings pertaining to the principal subject matter of the trial (namely the criminal liability), but also other proceedings that are not directly linked to the main course of the proceedings, and do not decide on the subject matter or on the main proceedings outcome. Exceptionally, only S. Kalinowski assumed that the term 'court proceedings' included only proceedings in which the court either issued a judgement of acquittal or decided that a criminal act had been committed.[23] The Supreme Court, in its jurisprudence, regarded numerous types of rulings as decisions concluding court proceedings/court decisions concluding proceedings.[24] Importantly, the list also includes judgements issued within the scope of cassation and reopening proceedings: decisions to leave the cassation appeal unconsidered,[25] decisions upholding the order refusing cassation appeal,[26] decisions dismissing the motion to reopen the proceedings.[27]

An additional supporting argument is provided by the prohibition that functions within the cassation proceedings, concerning the so-called super-cassation, as outlined in Article 539 CCP. This argument provides a threefold support. Firstly, the fact that the legislator has decided it is inadmissible to lodge a cassation appeal against a decision of the Supreme Court (and therefore – *lege non distinguente* – a judgement as well as an order, including an order dismissing a cassation appeal) which followed the review of the cassation appeal must lead to the conclusion that such a decision, in the absence of such a prohibition, would constitute a decision

[21] Both in the original wording of this provision and after its 2003 amendment replacing this phrase with: 'final court decision concluding the proceedings' – this change did not (and did not intend to) narrow or expand the scope of court proceedings in which lodging of such a cassation appeal is admissible. Instead it broadened the subject matter of this extraordinary appeal measure by including court decisions upholding decisions on the discontinuance of preparatory proceedings, which were not covered by the original formula of Article 521 CCP.

[22] Doda, Z., *Rewizja nadzwyczajna w polskim procesie karnym (węzłowe zagadnienia)*, Warszawa, 1972, pp. 120–121, 123.

[23] Kalinowski, S., *Rewizja nadzwyczajna w polskim procesie karnym*, Warszawa, 1954, p. 36.

[24] Final judgements issued in other areas of the trial, including ancillary matters, also conclude the proceedings, if they definitively close the examination of the issue in question and have lasting effects: final court decision on restoration of case files (decision of 29 May 2012, III KK 88/12), forfeiture of the bail bond (decision of 21 January 1998, II KKN 416/97), upholding the order refusing appeal or cassation appeal, leaving appeal or cassation appeal unconsidered; declaring admissibility or inadmissibility of extradition (resolution of 17 October 1999, I KZP 27/96), as well as decisions to take charge of or transfer a convict (Article 608) and decisions specifying the legal classification of an act according to Polish law and the penalty or measure to be enforced (Article 611c) – see also: Świecki, D., in: Świecki, D. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX/el., 2023, thesis 2 to Article 521.

[25] Decisions of 19 December 2006, II KK 156/06 and of 28 October 2021, III KK 237/21.

[26] Decision of 3 December 2010, II KK 140/10.

[27] Decisions of 25 September 2013, III KK 231/13 and of 22 January 2020, III KK 640/19.

that could be subject to an appeal – otherwise, such a provision would essentially be redundant. Clearly, this pertains to judgments that can be challenged through an extraordinary cassation (Article 521 CCP), and must thus constitute a court decision concluding the proceedings. This is due to the simple fact that in such a situation where there is no decision from the appellate court, which would form the basis for an appeal, a party is entirely barred from lodging a cassation appeal. Secondly, the prohibition only excludes the possibility of lodging a cassation appeal – the act is silent as to the possibility of reopening proceedings before the Supreme Court, where the proceedings were concluded by a decision following the cassation appeal. Assuming the legislator's rationality, we must presume that if it was the legislator's intention to exclude – in addition to preventing the lodging of the so-called super-cassation – the possibility for reopening of cassation proceedings, an additional prohibition would have been inserted in the provisions of the Code of Criminal Procedure. The lack of such a prohibition, while the prohibition of the so-called super-cassation is in effect, must mean that the legislator has not ruled out the possibility of reopening cassation proceedings. Thirdly and finally, the legislator did not adopt the prohibition of the so-called super-cassation for the purposes of reopening proceedings – neither explicitly, nor even by appropriate application – since Article 545 § 1 CCP does not reference Article 539 CCP. This implies that a decision of the Supreme Court issued following reopening proceedings can be challenged by an extraordinary cassation (Article 521 CCP), and it can also be the subject of reopening proceedings (although, primarily, on the grounds indicated in Article 540 § 1 (1), § 2 and § 3, and Article 542 § 3 CCP).

The Supreme Court also acknowledges that decisions made in cassation or reopening proceedings, in essence – decisions that conclude these proceedings, represent decisions concluding (court) proceedings, which can be the subject of a cassation appeal (in the case of cassation – excluding those covered by the prohibition of the so-called super-cassation).[28] The opinions expressed in these judgements are partially derived from the stance adopted in the decision of 26 September 1996, II KKN 87/96. In that decision, the Supreme Court assumed that the prohibition on lodging a so-called super-cassation appeal, as set out in Article 467a § 2 of the 1969 CCP, does not apply in a situation where the previous cassation appeal has been disregarded by the cassation court. The cassation court's decision to leave the cassation unconsidered does not then constitute a decision 'following the hearing of the cassation appeal', which can be challenged by a cassation appeal.

The aforementioned decisions endorse the view that decisions, which in those instances were challenged by an extraordinary cassation appeal, were decisions concluding court proceedings (or, using the current terminology, they were court decisions concluding the proceedings) – otherwise the extraordinary cassation

[28] See: already referred to above – decisions of 19 December 2006, II KK 156/06 and of 28 October 2021, III KK 237/21 (cassation against a decision of the Supreme Court to leave the cassation appeal unconsidered), decision of 3 December 2010, II KK 140/10 (cassation against a decision of the Supreme Court to uphold the order refusing cassation appeal), decisions of 25 September 2013, III KK 231/13 and of 22 January 2020, III KK 640/19 (cassations against decisions of the Supreme Court dismissing the motion to reopen the proceedings).

against these decisions would not be permissible. In this light, it is difficult to rationally surmise that, in the context of a cassation appeal (especially if it is based on absolute grounds for reversing the judgement) such decisions conclude court proceedings, and they lose this attribute when it comes to reopening of proceedings – and all this while the legal act uses virtually identical phrases.

Moreover, the interpretative exclusion of cassation and reopening proceedings from the scope of proceedings in which court proceedings may be reopened, would imply that the legislator tolerated the situation where decisions rendered within these extraordinary appeal procedures, and impacted by absolute grounds for reversing the judgement, continued to persist in the legal system (at least until one of the listed entities decided to lodge an extraordinary cassation appeal). Such an interpretative distinction concerning Article 542 § 3 CCP, and excluding proceedings concluded with a decision dismissing a cassation appeal or a motion for reopening proceedings, is not justified by a purposive interpretation.

Additionally, in case No. II KK 231/13, it was aptly highlighted *that* undoubtedly *Article 547 § 1 CCP explicitly stipulates the prohibition of appealing against decisions dismissing a motion for reopening of the proceedings, which were issued by the above-mentioned courts. However, this prohibition only applies to reopening proceedings, i.e. to appeals against decisions dismissing motions for reopening by way of appeal proceedings. Hence, this prohibition does not extend to the possibility of challenging such a decision by another extraordinary appeal measure such as a cassation appeal. This measure, evidently, given the content of Article 519 CCP (indicating that cassation appeals can only be derived from judgements) is not available to the parties, but Article 521 CCP permits entities listed in its disposition to derive a cassation appeal 'from any final court decision concluding the proceedings'.* Simultaneously, it should be underlined that the prohibition of appealing against subsequent decisions issued by the Supreme Court after the reopening of the proceedings (Article 547 § 3 CCP), apparent from the later part of the quoted statement, covers only the prohibition of certain appeals (appeals and complaints), not all appeals (i.e. cassation appeals or motions for reopening of the proceedings). Similarly, while the Code of Criminal Procedure precludes the possibility to lodge a complaint against a decision of an appellate court dismissing a motion for reopening of proceedings (Article 547 § 1 *in fine* CCP), a cassation against such a decision is permissible (though it refers only, due to the decision's form, to an extraordinary cassation – Article 521 CCP).[29]

In its practice to date, the Supreme Court has ruled out, in a number of decisions, the possibility of reopening cassation proceedings. This stance traces back to two fundamental decisions: the decision of 12 April 2001, III KO 53/99 and the decision of 27 June 2001, III KO 115/00, which are referred to in later rulings (either directly or indirectly – by referring to subsequent rulings which refer to at least one of these two decisions). It is noteworthy that both decisions were made two years before

[29] Cf. decisions of the Supreme Court of 14 June 2018, III KK 235/18 and of 22 January 2020, III KK 640/19 which, following a cassation appeal lodged by the Commissioner for The Human Rights, reversed the decisions of the appellate courts dismissing the motion for reopening due to one of the absolute grounds for reversing a judgement – Article 439 § 1(1) and (2) CCP, respectively.

the institution of invalidity was abolished and its prerequisites were transferred to the absolute grounds for reversing a judgement of and recognised as grounds for reopening of the proceedings.

In the case which resulted in the first of the aforementioned decisions, a motion was submitted to the Supreme Court to reopen the proceedings, in which a district court had ruled in the first instance, and a voivodeship court in the second instance. A cassation appeal was earlier lodged in this case, which the Supreme Court dismissed with a decision of 8 April 1999, as manifestly ill-founded. Subsequently, a motion for reopening of the proceedings was lodged by the defence counsel; however, that motion did not pertain to the reopening of the cassation proceedings, but the criminal proceedings on the decision on the defendant's criminal liability, which were ongoing before the common courts.

When ruling on the admissibility of the Supreme Court adjudicating in this case, it was emphasised that Article 544 § 2 CCP, which defines the reopening jurisdiction of the Supreme Court, suggests that the law uses in this context the phrase 'proceedings concluded by a decision', not 'proceedings, in which it has issued a decision'. Therefore, it was decided that, since when dismissing the cassation appeal, the Supreme Court only determines the ill-foundedness of this appeal measure, and thus it does not venture into the sphere in which the decision challenged by the motion for reopening of the proceedings enjoys *res judicata*, it is this decision, not the decision of the Supreme Court, that concludes the criminal proceedings. As a result of these considerations, the Supreme Court took the position that: *A decision of the Supreme Court with which it dismissed a cassation appeal does not constitute a decision concluding criminal proceedings, as referred to in Article 544 § 1 and § 2 of the Code of Criminal Procedure*.[30]

This ruling is valid and it is backed by the current legislation, and by the nature of the cassation proceedings and the nature of the decision dismissing cassation appeal; this view should thus be wholly endorsed. Unfortunately, though, it has been invoked several times, contrary to its actual merits and related analysis (e.g. in cases: SDI 10/06, V KO 64/06, V KO 15/07, IV KZ 59/08, IV KO 108/08, II KO 57/12, II KO 67/12, II KO 17/13), as a justification for the assumption that reopening of cassation proceedings which were concluded with a dismissal of a cassation appeal is supposed to be inadmissible, whereas no such claim was made in that ruling.[31] This might result either from the fact that the very thesis of the ruling may (though in the author's opinion it should not) raise doubts about whether it decides on the type of proceedings that may be reopened, or whether it refers only to the relation of the decision dismissing the cassation appeal and the main proceedings, in the context of functional jurisdiction, or from the fact that the content of Article 544 § 2 CCP itself was considered to obstruct reopening of cassation proceedings.

[30] This decision, with exactly this thesis, was published in the OSNKW 2001, Issue 7–8, item 67.

[31] Cf. also Świecki, D., op. cit., thesis 4 item 9 to Article 540 CCP. – Although the author cited the decision of 5 July 2007, V KO 15/07, this decision contained a reference to the decision on case no. KO 53/99.

The argument (and also the decisions based solely or mainly on it) referring to the content of Article 544 § 2 CCP, which would determine the inadmissibility of reopening of cassation or reopening proceedings, should be rejected *a limine*, as this provision addresses and resolves only the matter of jurisdiction. It does not specify what type of proceedings may be reopened or what type of decisions the extraordinary appeal measure in the form of a motion for a reopening of proceedings can be applied. This provision merely points out the relationship between reopening jurisdiction and the proceedings to be reopened, indicating that if the proceedings to be reopened concluded with a Supreme Court decision, it is that Court that has jurisdiction to rule on the reopening. In the event of a request to reopen a criminal case in which the Supreme Court dismissed the cassation appeal, such a decision does not conclude the proceedings, as that Court did not interfere in any respect with the determination of criminal liability, and the decision concluding the proceedings would belong to a common or a military court (either at the first or second instance – depending on when the proceedings ended). Conversely, if there is a request to reopen cassation or reopening proceedings, it is the Supreme Court's decision that concludes these proceedings, even if it dismisses the cassation appeal or motion for reopening of proceedings. In this case, it would not be the decision of the common court that the cassation appeal or motion for reopening of the proceedings referred to initially.

Article 544 § 2 CCP neither specifies the scope of proceedings that may be reopened (what type of decision may be challenged by this type of extraordinary appeal measure) nor the prerequisites for reopening the proceedings. This provision is of a purely jurisdictional nature, determining solely and exclusively which court within the judiciary structure is competent to rule on the reopening. Hence, assessing the admissibility of reopening proceedings based on this provision is groundless.

The flaw in the argumentation referencing Article 544 § 2 CCP is evident in decisions that interpret the content of Article 540 § 1 CCP regarding the scope of decisions against which this extraordinary appeal measure can be lodged, through the content of Article 544 § 2 CCP, which only regulates the issues of functional jurisdiction to hear the motion, and in particular – from the negative side – the jurisdiction of the Supreme Court. An example of this type of mistake are the reasons specified, for example, in the decision of 5 July 2007, V KO 15/07 (also repeatedly echoed later), where it was stated: *The application for reopening of the proceedings has proven legally inadmissible. Proceedings concluded by a decision of the Supreme Court, as referred to in Article 544 § 2 of the Code of Criminal Procedure, should be interpreted only as proceedings which, as to their merits, were concluded before the Supreme Court. Hence, the legal view, proposing that a decision with which the Supreme Court dismisses a cassation appeal does not constitute a decision concluding the proceedings within the meaning of the indicated provision, is accurate. This is because, in such a procedural setting, the validity of the decision that has been appealed against by a cassation is not infringed (see Supreme Court decision of 12 April 2001, III KO 53/99, OSNKW 2001, z 7–8, item 87; Supreme Court decision of 27 June 2001, III KO 115/00, OSNKW 2001, z 9–10, item 83). Therefore, since the decision dismissing the cassation appeal cannot be the subject of the reopening proceedings, the Supreme Court left the motion for reopening of the proceedings lodged by the counsel for Krzysztof Nowak unconsidered (Article 430 § 1 of the Code of Criminal*

Procedure in conjunction with Article 545 § 1 of the Code of Criminal Procedure) and charged the convict with the court costs for the reopening proceedings (Article 639 CCP).

Only in one decision did the Supreme Court acknowledge the defectiveness of this type of argumentative process. In its decision of 13 January 2017, SDI 70/16, it pointed out that the fact that in the jurisprudence of the Supreme Court there is already a well-established view that the issuance of a decision with which the Supreme Court dismissed the cassation appeal is not relevant in the context of the jurisdiction of the court on the subject of the motion for reopening of the proceedings, does not inhibit the reopening of the proceedings (cf. e.g. decisions: of 12 April 2001, III KO 53/99; of 27 June 2001, III KO 115/00). In fact, this standpoint demonstrates that the mere fact that the cassation appeal was decided to be ill-founded only concludes that this extraordinary appeal measure was unsuitable, and does not alter the fact that the court proceedings concluded with a final decision of the regional or appellate court. It was also emphasised that in this case, the motion for reopening did not involve disciplinary proceedings, but the court proceedings which concluded with the refusal to admit the cassation appeal.

The second ruling which, in addition to the decision in case III KO 53/99, underpins the view that cassation or reopening proceedings are inadmissible is the decision of the Supreme Court of 27 June 2001, III KO 115/00, which, incidentally, in its argumentation also refers to the decision issued 2 months earlier in case III KO 53/99. This time, the Supreme Court pointed out that "in a situation where the Supreme Court dismissed a cassation brought against a final decision concluding the proceedings, regardless of whether the grounds for the motion to reopen the proceedings are de novis or ex delicto – indicating committing an offence in connection with the proceedings conducted both before their final conclusion and in the cassation proceedings – the jurisdiction of the court to decide on the motion is determined solely by determining which court's decision has validly concluded the proceedings covered by the motion (Article 544 § 1 and 2 of the Code of Criminal Procedure), and it is not the decision dismissing the cassation appeal indicated at the beginning." The thesis of this published decision[32] once again revolves around the issue of jurisdiction of the reopening court, and in the decision, the Supreme Court asserted its jurisdiction, referring the case to the Court of Appeal for deciding on the reopening motion.

To the extent that this decision refers to the issue of Article 544 § 2 CCP, the author directs readers to the arguments already presented above. What is novel in this decision, however, is that besides analysing the issue of functional jurisdiction related to deciding on the motion for reopening proceedings, the Supreme Court touched on the possibility of examining, for reopening purposes, circumstances occurring after the final judgement, within the scope of cassation proceedings, including pre-cassation proceedings (in this case the defence counsel in the motion for reopening of the proceedings referred, among other things, to the fact that it was in the pre-cassation proceedings that the case file documents submitted to the Supreme Court for examination of the cassation were concealed or forged).

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[32] *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa*, 2001, Issue 9–10, item 83.

The Supreme Court stressed that though the decision of the Supreme Court issued as a result of cassation is final and concludes cassation proceedings, it is not sufficient to consider that in every case such a decision simultaneously concludes proceedings within the meaning of Articles 540 § 1 and 544 § 1 and 2 of the Code of Criminal Procedure. As a cassation appeal is lodged against a final decision concluding court proceedings (Articles 519, 521 CCP), it is exactly this decision to which Article 540 § 1 CCP refers, unless the Supreme Court, after reversing the appealed decision, issues a subsequent decision in the form of acquittal or discontinuance of proceedings (Article 537 § 2 CCP). Conversely, if the Supreme Court dismisses the cassation appeal, then the common court decision retains the value of a final decision concluding proceedings, as it has not been effectively challenged.[33]

In the written statement of reasons for the decision a reference was made to the work of M. Biłyj and A. Murzynowski[34] highlighting that the authors drew attention to the necessity of distinguishing between types of decisions rendered as a result of lodging an extraordinary review from the point of view of the grounds for reopening proceedings.

In the decision under discussion, particularly interesting with regard to grounds for reopening proceedings (the main proceedings on criminal liability merits, even if there were cassation proceedings, which concluded with a decision to dismiss the cassation appeal), is the statement, assuming that committing an offence in connection with cassation proceedings, even if it affected the content of the decision dismissing the cassation appeal, does not impact the possibility of reopening court proceedings concluded with common court's final decision, unless it is demonstrated that this fact could have also affected the content of the final decision concluding the proceedings. If such an influence was discovered, it would necessitate reversing precisely the common court's decision, and not the decision dismissing the cassation appeal, even if the latter was flawed. This is because, in any case, the cassation decision loses its significance as soon as the final decision, to which it referred, no longer enjoys *res judicata*.

Such a stance from the Supreme Court, presented in this decision, cannot be accepted for several reasons. Aside from the inadequacy of the argument referring to Article 544 § 2 CCP, for the determination of the scope of court proceedings where reopening is admissible, the Supreme Court did not so much fail to notice but trivialised an extremely important aspect concerning *propter falsa* grounds. Specifically, it highlighted that *the fact an offence was committed post-final decision, and that this fact, in that case, has only an indirect effect on it (by virtue of the fact that the cassation dismissal was incorrectly decided because of it), is of secondary importance. It should be noted, after all, that the law provision does not value the extent of the impact of the reason for reopening in question on the content of the decision; and the connection between the relevant fact and the proceedings during which the final decision was issued,*

[33] In this regard, reference was made to the resolution of the entire Criminal Chamber of the Supreme Court of 9 October 2000, I KZP 37/00.

[34] Biłyj, M., Murzynowski, A., op. cit., pp. 34–35.

is, in any case, unquestionable. Article 540 § 1 (1) CCP, by mentioning as grounds for reopening court proceedings concluded by a final decision (and thus, as the Supreme Court wishes – criminal liability proceedings before the common court, not cassation proceedings) committing an offence in connection with the proceedings, with a justified fear that this could have affected the decision content, refers in its content to the proceedings and the decision, which cannot be interpreted differently than the concepts listed in the 'head' of § 1 (the part of the sentence that begins the enumeration). Thus, it can only refer to an offence committed in connection with proceedings set to be reopened and its effect on the content of the final judgement to be reversed, not to an act committed after the conclusion of these proceedings and rendering this decision. In this regard, there is no rational basis for questioning that *propter* falsa grounds for reopening are historical in nature and thus relate only to acts committed before or during concluded legal proceedings, and not to acts committed after the conclusion of those proceedings. We would deal with such an act, on the other hand, if an offence were committed in connection with cassation proceedings.

Regardless of non-acceptance of this type of argumentation, it must be pointed out that the Supreme Court's standpoint leads to results that are unacceptable from a systemic perspective. The existence of grounds for reopening criminal proceedings, which would occur in cassation proceedings, and which could lead to a decision on criminal liability being overturned, would have to be decided by a common court (usually an appellate court, though in a particular set-up also by a regional court). It would not only have to establish the existence of grounds for reopening (in this respect, this is the ordinary competence of the reopening court) but would have to determine and assess whether these grounds caused the defective dismissal of the cassation. Precisely in this respect (the need to assess the defectiveness of the decision dismissing the cassation issued by the Supreme Court) would the reopening court, in fact, have to assume the role of the cassation court, albeit not to the full extent, and assess whether, in the absence of a circumstance constituting grounds for reopening, the cassation would have been upheld.

The Supreme Court also failed to recognise that the position taken in the decision is precluded by Article 539 CCP which prohibits the filing of so-called super-cassation. If we were to accept the assumption, on which the main part of the argument is based, that a final court decision concluding proceedings, against which a cassation is lodged, can only be the final decision of a common court concluding the proceedings, and the decision of the Supreme Court dismissing such a cassation, since it does not interfere with the content of such a decision, does not conclude court proceedings, then the introduction of the prohibition of super-cassation (at least in a substantial part) would be without reason, as such a decision of the Supreme Court would not conclude court proceedings.

