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CONTENTS

ARTICLES

SPIS TREŚCI

ARTYKUŁY

ON INTERACTION OF THE CONSTITUTIONAL COURT AND THE SUPREME COURT OF THE RUSSIAN FEDERATION TO ENSURE CASE LAW INTEGRITY*

IGOR YREVITZ OSTAPOVICH**, JACEK ZALEŚNY***

The abolition of the Russian Constitutional Court chambers (hereinafter the Russian CC), and the legalization of records as well as other novelisations[1] in the law on the Constitutional Court of the Russian Federation aimed at improving the efficiency of the latter.[2] According to the authors, the integration of the Supreme Arbitration Court and the Supreme Court in the single Supreme Court of the Russian Federation (hereinafter the Russian SC)[3] will improve the interaction between the Russian CC and the unified Russian SC, including in the field of achieving the case law integrity. The uniform case law is considered to be either an essential component

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1 М.С. Саликов, *Новеллы конституционного судебного процесса*, Российский юридический журнал № 4, 2011 [M.S. Salikov, Novelisations of constitutional judicial process, Russian Juridical Journal No. 4, 2011], pp. 7–13.

2 See: Г.А. Гаджиев, *Закон "О Конституционном Суде Российской Федерации": новеллы конституционного судопроизводства 2010 г.*, Журнал российского права № 10, 2011 [G.A. Gadzhiyev, The Law "On Constitutional Court of the Russian Federation": Novelisations of constitutional judicial process 2010, Russian Juridical Journal No. 10, 2011], pp. 17–26; В.А. Кряжков, *Законодательная модернизация статуса Конституционного Суда Российской Федерации*, Конституционное и муниципальное право № 10, 2011 [V.A. Kryazhkov, The legislative modernization of status of the Russian Federation Constitutional Court, Constitutional and Municipal Law No. 10, 2011], pp. 13–17.

3 The President of the Russian Federation instructed the unified Supreme Court of the Russian Federation to ensure the uniform interpretation of the law, SPS (Law Reference System) GARANT.ru: http://www.garant.ru/news/569652/#ixzz3XSfY4rkd (application date: 24.11.2016).

and the result of judicial activity[4] or the result of identical qualification of similar cases,[5] and a form of judicial control[6]. The uniform case law in turn should be aimed at promoting the rule of law. The uniform case law is ensured by the judicial supervision[7] or a form of lawmaking activity of higher courts[8].

However, the review of mutual relations of the Constitutional Court and the Supreme Court of the Russian Federation[9] leads to the conclusion that there are certain discrepancies present. Namely, in case of discrepancies between the legal positions of the Constitutional Court and the Plenum of the Supreme Court of the Russian Federation, by virtue of the direct instance, most judges of arbitration and general courts apply the practice of the Plenum of the Supreme Court of the Russian Federation. This preconditions court practice as well as the interpretation of legal provisions and their application in particular cases considered by them. At the same time, other judges use the legal position of the Constitutional Court of the Russian Federation as they consider its decisions and interpretations to be critical

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[4] С.Н. Братусь, А.Б. Венгеров, *Понятие, содержание и формы судебной практики*, [в:] С.Н. Братусь (ред.), *Судебная практика в советской правовой системе,* Москва 1975 [S.N. Bratus, A.B. Vengerov, Case law concept, content, and forms, [in:] S.N. Bratus (ed.), Case law in Soviet legal system, Moscow 1975], p. 9.

[5] Г.Л. Осокина, *Гражданский процесс. Особенная часть*, Москва 2007 [G.L. Osokina, Civil procedure. Special part, Moscow 2007], p. 724.

[6] Н.Г. Муратова, *Единство судебной практики: исторические предпосылки и современные тенденции*, [в:] Н.А. Колоколов (ред.), *Уголовное судопроизводство: теория и практика*, Москва 2011 [N.G. Muratova, Case law unity: Historical background and modern trends, [in:] N.A. Kolokolov (ed.), Criminal proceedings: Theory and practice, Moscow 2011], pp. 731–744.

[7] В.М. Жуйков, *Роль разъяснений Пленума Верховного Суда Российской Федерации в обеспечении единства судебной практики и защиты прав человека*, [в:] В.М. Жуйков (ред.), *Комментарий к постановлениям Пленума Верховного Суда Российской Федерации по гражданским делам*, Москва 2008 [V.M. Zhuykov, The role of clarification of the Plenum of the Supreme Court of the Russian Federation in ensuring the unity of the case law and human rights protection, [in:] V.M. Zhuykov (ed.), Commentaries to the resolutions of the Plenum of the Supreme Court in civil cases, Moscow 2008], p. 7.

[8] Е.К. Замотаева, *Судебное нормотворчество как фактор динамики и стабильности законодательства*, [в:] *Закон: стабильность и динамика*, мат-лы заседания Международной школы-практикума молодых ученых-юристов, Москва 2007 [E.K. Zamotayeva, Judicial lawmaking as a factor of legislative dynamics and dtability, [in:] Law: Stability and dynamics, materials of the meeting of the International School-Workshop of Young Legal Scholars, Moscow 2007], pp. 151–157.

[9] For more information, see: Постановление Пленума Верховного Суда РФ № 5 от 11 февраля 2007 г. "О изменении и дополнении некоторых постановлений Пленума Верховного Суда Российской Федерации по вопросам судебной деятельности", БВС РФ № 3, 2007 [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 5 dated 11 February 2007 "On amendments to certain resolutions of the Plenum of the Supreme Court of the Russian Federation concerning judicial activity", Bulletin of the Supreme Court of the Russian Federation No. 3, 2007], pp. 9–14; Постановление Пленума Верховного Суда РФ № 9 от 16 апреля 2013 г. "О внесении изменений и дополнений в Постановление Пленума Верховного Суда Российской Федерации № 8 от 31 октября 1995 г. 'О некоторых вопросах применения судами Конституции Российской Федерации при осуществлении правосудия'", БВС РФ № 5, 2013 [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 9 dated 16 April 2013 "On Amendments to the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8 dated 31 October 1995 'On certain issues of application of the Constitution of the Russian Federation by the courts in the administration of justice'", Bulletin of the Supreme Court of the Russian Federation No. 5, 2013], pp. 2–7.

for case law. They point out that the legal nature of the decisions of the Russian CC is hierarchically higher than the legal nature of the decisions of the Russian SC (similar to the hierarchy of normative legal acts, in the event of a conflict between subordinate acts and higher-rank ones, the latter apply). This phenomenon by its nature creates a discordance in judicial practice, despite the fact that the uniform application of the law by the courts is ensured by the Supreme Court of the Russian Federation (subpara. 1, para. 7, Art. 2 of the Federal Constitutional Law "On the Supreme Court of the Russian Federation"[10]).

Let us consider one such example. On 27 July 2011, the Presidium of the Supreme Court of the Russian Federation ordered the resumption of proceedings in view of the new circumstances based on recognizing the norms applied in *L.I. Kostareva*[11] Case improper by the Constitutional Court of the Russian Federation. At the same time, the Presidium of the Supreme Court of the Russian Federation in the supervision proceedings reviewed both the above decision of the Constitutional Court in *L.I. Kostareva* Case and other decisions of the Russian CC concerning the issue under review.[12] The review resulted in the following conclusion. The applicant's rights were violated "not by the decision of the first instance court on the property seizure" and "not by the cassation ruling that confirmed the legality and validity of the above decision, but by the continuous nature of seizure and the refusal of the investigating authorities to cancel the interim relief". Given that the applicant did not appeal against the actions and decisions of such authorities, the Presidium of the Supreme Court of the Russian Federation resumed the proceedings and at the same time *upheld such judgments*.[13]

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[10] See: Федеральный конституционный закон: "О Верховном Суде Российской Федерации" от 5 февраля 2014 г. № 3-ФКЗ, Российская газета № 27, 7 февраля 2014 [Federal Constitutional Law "On the Supreme Court of the Russian Federation" No. 3-FKZ dated 5 February 2014, Rossiyskaya Gazeta No. 27, 7 February 2014].

[11] Постановление Конституционного Суда Российской Федерации от 31 января 2011 г. № 1-П город Санкт-Петербург "По делу о проверке конституционности положений частей первой, третьей и девятой статьи 115, пункта 2 части первой статьи 208 Уголовно-процессуального кодекса Российской Федерации и абзаца девятого пункта 1 статьи 126 Федерального закона 'О несостоятельности (банкротстве)' в связи с жалобами закрытого акционерного общества 'Недвижимость-М', общества с ограниченной ответственностью 'Соломатинское хлебоприемное предприятие' и гражданки Л.И. Костаревой" ("Л.И. Костаревой"), Российская газета № 5405, 11 февраля 2011 [Resolution of the Constitutional Court of the Russian Federation No. 1-P dated 31 January 2011, Saint Petersburg, "On the case regarding the review of the constitutionality of provisions of the first, third and ninth parts of Article 115, clause 2 of the first part of Article 208 of the Criminal Procedure Code of the Russian Federation, and the ninth paragraph of clause 1 of Article 126 of the Federal Law 'On insolvency (bankruptcy)' in response to complaints of 'Nedvizhimost-M' closed joint-stock company, 'Solomatinsk Grain Receival Station' limited liability company, and Ms L.I. Kostareva (*L.I. Kostareva* Case), Rossiyskaya Gazeta No. 5405, 11 February 2011].

[12] Resolutions: No. 9-P dated 16 July 2008; No. 9-P dated 28 May 1999; No. 3-P dated 21 March 2007; No. 1-P dated 17 January 2008; No. 6-P dated 25 March 2008; No. 4-P dated 26 February 2010; and rulings: No. 614-O-O dated 17 July 2007 and No. 246-O-O dated 20 March 2008.

[13] К.Б. Калиновский, *Конституционный Суд следователю не указ?!*, Уголовный процесс № 10, 2011 [K.B. Kalinowskiy, Investigators do not take orders from the Constitutional Court?!, Criminal Procedure No. 10, 2011], p. 11.

Ms L.I. Kostareva again filed a suit to the Constitutional Court on 7 February 2013. In its ruling, the Constitutional Court noted[14] that the position set out in the disputed judicial acts did not correspond to the constitutional meaning of the Russian CC Resolution No. 1-P dated 31 January 2011.

On 25 September 2013, the Presidium of the Supreme Court of the Russian Federation resumed the case of Ms L.I. Kostareva, cancelled all judgments on the issue, and sent the case for retrial.[15] Further, the lower courts reviewed their decisions based on the position stated in the Resolution of the Presidium of the Supreme Court.

Despite occasional incidents, including in the above example, in order to minimize discrepancies in the court practice, the Secretariat of the Constitutional Court of the Russian Federation cooperates with the Russian SC Administrative Office Department.[16] Such interaction leads to the conclusion on the positive experience of awareness and bringing of the whole Russian judicial practice to unity. For example, the Letter No. 204P13 of the Supreme Court dated 31 January 2014 indicated the Resolution adopted by the Presidium of the Russian SC,[17] which resumed the proceedings at the proposal of the Chairman of the Supreme Court of the Russian Federation in view of the new circumstances that emerged due to

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[14] Определение Конституционного Суда Российской Федерации от 7 февраля 2013 года № 250-О "По жалобе гражданки Костаревой Людмилы Ивановны на нарушение ее конституционных прав положениями части девятой статьи 115 и статьи 154 Уголовно-процессуального кодекса Российской Федерации", СПС Право: http://docs.pravo.ru/document/view/67159310 (дата обращения: 04.04.2015) [Ruling No. 250-O of the Constitutional Court of the Russian Federation dated 7 February 2013 "Regarding the complaint of Ms Kostareva, Lyudmila Ivanovna, concerning the violation of the constitutional rights by provisions of the ninth part of Article 115 and Article 154 of the Criminal Procedure Code of the Russian Federation", Law Reference System Pravo: http://docs.pravo.ru/document/view/67159310 (application date: 04.04.2015)].

[15] Постановление Президиума Верховного Суда РФ от 25.09.2013 № 128П13, БВС РФ. 2014, № 2 [Resolution of the Presidium of the Supreme Court of the Russian Federation No. 128P13 dated 25 September 2013, Bulletin of the Supreme Court of the Russian Federation No. 2, 2014], p. 9.

[16] Отдел Аппарата Верховного Суда РФ по организационному обеспечению контроля исполнения постановлений Европейского Суда по правам человека и решений Конституционного Суда Российской Федерации (отдел Аппарата ВС РФ) [Department of the Administrative Office of the Supreme Court of the Russian Federation for organizational maintenance of supervision over the implementation of the European Court of Human Rights' judgments and decisions of the Constitutional Court of the Russian Federation (the Russian SC Administrative Office Department)].

[17] Постановление Президиума Верховного Суда РФ от 25.12.2013 № 315-П13ПР. В случае если существенно значимые обстоятельства, являющиеся предметом рассмотрения по уголовному делу, отражены в судебном акте неверно, он не может рассматриваться как справедливый акт правосудия и должен быть исправлен независимо от того, что послужило причиной его неправосудности. [Resolution of the Presidium of the Supreme Court of the Russian Federation No. 315-P13PR dated 25 December 2013. If essential circumstances, which are the subject of the criminal proceedings, reflected in the judicial act are wrong, such an act cannot be regarded as a fair act of justice and should be corrected, regardless of the reason of its illegitimacy.].

the Resolution of the Russian CC.[18] Besides, the Russian SC Administrative Office Department provides the information on individual measures taken in respect of the Russian citizens' complaints considered by the Constitutional Court of the Russian Federation.

Since 2013, the Constitutional Court of the Russian Federation has continued to prepare quarterly reviews of the practice of the decisions issued that are posted on the official website of the Russian CC and submitted to the Russian SC for information. According to the feedback from the law enforcers, the applied practice gave rise to certain interest in arbitration courts and general courts.

According to Russian researchers, the practice of the Constitutional Court and the Supreme Court of the Russian Federation contributes to the "cleanup" of the national legal system from the conflict of legal provisions and the rules of law that contradict the Constitution of the Russian Federation, thereby strengthening the common understanding of regulatory legal acts.[19] Ensuring of the rule of constitutional provisions[20] is the basis for the implementation of granted powers of the Russian CC and SC in terms of achieving the case law uniformity.

In addition, in order to ensure the case law uniformity, federal lawmakers introduced the following rules to the procedural codes:

– in the Code of Civil Procedure of the Russian Federation – "the recognition by the Russian Constitutional Court of the law applied in a particular case as

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[18] See: Постановление Конституционного Суда РФ от 16 мая 2007 г. № 6-П по делу о проверке конституционности положений статей 237, 413 и 418 Уголовно-процессуального кодекса Российской Федерации в связи с запросом Президиума Курганского областного суда, Российская газета, 12 мая 2007 [Resolution of the Constitutional Court of the Russian Federation No. 6-P dated 16 May 2007 in the case concerning the revision of constitutionality of Articles 237, 413, and 418 of the Criminal Procedure Code of the Russian Federation upon request of the Presidium of the Kurgan Regional Court, Rossiyskaya Gazeta, 12 May 2007].

[19] See: Е.А. Ершова, В.Н. Корнев, *Прямое применение Конституции к трудовым отношениям: современные проблемы теории и практики*, Российское правосудие № 6 (74), 2012 [E.A. Ershova, V.N. Kornev, Direct application of the Constitution to labour relations: Modern theory and practice, Russian Justice No. 6 (74), 2012], pp. 59–64; *Л*.В. *Л*азарев, Т.Г. Морщакова, Б.А. Страшун, *Конституция Российской Федерации в решениях Конституционного Суда России*, Москва 2005 [L.V. Lazarev, T.G. Morshchakova, B.A. Strashun, The Constitution of the Russian Federation in the decisions of the Constitutional Court of Russia, Moscow 2005], p. 8.

[20] В.В. Ершов, *Правовая природа правовых позиций суда*, Российское правосудие № 6 (86), 2013 [V.V. Ershov, The legal nature of the legal positions of courts, Russian Justice No. 6 (86), 2013], pp. 37–47; В.В. Ершов, *Судебная власть и правосудие в Российской Федерации*, Москва 2011 [V.V. Ershov, The judicial power and justice in the Russian Federation, Moscow 2011], p. 900; Н.В. Витрук, *Конституционное правосудие: судебное конституционное право и процесс*, Москва 2011 [N.V. Vitruk, The constitutional justice: Judicial constitutional law and proceedings, Moscow 2011], p. 26; *Л*.В. *Л*азарев, *Правовые позиции Конституционного Суда России*, Москва 2003 [L.V. Lazarev, The legal positions of the Constitutional Court of Russia, Moscow 2003], p. 34; А.В. Малько (ред.), *Краткий юридический словарь*, Москва 2008 [A.V. Malko (ed.), Small Dictionary of Law, Moscow 2008], p. 157; М.Б. Смоленский, *Конституционное (государственное) право России*, Ростов 2007 [M.B. Smolenskiy, The Constitutional (State) Law of Russia, Rostov 2007], p. 329; Б.С. Эбзеев, *Конституционный Суд России: правовая природа и функции*, [в:] *Конституционное правосудие в Российской Федерации и Германии: материалы круглого стола 9–10 октября 2012 года*, Москва 2013 [B.S. Ebzeyev, The Constitutional Court of Russia: Legal nature and functions, [in:] Constitutional justice in the Russian Federation and Germany: Materials from the Round Table held on 9–10 October 2012, Moscow 2013], pp. 21–36.

contradicting the Russian Constitution serves as the basis for review of court rulings that have entered into force";[21]

– in the Criminal Procedure Code of the Russian Federation – "the basis for resumption of the criminal proceedings in view of new or newly arisen circumstances, which include the recognizing by the Constitutional Court of the Russian Federation of the law applied by the court in a criminal case as inconsistent with the Constitution of the Russian Federation";[22]
– in the Arbitration Procedure Code of the Russian Federation – "recognizing by the Constitutional Court of the Russian Federation of the law applied by an arbitration court in a specific case in adopting the decision, in connection with which the applicant has filed a petition with the Constitutional Court of the Russian Federation, as incompliant with the Constitution of the Russian Federation";[23]
– in the Code of Administrative Court Procedure of the Russian Federation – "recognizing by the Constitutional Court of the Russian Federation of the law applied in a specific case in adopting the decision, in connection with which the applicant has filed a petition with the Constitutional Court of the Russian Federation, as incompliant with the Constitution of the Russian Federation".[24]

In addition, in April 2015, the Russian SC in its Ruling on the case No. 307-KG14-4737 stated that "(...) the basis for revision of judicial acts due to new circumstances in the applicant's case, in connection with the adoption of the act by the Constitutional Court of the Russian Federation, is not a specific, adopted judicial act, i.e. the decision which may mean in the legal science the decision, resolution, and ruling, but the identified and worded in a particular judicial act (decision in the generalized sense) constitutional and legal meaning of the rule, that has not been attributed to such rule previously in the course of law enforcement".[25]

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[21] П.3, ч.4 ст. 392 Гражданского процессуального кодекса Российской Федерации от 14 ноября 2002 г. № 138-ФЗ (с изменениями и дополнениями от 6 апреля 2015 г.), Российская газета № 220, 20 ноября 2002, [para. 3, part 4 of Art. 392 of the Civil Procedure Code of the Russian Federation dated 14 November 2002, No. 138-FL (as amended on 6 April 2015), Rossiyskaya Gazeta No. 220, 20 November 2002].

[22] П. 1, ч. 4. ст. 413 Уголовно-процессуального кодекса Российской Федерации от 18 декабря 2001 г. № 174-ФЗ (с изменениями и дополнениями от 30 марта 2015 г.), Российская газета № 249, 22 декабря 2001 [para. 1, part 4 of Art. 413 of the Criminal Procedure Code of the Russian Federation dated 18 December 2001, No. 174-FL (as amended on 30 March 2015), Rossiyskaya Gazeta No. 249, 22 December 2001].

[23] П.3, ч.3 ст. 311. Арбитражного процессуального кодекса Российской Федерации от 24 июля 2002 г. № 95-ФЗ (с изменениями и дополнениями от 6 апреля 2015 г.), Российская газета № 137, 27 июля 2002 [para. 3, part 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation dated 24 July 2002, No. 95-FL (as amended on 6 April 2015), Rossiyskaya Gazeta No. 137, 27 July 2002].

[24] П.3, ч.1 ст. 350 Кодекса административного судопроизводства Российской Федерации от 08 марта 2015 г., № 21-ФЗ (с изменениями и дополнениями от 03 июля 2016 г.), Российская газета № 49, 11 марта 2015 [para. 3, part 1, Art. 350 of the Code of Administrative Court Procedure of the Russian Federation dated 8 March 2015. No. 21-FL (as amended on 3 July 2016), Rossiyskaya Gazeta No. 49, 11 March 2015].

[25] Определение Верховного Суда РФ от 21 апреля 2015 г. по делу № 307-КГ14-4737: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=424834 (дата обращения: 24.11.2016) [Ruling of the Supreme Court No. 307-KG14-4737 dated 21 April 2015], pp. 7–8,

At the same time, we should agree with the Chairman of the Supreme Court of the Russian Federation, who notices plenty of rulings of the Constitutional Court, the text of which "literally does not comply with the current rules of the Criminal Procedure Court and introduces certain difficulties in law enforcement".[26]

Summarizing, it should be noted that in addition to the above procedural mechanisms, we believe that annual discussion of controversial law enforcement issues at a joint meeting of the Russian SC and CC, for example at the Joint Plenum of the Russian SC and CC, will contribute to the achievement of the case law uniformity. General solutions found in this manner would serve the case law unification and the reliability of law, i.e. the implementation of the key values of justice.

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[26] Vyacheslav Lebedev considers it necessary to adopt the new Criminal Code and Criminal Procedure Code, Pravo.ru, 18 October 2016, 12:35.

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ON INTERACTION OF THE CONSTITUTIONAL COURT AND THE SUPREME COURT OF THE RUSSIAN FEDERATION TO ENSURE CASE LAW INTEGRITY

Summary

The article discusses the problem of interaction of the Constitutional Court and the Supreme Court of the Russian Federation with respect to case law integrity. The authors present a hypothesis that the merge of the Supreme Arbitration Court and the Supreme Court in the single Supreme Court will improve the interaction between the Constitutional Court and the other courts, including in the field of achieving case law integrity. The uniform case law is considered to be either an essential component and the result of judicial activity or the result of identical qualification of similar cases, and a form of judicial control. The uniform case law should be aimed at promoting the rule of law.

Key words: the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, judicial control, uniform case law

O RELACJACH SĄDU KONSTYTUCYJNEGO I SĄDU NAJWYŻSZEGO W FEDERACJI ROSYJSKIEJ W ZAKRESIE UJEDNOLICANIA PRAKTYKI SĄDOWEJ

Streszczenie

W artykule poddano analizie kwestie interakcji zachodzących między Sądem Konstytucyjnym i Sądem Najwyższym Federacji Rosyjskiej, w kontekście jednolitości orzecznictwa sądów. Autorzy stawiają hipotezę, że ujednoliceniu orzecznictwa sądowego i poprawie współpracy między Sądem Konstytucyjnym i innymi sądami służyłoby połączenie Naczelnego Sądu Arbitrażowego oraz Sądu Najwyższego w Sąd Najwyższy. Dzięki tej zmianie organizacyjnej można byłoby realizować wartość ustrojową w postaci poprawy efektywności działalności sądowej i spójnego rozstrzygania przez sądy w podobnych sprawach. Z kolei jednolitość orzecznictwa sądowego powinna służyć promowaniu rządów prawa.

Słowa kluczowe: Sąd Konstytucyjny Federacji Rosyjskiej, Sąd Najwyższy Federacji Rosyjskiej, kontrola sądowa, jednolitość orzecznictwa

PROSPECTS OF REGULATION OF MINING ACTIVITIES IN THE MODERN SPACE LAW

ZAFIG KHALILOV*

1. INTRODUCTION

As it is well known, international-legal relations in the field of using and research of outer space are regulated by international space law. Obviously, as time passes the presence of some uncertainties and problems in international space law is clearly noticed. Nowadays, one of the most studied and discussed themes in the international space law are issues of legal regulation of mining activities in the outer space. In fact, despite the fact that conducting mining activities in the outer space has been available as an idea since the conquer of space and the Moon, it was applied in practice just as a study aimed for scientific research purposes. However, upon signing, on 24 November 2015, of the Commercial Space Launch Competitiveness Act (CSLCA) in the USA by Former US President Barack Obama, these issues were put on the agenda with new issues. Thus, the law regulating problems of acquiring minerals from outer space was approved in the USA for the first time.

Therefore, the urgency of the subject of this paper is based on investigation of legal prospects related to implementation of mining activities in the international space law. The above-mentioned facts, beside defining the urgency of the given topic, also made it necessary to research this issue and its compliance with modern international law.

The regulatory issues of mining activities in the outer space have been researched since the beginning of the 20th century in the international law literature.

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Fabio Tronchetti,[1] Ricky Lee,[2] Rupert W. Anderson,[3] and Edward Hudgins[4] can be mentioned among the scholars who conduct research in this field and are the authors of books on the subject. However, researchers who have been the authors of papers on this topic in recent years must also be noted: Catherine Lvovna Farafontova,[5] Barry Kellman,[6] Elizabeth Howell,[7] etc.

I must point out that many researchers have discussed this topic at forums and lectures and expressed their views: Stephan Hobe, Tanja Masson-Zwaan, Robert Richards, Ram Jakhu, Gbenga Oduntan, and others. The analysed topic has become one of the issues on the agenda in the international space law due to becoming especially urgent in recent years. The purpose of the forgoing paper is to verify the compliance of the new US normative-legal act, which provides for mining activities in the outer space, with the international law. To achieve this goal, the following tasks need to be undertaken:

– commentary on thoughts and hypotheses of legal scholars from various countries, related to national normative-legal acts adopted in the USA, which regulate mining activities conducted in the outer space;
– analysis of the current contradictions between the US Commercial Space Launch Competitiveness Act and the international Outer Space Treaty;
– assessment of legal superiority of Articles 2, 6 and 9 of the international Outer Space Treaty over newly adopted US law.

As it has been noted above, based on CSLCA, all private companies of the USA obtained the right to possess minerals which have been acquired as a result of their mining activities carried out in the outer space. It means that, by executing this law in the country, the state cannot accumulate the resources which private companies will acquire from the outer space. The given law creates opportunities for the US companies to officially carry out mining activities in the outer space. Currently, according to the newly adopted law, any US citizen may become an owner of any part that has been obtained from an asteroid. On the other hand, as the word

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[1] F. Tronchetti, *The exploitation of natural resources of the Moon and other celestial bodies: a proposal for a legal regime*, Series: Studies in Space Law (Book 4), Martinus Nijhoff Publishers, Leiden–Boston, 2009, p. 382.

[2] R. Lee, *Law and regulation of commercial mining of minerals in outer space*, Springer Science+Business Media, Heidelberg 2012, p. 372.

[3] R.W. Anderson, *The cosmic compendium: Space law*, Lulu.com, United States, 31 March 2015, p. 179.

[4] E. Hudgins, *Space: The free-market frontier*, Cato Institute, Washington D.C., 20 December 2002, p. 220.

[5] E.L. Farafontova, A.N. Beloborodova, *Problems of legal regulation in the field of mining operations in outer space*, Magazine: Actual problems of aviation and astronautics, Issue No. 9, Vol. 2/2013 [Е.Л. Фарафонтова, А.Н. Белобородова, *Проблема правового регулирования в области добычи полезных ископаемых в космическом пространстве*, Журнал: Актуальные проблемы авиации и космонавтики, Выпуск № 9, том 2, 2013]. The publication is available at: http://cyberleninka.ru/article/n/problema-pravovogo-regulirovaniya-v-oblasti-dobychi-poleznyh-iskopaemyh-v-kosmicheskomprostranstve#ixzz4FFrF91GH, accessed on 18 August 2017.

[6] B. Kellman, *On commercial mining of minerals in outer space: A rejoinder to Dr Ricky J. Lee* 39 Air and Space Law, Issue 6, 2014, pp. 411–420.

[7] E. Howell, *Who owns the Moon? Space Law & Outer Space Treaties*, 15 July 2016, available at: http://www.space.com/33440-space-law.html, accessed on 19 August 2017.

"resource" quoted here is of unclear meaning in this context, the said law is related to the Moon, other planets and celestial bodies. In the present situation, a group of persons from "Planetary Resources" and "Deep Space Industries" companies in the USA who are engaged in these activities may easily own these resources. In addition, according to the new law, the US citizens may possess, own, transport, use and sell the space resources acquired as they wish.[8]

The world community became aware that this step taken by the USA was followed by Luxembourg which undertook a similar initiative and justified it by confirming the legality of mining activities in the outer space at the national legislative level.[9] Consequently, the most controversial issue arose for the international legal community. The question is whether the international Outer Space Treaty, which lays the foundation of the international space law, conforms to laws adopted within the national legislative framework.

2. THOUGHTS AND HYPOTHESES OF LEGAL SCHOLARS

At this stage, it would be purposeful to review the thoughts related to this issue of law researchers from various countries.

Professor Ram Jakhu from the Institute of Air and Space Law at McGill University regards the US Space Act as directly violating the treaty since it allows states, private firms, or international organizations to appropriate natural space resources.[10]

Dr Gbenga Oduntan of the University of Kent, an international commercial law expert, claims it can be assumed that the list of states with access to the outer space will grow from the current dozen or so, and they will institute their own space mining programmes. "That means that the pristine conditions of the cradle of nature from which our own Earth was born may become irrevocably altered forever, making it harder to trace how we came into being," he wrote, warning that once celestial bodies are contaminated with earthly microbes, human chances of discovering alien life could be ruined. Furthermore, Dr Oduntan said: "The US House Committee on Science, Space and Technology, for instance, denied any violation of the country's international obligations, although its statement currently does not have any particular reference to international law".[11]

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[8] *How does space law change: whether it is possible to become the owner of an asteroid?* 13 December 2015 [*Как меняется космическое право: можно ли стать владельцем астероида?*, 13 декабря 2015], available at: http://hi-news.ru/research-development/kak-menyaetsya-kosmicheskoe-pravo-mozhno-li-stat-vladelcem-asteroida.html, accessed on 18 August 2017.

[9] A. Pasztor, *Luxembourg sets aside funds for asteroid-mining push*, 3 June 2016, available at: http://www.wsj.com/articles/luxembourg-sets-aside-funds-for-asteroid-mining-push-1464947123, accessed on 19 August 2017.

[10] K. Pascual from Tech Times, U*S Space Mining Law is potentially dangerous and illegal: How Asteroid Mining Act may violate international treaty*, 28 November 2015, available at: http://www.techtimes.com/articles/111534/20151128/u-s-space-mining-law-is-potentially-dangerous-and-illegal-how-asteroid-mining-act-may-violate-international-treaty.htm#sthash.iH2sjGpt.dpuf, accessed on 19 August 2017.

[11] *Ibid*.

Let us focus on the opinions of scholars such as Tanja Masson-Zwaan and Robert Richards on the discussed topic. They both point out that: "The law explicitly intends to be consistent with US obligations under the 1967 Outer Space Treaty, which has been signed by over 100 nations and remains the pre-eminent international agreement governing all activity in outer space. One of its provisions is Article II, which states that outer space, including the moon and other celestial bodies, is not subject to national appropriation. Some are of the opinion that Article II makes it illegal to extract space resources, but this is not supported by international consensus. Indeed, Article II is balanced by Article I, which states, 'Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.' The US space resources law is not about claiming territory, nor an assertion of sovereignty or appropriation of 'celestial land'; it is about confirming and codifying rights for US private citizens/companies to peacefully explore, extract and own resources, like the US and Soviet governments did back in the 1960s and 1970s, and like other governments and companies intend to do in the future. The new law explicitly codifies rights for the private sector that were only implicit in the Outer Space Treaty. It adds a level of certainty for investors and provides a foundation for building additional regulatory frameworks in the United States and elsewhere. The United States, as a signatory to the Outer Space Treaty, is obliged to make sure that any private company it authorizes or licenses will not violate the state's treaty obligations. These include that the exploration and use of space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind and promote international cooperation, that the moon and other celestial bodies may be used only for exclusively peaceful purposes, harmful contamination and interference shall be avoided, etc." Moreover, the above-mentioned researchers also point out that the new US law will help protect mining activities that could one day help the economies of the Earth and secure our future in space.[12]

Russian law scholars when trying to find the solution to this issue refer to the existing similar norm in international Law of the Sea. As it is known, according to the United Nations Convention on the Law of the Sea, dated 10 December 1982, the special norms are considered in connection with regulations for mining of minerals from the international seabed Area: "The Area and its resources are the common heritage of mankind. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized. Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and

[12] *Will the United States rule space resource mining?*, posted on 22 December 2015 by T. Masson-Zwaan and B. Richards in Interdisciplinary Study of the Law, available at: http://leidenlawblog.nl/articles/will-the-united-states-rule-space-resource mining, accessed on 18 August 2017.

needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations."[13]

Thus, many Russian scholars are guided by the norms of the United Nations Convention on the Law of the Sea in legal settlement of the international problem of minerals mining in the outer space. The mentioned researchers support the idea of relevant norm development which may be applied to the international space law.[14]

One can list numerous similar views.

3. CURRENT CONTRADICTIONS AND SUPERIORITY OF THE INTERNATIONAL LAW

I would like to explain my thoughts on the studied topic as follows. As it is well known, Article II of the Outer Space Treaty of 1967 (the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies) reads: "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[15] I think that the quoted Article II clearly stipulates that the outer space is not to be the subject of national appropriation by claim of sovereignty, use or occupation, or in any other manner. In addition, this issue is defined as an important principle of the international space law and has been included in national legislations of the majority of states which have ratified the international Outer Space Treaty. Namely, under this Article, forming the basis of the space law, the matter of contradiction between the newly adopted US law and the international treaty can be seen as urgent. In the modern time, the idea of industrial appropriation of the outer space is considered in terms of space information complexes, space scientific systems, space industrialization, etc. Naturally, although these matters are globally important, this does not mean the space is to be appropriated. Moreover, the ban on national appropriation of the outer space is the base line of international law. From this point of view, any interstate legislative act which facilitates the national appropriation of the outer space contradicts the international law. Unfortunately, this issue is not supported by international consensus among scholars who conduct research in this field.

On the other hand, the US and some European researchers (e.g. Tanja Masson-Zwaan) try to comment on Article I of the international Outer Space Treaty in favour of the USA. In Article I of the Outer Space Treaty, it is said that: "The exploration and use of outer space, including the Moon and other celestial bodies, shall be

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[13] The United Nations Convention on the Law of the Sea (UNCLOS) of 1982, Articles 136, 137, 140, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, accessed on 18 August 2017.

[14] E.L. Farafontova, A.N. Beloborodova, *Problems of legal regulation…* [Е.Л. Фарафонтова, А.Н. Белобородова, *Проблема правового регулирования…*].

[15] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 27 January 1967, Article II, available at: http://www.unoosa.org/pdf/publications/ST_SPACE_061Rev01E.pdf, accessed on 19 August 2017.

carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies. There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation".[16] In my opinion, Article I of the aforementioned treaty is of a general and introductive nature and by no means provides for the mining activities in the outer space as conducted by individual companies at their own discretion. Some researchers speak about "free access of celestial bodies in all areas" and distort the meaning of the relevant article by supplying the wrong commentaries. In fact, Article I of Outer Space Treaty allows only conducting scientific research and studies. As seen in the Article, some countries may cooperate in scientific research carried out in the outer space. However, the law adopted in the USA entirely rejects the requirement of the international treaty. Specifically, according to this law, the US citizens may become the owners of acquired space resources, sell and transport them as they deem. It becomes clear that this law is not intended for scientific research. This law clearly helps individuals and relevant companies to set an extensive business network which will result in mining activities carried out in space.

Overall, it should be noted that there is a fundamental contradiction between the new US law and the international Outer Space Treaty. Primarily, it should be taken into account that both Article II and Article IX of the Outer Space Treaty complement each other and reveal that the newly adopted US law infringes the international law. Article IX of the Outer Space Treaty reads: "States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment."[17] As it can be seen, the states came to agreement on implementing relevant actions for prevention of outer space and celestial bodies from contamination, and of undesirable change to the environment on the Earth. It means that the states which adopted this treaty cannot be ignorant of this matter, which is crucial for mankind. I should be pointed out that the duty of the states to avoid harmful contamination of the outer space is considered by many researchers an important principle of the international space law.

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16 *Ibid*. Article I.
17 *Ibid.* Article IX.

The contradictions between the international Outer Space treaty and the newly adopted US law do not consist of just the above-commented issues. Given this, I must point out in particular the provisions related to activity of non-governmental organizations in the outer space, as stipulated in the other parts of the said international treaty. Such contradictions are directly linked with the implementation of obligations arising from the newly adopted US law. As it is well known, Article VI of the international Outer Space Treaty stipulates that: "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty."[18] As it can be seen, Article VI of the treaty requires countries to perform "authorization and continuing supervision" of activities in space by non-government entities under their jurisdiction. That is usually done in the United States by licensing of commercial activities: by the Federal Aviation Administration (FAA) for launches and re-entries, by the Federal Communications Commission (FCC) for communications, and by the National Oceanic and Atmospheric Administration (NOAA) for remote sensing. But other emerging commercial activities, including not just asteroid mining but also lunar landers, satellite servicing, and commercial space stations, fall into gaps where there is no clear licensing authority and, thus, no means for the US to carry out its obligations under Article VI.[19]

To regulate at least the said activity, the matter of allowing of such missions had to be reflected in the US legislation. The above once again shows that the USA cannot implement the obligations stipulated in Article VI of the international Outer Space Treaty as it is required. Thus, the USA is deprived of the present law application practice and there is a legal vacuum in the legislation of the state in view of regulating relations in this field. That is, no relevant norm is provided for licensing activities of non-government organizations under the newly adopted US law. For that reason, currently the obligations that the state is bound by based on the relevant international treaty as concerns activity planned by the US companies remain aside from legal regulation. It is clear that at present the US Government has no possibility to fulfil the obligations stipulated under Article VI of the international Outer Space Treaty.

A group of US researchers analyse the content of other articles of the Outer Space Treaty in a different manner and try to legalize the new law at the international level. No doubt, the Outer Space Treaty provides for the basic issues related to use of the outer space in a clear and exact manner with mutual understanding of the parties. That is, providing relevant comments on given provisions according to own

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[18] *Ibid.* Article VI.

[19] J. Foust, *Mining issues in space law,* 9 May 2016, available at: http://www.thespacereview.com/article/2981/1, accessed on 19 August 2017.

purpose, the content will not be changed. Therefore, I believe that the new US law may be considered a unilateral normative-legal act which entirely confronts the international legal regime. This once again shows that the USA do not observe the duties and obligations stipulated in the international Outer Space Treaty.

The research conducted shows that the US Commercial Space Launch Competitiveness Act decidedly contravenes the international treaty. To my mind, this law will change completely the direction in which the outer space law aims, and which was developed over many years and adopted at the international level. I believe that the US law paves the way for a dangerous precedence in the future. As a result, in many countries, the tradition of adopting such draft laws may be started. As I have already noted, Luxembourg formed a normative-legal base which supports the US activity. The state which ratified the international Outer Space Treaty should avoid adopting the above law. Undoubtedly, the provisions of the international treaty were adopted after extensive debates based on the opinions of experts and reflect a unified approach. The adoption of the discussed law in the USA may cause various problems not only of legal but also ecological nature. Ecologists, as well as experts dealing with space studies, claim that continuation of such process may be hazardous for the environment of the Earth. In my view, the adoption of the new law by the USA just for business purposes in contradiction to international legal obligations may bring about a new ecological threat.

At the same time, if we approach this issue from another perspective, the universally adopted legislative standards should be especially taken into account. Today, the legislation of many countries provides for requirements on safe implementation of mining works on the Earth. For example, when conducting mining works on the Earth's interior, the important matters like condition of the atmosphere, control of oxygen in the relevant area, etc. are strictly observed. In addition, the mining controlling authority in each state bears responsibility for conducting mining works according to the established rules and in a safe mode. At the same time, no relevant requirements were established at the international level for the outer space to secure performing of mining works under safe conditions. Obviously, any mining work should be implemented without contaminating the space in view of conditions in the outer space. In this regard, I believe that carrying out of this process in the outer space leads to many unresolved questions for the international law and ecology. The questions arise of how to carry out mining works in the outer space and control this process by the international entity, bearing in mind the harmful impact of the activities on the environment, maintaining the ecological balance, quantitative and qualitative change in individual components in the ecological system, etc. There is no legal tool connected with regulation at the international level of mining works in the outer space. There are justified reasons, namely the world community relying on the international Outer Space Treaty has not thought about it and research in the outer space was conducted just for scientific purposes. In my opinion, the relevant legislative acts adopted in the USA and those drafted in Luxembourg violate the requirements of the international Outer Space Treaty, and create potential danger for the outer space, as focused on business approach, and of illegal nature. Presently, under the international Outer

Space Treaty the adoption of any national legislative act which provides for mining works in the outer space is avoided. In the current circumstances, the adoption of acts with such content must be guided by the requirements of the international Outer Space Treaty, since in regulation of relations in this field the international treaty is legally effective at the global level.