The content of Article 539 CCP, however, suggests the opposite legislative intent. It prohibits the lodging of a cassation appeal against a Supreme Court's decision made after the cassation was heard, and thus – *lege non distinguente* – also against a decision dismissing an extraordinary appeal. Hence, the legislator must have regarded final decisions of the Supreme Court, concluding the cassation proceedings on the merits,

after which no further proceedings are pending, as judgements concluding court proceedings. Furthermore, the concept of a court decision concluding proceedings, understood in such a way, as adopted by the Supreme Court, would obstruct the admissibility of cassation appeals at least against decisions of the Supreme Court to leave the cassation appeal unconsidered – such a decision, like a decision dismissing a cassation appeal, does not in any way interfere with a final decision of a common court. In this respect, the jurisprudential practice of the Supreme Court in the last quarter of a century is uniform and allows for such a possibility explicitly (cf. the decision of the Supreme Court of 26 September 1996, II KKN 87/96, which initiated this trend).

The work of M. Biłyj and A. Murzynowski cited by the Supreme Court in the discussed decision also does not support the view adopted by the Supreme Court. On the contrary, these authors explicitly allowed for the possibility of reopening the reopening proceedings. They pointed out *that a court decision refusing the reopening of proceedings concludes court proceedings related to the consideration of the motion lodged in this case. It should be stated that under certain conditions (failure to appeal against it in due time, or exhaustion of the course of proceedings), this decision acquires the value of being final and may be appealed against only by means of an extraordinary review or by reopening proceedings. Such a decision, being final, creates a state of* res judicata *for the determination of the lack of grounds for reopening of proceedings, indicated in the negative decision of the motion lodged by a party.*[35]

Although the position on the inadmissibility of reopening cassation and reopening proceedings concluded by a decision dismissing the extraordinary appeal measure is prevailing, it is not a view expressed uniformly or dominantly with only few exceptional dissenting voices. In the last 15 years, two groups (the first one is more numerous) of decisions can be distinguished, in which the Supreme Court allowed the possibility of reopening cassation or reopening proceedings (in some of them, if the prerequisites are met, it reopened proceedings, annulled the judgements and referred the cases for retrial).

The first group of such decisions comprises those of the Supreme Court issued pursuant to Article 540 § 2 CCP in connection with decisions of the Constitutional Tribunal declaring unconstitutionality. For the purposes of the present analysis, it is irrelevant what the substantive outcome of the reopening proceedings was – the reversal of the contested decision or the dismissal of the motion for evidence; what remains relevant is that the Supreme Court considered the motions on their merits:

1) **Article 535 § 2 CCP** (as enacted) – following the decision of the Constitutional Court of 12 January 2006, SK 30/05;[36]

[35] Biłyj, M., Murzynowski, A., op. cit., p. 61.

[36] Decisions of: 12 April 2006, IV KO 24/06; 11 December 2006, SDI 27/06; 26 February 2007, IV KO 68/06; 17 March 2007, IV KO 31/07; 30 August 2007, IV KO 43/07; 18 June 2009, IV KO 89/09,) (it should be noted, however, that in the decisions of: 25 October 2006, V KO 64/06; 14 July 2009, IV KO 75/09 and 25 November 2010, V KO 87/10, the Supreme Court left the motions for reopening unconsidered, deeming the reopening inadmissible – in each of these cases, however, the argument of jurisdiction was used, which was incorrect and impossible to apply (Article 544 § 2 CCP, in case V KO 64/06 also with reference to the decision in case III KO 53/99, and in case V K87/10 also a reference was made to Article 544 § 2 of CCP,

2) **Article 526 § 2 CCP** (as it stood prior to 16 August 2016 because on that day the decision of the Constitutional Tribunal was published in the Journal of Laws – Journal of Laws 2016, item. 1243) providing for a qualified form of compulsory legal representation in the proceedings, presupposing the necessity of drawing up and signing the cassation appeal not only by an advocate or an attorney-at-law, but also by a person who is at the same time a defence counsel or an authorised representative (which excluded the possibility of drawing up and signing the cassation appeal by a party who has appropriate professional qualifications) – judgement of the Constitutional Tribunal of 21 June 2016, SK 2/15;
3) **Article 50 § 3** Act – law on common courts – the decision of the Constitutional Court of 5 July 2005 SK 26/04.[37]

It must be admitted, of course, that in most of these decisions (excluding two) the Supreme Court did not address the issue of the admissibility of reopening the proceedings pending before the Supreme Court in its written reasons, even if the issue was considered and decided prior to ruling on the merits of the motion to reopen the proceedings.

In its decision in SDI 70/16, the Supreme Court clarified that the applicability of Article 540 § 2 CCP is also not limited exclusively to the main subject of the proceedings. The content of the provision does not support such a limitation, and since the regulation specifying the grounds for reopening of proceedings – as well as the grounds for cassation – constitutes a limitation in access to this extraordinary appeal measure for the parties, it i would be illegitimate to further narrow – through interpretation – the scope within which proceedings may be reopened (*exceptiones non sunt extendendae*). The fact that there was a standpoint in the Supreme Court case law (characterised by the Supreme Court as established) that a decision of the Supreme Court dismissing a cassation appeal is not relevant in the context of jurisdiction over a motion to reopen proceedings did not hinder the reopening of proceedings in this case. This standpoint means that determination of the cassation appeal as ill-founded only affects the wrongfulness of this extraordinary appeal measure and does not change the fact that the court proceedings concluded with a final decision of the regional or appellate court. In the present case there was no substantive decision on the merits of the cassation appeal, but this is irrelevant, as the motion for reopening does not concern the disciplinary proceedings, but those court proceedings that concluded with the refusal to accept the cassation appeal.

In point 3 of the statement of reasons for the decision, the Supreme Court not only acknowledged the issue of admissibility of reopening the proceedings, but also conducted a broader analysis. It pointed out that decisions concluding proceedings

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although by using the formula 'in conjunction with Article 540 § 1 in principio of the Code of Criminal Procedure', and the judgements in cases III KO 53/99, III KO 115/00 and V KO 15/07.

[37] Orders of the Supreme Court of: 13 January 2017, SDI 70/16; 17 January 2017, II KO 27/16; 24 April 2017, SDI 5/17; 8 June 2017, SDI 45/17 – in these cases there was not only a reopening of the cassation proceedings, which were already in place as a result of the cassation appeal admitted by the Supreme Court, but in some of them there was a reopening of the cassation proceedings concluded by a Supreme Court decision upholding the order refusing cassation appeal, and thus of the cassation proceedings in their inter-institutional phase.

do not necessarily preclude the rendering of a judgement, and that these decisions should be understood not only in relation to the criminal liability of the perpetrator but also to other subject matters. In the latter case, they pertain to rulings on specific autonomous issues that arise in various ancillary matters during and in connection with the course of the relevant criminal proceedings. The reopening proceedings were considered as such proceedings, including the appeal proceedings conducted within their framework (complaint against the order refusing to accept the complaint against the decision of the court of appeal dismissing the motion for reopening). The decision referred to the views of academic scholars and jurisprudence of the Supreme Court on the grounds of cassation, which consider, among other things, that decisions of the court of appeal implying the inadmissibility of the complaint against the decision of the court of first instance are considered 'decisions concluding court proceedings'.[38]

The second group of decisions includes cases in which the Supreme Court allowed the possibility of reopening the reopening proceedings due to the occurrence of absolute grounds for reversing a judgement specified in Article 439 § 1 CCP, i.e. pursuant to Article 542 § 3 CCP (although *in concreto* the reopening proceedings took place before the appellate court, this does not affect the assessment of the admissibility of the reopening proceedings).

In the chronologically first decision of this kind (decision of the Supreme Court of 18 March 2010, III KO 96/09) it was indicated that "although the institution of reopening proceedings generally applies to proceedings concluded with a final decision on criminal liability (see grounds for reopening indicated in Article 540–540a CCP), it is indisputable that when the reasons giving grounds for reopening proceedings ex officio (Article 542 § 3 CCP) are present, this institution also applies to proceedings conducted after the decision determining the main fact has become final (e.g. enforcement proceedings). Therefore, there is no doubt that Article 542 § 3 CCP is also applicable to reopening proceedings, which are subject to examination ex officio for the legal defects listed in Article 439 § 1 CCP, including – those specified specifically for these proceedings – Article 439 § 1 (1) in conjunction with Article 40 § 3 CCP." In this case, the Supreme Court reopened the reopening proceedings, reversed the appealed decision dismissing the motion to reopen the proceedings and referred the case to the Court of Appeal as the reopening court for retrial. The reason for this decision was that the decision dismissing the application for reopening the proceedings suffered from one of the absolute grounds for reversing a judgement.

And in its decision of 27 March 2013, II KO 13/13, the Supreme Court reopened the reopening proceedings concluded by the decision of the court of appeal dismissing the motion for reopening, reversed the decision of that court, and referred the motion for reopening for reconsideration in the reopening proceedings. The grounds for this decision was Article 439 § 1 (1) in conjunction with Article 40 § 1 (7) CCP (Article 542 § 3 CCP). In the statement of reasons for its decision, the Supreme Court indicated that *although the institution of reopening proceedings generally applies to proceedings concluded with a final decision on criminal liability (see grounds for reopening*

[38] Decision of the Supreme Court of 9 August 2007, V KO 35/07.

indicated in Article 540–540a CCP), it is indisputable that when the reasons giving grounds for reopening of the proceedings ex officio (Article 542 § 3 CCP) are present, this institution also applies to proceedings conducted after the decision determining the main fact has become final (e.g. enforcement proceedings). There is no doubt that Article 542 § 3 CCP is also applicable to reopening proceedings, which are subject to examination ex officio for the legal defects listed in Article 439 § 1 CCP, including – those specified specifically for these proceedings – Article 439 § 1 (1) in conjunction with Article 40 § 3 CCP.

In its decision of 24 February 2021, II KO 4/21, the Supreme Court reopened the reopening proceedings concluded by the decision of the court of appeal dismissing the motion for reopening. It reversed that decision, and referred the motion for reopening to the Supreme Court as the competent court to consider it in connection with the substance of Article 544 § 2 CCP. The grounds for reopening in that case were provided for in Article 542 § 3 in conjunction with Article 439 § 1 (4) CCP.

Although in the first two cases indicated above (III KO 96/09 and II KO 13/13), the Supreme Court adopted (albeit only regarding grounds for reopening specified in Article 542 § 3 CCP) a position converging with the standpoint presented in this study, it should be noted, that no argumentation was presented to support this view, apart from the assertion that there is no doubt that Article 542 § 3 CCP is applicable. *Nota bene*, it was also not indicated, despite the clear position taken in this respect, why reopening of the reopening proceedings based on the grounds specified in Article 542 § 3 CCP is at all admissible, while it is not admissible based on the grounds specified in Articles 540–540a CCP.

The first of the cited rulings requires special attention for another reason. The rapporteur in this case was a judge who also participated in the panel adjudicating case III KO 115/00 (also as the rapporteur), in which the opinion on the inadmissibility of reopening proceedings was voiced, even before the introduction – together with the liquidation of the judgement invalidation – of grounds for reopening proceedings ex officio (Article 542 § 3 CCP). This opinion has been repeated many times in the subsequent judicial decisions and literature on the subject. This circumstance is significant for assessing the legitimacy of, as it were, automatic transposition of the view pronounced in 2001 onto the grounds of the currently binding legal state without acknowledging the normative changes that occurred with the repeal of the institution of invalidity from the legal system. Unfortunately, except for a few isolated cases, this ruling has largely gone unnoticed in jurisprudence and literature on the subject.

From this perspective, the composition of court in the cited case II KO 13/13 is also worth noting. The panel included a judge (although he was not the rapporteur) who, in principle, argued against the admissibility of reopening the cassation or reopening proceedings.[39] In case V KO 47/10, a firm view was expressed that *reopening proceedings as such cannot be reopened, either at the request of a party or*

[39] Decision of 15 April 1998, III KKN 420/97, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa, 1998, Issue 5–6, item 29; Hofmański, P., op. cit., p. 119; decisions of the Supreme Court to uphold an order refusing to admit a cassation (see Grzegorczyk, T., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2003, p. 1284)

ex officio, if they were previously concluded by a final court decision dismissing a party's motion or on the grounds that there are no grounds for reopening the proceedings ex officio.

In order to justify this view, it has been pointed out that reopening of the proceedings relates exclusively to 'court proceedings concluded with a final decision,' and all grounds for reopening (including those specified in Article 542 § 3 CCP) pertain only to such proceedings. The provisions on reopening are placed within the framework of the norms on extraordinary appeal measures, after the entire court proceedings have been regulated. These court proceedings, as regulated in the earlier provisions, are proceedings on the merits of the trial and thus pertain to the legal liability of a certain person, including the issue of admissibility of conducting proceedings on this matter. From this it was deduced that the reopening of finally concluded proceedings is valid precisely with regard to court proceedings concerning such subject matter. Apart from criminal liability, the statement of reasons also indicated other subject matters of the main proceedings. The Supreme Court also pointed out that the doctrine allows for the possibility of reopening ancillary proceedings, which concern a scope different from the main course of the trial. However, this applies only to proceedings that are autonomous in relation to the main proceedings. In the case of reopening proceedings, their subject is not legal liability or any other ancillary issue unrelated to the proceedings concerning this liability, but rather the issue of the existence of grounds for reopening as such, where the issue of legal liability is already resolved by a final court decision. Therefore, it is not an ancillary proceeding as referred to above. A different understanding of this construction, as indicated in the statement of reasons, would lead to the assumption that reopening of cassation proceedings concluded with a dismissal of the cassation appeal, is also possible, as they are concluded with a final court decision, even in a situation where the cassation against the decision made as a result of previous cassation hearing is already inadmissible (Article 539 CCP).

However, the reference to the work of M. Biłyj and A. Murzynowski, made in the written statement of reasons for the decision in case V KO 47/10 (as it was made with regard to the decision in case III KO 115/00) was imprecise. While the authors express a general view of the kinds of proceedings that may be the subject of the proceedings cited in the decision, when specifically referring to the issue of reopening the proceedings and to the final decision dismissing the motion for reopening, they explicitly indicate that the decision dismissing the motion for reopening, once it has become final, may subsequently be the subject of an extraordinary review or reopening of proceedings. It should be remembered that in the 1969 Criminal Procedure Code absolute grounds for reversing a judgement constituted grounds for reopening proceedings not only ex officio, but also at the request of a party (cf. Article 474 § 2 in conjunction with 476 § 2 and Article 388 of the 1969 CCP).

A comment should also be made with reference to the order of 23 March 2022, III KO 22/22, which prima vista could suggest that the signalling by a party to the proceedings, made under Article 9 § 2 CCP, led to an examination of the occurrence, in the cassation proceedings concluded by a decision dismissing the cassation as manifestly ill-founded, of absolute grounds for reversing a judgement to which the signalling referred, and which, according to the party, was to affect the decision of

the Supreme Court issued under Article 535 § 3 CCP.[40] This is directly indicated by the content of the ruling, which refers to the lack of grounds (strongly suggesting a prior examination of the merits of the issue with a negative result regarding the reopening of the proceedings ex officio, as referred to in Article 542 § 3 CCP). On the other hand, the statement of reasons clearly proves that the grounds for issuing such an order were the lack of possibility (inadmissibility) of reopening the cassation proceedings ex officio. Hence, when applying Article 118 CCP, the decision should be perceived as a decision on the inadmissibility of reopening, and not on the lack of grounds for reopening.[41]

In conclusion, it should be pointed out that the provisions of the Code of Criminal Procedure allow for the possibility of reopening the cassation or reopening proceedings concluded with a decision dismissing the lodged appeal measure, and the only limitations to reopening will be formed by the grounds for appeal. The grounds indicated in Article 540 § 1 (2) and Article 540a CCP will not apply here. While advocating such an interpretation of Article 540 and Article 542 § 3 CCP, one should remember that in the jurisprudence of the Supreme Court over the last 24 years, although not uniform, the opposite view was adopted, albeit in a dominant (especially in quantitative terms). The legal norm, which has developed in the process of interpretation and application of the law (even if this interpretation has been incorrect) and has functioned in legal circulation for many years), is indeed important for the stability of the law and legal relations. However, this aspect of the issue under consideration here requires a separate analysis, and therefore does not constitute the subject of this paper.

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[40] Article 439 § 1 (2) of CCP in view of the fact that the single-member panel of the Supreme Court that heard the cassation was composed of a judge appointed in 2018.

[41] It should be noted that the lack of admissibility of reopening the proceedings, adopted in the order, cannot be offset by the possibility, indicated in the final part of the statement of reasons, to file an extraordinary cassation appeal by one of the entities specified in Article 521 of the CCP. The lodging of such a cassation conflicts with the prohibition against filing the so-called super-cassation (Article 539 CCP), i.e. a cassation against a ruling resulting from the hearing of this type of extraordinary appeal. While it is legitimate, as previously mentioned, for case law to allow a cassation appeal against a decision that leaves a cassation appeal unconsidered, such a possibility does not extend to decisions dismissing a cassation, as these decisions adjudicate on the merits of the lodged cassation.

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ON THE CONCEPT OF AN APPELLATE MEASURE IN A CRIMINAL PROCEEDING

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Abstract

The aim of the paper is to analyse how the term 'appellate measure' is interpreted in the Polish doctrine of criminal procedure law and, in particular, to assess the accuracy of the assumption that the possibility of recognising a particular means of indictment of a decision as an appellate measure is determined by its normative features. Based on the analysis of the characteristic features of each means of indictment of a decision, an attempt is made to demonstrate that this assumption may be regarded as incorrect. It is suggested that the previous definition of an appellate measure be revised, and recognise that this concept is purely of a conventional (traditional) nature, which means that the possibility of classifying a particular means of indictment of a decision as an appellate measure should not depend on its nature or similarity to other legal measures considered as means of indictment of a decision.

Keywords: appellate measures, means of indictment of a decision, devolutionist nature, suspending nature, prohibition of *reformatio in peius*, appellate proceeding, criminal proceeding/trial

1. INTRODUCTION

The most fundamental concepts in the area of appellate proceedings in a criminal trial include the terms 'means of indictment of a decision' and 'appellate measure'. The former does not raise significant doubts. Means of indictment of a decision are any legal measures stipulated by criminal procedure law that an involved party may use to challenge a procedural decision and subject it to review by another procedural

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body, deprive it of its legal force, or to demand a review of a procedural activity that is not a decision.[1] The term 'appellate measure' raises many more doubts.

According to the prevalent opinion among the representatives of the criminal procedure law doctrine, the following features distinguish appellate measures from the remaining means of indictment of a decision: (1) accusatorial nature; (2) devolutionist nature; (3) suspending nature; (4) reformist nature; and (5) prohibition of *reformatio in peius*.[2] Other authors argue that a means of indictment of a decision may be recognised as an appellate measure also if it only possesses some of the characteristic features mentioned above in points (1) to (4) (D. Drajewicz),[3] (2) and (4) (S. Waltoś, P. Hofmański and J. Grajewski),[4] (1) to (3) (P. Piszczek),[5] or (2) and (3) (T. Grzegorczyk, P. Wiliński, W. Jasiński and W. Daszkiewicz, T. Nowak and S. Stachowiak).[6] Despite

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[1] See Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie postępowanie karne*, Warszawa, 2009, p. 768; similarly Skorupka, J., in: Skorupka, J. (ed.), *Proces karny*, Warszawa, 2020, p. 702; cf. Piszczek, P., in: Kruszyński, P. (ed.), *Wykład prawa karnego procesowego*, Białystok, 2012, p. 378, where he posits, "means of indictment of a decision encompass all methods stipulated in criminal procedure that an entitled party can use if they are unsatisfied with the settlement and seek to change or annul it". This definition might be too narrow. Firstly, means of indictment of a decision are not confined to settlements but also pertain to other procedural activities or even omissions (see Article 467 § 1 Act of 6 June 1997: Code of Criminal Procedure, Journal of Laws of 2022, item 1375, hereinafter referred to as CCP). Secondly, since a means of indictment of a decision does not necessarily involve settlements, the entitled party does not need to strive to change or cancel anything. A decision by a second instance body sometimes involves recognising a particular procedural activity as unlawful or missing (see Article 467 § 2 CCP). Thirdly, a complainant, although usually dissatisfied with a particular settlement, does not need to be. Even a means dismissed due to a breach of the prohibition under Article 425 § 3 CCP continues to be a means of indictment of a decision. Indeed, the provision does not involve 'lack of satisfaction' and moreover, it does not apply to all complainants (see second sentence of Article a 425 § 3 CCP). For these reasons, the definition proposed by K. Marszał and J. Zagrodnik also appears too narrow. According to them, "a means of indictment of a decision is a complaint addressed to a procedural body with a request for a review of a procedural decision" (Marszał, K., Zagrodnik, J., in: Zagrodnik, J. (ed.), *Proces karny*, Warszawa, 2021, p. 699; similarly Waltoś, S., Hofmański, P., *Proces karny. Zarys systemu*, Warszawa, 2013, p. 320). As indicated, a means of indictment of a decision does not need to pertain to procedural decisions nor contain a request for review. Lodging some means of indictment of a decision (e.g. objection to an order) leads to the removal of a decision from legal transactions without the need for its review.

[2] Thus, inter alia, Skorupka, J., op. cit., p. 706; Świecki, D., in: Świecki, D. (ed.), *Meritum. Postępowanie karne*, Warszawa, 2019, p. 943; Paluszkiewicz, H., in: Dudka, K., Paluszkiewicz, H., *Postępowanie karne*, Warszawa, 2022, pp. 612–613; cf. Paluszkiewicz, H., *Metodyka sporządzania środków zaskarżenia w postępowaniu karnym i karnoskarbowym. Wzory pism procesowych*, Warszawa, 2022, p. 8, where the author expresses a somewhat different opinion, overlooking the reformist nature of appellate measures.

[3] Drajewicz, D., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz. Art. 425–682*, Warszawa, 2020, p. 5.

[4] Waltoś, S., op. cit., p. 320; Grajewski, J., Steinborn, S., *Przebieg procesu karnego*, Warszawa, 2012, pp. 290–291.

[5] Piszczek, P., in: Kruszyński, P. (ed.), *Wykład…*, op. cit., pp. 378–379.