4. CONCLUSIONS

To summarise above discussion, I am in favour of codifying issues related to future mining activities in the outer space by means of a unified international legal act. In particular, a new international convention should be adopted to regulate mining works in the outer space. Such convention may not ignore the principles defined in the treaty governing the exploration and use of outer space and the agreement governing the activities on the Moon and other celestial bodies. It must be noted that the general content of provisions of the treaty on the Moon entirely support the Outer Space Treaty. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies adopted in 1979 (the Moon Agreement) provides that: "The exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development." My aim is to note that the new international convention to be adopted in this field cannot acknowledge the interests and benefits of a couple of states (e.g. the USA, Luxembourg or other). Such new international convention has to reflect comprehensively the interests and benefits of all world states in the outer space. Briefly, the new international convention should take into account the requirements of all important agreements adopted previously in the field of the international space law. At present, American companies are free to act in the outer space as they wish. This is because the newly adopted US law does not meet relevant international legal obligations. Practically, the activity of American companies in the outer space will be carried out freely without relying on any international legal obligations. They do not have any barrier to that. However, the equality conditions should be taken into account as the basis in view of conducting such activities in the outer space. This principle can be established only by way of the new international convention. It would also be beneficial if the mining activity conducted in outer space is not entirely business-focused. Namely, this issue may be classified under relevant norms as scientific research work, business survey, etc. in the frame of the new international convention. Moreover, the new convention should acknowledge the fundamental principles of the international space law and the international environmental law. All the aspects I have mentioned above, related to implementation of safe works in the outer space, should be reflected in the relevant norms. This proposed convention should certainly define specific international and interstate standards on ecology.

In addition to the international convention, a special international body may be also established in order to regulate the activities involving search for, exploration and utilising of minerals in the outer space, as well as to secure control in this

area. The status and competences of such body may be stipulated in the discussed international convention. Further remarks may be offered, should an initiative for the new international convention arise at the international level.

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PROSPECTS OF REGULATION OF MINING ACTIVITIES IN THE MODERN SPACE LAW

Summary

This paper analyses the issues of discrepancies between the new US regulatory legal act, which provides for conducting mining activities in outer space, and the international law. The author analyses the contradictions between the US Commercial Space Launch Competitiveness Act and the international Outer Space Treaty, where the shortcomings have also been presented. According to the results of the analysis carried out in the paper, it has been revealed that in the modern time the relevant legislative acts adopted in the United States and those drafted in Luxembourg violate the provisions of the international Outer Space Treaty. By creating an environmental hazard for space, they focus on non-legal approach of business nature. By adoption of the new law, the USA does not meet its obligations under the international Outer Space Treaty. Presently, the international Outer Space Treaty makes it impossible to adopt some national legislative act, which defines mining activities in the outer space. In view of the above, the author offers to adopt a new international convention in the field of mining activities in the outer space in the future. Only the new international convention may reflect comprehensively the interests and benefits of all world states in the outer space. Beside adopting of the international convention, a special international body may be also established for the purpose of regulating activities related to search for, exploration and utilization of minerals in space and securing control in this area.

Key words: outer space, international space law, mining activities, space resources, celestial bodies, the Moon

PERSPEKTYWY UREGULOWANIA DZIAŁALNOŚCI GÓRNICZEJ WE WSPÓŁCZESNYM PRAWIE O PRZESTRZENI KOSMICZNEJ

Streszczenie

Autor analizuje rozbieżności między nowym aktem prawa amerykańskiego, który przewiduje prowadzenie działalności górniczej w przestrzeni kosmicznej, a prawem międzynarodowym. Artykuł wykazuje sprzeczności między amerykańską ustawą o wolnym dostępie do komercyjnych przestrzeni kosmicznych (Commercial Space Launch Competitiveness Act) a międzynarodowym Traktatem o przestrzeni kosmicznej, przedstawiając również pewne braki w tym zakresie. Przeprowadzona analiza dowodzi, że akty prawne przyjęte w Stanach Zjednoczonych oraz w Luksemburgu naruszają postanowienia międzynarodowego Traktatu o przestrzeni kosmicznej. Stwarzając zagrożenie dla środowiska naturalnego, koncentrują się na sprzecznym z prawem podejściu do prowadzenia działalności gospodarczej. Przyjmując nową ustawę, Stany Zjednoczone nie realizują przyjętych zobowiązań wynikających z Traktatu o przestrzeni kosmicznej. Obecnie traktat ten uniemożliwia przyjęcie krajowego aktu praw-

nego regulującego działalność górniczą w przestrzeni kosmicznej. Autor proponuje przyjęcie nowej międzynarodowej konwencji w dziedzinie górnictwa w przestrzeni kosmicznej. Tylko takie rozwiązanie może w pełni odzwierciedlać interesy i korzyści wszystkich państw świata w przestrzeni kosmicznej. Poza przyjęciem nowej międzynarodowej konwencji, zasadne jest ustanowienie specjalnego organu międzynarodowego regulującego działania związane z poszukiwaniem, badaniem i wykorzystaniem minerałów w kosmosie oraz zapewniającego kontrolę w tej dziedzinie.

Słowa kluczowe: przestrzeń kosmiczna, międzynarodowe prawo kosmiczne, działalność górnicza, zasoby przestrzeni kosmicznej, ciała niebieskie, Księżyc

MIXED PENALTY: A NEW PENAL LAW RESPONSE INSTRUMENT IN POLISH CRIMINAL LAW

MIROSŁAWA MELEZINI*

The amendment to the Criminal Code of 20 February 2015[1] (CC) resulted in broad and deep changes in the Polish legal order. The system of penal response to petty crime was substantially reorganised. The justification for the Bill amending the Criminal Code[2] indicates that its basic objective is rationalisation of penal policy by introducing changes in the structure of adjudicated punishments. It is mainly aimed at minimising the significance of the penalty of deprivation of liberty (imprisonment) with the suspension of its execution, and the treatment of the penalty of imprisonment in the judicial practice in general, thus not only the absolute but also the suspended one, as *ultima ratio*. The justification clearly indicates that the high level of the imprisoned convicts' population (80,000) and the enormous number (46,000) of persons sentenced to absolute imprisonment who do not serve it result from the defective structure of punishments adjudicated in relation to the level and characteristics of criminality. According to the authors of the Bill, the reason for that is the fact the courts overuse the penalty of deprivation of liberty with conditional suspension of its execution (over 55% sentences), because persons sentenced to imprisonment with conditional suspension of its execution who have been ruled to serve it constitute almost 50% of the convict population.

Having that in mind, within the new strategy in the penal policy, in particular the possibility of adjudicating the penalty of imprisonment with conditional suspension of its execution was limited (Article 69 §1 CC), the *ultima ratio* principle of absolute imprisonment was changed into the *ultima ratio* principle of imprisonment in

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1 Act of 20 February 2015 amending the Act: Criminal Code and some other acts, Journal of Laws [Dz.U.] of 2015, item 396.

2 Justification of the governmental Bill amending the Act: Criminal Code and some other acts, Sejm paper No. 2393, 15 May 2014, pp. 1–9.

general with the extension of its application to all crimes carrying the punishment of deprivation of liberty of up to five years, thus giving priority to a fine or the punishment of limitation of liberty (Article 58 §1 CC), non-custodial punishments (fine and limitation of liberty) were introduced as applicable to all statutory imprisonment punishments of up to eight years (Article 37a CC), and a totally new solution unknown in our legal order before, the "mixed penalty", was added (Article 37b CC).

The provision of Article 37b CC originally stated that: "In case of a misdemeanour carrying a penalty of deprivation of liberty, regardless of the minimum statutory limit of punishment for the act envisaged, a court may rule a penalty of deprivation of liberty of up to three months, and in case the maximum statutory limit of punishment for the act envisaged is 10 years, deprivation of liberty of six months, and a penalty of limitation of liberty of up to two years. The penalty of imprisonment is to be served first unless the Act stipulates otherwise".

The wording of the cited provision indicates that the legislator, enacting the 2015 amendment to the Criminal Code, introduced a new solution creating a possibility of adjudicating two punishments for every misdemeanour carrying a penalty of deprivation of liberty: a short-term imprisonment and limitation of liberty. This innovative statutory conception of penal response to crime has been called "mixed penalty" with an indication that it is a "combined form of penal repression".[3] It seems that the phrase used in the statutory motives adequately reflects the complexity of the construct. It is composed of two parts: two different penalties adjudicated simultaneously and composing one inseparable form of penal response to committed crime. Thus, the term "mixed penalty" describes a mixed legal construction of the provision of Article 37b CC, and not – as some representatives of the doctrine state – "a specifically mixed punishment",[4] or "a mixture of separate penal consequences within one punishment [a penalty of deprivation of liberty and a penalty of limitation of liberty – comment by M. M.]".[5] Still, the components of a mixed penalty do not mix. They constitute two different components of an entire penal response to crime and, in addition, they are executed separately. Article 37b CC overtly stipulates that imprisonment shall be served first and limitation of liberty next.

In the literature on criminal law, the legal construct is usually called "mixed penalty". This is a term A. Grześkowiak uses in the commentary on Article 37b CC, which rightly recognises the fact that "two components of the punishment are placed under one term, thus uniting its elements, which confirms the introduction of a new punishment to the system of criminal law and not only the eclectic idea of sentencing". The author further explains: "mixed penalty incorporates the adequate content resulting from the conjunction of the essence of the penalty of deprivation of liberty and a successive penalty of limitation of liberty. This content (…) results

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[3] Justification of the governmental Bill, No. 2393, p. 11.

[4] M. Małecki, *Co zmienia nowelizacja art. 37b k.k.?* [What does the amendment to Article 37b CC change?], Czasopismo Prawa Karnego i Nauk Penalnych Vol. 2, 2016, p. 19.

[5] M. Małecki, *Ustawowe zagrożenie karą i sądowy wymiar kary* [Statutory penalty and judicial adjudication of penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz* [Amendment to criminal law of 2015. Commentary], Kraków 2015, p. 297.

from the whole penal response to crime". At the same time, A. Grześkowiak rightly notices that the legislator "did not introduce a mixed penalty into the catalogue of penalties but gave it the features of an institution of penalty adjudication".[6] Also V. Konarska-Wrzosek, in the commentary on Article 37b CC, uses the term "mixed (combined) penalty", emphasising that in case of Article 37b CC we deal with a directive of judicial adjudication of punishment. The author indicates that the institution of a mixed penalty consists in adjudication of two types of punishment in the form of a short-term imprisonment and limitation of liberty.[7] Also A. Sakowicz uses a term "mixed penalty" in the opinion on the Bill amending the Criminal Code.[8] The authors of the course-book *Prawo karne*, M. Królikowski and R. Zawłocki, also use the term and claim that the mixed (or combined) penalty is an important element of the criminal law reform.[9] M. Szewczyk[10] and M. Melezini[11] use the term "mixed penalty" in *System Prawa Karnego*. *Kary i inne środki reakcji prawnokarnej*. Other authors analysing Article 37b CC also use the term "mixed penalty".[12] The term is applied as well as a selected statistical unit in 2015 statistical reports of the Ministry of Justice, concerning persons whose cases are considered in the first instance regional and district courts.[13] Thus, the term "mixed penalty" may be deemed common in literature and is used by the Ministry of Justice in statistical material that is a basis for the analysis of implemented criminal policy.

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[6] A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], 3rd edition, C.H. Beck, Warsaw 2015, pp. 326–331.

[7] V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Wolters Kluwer, Warsaw 2016, pp. 229–231.

[8] A. Sakowicz, *Opinia prawna na temat projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw* [Legal opinion on the Bill amending the Criminal Code and some other acts], Sejm paper No. 2393.

[9] M. Królikowski, R. Zawłocki, *Prawo karne* [Criminal law], C.H. Beck, Warsaw 2015, pp. 345–346; see also: R. Zawłocki, *Reforma prawa karnego materialnego od 1.07.2015 r. Uwagi ogólne dotyczące najważniejszych zmian w Kodeksie karnym* [Criminal law reform since 1 July 2015: General comments on the most important changes in the Criminal Code], Monitor Prawniczy No. 11, 2015, paper obtained from System Informacji Prawnej Legalis.

[10] M. Szewczyk, *Kara ograniczenia wolności* [Penalty of deprivation of liberty], [in:] M. Melezini (ed.), *System Prawa Karnego, Tom 6. Kary i inne środki reakcji prawnokarnej* [Criminal law system. Vol. 6: Penalties and other penal law response measures], 2nd edition, C.H. Beck, Warsaw 2016, p. 223.

[11] M. Melezini, *System środków reakcji prawnokarnej. Rys historyczny* [System of penal law response measures. Historical overview], [in:] M. Melezini (ed.), *System Prawa Karnego…* [Criminal law…], pp. 72–73.

[12] See, inter alia, T. Szymanowski, *Nowelizacja kodeksu karnego w 2015 r.* [Amendment to the Criminal Code in 2015], Przegląd Więziennictwa Polskiego No. 87, 2015, p. 12; K. Postulski, *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], 3rd edition, Warsaw 2016, p. 218; E. Hryniewicz-Lach, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Tom II. Komentarz. Art. 32–116* [Criminal Code: General part, Vol. II: Commentary, Articles 32–116], 3rd edition, Warsaw 2015, pp. 43–45; M. Błaszczyk, *Kara mieszana* [Mixed penalty], [in:] S. Pikulski, W. Cieślak, M. Romańczuk-Grącka (eds), *Przyszłość polskiego prawa karnego. Alternatywne reakcje na przestępstwo* [Future of Polish criminal law. Alternative response to crime], Olsztyn 2015, pp. 153–163.

[13] See, statistical reports MS-S6 and MS-S6o developed in the department of Statistical Managerial Information of the Ministry of Justice.

According to M. Małecki, the use of the term "mixed penalty" to specify a legal construct under Article 37b CC in the literature is "absolutely inadequate" and "in fact erroneous", suggesting that "we deal with adjudication of one specifically mixed penalty".[14] The author calls the discussed solution "a sequence of penalties" because, in his opinion, Article 37b CC creates a possibility of "adjudicating two different penalties at the same time and executing them in the sequence determined in the statute". He emphasises that "After the application of Article 37b CC, there is no mixing of the two separate penal consequences within one 'penalty' but simultaneous use of both response measures towards one perpetrator with the rules of administration and the way of serving each of those penalties alone taken into consideration".[15]

J. Majewski has reservations about "mixed penalty" and argues that the term is not very fortunate because it suggests that "it is related to adjudication of one punishment (with mixed features partly referring to imprisonment and partly to limitation of liberty), and this is not really so – under Article 37b CC, two penalties are adjudicated and they retain their separate being".[16]

In A. Zoll's opinion, "the sequential sanction (deprivation of liberty for a period from one month to three months or to six months and limitation of liberty for up to two years) laid down in Article 37b CC should be treated as one complex response to committed crime".[17] Sharing the opinion on the comprehensive treatment of the penal response under Article 37b CC, it is necessary to emphasise that the components of this single form of penal response are subject to successive (sequential) execution: first, the penalty of deprivation of liberty, next the penalty of limitation of liberty, and with reference to the execution of a mixed penalty, we can speak about sequencing.

From the point of view of criminal policy, the introduction of the possibility of applying a mixed penalty composed of short-term deprivation of liberty and limitation of liberty extends the range of instruments of penal response to misdemeanour carrying imprisonment. The justification for the governmental Bill amending the Criminal Code indicates that the institution of a mixed penalty "should be especially attractive in case of more serious misdemeanours".[18] Thus, one can see in the new regulation the legislator's attempt to increase the flexibility of response to the so-called medium-weight criminality. It is worth noting that, resulting from the amendment to the Criminal Code, the radical limitation of the

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[14] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 297; and by the same author: *Co zmienia…* [What does the amendment…], p.19; *Sekwencja krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności (art. 37b k.k.) – zagadnienia podstawowe* [Sequence of short-term penalty of deprivation of liberty and a penalty of limitation of liberty (Article 37b CC – basic issues], Palestra No. 7–8, 2015, pp. 39–43.

[15] M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 297.

[16] J. Majewski, *Kodeks karny. Komentarz do zmian 2015* [Criminal Code: Commentary on amendments of 2015], Warsaw 2015, p. 95.

[17] A. Zoll, *Zmiany w zakresie środków probacyjnych (ustawa nowelizująca Kodeks karny z 11 marca 2016 r.)* [Changes in the scope of probation measures (Act amending the Criminal Code of 11 March 2016)], Czasopismo Prawa Karnego i Nauk Penalnych Vol. 2, 2016, p. 11.

[18] Justification of the governmental Bill, No. 2393 p. 11.

application of the penalty of deprivation of liberty with conditional suspension of its execution, which had constituted a leading instrument of penal response in the judicial practice before, would have to make the adequately severe penalty of absolute imprisonment, which must be treated as *ultima ratio*, an alternative to this form of punishment. In case of medium-weight misdemeanours, the institution of a mixed penalty undoubtedly extends the scope of judicial discretion to shape a hardship adequate to a particular perpetrator and a specific case.

Especially with regard to perpetrators of the most serious misdemeanours who are not subject to Article 37a CC, introducing non-custodial penalties (a fine and a penalty of limitation of liberty) to all statutory crime threats carrying a penalty of deprivation of liberty of up to eight years, a court, seeing the need for giving up the institution of long-term isolation in prison in case of a particular perpetrator, may adjudicate a short-term penalty of deprivation of liberty and a penalty of limitation of liberty under Article 37b CC. In the legislative motives it is rightly indicated that: "In many situations, adjudication of a short-term isolation punishment is sufficient to achieve adequate results within the area of social prevention connected with that sanction", and it is added that: "In such a case, a penalty of limitation of liberty, which would aim at strengthening a socially desired perpetrator's behaviour might be a supplement to penal impact, and at the same time, would be deprived of such strong stigmatising effect".[19]

It seems that the short-term penalty of deprivation of liberty adopted in Article 37b CC is seen as a specific shock therapy connected with full isolation from the outside world, which starts a process of exerting influence to be continued within the non-custodial penalty, i.e. limitation of liberty. If we treat a mixed penalty this way, the penalty of limitation of liberty is not a supplement to penal influence, but – as A. Grześkowiak rightly emphasises – it is "an essential, equally important part and intended continuation of the process".[20]

Treating a mixed penalty as one comprehensive response to a committed crime, one should also treat the hardship of a mixed penalty in a complex way and not as the hardship of its every element apart. It is rightly noticed in the literature that the total hardship may be even bigger if it is combined with additional hardships, e.g. adjudication of a cumulative fine apart from imprisonment or penal measures.[21]

The provision of Article 37b CC constitutes an institution of a judicial imposition of a penalty and is not an element of the statutory punishment for misdemeanours. As far as this issue is concerned, the doctrine is completely unanimous.[22] The wording of Article 37b CC clearly indicates that a court may apply the mixed penalty "in case

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[19] Justification of the governmental Bill, No. 2393, pp. 12–13.

[20] A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny…* [Criminal Code…], p. 329.

[21] A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny…* [Criminal Code…], p. 328.

[22] See, inter alia, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 294; and by the same author, *Sekwencja krótkoterminowej kary...* [Sequence of short-term penalty...], pp. 44–45; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…* [Criminal Code…], p. 320; J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], pp. 95–97; M. Królikowski, R. Zawłocki, *Prawo karne…* [Criminal law…], p. 346; M. Błaszczyk, *Kara mieszana...* [Mixed

of a misdemeanour carrying a penalty of deprivation of liberty, regardless of the minimum statutory limit envisaged in the Act for the given act". Thus, Article 37b CC is applicable to a specific case at the stage of judicial imposition of a penalty.[23] If it is recognised that Article 37b CC constitutes a directive on the judicial imposition of punishment allowing adjudication of the mixed penalty, the extraordinary mitigation or aggravation of penalty is not applicable to it and the provision of Article 38 §1 CC is not applicable either, which is clearly stated in the legislative motives.[24]

Imposing the mixed penalty, a court must comply with the penal rules and directives on penalty imposition. It should always take decisions based on general directives on punishment imposition as well as directives of special nature. It should also pay attention to ensuring that the hardship resulting from the mixed penalty applied and other potential measures of adjudicated penal response do not exceed the level of the perpetrator's guilt and that the level of social harmfulness of the act is taken into consideration. It is worth drawing attention to the directive under Article 58 §1 CC, which – after the amendment to the Criminal Code of 20 February 2015[25] – laid down the principle of treating the penalty of absolute deprivation of liberty and that with conditional suspension of its execution as *ultima ratio* and, as a result, gave non-custodial penalties a priority status where the Act envisages a possibility of choosing a type of penalty and a crime carries a penalty of deprivation of liberty not exceeding five years. In such cases, the institution of the mixed penalty will be possible only when in a specific situation concerning a particular perpetrator no non-custodial penalty (a fine or a penalty of limitation of liberty) would meet the objective of punishment.

The change of the wording of Article 58 §1 CC, the extension of grounds for adjudicating non-custodial penalties by the provision of Article 37a CC modifying statutory penalties connected with the type of crime as well as radical limitation of the possibility of applying conditional suspension of the execution of a penalty of deprivation of liberty create broad opportunities to adjudicate non-custodial penalties (a fine or a penalty of limitation of liberty). It is also to ensure meeting the main objective of the criminal law reform of 2015, which is rationalisation of penal policy tending to reduce prison population, especially to cut the number of persons waiting for the execution of a valid and final imprisonment sentence. In this context, a mixed penalty should be perceived as an instrument that makes penal response more flexible not only in cases where adjudication of non-custodial penalty or the application of conditional suspension of the execution of a penalty of deprivation of liberty is not well grounded, but especially in relation to misdemeanours carrying a penalty of deprivation of liberty for which no non-custodial alternatives are envisaged.