[6] Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie…*, op. cit., p. 771; Wiliński, P., in: Wiliński, P. (ed.), *Polski proces karny*, Warszawa, 2020, p. 622; Jasiński, W., in: Boratyńska, K.T., Chojniak, Ł., Jasiński, W., *Postępowanie karne*, Warszawa, 2018, pp. 570–571; Daszkiewicz, W., Nowak, T., Stachowiak, S., *Proces karny. Część szczególna*, Poznań, 1996, p. 110; also note the somewhat ambiguous stance of K. Marszał and J. Zagrodnik, in: Marszał, K., Zagrodnik, J. (eds), *Proces…*, op. cit., p. 699, who indicate that "The devolutionist nature is the basic criterion distinguishing the first group [i.e. appellate measures] […]. It is the most important feature setting

some differences in terminology, all these views are based on the assumption that the possibility of recognising a means of indictment of a decision as an appellate measure is not determined by the legislator's arbitrary decision (e.g. name of a particular legal measure or place of its regulation), but the nature (essence, features) of this measure.[7] Based on the use of the above-presented criteria for distinguishing appellate measures from means of indictment of a decision, it is assumed that the latter category currently only includes an appeal and a complaint.[8]

The aim of the paper is to examine the accuracy of this assumption and determine whether one can speak about 'truly' (i.e. based on their essence) appellate measures or whether the term is in fact conventional, organisational, and technical in nature. This verification will be conducted through an analysis of some means of indictment of a decision functioning in the contemporary criminal trial, including in particular those commonly recognised as appellate measures. If at least one of them does not meet all the above-mentioned criteria, the definition of an appellate measure adopted in the literature will prove to be incorrect. Likewise, if it appears that at least one means of indictment of a decision commonly recognised as non-appellate measures meets the criteria. To streamline further discussions, whenever a challenged settlement, decision or judgement is mentioned, they should be understood as activities that are not procedural decisions and omissions that may also be challenged.

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apart appellate measures from the entire group of means of indictment of a decision [explanation and underlining by B.Ł.]".

[7] It is worth noting that only opinions of current representatives of the criminal procedure doctrine are referred to herein; cf. e.g. Kaftal, A., *System środków odwoławczych w polskim procesie karnym (rozważania modelowe)*, Warszawa, 1972, p. 7, in whose opinion, "appellate measures should […] be understood as methods stipulated in the procedure that the entitled party can use to appeal against a judgement infringing his rights and request a review of the judgement challenged". This definition, formulated over 50 years ago, seems to align more closely with the concept of 'means of indictment of a decision'. An identical definition was proposed in the 1960s: Kalinowski, S., *Postępowanie karne. Zarys części szczególnej*, Warszawa, 1964, pp. 220–221. At the same time, unlike A. Kaftal, he provided more detail by adding: "an essential feature of appellate measures is their devolutionist nature, i.e. what results in transferring a case for review to a higher instance […]. The other crucial feature of appellate measures is the fact that these are motions filed by the parties to a proceeding".

[8] Contrarily Grajewski, J., Steinborn, S., *Przebieg…*, op. cit., p. 290; Marszał, K., Zagrodnik, J., in: Zagrodnik, J. (ed.), *Proces…*, op. cit., p. 701; Piszczek, P., in: Kruszyński, P. (ed.), *Wykład…*, pp. 380–381; Cichoński, M., *Względne podstawy odwoławcze w polskim procesie karnym. Studium z perspektywy dogmatyki oraz ogólnej refleksji nad prawem*, Warszawa, 2022, pp. 6–7, who differentiate between ordinary and extraordinary appellate measures, suggesting that, inter alia, cassation and motion to resume a proceeding are, in their opinion, appellate measures; critically about this division of means of indictment of a decision: Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie…*, op. cit., pp. 768–769, who rightly point out that the legislator clearly distinguished appellate measures (Part IX CCP) from extraordinary means of indictment of a decision (Part XI CCP).

2. POSSIBLE FEATURES OF MEANS OF INDICTMENT OF A DECISION

Determining whether a given means of indictment of a decision possesses a given feature requires a prior, at least brief, explanation of each feature.

2.1. ACCUSATORIAL NATURE

The accusatorial nature means that a review proceeding can only be conducted after an entitled party lodges a given means of indictment of a decision, thus it cannot be initiated ex officio by a proceeding body (by the way, it is worth pointing out that this feature characterises a given review proceeding rather than a means of indictment of a decision itself).

2.2. DEVOLUTIONIST NATURE

The devolutionist nature means that a means of indictment of a decision may be substantively recognised only by a body superior to the one that issued the challenged decision. It is sometimes assumed that the devolutionist nature is also maintained when a second instance body is on the same level as the first instance body (the so-called horizontal or flattened devolutionist nature).[9] However, this view should be strongly disapproved. There should be no doubt that the feature analysed does not merely depend on the transference of a case to whatever body. The point is that a body that is assumed to be more competent and experienced than the first instance body should re-examine the supposedly incorrect settlement of a case. If a reviewing body is not hierarchically superior to a reviewed body, the idea of devolution and its guarantees are negated. Therefore, horizontal devolution simply implies a lack of devolutionist nature.

2.3. SUSPENDING NATURE

The suspending nature of a means of indictment of a decision lies in the fact that its lodging suspends execution of the challenged settlement. In the criminal procedure law doctrine, two forms of suspending nature are recognised: absolute and relative. Absolute suspending nature implies that execution of the challenged settlement is suspended *ex lege* by lodging a means of indictment of a decision, eliminating the need for any separate decision on the matter. Conversely, relative suspending nature implies that even though lodging a given means of indictment of a decision does not suspend the execution of the challenged settlement, a relevant body

[9] Thus, inter alia Skorupka, J., in: Skorupka, J. (ed.), *Proces…*, op. cit., p. 706; Paluszkiewicz, H., in: Dudka, K., Paluszkiewicz, H., *Postępowanie…*, op. cit., p. 613; Świecki, D., in: Świecki, D. (ed.), *Meritum…*, op. cit., p. 943.

(either reviewing or reviewed) can still decide on its suspension. The concept of relative suspending nature shares as much in common with the suspending nature as the horizontal devolutionist nature with the devolutionist nature. If a decision on suspension of the execution of the challenged settlement depends on the body, it does not directly relate to lodging a means of indictment of a decision and is unknown at the moment of its lodging; hence the mere possibility of applying a means cannot be treated as its feature. All means of indictment of a decision, the lodging of which does not automatically suspend the execution of a challenged settlement, should be recognised as non-suspending measures. Approving of the concept of relative suspending nature would be absurd because, as a result, it would be necessary to assume that a conviction by the court of first instance has a relatively acquittal nature, because the court of second instance may alter the settlement.

2.4. REFORMIST NATURE

Reformist nature means that a body reviewing the challenged settlement may issue a substantive decision, i.e. settle the essence of a case independently. The opposite of this feature is cassation, which indicates that the body of second instance, recognising the decision of the body of first instance as incorrect, may only cancel it, and either discontinue the case or refer it for re-hearing to the body of first instance, which will exclusively settle the case substantively.

2.5. PROHIBITION OF *REFORMATIO IN PEIUS*

The prohibition of *reformatio in peius* signifies that the body of second instance cannot adjudicate to the detriment of the complainant if the means of indictment of a decision has been lodged by (more precisely: in favour of) this complainant (direct prohibition of *reformatio in peius*). Moreover, a decision worsening the legal situation of the sole complainant cannot also be issued by the body of first instance to which the reviewing body referred the case for re-examination (indirect prohibition of *reformatio in peius*). In the literature, it is assumed that the prohibition applies only to the accused, but it should be acknowledged that in reality, as a theoretical construction found not only in a criminal trial,[10] it applies to every complainant. The fact that the prohibition of *reformatio in peius* in a specific legal system (or in a specific type of proceedings) may have a different scope in relation to various

[10] See Article 384 Act of 17 November 1964: Code of Civil Procedure (Journal of Laws of 2021, item 1805, as amended); Article 139 Act of 14 June 1960: Code of Administrative Procedure (Journal of Laws of 2022, items 2000 and 2185); Article 234 Act of 29 August 1997: Tax Law (Journal of Laws of 2021, item 1540, as amended); Article 134 § 2 Act of 30 August 2002: Law on the proceedings before administrative courts (Journal of Laws of 2022, items 329, 655 and 1457); Article 146 par. 1 Act of 17 December 2004 on liability for a breach of public finance discipline (Journal of Laws of 2021, item 289).

parties to the proceeding (e.g. to protect the interests of the accused in the broadest way) is a separate issue.[11]

Having defined the individual features of a means of indictment of a decision, one should now verify whether they are characteristic of the most typical means of indictment of a decision applicable in a criminal trial, i.e. an appeal, a complaint, a cassation, a complaint against the judgement of an appellate court, a motion to resume a court proceeding, an extraordinary complaint, motions to cancel a valid judgement pursuant to Article 96 Act of 8 December 2017 on the Supreme Court,[12] or pursuant to Act of 23 February 1991 on the recognition of convictions of persons who were subject to suppression for their activities for the independent existence of the Polish State as invalid,[13] and an objection to an order.

3. ANALYSIS OF THE FEATURES OF INDIVIDUAL MEANS OF INDICTMENT OF A DECISION

3.1. APPEAL

Appellate proceedings cannot be conducted if an appeal has not been lodged (accusatorial nature). A trial arrangement in which the court that issued a challenged judgement hears an appeal is not possible (devolutionist nature). A situation in which a judgement challenged in an appeal is subject to execution before it becomes final and valid is also not possible (suspending nature). When hearing an appeal in accordance with Article 437 CCP, the court of second instance may alter the challenged judgement, as well as revoke it and subsequently discontinue the proceeding or refer it for re-hearing to the court of first instance (reformist nature). Generally, the court to which the appeal has been lodged is not entitled to rule to the detriment of the complainant, but the criminal procedure law also provides for a situation in which the court may change the judgement adversely even though the appeal has been lodged to act in favour of the complainant (Article 434 § 4 CCP), as well as a contrasting situation in which the court may change the judgement in favour of the accused although the appeal has been lodged to act adversely (Article 434 § 2 CCP) (prohibition of *reformatio in peius*).

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[11] For more on individual features of means of decision indictment, see Skorupka, J., in: Skorupka, J. (ed.), *Proces…*, op. cit., pp. 706–707; Marszał, K., Zagrodnik, J., in: Zagrodnik, J. (ed.), *Proces…*, op. cit., pp. 700–701; Piszczek, P., in: Kruszyński, P. (ed.), *Wykład…*, op. cit., pp. 379–380; Waltoś, S., Hofmański, P., *Proces…*, op. cit., p. 320; Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie…*, op. cit., p. 771.

[12] Journal of Laws of 2021, item 1904 and of 2022, items 480 and 1259, hereinafter referred to as ASC.

[13] Journal of Laws of 2021, item 1693, hereinafter referred to as ARCI.

3.2. COMPLAINT

Depending on the situation, the complaint can be handled by a higher-level body, same-level body, or even the body that issued the challenged decision (devolutionist nature). Under Article 462 § 1 CCP, lodging a complaint does not suspend the execution of the reviewed decision, unless specifically stated otherwise by law (e.g. Article 290 § 3 CCP) or decided by a competent authority (suspending nature). Regarding accusatorial nature, reformist nature, and the prohibition of *reformatio in peius*, a complaint bears similarities to an appeal.

3.3. CASSATION

Depending on procedural arrangements, cassation can be heard by a superior body or a body of the same hierarchically level. The former is, of course, a rule, while the latter may take place only exceptionally when the Supreme Court acts as the reviewing body. This is possible when a case is taken over for examination pursuant to Article 441 § 5 CCP (while answering a specific legal question) or when the first instance court hearing a case is a military district court the appeals against whose judgements can be heard, pursuant to Article 655 § 1 (1) CCP, by the Supreme Court (devolutionist nature). The mere filing of a cassation does not suspend the execution of the challenged judgement; however, under Article 532 § 1 CCP, the cassation court may decide to suspend it (suspending nature). As per Article 537 § 1 CCP, when a cassation is upheld, the Supreme Court may only revoke the challenged judgement, which *prima facie* indicates a strictly cassation-like nature of this means of indictment of a decision (in accordance with its name). At the same time, however, should the conviction be deemed unjust, the highest judicial body may acquit the accused without needing to refer the case for re-hearing to the competent court (Article 537 § 2 *in fine* CCP), essentially changing the challenged judgement[14] (reformist nature). With regard to the accusatorial nature and prohibition of *reformatio in peius*, a cassation demonstrates features similar to an appeal.

3.4. COMPLAINT AGAINST A JUDGEMENT OF AN APPELLATE COURT

Under Article 539b § 2 CCP, lodging a complaint against a judgement of an appellate court suspends the execution of the second instance court's judgement on the revocation of the judgement of the court of first instance and referring the case for rehearing to it (suspending nature). If this means of indictment of a decision is upheld, the Supreme Court may, pursuant to Article 539e § 2 CCP, revoke

[14] See Hofmański, P., 'Orzeczenie sądu kasacyjnego', in: Płachta, M. (ed.), *Aktualne problemy prawa i procesu karnego. Księga ofiarowana Profesorowi Janowi Grajewskiemu*, Gdańskie Studia Prawnicze, No. 11, Gdańsk, 2003, p. 346; approvingly: Kozielewicz, W., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz. Art. 425–682*, Warszawa, 2020, p. 394; similarly: Święcki, D., in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2021, p. 1416.

the challenged judgement and refer the case for rehearing to the appellate court (reformist nature). With regard to the accusatorial nature, devolutionist nature and prohibition of *reformatio in peius*, this measure is similar to a cassation.

3.5. MOTION TO RESUME A PROCEEDING

Pursuant to Article 542 § 1 CCP, a proceeding may be resumed based on a motion or, in the event of serious breaches, ex officio (accusatorial nature). Under Article 544 §§ 1 and 2 CCP, a decision on the resumption of proceedings is made by a higher instance court where a lower instance court has issued a judgement, or by a court of the same instance if the proceedings concluded with a Supreme Court judgement (devolutionist nature). With respect to the suspending nature, reformist nature and prohibition of *reformatio in peius*, the motion to resume a proceeding resembles a cassation.

3.6. EXTRAORDINARY COMPLAINT

In accordance with Article 89 § 1 *in principio* ASC, an extraordinary complaint may be lodged only against judgements of common and military courts. The Supreme Court, which is the only court authorised to hear such appellate measures, is neither a common court nor a military one (*argument ex* Article 175(1) of the Constitution of the Republic of Poland),[15] therefore it should be assumed that this measure is not subject to judgements issued directly by the Supreme Court[16] (cf. Article 94 § 2 ASC). This means that a higher-level body, i.e. superior to the body that issued the challenged judgement, shall always hear an extraordinary complaint (devolutionist nature). Pursuant to first sentence of Article 91 § 1 ASC, if an extraordinary complaint is upheld, the Supreme Court revokes the challenged judgement and, depending on the proceeding's outcome, decides on the merits of the case, discontinues the proceeding or refers the case for rehearing to the competent body (reformist nature). With regard to the accusatorial nature, suspending nature and prohibition of *reformatio in peius*, an extraordinary complaint demonstrates the features similar to a cassation.

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[15] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, of 2001 No. 28, item 319, of 2006 No. 200, item 1471 and of 2009 No. 114, item 946).

[16] Thus, also Dziga, K., 'Czy możliwe jest merytoryczne rozpoznanie skargi nadzwyczajnej w sprawach karnych', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 2, p. 146; Szczepaniec, M., 'Skarga nadzwyczajna w praktyce – wybrane zagadnienia', *Prokuratura i Prawo*, 2021, No. 9, p. 15; Szczucki, K., *Ustawa o Sądzie Najwyższym. Komentarz*, Warszawa, 2020, theses 39–40 to Article 89; differently, after the adoption of Act of 10 May 2018 amending Act: Law on the system of common courts, Act on the Supreme Court and some other acts (Journal of Laws, item 1045), amending the original wording of Article 94 § 2 ASC; Gruszecka, D., 'Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście »wypełniania luk w systemie środków zaskarżenia«', *Palestra*, 2018, No. 9, p. 28; thus, as it seems, also Świecki, D., in: Świecki, D. (ed.), *Meritum…*, op. cit., pp. 952–953.

3.7. MOTION TO REVOKE A FINAL AND VALID JUDGEMENT PURSUANT TO ARTICLE 96 ASC

According to Article 96 § 1 ASC, the Supreme Court may revoke a final and valid judgement issued in a criminal case that, at the time of adjudication, was not subject to Polish courts' jurisdiction due to the person involved, or in which a court proceeding was inadmissible at the time of adjudication. Unlike in the case of an extraordinary complaint, the challenged judgement does not have to be issued by a common or a military court, which means, conversely, that the means of indictment of a decision under analysis may also concern the judgements of the Supreme Court itself (devolutionist nature). Another difference between the institutions is that if the motion to revoke a final and valid judgement is upheld, the Supreme Court cannot change the challenged judgement, which also results from the very conditions for upholding this means of indictment of a decision, not to mention its name (reformist nature). Taking into account the conditions and possible consequences of upholding the measure analysed, one should assume that a judgement to the detriment of the complainant cannot be issued as a result of the hearing of the motion to revoke a final and valid judgement (prohibition of *reformatio in peius*). With regard to the accusatorial nature and suspending nature, this measure resembles a cassation.

3.8. MOTION TO REVOKE A FINAL AND VALID JUDGEMENT PURSUANT TO ARCI

Under Article 3(1) ARCI, revocation of a final and valid judgement in the analysed mode may take place solely based on a motion (accusatorial nature). In accordance with the first sentence of Article 2(1) ARCI, a district court (or a military district court) determines the invalidity in every case, irrespective of the body issuing the challenged settlement. If a regional court or a non-judicial body's judgement is in question, a higher-level body superior to a reviewed one will handle the means. However, if a district court, an appellate court or the Supreme Court (or their historical counterparts, such as the Supreme Military Court) issued the judgement that was then challenged, a court of the same instance or even a lower instance court would hear the motion to revoke a judgement (devolutionist nature). Article 3(4) ARCI states that provisions regulating an ordinary criminal proceeding should apply in the proceeding concerning the revocation of a final and valid judgement. Although Article 96 § 7 ASC clearly indicates that provisions on a cassation should apply by analogy in relation to the proceeding concerning the revocation of a judgement in the above-discussed mode, Article 3(4) ARCI does not specify which specific provisions should apply. Case law assumes that the motion in question should be treated "by analogy, as an entitled accuser's complaint"[17] (and therefore e.g. as an indictment of a decision or a motion to grant a compensation

[17] Ruling of the Appellate Court in Katowice of 27 July 2001, II AKz 526/01, OSA 2002, No. 1, item 2.

for wrongful conviction). This suggests that the district court examining it, formally a court of first instance, cannot make use of the possibility of withholding the execution of the challenged judgement, as laid down in Article 462 § 1 or Article 532 § 1 CCP. This remark, of course, is purely theoretical, as decisions challenged in this undoubtedly specific mode have already been fully implemented due to their essence (suspending nature). If the motion is upheld, a court can only declare the challenged judgement as invalid. Pursuant to the first sentence of Article 2(1) ARCI, recognising a judgement's invalidity is deemed 'equivalent to an acquittal'. This implies that upholding the motion essentially settles the case (i.e. the issue of liability of a erson subject to suppression for a given act) (reformist nature). Given the narrow scope of a court's cognition examining a motion to revoke a judgement, as well as the possibility of lodging it solely in favour of a person subject to suppression, it should be assumed that no judgement to the complainant's detriment can be issued in its course, regardless of the assessment on the possibility of properly applying provisions concerning prohibition of *reformatio in peius* in the analysed mode of proceedings (prohibition of *reformatio in peius*).

3.9. OBJECTION TO A COURT ORDER

Due to the nature of an objection to a court order, the measure cannot be unambiguously classified through the prism of the features distinguished previously. Since lodging an objection to a court order causes that the judgement challenged loses its legal effect without the need to be reviewed, the measure is not 'recognised' within the traditional sense of the word (i.e. assessed in terms of merits) at all, and the judgement challenged is neither enforceable nor unenforceable. It is not certain whether the assessment of the means of indictment of a decision in question with regard to devolutionist nature or suspending nature makes sense at all. Therefore, only for the purpose of further research, it can be pointed out that lodging an objection to a court order does not result in referring a case to a higher instance court. The loss of legal force by the challenged order means that the court that issued the judgement will continue dealing with case (devolutionist nature). The measure in question also does not result in the suspension of the execution of the judgement challenged. As it was earlier aptly pointed out in the literature, objections have only a superficial suspending nature. A classic suspending nature consists in the fact that a judgement challenged is not executed although, in the legal sense, it exists[18] (suspending nature). Since the use of the measure in question always leads to the elimination of the judgement challenged from legal transactions, it never results in a change of the judgement challenged (reformist nature). In accordance with Article 506 § 6 CCP, a court hearing a case after an objection has been lodged

[18] See Nowikowski, I., 'Sprzeciw wobec decyzji referendarza sądowego w Kodeksie postępowania karnego (kwestie wybrane)', in: Świecki, D., Kasiński, J., Misztal, P., Rydz-Sybilak, K., Małolepszy, A. (eds), *Artes serviunt vitae, sapientia imperat. Proces karny sensu largo – rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorczyka z okazji 70. urodzin*, Warszawa–Łódź, 2019, p. 475 and the literature cited therein.

is not bound by the content of the order that lost force. It is assumed that this regulation means that a judgement issued in the further proceeding may worsen the situation of the person who lodged an objection to a court order in comparison to a situation resulting from the judgement (prohibition of *reformatio in peius*).[19] With regard to the accusatorial nature, the means of indictment of a decision analysed above resembles an appeal.

4. CRITERIA FOR ASSESSING CHARACTERISTIC FEATURES TYPICAL OF A MEANS OF INDICTMENT OF A DECISION

The answer to the question whether a given appellate measure is characterised by a given feature depends on the adopted research perspective. In this context, at least two approaches are possible: a positive approach, which asserts that a means of indictment of a decision has a given feature when it is possible to imagine at least one procedural arrangement in which a specific means meets the requirements for being recognised as accusatorial, devolutionist, suspending, reformist or subject to the prohibition of *reformatio in peius*. For example, in the positive approach, a cassation is recognised as a devolutionist means of indictment of a decision, even if the body that issued the challenged judgement re-examines it in specific situations. In accordance with this stance, the key factor is that in other situations, the court of cassation is of a higher instance than the court that issued the judgement under review. The features of individual appellate measures in the positive approach are presented in Table 1.[20]

In accordance with the second possible approach – negative approach – a means of indictment of a decision cannot be recognised as one having a given characteristic feature when it is possible to imagine at least one procedural arrangement in which the specific measure does not meet the requirements for being recognised as accusatorial, devolutionist, suspending, reformist or subject to the prohibition of *reformatio in peius*. For example, in the negative approach, an appeal is not a means of indictment of a decision that is reformist in nature since there are situations in which the approval of the measure cannot entail a direct change of the challenged settlement by a court of second instance. The features of individual means of indictment of a decision in the negative approach are presented in Table 2.

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[19] For more on the scope of the prohibition of *reformatio in peius* when objecting to a court order, including in particular whether the effect of the order depends on circumstances revealed during a proceeding that argue for adjudicating a stricter penalty than the one initially passed in the order, see Łukowiak, B., 'Sprzeciw od wyroku nakazowego a zakres obowiązywania zakazu reformationis in peius', *Studia Prawnicze*, 2020, Vol. 221, No. 1, pp. 143–162.