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penalty...], p. 154; E. Hryniewicz-Lach, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna...* [Criminal Code: General part...], p. 44.

[23] M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 294.

[24] Justification of the governmental Bill, No. 2393, p. 12.

[25] Act of 20 February 2015 amending the Act: Criminal Code and some other acts, Journal of Laws [Dz.U.] of 2015, item 396.

The scope of application of the provision on a mixed penalty covers all misdemeanours carrying a penalty of deprivation of liberty. Here, neither the minimum nor the maximum limit of a statutory penalty is relevant. As J. Majewski rightly notices, the maximum limit of a penalty of deprivation of liberty indicated in Article 37b CC only determines the length of deprivation of liberty adjudicated together with a penalty of limitation of liberty.[26] It should be assumed that a court may apply a mixed penalty not only in cases concerning misdemeanours carrying an alternative penalty of deprivation of liberty and non-custodial penalties. The provision of Article 37b CC does not indicate that it concerns misdemeanours carrying "only" a penalty of deprivation of liberty. Thus, it can be assumed that a mixed penalty may be applied in case of every misdemeanour that statutorily carries not only a penalty of deprivation of liberty but also a fine and a penalty of limitation of liberty. J. Majewski[27] and M. Małecki[28] share such a stand in the doctrine. However, it is worth mentioning that there is also an opinion in the literature that a mixed penalty may be applied in case of a misdemeanour carrying only a penalty of deprivation of liberty without any non-custodial alternatives.[29] It should be added that the application of a mixed penalty is inadmissible in case of misdemeanours carrying only a penalty of a fine or limitation of liberty.

The outcome of my research into the criminal policy implemented by common courts in 2015[30] shows that a mixed penalty is applied in the judicial practice also in cases of misdemeanours alternatively carrying a penalty of deprivation of liberty and non-custodial penalties. From 1 July 2015 until the end of 2015, i.e. in the first period of the criminal law reform being in force, 39 of the total number of 735 mixed penalties adjudicated were a form of penal response applied to perpetrators of misdemeanours carrying alternatively a fine, a penalty of limitation of liberty and a penalty of deprivation of liberty. These were sentences under Article 209 CC (persistent evasion of alimony) – 22 cases, Article 178a §1 CC (driving in the state of insobriety or under the influence of narcotic drugs) – 9 cases, Article 190 CC (punishable threat) – 6 cases, Article 222 CC (violation of bodily integrity of a public official) – 2 cases. Article 37b CC was most often applied in case of perpetrators of serious misdemeanours such as: burglary and theft (Article 279 CC) – 139 cases, robbery (Article 280 §1 CC) – 94 cases, and fraud (Article 286 CC) – 62 cases.

The imposition of a mixed penalty under Article 37b CC may be as follows:

1) where the maximum limit of a statutory penalty is lower than 10 years' imprisonment, a court may adjudicate a penalty of deprivation of liberty for a period

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[26] See, J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], p. 99.

[27] See, J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], p. 98.

[28] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 294

[29] See, A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny…* [Criminal Code…], p. 329; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…* [Criminal Code…], p. 230.

[30] See, M. Melezini, *Polityka karna sądów w kontekście reformy prawa karnego. Wstępne wyniki badań* [Courts' penal policy in the context of criminal law reform. Preliminary research findings], [in:] J. Giezek, D. Gruszecka (ed.), *Księga Jubileuszowa ofiarowana Profesorowi Tomaszowi Kaczmarkowi* [Jubilee book presented to Professor Tomasz Kaczmarek], (in press).

from one month to three months, and a penalty of limitation of liberty for a period from one month to two years;
2) where the maximum limit of a statutory penalty is ten years' imprisonment or higher, a court may adjudicate a penalty of deprivation of liberty for a period from one month to six months, and a penalty of limitation of liberty for a period from one month to two years.

The statutory minimum of a penalty of deprivation of liberty imposed within a mixed penalty results from Article 37 CC, which indicates one month. On the other hand, Article 37b CC stipulates that the period of deprivation of liberty within a mixed penalty may be three months or six months. This means that a penalty of deprivation of liberty within a mixed penalty is imposed in months (from one to three months or to six months). The other component of a mixed penalty – a penalty of limitation of liberty – may be imposed for a period from one month to two years and it is laid down in Article 34 §1 CC. At the same time, the provision stipulates that a penalty of limitation of liberty is imposed in months and years.

A court imposing a penalty of deprivation of liberty laid down in Article 37b CC and, at the same time, a penalty of limitation of liberty must cite Article 37b CC in the sentence because only this provision of the Criminal Code envisages a possibility of adjudicating a penalty of deprivation of liberty and a penalty of limitation of liberty within one form of penal response.

As far as a penalty of limitation of liberty as a component of a mixed penalty is concerned, the content of this penalty is laid down in Articles 34–35 CC. After the substantial modification of the legal form of a penalty of limitation of liberty based on the Act amending the Criminal Code of 20 February 2015, this penalty might be adjudicated in any of the four forms laid down in Article 34 §1a CC, or might constitute any combination of hardships connected with content of particular forms of a penalty of limitation of liberty, and might consist in:
1) an obligation to perform unpaid supervised work for social purposes ranging from 20 to 40 hours per month;
2) an obligation to remain in the domicile or another assigned venue, with the use of electronic monitoring system and with a restriction that the period of the obligation could not exceed 12 months, 70 hours per week and 12 hours per day;
3) an obligation under Article 72 §1 (4–7a) CC, i.e. an obligation:
   a) to work, learn and get prepared for a vocation,
   b) to refrain from excessive consumption of alcohol or using narcotic drugs,
   c) to undergo treatment of addictions,
   d) to submit to psychotherapy or psycho-education,
   e) to take part in rehabilitation programmes,
   f) to refrain from frequenting specified community circles or venues,
   g) to refrain from contacting the aggrieved party or other persons in a specified way or approaching them;
4) a deduction of 10–25% of the monthly remuneration in order to contribute to a socially worthy cause designated by a court.

A penalty of limitation of liberty imposed within a mixed penalty may be combined with a cash payment and other duties (Article 34 §3 CC).

This most flexible penalty of all laid down in criminal law makes it possible to compose the content adequate to the needs of a particular case.[31]

However, the amendment to the Criminal Code laid down in two Acts of 11 March 2016,[32] thus after less than a year of earlier amendments being in force, introduced substantial changes to the legal form of the penalty of limitation of liberty. The legislator abandoned two new forms of the penalty of limitation of liberty introduced by the Act of 20 February 2015, i.e. an obligation to remain in the domicile or another assigned venue with the use of electronic monitoring and a possibility of adjudicating extended obligations referred to in Article 72 §1 (4–7a). The legislative motives[33] indicated that the introduction of the form of execution of a penalty of limitation of liberty in the system of electronic monitoring and the abandonment of the system of electronic monitoring as a form of execution of a penalty of limitation of liberty resulted in the fall in the number of convicts under the system of electronic monitoring. It was recognised that the change "proved to be practically extremely ineffective" and in the future might lead to "marginalising of this institution in the sphere of criminal policy". It was emphasised that "the execution of two different types of penalty cannot be exercised in the same form". Therefore, the legislator proposed reintroduction of the system of electronic monitoring as a form of execution of a penalty of limitation of liberty, which was eventually enacted.

The other Act, on the other hand, repealed another form of the penalty of limitation of liberty, consisting in adjudicating obligations laid down in Article 72 §1 (4–7a) CC. At the same time, obligations indicated, in accordance with Article 34 §3 CC, remained facultative obligations to be applied as an additional measure of influencing a convict.

As a result, the two Acts of 11 March 2016 changed the normative model of the penalty of limitation of liberty, which now consists of two forms of that penalty (Article 34 §1a (1) and (4) CC), i.e.:

1) an obligation to perform unpaid supervised work for social purposes ranging from 20 to 40 hours per month;

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[31] For more on the issue of a penalty of deprivation of liberty, see A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…* [Criminal Code…], pp. 293–314; T. Sroka, *Kara ograniczenia wolności* [Penalty of limitation of liberty], [in:] W. Wróbel, *Nowelizacja prawa karnego 2015. Komentarz* [Amendment to criminal law 2015: Commentary], pp. 85–153; J. Majewski, *Kodeks karny. Komentarz*... [Criminal Code: Commentary...], pp. 54–82; M. Szewczyk, *Kara ograniczenia*... [Penalty of deprivation...], [in:] M. Melezini (ed.), *System Prawa Karnego*... [Criminal law system...], pp. 210–227; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…* [Criminal Code…], pp. 213–222; M. Melezini, *Z problematyki kodeksowej regulacji kary ograniczenia wolności* [Issues of statutory regulation of a penalty of deprivation of liberty], [in:] J. Sawicki, K. Łucarz (eds), *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne i procesowe, Tom I. Księga Jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu* [At the contact point of criminal law and misdemeanour law: substantive and procedural legal issues. Vol. I: Jubilee book for Professor Marek Bojarski], Wrocław 2016, pp. 349–361.

[32] Act of 11 March 2016 amending the Act: Criminal Code and the Act: Executive Penal Code, Journal of Laws [Dz.U.] of 2016, item 428; Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] of 2016, item 437.

[33] See, Bill amending the Act: Criminal Code and the Act: Executive Penal Code. Justification, Sejm paper No. 218, p. 2.

2) a deduction of 10-25% of the monthly remuneration in order to contribute to a socially worthy cause designated by a court.

The provision of Article 34 §1b CC still admits a possibility of adjudicating this obligation and a deduction separately or together, and the amended Article 34 §3 CC envisages a possibility of adjudicating pecuniary consideration laid down in Article 39(7) CC or imposing additional obligations referred to in Article 72 §1 (2–7a) CC. It is worth adding that Article 34 §2 CC has remained unchanged and specifies permanent and obligatory elements of the penalty of limitation of liberty, which occur in every form of this penalty, i.e. a ban on changing domicile by the convict in the course of serving the penalty without the prior court's consent and an obligation to provide information about the course of the penalty execution.

There was a controversy in the doctrine over the issue of admissibility of conditional suspension of the execution of the penalty of deprivation of liberty that is a component of a mixed penalty. A lack of statutory exclusion of the possibility of conditional suspension of the execution of adjudicated penalty of deprivation of liberty made some representatives of the doctrine present an opinion that conditional suspension of the execution of a penalty of deprivation of liberty as a component of a mixed penalty is admissible.[34] Others expressed a totally different opinion on inadmissibility of conditional suspension of the execution of a penalty of deprivation of liberty adjudicated in accordance with Article 37b CC.[35] The outcome of the research into the criminal policy in 2015, which was mentioned above, made it possible to establish that suspension of the execution of a penalty of deprivation of liberty as a component of a mixed penalty was used in the judicial practice. During the six months of the new regulation laid down in Article 37b CC being in force, in 17 of the total number of 735 mixed penalty sentences, the execution of a penalty of deprivation of liberty was conditionally suspended, which accounted for 2.3% of all the adjudicated penalties.

The indicated interpretational problems resulting from the provision of Article 37b CC have been partly solved by the legislator who, with the Act amending the Criminal Code of 11 March 2016,[36] excluded the possibility of suspending the execution of a penalty of deprivation of liberty under Article 37b CC.

After the amendment to the content of Article 37b CC, the presently binding Article 37b CC stipulates that: "In case of a misdemeanour carrying a penalty of deprivation of liberty, regardless of the minimum statutory penalty limit for a given act laid down in the Act, a court may adjudicate a penalty of deprivation of liberty for a period not exceeding three months, and where the maximum statutory penalty limit is at least ten years – for six months, and at the same time

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[34] See, A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…* [Criminal Code…], p. 331; J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], p. 100; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Kraków 2015, p. 123; M. Błaszczyk, *Kara mieszana...* [Mixed penalty...], p. 157.

[35] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], pp. 298–299; and by the same author: *Sekwencja krótkoterminowej kary...* [Sequence of short-term penalty...], pp. 45–46; *Co zmienia…* [What does the amendment…], pp.19–44.

[36] Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] of 2016, item 437.

a penalty of limitation of liberty of up to two years. Provisions of Articles 69–75 are not applicable. A penalty of deprivation of liberty is executed first, unless the Act provides otherwise".

The amendment to the Criminal Code adds a sentence: "Provisions of Articles 69–75 are not applicable". This change is to be assessed positively because to some extent it eliminates interpretational doubts in relation to the content of Article 37b CC. In the justification of the Bill amending the Criminal Code,[37] the draftsman – referring to the new way of forming a penal repression introduced to the Polish legal order, i.e. a mixed penalty – indicates that the essence of a mixed penalty consists in "short-term imprisonment and then a longer period of limitation of liberty". Thus, a penalty of deprivation of liberty is connected with a short period of isolation from the outside world and its deterrent shock effect. The draftsman rightly notes that efficiency of a short-term penalty of deprivation of liberty is substantially decreased where this kind of punishment can be subject to conditional suspension of its execution, which – according to the draftsman – was possible based on the formerly binding regulations. At the same time, the draftsman, drawing attention to the threat connected with excessively frequent application of conditional suspension of the execution of a penalty of deprivation of liberty and, as a result, a possibility of occurrence of an erroneous structure of adjudicated penalties, formulated a proposal to exclude the possibility of conditional suspending the execution of a penalty of deprivation of liberty under Article 37b CC.

It is worth emphasising that if the concept of a mixed penalty is perceived as "one complex response to committed crime",[38] and in my opinion it should be treated as such, as A. Zoll rightly claims, this point of view, without the supplementation introduced by the amending Act, neither allows for the application of conditional suspension of the execution of a penalty of deprivation of liberty adjudicated in accordance with Article 37b CC, nor for a conditional earlier release.[39] However, as A. Zoll rightly notes, if the legislator had decided on inadmissibility of the application of conditional suspension of the execution of a penalty, the conditional earlier release should have also been explicitly excluded, which the legislator did not do though.[40] It should be deemed that the application of conditional earlier release from a penalty of deprivation of liberty is not purposeful because the penalty is to be executed first and the period of service is relatively short.[41]

However, a question arises whether the exclusion of a possibility of applying conditional suspension of the execution of a penalty of deprivation of liberty as an element of a mixed penalty is applicable to somebody who has turned state's evidence (Article 60 §3 or 4 CC) and a mixed penalty has been imposed on him

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[37] Justification of the Bill amending the Act: Criminal Procedure Code and some other acts, Sejm paper No. 207, p. 17. See also: M. Małecki, *Co zmienia…* [What does the amendment…], pp. 44–51.

[38] A. Zoll, *Zmiany w zakresie środków...* [Changes in the scope of probation...], p. 11.

[39] *Ibid*.

[40] For more on this issue, see: A. Zoll, *Zmiany w zakresie środków...* [Changes in the scope of probation...], p. 11.

[41] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty...], p. 301.

in accordance with Article 37b CC, and in case of the application of the provision of Article 87 §2 CC on an aggregate penalty. Unfortunately, the legislator has not solved this problem and this way has not eliminated interpretational differences. Due to potentially different answers in the areas indicated, it seems that in every case of adjudicating a penalty of deprivation of liberty under a mixed penalty, conditional suspension of the execution of a penalty of deprivation of liberty is irrational due to the aims and functions of the institution of binding two penalties into one mixed penalty.

In case of the imposition of a mixed penalty, a penalty of deprivation of liberty is executed first and then a penalty of limitation of liberty follows. This sequential execution laid down in Article 37b CC (in the last sentence) explicitly results from the Act. Article 17a of the Executive Penal Code is an exception concerning the change of the sequence of executing penalties. The provision stipulates the execution of a penalty of limitation of liberty first only when there are legal obstacles to the prompt execution of a penalty of deprivation of liberty, e.g. postponement of the execution of a penalty or interruption of the penalty execution.[42] Statutory determination of the sequence of penalties: first, as a rule, a short-term isolation penalty, i.e. a short shock connected with a convict's isolation from the outside world, then a non-isolation penalty in the form of limitation of liberty and exerting influence on the convict in non-custodial conditions, creates conditions for meeting the aims of a mixed penalty as a whole.

Finally, It must be emphasised that the introduction of an innovative solution to the criminal law consisting in combining a short-term penalty of deprivation of liberty and a penalty of limitation of liberty in the mixed penalty should be assessed positively. This form of reaction extends the ways of responding to crime and makes them more flexible, especially to crimes of medium criminal weight. Due to considerable plasticity of the content of the mixed penalty and a possibility of applying different levels of its hardship, courts are given a lot of freedom in the selection of an adequate penal response to a crime assigned to a perpetrator. However, to what extent the practitioners of the justice system will approve of the normative solution laid down in Article 37b CC will depend on both the procedural stand of public prosecutors and the adjudicating judges' attitude to the method of tailoring penal repression.

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[42] See, K. Postulski, *Kodeks karny wykonawczy...* [Executive Penal Code...], pp. 218–219.

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MIXED PENALTY: A NEW PENAL LAW RESPONSE INSTRUMENT IN POLISH CRIMINAL LAW

Summary

The article discusses an innovative in the Polish legal order solution envisaged in Article 37b of the Criminal Code introduced by the Act of 20 February 2015, which is a extensive amendment to criminal law, amended again by the Act of 11 March 2015. A complex legal construct laid down in Article 37b CC, called "mixed penalty", allows simultaneous imposition of two penalties on the crime perpetrator, i.e. a short-term imprisonment sentence and a penalty of limitation of liberty. While the doctrine is fully compliant with respect to recognising that Article 37b CC constitutes an institution of judicial imposition of a penalty, there are basic differences connected with the nature of the mixed penalty (sometimes described as "a sequential sanction"). A position is presented that the adopted solution creates one, treated as a whole, mixed penalty that is a form of penal response composed of two types of punishment. The author shares this opinion. There is also a stand that Article 37b CC makes it possible to adjudicate two penalties, which are autonomous. The author analyses the complex legal construct of the mixed penalty, discusses the aims and functions of the new type of penal response, criminal policy assumptions, and principles and directives governing a mixed penalty imposition. The article also discusses controversial issues concerning, inter alia, conditional suspension of the execution of a penalty of deprivation of liberty adjudicated in accordance with Article 37b CC before and after the amendment.

Key words: mixed penalty, sequence of penalties, penalty of deprivation of liberty (imprisonment), penalty of limitation of liberty, conditional suspension of the execution of a penalty, amendment to the Criminal Code, misdemeanour

KARA MIESZANA – NOWY INSTRUMENT REAKCJI PRAWNOKARNEJ W POLSKIM PRAWIE KARNYM

Streszczenie

Przedmiotem artykułu jest nowatorskie w polskim porządku prawnym rozwiązanie przewidziane w art. 37b k.k., wprowadzone obszerną ustawą nowelizującą prawo karne z dnia 20 lutego 2015 r., zmodyfikowane następnie ustawą z dnia 11 marca 2015 r. Ujęta w art. 37b k.k. złożona konstrukcja prawna, którą określono terminem „kara mieszana", stwarza możliwość jednoczesnego orzeczenia wobec sprawcy przestępstwa dwóch kar, tj. krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności. O ile doktryna jest w pełni zgodna w kwestii uznania, że art. 37b k.k. stanowi instytucję sądowego wymiaru kary, o tyle zasadnicze rozbieżności związane są z charakterem tzw. kary mieszanej (określanej niekiedy terminem „sankcja sekwencyjna"). Prezentowane jest stanowisko, że przyjęte rozwiązanie tworzy jedną, ujmowaną całościowo tzw. karę mieszaną, stanowiącą formę reakcji karnej, składającą się z dwóch kar. Tego rodzaju zapatrywanie prezentuje autorka tekstu. Wyrażany jest także pogląd, że art. 37b k.k. stwarza możliwość jednoczesnego wymierzenia dwóch kar, które zachowują swoją autonomię. W opracowaniu autorka poddaje analizie złożoność konstrukcji prawnej kary mieszanej, omawia cele i funkcje nowej formy reakcji karnej, założenia kryminalno-polityczne, zasady i dyrektywy wymiaru kary mieszanej. Przedmiotem rozważań są także zagadnienia sporne, dotyczące m.in. warunkowego zawieszenia wykonania kary pozbawienia wolności, orzeczonej na podstawie art. 37b k.k. w pierwotnym brzmieniu i po zmianach.

Słowa kluczowe: kara mieszana, sekwencja kar, kara pozbawienia wolności, kara ograniczenia wolności, warunkowe zawieszenie wykonania kary, nowelizacja kodeksu karnego, występek

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REVOCATION OF CONDITIONAL RELEASE IN THE POLISH EXECUTIVE PENAL CODE

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1. INTRODUCTION

Conditional release of a convict sentenced to imprisonment from serving a portion of the penalty constitutes a probation period. The time that remains to be served may not be shorter than two years and longer than five years (Article 80 §1 of the Criminal Code[1], hereinafter CC). If a convict is a habitual offender (Article 64 §2 CC), the period may not be shorter than three years (Article 80 §2 CC), and in case of conditional release from 25 years' imprisonment or life sentence, the probation period shall be 10 years (Article 80 §3 CC). The probation period is a continuation of rehabilitation in the conditions of monitored freedom.[2] It is a period of checking whether the convict complies with the legal order, especially whether he refrains from relapsing into crime. In literature, the probation period is believed to be the basic measure of pedagogical influence.[3] It influences convicts' behaviour by exerting pressure on them in order to make them fulfil their obligations and prevent relapse into crime.[4] If a convict fails to observe the conditions and shows that he does not deserve the conditional release, which can be demonstrated by a violation of the legal order, especially the commission of crime, evasion of supervision, performance of imposed duties or adjudicated penal measures, forfeiture or compen-

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1 *Kodeks karny*, Act of 6 June 1997, Journal of Laws [Dz.U.] of 1997, No. 88, item 553, as amended.

2 A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Vol. I, Part 2, Wolters Kluwer, Warsaw 2016, p. 380.

3 J. Bafia, K. Buchała, *Warunkowe zwolnienie. Wprowadzenie i komentarz do ustawy z dnia 29 maja 1957 r.* [Conditional release: Introduction and commentary on the Act of 29 May 1957], Warsaw 1957, p. 69; J. Wąsik, *O konieczności dalszego doskonalenia instytucji warunkowego zwolnienia* [On the necessity of continuing improvement of conditional release], Wojskowy Przegląd Prawniczy No. 1, 1982, p. 93.

4 M. Ryba, *Warunkowe zwolnienie w polskim prawie karnym* [Conditional release in the Polish criminal law], Wydawnictwo MON, Warsaw 1966, p. 131.

sation, the conditional release shall or may be revoked (Article 160 §1–4 Executive Penal Code,[5] hereinafter EPC). The revocation of conditional release is a negative result of the probation and a verification of a penitentiary court's former optimistic criminological forecast of the convict's behaviour.[6]

2. REVOCATION MODE

Depending on the type of the convict's behaviour during the probation period, the revocation of conditional release shall be obligatory or optional. The former may be absolute or relative in nature.

A penitentiary court is obliged (absolute obligatoriness) to revoke conditional release in case of a serious violation of the legal order such as:

– the commission of deliberate crime for which a court adjudicated a valid penalty of imprisonment without conditional suspension of its execution (Article 160 §1 EPC);
– a crime committed with the use of violence or illegal threat against a close relation or a juvenile residing together with the perpetrator, a flagrant violation of the legal order consisting in the relapse into using violence or illegal threat against a close relation or a juvenile residing together with the perpetrator (Article 160 §2 EPC).

The revocation of conditional release is – in accordance with Article 160 §4 EPC – obligatory when, after an admonition issued by a court's professional probation officer, a convict flagrantly violates the legal order, especially commits a crime other than premeditated, or the adjudicated penalty has been other than absolute imprisonment, or he evades supervision, fulfilment of imposed obligations or adjudicated penal measures, forfeiture or compensation, unless there are special reasons against it (absolute obligatoriness).

In compliance with Article 160 §3 EPC, the revocation of conditional release may take place in case of a flagrant violation of the legal order, especially the commission of a crime other than premeditated or adjudication of a penalty other than absolute imprisonment, or evasion of supervision, fulfilment of imposed obligations or adjudicated penal measures, forfeiture or compensation (optional revocation).

3. REASONS FOR OBLIGATORY REVOCATION OF CONDITIONAL RELEASE

Reasons for obligatory revocation of conditional release laid down in the Executive Penal Code are individually formulated in relation to all convicts and persons convicted for a crime committed with the use of violence or illegal threat against a close relation or a minor residing together with the perpetrator.

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[5] *Kodeks karny wykonawczy*, Act of 6 June 1997, Journal of Laws [Dz.U.] of 1997, No. 90, item 557, as amended.

[6] W. Rodakiewicz, *Warunkowe zwolnienie młodocianych z reszty kary pozbawienia wolności* [Conditional release of juvenile perpetrators from serving the remaining imprisonment sentence], Kolonia Limited 2005, p. 226.

3.1. REVOCATION OF CONDITIONAL RELEASE IN RELATION TO EVERY CONVICT

In relation to every convict, the revocation of conditional release depends on:
– the commission of premeditated crime;
– a valid and final imprisonment sentence without conditional suspension of its execution (Article 160 §1 EPC).

The above reasons are to substantially limit the scope of obligatory revocation of conditional release.

The only limitation to the type of crime is the requirement that it should be deliberate. A mixed fault crime (*culpa dolo exorta*) is also deliberate.

In compliance with *argumentum a contrario*, the effect does not result from the commission of an unintentional crime and conviction for it even for imprisonment without conditional suspension of its execution. It does not matter whether a crime committed is a felony or a misdemeanour or whether it is similar to the one the released has been convicted of and has been serving the imprisonment for that is subject to release. The condition is broader than in case of ordering suspended penalty execution because then it requires that the perpetrator should have been convicted for committing a similar deliberate crime (Article 75 §1 CC). It is rightfully stated in the doctrine that this difference is not rationally justified and it is proposed *de lege ferenda* to standardise the conditions by adopting the condition specified for ordering penalty execution.[7]

The type of penalty adjudicated for a crime committed has been narrowed to imprisonment without conditional suspension of its execution. It is a legitimate solution because the penalty of imprisonment with conditional suspension of its execution for a deliberate crime committed in the probation period indicates that there is no need to isolate a perpetrator from the society and imprison him, and there is still an optimistic criminological forecast on his behaviour.

Taking into consideration that conditional suspension of imprisonment execution is possible only in case the imprisonment penalty is imposed for a period not exceeding one year (Article 69 §1 CC), the discussed crimes are more serious. It is emphasised in the doctrine that a convict who, after he has been trusted and released, commits a new crime in the probation period is a dangerous criminal requiring that decisive measures be taken, including the revocation of conditional release.[8] The conviction for an intentional crime with a sentence of imprisonment with conditional suspension of its execution or a fine, or limitation of liberty with conditional suspension of its execution, does not result in the revocation of conditional release. Consequently, the conviction for one of the penalties does not mean that the probationer has betrayed trust. It does not matter whether and to what extent the penalty has been executed. Article 160 §1 EPC does not make the decision on the revocation of release dependent on the penalty execution. Thus, the

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[7] J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności* [Conditional release from serving the remaining imprisonment sentence], C.H. Beck, Warsaw 2010, p. 329.

[8] M. Ryba, *Warunkowe zwolnienie…*. [Conditional release…], p. 132.

remission of penalty based on amnesty or a granted pardon has no influence on the decision. It is rightly pointed out in the doctrine that amnesty and an individual act of granting a pardon are not circumstances that waive the criminality of an act.[9]

Although Article 160 §1 EPC refers to crime commission, which suggests that valid and final conviction is not required, such supposition is in conflict with the further part of the provision that requires a valid and final sentence. Therefore, the revocation of conditional release is not possible until a valid sentence for a new crime is issued. Conviction for the commission of a deliberate crime in a valid imprisonment sentence without conditional suspension of its execution makes the adjudicating court – based on Article 160 §1 EPC – bound to revoke the conditional release of the perpetrator.[10]

3.2. REVOCATION OF CONDITIONAL RELEASE FOR A CRIME OF DOMESTIC VIOLENCE

The conditions for the revocation of conditional release of the convicted of a crime committed with the use of violence or illegal threat against a close relation or a juvenile residing together with the perpetrator are broader. The revocation of conditional release of such a convict takes place in case of a flagrant violation of the legal order consisting in the relapse into using violence or illegal threat against a close relation or a juvenile residing together with the perpetrator (Article 160 §2 EPC). The word "relapse" indicates that it refers to the conditionally released from serving the penalty for a crime committed against a close relation or a juvenile residing together with the perpetrator. Linking *modus operandi* in the form of "violence" and "illegal threat" with the conjunction "and/or", meaning an inseparable alternative, proves that both acts do not have to be committed in the same way. The crime that the conditionally released has been sentenced for might have been committed with the use of violence and the perpetrator committing a crime in the probation period might have used only illegal threat and vice versa. Both acts have to be committed against a close relation or a juvenile residing together with the perpetrator, however, the persons do not need to have the same identity.

Conviction for the act of using violence or illegal threat against a close relation or a juvenile residing together with the perpetrator is not required; the assessment is made at a penitentiary court's discretion.

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[9] M. Ryba, *Warunkowe zwolnienie…* [Conditional release…], p. 133.

[10] The Supreme Court ruling of 18 April 1979, VI KZP 5/79, OSNKW 1979, No. 6, item 64.

3.3. REVOCATION OF CONDITIONAL RELEASE AFTER A WRITTEN ADMONITION

Grounds for the revocation of conditional release after the issue of a written admonition by a court's professional probation officer are the same as those that justify an optional revocation. These are: a flagrant violation of the legal order, especially the commission of a crime other than deliberate or adjudication of a penalty other than absolute imprisonment or evasion of supervision, fulfilment of the imposed penal measures, forfeiture or compensation (Article 160 §4 EPC). The issue of a written admonition by a court's professional probation officer is a circumstance resulting in the change of the optional mode of the revocation of conditional release into the obligatory one. The above-mentioned circumstances concerning the convicted person's behaviour have to take place after the admonition; the behaviour before does not matter. The former behaviour, which is discussed below, may result in the optional revocation of conditional release (Article 160 §3 EPC).

The issue of an admonition by a court's probation officer may take place only when the conditionally released is under his supervision in the probation period. Only the court's probation officer in charge of the convicted is authorised to issue a written admonition to him. A court's probation officer in charge of the supervision of the convicted person keeps contact with him (Article 172 §1 EPC). He organises and conducts activities that are to help the convicted in social rehabilitation and prevent him from relapsing into crime as well as supervises him in fulfilling the obligations imposed by the court or connected with the supervision (Article 173 §1 EPC).

The convicted is given an admonition in case there are circumstances justifying a motion to revoke conditional release laid down in Article 160 §3 EPC, but a court's probation officer drops the action due to the type and degree of violation justifying a belief that, although the motion is abandoned, the aims of the probation measure will be achieved (Article 173 §3 EPC). Filing a motion might result in the revocation of conditional release. Dropping the action, a court's probation officer is obliged to give the convicted a written admonition in which he indicates the type of violation and notifies about the consequences of failing to meet the recommendations, i.e. that continuation to act in the same way shall result in the revocation of conditional release. The copy of the admonition is submitted at the court (Article 173 §4 EPC). A written admonition is a warning given to the convicted that if he does not change his behaviour, the conditional release shall be invoked.

If a convict, in spite of the admonition, does not change his behaviour and continues to flagrantly violate the legal order or evades the supervision, the fulfilment of imposed obligations or adjudicated penal measures, forfeiture or compensation, a court may take a decision not to revoke conditional release, provided there are special reasons to do so. A court may refrain from revoking conditional release in case the above-mentioned convict's behaviour has been caused by a series of different reasons that can be justified to some extent.

4. CONDITIONS FOR OPTIONAL REVOCATION

Revocation of conditional release – in accordance with Article 160 §3 EPC – is possible in case the released:

- flagrantly violates the legal order, especially commits a crime other than deliberate or where the adjudicated punishment has been different from absolute imprisonment;
- evades supervision;
- evades fulfilling imposed obligations;
- evades the adjudicated penal measures, forfeiture or compensation.

There is a correlation between the scope of these breaches and the elements of optimistic criminological forecast that has resulted in conditional release. It is because the condition for release is a court's confidence that the convict will comply with the penal or protective measures and the legal order, in particular, that he will not relapse into crime (Article 77 §1 CC).

Evading supervision or obligations must be the fault of the conditionally released.[11] It is rightly assumed in the doctrine that evading supervision and the fulfilment of imposed obligations or adjudicated penal measures, forfeiture or compensation, occurs where the released can submit to supervision, fulfil imposed obligations or adjudicated measures but does not want to do that, which demonstrates negative mental attitude to the obligations[12] and indicates ill will on his part.[13] Inability to conform to the obligations caused by independent circumstances does not constitute evasion. The Supreme Court rightly states: "Non-performance of a specified obligation imposed on the convict (…) is not tantamount to evasion (…). Because the term 'to evade' incorporates the obliged person's negative mental attitude towards an imposed obligation (ill will) where, in spite of real opportunity to fulfil the obligation, he does not do it".[14]

The content of Article 160 §3 EPC has been wrongly interpreted in literature as the exemplification of the violation of the legal order as well as the evasion of supervision, imposed obligations and adjudicated penal measures, forfeiture and

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[11] The Supreme Court ruling of 28 July 1980, V KRN 146/80, OSNKW 1980, No. 10–11, item 82 with a gloss by M. Leonieni, OSP 1981, No. 7–8, item 144; the Supreme Court ruling of 17 October 1995, III KRN 96/95, LEX No. 479155 with a gloss of approval by Z. Gostyński, Prokuratura i Prawo No. 9, 1996, pp. 85–89.

[12] A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny*… [Criminal Code…], p. 382; the Supreme Court ruling of 6 June 1972, V KRN 122/72, OSNKW 1972, No. 11, item 177.

[13] The Supreme Court ruling of 12 October 1988, V KRN 212/88, LEX No. 17938; the Supreme Court ruling of 7 October 2010, V KK 301/10, Prokuratura i Prawo – annex 2011, No. 2, item 4; the Appellate Court in Kraków ruling of 27 October 2005, II AKzw 641/05, KZS 2005, No. 11, item 34; K. Postulski, *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], Wolters Kluwer, Warsaw 2012, p. 654.

[14] The Supreme Court ruling of 23 February 1974, IV KRN 17/74, OSNKW 1974, No. 5, item 95 with comments by S. Pawela, *Przegląd orzecznictwa Sądu Najwyższego w zakresie prawa karnego wykonawczego za lata 1973–1975* [Review of the Supreme Court rulings on the executive penal law in 1973–1975], Nowe Prawo No. 10, 1976, p. 1431 ff; the Supreme Court ruling of 12 October 1988, V KRN 212/88, LEX No. 17938; the Supreme Court resolution of 12 December 1995, I KZP 35/95, OSNKW 1996, No. 1–2, item 2 with a gloss by K. Postulski, Palestra No. 7–8, 1996, p. 268.

compensation.[15] The provision links the preceding list of these circumstances with the violation of the legal order with the use of a sentence conjunction "or", thus the sentence is a disjunctive alternative, which means that the two terms are separate beings.

4.1. FLAGRANT VIOLATION OF THE LEGAL ORDER

The legal order is a legal system that is in force in every field of social life. It refers to all the branches of law. It is not right to narrow the range of this term to the collection of principles and rules laid down as criminal law norms.[16]

The violation of the legal order means the behaviour that does not conform to the law in force. It is rightly assumed in literature that public law crimes may be considered the violation of the legal order provided that this violation is validly proved in the course of procedure laid down in the law.[17]

Article 160 §3 EPC does not refer to any violation of the legal norms but only such that is flagrant. The word "flagrant" [*rażący*] means "shocking because done in an easily noticed way showing unquestionable defects".[18] Thus, it is such a violation of the legal norms in force that indicates their flagrant breach. Court judgements rightly emphasise that: "The violation of the legal order is a convict's action against obligations and prohibitions of the criminal law, especially the commission of crime or a misdemeanour and acting against the rules the compliance with which is within the limits of tasks and aims that criminal law relates with such measures as conditional release, especially by evading imposed obligations, supervision or adjudicated penal measures. The recognition of the 'flagrant' nature of the violation of the legal order requires that significant pejorative content be present in it. Thus, it is such a breach of the legal order that is flagrant, persistent, obvious and with a lot of ill will".[19]

The commission of a serious misdemeanour may be such a violation. The judicature rightly notices that: "the commission of a misdemeanour, although it

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[15] W. Rodakiewicz, *Warunkowe zwolnienie…* [Conditional release…], p. 231.

[16] K. Łucarz, *Zakaz prowadzenia pojazdów jako środek polityki kryminalnej* [Ban on driving as a measure of criminal law policy], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2005, pp. 218–219; K. Postulski, *Kodeks karny wykonawczy…* [Executive Penal Code…], p. 655.

[17] J. Skupiński, *Rażące naruszenie porządku prawnego jako podstawa odwołania środka probacyjnego* [Flagrant violation of the legal order as grounds for revocation of a probation measure], [in:] A. Michalska-Warias, I. Nowikowski, J. Piórkowska-Flieger (ed.), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu* [Theoretical and practical issues of contemporary criminal law: Professor Tadeusz Bojarski jubilee book], Lublin 2011, pp. 317–318.

[18] *Praktyczny słownik współczesnej polszczyzny* [Practical Dictionary of Contemporary Polish Language], H. Zgółkowa (ed.), Vol. 35, Poznań 2002, p. 265.

[19] The Appellate Court in Kraków ruling of 26 August 2014, II AKzw 835/14, KZS 2014, No. 10, item 43; the Appellate Court in Kraków ruling of 21 October 2015, II AKzw 965/15, Prokuratura i Prawo – annex 2016, No. 6, item 23.

is a violation of the legal order, is not always 'flagrant'".[20] The requirement that it should be committed persistently and with ill will is too far reaching.[21]

The commission of crime is a flagrant violation of the legal order. It is directly mentioned in the provision and is provided as an example of a violation of the legal order, which is confirmed by the use of the word "especially". Undoubtedly, the commission of any crime, although Article 160 §3 EPC indicates that it applies to a crime different than the one laid down in §1, may be a violation of the legal order. This legislative solution is justified by the fact that it was to exclude from the provision the commission of crime resulting in obligatory revocation of conditional release.

The revocation of conditional release due to the commission of crime may take place where the conditionally released commits a crime:

– that is deliberate and the punishment adjudicated has been imprisonment with conditional suspension of its execution, a fine or limitation of liberty;
– that is unintentional, regardless of the adjudicated punishment, which may even be imprisonment without conditional suspension of its execution.

The commission of a crime is *ex lege* recognised as a flagrant violation of the legal order.[22] It is hard to approve of the opinion that not every crime commission is a flagrant violation of the legal order justified by the fact that a penitentiary court cannot be deprived of the possibility of assessing the degree of the legal order violation.[23] The linguistic interpretation of Article 160 §3 EPC is an obstacle to this. It clearly indicates that the commission of crime is one of the examples of a flagrant violation of the legal order.

The commission of crime must be confirmed by a valid sentence or a valid decision of conditional discontinuation of the criminal proceedings.[24] A sentence may also be one in which a court renounces inflicting a punishment.[25] Thus, the opinion that a sentence in which a court renounces inflicting a punishment on the conditionally released does not constitute grounds for a facultative revocation of the conditional release cannot be agreed with.[26]

It might seem that in this case a valid sentence is not necessary to confirm the commission of crime as Article 160 §3 EPC does not lay down such a specification while it is included in §1 of the provision. This may prove that the legislator abandoned that condition. However, one cannot ignore the fact that the issue of a ruling to revoke conditional release based on an invalid sentence would be in conflict with the constitutional principle of presumption of innocence (Article 42(3)

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[20] The Appellate Court in Kraków ruling of 29 May 2015, II AKzw 408/15, Prokuratura i Prawo – annex 2016, No. 2, item 17.

[21] J. Lachowski, *Warunkowe zwolnienie…* [Conditional release…], p. 339.

[22] S. Lelental, *Kodeks karny wykonawczy* [Executive Penal Code], Warsaw 2001, p. 432.

[23] J. Lachowski, *Warunkowe zwolnienie…* [Conditional release…], p. 333.

[24] A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny…* [Criminal Code…], p. 382.

[25] E. Skrętowicz, *Wyrok sądu karnego pierwszej instancji* [First instance criminal court ruling], UMCS, Lublin 1989, pp.74–75.

[26] M. Kalitowski, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny, Komentarz* [Criminal Code: Commentary], Vol. I, Gdańsk 2005, p. 675.

of the Constitution of the Republic of Poland). As a result, the opinion that "ruling on the release, a court has the discretion – in accordance with the principle of judicial independence (Article 8 §1 EPC) – to decide whether the convict committed acts he was accused of in other proceedings, still not concluded, and does not have to wait with its decision until the other sentence is valid should be considered incorrect. The decision is made only for the use in the proceedings after the revocation of conditional release and is not important for the sentence in the new proceedings, thus also for the potential punishment for a new act the convict was charged with. It is conditioned only by rational argumentation, including evidence, that constitutes grounds for denying the right to the convict who did not plead guilty to the latest charges".[27]

Another erroneous opinion is that the "guilty" verdict and sentencing of the conditionally released to imprisonment with conditional suspension of its execution or conditional discontinuation of the proceedings cannot constitute actual grounds for the revocation of conditional release, because in both cases a court has decided there is a positive criminal forecast for the convict.[28] Although the revocation of conditional release due to the commission of crime is based on the assumption that the convict does not show promise as a law-abiding citizen and due to that courts' assessments would be in conflict. However, the facultative revocation can prevent this conflict, and it cannot be excluded that a sentence for a crime committed during the probation period is wrongful and the exclusion of the possibility of revoking conditional release would promote the convict who has been wrongly sentenced to imprisonment with conditional suspension of its execution or where the proceedings have been conditionally discontinued. Moreover, it would be flagrantly unjust as the revocation of conditional release might take place in case of more lenient sentences, e.g. a fine or limitation of liberty, as well as the violation of other branches of law. A convict sentenced to a more severe punishment such as imprisonment with a suspension of its execution would be in a better situation than the one whose punishment was a fine or limitation of liberty.