[20] Although the concept of relative suspending nature was previously abandoned, for the purpose of developing Table 1, it was acknowledged that in a specific case, if a competent body suspends the execution of a challenged judgement due to a lodged means of indictment of a decision, it could be deemed as having a suspending nature.

Table 1. Features of means of indictment of a decision in the positive approach

Means name	Means features				
	accusatorial nature	**devolutionist nature**	**suspending nature**	**reformist nature**	**prohibition of *reformatio in peius***
Appeal	+	+	+	+	+
Complaint	+	+	+	+	+
Cassation	+	+	+	+	+
Complaint against a judgement of an appellate court	+	+	+	–	+
Motion to resume a proceeding	+	+	+	+	+
Extraordinary complaint	+	+	+	+	+
Motion to revoke a final and valid judgement pursuant to Article 96 ASC	+	+	+	–	+
Motion to revoke a final and valid judgement pursuant to ARCI	+	+	–	+	+
Objection to a court order	+	–	–	–	–

Source: own development.

The conclusions drawn from the application of both approaches will be identical in those situations where a given means of indictment of a decision absolutely (i.e. in every procedural arrangement that can be imagined) matches or does not match a specific feature. For example, an appeal is a means that is suspending in nature in both the positive and the negative approach, because lodging it always suspends the execution of a challenged judgement. At the same time, in a specific procedural arrangement, lodging an appeal may be connected with the fact that the court of second instance cannot change or revoke a judgement challenged to the complainant's detriment (e.g. in the event the appeal is lodged only in favour of the accused who has not been convicted with the application of the so-called small crown witness arrangement), while in another procedural arrangement, lodging

Table 2. Features of means of indictment of a decision in the negative approach

Means name	Means features				
	accusa-torial nature	devolu-tionist nature	suspen-ding nature	reformist nature	prohibition of *reformatio in peius*
Appeal	+	+	+	–	–
Complaint	+	–	–	–	–
Cassation	+	–	–	–	–
Complaint against a judgement of an appellate court	+	–	+	–	–
Motion to resume a proceeding	–	–	–	–	–
Extraordinary complaint	+	+	–	–	–
Motion to revoke a final and valid judgement pursuant to Article 96 ASC	+	–	–	–	+
Motion to revoke a final and valid judgement pursuant to ARCI	+	–	–	+	+
Objection to a court order	+	–	–	–	–

Source: own development.

the same means of indictment of a decision will not be connected with absolute inability to worsen the complainant's situation (e.g. in the event an appeal is lodged only to the detriment of the accused but the court of second instance notices the need to change the legal classification of the act in favour of the accused). This means that an appeal may be recognised as a means of indictment of a decision that is subject to the prohibition of *reformatio in peius* (positive approach) as well as a means that is not subject to this prohibition (negative approach). Of all the above-analysed means of indictment of a decision, only an objection to a court order demonstrates the same features regardless of the research perspective adopted (cf. Table 1 and Table 2).

5. CONCLUSIONS

Assuming that an appellate measure is a means of indictment of a decision that is accusatorial, devolutionist, suspending and reformist in nature and is subject to the prohibition of *reformatio in peius*, one should approve of the stance that in the current legal state, an appeal and a complaint are appellate measures. Through positive approach application, other means of indictment of a decision, i.e. a cassation, a motion to resume a proceeding and an extraordinary complaint, should also be acknowledged as appellate measures (see Table 1). Conversely, with the negative approach, neither an appeal nor a complaint is indeed an appellate measure. In fact, no current means of indictment of a decision can be recognised as an appellate measure (see Table 2). As a side note, even if a means of indictment of a decision that meets only some of the above-mentioned requirements were considered an appellate measure, conclusions would remain the same.

Discrepancies between the appellate measures definition adopted in case law and literature, and the analysis results of normative features of specific decision indictment means can be resolved in three ways. Firstly, one could abandon the term 'appellate measure' completely, resorting to the broader term 'means of indictment of a decision'. Secondly, using the described positive approach, the term 'appellate measure' could refer to a larger group of means of indictment of a decision, including some extraordinary ones. Thirdly, the prior interpretation of the term 'appellate measure' could be disregarded.

Means of indictment of a decision seem to form a group too heterogeneous to suffice as a collective concept for adjudication practice or a scientific debate on basic forms of the appellate procedure. On the other hand, extending the appellate measure concept to include a cassation, a motion to resume a proceeding and an extraordinary complaint, would likely reduce their practical value. Often, the term is used not to describe an appellate measure meeting certain requirements, but avoid repeating the term 'an appeal and a complaint' when discussing provisions concerning both legal means (see e.g. Articles 26, 428 or 655 § 1 (1) CCP). Expanding the term 'appellate measure' might require another term to describe only the two most typical and frequently lodged means of indictment of a decision, leading to unnecessary multiplication of entities, conflicting with the economy of thought principle. Therefore, redefining the term in question seems the most appropriate solution.

No 'genuinely' appellate measures exist, let alone their essence. The term should serve conventionally to organise the system of decision indictment means for scientific, educational and practical purposes, allowing, inter alia, more synthetic editing of legal provisions, judgements justifications, and scientific and educational texts. The term 'appellate measures' should denote legal instruments explicitly recognised as such by the legislator, regardless of their normative features or whether other legal instruments might share these features.

Due to the long-standing tradition and civil procedure models, only an appeal and a complaint should be recognised as appellate measures in a criminal trial.

However, it seems that, *de lege lata*, all means of indictment of a decision laid down in Part IX CCP, thus also an objection, should be recognised as appellate measures. This solution, albeit not aligned with the afore-mentioned patterns and linguistic tradition, implies that when an appellate measure is referred to in Chapter 48 CCP, in general, guided by the systemic interpretation directives, including in particular *a rubrica* reasoning, one should presume that *lege non distinguente* is about an appeal (Chapter 49 CCP), as well as a jointly regulated complaint and objection (Chapter 50 CCP).[21] Thus, *de lege ferenda*, it is necessary to relocate the regulation concerning an objection from Part IX CCP to another place in the act on criminal procedure, and possibly, in the course of regulating individual types of objection, to refer (e.g. in Articles 93a and 506 CCP) to the application of the provisions on the appellate procedure or a complaint by analogy.

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AMENDMENT TO THE RIGHTS AND OBLIGATIONS OF A JOURNALIST IN ACT: PRESS LAW FROM THE PERSPECTIVE OF CONSCIENCE CLAUSE

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Abstract

The conscience clause, sometimes also referred to as the right to conscientious objection, is based on the possibility of refusing to comply with a binding legal norm due to its non-conformity with the indications of conscience of the person who invokes its content. Commonly derived, especially in Poland, from Article 53 of the Constitution of the Republic of Poland, this clause initially applied to physicians' actions. It was also suggested that this clause could form the basis for conscientious objection to an abortion procedure. Drawing on Article 10(2) of the Charter of Fundamental Rights of the European Union, and emphasising the differences in the wording of this provision in different language versions, the article argues that such interpretation of the conscience clause is too narrow and poor. Attention is drawn to the amendments made to the wording of Article 10(2) of the Press Law, where the legislator replaced the journalist's obligation to follow the editorial policy with the right to refuse to carry out an official order if the journalist believed that they were expected to publish a material that would violate the principles of reliability, objectivity and professional diligence. This solution undoubtedly constitutes the approval of the broadly understood conscience clause explicitly formulated in the Charter of Fundamental Rights of the European Union. The content of Article 10(2) of the EU Charter of Fundamental Rights allows for conscientious objection to apply to actions of the representatives across all professions.

Keywords: conscience clause, Press Law, Charter of Fundamental Rights of the European Union, journalist, diligence and integrity in journalistic work

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The original text of Article 10(2) of the Act: Press Law, determining the rights and obligations of a journalist, stipulated that "under the employment relationship, a journalist is obliged to follow the general editorial policy specified in the statute or the rules and regulations of the editorial office".[1] The wording of the provision faced considerable criticism, highlighting that the obligation for journalists to follow a general editorial policy was in conflict with the freedom of press as outlined in the Press Law and confirmed in Article 14 of the Constitution of the Republic of Poland.[2] It was argued that imposing obligation to adhere to a general editorial policy essentially required expressing predetermined values and presenting facts favourably to the worldview promoted by the editorial office, under pain of breaching an employee's duties.

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[1] The concepts of 'editorial policy' and 'nature of publication' have not been defined in Act: Press Law. As indicated in the doctrine, an 'editorial policy' should be understood as ideological and worldview preferences, as well as the objectives of a given medium; on the other hand, the term 'nature of publication' refers to the readers to whom the paper is addressed, the adopted artistic assumptions and the way and form of editing. See Sobczak, J., *Ustawa prawo prasowe. Komentarz*, Warszawa, 1999, pp. 140–141 and 344; idem, *Prawo prasowe. Komentarz*, Warszawa, 2008, pp. 388–389, 798. The stance was accepted in the judicature; cf. VI ACa 616/05, the judgement of the Appellate Court in Warsaw of 14 December 2005, Lex No. 1642535; the judgement of the Supreme Court of 18 January 2007, 1CSK 376/06 OSP 208, No. 4, item 44; the judgement of the Supreme Court of 18 January 2007, 351/06 Lex No. 469993; according to I.B. Mika, an 'editorial policy' may cover not only some objectives and values which an editorial office wants to favour but also determine the conduct, means and methodology adopted to achieve the planned objectives, Mika, I.B., in: Barta, J., Markiewicz, R., Matlak, A. (eds), *Prawo mediów*, Warszawa, 2008, p. 450; also see Kosmus, B., Kuczyński, G., *Prawo prasowe. Komentarz*, Warszawa, 2013, p. 136.

[2] Discussing this thread, J. Sobczak indicates that since there is no definition of 'editorial policy', as a result, there must be doubts as to what its breach consists in. He emphasises that striving to follow an editorial policy may be in conflict with the tasks of the press, in particular with the right to provide reliable information laid down in Article 1 of the Press Law and an obligation to present phenomena discussed in an accurate way that is stipulated in Article 6 of that Act; see Sobczak, J., *Prawo prasowe. Komentarz…*, op. cit., p. 392; also see Sobczyk, A., 'Glosa do wyroku Sądu Najwyższego z dnia 19 marca 1998 r. I PKN 570/97', *Orzecznictwo Sądów Polskich*, 1999, issue 7–8, item 131. In the gloss, the author points out that a journalist may be convinced that he has the knowledge of facts important to society, which due to the editorial policy are presented by the editorial office in an incomplete or unreliable way. He points out that such a journalist has the right and even moral and professional duty to provide such information in a different way if the editorial office employing him refuses to publish his complete version. According to J. Sobczak, when a journalist's stance that is in conflict with the editorial policy is presented, the classification of such an activity as a material breach of basic employee's obligations is groundless. At the same time, it is emphasised that the existence of an editorial policy cannot be presumed; it must unambiguously result from the statute or rules and regulations of the editorial office. The Supreme Court also formulated such an opinion by stating that the presentation of the material that was not approved of by the editorial office employing a journalist, "although in conflict with the obligation to follow the general editorial policy, should not be assessed as one that seriously (in the objective sense) infringes" the interests of the editorial office, which excludes the classification of the act as a material breach of basic employee's duties; justification of the judgement of the Supreme Court of 19 March 1998, I PKN 570/97. With respect to the material breach of employee's duties, E. Nowińska expressed a different stance, stating that the publication of the press material that is in conflict with an editorial policy may result in a breach of trust, which can be classified as an act infringing the important interests of the employer. See Nowińska, E., *Wolność wypowiedzi prasowej*, Warszawa, 2007, p. 54.

Undoubtedly, this forces journalists to choose the material selectively, to avoid presenting all viewpoints, or to operate under predetermined assumptions, neither of which exemplifies particular diligence or reliability.[3] It was emphasised that an employee's obligation to follow the editorial policy should not surpass the duty to present the discussed phenomena genuinely. It was indicated that the enactment of an editorial policy represents a particular interest that does not have to be in line with societal interest. Attention was drawn to the hierarchy of values and it was emphasised that freedom of speech greatly outweighs any constraints of the editorial policy. It was pointed out that the need to ensure internal freedom of the press argues against prioritising the employee's obligation to implement the general editorial policy and that freedom of the press alone does not guarantee democratic social communication.

On this occasion, Resolution No. 1003 of the Parliamentary Assembly of the Council of Europe was invoked,[4] which called for distinguishing between the press company's ownership and corporate structure and the journalists' activity.[5] It was also emphasised that a journalist should prioritise compliance with the obligation imposed on him by the legislator over the employer's internal regulations. It was argued that Article 10(2) of the Press Law aims to give priority to the solution adopted in rules and regulations, as well as statutes, over obligations outlined in the Act. Ethical obligations of journalists and their need to maintain special diligence and reliability were emphasised, which might be in conflict with the requirements laid down in the editorial policy.[6]

These reflections underpinned demands for repealing the solution adopted in Article 10(2) of the Press Law and for granting journalists the right to conscientious

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[3] Kuczyński, G., Stelina, J., 'Zakres kolizji podstawowych obowiązków dziennikarza na gruncie art. 10 ustawy prawo prasowe', in: Adamowski, J.W., Wallas, T., Kakareko, K. (eds), *Między Klio a Themis. Księga dedykowana Profesorowi Jackowi Sobczakowi*, Warszawa–Poznań, 2016, pp. 615–616. Also cf. the Supreme Court resolution of 18 February 2005, case No. III CZP 53/04, OSN C 2005, No. 7–8, item 114.

[4] Council of Europe, Parliamentary Assembly, Resolution 1003(1993) on the ethics of journalism (adopted by the Assembly on 1 July 1993, 42nd Sitting): based on Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, it was stated that the aim of mass media consists in the absolute right to demand that the information supplied by journalists be truthful and the opinions be formulated ethically. It is necessary to draw a clear distinction between news and opinions. The latter, as it was pointed out in the Resolution, are necessarily subjective, and therefore should not be made subject to the criterion of truthfulness, they should, nevertheless, be expressed honestly and ethically. Opinions should not deny facts or confirmed information so truthfulness and honesty are two basic ethical criteria for providing news and expressing opinions. It was emphasised that political opinions of the owners and editors should not influence the selection of information or result in the abandonment of ethical standards. It was also pointed out that media should show transparency in matters of ownership enabling citizens to ascertain clearly the identity of proprietors and the extent of their influence. Ethical principles should be taken into account in codes set up by journalists and the implementation of these principles should be supervised by independent entities comprising journalists, publishers, media users, experts and judges; for more on the issue see Sobczak, J., 'Europejski ład komunikacyjny w procesie globalizacji', in: Sobczak, J., Bäcker, R. (eds), *Europejska myśl polityczna wobec globalizacji. Tradycja i wyzwania współczesności*, Łódź, 2005, pp. 61–62.

[5] Młynarska-Sobaczewska, A., *Wolność informacji w prasie*, Toruń, 2003, pp. 60–62.

[6] Kuczyński, G., Stelina, J., *Zakres kolizji…*, op. cit., pp. 616–618.

objection. This would allow them to refuse presentation of content that is contrary to their beliefs and would attempt to balance journalistic need for freedom of conscience, independence, and autonomy connected with the performance of their profession with the constraints resulting from working within a particular editorial office or media organisation.[7] It was noticed that the 'Media Ethics Charter',[8] defining the principle of honesty in a journalist's work, stipulates that the conscience clause provides journalists with a refusal right for orders conflicting with their beliefs. It was indicated that it is a measure that can be invoked by journalists seeking to refrain from actions that violate their established beliefs or value system.[9]

Demands for the introduction of the conscience clause to the legal regulations concerning the profession of a journalist were accompanied by a misleading reference to the supposed fact that all the other European countries had such normative guarantees for journalists in place. However, in fact, such a solution exists only in the French legal system, which was credited to the thriving and well-organised journalistic community.[10] They were laid down in the Act on the profession of

[7] Kononiuk, T., 'Klauzula sumienia w zawodzie dziennikarza', in: Adamowski, J.W., Wallas, T., Kakareko, K. (eds), *Między Klio a Themis. Księga dedykowana Profesorowi Jackowi Sobczakowi*, Warszawa–Poznań, 2016, p. 548.

[8] The Media Ethics Charter was developed on the initiative of the Polish Journalists Association [Stowarzyszenie Dziennikarzy Polskich] and signed by presidents of journalists' associations and trade unions, as well as the national priest, Rev. Wiesław Niewęgłowski, on 29 March 1995. The Charter indicates that journalists should follow principles of objectivism, separation of information from comments, honesty, respect and tolerance, priority of the interest of the audience, freedom and responsibility, but does not invoke directly the conscience clause. It only points out that the honesty principle means "acting in conformity with one's own conscience and the audience interest, not submitting to influence, incorruptibility, and refusing to act against one's beliefs". See https://spunk.pl/wp-content/uploads/2014/03/Karta-etyczna-mediow.pdf, accessed on 26 January 2023; also cf. Murawska-Najmiec, E., 'Informacja na temat istniejącego w Polsce systemu ochrony etyki dziennikarskiej', *Analiza Biura Krajowej Rady Radiofonii i Telewizji*, 2006, No. 7, pp. 1–75. Notably, *Zasady etyczne dziennikarstwa w telewizji publicznej (informacja, publicystyka, dokument)*, appendix to Resolution No. 110 (96) of the Board of TVP S.A. of 16 May 1996, paragraph 15 includes a reference to the conscience clause and a statement that "The acceptance of the 'Mission of Telewizja Polska S.A. as a public broadcaster' corresponds to a journalist's right to refuse to perform orders that are in conflict with their deep beliefs, the law or ethical principles and requirements of professionalism". Furthermore, "if, as a result of that, an employment contract is terminated, it cannot be of disciplinary nature" (Appendix No. 6, p. 29). As indicated in *Zasady etyki dziennikarskiej w Telewizji Polskiej S.A. – informacja, publicystyka, reportaż, dokument, edukacja* (amendment proposal of 25 January 2006) sec. XV paragraph 4, "a TVP journalist has the right to refuse to perform an official order conflicting with the law, professional ethics or requirements of professionalism, or deep beliefs; if, as a result of that, an employment contract is terminated, it cannot be of disciplinary nature" (Appendix No. 7, p. 38). The rules of conduct of the TVP S.A. journalists in the course of the electoral campaign and the elections (Appendix to Resolution No. 291/2005 of the Board of TVP S.A. of 26 July 2005) stipulate that "independence imposes a responsibility for objectivism and truthfulness of information on journalists; it requires autonomy of thinking and resistance to external pressures. Under the conscience clause, a journalist has the right to refuse to perform orders that are in conflict with their beliefs, the law in force and ethical principles" (Appendix No. 8, p. 39).

[9] Szast, M., 'Znaczenie sumienia we współczesnym dyskursie metodologicznym nauk społecznych', in: Piestrak, R., Psonka, S., Szast, M. (eds), *Klauzula sumienia. Regulacje prawne vs. Rzeczywistość*, Stalowa Wola, 2015, p. 55.

[10] Segales, J., *La clausula do conciencia del professional de la information*, Valencia, 2000, p. 58; Escobar de la Serna, L., *La cláusula de conciencia*, Madrid, 1997, pp. 38–44.

a journalist and then in the Labour Code. However, this clause has been seldom invoked in court proceedings and there is a scarcity of judgements on this issue.[11]

The Italian system has an interesting legal situation with the conscience clause without a normative form, but invoked by the judicature.[12] It is sometimes introduced into the collective labour agreement for journalists. In fact, it relates to the issue of journalist' compensation in the event of an editorial policy change or if prepared press material is used in a press publication with an entirely different profile. Yet, these solutions only apply to certain journalists, such as professionals, columnists, apprentices, freelance journalists and web editors responsible for electronic editions.[13]

Numerous attempts to introduce the conscience clause to the Polish legislation have been mase, connected with calls for a systemic change in the rules. Initial attempts at the turn of 1990 faced a divided journalistic community with no will to consider proposals.[14] In 2006, the proposal resurfaced in tandem with another attempt to develop a new press law. However, the journalistic community felt that the Press Law then in force served the function of the press and journalists' interests well and did not support the project.[15] Another attempt to introduce the conscience clause to press law was made in 2009 on the initiative of the Media Ethics Council,

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[11] Derieux, E., *Droit de la Communication,* Paris, 1999, passim; Auvert, P., *Les journalistes. Statu. Resposabilites*, Paris, 1994, passim; the issue of the conscience clause in French press system was the subject matter of an analysis in the unfortunately unpublished doctoral dissertation developed under the supervision of J. Sobczak: Habel, A., *System prasowy Francji (1994–2001)*, Poznań, 2002 (Adam Mickiewicz University, Faculty of Social Sciences, 16 December 2002); see idem, 'Żurnalista z cenzusem', *Forum Dziennikarzy*, 2004, No. 3.

[12] In the Italian legal system, the conscience clause is applicable to physicians and other medical staff, and lets them refrain from providing medical services that are in conflict with their conscience. It results from the regulation of Article 9 of the Act of 22 May 1978 No. 194 concerning standards of the protection of maternity and performing abortion; see Legge del 22 maggio 1978 n. 194, Gazz. Uff. del 22 maggio 1978, No. 140. The conscience clause in the Italian legal system has legal grounds in Article 21 of the Constitution, which proclaims freedom of conscience. Under that Article, everyone has the right to freely express their thoughts with the use of words, writing and any other forms of dissemination. Thus, one can infer from this provision that conscientious objection is an attribute of the freedom of conscience. The Italian Constitutional Court, in its judgement of 10 February 1997 No. 43, stated that the freedom of conscience should be classified as a recognised and inviolable human right. In addition, in another judgement of 19 December 1991 No. 467, the Constitutional Court asserted that individual protection of conscience constitutes part of fundamental freedoms and the rights that are inviolable, recognised and guaranteed to a human being as an individual, which are referred to in Article 2 of the Constitution, constituting a constitutional value justifying exemption from public duties determined in the Constitution as superior (the conscience clause). Urbaniak, M., *Klauzula sumienia wobec nowych procedur medycznych we włoskim systemie prawnym*, Toruń, 2016, pp. 59–75.

[13] Molina, C., *Empresas de Communicacion y "Clausula de conciencia" de los periodistas*, Granada, 2000, p. 22; Capseta, J., *La clausula de Conciencia periodistica*, Madrid, 1998, pp. 64–70.

[14] Sobczak, J., *Prawo prasowe. Komentarz…*, op. cit., pp. 18–19; Iłowiecki, M., *Pilnowanie strażników, Etyka dziennikarska w praktyce*, Warszawa, 2012, p. 190 et seq.

[15] Kononiuk, T., *Etyczne dziennikarstwo. Ewolucja deontyczna zawodu*, Warszawa, 2015, p. 17; idem, *Profesjonalizacja w dziennikarstwie. Między modernizmem a ponowoczesnością*, Warszawa, 2015, p. 151 et seq.

which indicated the protective function that the clause would offer journalists.[16] The Committee on Culture and the Media, responding to the journalistic community's expectations, included the conscience clause in Article 21 of the Press Law Bill. Controversies arose during the legislative process over the subjective and objective scope of the conscience clause, particularly whether it should apply to all journalists or only those employed in public media. It was emphasised that the conscience clause should prevent exerting pressure on journalists and coercing them to express opinions that are in conflict with their conscience.[17] As a result of the debate, the conscience clause was included in the text of the Bill in the Article stipulating the tasks of public media. Nevertheless, the President vetoed the Act passed by the Sejm, and the Sejm did not reject his veto.

When the need to introduce the conscience clause in relation to journalists was rather insistently promoted in journalistic texts, nobody considered the content of this term in press law and it was actually treated synonymously with 'conscientious objection'. However, in the doctrine, Ewa Łętowska questioned the exact similarity of the two terms.[18] The essence of the conscience clause is the legally recognised option to refuse compliance with a binding legal norm that is in conflict with the indications of conscience. It is sometimes pointed out that the conscience clause is a procedure of pursuing natural-legal freedom of conscience resulting from the inherent dignity of a human being. It also applies to extreme cases when the conscience of one person must decide about the health and life of another person. In the literature, however, it is pointed out that the possibility of acting in compliance with one's own conscience is not only a protected right of the representatives of some non-medical professions, but also their obligation. W. Leder argues that the profession of a judge is such a profession.[19] This raises the question whether a similarly interpreted conscience clause could apply to journalists, who actually do

[16] Iłowiecki, M., *Pilnowanie strażników…*, op. cit., p. 190 et seq. J. Żakowski played an important role in advocating for the clause by indicating that its presence in a normative act would let journalists avoid expressing opinions that are clearly in conflict with their conscience and providing information that does not reflect the real state of facts.

[17] Serafin, M., *Klauzula sumienia w pracy dziennikarskiej,* in: Piestrak, R., Psonka, S., Szast, M. (eds), *Klauzula sumienia…*, op. cit., p. 80.

[18] She states that: "the conscience clause means conscientious objection recognised and institutionalised by the law. It makes an exception to the rule constituting a legal obligation and exempts from liability for the lack of its fulfilment". She emphasises that this is how the conscience clause works in the case of a physician and in the case of military service. Next she indicates that "conscientious objection does not have this feature; it is a wider concept and is close to civil disobedience. It means refraining from fulfilling an obligation (also, but not necessarily, a legal one) being aware of the potentially unlawful conduct and agreeing for a legal sanction in order to express a (moral or civil) protest and is most often a demonstration and an impulse to change the law". Cf. Łętowska, E., 'Tylnymi drzwiami ku uniwersalnej klauzuli sumienia? (Uwagi na marginesie "sprawy drukarza" przez TK)', *Państwo i Prawo*, 2022, No. 2, p. 4.

[19] Leder, W., 'Sumienie sędziego. Czy sędziom powinna przysługiwać możliwość powołania się na klauzulę sumienia?', *Zeszyty Naukowe Towarzystwa Doktorantów UJ Nauki Społeczne*, 2018, Vol. 21, No. 2, p. 161. For more on the issue cf. Zajadło, J., 'Sumienie sędziego', *Edukacja Prawnicza*, 2017/2018, Vol. 169, No. 1, p. 37 et seq.

not decide about others' life and health, but have a significant influence on how the audience for their texts perceive reality.

The conscience clause was first of all applicable to physicians. However, the adoption of the concept in relation to this professional group prompted other professional groups, inter alia pharmacists and teachers, to invoke the conscience clause. It has also constituted grounds for opposing to serve in the armed forces by some believers and non-believers who claimed to be pacifists.

Given the above, questions must arise about the scope of the term 'conscience' and 'freedom of conscience'. Article 53(1) of the Constitution is generally accepted as the constitutional basis for the conscience clause and conscientious objection. This subject has received much academic attention, primarily examining the scope and content of protected rights, their limitations, and conflicts with other rights and freedoms.[20] It has frequently been the subject of interpretation by the Constitutional Tribunal,[21]

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[20] Krukowski, J., 'Konstytucyjna ochrona sumienia i religii', in: *Sześć lat konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, Warszawa, 2003; Kondratiewa-Bryzik, L., Wieruszewski, R., Wyrzykowski, M. (eds), *Prawne granice wolności sumienia i wyznania*, Warszawa, 2001, passim; Hucał, B., *Wolność sumienia i wyznania w orzecznictwie Trybunału Praw Człowieka,* Warszawa, 2012; Sobczak, W., *Wolność myśli, sumienia i religii. Poszukiwanie standardu europejskiego*, Toruń, 2013, passim; Gołda-Sobczak, M., Sobczak, W., 'Wolność sumienia i wyznania w świetle najnowszych orzeczeń Europejskiego Trybunału Praw Człowieka', *Środkowoeuropejskie Studia Polityczne*, 2009, No. 1–2; Gołda-Sobczak, M., 'Wolność sumienia i wyznania, jej gwarancje w systemie prawnym Rady Europy oraz orzecznictwie europejskiego Trybunału Praw Człowieka w Strasburgu', *Ius Novum*, 2008, No. 3; Pyclik, K., 'Wolność sumienia i wyznania w Rzeczypospolitej Polskiej (założenia filozoficzno-prawne)', in: Banaszak, B., Preisner, A. (eds), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa, 2002, p. 437 et seq.; Leszczyński, P.A., 'Wolność sumienia', in: Mezglewski, A. (ed.), *Leksykon prawa wyznaniowego. 100 podstawowych pojęć*, Warszawa, 2014, p. 527; Czochara, A., 'Mechanizmy wolności sumienia i wyznania w państwach Europy Zachodniej', in: Czochara, A., Górowska, B., Nadolski, M., Osuchowski, J. (eds), *Dylematy wolności sumienia i wyznania w państwach współczesnych*, Warszawa, 1996; Janyga, W., *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznania*, Warszawa, 2010; Kłaczyńska, K., *Dyskryminacja religijna a prawno-karna ochrona sumienia i wyznania*, Wrocław, 2005; Łopatka, A., *Prawo do wolności myśli, sumienia i religii*, Warszawa, 1995; Osuchowski, J., 'Prawnoteoretyczne problemy wolności, sumienia i wyznania', in: *Dylematy wolności sumienia i wyznania w państwach współczesnych*, Warszawa, 1996; Pietrzak, M., 'Wolność sumienia i wyznania w RP. Regulacje prawne i praktyka', in: Pietrzak, M., *Demokratyczne świeckie państwo prawa*, Warszawa, 1999; Sobczak, J., Sobczak, W., 'Wolność sumienia i wyznania. Prawo człowieka czy iluzja', in: Jaskiernia, J. (ed.), *Efektywność europejskiego systemu ochrony praw człowieka. Obszary analizy skuteczności Europejskiego systemu ochrony praw człowieka*, Toruń, 2012; Sobczyk, P., 'Wolność sumienia i religii w art. 53 Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997', *Prawo Kanoniczne*, 2001, No. 3–4; Warchalowski, K., *Prawo do wolności myśli, sumienia i religii w Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności*, Lublin, 2004; Winiarczyk-Kossakowska, M., 'Wolność sumienia i religii', *Studia Prawnicze*, 2001, Vol. 147, Issue 1; Wiśniewski, L., 'Wolność sumienia i wyznania w Europejskiej Konwencji Praw Człowieka i w prawie Polskim', *Państwo i Prawo*, 1992, No. 4.

[21] See, inter alia, Constitutional Tribunal judgement of 7 October 2015, K 12/14, OTK-A2015, No. 9, item 143; Constitutional Tribunal judgement of 2 December 2009, U 10/07, OTK-ZU 2009, No. 11A, item 163; Constitutional Tribunal judgement of 5 May 1988, K 35/97, OTK-ZU 1998, No. 3, item 32; Constitutional Tribunal judgement of 7 June 1994, K 17/93, OTK 1994, No. 1, item 11; Constitutional Tribunal judgement of 6 October 2015, SK 54/13, OTK-A 2015, No. 9, item 142; Constitutional Tribunal judgement of 10 December 2014, K 52/13, OTK-A 2014, No. 11, item 118.

the Supreme Court,[22] and administrative courts.[23] In the Polish reality, the freedom formulated in Article 53 Constitution was understood as the freedom to profess religion, on the one hand, and even a guarantee of an atheistic worldview, on the other hand.

Within the colloquial meaning, 'conscience' is "a mental attribute, an ability to correctly assess one's behaviour as consistent or inconsistent with accepted ethical standards; it is the awareness of moral responsibility for one's actions and behaviour".[24] 'Conscience' is a term of religious origin, found not only in Christianity, but also in many other religious systems. With the evolution of ethics, it was borrowed and integrated into various ethical systems.[25] The term 'conscience' has also been adapted for psychological research and remains in use in this field today. Thus, 'conscience' operates in many contexts, which makes it an element of divergent categorical grids, which is not conducive to debaters' agreement. At the same time, it is necessary to agree with the stance that it is challenging to formulate one sufficiently coherent definition that would allow for the interpretation of the conscience clause through its lens if the former takes a normative form. It is due to the fact that conscience will always be "a subjective feeling about what is good and wrong, about justice and injustice".[26] It is pointed out in the doctrine that, even for non-medical professions, conscience in its broad sense encapsulates elements not only stemming from ethical or religious worldview, but also relating to professionalism, knowledge and professional routine.[27]

In relation to the profession of a journalist, professionalism undoubtedly includes principles of reliability, objectivity and exceptional professional diligence, along with the necessity to protect the personality rights of others. At the same time, it is indicated that the right to conscientious objection is seen as a natural right, which should be constrained by positive law due to other values. Absolute right to conscientious objection, some authors argue, could undermine the certainty of law, enable non-compliance with its norms, discrimination, and infringement of other people's rights based on the criteria dictated exclusively by the worldview.[28]

The tendency to regulate the freedom of conscience took place after the Second World War, coinciding with the revival of natural law doctrine and the move to

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[22] See, inter alia, Supreme Court judgement of 27 July 2000, IV CKN 88/80, OSP 2003, issue 9, item 115; Supreme Court judgement of 20 June 2001, I CKN 1135/98, OSNC 2002, No. 2, item 23; Supreme Court judgement of 24 March 2004, IV CK 108/03, OSNC 2002, issue 4, item 65; Supreme Court judgement of 26 February 2003, III KK 500/02, OSNwSK 2003, No. 1, item 419; Supreme Court judgement of 27 June 2003, III KK 227/03, OSNwSK 2003, No. 1, item 1403.

[23] Judgement of the Voivodeship Administrative Court in Szczecin of 24 July 2019, II SA/Sz 451/19 Lex. No. 2722218; judgement of the Voivodeship Administrative Court in Wrocław of 30 January 2018, IV SA/Wr 455/17, Lex No. 2620340; judgement of the Voivodeship Administrative Court in Szczecin of 24 February 2021, II SA/Sz 667/20, Lex No. 3164266.

[24] See Szymczak, M. (ed.), *Słownik języka polskiego*, Vol. III, Warszawa, 1989, p. 370; Dubisz, S. (ed.), *Uniwersalny słownik języka polskiego*, Vol. III, Warszawa, 2003, p. 1450.

[25] Lubowicka, G., *Sumienie jako poświadczenie. Idea podmiotowości w filozofii Paula Ricoeura*, Wrocław 2000, passim; Valadier, P., *Pochwała sumienia*, Warszawa, 1997, passim.

[26] Schwierskott-Matheson, E., *Wolność sumienia i wyznania w wybranych państwach demokratycznych*, Regensburg, 2012, pp. 154–155.

[27] Zajadło, J., 'Sumienie sędziego…', op. cit., p. 40; Leder, W., 'Sumienie sędziego…', op. cit., pp. 164–165.

[28] Ibidem, p. 166.

codify a catalogue of fundamental rights and freedoms of the individual. Today, the freedom of conscience together with the freedom to profess religion is a universal standard and one of the fundamental human rights and freedoms expressed in numerous international legal acts.[29]

The issue of the conscience clause was not included in the rights protected by the International Covenant on Civil and Political Rights or the European Convention for the Protection of Human Rights and Fundamental Freedoms.[30] However, Article 10(2) of the Charter of Fundamental Rights of the European Union (hereinafter: CFR), which was adopted later, introduced a regulation concerning conscientious objection.[31] However, the provision raises doubts. Its official text in the Polish language reads: "Uznaje się prawo do odmowy działania sprzecznego z własnym sumieniem, zgodnie z ustawami krajowymi regulującymi korzystanie z tego prawa" [literally: The right to refuse to act contrary to one's conscience is recognised, in accordance with the national laws governing the exercise of the right].[32] In this wording, Article 10(2) CFR stipulates a new guarantee of human rights and may even be an expression of a new human right.[33] In the English language, the text of Article 10(2) reads: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right". In the French language, it reads: "Le droit à l'objection de conscience est reconnu selon les lois nationales qui en régissent l'exercice". And in the German version it is as follows: "Das Recht auf

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[29] See Sobczak, W., *Wolność myśli…*, op. cit., p. 183 et seq., Piechowiak, M., 'Wolność religijna i dyskryminacja religijna – uwagi w kontekście rezolucji Parlamentu Europejskiego z 20 stycznia 2011 r.', in: Stadniczeńko, S., Rabiej, S. (eds), *Urzeczywistnianie wolności przekonań religijnych i praw z niej wynikających*, Opole, 2012, p. 107 et seq.

[30] See abundant and competent deliberations concerning that by I.C. Kamiński in: Wróbel, A. (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz,* Warszawa, 2020, pp. 348–350. The author draws attention to the fact that the right to refuse to perform military service was recognised regardless of the lack of a clear regulation in the European Court of Human Rights case law and the universal system of the International Covenant on Civil and Political Rights (§ 11 of the General Comment No. 22; also see Resolution No 2002/45 of the UN Human Rights Committee of 23 April 2002). Based on the analysis of the ECtHR case law, it is indicated that the Court understood the freedom of conscience as autonomy in the sphere of philosophical, axiological, moral, as well as political and religious beliefs. It pointed out that the freedom of conscience makes it possible to determine one's intelectual identity. See Milkowski, K., *Klauzula sumienia w orzecznictwie Europejskiego Trybunału Praw Człowieka*, in: Piestrak, R., Psonka, S., Szast, M. (eds), *Klauzula sumienia. Regulacje prawne vs rzeczywistość*, Stalowa Wola, 2015, p. 20.

[31] However, it is emphasised in the literature that despite the lack of a clear regulation in the European Convention, the case law of the European Court of Human Rights in Strasbourg recognised the right to conscientious objection as an important element of democratic society. It took place after the ECtHR reinterpreted the provisions of the ECHRFF as a result of the judgement of the Grand Chamber of 7 July 2011, complaint No. 2345903. See Falski, J., 'Sprzeciw sumienia w orzecznictwie EPTC (na podstawie wyroku Wielkiej Izby z 7 lipca 2011 w sprawie Bayatyan v. Armenii)', *Przegląd Sejmowy*, 2016, Vol. 134, No. 3, pp. 7–19. Earlier on this issue: Sobczak, W., *Wolność myśli…*, op. cit., pp. 458–462.

[32] OJ C 303, 14.12.2007, p. 1.

[33] Skwarzyński, M., 'Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka', *Przegląd Sejmowy*, 2013, Vol. 119, No. 6, pp. 9–26.

Wehrdienstverweigerung aus Gewissensgründen wird nach den einzelstaatlichen Gesetzen anerkannt, welche die Ausübung dieses Rechts regeln".[34]

The German version of Article 10(2) translates into Polish as follows: "Prawo do odmowy służby wojskowej z powodu sumienia zostaje uznane przez ustawy poszczególnych państw, regulujące korzystanie z tego prawa".[35] In many publications, the German text of Article 10(2) is literally translated as follows: "The right to refuse to serve in the armed forces on the grounds conscience is recognised, in accordance with the national laws governing the exercise of this right".[36] Such a translation limits the content of Article 10(2) CFR to military service while the original text refers to any actions, i.e. also to the behaviour of the representatives of various other professions. Thus, it is not possible to question that Article 10(2) CFR was intended to express, and does express, a new normative content that was not included in ECHR and which the ECtHR interpreted in its judgements on Article 10 ECHR.

At the same time, it is necessary to recall Resolution No. 337 of 1967 of the Parliamentary Assembly of the Council of Europe on the right to conscientious objection[37] and Recommendation No. 478 of 1967 on the right to conscientious objection,[38] where it was recognised that the ability to invoke the conscience clause is one of human rights. This position was accepted and broadened in Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe of 7 October 2010 on the right to conscientious objection in lawful medical care.[39] This Resolution established a universal standard for protecting individuals practicing medical professions.[40] The Parliamentary Assembly encouraged the member states of the Council of Europe to develop comprehensive

[34] The different language versions of the Charter of Fundamental Rights of the European Union, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12012P%2FTXT, accessed on 29 January 2023.

[35] Quotation from: Skwarzyński, M., 'Sprzeciw sumienia w europejskim…', op. cit., p. 12.

[36] See Grzymkowska, M. (ed.), *Prawa człowieka*, Kraków, 2005, p. 86.

[37] Resolution 337 (1967). *Right of conscientious objection*, issued at the 22nd Sitting of the Parliamentary Assembly of the Council of Europe on 26 January 1967; for more on the issue see Banaś, H., 'Sprzeciw sumienia w orzecznictwie ETPCz. Problematyka odmowy podjęcia służby wojskowej', *Folia Iuridica Universtitatis Wratislaviensis*, 2015, Vol. 4, No. 2, pp. 71–90.

[38] Recommendation 478 (1967) *Right of conscientious objection,* issued at the 22nd Sitting of the Parliamentary Assembly of the Council of Europe on 26 January 1967. The subsequent normative act was Recommendation No. 816 (1977) on the right to conscientious objection in relation to service in the armed forces. It was submitted to the Committee of Ministers of the Council of Europe with a proposal to include the right to conscientious objection in conventional rights. As a result, on 9 April 1987, the Committee of Ministers of the Council of Europe issued a recommendation concerning the right to conscientious objection in relation to the obligatory service in the armed forces: *Recommendation No. R (87)8 of the Committee of Ministers to member states regarding conscientious objection to compulsory military service*, adopted by the Committee of Ministers of the Council of Europe at the 460th meeting on 9 April 1987.

[39] Resolution 1763, *The right to conscientious objections in lawful medical care,* Assembly debate on 7 October 2010, http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1763.htm, accessed on 22 January 2023.

[40] Nawrot, O., 'Klauzula sumienia w zawodach medycznych w świetle standardów Rady Europy', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2012, No. 3, p. 11.

and transparent solutions to define and regulate the right to conscientious objection in healthcare and medical services.[41]

In its judgements, the Constitutional Tribunal incorporated the conscience clause into the Polish legal system, specifically for physicians obliged to make a decision on the permissability of abortion and to perform abortions, even before its official codification in statutory provisions.[42] According to the judgement of the Tribunal of 15 January 1991, U 8/90, the clause for physicians was introduced based on Article 82(1) of the Constitution of 1952, guaranteeing citizens freedom of conscience and religion, and Article 18 of the International Covenant on Civil and Political Rights.[43] The judgement's justification stated that Article 39 of the Act on the profession of a physician does not create a privilege for physicians as the freedom of conscience is a primary and inalienable category, only confirmed by constitutional law and international regulations.[44] The freedom of conscience was emphasided to mean not only the right to espouse a particular worldview, but above all the right to act in accordance with one's conscience and to be free from coercion to act against one's conscience.

The judgement of the Constitutional Tribunal of 7 October 2015 was undoubtedly decisive for understanding of the conscience clause by the judiciary.[45] Although its subject matter was the compliance of Article 39 Act of 5 December 1996 on the profession of a physician and a dentist with Article 53(1) in conjunction with Article 31(3) of the Constitution in relation to a physician's obligation to provide a medical service that is in conflict with their conscience, the justification, based on an abstract formula, considered the principle of conscience very broadly. Freedom of conscience was indicated to mean not only the right to espouse a particular worldview, but first of all the right to behave in a way that conforms with one's conscience and to be free from coercion to act against one's conscience. This freedom is guaranteed by the conscience clause understood as a possibility to refuse actions that are lawful and obligatory but conflict with the worldview, i.e. ideological or religious beliefs of the individual concerned. At the same time, it was emphasised that in the ethical dimension it proves "the primacy of conscience over statutory law requirements, and in the juridical sphere it ensures the exercise of the freedom of conscience and eliminates conflicts of statutory law with ethical norms, enabling

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41 Cf. Pawlikowski, J., 'Prawo do sprzeciwu sumienia w ramach legalnej opieki medycznej. Rezolucja nr 1763 Zgromadzenia Parlamentarnego Rady Europy z 7 października 2010 r.', *Studia z Prawa Wyznaniowego*, 2011, Vol. 14, pp. 313–338.

42 See judgement of the Constitutional Tribunal of 15 January 1991, U 8/90 OTK 1991, item 8 and ruling of 7 October 1992, U 1/90.

43 As regards the interpretation of Article 18 of the International Covenant on Civil and Political Rights, see Sobczak, W., in: Wieruszewski, R. (ed.), *Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych*, Warszawa, 2012, pp. 419–460.

44 As regards the content of Article 39 APP in conjunction with Article 30 APP, see Bagińska, A., 'Obowiązek udzielenia pomocy lekarskiej oraz prawnie dopuszczalne możliwości od jego odstąpienia', in: Haberko, J., Kocyłowski, R.D., Pawelczyk, B. (eds), *Lege artis: problemy prawa medycznego*, Poznań, 2008, pp. 73–80; cf. also Chudzińska, M., Grzanka-Tykwińska, A., Sygit, B., 'Lekarskie prawo do sprzeciwu sumienia a odpowiedzialność prawna', *Studia Prawnicze KUL*, 2014, No. 4, Vol. 60, pp. 21–40.