Where there is no valid sentence yet, there are no obstacles in the way of a penitentiary court assessing the commission of an act as a flagrant violation of the legal order.[29] Judicial decisions emphasise that "For the assessment of the convict's compliance with the conditions of probation, it does not matter that there are other criminal proceedings conducted against him. Until there is a valid sentence in these proceedings, no conclusion disadvantageous for the convict can be made only because the proceedings are pending. That would violate the principle of presumption of innocence laid down in Article 42(3) of the Polish Constitution. However, this is not an obstacle to a penitentiary court examining the probation also

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[27] The Appellate Court in Kraków ruling of 24 September 2004, II AKz 572/04, KZS 2004, No. 9, item 44; the Appellate Court in Kraków ruling of 25 June 2004, II AKzw 389/04, KZS 2004, No. 6, item 21.

[28] J. Lachowski, *Warunkowe zwolnienie*… [Conditional release…], p. 333; the Appellate Court in Kraków ruling of 13 October 2004, II AKzw 589/04, KZS 2004, No. 10, item 15; the Appellate Court in Kraków ruling of 28 February 2002, II AKz 61/02, KZS 2002, No. 2, item 30.

[29] W. Rodakiewicz, *Warunkowe zwolnienie*… [Conditional release…], p. 233.

based on this new proceedings. The court takes decisions on its own and assesses facts and legal issues that are important in its opinion (Article 8 §1 EPC), and does not have to wait for the another sentence".[30] Not questioning this option, it is necessary to emphasise that it may take place only when the commission of crime is unquestionable, e.g. when the convict is caught red-handed committing crime.

4.2. EVASION OF SUPERVISION

Supervision is optional. It is obligatory only in accordance with Article159 §1 *in fine* EPC, when:

- a convict has been sentenced for a crime committed due to paraphilia: rape (Article 197 CC), taking sexual advantage of mental disability or vulnerability (Article 198 CC), sexual abuse in relationship of dependence (Article 199 CC), sexual abuse of a minor (Article 200 CC), use of communications or communications network to commit some crimes against sexual liberty and decency (Article 200a CC), promotion of paedophile-related behaviour (Article 200b CC), incest (Article 201 CC), presentation of pornographic material in public (Article 202 CC) or subjecting to prostitution (Article 203 CC);
- a minor perpetrator has committed a deliberate crime;
- a convict has been sentenced for a crime committed in the special relapse circumstances (Article 64 CC);
- a convict has been sentenced to life imprisonment.

Evasion of supervision may result in the revocation of conditional release only when a convict has been subdued to supervision. Evasion of supervision is a failure to fulfil obligations that result from supervision. A convict is obliged to fulfil supervision-related obligations (Article 169 §1 CPC). Having this in mind, one may recognise the following examples of evading supervision:

- failure to meet a probation officer of the competent court immediately, not later than in seven days from the receipt of the notification of imposed supervision (Article 169 §2 EPC);
- failure to appear in court or meet a court's probation officer in order to answer questions connected with the course of supervision and the fulfilment of imposed obligations (Article 169 §3 EPC);
- failure to answer questions concerning the course of supervision and the fulfilment of imposed obligations (Article 169 §3 CPC);
- change of permanent domicile without the court's prior consent (Article 169 §3 EPC);
- precluding a probation officer from entering the place of residence (169 § 3 EPC);
- failure to inform a court's probation officer about the change of employment (Article 169 §3 EPC).

[30] The Appellate Court in Kraków ruling of 8 July 1999, II AKz 300/99, OSA 2000, No. 3, item 24.

It is rightly assumed in judicial decisions that: "Evasion of supervision takes place through the behaviour demonstrating a convict's negative mental attitude towards obligations imposed on him, indicating his ill will and resulting in failure, despite a physical possibility, to fulfil obligations and submit to supervision, which is his fault. Failure to contact a probation officer is an indication of such evasion. It prevents a probation officer from supervising the convict and monitoring his behaviour, as well as obligations imposed on him".[31]

4.3. EVASION OF IMPOSED OBLIGATIONS

A penitentiary court, taking a decision to conditionally release a convict – in accordance with Article 159 §1 EPC – may impose the following obligations on him: (1) to inform the court or the court's probation officer about the course of the probation; (2) to apologise to the aggrieved party; (3) to fulfil an obligation to pay another person's maintenance; (4) to work, study or obtain vocational qualifications; (5) to refrain from excessive consumption of alcohol or narcotic drugs; (6) to participate in addiction treatment programmes; (7) to undergo to therapy, especially psychotherapy and psycho-education; (8) to participate in educational rehabilitation programmes; (9) to refrain from spending time in specified company or places; (10) to refrain from contacting the aggrieved party or other persons in a specified way or approaching the aggrieved party or other persons; (11) to leave the place of residence occupied together with the aggrieved party; (12) to behave in another appropriate way in the probation period, which can prevent relapse into crime.

The court may also oblige the convict to redress the damage in full or in part if the damage caused by a crime for which the convict was sentenced has not been redressed. Failure to fulfil any of the obligations may result in the revocation of conditional release.

4.4. EVASION OF ADJUDICATED PENAL MEASURES, FORFEITURE AND COMPENSATION

There is a dispute in the legal doctrine whether it is evasion of only those penal measures, forfeiture or compensation, constituting grounds for the revocation of conditional release that were adjudicated in the imprisonment sentence from which the convict has been conditionally released or those adjudicated in another sentence. It is believed that the revocation of conditional release is decided based on the evasion of the above-mentioned measures adjudicated in the same sentence that inflicted the punishment being subject to conditional release.[32] Still, there are also

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[31] The Appellate Court in Kraków ruling of 15 January 2009, II AKzw 1130/08, Prokuratura i Prawo – annex 2009, No. 7–8, item 35.

[32] J. Śpiewak, *Warunkowe zwolnienie w kodeksie karnym i kodeksie karnym wykonawczym* [Conditional release in the Criminal Code and the Executive Penal Code], Przegląd Więziennictwa Polskiego No. 20–21, 1998, pp. 19–20.

opinions that this should apply to all measures adjudicated in any other cases before a convict's conditional release.[33] It is argued that evasion of these measures may indicate inappropriate use of the probation period, disrespect for the law and court's rulings, which may be classified as a flagrant violation of the legal order during the conditional release.[34] The latter stand is erroneous and it is based, as it has been proved above, on the assumption that evasion of adjudicated penal measures, forfeiture and compensation is a flagrant violation of the legal order.

5. CONSEQUENCES OF THE REVOCATION OF CONDITIONAL RELEASE

The direct consequence of the revocation of conditional release is the necessity to return to prison to serve the remaining punishment that had to be served when conditional release was granted. The probation time is not offset from the penalty period (Article 160 § 8 EPC).

Another consequence is the extension of the quantity of service required for the next conditional release. In accordance with Article 81 CC, where conditional release is revoked, the next conditional release cannot take place before a convict serves at least a year's imprisonment after the return to prison, and where the punishment is 25 years' imprisonment or life imprisonment – before he serves at least five years' imprisonment. This new quantity of the punishment service covers the period spent in prison after the return. The judicature rightly points out that "The provision of Article 81 CC clearly indicates the necessity to fulfil the first of the listed requirements, i.e. serving at least one year's imprisonment of the adjudicated punishment, which means that in other cases of the re-application of conditional release, the imprisonment limits laid down in Article 78 §1 and 2 CC, calculated based on the total punishment, are applicable".[35] The time limits start running from the return to prison and not the very start of the whole punishment service from which the convict was conditionally released and then the release was revoked.[36] The day when the convict is imprisoned again because of the revocation of conditional release is taken into account, not the day when the revocation decision was made or became valid.[37] Article 81 CC provides for the re-imprisonment and the quantity of punishment to be served.[38]

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[33] T. Szymanowski, [in:] T. Szymanowski, Z. Świda, *Kodeks karny wykonawczy. Komentarz. Ustawy dodatkowe, akty wykonawcze* [Executive Penal Code. Commentary. Additional acts, secondary legislation], Librata, Warsaw 1998, p. 365; J. Lachowski, *Warunkowe zwolnienie*… [Conditional release…], p. 339.

[34] W. Rodakiewicz, *Warunkowe zwolnienie*…. [Conditional release…], p. 235.

[35] The Appellate Court in Katowice ruling of 17 February 1999, II AKz 79/99, Prokuratura i Prawo – annex 1999, No. 9, item 22.

[36] The Appellate Court in Lublin ruling of 2 March 2011, II AKzw 179/11, LEX No. 852293.

[37] V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Wolters Kluwer, Warsaw 2016, p. 457.

[38] L.K. Paprzycki, A. Sakowicz, [in:] M. Filar (ed.), *Kodeks karany. Komentarz* [Criminal Code: Commentary], Wolters Kluwer, Warsaw 2016, p. 626.

In case of the release from a total of two or more penalties (Article 79 §1 CC), which may take place when conditional release is revoked because of the commission of a crime in the probation period, the subsequent terms are calculated from the day when the convict was imprisoned to serve any of the penalties and not the day when he started serving the penalty from which he was released and then the release was revoked.[39]

6. CONCLUSIONS

1. Conditional release from imprisonment starts a probation period during which the convict's behaviour is monitored to check whether he has readjusted to life in the society. A violation of the (broadly understood) legal order by him results, depending on the significance of that violation, in the obligatory or optional revocation of conditional release.
2. A penitentiary court is obliged to revoke conditional release in case:
   a) of the commission of deliberate crime for which the convict was validly sentenced for imprisonment without conditional suspension of its execution (Article 160 §1 EPC); as well as mixed fault crime committed with intent but causing unintended consequences (*culpa dolo exorta*). The court deciding on conditional release is bound by the sentence.
   b) a convict sentenced for a crime committed with the use of violence or illegal threat against a close relation or a minor residing together with the perpetrator flagrantly violates the legal order by relapsing into the use of violence or illegal threat against a close relation or a minor residing together with the perpetrator (Article 160 §2 EPC); the revocation is connected with the domestic violence. It is not necessary to sentence the perpetrator again for an act committed with the use of violence or illegal threat against a close relation or a minor residing together with the perpetrator; a penitentiary court alone assesses the situation.
   c) a convict, despite the written admonition issued by a court's professional probation officer, flagrantly violates the legal order, especially when he commits a crime other than deliberate or the adjudicated punishment was different from absolute imprisonment, or a convict evades supervision, the fulfilment of imposed obligations or adjudicated penal measures, forfeiture or compensation, unless there are special reasons against (Article 160 §4 EPC). The revocation is ruled because of the same circumstances that justify optional revocation of conditional release. A written admonition issued by a court's

[39] The Appellate Court in Kraków ruling of 17 November 2010, II AKzw 977/10, LEX No. 785269; the Appellate Court in Kraków ruling of 18 November 2003, II AKz 548/03, KZS 2003, No. 11, item 28; J. Lachowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna* [Criminal Code; General part], Vol. II, C.H. Beck, Warsaw 2015, p. 452; and J. Skupiński, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], C.H. Beck, Warsaw 2015, p. 527; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…* [Criminal Code…], p. 457; A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny…* [Criminal Code…], p. 383.

professional probation officer is a circumstance resulting in the change of the type of revocation from optional to obligatory. A written admonition is a warning that if a convict does not change his behaviour, conditional release shall be revoked.

3. The revocation of conditional release is optional in case of a flagrant violation of the legal order, especially the commission of a crime other than deliberate or the adjudication of a penalty different from absolute imprisonment, or evasion of supervision, the fulfilment of imposed obligations or adjudicated penal measures, forfeiture or compensation (Article 160 §3 EPC). Evasion of supervision, the fulfilment of imposed obligations or adjudicated penal measure takes place when the released may submit to supervision, fulfil imposed obligations or adjudicated measures but he does not want to do that, which indicates his negative mental attitude towards these obligations, i.e. his ill will. Inability to fulfil the obligations due to justified reasons is not regarded as evasion.

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The Appellate Court in Kraków ruling of 21 October 2015, II AKzw 965/15, Prokuratura i Prawo – annex 2016, No. 6, item 23.

REVOCATION OF CONDITIONAL RELEASE IN THE POLISH EXECUTIVE PENAL CODE

Summary

The article discusses the revocation of conditional release from the imprisonment penalty. The release is for a probation period during which a convict's behaviour is monitored in order to check if he has re-adjusted to life in the society. His violation of the legal order in its broad meaning, depending on the significance of this violation, results in the obligatory or optional revocation of the conditional release. The article presents thoroughly the circumstances that result or may result in the revocation of the conditional release.

Key words: probation period, legal order, imprisonment, conviction, conditional release, sentence

ODWOŁANIE WARUNKOWEGO ZWOLNIENIA W POLSKIM PRAWIE KARNYM WYKONAWCZYM

Streszczenie

Przedmiotem artykułu jest odwołanie warunkowego zwolnienia od odbycia kary pozbawienia wolności. Zwolnienie następuje na okres próby, w trakcie której sprawdzane jest zachowanie skazanego pod kątem jego przystosowania do życia w społeczeństwie. Naruszenie przez niego szeroko pojętego porządku prawnego skutkuje – w zależności od wagi jego naruszenia – obligatoryjnym lub fakultatywnym odwołaniem warunkowego zwolnienia. Szczegółowo omówione są przyczyny powodujące lub pozwalające na odwołanie warunkowego zwolnienia.

Słowa kluczowe: okres próby, porządek prawy, pozbawienie wolności, skazanie, warunkowe zwolnienie, wyrok

CRIME OF PERSUASION TO COMMIT OR ASSISTANCE IN THE COMMISSION OF SUICIDE UNDER ARTICLE 151 CC

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PAWEŁ BACHMAT**

1. INTRODUCTION

It is common knowledge that contemporary criminal legislations have given up treating suicide as a punishable act in case of both effectively committed suicides and attempted ones.[1] In the context of committed suicide, it is obvious that punishment as a personal hardship that should be faced by a perpetrator is not possible because of the actual circumstances. According to M. Cieślak, attempted suicide impunity, which is common today, may lead to certain confusion as well as drawing inappropriate conclusions regarding the rightness of the current legal state. As the author writes: "Based on the principles of our legal system, a temptation to present the following justification might occur: attempted suicide is not a crime because as an expression of a human right to decide about one's own life it is not a socially dangerous act. Due to the possible varied interpretation of the concept of social danger, this conclusion might also lead to the questioning of grounds for penalisation of persuasion to commit or assistance in the commission of suicide (…). However, the problem is that it would be absolutely false. It is grounded in a thesis that an individual has a right to freely decide about their life, which is highly controversial. It does not take into consideration the social aspect of existence and of human personality; it does not take into consideration (…) the fact that human life is the highest value for the individual but also a social value, i.e. a value for other people

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1 M. Cieślak, [in:] I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego. O przestępstwach w szczególności* [Criminal law system: On crime in particular], Vol. IV, part 1, Ossolineum, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985, p. 372.

and the whole society."[2] The senselessness of an act of punishment in such a case and a conflict with the aim of punishment (both general and specific prevention) can be the best explanation for attempted suicide impunity.

On the one hand, the reason for a lack of criminalisation of suicidal attempts is an individual's, as an owner of this good, right to free and unlimited decisions about one's life. On the other hand, it is justified by criminal policy (especially by the utilitarian nature of a criminal penalty). And finally, it is rationalised with the use of humanitarian reasons.[3] In A. Zoll's opinion, the fact that a suicidal attempt is not a forbidden act does not mean that man has the right to make an attempt on his life. In the author's opinion, in case of such an attempt, although the suicide does not match the sanctioning norm under Article 148 §1 Criminal Code (CC), he commits an act violating a sanctioned norm to protect every human life (under Article 38 of the Constitution of the Republic of Poland). Treating a suicidal attempt as an illegal act, as A. Zoll writes, makes it possible to regard the behaviour of a person trying to foil the suicidal attempt as necessary self-defence which justifies the infringement of a suicide's freedom.[4] However, such interpretation is not convincing and, as it is rightly emphasised in the doctrine, the recognition that a suicidal attempt is an illegal act would mean that man has a duty (and not a right) to live.[5]

A question is raised what reasons made the legislator criminalise persuasion to commit and assistance in the commission of suicide (especially in the context of suicide and attempted suicide impunity). If we take into consideration a general construction of instigating and aiding and abetting in prohibited acts (laid down in Article 18 CC), there is no doubt; these types of acts are punishable because of penalisation of the commission of an act they lead to.[6] However, suicide is legally irrelevant behaviour. Thus, it is necessary to ask a question why the legislator, deciding to leave suicidal behaviour outside the area of criminalisation, does not do it in relation to persons cooperating with a suicide in the act of his/her self-destruction. As J. Malczewski rightly emphasises, a conclusion can be drawn from the principle of accessoriness binding in criminal law that instigating and aiding and abetting in the commission of an act that does not constitute a crime should not be treated as crime. However, since it is otherwise and there is a provision criminalising these types of behaviour, it is legitimate to imply that the legislator had different reasons than condemnation of suicide as such.[7] It can be deemed

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[2] M. Cieślak, [in:] *System…* [System…], pp. 372–373.

[3] R. Kokot, *Z problematyki karalnego doprowadzenia do samobójstwa – uwagi na tle ustawowych znamion art. 151 k.k.* [Some issues of punishable causation of suicide – comments based on the statutory features under Article 151 CC], Part I, [in:] *Nowa kodyfikacja karna* [New Criminal Code], Vol. XXXV, AUWr No. 3670, Wrocław 2015, pp. 16–17.

[4] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna* [Criminal Code: Special part], Vol. II: *Komentarz do art. 117–277 k.k.* [Commentary on Articles 117–221 CC], Wolters Kluwer, Warsaw 2013, p. 320.

[5] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz* [Criminal Code: Special part. Commentary], Wolters Kluwer, Warsaw 2014, p. 193.

[6] J. Malczewski, *Problemy z prawną kwalifikacją lekarskiej pomocy do samobójstwa (art. 151 k.k.)* [Problems concerning legal classification of medical assistance in suicide (Article 151 CC)], Prokuratura i Prawo 11/ 2008, Warsaw, p. 26

[7] J. Malczewski, *Problemy...* [Problems...], p. 26.

(although it is a huge simplification) that a ban on encouraging and assisting in suicide aims mainly at preventing abuse, i.e. cases when an accomplice to suicide has immoral motives (e.g. to harm a victim or even benefit from his/her death).[8]

The fact that Polish criminal law does not stipulate suicide penalisation does not raise any controversies, and attempts to find other grounds for penalisation of a suicide who has survived attempted self-destruction (e.g. under Article 13 §1 CC in relation with Article 148 §1 CC, Article 156 CC, Article 157 CC or 160 CC), of course based on an assumption that other persons' rights have not been infringed, do not lead to positive results.[9] It is also doubtful if in case of attempted suicide the provisions of Article 145 §1(2) CC could be applicable (self-injury in order to avoid substitute military service) or Article 342 §1(1) CC (self-injury in order to avoid military service) because of the different aim that a person committing self-destruction has.[10] K. Burdziak is right when claiming that a perpetrator of attempted suicide deserves compassion and assistance, and initiation of criminal proceedings against them (and possible punishment) may only worsen their state and encourage them (and other potential suicides) to look for more efficient ways of killing themselves. These arguments, in the author's opinion, are also for giving up a possibility of treating attempted suicide even as a behaviour matching the features of some offences (e.g. Article 51 of Misdemeanour Code [MC]: breach of the peace, Article 140 MC: indecent incident).[11] This is a rational opinion because adoption of another conception might lead to hidden criminalisation of the phenomenon of suicide.[12] However, the above-mentioned considerations cannot be used to draw a conclusion that in every instance (regardless of circumstances, a suicide's *modus operandi* and its actual results) a suicide's act will be exempt from criminal liability. A series of crimes may be committed by a suicide in connection with their attempt at self-destruction. Such interpretation is necessary because otherwise an unsuccessful suicide would be granted specific immunity to prosecution for their acts, which might even lead to simulation of attempted suicide in order to remain unpunished for harming another person. It is not possible to list all (at least hypothetically) possible situations but a few examples can be indicated (of course based on an assumption that a suicide has survived an attempt at self-destruction):

– jumping from a height, a suicide falls on another person and causes his/her death or damage to health (liability under Article 155 CC: involuntary manslau-

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[8] J. Malczewski, *Problemy*... [Problems…], p. 27.

[9] Compare interesting conclusions by K. Burdziak, *Samobójca czy zabójca? Kilka słów na temat statusu samobójcy w polskim prawie karnym* [A suicide or a killer? A few words on a suicide's status in the Polish criminal law], Wojskowy Przegląd Prawniczy, No. 4, Warsaw 2014, p. 130 ff.

[10] Compare: K. Burdziak, *Samobójca*... [A suicide…], pp. 133–135. J. Majewski rightly states that: "A soldier who attempting suicide, causes self-inflicted injury, does not commit a crime under Article 342 because he does not act to evade military service". J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna* [Criminal Code: Special part], Vol. III: *Komentarz do art. 278–363* [Commentary on Art. 278–363], Warsaw 2008, p. 989.

[11] K. Burdziak, *Samobójca*... [A suicide…], p. 139. Compare also: A. Wąsek, *Prawnokarna problematyka samobójstwa* [Criminal law aspects of suicide], Wydawnictwo Prawnicze, Warsaw 1982, p. 51.

[12] A. Wąsek, *Prawnokarna*... [Criminal law…], p. 51.

ghter, Article 156 §2 CC: involuntary damage to health, or 157 §3 CC: involuntary causing medium detriment to health);
– driving a car, a suicide causes a traffic accident that inflicts injuries on another person as laid down in Article 157 §1 CC (Article 177 §1 CC) or causes death or severe detriment to health (Article 177 §2 CC), or causes a disaster in land traffic (Article 173 §2 CC), or brings about direct danger of a disaster in land traffic (Article 174 §2 CC), etc.;
– driving a car with a close relation (who does not want to deprive oneself of life), a suicide deliberately causes a traffic accident in which that other person is killed (Article 148 §1 or in cumulative classification under Article 177 §2 CC);
– a suicide attempts to kill himself/herself with the use of gas supplied to households in a multi-apartment building, where after some time the gas explodes to cause damage to property and even detriment to other people's health (possible classification, inter alia: Article 163 §2, Article 164 §2, Article 165 §2 CC);
– a suicide makes a suicidal attempt by self-burning and causes a fire threatening the life or health of many people and danger of large-scale property loss (Article 163 §2 CC);
– a suicide attempts to kill himself/herself with the use of illegally possessed firearms (liability under Article 263 §2 CC).

As indicated above, these are not all possible theoretical instances of an attempted suicide's criminal liability; literature indicates also a series of other possibilities (e.g. liability for the infringement of domestic peace, defamation or slander,[13] insult, possession and consumption of narcotic drugs, child abandonment[14]).

2. ANALYSIS OF STATUTORY FEATURES OF THE CRIME UNDER ARTICLE 151 CC

2.1.

It is commonly recognised in the doctrine that the subject of protection in case of the crime under Article 151 CC is human life.[15] It is sometimes added that it concerns life as value that constitutes social good, thus such that an individual as an owner

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[13] In the context of farewell letters left.

[14] See: A. Wąsek, *Prawnokarna...* [Criminal law…], p. 51. Compare also comments by K. Daszkiewicz, *Przestępstwa przeciwko życiu i zdrowiu. Rozdział XIX kodeksu karnego. Komentarz* [Crime against life and health. Chapter XIX Criminal Code: Commentary], C.H. Beck, Warsaw 2000, p. 253.

[15] Compare inter alia: R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], C.H. Beck, Warsaw 2015, p. 906; K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], C.H. Beck, Warsaw 2015, p. 865; M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System prawa karnego* [Criminal law system], Vol. 10, *Przestępstwa przeciwko dobrom indywidualnym* [Crime against individual good], C.H. Beck, Warsaw 2016, p. 147; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Wolters Kluwer, Warsaw 2016, p. 410; U.K. Ćwiklicz, *Eutanazja a wspomagane samobójstwo* [Euthanasia and supported suicide], Przegląd Policyjny, No. 3 (95), 2009, p. 145.

cannot freely decide about.[16] Such interpretation is sometimes criticised by stating that the fact that man has no right to freely decide about their own life because it is protected regardless of their will, should not mean that this freedom is exclusive to such an extent that it also eliminates rights to undertake any life-threatening self-destructive activities.[17] J. Malczewski has an interesting view on what subject to protection is within the analysed crime and states that the provision "intends to serve the protection of potential suicides against undesired and harmful influence of third parties."[18] However, the most convincing is the opinion expressed by J. Giezek, who believes that the subject to protection under Article 151 CC is human life and freedom from destructive influence on how man decides about their life.[19]

2.2.

Article 151 CC defines a causative factor as "inducing person to make an attempt on their own life", which can be done by persuasion or assistance. A question can be raised whether the terms persuasion and assistance reflect the terms of instigating and aiding and abetting laid down in Article 18 §2 and 3 CC. A view that seems to dominate the criminal law doctrine is that the interpretation of these terms should be based on the provisions on these non-causative forms of the phenomena.[20] Already on the grounds of the former Criminal Code (of 1969), this opinion was presented by inter alia J. Śliwowski,[21] W. Wolter[22] and M. Siewierski[23]. In the currently binding legal order, A. Zoll claims that: "there are no reasons for a different interpretation of the concepts of persuasion or assistance from that adopted in Article 18 §2 and 3 CC. The difference consists in the fact that due to a lack of penalisation of a suicidal attempt, the two forms of cooperation had to be specified as forms of implementing a specific prohibited act".[24] In B. Michalski's opinion, the provision of Article 151 CC "constitutes a norm of special nature because it classifies behaviour that in fact consists in instigating (persuasion) or aiding and abetting (assistance) in the commission of an act, which is not a crime itself (suicide), by another person".[25]

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[16] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny*... [Criminal Code…], p. 151. B. Michalski, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny. Część szczególna* [Criminal Code: Special part], Vol. I: *Komentarz do art. 117–221* [Commentary on Articles 117–221], C.H. Beck, Warsaw 2010, p. 306.

[17] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny*... [Criminal Code…], p. 193. Compare also comments by J. Malczewski, *Problemy*... [Problems…], p. 26 ff.

[18] J. Malczewski, *Problemy*... [Problems…], p. 27.

[19] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny*...[Criminal Code…], p. 193.

[20] J. Kosonoga-Zygmunt, *Namowa i udzielenie pomocy do samobójstwa (art. 151 k.k.)* [Persuasion and assistance in suicide (Article 151 CC)], Prokuratura i Prawo 11/2015, Warsaw, p. 48.

[21] J. Śliwowski, *Prawo karne* [Criminal law], 2nd edition, Warsaw 1979, p. 356.

[22] W. Wolter, [in:] I. Andrejew, W. Świda, W. Wolter (ed.), *Kodeks karny z komentarzem* [Criminal Code with commentary], Wydawnictwo Prawnicze, Warsaw 1973, p. 448.

[23] M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Wydawnictwo Prawnicze, Warsaw 1977, p. 391.

[24] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny*... [Criminal Code…], Vol. II, pp. 321–322.

[25] B. Michalski, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny*... [Criminal Code…], Vol. I, Warsaw 2010, p. 306.

M. Królikowski expresses a similar view: "The behaviour classified in the discussed provision has features typical of the description of the activities of instigating and aiding and abetting (…). In order to interpret these features, it is necessary to use the output of the doctrine and the judicature with regard to Article 18 §2 and 3 CC".[26]

Thus, it is necessary to take a closer look at how the contemporary criminal law doctrine interprets the meaning of the terms "persuasion" and "assistance" as features of the analysed type of a prohibited act. Let us start with an analysis of the concept of persuasion, which seems to cause more interpretative problems. According to A. Marek, "persuasion to commit suicide is nothing else than inducing a person to do something, which is the content of the activity of instigating".[27] As A. Wąsek claims, the scope of meaning of the terms "persuasion" [*namowa*] and "inducing" [*nakłanianie*] is the same.[28] K. Daszkiewicz is of a different opinion and believes that Article 151 CC (as well as the former wording of the provision) does not introduce the features of instigating but persuasion, and in the author's opinion, "this is not the same"[29]. According to L. Tyszkiewicz, "instigating [*podżeganie*] is described by the feature of the word 'to persuade' [*namawiać*] instead of 'to induce' [*nakłaniać*], which means that the scope of forms of instigating has been limited to the forms that are less intense".[30] Also P. Góralski believes that persuasion to suicide is a narrower term than inducing to commit a prohibited act.[31] K. Burdziak is convinced that the meaning of a verb "to induce" is broader than "to persuade".[32] Z. Gądzik argues as well that "persuasion to commit suicide is an act the meaning of which is narrower than in case of inducing (Article 18 §2 CC)".[33] However, we should agree with J. Kosonoga-Zygmunt, who believes that the representatives of the doctrine who claim that the meaning of persuasion and inducing is the same are right; the use of the term "persuasion" instead of "inducing" by the legislator results mainly from the linguistic reasons.[34] It must be reminded that according to the

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[26] M. Królikowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część szczególna* [Criminal Code: Special part], Vol. I, *Komentarz. Art. 117–221* [Commentary. Articles 117–221], C.H. Beck, Warsaw 2013.

[27] A. Marek, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Wolters Kluwer, Warsaw 2010, p. 378.

[28] A. Wąsek, *Prawnokarna*... [Criminal law…], p. 60.

[29] K. Daszkiewicz, *Przestępstwa*... [Crime…], p. 250.

[30] L. Tyszkiewicz, [in:] M. Filar (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Wolters Kluwer, Warsaw 2014, p. 859.

[31] P. Góralski, *Pomoc i namowa do samobójstwa (art. 151 k.k.) w poglądach doktryny oraz danych statystycznych* [Assistance and persuasion to suicide (Article 151 CC) in the legal doctrine and statistics], [in:] L. Bogunia (ed.), *Nowa kodyfikacja prawa karnego* [New Criminal Code], Vol. XIII, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2003, p. 39. As the author claims, inducing to commit a prohibited act "may also have other verbal forms (e.g. insisting, promising benefits) as well as non-verbal (e.g. specific gestures influencing the addressee's decision-making processes). Persuasion is only action and inducing is possible also in the form of omission to act." (P. Góralski, *Pomoc*... [Assistance…], pp. 39–40).

[32] K. Burdziak, *Kierowanie wykonaniem samobójstwa i polecenie jego wykonania w polskim prawie karnym* [Managing the commission of suicide and ordering its commission under the Polish criminal law], Ruch Prawniczy, Ekonoloczny i Socjologiczny, No. 4, 2014, p. 181.

[33] Z. Gądzik, *Prawnokarna ocena samobójstwa* [Assessment of suicide under criminal law], Roczniki Nauk Prawnych, Vol. XXII, No. 3, 2012, p. 140.

[34] J. Kosonoga-Zygmunt, *Namowa*... [Persuasion…], p. 50.

Polish Language Dictionary, the verb "to persuade" means: "to encourage someone to do something, to induce, to convince";[35] thus, there are no rational arguments for awarding it the meaning that is different from that resulting from the grammatical interpretation. As M. Budyn-Kulik notes, it seems that the legislator used a different term in Article 18 §2 CC only in order to emphasise that Article 151 CC classifies a different intrinsic type of crime.[36]

Generally speaking, persuasion influences the intellectual as well as emotional sphere of another person and aims at triggering an intention to commit suicide.[37] M. Budyn-Kulik is a supporter of the broad interpretation of the term persuasion, which consists in inducing another person verbally or in another implicit way, e.g. a gesture; thus, it means any action that might influence a victim's decision to attempt on his/her own life.[38] B. Michalski is of a similar opinion and allows a written form (apart from a verbal one) and adequate unambiguously understood gestures.[39] R. Kokot presents a different view and claims that only verbal persuasion is possible and all non-verbal incentives to commit suicide (e.g. gestures) are beyond the meaning of this feature. Acknowledging that although the grammatical interpretation (by referring to etymology) might lead to a conclusion that the fulfilment of the feature should be associated only with spoken words, the author rightly states that it is necessary to adopt a more rational interpretation from the point of view of a sanctioned norm laid down in this provision, including a written form of persuasion in this feature influencing a victim's decision and leading to the commission of suicide.[40] On the other hand, K. Burdziak is of opinion that persuasion may be executed only by verbal influence on another person's will. According to this author, it is difficult to imagine that an even most meaningful gesture or facial expression might trigger an intention to commit suicide.[41] Being for the identification of the scope of the concepts of persuasion and inducing, we share an opinion about a broad scope of the term persuasion covering not only verbal forms but also any other (written ones like short text messages, e-mails, and even explicit gestures), provided that they can effectively influence another person's will and make him/her intend to attempt self-destruction. Although the classification of gestures in the persuasion category may be open to doubt, there are no rational contraindications to that (e.g. unambiguous gestures encouraging suicide made by a deaf person; gestures shown through a glass window or from a long distance when the voice is not heard or the message is produced in loud noise). Obviously, it can also happen that those gestures (encouraging suicide, e.g. shown to a person hesitating whether to jump from a tower block roof) may sometimes be recognised

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[35] http://sjp.pl/namawia%C4%87; M. Szymczak (ed.), *Słownik języka polskiego* [Polish Language Dictionary], Vol. 1, PWN, Warsaw 1984.

[36] M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System*... [System…], p. 147.

[37] J. Kosonoga-Zygmunt, *Namowa*... [Persuasion…], p. 50.

[38] M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System*... [System…], p. 148.

[39] B. Michalski, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny*... [Criminal Code…], p. 307.

[40] R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny*.... [Criminal Code…], Warsaw 2015, p. 909.

[41] K. Burdziak, *Kierowanie*... [Managing…], pp. 180–181.

as assistance under Article 151 (because a victim has already intended to make a suicidal attempt).

The person who persuades does not have to have a direct contact with the person being persuaded; this can be done with the use of any other form of communication: a telephone call, a talk on the Internet (Skype, gadu-gadu, etc.), and correspondence (letters, short text massages, e-mails).[42] A suicide does not have to know the person who persuades or assists him/her; a perpetrator may remain anonymous for a suicide (e.g. providing information on the Internet). Both persuasion to and assistance in the commission of suicide must concern a definite person, even if the circle of addressees was abundant (e.g. members of a big sect encouraged by their guru to commit suicide).[43]

Calling for suicide that is not addressed to a definite person does not constitute persuasion, but sometimes it is raised in the doctrine that calling for suicide posted on the Internet blog or a social network service may be considered persuasion.[44] However, developing and publishing instruction, advice and hints on how to commit suicide as well as other content that may hypothetically facilitate the commission of suicide do not constitute persuasion and assistance if they are addressed to personally indefinite, anonymous circle of recipients.[45] We cannot speak of matching the statutory features of the crime under Article 151 CC in a situation when there is a call for suicide made in public (and it does not concern a definite person).[46] As it is stated in the doctrine, it is also not possible in such a case to recognise the features of a crime under Article 255 CC, because an act a perpetrator calls for is not illegal.[47]

Persuasion must be clear and unambiguous and its content cannot raise questions about a perpetrator's intention. As R. Kokot emphasises, "to recognise the matching features of persuasion to the commission of suicide, it is not sufficient to influence a person through emotional manipulation aimed at generating deep depression, breakdown or despair and, in consequence, 'suicidal thoughts'".[48] If a perpetrator's behaviour is taking the form of harassment or even abuse that result in the victim's suicide, it may be subject to liability under Article 190a §1 CC or 207 §3 CC (or possibly 352 §3 CC).

Persuasion referred to in Article 151 CC may be in the form of a request, a suggestion, a proposal, etc. On the other hand, the use of threat, blackmail, extortion or hypnosis – according to R. Kokot – goes beyond the scope of the criminal features.[49] In such cases, considering classification under Article 148 (§1 or 2) CC seems to be well grounded. Also A. Wąsek's opinion deserves attention. He claims that a perpetrator who has only seemingly participated in suicide – solely in order

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42 R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny...* [Criminal Code…], p. 909; M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System...* [System…], p. 148.

43 R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny...* [Criminal Code…], p. 910.

44 M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System...* [System…], p. 148

45 M. Filar, *Lekarskie prawo karne* [Medical criminal law], Zakamycze, Kraków 2000, p. 335. P. Góralski, *Pomoc...* [Assistance…], p. 42.

46 R. Kokot, [in:], R.A. Stefański (ed.), *Kodeks karny...* [Criminal Code…], p. 910.

47 *Ibid*.

48 R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny...* [Criminal Code…], p. 909.

49 *Ibid*.

to dispose of a victim with the use of his/her behaviour – should be liable for the commission of the crime under Article 150 or 151 CC and not for manslaughter under Article 148 CC. In the author's opinion, the fact that a perpetrator uses a ruse should be taken into consideration when administrating punishment.[50] One can have doubts whether this is a right stand. In such a case, classification under Article 151 does not seem well grounded and may be treated as specific "promotion" of a perpetrator for his/her inventiveness. One cannot exclude cases in which a perpetrator using a ruse has motives deserving special condemnation, which should lead to classification under Article 148 §2(3) CC. On the other hand, as far as the use of violence by a perpetrator is concerned, P. Góralski is right to say that it would be too far reaching to state that forcing a victim to commit suicide might be treated as an act subject to Article 151 CC. Although the interpretation of the term "to induce" [*doprowadzać*] does not exclude it (in comparison with the words "to assist" [*pomagać*] or "to persuade" [*namawiać*]), the performance of these activities with the use of force towards a potential suicide is doubtful.[51] However, the author does not suggest what the correct legal classification of the perpetrator's act in such a case should be (although, it seems Article 148 CC should be applied).

In case an intention to make an attempt on one's own life is not provoked by a perpetrator's persuasion but results from other reasons and the perpetrator with the use of persuasion only strengthens this intention in a potential suicide's psyche (e.g. providing the suicide with advice, tips and information or eliminating possible doubts), the perpetrator's behaviour does not constitute persuasion (under Article 151 CC) but is psychical assistance (matching the latter of the verb-related features of the crime under Article 151 CC).[52]

There is no uniformity in the doctrine concerning the assessment of a case of strengthening a given person's intention to commit suicide. In some authors' opinion, it can be treated as persuasion, especially when a potential suicide hesitates whether to perform an act of self-destruction (L. Peiper,[53] A. Wąsek,[54] M. Budyn-Kulik,[55] J. Giezek[56]). A similar interpretation of the feature of persuasion can also be found in the Supreme Court's rulings. In its ruling of 24 January 1967, the Supreme Court states that persuasion is "not only a perpetrator's activity aimed at evoking another person's will to perform an act but also any form of persuasion aimed at making another person not give up the intention (…), especially hurrying another person into performing a planned act (…), thus also any form of influence aimed at strengthening the will to commit a crime in another person's psyche".[57] It seems, however, not to be the proper interpretation. A perpetrator's behaviour consisting

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[50] A. Wąsek, *Prawnokarna*... [Criminal law…], p. 109.

[51] P. Góralski, *Pomoc*... [Assistance…], p. 43.

[52] B. Michalski, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny*... [Criminal Code…], pp. 307–308.

[53] L. Peiper, *Komentarz do kodeksu karnego* [Commentary on Criminal Code], Kraków 1936, p. 463.

[54] A. Wąsek, *Prawnokarna*... [Assessment of…], p. 61.

[55] M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System*... [System…], p. 148.

[56] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny*... [Criminal Code…], p. 194.

[57] The Supreme Court ruling of 24 January 1967, file no. II KR 211/66, unpublished.

in strengthening a potential suicide's will should not be treated as persuasion but as psychical assistance in the commission of suicide.[58] This opinion rightly dominates the Polish doctrine (inter alia M. Cieślak,[59] B. Michalski,[60] A. Marek,[61] R. Kokot[62]). There is also another conception in the doctrine that is worth mentioning. According to it, in such a situation it is possible to use the concept of inefficient attempt in case a perpetrator does not know that a suicidal attempt has already been planned.[63]

Assistance in the commission of suicide, as a rule (although obviously with the suicidal attempt specificity taken into consideration), matches the formula of aiding and abetting laid down in Article 18 §3 CC,[64] thus it can consist in both action and omission in case the perpetrator does not fulfil his/her legal duty to prevent a suicidal attempt.[65] The perpetrator plays the role of a guarantor who has a special legal duty to prevent the consequence of an attempt on somebody's own life.[66] However, as K. Burdziak rightly notes, Article 151 CC refers to assistance and not to facilitation, which is laid down in Article 18 §3 CC.[67] In the author's opinion, although the analysed phrase should be described in the same way as aiding and abetting, it is necessary to clearly emphasise that assistance is to lead a person to an attempt on his/her own life (and hence, is to indirectly cause a suicidal attempt).[68] Thus, we cannot speak of the commission of the crime under Article 151 when facilitation finishes, because the activity must be effective. Therefore, unlike in case of persuasion, physical assistance (e.g. provision of poison) as well as psychical assistance (e.g. advice) cannot evoke an intention to commit suicide. However, it can help a victim enter the phase of trying to commit suicide. In case they turn out to constitute one of the factors that conditions the commission of suicide, there are grounds to recognise they match the features of misdemeanour under Article 151 CC.[69]

It is not important for legal classification whether assistance has resulted from a victim's inspiration or has been a perpetrator's own initiative (although this circumstance can undoubtedly influence the administration of punishment[70]). Unlike persuasion, which always precedes the intention to commit suicide (and is intellectual in nature), assistance (as a rule, but not exclusively) is physical in nature and may be given to a person who has already formed an intention to commit

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[58] J. Kosonoga-Zygmunt, *Namowa*... [Persuasion…], p. 51.