45 K 12/14 OTK-A 2015, No. 9, item 143.

an individual to behave decently, consistently with one's beliefs".[46] Forcing actions against one's conscience was rightly noted in the justification as an infringement of the inalienable human dignity.[47]

Furthering this idea, Constitutional Tribunal Judge, A. Wróbel, in a dissenting opinion to the judgement of the Constitutional Tribunal of 7 October 2015, pointed out that the freedom of conscience means, in the internal sphere, the right to form one's conscience, and in the external sphere, the right to express one's own moral beliefs and the right to be free from coercion in accordance with conscience and moral beliefs.[48] He disagreed with the Tribunal's view, expressed in the judgement's justification,

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[46] The author of the gloss on the judgement of the Constitutional Tribunal of 7 October 2015, P. Szudejko, emphasised that the norm of Article 53(1) of the Constitution determines the freedom of conscience in the internal sense as the right to have particular beliefs, to develop and change them freely. He pointed out that freedom of conscience should be taken into account as early as at the stage of choosing a profession, though he overlooked that an individual's ethical imperatives may evolve throughout their life. He also stated that Article 38 of the Act on the profession of a physician and a dentist, primarily refers to the conflict between a physician's ethical beliefs and a patient's will. See Szudejko, P., 'Zakres klauzuli sumienia. Glosa do wyroku TK z dnia 7 października 2015 r., K 12/14', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2016, No. 3, pp. 107–115. Another author of a gloss, O. Nawrot, emphasised that Article 39 of the Act on the profession of a physician and a dentist interpreted in relation to Article 53(1) of the Constitution is a classical limitation clause determining the lawful scope of exercising the freedom of conscience by a physician in relation to a patient. On the other hand, this norm introduces a mechanism for resolving potential conflicts between a physician's positive duty to act in accordance with their conscience and provision of a health service that conflicts with the physician's values, *Przegląd Sejmowy*, 2016, No. 4, pp. 138–143.

[47] Human dignity is at the same time a theological, philosophical, and legal category. Researchers studying dignity trace its roots back to religious texts or natural laws. Among the proponents of the first stance are, inter alia, Thomas Aquinas and Giovanni Pico della Mirandola, and at present, J. Maritain and, in social teaching, Popes John XXIII, Paul VI, and John Paul II. Cf. Mazurek, F.J., *Godność osoby ludzkiej podstawą praw człowieka*, Lublin, 2001, p. 17 et seq.; idem, 'Pojęcie godności człowieka. Historia i miejsce w projektach Konstytucji III Rzeczypospolitej', *Rocznik Nauk Prawnych KUL*, 1996, Vol. VI, p. 34 et seq.; idem, *Prawa człowieka w nauczaniu społecznym Kościoła (od papieża Leona XIII do papieża Jana Pawła II)*, Lublin, 1991, p. 18; idem, 'J. Maritaina Koncepcja praw człowieka', in: Jacques Maritain prekursor soborowego humanizmu', in: Kowalczyk, S., Balawajder, S., (eds), *Jacques Maritain – prekursor soborowego humanizmu: myśl filozoficzno-teologiczna Jacquesa Maritaina*, Lublin, 1992, p. 165, et seq.; Soto-Klass, E., 'Starotestamentowe podstawy godności człowieka', in: Complak, K. (ed.), *Godność człowieka jako kategoria prawa (Opracowania i materiały)*, Wrocław, 2001, pp. 55–64; Gałkowski, J.W., 'Jan Paweł II o godności człowieka', in: Czerkawski, J. (ed.), *Zagadnienie godności człowieka*, Lublin, 1994, p. 108; Maritain, J., 'Osoba i społeczeństwo', in: Kowalczyk, S., *Wprowadzenie do filozofii J. Maritaina*, Lublin, 1992, pp. 42–44. The representatives of the second stance include some Greek philosophers: Hesiod, Heraclitus, the Stoics (Cicero), as well as J. Kant; cf. Meyer, M.J., 'Idea godności u Kanta a współczesna myśl polityczna', in: Complak, K. (ed.), *Godność człowieka jako kategoria prawa*, Wrocław, 2001, pp. 43–53; Łopatka, A., 'Prawa człowieka refleksje wokół pojęcia', in: *Teoria prawa, filozofia prawa, współczesne prawo i prawoznawstwo*, Toruń, 1998, p. 148; idem, 'Prawo natury a świadomość prawna', in: Szyszkowska, M. (ed.), *Powrót do prawa ponadustawowego*, Warszawa, 1999, p. 112; also see Kamela, P., 'Koncepcja minimalna treści prawa natury H.L.A. Harta i jej oddziaływanie w Polsce', in: Szyszkowska, M. (ed.), *Powrót do prawa ponadustawowego*, Warszawa, 1999, pp. 301–314.

[48] See the dissent from judgement of the Constitutional Tribunal of 7 October 2015, case No. K 12/14 OTK – A 2015, No. 9, item 143, pp. 1758–1765. In the further part of the dissenting opinion, it is stated that the Constitution does not guarantee *expressis verbis* the right to refuse to act contrary to one's conscience as part of the freedom of conscience in the same way as Article 10(2) of the Charter of Fundamental Rights of the European Union does.

concerning the exceptional "extra-positive" position of the freedom of conscience among other constitutional freedoms, or the idea that "the Polish constitutional legislator has definitively departed from the concept of granting protection, guaranteeing or tolerating the freedom of conscience (…) because it is an extra-positive freedom inherent in the human nature". Highlighting the dissent, A. Wróbel emphasised that Article 53(1) of the Constitution does not protect every moral belief, but only a moral prohibition or obligation, or permission that is internal and irresistibly obliging to the behaviour or action that is specified in the given circumstances. He pointed out that simple reluctance, prejudice, aversion, ressentiment, repugnance, disgust, contempt, distaste, revulsion, unkindness, dislike or antipathy towards certain behaviour are not protected by Article 53(1) of the Constitution. He emphatically stressed that behaviour in conflict with conscience is not in conflict with any moral belief, but only one that threatens the identity and integrity of a person formed by conscience. In this situation, the right to refuse to behave contrary to one's conscience should be internally limited by the irresistible nature of moral beliefs that obligate an individual to behave in a certain way. He also pointed out that the individualisation of moral beliefs at the constitutional level means that an individual may profess and present their moral beliefs, which are not shared by the majority of society, opposing the dominant system of moral values with their own moral views and beliefs.

The considerations of the author of the dissent seem highly significant for the more crucial thread of this analysis. They are of general and abstract nature while the justification of the judgement of the Constitutional Tribunal largely sidesteps this element, arguing that the judgement "is about the scope of application of the conscience clause by physicians, while the status allows for eliminating a number of doubts and reducing the risk of subjectivism".[49]

The conscience clause applicable to physicians and dentists, resulting from the Act on the professions of a physician and a dentist,[50] as confirmed by judgements of the Constitutional Tribunal[51] and various competent, very detailed and well-documented doctrine opinions,[52] has led to genuine envy among other professional

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[49] The authors of the remaining opinions of dissent from the judgement of the Constitutional Tribunal of 7 October 2015, S. Biernat, T. Liszcz, S. Wronkowska-Jaśkiewicz, also referred to the issue of the conscience clause binding physicians that is exposed in the justification of the judgement. They only criticised it for failing to identify values or rights indicated in the content of Article 31 par. 3 Constitution, the exercise of which might justify the limitation of the freedom of conscience (S. Biernat).

[50] Consolidated text, Journal of Laws 2022, item 1731; cf. Zielińska, E. (ed.), *Ustawa o zawodzie lekarza i lekarza dentysty. Komentarz*, Warszawa, 2022.

[51] Judgement of the Constitutional Tribunal of 7 October 2015, K12/14, OTK-A 2015, No. 9, item 143; see Nawrot, O., 'Glosa do wyroku TK, z dnia 7 października 2015, K12/14', *Przegląd Sejmowy*, 2016, No. 4, pp. 138–148; Szudejko, P., 'Zakres klauzuli sumienia. Glosa do wyroku TK, z dnia 7 października 2015 r., K 12/14', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2016, No. 3, pp. 107–115; judgement of the Constitutional Tribunal of 19 January 1991, U 8/90, OTK 1991, No. 1, item 8.

[52] Zoll, A., 'Klauzula sumienia', in: Stanisz, P., Pawlikowski, J., Ordon, M. (eds), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin, 2014, p. 77 et seq.; Bosek, L., 'Problem zakresowej niekonstytucyjności art. 39 ustawy o zawodach lekarza i lekarza dentysty', in: *Sprzeciw sumienia*…, op. cit.; idem, 'Klauzula sumienia – czy ustawa o zawodach lekarza i lekarza dentysty jest zgodna z Konstytucją RP', *Medycyna Praktyczna*, 2014, No. 1, p. 104 et seq.;

groups, including numerous medical occupations. Interestingly, journalists often voice the need for the ability to invoke the conscience objection. There is no doubt that journalists play a significant role in social and, unquestionably, political life, as by collecting, using and distributing press materials, they inform the public about critical facts and events. Commenting on those facts, they shape public opinion and exert overwhelming influence on the perception of events and their assessment.[53]

idem, 'Klauzula sumienia', in: Safjan, M. (ed.), *Prawo wobec medycyny i biotechnologii. Zbiór orzeczeń z komentarzami*, Warszawa, 2011, p. 24 et seq.; Nawrot, O., 'Prawa człowieka, sprzeciw sumienia i państwo prawa', in: Stanisz, P., Pawlikowski, J., Ordon, M. (eds), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin, 2014; Nesterowicz, M., Karczewska-Kamińska, N., 'Prawa pacjenta w kontekście odmowy udzielenia świadczeń medycznych przez lekarza lub szpital (w związku z klauzulą sumienia)', in: *Sprzeciw sumienia…*, op. cit.; Jakuszewicz, A., 'Ujęcie wolności sumienia w świetle demokratyczno-funkcjonalnej teorii praw podstawowych', *Studia Prawnicze KUL*, 2014, Vol. 59, No. 3, pp. 51–78, therein broad discussion in the German literature; Raczyński, O., 'Klauzula sumienia – gwarancja wolności sumienia przy wykonywaniu zawodu lekarza, czy ograniczenie dostępu do świadczeń zdrowotnych?', *Internetowy Przegląd Prawniczy TBSP UJ*, 2017, No. 2, pp. 173–188; Skwarzyński, M., 'Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka', *Przegląd Sejmowy*, 2013, No. 6, p. 10 et seq.; idem, 'Korzystanie z klauzuli sumienia jako realizacja wolności wewnętrznej, czy/i zewnętrznej', *Opolskie Studia Administracyjno-Prawne*, 2015, Vol. 13, No. 4, p. 16; idem, 'Sprzeciw w sumienia w adwokaturze', in: Mezglewski, A., Tunia, A. (eds), *Standardy bezstronności światopoglądowej władz publicznych*, Lublin, 2013, pp. 201–220; Nawrot, O., 'Sprzeciw sumienia a prawa człowieka i ich filozofia', in: Nawrot, O. (ed.), *Klauzula sumienia w państwie prawa*, Sopot, 2015, pp. 17–34 et seq.; ibid, 'Sumienie lekarza, a prawa człowieka w świetle standardów Rady Europy', *Medycyna Praktyczna*, 2014, No. 1, p. 111; ibid, 'Klauzula sumienia w zawodach prawniczych w świetle standardów Rady Europy', *Zeszyty Prawnicze Analiz Sejmowych Kancelarii Sejmu*, 2012, Vol. 35, No. 3, pp. 11–22; Zoll, A., 'Klauzula sumienia w medycynie – gwarancja czy ograniczenie wolności sumienia pracowników', in: Nawrot, O. (ed.), *Klauzula sumienia w państwie prawa*, Sopot, 2015, p. 120 et seq.; idem, 'Charakter prawny klauzuli sumienia', *Medycyna Praktyczna*, 2014, No. 1, p. 102; Zalewski, W., 'Klauzula sumienia w prawie karnym', in: Nawrot, O. (ed.), *Klauzula sumienia w państwie prawa*, Sopot, 2015, p. 61 et seq.; Orzeszyna, K., 'Klauzula sumienia jako gwarancja realizacji prawa do wolności sumienia', *Medyczna Wokanda*, 2017, No. 9, pp. 17–29; Gałązka, M., 'Odmowa przerywania ciąży a klauzula sumienia lekarza', *Studia z Prawa Wyznaniowego*, 2013, No. 16, pp. 23–42; Dobrowolska, B., 'Sprzeciw sumienia w praktyce pielęgniarki i położnej. Analiza rozwiązań polskich i wybranych rozwiązań europejskich', *Studia z Prawa Wyznaniowego*, 2013, No. 16; Drozd, M., 'Prawo farmaceuty do sprzeciwu sumienia w świetle obowiązujących regulacji prawnych', *Studia z Prawa Wyznaniowego*, 2013, No. 16; Szostek, A., 'Sprzeciw sumienia a prawo naturalne', *Teologia i Moralność*, 2013, Vol. 14, No. 2, pp. 7–8; Radlińska, I., Kolwitz, M., 'Klauzula sumienia realizowana w prawie medycznych zawodów medycznych w kontekście realizacji Europejskiej konwencji praw człowieka', *Pomeranian Journal of Life Sciences*, 2015, Vol. 61, No. 4, p. 464 et seq.; Brzozowski, W., 'Prawo lekarza do sprzeciwu sumienia (po wyroku Trybunału Konstytucyjnego)', *Państwo i Prawo*, 2017, No. 7, p. 34; Bar, W., 'Problematyka klauzuli sumienia w polityce i prawie meksykańskich Stanów Zjednoczonych', *Teka Komisji Prawniczej OL PAN*, 2012, pp. 48–59; Ferenc-Szydełko, E., 'Wolność sumienia jako dobro prawne', in: Kozerska, E., Maciejewski, M., Stec, P. (eds), *Historia testis temporum, lux veritatis, vita memoriae, nuntia vetustatis. Księga jubileuszowa dedykowana profesorowi Włodzimierzowi Kaczorowskiemu*, Opole, 2015, pp. 671–689; Cichoń, Z., 'Klauzula sumienia w różnych zawodach', in: *Prawnik katolicki a wartość prawa*, Kraków, 1999, pp. 44–51.

[53] Sobczak, J., 'Dziennikarstwo – zawód, misja czy powołanie?', in: Cisak, W. (ed.), *Media i dziennikarstwo na przełomie stuleci. Wybrane zagadnienia*, Poznań, 2004, pp. 7–30; idem, 'Zawód dziennikarza w optyce Europejskiego Trybunału Praw Człowieka. Między idealistycznym a realistycznym paradygmatem wolności prasy', in: Lis, W. (ed.), *Status prawny dziennikarza*, Warszawa, 2014, pp. 61–98; Sobczak, J., Kakareko, K., 'Zawód dziennikarzy w obliczu zmian', *Zeszyty Naukowe KUL*, 2017, Vol. 237, No. 1, pp. 107–141.

Current press law seems to attach great importance to journalists' duties, mandating particular diligence and reliability in collecting and using press materials, and advising them to verify the truthfulness of acquired information.[54] They must also protect personal goods and interests of informants acting in good faith, as well as use correct language and avoid profanities (Article 12(1)(1)–(3) of the Press Law).[55] It is indicated in a very general way that journalists are required to serve society and the State, acting within the law's limits in accordance with professional ethics and social coexistence principles (Article 10(1) of the Press Law).[56] Recognising the importance of these obligations, the legislator safeguarded freedom of the press and other means of social communication in Article 14 of the Constitution, while ensuring in Article 54(1) of the Constitution that everyone shall have freedom to express opinions, and acquire and disseminate information. This constitutional freedom of the press, affirmed in numerous international acts, had given rise to

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[54] Wiśniewski, A., 'Uwagi o zastosowaniu standardów Strasburskich w sprawach dotyczących dóbr osobistych (na tle ostatnich orzeczeń ETPC w sprawach przeciwko Polsce)', *Gdańskie Studia Prawnicze*, 2018, Vol. XXXIX, pp. 73–85; Nowikowska, M., Sieńczyło-Chlabicz, J., 'Obowiązek szczególnej staranności w świetle ustawy prawo prasowe', *Przegląd Ustawodawstwa Gospodarczego*, 2009, No. 3, pp. 21–32; Kordasiewicz, B., *Jednostka wobec środków masowego przekazu*, Wrocław–Warszawa–Kraków, 1991, pp. 37–39; Wasilewski, P., *Wolność prasowej wypowiedzi satyrycznej. Studium cywilistyczne na tle porównawczym*, Warszawa, 2012, pp. 221–238; Rodak, B., *Swoboda dziennikarskiej wypowiedzi. Prawo do ochrony dobrego imienia osoby oskarżonej w postępowaniu karnym. Glosa do wyroku ETPC z dnia 2 czerwca 2015 r., 54145/10*, LEX/el, 2015; Pałka, K., 'Odpowiedzialność prasy za naruszenie dóbr osobistych. Glosa do wyroku SN z dnia 29 marca 2012 r., I CSK 370/11', *Przegląd Sądowy*, March 2013, pp. 125–132; Barta, J., Markiewicz, R., 'Bezprawność naruszenia dobra osobistego wobec rozpowszechnienia w prasie nieprawdziwych informacji', in: Ogiegło, L., Popiołek, W., Szpunar, M. (eds), *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków, 2005, p. 796 et seq.; Wierciński, J., *Niemajątkowa ochrona czci*, Warszawa, 2002, p. 137 et seq.; Krajewski, M., 'Niezachowanie należytej staranności – problem bezprawności czy winy', *Państwo i Prawo*, 1997, Issue 10, p. 38; Grzeszak, T., 'Obowiązek dziennikarskiego autosprostowania. Glosa do wyroku SN z dnia 14 maja 2003 r., I CKN 463/01', *Przegląd Prawa Handlowego*, 2004, No. 3, p. 55 et seq.; Nowikowska, M., 'Kryterium działania w interesie społecznym jako okoliczność wyłączająca bezprawność naruszenia dóbr osobistych', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2010, No. 3–4, pp. 93–101; Zalewski, W., 'Wyłączenie bezprawności zniesławienia; argumentum relata refero czy kontratyp cytatu? Glosa do postanowienia SN z dnia 7 lutego 2007 r., III KK 243/06', *Gdańskie studia Prawnicze – Przegląd Orzecznictwa*, 2008, No. 2, pp. 129–138; Tymiec, R., 'Pojęcie bezprawnego naruszenia dóbr osobistych – art. 24 § 1 k.c. art. 12 ust. 1 pkt. 1 prawa prasowego. Glosa do wyroku SN z dnia 14 maja 2003, I CKN 463/01', *Państwo i Prawo*, 2004, No. 4, pp. 120–124.

[55] Gołda-Sobczak, M., 'Use of indecent words in a public place as a misdemeanour', *Ius Novum*, 2019, Vol. 13, No. 4, pp. 58–72; idem, 'Odpowiedzialność karna za zniewagę. Uwarunkowania językowe', in: Jakuszewicz, A. (ed.), *Język i prawo*, Bydgoszcz, 2018, pp. 125–142; judgement of the District Court in Warsaw of 22 August 2018, X Ka 721/18, LEX No. 2566284.

[56] Wójciuk, M., 'Pozaprawne podstawy odpowiedzialności dziennikarskiej', *Palestra*, 2013, No. 3–4, pp. 27–33; Kruk, E., 'Dziennikarz jako zawód zaufania publicznego', *Annales Universitatis Mariae Curie-Skłodowska*, 2017, Vol. 64, No. 2, pp. 131–146; Raczkowska, A., *Kształtowanie się dziennikarskiej etyki normatywnej w Polsce*, Warszawa, 2019, passim. Judgement of the Appellate Court in Warsaw of 13 January 2009, VI ACa 908/08, LEX No. 1641217; judgement of the Supreme Court of 21 July 2017, I CSK 375/16, Legalis 1651437; judgement of the Supreme Court of 4 April 2017, I CSK 245/16, Legalis 1657003; judgement of the Appellate Court in Warsaw of 20 January 2017, I ACa 2139/15, Legalis 1657694; judgement of the Appellate Court in Warsaw of 10 May 2016, I ACa 1076/15, Legalis 147014; judgement of the Appellate Court in Białystok of 6 November 2016, I ACa 562/15, Legalis 1360655.

numerous analyses in commentaries, monographs and articles.[57] Discussing them herein would, however, exceed the scope of this study.

The original wording of Article 10(2) of the Press Law was changed by means of Article 1(3) of the Act of 27 October 2017[58] amending the Act as of 12 December 2017. The reference to the provision of the conscience clause or conscientious objection was abandoned. As it stands now, journalists have the right to refuse to carry out an official order if the text they are supposed to publish infringes the principle of reliability, objectivism and professional diligence, referred to in Article 12 of the Press Law. However, this raises a question whether an official order applies to journalists cooperating with an editorial office based on a mandate contract, a specific task contract or within the cooperation of businesses, or employed based on the labour contract. Some doctrine representatives believe that Article 10(2) of the Press Law through the content of Article 12(2) and (3) of the Press Law, also applies to professionals operating under non-employment types of contracts.[59]

Invoking Article 10(2) of the Press Law protects a journalist against the possibility of losing the job. Of course, reference to Article 10(2) when refusing to carry out an official order or to consent to modification of the press material does not constitute a breach of employee's obligations. However, it is emphasised in the doctrine that this does not mean that the employer or persons acting on his behalf must consider this behaviour legitimate. The employer may be convinced that the order they issued was not in conflict with the requirements of journalistic objectivism, diligence and reliability, and did not justify refusal to give consent to changes in the press material.

The renunciation of reference to 'conscience clause' or 'conscientious objection' in Article 10(2) is a right step because it settles potential disputes over the objective scope of the terms. It also does not provoke representatives of other professions to file claims for similar rights. The content of Article 10(2) CFR is clearly not sufficiently known to the representatives of professional corporations and individual representatives of various professions, who probably do not realise that it gives them the right to refuse to act contrary to their conscience. Without referring to the issue of conscience, in Article 10(2) of the Press Law the legislator linked the journalists' right to refuse to carry out an official order to the obligations laid down in Article 12(1) of the Press Law. Their

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[57] Sobczak, J., 'Wolność myśli, wypowiedzi, słowa, przekazywania i otrzymywania informacji w projektach konstytucji zgłaszanych dobie prac ustrojodawczych w latach 1993–1997', in: Piontek, D. (ed.), *W kręgu mediów i polityki*, Warszawa, 2003, pp. 177–190; idem, 'Wolność środków społecznego przekazu czy wolność ekspresji w orzecznictwie Trybunału Sprawiedliwości w Strasburgu', in: Paradowski, R. (ed.), *Kulturowe instrumentarium wolności. Etyka i prawo*, Poznań, 2005, pp. 163–208; idem, 'Wolność słowa w myśl litery prawa i w praktyce prasy lokalnej (polski zaścianek środków społecznego przekazu w globalnej wiosce wobec wyzwań europejskich systemów prawnych)', in: Chłopecki, J., Polak, R. (eds), *Media lokalne a demokracja lokalna*, Rzeszów, 2005, pp. 59–90; idem, 'Wolność prasy. Złudzenia – oczekiwania – rzeczywistość', in: Sokołowski, M. (ed.), *Media w Polsce. Pierwsza władza IV RP?*, Warszawa, 2007, pp. 303–334; idem, 'Czy wolność słowa i wolność prasy są rzeczywiście potrzebne społeczeństwu i państwu?', *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 2018, yearly LXXX, Issue 1, pp. 133–150.

[58] Journal of Laws 2017, item 2173.

[59] Raczkowska, A., Raczkowski, M., 'Klauzula sumienia w zatrudnieniu dziennikarza', *Praca i Zabezpieczenie Społeczne*, 2021, No. 6, pp. 15–23.

scope, beyond doubt, has been in fact clarified in the doctrine many times and has been the subject of numerous judgements of the Supreme Court and common courts. At the same time, emphasis was placed on principles of reliability, objectivism and professional diligence, aligning with the current paradigm of responsible journalism. However, the current provision of Article 10(2) of the Press Law has not been invoked during court disputes and has not been noted in case law. The doctrine largely overlooked this change; its existence was acknowledged but no thorough analysis was conducted. The right to refuse to carry out an official order, granted to journalists, seems closer to the construction of conscience objection than the conscience clause.

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LEGAL STATUS OF THE POLISH ACADEMY OF ARTS AND SCIENCES

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Abstract

The aim of this article is to analyse the legal status of the Polish Academy of Arts and Sciences, an entity operating within the system of higher education and science. The study explores the Academy's origins, its legal form and role it plays within the system of higher education and science, and its rights and obligations under the law. The findings presented in the paper allow for drawing conclusions on the legal status of the Academy, in particular recognising that it is a legal person functioning in the legal form of a (registered) association, and at the same time an organisation directly included by the legislator in the category of entities of the system of higher education and science. The study indicates the reasons justifying the Academy's inclusion in the catalogue of entities of this system, primarily its exceptional achievements in the field of scientific activities and popularising their results, as well as the universality of undertaken activities, tradition and reputation within the scientific community.

Keywords: Polish Academy of Arts and Sciences, higher education, science, associations

1. INTRODUCTION

The article's topic is the legal status of the Polish Academy of Arts and Sciences [Polska Akademia Umiejętności] (hereinafter: PAU). The Polish legal order lacks a universally applicable legal act regulating the organisation (structure) and functioning of this institution in a separate and comprehensive manner. Provisions governing PAU's rights and obligations are dispersed throughout the legal system,

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with a significant part relating to the area of higher education and science, which is in line with the tasks the PAU performs.

In my opinion, examining the legal form under which the PAU operates and its organisational evolution is essential. Another interesting aspect is PAU's role as an entity in this system, i.e. what are PAU's rights and obligations in its capacity as part of Polish science. Additionally, the obligations and rights of the PAU in other areas should be analysed as well. I believe that analysing these matters will enable us to understand PAU's legal form, its role resulting from the legal system, and why the legislator has distinguished the PAU as an institution related to the Polish system of higher education and science.

The primary method employed in this study is dogmatic, entailing an analysis of regulations that determine the functioning of the PAU and other entities within the system of higher education and science. When necessary, the historical-legal method is also employed, focusing on the genesis of PAU and its organisational and legal evolution.

2. GENESIS OF THE PAU

PAU traces its origins back to the late 18th century. In 1776, Hugo Kołłątaj proposed the idea of reforming the Jagiellonian University "and establishing an institution dedicated to scientific research. His project envisaged introducing five academies instead of four traditional academic faculties: philosophy, law, medicine, and theology".[1] In 1809, "Prince Józef Poniatowski, having taken control for the Duchy of the then Austrian-ruled Kraków, the former capital of Poland, granted the Jagiellonian University a statute. It followed Hugo Kołłątaj's idea, establishing Kraków Academic Institute, modelled on the French Institute with an aim to support the comprehensive development of science. However, this concept did not come to fruition at that time".[2] In 1815, the Kraków Learned Society was founded, "on the initiative of Walenty Litwiński, Rector of the University of Kraków, under the statute adopted on 24 July 1815 at the session of the Rector's Council. Alongside the Friends of Science Society in Warsaw, the Poznań Friends of Science Society and the Learned Society in Toruń, it was one of the oldest institutions of general science in Poland, and the only association of this type in the period 1832–1856".[3] The organisation's goal was to "disseminate knowledge in the field of science and arts, and to care for the monuments of Polish history and literature".[4] According to the organisation's Statute, the purpose of its operation was to "multiply all sciences, spread light and propagate industrial art and craftsmanship in the nation".[5]

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1 Dybiec, J., *Polska Akademia Umiejętności 1872–1952*, Kraków, 1993, p. 7.

2 Kutrzeba, S., *Polska Akademia Umiejętności: 1872–1937*, Kraków, 1938, p. 1.

3 Maciuk, M., Mrówka, M., 'Wokół 200. rocznicy powołania Towarzystwa Naukowego Krakowskiego (1815–1872)', *Krakowski Rocznik Archiwalny*, 2016, Vol. 22, p. 240.

4 Danowska, E., 'Akademia Umiejętności – Polska Akademia Umiejętności. Czas przełomu po odzyskaniu niepodległości', *Rocznik Biblioteki Kraków*, 2018, yearly II, p. 151.

5 Maciuk, M., Mrówka, M., op. cit., p. 240.

On 2 May 1871, Emperor Franz Joseph I issued a rescript, transforming the Society into the Academy of Learning [Akademia Umiejętności]. However, it was Józef Majer, a physician, physiologist, anthropologist, Rector of the Jagiellonian University, and the President of the Kraków Learned Society, who initiated the establishment of the organisation.[6] The Academy was founded thanks to the efforts of Prince Jerzy Lubomirski and Earl Alfred Potocki; with the latter being the President of the Council of Ministers (President-Minister) of Austria. As it is indicated, "Józef Majer had an opportunity to draw their attention to the importance of the Institution as well as the position and means appropriate for this task; and finally, the only way to remedy this by granting the Kraków Learned Society the rank of a Public Institution similar to that of Academies".[7] Between 2 May 1871 and 3 May 1872, the Kraków Learned Society transitioned into the Academy of Learning, ending its activities on 29 April.[8] In turn, on 16 February 1872, the Emperor approved the statute (actually prepared by Society members); in line with the statute, "members of the Learned Society elected the first 12 Academy members from among themselves. By the end of that year, faculties were organised, and at the beginning of the next year, the first public meeting was held to celebrate the 400th anniversary of Copernicus' birth, the inaugural meeting with great ceremony in the presence of the authorities, on 7 May 1873".[9]

Until Poland regained its independence, the Academy functioned with minimal change (merely increasing its members count). It was not only a scientific organisation, but also a patriotic one, "considering itself a Polish institution that gathered Polish scholars irrespective of their place of residence and citizenship. Everyone could participate in its work, as well as attend its annual general assemblies, which were held on 3 May to symbolically celebrate anniversaries of the adoption of the 1791 Governance Act".[10] As highlighted, "the Academy of Learning was the most extensive scientific society conducting the broadest scientific activities in Polish territories until 1918".[11] Consequently, after the rebirth of the Republic of Poland it was only natural for this organisation to start functioning as the Polish Academy of Arts and Sciences. The formal change happened on 22 July 1919, following a new statute granted to the institution by the Chief of State.[12] Under this Statute, the PAU was a public service institution under the Polish State's care (later "under the care of the State authorities, in particular under the protection of the President of the Republic of Poland, who shall approve the election of foreign members, both active ones and correspondents, president, vice-presidents and secretary-general"[13]). In its first years in reborn Poland, the PAU faced financial difficulties and, therefore, "the Government of Poland helped the Academy substantially by providing subsidies

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[6] See Sławoj, Z., 'Polska Akademia Umiejętności w służbie narodu', *Niepodległość i Pamięć*, 1998, No. 13, p. 88.

[7] Ibidem.

[8] Ibidem, p. 89.

[9] Kutrzeba, S., op. cit., p. 2.

[10] Danowska, E., op. cit., p. 152.

[11] Ibidem.

[12] Cf. Kutrzeba, S., op. cit., p. 3.

[13] Ibidem, p. 4.

from the Ministry of Religious Denominations and Public Enlightenment. However, after the acquisition of the Żywiec estates and the onset of the Great Depression on the New York Stock Exchange, subsidies were capped at PLN 70,000 per year".[14] The financial situation of the PAU improved only after it acquired a land property "comprised of four parts: Archduke Karol Stefan Habsburg's, Paweł Tyszkowski's, Władysław Józef Fedorowicz's and Stanisław Sozański's.[15]

Upon the outbreak of the Second World War, PAU and its members became the target of persecution: "The German occupation aimed to dismantle the Academy; its authorities were dismissed, and its museum premises were repurposed as warehouses for various scientific collections".[16] Despite conspiracy activities, the war had a devastating impact on PAU: "It lost its assets, which were the basis of its activity, the library and museum collections suffered slightly (…), 70 members died or were killed by the occupier during the war".[17] Post- war it emerged that the new Polish authorities saw no need for PAU and, therefore, actions were taken to curtail and possibly dissolve the organisation. This move was particularly evident amidst increasing trends towards centralisation and ideological oppression. On 21 June 1951, "the General Assembly adopted a resolution on transferring its premises and assets to the Polish Academy of Sciences (PAN)".[18] After 1952, the PAU "started to decline as PAN took over its research units".[19] Revival attempts post-1956 were unsuccessful.

Following the political transformation that started in 1989, PAU resumed activities, firstly by re-establishing its structure and organisational units, then by restoring its scientific and publishing activities.[20] The PAU was (physically) re-established by "a group of members in accordance with the former statute, maintaining its organisational continuity and referring to the traditional forms of its activity".[21]

In my opinion, several conclusions can be drawn from these facts. Firstly, the legal continuity of PAU at least since 1872, when the Academy of Learning was founded based on the Kraków Learned Society, is undeniable. Despite systemic and organisational transformations over the decades, the PAU was never officially dissolved (even when post-war communist authorities undertook a number of actions actually aimed at ending its operation). Secondly, it should be recognised that the PAU has functioned as a scientific institution, focusing primarily on scientific research and associated popularisation activities. The fundamental profile of the organisation has remained unchanged, positioning the PAU as a learned society that brings together distinguished representatives of the Polish scientific community and acting for the benefit of society since the beginning of its activities.

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[14] Biliński, P., Skrzyński, T., 'Zarząd majątkami Polskiej Akademii Umiejętności w dwudziestoleciu międzywojennym', *Studia z Historii Społeczno-Gospodarczej*, 2010, Vol. VIII, p. 282.

[15] Ibidem.

[16] Dybiec, J., op. cit., p. 13.

[17] Ibidem, p. 14.

[18] Ibidem, p. 22.

[19] Ibidem, p. 23.

[20] See https://pau.krakow.pl/index.php/pl/akademia/historia

[21] https://encyklopedia.pwn.pl/haslo/Polska-Akademia-Umiejetnosci;3959726.html

Thirdly, the non-public nature of the institutions is notable. Although it functioned in various legal and political circumstances, it has never been an administrative agency, but rather an entity independent of the state (within the legal limits), with its own assets and defining its own tasks. Lastly, it should be pointed out that over the decades an important aspect of the PAU's functioning has been its corporate character. Natural persons (eminent Polish scientists) associated with the PAU through membership have consistently formed its core.

These findings related to the historical role of the PAU lead to a discussion about the legal form in which the organisation functions at present.

3. LEGAL FORM OF THE PAU

At the beginning of this part of deliberations, it is necessary to note that in the Polish legal system, there is no universally binding normative act within the Polish legal system that regulates the legal status of the PAU as an individual organisation. Therefore, the regulations governing the PAU's operations should be identified amongst solutions designed for such institutions. To determine which provisions apply to PAU, it is necessary to examine the nature of the institution taking into account the legal and organisational solutions applied to it. The PAU Statute regulations will serve as the basis for this analysis.

As far as the issue of legal continuity of the PAU is concerned, provision of § 1 of the PAU Statute should be recalled, which states that the Academy of Learning in Kraków, established in 1872 based on the Kraków Learned Society founded in 1815 shall be called "the Polish Academy of Arts and Sciences" from the Polish State's rebirth. In my opinion, this provision supports the above-presented reasoning regarding the historical (and also organisational and legal) roots of the PAU. What is noteworthy is the reference to the Kraków Learned Society as a 'parent organisation' from which the Academy of Learning and then PAU originated. This confirms that the PAU originates directly from the Academy of Learning and that the organisation's name change is the only significant aspect from a succession perspective. Another important circumstance is that this provision does not indicate any period of interruption in the PAU's functioning (even during the time when the communist authorities *de facto* supressed organisation's activities), thereby confirming the PAU's formal continuity.

As regards the tasks of PAU, it is necessary to point out § 2 and § 5 of the Statute. First sentence of § 2 stipulates that the PAU is an institution established to nurture science and culture, while § 5 states that the PAU's task is to support and facilitate creative work in Poland, encourage, coordinate, if possible, manage, if necessary, and reward such work.[22] It can be stated that the previously mentioned continuity

[22] The provision also determines that the PAU, in particular, shall record, secure and protect the fruits of the Polish creative work, and make them available to science and common culture, and maintain their communication with abroad; in agreement with Polish scientific and cultural associations and institutions and in cooperation with them, it is obliged to initiate, organise, and conduct scientific and cultural undertakings that should be implemented with the combined

is evident in the scope of the PAU's tasks, with its focus on supporting scientific activities and science popularisation. Therefore, the PAU maintains its operational profile, persisting as a specialised institution, committed to the development of Polish science.

The statutory provisions also establish the PAU as an organisation separate from the administrative apparatus, as confirmed by several factors. Firstly, as § 3 of the Statute stipulates, the PAU has the status of a legal person. In my opinion, this regulation is somewhat imprecise. The solution adopted in the Polish legal system is based on the normative method of regulating legal persons; "Thus, apart from the State Treasury, legal personality is vested only in such organisational units that are granted this status by special provisions. Legal persons are specified organisational units that are equipped with legal capacity and competence to participate in legal transactions thanks to the attribute of legal personality".[23] Hence, under Polish law there are organisational units that have legal personality and those without this attribute. Legal personality stems from the legislator's decision, and the unit in question cannot grant it to itself or limit it by virtue of its internal act. In this context, it should be stated that the formula used in the above-mentioned provision of the Statute might be recognised as not fully consistent with the current legal solutions resulting from commonly applicable law. Instead of using the phrase 'shall have the nature of a legal person', the provision should explicitly state that the PAU 'shall have legal personality'. Stating that an entity 'shall have the nature' of a legal person may suggest that it does not have legal personality but has some features typical of entities with this type of status. While the use of terminology derived from earlier legal systems in a current organisational act is understandable (due to preserving the PAU tradition), in my opinion, the part of the act regarding the organisation's legal status should take into account the need to ensure consistency with the currently binding legal regulations. However, regardless of the terminological issue, it should be pointed out that, in my view, § 3 of the Statute suggests that the PAU is an independent entity. This is linked not only to the legal personality of the PAU indicated in the provision, but to its indirect identification as a self-governing organisation, therefore setting its own operational rules. Secondly, the analysis of the PAU Statute leads to an inference that the organisation creates its bodies and determines their staffing on its own and independently of public authorities.[24] Nevertheless, in this context, it is necessary to notice the elements of statutory regulations that stipulate specific forms of public authorities' influence on the functioning of the PAU in the systemic dimension. In particular, attention should be drawn to the provision under § 20 of the Statute, which states that the President of the Polish Academy of Arts and Sciences shall be elected for a three-year term from among active members by an absolute majority

effort of Polish scholars and artists; in matters connected with science and culture, whenever it recognises that it is in their interest, the PAU is obliged to file motions, commentaries and requests to the State Authorities, or to publicly voice its opinions to society.

[23] Nazaruk, P., in: Ciszewski, J. (ed.), *Kodeks cywilny. Komentarz aktualizowany*, LEX/el., 2022, Article 33.

[24] Cf. § 7 and §§ 19–21 of the Statute.

in a secret ballot at the General Assembly. The same election process applies to the Vice-Presidents of the PAU (pursuant to § 7) and the Secretary General of the PAU. The election of the President, Vice-presidents and Secretary General requires the approval of the President of the Republic of Poland. The regulation, on the one hand, obliges the PAU to seek approval from the President of the Republic of Poland for the election of the holders of its organisation body roles, and on the other hand, seems to be heading towards creating the competence of the President of the Republic of Poland in this respect. However, it should be pointed out that as per current regulations, the President of the Republic of Poland does not have the power to act in this area; neither the Constitution of the Republic of Poland nor any statutes mandate the President of the Republic of Poland to have binding influence on staffing of bodies in non-governmental organisations that are legal persons. In my opinion, the regulation analysed should be interpreted in accordance with the current political system, and thus, understood as the PAU's obligation to notify the President of the Republic of Poland about the election of its authorities. However, it does not imply the President of the Republic of Poland's competence to shape the personnel of those bodies. This type of competence would have to be laid down in a commonly binding legal act. Alternatively, the regulation in question could be interpreted as a type of 'encouragement' for the President of the Republic of Poland to do the PAU the 'courtesy' of responding, i.e. informing the PAU that the state body has acknowledged the election of the organisation authorities. Thirdly, attention should be drawn to the statutory norms regarding the PAU's assets. The Statute clearly indicates the PAU's financial separateness and independence. § 25 stipulates that PAU's assets consist of movables and immovable property for its general purposes, and assets for special purposes, used as per the donor's instructions. In turn, § 26 of the Statute details the types of PAU's income. It is noteworthy that, in accordance with the Statute, the primary source of PAU's finance is income from the organisation's property, although at the same time the provision assumes that 'state funds' could constitute income as well.

Shifting focus to the relationship between the PAU and persons engaged in its operations, it is first of all necessary to emphasise that the Statute unambiguously implies the existence of membership bonds. This conclusion is derived from numerous statutory provisions, inter alia: § 7 determining the competence of the PAU's General Assembly in electing its members (as well as awarding honorary membership), § 14 categorising PAU members (national members, including national active and national correspondent, and foreign members),[25] § 15 defining obligations of national and foreign members, §§ 16 and 18 detailing procedure for PAU's departments and the General Assembly to elect their members,

[25] It should be pointed out that the Statute limits the number of members of the PAU and determines the requirements they have to meet to perform the function of the PAU member (outstanding scholars and artists, and exceptionally other persons whose creative work was the glory of the Polish nation can be active national members or correspondents; they must be Polish citizens. Citizens of other countries who are outstanding scholars and artists living abroad can be foreign members of the PAU).

§ 17 identifying one more membership category, i.e. honorary membership.[26] Furthermore, § 20 stipulates that the President of the PAU shall be elected from among the organisation's members for a three-year term by an absolute majority in a secret ballot at the General Assembly. The unambiguous and consistent foundation of the PAU on the structure of membership indicates that it should be considered a corporate legal person (a corporation). Membership embodies "a corporate bond between a person who is a member and a corporation, which consists in the fact that the member of the corporation is part of the corporation organisational structure and thus has determined rights and obligations. A corporation is based on the cooperation of a group of entities working towards a specific goal. Cooperation, on the other hand, is expressed through the exercise of rights and fulfilment of obligations by members towards a corporation as a certain community, most often equipped with a separate legal personality".[27] Therefore, there are no doubts that, by emphasising the issue of the PAU membership, the statutory legislator signifies its corporate nature as a legal person.

Another important consideration is how the PAU Statute pertains to the organisation's legal form. Given above-presented findings concerning PAU's legal personality and corporate nature, one would expect the Statute to regulate the PAU's legal position as an association. The features of this type of entity best correspond to the above-mentioned conditions determining the PAU operations. An association is "a voluntary membership-based structure formed to implement jointly agreed plans and utilising selected means".[28] However, upon reading the Statute, it is evident that it does not refer to any association form present in the Polish legal system. It can only be inferred from § 2 that the PAU is 'a public service institution' under "State Authorities' care, in particular under the protection of the President of the Republic of Poland". This solution does not clarify PAU's legal form, since the concept of 'an institution' does not determine a legal-administrative formula typical of associations. There is also no 'national public service institution' in the Polish legal system. Thus, it seems that the formula used in the Statute may be classified as one referring to the tradition and, at the same time, emphasising the significant role of the PAU as an organisation that is permanently present in the Polish scientific community. The inclusion of a phrase referring to public service in the Statute could be also interpreted as a reference to a common-interest association existing in the Polish legal system. Such organisations functioned based on the provisions of the Regulation of the President of the Republic of Poland of 27 October 1932: Law on Associations.[29]

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[26] A person whose merits for Poland are commonly recognised can be honorary member.

[27] Kopaczyńska-Pieczniak, K., 'Rozdział II. Członkostwo w korporacji', in: *Korporacja. Elementy konstrukcji prawnej*, Warszawa, 2019.

[28] Florczak-Wątor, M., in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el., 2021, Article 58. In a broader sense, an association means "a type of social collective, a group formed voluntarily with a conscious intention to achieve particular objectives, which is characterised by the fact that its members share the same or very similar values, forms of conduct, activities and attitudes connected with obtaining the set mutual objectives; and within an association, there are more or less formally determined principles of directing, managing and organising collective activities" (Kopaczyńska-Pieczniak, K., op. cit.).

[29] Journal of Laws, item 808, as amended.

Article 46 of the Regulation stipulates that associations the development of which is particularly useful for the State or social interest of the Republic of Poland may be recognised as common-interest associations.[30] The feature of 'particularly useful' associations does not exist in the current legal system. All associations are subject to regulations laid down in Act of 7 April 1989: Law on Associations[31] and have the same legal position; thus, there are no normative grounds for granting special rights to a particular group of them or favouring those organisations.[32]

Considering these findings, it is necessary to conclude that PAU is a non-state entity that has legal personality and acts in accordance with the principle of voluntary membership of natural persons, characterised by self-governance, functioning for a particularly noble purpose that is the development of Polish science and popularisation of its achievements. Therefore, its essence corresponds to the definition of an association laid down in Article 2(1) of the Act: Law on Associations ("An association is a voluntary, self-governing, permanent and non-profit organisation"). The PAU is an organisation (association) exercising constitutional freedom of association, and its existence and membership depend solely on the will of natural persons. The PAU is self-governing, because, as a legal person operating independently of public authorities, it freely structures its organisation, determines membership criteria, assigns tasks, adopts methods of functioning, as well as takes decisions on the intensity of undertaken activities and on appointing selected persons to PAU authorities.[33] The PAU is a permanent organisation, because its tasks are long-term, planned for many years and without a definitive time horizon. Lastly, the PAU is a non-profit organisation, as its main objective is not to conduct activities generating income but to pursue activities connected with its statutory aims.

Thus, despite the lack of a clear determination of the organisation's legal form in statutory provisions, the PAU should be recognised as an association, acting

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[30] In accordance with Article 47 of the Regulation, the recognition of an entity as a common-interest association used to be based on Regulation of the Council of Ministers, issued on the motion of the Minister of the Interior filed in consultation with the ministers concerned. From the point of view of the practice of this type of associations' functioning, inter alia, Article 48 is considerably important ("An association may accept donations and acquire movable and immovable assets without any restrictions and the need to obtain permissions stipulated in special provisions that regulate matters concerning donations and acquisition of property by natural and legal persons") and Article 51 ("Recognition may be accompanied by granting an association the privilege of exclusivity to operate in a certain scope within the territory of the entire State or smaller, which will entail the exclusion of any other associations from encroaching on this scope in the relevant area, regardless of their former rights and the wording of statutes"). For more on the role of common-interest associations see: Gronkiewicz, A., 'Organy organizacji społecznych jako organy administracji publicznej prowadzące postępowanie administracyjne ogólne', in: *Organizacja społeczna w ogólnym postępowaniu administracyjnym*, Warszawa, 2012.

[31] Journal of Laws of 2020, item 2261.

[32] It can be added that Article 53 Act: Law on associations stipulated that associations that were common-interest ones before the Act entered into force shall be granted the honorary title: "Common-Interest Association" and entered into the register of associations. The provision was adjusting in nature. However, it was repealed on 13 March 1990 by virtue of Act of 23 February 1990 amending Act: Law on associations and Act on Higher Education (Journal of Laws, item 86).

[33] See Rzetecka-Gil, A., in: *Prawo o stowarzyszeniach. Komentarz*, LEX/el., 2017, Article 2.

based on commonly binding provisions that regulate the functioning of this type of organisations. However, it should be noted that PAU is registered in the National Court Register [Krajowy Rejestr Sądowy] of associations, other social and vocational organisations, foundations and independent healthcare institutions.[34]

4. PAU AS AN ENTITY WITHIN THE SYSTEM OF HIGHER EDUCATION AND SCIENCE

The Act of 20 July 2018: Law on Higher Education and Science (hereinafter: LHES), as a comprehensive regulation, stipulates the operating norms of the system of higher education and science. Article 7 LHES identifies the system components, i.e. the institutions forming the system of higher education and science (par. 1) and those acting on behalf of the system[35] (paragraph 2). LHES lists the following system components: universities, federations of the entities of the system of higher education and science, the Polish Academy of Sciences, institutes of the Polish Academy of Sciences, research institutes, international scientific institutes established based on separate legal acts and operating in the territory of the Republic of Poland, the Łukasiewicz Centre, institutes operating within the Łukasiewicz Centre Network, the Polish Academy of Arts and Sciences, as well as other entities involved in scientific activities on an independent and continuous basis.

Thus, as the above facts indicate, the PAU is explicitly included in the provisions of the Act as an inherent part of the higher education and science system.[36] It should be noted that the PAU is the only non-public institution (not founded by public authorities) that has been indicated as an individually designated entity in the catalogue of the institutions of the system of higher education and science (the catalogue also lists other independent entities but they are indicated only by type[37] or implicitly[38]). This legislative approach should be interpreted as a deliberate act by the legislator to distinguish PAU from other entities functioning in the same legal form and in similar areas. It should be pointed out that the PAU might also

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34 The PAU has been registered under No. 0000213557. The entry directly indicates the legal form of the PAU.

35 These are: the National Academic Exchange Agency, the National Research and Development Centre, the National Science Centre, the Medical Research Agency.

36 It is worth noticing that in the legal state before LHES entered into force, there was no attempt to define the system of higher education. Attention is drawn to this fact in literature: "The Law on higher education of 2005, in Article 4(3), introduces an undefined concept of higher education and science indicating that universities are its integral part. Implicitly, the system of higher education was composed of universities, i.e. higher-level schools conducting studies, established in accordance with the statute (Article 2(1)(1) LHES). Act of 30 April 2010 on the principles of funding science (Journal of Laws of 2018, item 87) did not indicate a catalogue of entities creating the system of (science) scientific research or a collective of institutions conducting scientific activities" (Woźnicki, J., in: Degtyarova, I., Dokowicz, M., Hulicka, M., Jędrzejewski, T., Mrozowska, A., Wojciechowski, P., Woźnicki, J., *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2019, Article 7).

37 It concerns entities referred to in Article 7(1)(8) LHES.

38 It concerns independent (non-public) universities.

be included among entities primarily engaged in independent and continuous scientific activities, i.e. those entities that constitute elements of the system of higher education and science because they meet the requirements laid down in LHES. These requirements, equal and objective in nature, do not favour any organisation.

Consequently, PAU will remain a part of the system of higher education and science regardless of whether it will be an institution conducting "mainly scientific activity in an independent and continuous manner" in the future. Even if the PAU, for various reasons, discontinues this type of activity, only the legislator will be competent to decide on its further status as an element of the higher education and science system. The only way to exclude the PAU from the system would be a legislative intervention to amend the catalogue under Article 7(1) LHES. Given PAU's inclusion in the provisions of the Act, there is no need to verify the existence of the circumstances indicated in Article 7(1)(8) LHES. In other words, whenever legal provisions grant specific rights to "an entity of the system of higher education and science", in relation to the PAU, there will be no need to check whether the organisation meets the requirements for conducting a scientific activity. The provisions of LHES determine the status of the PAU in this respect, and nobody will do this in whatever verification procedure (i.e. at the stage of enforcing the law).[39]

This raises the question about the justification for the legislative decision. The existence of a distinguishing feature, a special feature, would provide substantive grounds for including one of the system institutions in the provisions of the law and thus permanently anchoring it within this system. In my opinion, there may be several reasons for including the above-mentioned solution in the Act. First of all, we should emphasise the extraordinary, comprehensive (interdisciplinary) and territorially unlimited scope of the organisation's activity. As per its Statute, PAU "is an institution established to nurture science and culture".[40] This generally formulated task is specified in the organisational act by means of indicating structural conditions that give guidance on the work of this organisation. In accordance with § 6 of its Statute, the PAU consists of six faculties, or Classes: Philology, History and Philosophy, Sciences and Technology, Natural Sciences, Medicine, and Artistic Creativity. These Classes may establish commissions and standing or temporary committees to do research or perform special tasks. These commissions operate beyond the subject matter and scope of the Classes' activities, as deduced from literal interpretation of the Classes' names, attesting to PAU's search for new research areas and flexible approach to the organisational and structural issues.[41]

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[39] The classification of entities as elements of the higher education and science system was, among other things, the focus of deliberations included in the justification for the judgement of the Supreme Administrative Court of 23 June 2020, case No. I OSK 284/20, stating, inter alia, that: "No provision of the statute provides grounds for approving the view that only entry of a unit to the POL-on system establishes its subjectivity and thus enables application for the granting of a scientific category. On the contrary, the wording of Article 346(1) LHES in conjunction with Article 7 LHES explicitly states that, inter alia, other entities conducting predominantly independent and continuous scientific activity are subject to system entry".

[40] § 2 PAU Statute.

[41] For example, the History and Philosophy Class has the following commissions: Commission on Central Europe, Commission on Eastern Europe, Commission on Law, Commission on

What is more, other statutory regulations (§ 12) indicate that inter-class committees and commissions may be established to perform interdisciplinary tasks.[42] In total, the scope of the PAU's activities covers a very wide spectrum of issues and the activeness of the organisation in the scientific area, to greater or lesser extent, relates to all fields of science. This definitely distinguishes the PAU from other organisations (learned societies) that usually focus their research attention and activity on a specific discipline or even its small section. This comprehensiveness of PAU makes it possible to talk about the organisation as a sui generis scientific institution with an extensive field of research interests and using the method of interdisciplinary approach. It is also necessary to emphasise the issue of the territorial range of the PAU's activity. Pursuant to § 4 of its Statute, the organisation is based in Kraków but can establish scientific stations and commissions in other towns in the Republic of Poland or abroad.[43] This indicates the potentially unlimited scope of the PAU's activities and also demonstrates the institution's ability to organise extensive activities and maintain a complex internal structure, including centres located outside the country. Secondly, attention should be drawn to the fact that the current PAU is an entity continuing activities aimed at protecting and developing the achievements accumulated over a hundred and fifty years. Thus, the PAU is a centre that stands out from other Polish scientific associations in terms of maintaining continuity of functioning in the field of conducting various research works.[44] In this functional approach, despite its non-state character, it is closer to the sphere of public service in its broader meaning as activity connected with universality and accessibility for the general public,[45] for the common good, and for general purposes. In this context,

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the History and Culture of Jews, Commission on Prehistory of the Carpathians, Commission on Economic Sciences, Commission on Ethnography, Commission on the History of Wars and Military Science, Commission on Archaeology of Mediterranean Countries, Commission on Media Studies, and Commission on Biographies.

[42] At present, these include: Commission on Threats to Civilisation, Commission on the History of Science, Commission on the Evaluation of Textbooks, Commission on European Matters, Commission on the Philosophy of Sciences, Commission for the Studies on the Polish Diaspora, Commission on Anthropology, Commission on Ergonomics, Commission on Culture and Media Management, and Polish CIHEC Subcommission.

[43] At present, the scientific stations functioning in Poland are in Katowice and Gdańsk, and the stations abroad are in the United States and Canada. Under § 4 the PAU Statute, the approval of the President of the Republic of Poland is required to open a scientific station abroad. However, it should be pointed out that the commonly binding law does not lay down norms granting this type of competence to the President of the Republic of Poland. The internal organisational act, i.e. the statute of association, cannot stipulate this. That is why I interpret the above-mentioned statutory provision as a limitation that the organisation imposes on itself on its own. Thus, it is a measure obliging the relevant bodies of the PAU to notify the President of the Republic of Poland of its intention to establish a scientific station abroad in advance.

[44] We should point to the fact that there are also other scientific associations with a long tradition dating back to the 19th century, e.g. Poznań Society of the Friends of Sciences (est. 1857), Płock Learned Society (1820), Learned Society in Toruń (1875), Polish Philology Society (1893), Polish History Society (1886), and Stanisław Moniuszko Warsaw Music Society (1870), see: https://encyklopedia.pwn.pl/haslo/Towarzystwa-naukowe-dzialajace-w-Polsce; 447101.html (accessed on 11 August 2022).

[45] Cf. the judgement of the Supreme Administrative Court of 26 November 2009, case No. I OSK 222/09.

it is particularly important to emphasise those aspects of the PAU's activities that are connected with the dissemination of scientific knowledge, aim to promote social awareness in various fields and to distinguish persons of outstanding merit in those fields (I mean, in particular, publications of the PAU[46] and activeness connected with awarding prizes for outstanding scientific achievements[47]). Thirdly, attention should be drawn to the fact that PAU's significance as an important component of Polish science has been confirmed by institutional bonds between this organisation and other Polish scientific centres. In this respect, it is in particular necessary to mention the PAU Scientific Library that has been operating since 1 January 2000: "The Kraków Learned Society started building it in the middle of the 19th century. It functioned as the Library of the Academy of Learning (from 1872) and the Library of the PAU (from 1920) until 1952, and from 1953 as an independent facility of the PAN. As a result of the agreement concluded between the PAN and the PAU on 20 October 1999, it was transferred back to the PAU and is under its management".[48] The Archives of Science of the PAN and the PAU in Kraków function based on a similar principle of inter-institutional cooperation: "Apart from the resources of the PAN (from 1953), it keeps archives of the Kraków Learned Society (1815–1872) and other Kraków-based associations, in particular the Academy of Learning (from 1872) and the PAU (1918–1952 and from 1989), as well as numerous works of scientists (…). As a result of the agreement between the PAN and the PAU, since 1 May 2002, it has functioned as an independent unit (formerly a branch of the PAN Archive in Warsaw) called the Archive of Science of the PAN and the PAU in Kraków".[49] It should also be mentioned that the PAU is involved in the activities of the Polish Library in Paris founded in 1838 by the members of the so-called Great Emigration: "The PAU took upon itself an obligation to co-finance the Library (with the use of funds allocated by the Ministry of Education and Science). It also supports substantive work: in 2004–2011 by sending highly qualifies professional

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[46] The PAU publishes scientific journals (inter alia, *Acta Archaeologica Carpathica*, *Acta Militaria Mediaevalia*, *Czasopismo Prawa Karnego i Nauk Penalnych*, *Folia Historiae Artium*, *Kwartalnik Prawa Prywatnego*, *Studia Historiae Scientiarum*), dissertations of the PAU Classes, series publications (inter alia, studies and materials for the history of the Polish Academy of Arts and Sciences, Biblioteka Przekładów z Literatury Starożytnej, Moravia Magna, minutes of the sittings of the Council of Ministers of the Republic of Poland), works of the PAU commissions (inter alia, Prace Komisji Astrofizyki, Prace Komisji PAU do Badań Diaspory Polskiej, Monografie Komisji Etnograficznej, Prace Komisji Etyki Medycznej, Prace Komisji "Fides et Ratio", Prace Komisji Filologii Klasycznej, Prace Komisji Historii i Kultury Żydów, Prace Komisji Historii Wojen i Wojskowości), and non-series publications.

[47] The PAU awards prizes, inter alia, Erazm and Anna Jerzmanowski Prize, Nicolaus Copernicus Prize (in nine categories: astronomy, economics, classics, natural philosophy, cosmology and astrophysics, medicine, earth sciences, and law), Professor Marian Mięsowicz Prize, Professor Tadeusz Browicz Prize, Professor Adam Bielański Prize.

[48] https://pau.krakow.pl/index.php/pl/struktura/biblioteka-naukowa-pau-i-pan (accessed on 11 August 2022).

[49] https://pau.krakow.pl/index.php/pl/struktura/archiwum-nauki-pan-i-pau (accessed on 11 August 2022).

employees, and currently by applying for and conducting research projects aimed at inventorying, cataloguing, developing and digitising the BPP collections".[50]

In my view, these circumstances justify the view that the PAU is an extraordinary entity with specific tasks and unique traditions, while also connected with public institutions operating in the field of scientific activities and the popularisation of their findings (in particular, together with the Polish Academy of Sciences). Thus, PAU distinguishes itself not only through its legal status, but also its functions, scope of scientific research, range of research interests, type of service to citizens, reputation within the Polish scientific community, publishing activities, and its involvement in operating (or co-operating) scientific institutions. In my opinion, it is insignificant that the PAU uses the name 'Academy'. In the context of higher education and science system, it is a term classifying universities within a specific category (academic education institution[51]).

5. RIGHTS AND OBLIGATIONS OF THE PAU RESULTING FROM THE PROVISIONS OF THE LAW

5.1. First of all, it is necessary to indicate the rights of the PAU in relation to exemptions stipulated in Act of 19 March 2004: Customs Law. The provisions of the Act grant exemptions from customs duties, which "constitute an exception to the rule of commonly binding customs duties, which means that every commodity transported from the territory of a third country to the EU customs area is subject to import tax. An importer may be made exempt from customs duties provided that it results from the provisions of the law".[52] The Act stipulates that the mechanism may be applied to:

(1) units and organisations entitled to exemptions from customs duties on educational, scientific and cultural materials;
(2) private institutions entitled to exemptions from customs duties on scientific instruments and equipment;
(3) private institutions entitled to exemptions from customs duties on animals specially prepared for laboratory use and biological or chemical substances;
(4) institutions and laboratories entitled to exemptions from customs duties;
(5) healthcare units and medical institutes entitled to exemptions from customs duties;
(6) institutions involved in quality control of raw materials used in the production of medicinal products that are entitled to exemptions from customs duties.

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[50] https://pau.krakow.pl/index.php/pl/struktura/biblioteka-polska-w-paryzu (accessed on 11 August 2022).

[51] In accordance with Article 14 par. 1 LHES, a university is an academic education institution if it conducts scientific activity and is a holder of a scientific category A+, A or B+ in at least one scientific or artistic discipline. For the genesis of the term "academy" in the Polish system of higher education and science, see Woźnicki, J., in: Degtyarova, I., Dokowicz, M., Hulicka, M., Jędrzejewski, T., Mrozowska, A., Wojciechowski, P., Woźnicki, J., *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2019, Article 16.

[52] Laszuk, M., in: Komorowski, E., Michalski, R., Laszuk, M., *Prawo celne. Komentarz*, Warszawa, 2022, Article 36.

The PAU is an institution entitled to customs duty exemptions in three areas. Firstly, it is the field of scientific instruments and equipment. Pursuant to the provisions of the Regulation of the Minister of Science and Higher Education of 20 December 2010 concerning the list of private institutions entitled to exemptions from customs duties on imported scientific instruments and equipment, PAU is included in the catalogue of entities entitled to exemptions from customs duties on imported scientific instruments and equipment referred to in Article 44(2)(b) of Council Regulation (EC) No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty (OJ L324, 10.12.2009. p. 23), included in the Annex to the implementing act.[53]

Secondly, PAU is included in the list of units and organisations entitled to exemptions from customs duties on imported educational, scientific and cultural materials, as annexed to the Regulation of the Minister of Science and Higher Education of 27 December 2010 concerning the list of units and organisations entitled to exemptions from customs duties on imported educational, scientific and cultural materials (Journal of Laws of 2022, item 1612).

Thirdly, the PAU is also listed in the catalogue of private institutions entitled to exemptions from customs duties on imported animals specially prepared for laboratory use and biological or chemical substances (Regulation of the Minister of Science and Higher Education of 23 December 2010 concerning the list of private institutions exempt from customs duties on imported animals specially prepared for laboratory use and biological or chemical substances, Journal of Laws, item 1738, as amended).

5.2. PAU is an entity that benefits from the funds for higher education and science provided for in LHES. Under Article 366(1)(6) LHES, PAU receives funds for conducting scientific activities and implementing research investments, and may also receive funds under scholarships and programmes of the minister responsible for higher education and science. Pursuant to Article 368(7) LHES, the minister, upon request, shall determine the amount of the subsidy from the funds specified in Article 365 subsection 2 (a) and (b). The method of determining the subsidy amount for the PAU is specified in an implementing act issued based on Article 402 LHES.[54] It should be added here that the PAU is the only association receiving public funds stipulated in

[53] It is worth noting that the annexe contains "a catalogue of private institutions whose main activity is education or scientific research that entitle to exemptions from customs duties on imported scientific instruments and equipment". Therefore, justifiably, the PAU is included among "private institutions". Although Act: Customs Law does not provide a definition of this term (uses it in Articles 44 and 45), it can be justifiably inferred that these are such institutions that were not founded as a result of public authorities' activities (other institutions referred to in the annexe include independent universities and higher divinity schools conducted by churches and religious denomination associations, independent schools, research institutes, the Łukasiewicz Research Network institutes, entrepreneurs that have a status of a research and development centre, the Ossoliński National Institute, and the Kórnik Institute).

[54] The authorisation laid down in this Article has been exercised by means of the issue of Regulation of the Minister of Science and Higher Education of 9 September 2019 concerning method of allocating funds for maintenance and development of educational potential and research potential that is at the disposal of the minister responsible for higher education

LHES in the form of a subsidy. While other organisations operating under this legal framework may benefit from some funds allocated to higher education and science, they do not receive these in the form of subsidies.[55]

5.3. The PAU is also considered in some regulations on awarding prizes in the field of higher education and science. Notably, the President of PAU is defined as an entity eligible to apply for awards to:
(1) the minister responsible for the marine economy, in relation to this minister's awards for academic teachers;[56]
(2) the minister responsible for higher education and science, in relation to awards for outstanding achievements in the field of scientific, educational, research implementation-related and organisational activities, as well as awards for the aggregate achievements;[57]
(3) the President of the Council of Ministers, in relation to awards for outstanding doctoral dissertations, highly evaluated achievements recognised as a basis for granting a higher doctoral degree or achievements in the field of scientific or research implementation-related activities.[58]

5.4. We should also draw attention to regulations recognising PAU as an entity involved in various types of mechanisms aimed at ensuring a high level of initiatives in the field of education and science. In this respect, the following should be highlighted in particular:
(1) PAU's participation in proceedings for entry into the list of experts on general education textbooks and the list of experts on linguistic opinions;[59]
(2) PAU's participation in proceedings for entry into the list of Matura exam moderators;[60]

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and science, and for tasks related to maintenance of training aircraft and training centres for air staff. (Journal of Laws of 2022, item 305).

[55] In accordance with Article 366 par. 1 (8) LHES, an organisational unit acting for popularisation of science is entitled to funds for the implementation of programmes and undertakings of the minister, as well as funds for tasks co-financed from the European Union budget or funds from aid provided by Member States of the European Free Trade Agreement (EFTA) that are not subject to refund, or other funds from foreign sources that are not subject to refund. The legislator did not limit the application of the provision to organisations functioning within specified legal forms; therefore, it can be assumed that they can also include associations.

[56] Cf. § 9 subsection 1 (2) (c) of the Regulation of the Minister of Marine Economy and Inland Navigation of 16 April 2019 concerning awards of the minister responsible for marine economy and inland navigation for academic teachers (Journal of Laws, item 846).

[57] Cf. § 4 subsection 1 (7) of the Regulation of the Minister of Science and Higher Education of 23 January 2019 concerning awards of the minister responsible for higher education (Journal of Laws of 2021, item 2286).

[58] Cf. § 6 subsection 1 (4) of the Regulation of the President of the Council of Ministers of 21 May 2019 concerning the criteria and mode of awarding prizes of the President of the Council of Ministers and a motion to grant them (Journal of Laws, item 976, as amended).

[59] See § 11 subsections 2 and 3 of the Regulation of the Minister of National Education of 3 October 2019 concerning approval of textbooks (Journal of Laws, item 2013).

[60] See Article 9ca (3)(2) of the Act of 7 September 1991 on the system of education (Journal of Laws of 2021, item 1915, as amended).

(3) inclusion of the PAU Library in the list of libraries possessing collections recognised as national library resources;[61]
(4) recognition of PAU as an institution with which the Plenipotentiary of the Government for Development and Internationalisation of Education and Science may cooperate.[62]

6. CONCLUSIONS

The findings presented in this paper allow for drawing conclusions concerning PAU's legal status and tasks. As far as the PAU status is concerned, it is worth pointing out that it is a legal person operating in the legal form of a (registered) association, and at the same time an organisation directly classified by the legislator as one belonging to the category of entities in the system of higher education and science. This classification is supported primarily by PAU's extraordinary achievements in the field of scientific activities and popularisation of their findings, along with its broad activeness, tradition and reputation in the scientific community, as noted by the legislator and reflected in numerous legal regulations. However, it is important to note that, unlike statutory regulations, PAU does not enjoy special systemic status among other associations; the Law on Associations does not lay down norms distinguishing the PAU, nor are there commonly binding regulations recognising PAU as a special kind of association.

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[61] See Annex to Regulation of the Minister of Culture and National Heritage of 4 July 2012 concerning national library resources (Journal of Laws of 2021, item 1308).

[62] See § 3 subsection 2 of the Regulation of the Council of Ministers of 27 April 2022 concerning the establishment of the Plenipotentiary of the Government for Development and Internationalisation of Education and Science (Journal of Laws, item 945).

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