[59] M. Cieślak, [in:] *System*… [System…], p. 378.

[60] B. Michalski, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny*... [Criminal Code…], pp. 307–308.

[61] A. Marek, *Kodeks karny*... [Criminal Code…], p. 378.

[62] R. Kokot, [in:] *Kodeks*, p. 909.

[63] R. Kokot, *Z problematyki*... [Some issues…], part I, p. 25.

[64] R. Kokot, *Z problematyki*... [Some issues…], Part II, [in:] *Nowa kodyfikacja karna* [New Criminal Code], Vol. XXXVI, AUWr No. 3680, Wrocław 2015, p. 29.

[65] P. Góralski, *Prawne i społeczne aspekty eutanazji* [Legal and social aspects of euthanasia], Libron, Kraków 2008, p. 277; R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny*... [Criminal Code…], p. 909.

[66] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny*... [Criminal Code…], p. 194.

[67] K. Burdziak, *Kierowanie*... [Managing…], p. 181.

[68] *Ibid*., p. 182.

[69] *Ibid*.

[70] R. Kokot, *Z problematyki*... [Some issues…], part I, p. 29.

suicide.[71] The essence of aiding and abetting consists in facilitating another person's implementation of an intention to commit suicide (e.g. by supplying firearms, poison or another object that will be used to commit suicide as well as advice, tips or strengthening a suicidal intention[72]). Psychical assistance – in compliance with the interpretation of the Supreme Court – should be understood as "assistance given mainly in a verbal form by contrast to aiding and abetting that is in the form of action. However, this assistance does not only consist in advice and hints facilitating the commission of a crime but also in such perpetrator's behaviour that in especially convincing way manifests total solidarity with the perpetrator's intention and may in some situations create an atmosphere in which the direct perpetrator's intention develops, matures and strengthens the perpetrator in the already made decision (…)".[73] According to J. Giezek, by contrast to aiding and abetting (as laid down in Article 18 §3 CC) which may take place also in the course of the commission of a prohibited act, assistance (as understood in Article 151 CC) must take place before suicide is committed. As the author writes, if a perpetrator assisted another person in the course of his/her commission of suicide, he/she would lead (also in a purely causative sense) to undertake such an act and thus, the result laid down in Article 151 CC could not be attributed to him/her (because at the moment of giving assistance the result would have been achieved).[74] However, this opinion should be deemed incorrect. There are no obstacles to strengthen a victim's suicidal decision in the course of its fulfilment in the face of his/her hesitation (giving psychical assistance this way) or to provide a victim with means or tools to efficiently commit suicide in the course of a suicidal attempt being made (with no expected effect in the form of death).

It must be emphasised that not every instance of persuasion and not every act of assistance in the commission of suicide complies with statutory features of the crime under Article 151 CC. In accordance with this provision, behaviour is a causative factor only if it has "so intense influence on another person that it can be recognised as one that meets the requirements leading to the commission of suicide".[75] It must be highlighted that in accordance with the linguistic interpretation, the verb "to lead" means: "to be a cause of something, to make someone do something, to cause something, to provoke something".[76] Thus, it does not raise any doubts that not

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[71] H. Popławski, *Doprowadzenie do samobójstwa* [Leading to suicide], Patologia Społeczna – Zapobieganie, Vol. X, 1981, p. 57.

[72] According to A. Mazurek, "Intellectual assistance in the commission of suicide may be demonstrated by giving advice, hints or information about an efficient method of self-destruction to a person who has already decided to commit suicide. For example, a perpetrator explains it to a victim how to obtain poison or which substances used in an appropriate way are most efficient, etc. A. Mazurek, *Odpowiedzialność karna za podżeganie lub pomocnictwo do samobójstwa oraz doprowadzenie do zamachu samobójczego* [Criminal liability for instigation or assistance in suicide and leading to a suicidal attempt], Wojskowy Przegląd Prawniczy No. 1, Warsaw 1980, p. 69.

[73] The Supreme Court ruling of 9 August 1973, I KR 178/73, OSNKW 1974, Vol. 3, item 43.

[74] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny...* [Criminal Code…], p. 194.

[75] R. Kokot, *Z problematyki...* [Some issues…], part I, p. 23.

[76] As M. Budyn-Kulik notes: "in this understanding of the word, a person may be led to suicide by persuasion. On the other hand, in a situation where a causative action consists in assistance, a victim (a future suicide) has already taken a decision on a suicidal attempt, thus

every type of persuasion and not every kind of assistance can be recognised as one matching the features of the analysed crime; only these types can be regarded as such which may be called "persuasion leading to attempt on one's own life" or "assistance leading to an attempt on one's own life". It is emphasised in the doctrine that a perpetrator's behaviour in a causative sense must be a condition for suicide as without this persuasion or without this assistance, suicide would not be committed; the attribution of a result may take place only when the perpetrator's behaviour is of basic importance and decisive.[77]

The crime under Article 151 CC is substantive in nature. Its features include an effect understood not only as another person's death but a suicidal attempt regardless of its result.[78] Thus, in case of committed suicide (resulting in death), not only damage to the good such as life constitutes the commission, but also exposure to damage in case of attempted suicide (when a suicidal attempt does not cause direct threat of death).[79] Obviously, general liability for the attempted crime under Article 151 CC can be taken into consideration. It will take place in a situation when persuasion does not evoke a victim's intention to commit suicide as well as when such intention has occurred but a victim's behaviour has not entered the stage of making an attempt.[80] An attempt may be both efficient and inefficient, and – what seems to be obvious – inefficiency must occur on the part of a perpetrator (i.e. a person leading to the commission of suicide), not on the part of a person led to the commission of suicide. For example, persuasion to the commission of suicide performed in a language that another person does not understand or providing that person with a suicidal substance that is not poisonous should be recognised as inefficient.[81]

There is a series of interpretational problems connected with the issue of the object of performing activity in case of the crime under Article 151 CC. It is considered that only a person capable of taking decisions independently (in case of persuasion) or a person who has already – consciously – made such a decision (in case of assistance) can be this object. It is quite commonly assumed in the doctrine that a person incapable of recognising the significance of an act and managing his/her activities because of age or psychical condition cannot be the object of the performing activity in this crime (and there is a belief that in such cases classification under Article 148 CC is substantiated).[82] Already based on the Criminal Code of 1932, S. Śliwiński suggested that a decision on the commission of suicide should be a decision made by a person who disposes of his/her own volition; thus, it cannot be a decision made by a person who cannot recognise the significance of his/her

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he/she cannot be led to that. The legislator, in order to be succinct, used one verb to describe the feature. It seems that it would be more appropriate to use two verbs to describe the perpetrator's behaviour: someone who leads by persuasion or assists" (M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System...* [System…], p. 149).

77 R. Kokot, *Z problematyki...* [Some issues…], part I, p. 23.

78 M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System...* [System…], p. 150. A. Mazurek, *Odpowiedzialność...* [Criminal liability…], p. 69.

79 R. Kokot, *Z problematyki...* [Some isssues…], part I, p. 24.

80 A. Mazurek, *Odpowiedzialność...* [Criminal liability…], p. 69.

81 R. Kokot, *Z problematyki...* [Some issues…], part I, p. 25.

82 Compare: M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System...* [System…], p. 150.

act and manage his/her activities (in particular, it cannot be a decision made by a person who is underage, *non compos mentis* or acting in error[83]). W. Wolter[84] presented a similar opinion when the Criminal Code of 1969 was still in force. Based on the current Criminal Code, it is also a quite commonly adopted conception. A. Zoll,[85] M. Budyn-Kulik,[86] M. Królikowski,[87] L. Tyszkiewicz[88] and A. Wąsek[89], among others, represent this standpoint. For example, according to A. Zoll, in case of the crime under Article 151 CC, "a minor (everyone under the age of 16, see Article 32 of Act of 5 December 1996 on the professions of a physician and a dentist) and a person who because of psychical disorders cannot recognise the significance of undertaken action is not (…) the object of the performed activity. Persuasion of a minor or a handicapped person, or giving them assistance leading to suicide should be classified as the commission of the crime under Article 148 §1 (or possibly, if features are matched, under Article 148 §2 CC)."[90] According to M. Królikowski, "the object of the performed activity is a person capable of recognising the significance of an act of suicide. In case of influencing a minor under the age of 16 (…) or a person who cannot manage his/her activities or recognise the significance of his/her act, the act – because of the features of the person and increased dependence on the instigator's or assistant's influence – should be treated as the commission of the crime laid down in Article 148 §1 CC (or possibly 148 §2 CC)."[91]. A. Wąsek analyses the issue in detail and points out that there are six possible solutions,[92] however, he supports an opinion that only a major can give efficient consent to the loss of a legal good.[93] A similar opinion, like in the majority of the doctrine, is held in the judicial decisions, which can be exemplified by the ruling of the Court of Appeal in Gdańsk of 13 November 2009,[94] ("A person who is persuaded or assisted in the commission of a suicidal attempt must, due to their psychical features, be able to fully recognise the significance of the act and manage their activities. If they lack

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[83] S. Śliwiński, *Udział w czynie osoby atakującej swoje własne dobro* [Participation in an act performed by a person against their own good], Demokratyczny Przegląd Prawniczy, No. 9, 1948, p. 48.

[84] W. Wolter, [in:] I. Andrejew, W. Świda, W. Wolter (ed.), *Kodeks karny*... [Criminal Code…], p. 448.

[85] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny*... [Criminal Code…], p. 323.

[86] M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System*... [System…], p. 150.

[87] M. Królikowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny*... [Criminal Code…], p. 232.

[88] L. Tyszkiewicz, [in:] M. Filar (ed.), *Kodeks karny*... [Criminal Code…], Warsaw 2014, p. 859.

[89] A. Wąsek, *Prawnokarna*... [Criminal law…], pp. 73–74.

[90] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny*... [Criminal Code…], p. 323.

[91] M. Królikowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny*... [Criminal Code…], p. 232.

[92] A. Wąsek points out the following solutions: (1) to treat this kind of act, regardless of a victim's age, as crime under Article 151 CC, or classify it as manslaughter where (2) a victim was under 13 years of age, (3) under 13 and between 13 and 17 years of age but acted without full recognition, (4) under 15 years of age, (5) under 17 years of age, (6) under 18 years of age. A. Wąsek, *Prawnokarna*... [Criminal law…], pp. 73–76.

[93] A. Wąsek, *Prawnokarna*... [Criminal law…], pp. 73–74.

[94] File no. II Aka 276/09, Prokuratura i Prawo 2011, No. 9, item 30, Annex.

such recognition (child, *non compos mentis*), the perpetrator's act can be recognised as the crime under Article 148 CC").

An opinion different from the above-presented (prevailing) one is worth mentioning, too. According to K. Burdziak, leading a person to a self-destructive activity where he/she is incapable of recognising the significance of the undertaken act or is in error as far as this significance recognition is concerned should be classified in accordance with Article 151 CC.[95] The author broadly argues his stand noticing, however, that this classification is not a fully satisfactory solution. Thus, it is necessary to appropriately amend the analysed provision. He refers to a very interesting proposal *de lege ferenda*[96] made by Ł. Pohl, who suggests that it is reasonable to amend Article 151 by adding an adequate paragraph laying down a ban on leading such persons to make attempts on their own life and stipulating similar punishment.[97]

2.3.

The crime classified in Article 151 CC is common in nature. In case it is committed via action, anyone can commit it. However, only a person who has a special legal duty to prevent a result may commit omission matching statutory features of the crime (Article 2 CC); in this case the crime is individual in nature.

Matching statutory features of a crime under Article 151 CC may take place not only in the form of single perpetration but also co-perpetration (and of course multi-perpetration). What raises doubts, however, is a possibility of committing this prohibited act as non-executive perpetration (managerial and recommending). According to A. Zoll, managerial and recommending perpetration should be classified as manslaughter under Article 148 §1 or 2 CC.[98] It seems that the basic argument in this field might be the fact that the level of social harm, e.g. of recommending perpetration – as a rule (if it can be stated *in abstracto*) – is bigger than e.g. of persuasion to commit suicide. It seems, however, that this opinion, although logically substantiated, raises considerable doubts in the normative sense and cannot be accepted.[99] There is no conflict of opinion, however, with regard to the fact that the analysed issue is not unambiguous and the statutory approach to the crime can raise doubts. Worth

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[95] K. Burdziak, *Przedmiot czynności wykonawczej przestępstwa z art. 151 kodeksu karnego* [The object of an executive act of the crime under Article 151 CC], Zeszyty Naukowe Uniwersytetu Szczecińskiego, Acta Iuiris Stetinensis 10, No. 861, 2015, p. 14 ff.

[96] K. Burdziak, *Przedmiot*... [The object…], p. 28.

[97] Ł. Pohl, *Kierowanie wykonaniem samobójstwa i polecenie jego wykonania w polskim prawie karnym (analiza de lege lata i postulaty de lege ferenda)* [Managing the commission of suicide and ordering its commission in the Polish criminal law (comments *de lege lata* and proposals *de lege ferenda*)], [in:] A. Michalska-Warias, I. Nowikowski, J. Piórkowska-Flieger (ed.), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana profesorowi Tadeuszowi Bojarskiemu* [Theoretical and practical problems of the contemporary criminal law. Professor Tadeusz Bojarski jubilee book], Wydawnictwo UMCS, Lublin 2011, p. 529.

[98] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny*... [Criminal Code…], p. 322

[99] M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System*... [System…], p. 151, R. Kokot, *Z problematyki*... [Some issues...], part II, p. 31.

quoting is L. Pohl's accurate observation that in case of managing the commission of suicide and recommendation of its commission we do not deal with relative treatment of punishable prohibited behaviour because suicide is not a punishable prohibited act, and this means that stating that managing the commission of suicide and recommendation of suicide commission are forms of criminal co-operation is erroneous. The author rightly claims that it is easier to prove that managing the commission of suicide is one of the ways of assisting a person in an attempt on his/her own life (and recommendation of the commission of suicide is a form of persuasion) than to prove that this management (and recommendation) constitutes the behaviour that kills a person (which results in liability under Article 148 CC).[100] As a consequence, L. Pohl rightly supports the opinion that managing the commission of suicide and recommendation of its commission constitute the perpetrator's behaviour that matches the features specified in Article 151 CC. However, noticing the weaknesses of this solution (mainly in the context of a sanction inadequate to the significance of the act), the author formulates proposals *de lege ferenda* aimed at solving the occurring problems. The first proposal is to raise the maximum punishment limit laid down in Article 151 CC (up to 10 years), which would better meet the requirement of penal response to making another person kill himself/herself by managing the commission of suicide or recommending its commission. The second one, more appropriate in my opinion, recommends adding two paragraphs to Article 151 CC, which would give managing of the commission of suicide and recommendation of its commission (as forms of making another person kill himself/herself) a status of separate punishable prohibited acts carrying one to ten years' imprisonment.[101]

Statutory features of a crime in non-causative forms (instigating and aiding and abetting) may be implemented following general rules. Thus, it may be both instigating persuasion to make an attempt on one's own life as well as instigating assistance and also aiding and abetting in persuasion or assistance in the commission of suicide.[102] Certainly, there may be a thought about the so-called chain instigation and aiding and abetting in the above-mentioned cases, which however – because of the causative nature of persuasion and assistance – is normatively unjustified.[103]

2.4.

The doctrine seems to be dominated by a view that the crime under Article 151 CC in the form of persuasion may be committed only with a direct intention and in case of assistance with both direct and potential intention.[104] K. Buchała's isolated

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[100] Ł. Pohl, *Kierowanie*... [Managing…], p. 527.

[101] Ł. Pohl, *Kierowanie*... [Manging…], pp. 528–529.

[102] For instance, X persuades another person (Y) to persuade Z to commit suicide or assist Z in the course of suicide. As X wants Y to convince Z (or assist Z in suicide), he facilitates this persuasion, e.g. organising Y and Z meeting. M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System*... [System…], p. 151.

[103] R. Kokot, *Z problematyki*... [Some issues…], part II, p. 33.

[104] J. Śliwowski, *Prawo karne*... [Criminal law], Warsaw 1979, p. 356; M. Cieślak, [in:] *System*… [System…], p. 378; W. Wolter, [in:] *Kodeks karny*… [Criminal Code…], p. 448; M. Budyn-

(and inaccurate) opinion is worth mentioning. He believes that "due to the phrase 'by rendering assistance induces' the crime can be committed only with direct intention".[105]

Some doubts are raised in the doctrine with regard to the possibility of the occurrence of a potential intention in case of persuasion of another person to make an attempt on his/her own life. The arguments pointed out by A. Wąsek are worth mentioning. He believes that the term "persuasion" (in the same way as "inducing") does not encode purposefulness of a perpetrator's action. If persuasion were to be connected only with direct intention, statutory limitation of the subject of inducing to direct intention would be useless.[106] If the legislator did not predict that persuasion is also possible with potential intention, the limitation of the scope of criminalisation to direct intention would be unjustified. Thus, it is justified to state that the term "persuasion" (corresponding to "inducing") does not give grounds either to adopt interpretation limiting the possibility of committing the crime under Article 151 (in the form of persuasion) only to direct intention. A. Wąsek's arguments are convincing. Undoubtedly, the term "persuasion" does not hint intention and it is not difficult to imagine instances of persuasion in which someone wants another person to have an intention or do something, as well as situations in which a person persuading only agrees on the effects of his/her persuasion. J. Kosonoga-Zygmunt shares A. Wąsek's opinion[107] and, it seems, so does P. Góralski.[108]

Neither motive nor aim belongs to statutory features of the crime classified in Article 151 CC. As it is rightly noticed in the doctrine, however, culpability of this crime commission differs depending on whether a perpetrator has had noble or ill motives.[109] A situation in which the perpetrator makes a person kill himself/herself with the use of assistance resulting from the victim's request because this perpetrator feels sorry for the victim is an interesting issue causing some interpretational problems. It is not an invented, purely hypothetical situation because it can be encountered in the judicial practice.[110] There are three attitudes toward this matter in the doctrine:

1) According to some lawyers, a perpetrator's act is not punishable in such a case (based on the interpretation of the provisions of Articles 151 and 150, it is legally neutral). The argumentation is as follows: if in case of mercy killing (an act, which is more socially dangerous than the act under Article 151 CC) it is possible to drop prosecution and the legislator does not lay down this possibility

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-Kulik, [in:] J. Warylewski (ed.), *System...* [System…], p. 151; A. Zoll, [in:] *Kodeks karny...* [Criminal Code…], p. 324; A. Marek, *Kodeks karny...* [Criminal Code…], p. 378; M. Królikowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...* [Criminal Code…], p. 233; R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny...* [Criminal Code…], p. 911.

[105] K. Buchała, *Prawo karne materialne* [Substantive criminal law], II edition, PWN, Warsaw 1989, p. 620.

[106] Article 18 §2 CC: "Whoever, willing that another person should commit a prohibited act, induces the person to do so, shall be liable for instigating".

[107] J. Kosonoga-Zygmunt, *Namowa...* [Persuasion…], p. 52.

[108] P. Góralski, *Pomoc...* [Assistance…], p. 40.

[109] A. Wąsek, *Prawnokarna...* [Criminal law…], p. 63.

[110] Case No. II K 139/09 SO w Koszalinie.

in case of Article 151 CC, using logical interpretation (*argumentum a minori ad maius*) one should draw a conclusion that assistance in the commission of suicide (implemented on demand and because of sympathy for a victim) is not subject to liability at all;[111]

2) According to other authors, assistance in the commission of suicide on demand and because of sympathy is in fact mercy killing and as such should be prosecuted based on Article 150 CC;[112]
3) The third group of authors believe that even in case of demand and sympathy on the part of a person assisting in suicide, the classification based on Article 151 CC is justified.[113]

The third option presented above should be considered appropriate. Thus, the classification under Article 151 is justified in such a case, and the fact that the act is on demand and compassion motivated will undoubtedly constitute circumstances influencing the administration of penalty (and may lead to extraordinary mitigation of the punishment). As A. Wąsek writes, when a perpetrator motivated by compassion provides poison for a terminally ill relative suffering from terrible pain, he/she deserves clemency and the act (classified under Article 151 CC), in the author's opinion, deserves more leniency than euthanasia.[114] As far as the first of the above-mentioned stands is concerned (undoubtedly the most advantageous for a perpetrator), worth mentioning is P. Góralski's right opinion that "one cannot *de lege lata* assume non-culpability of euthanasia-related assistance in the commission of suicide based on the fact that a perpetrator's act is less socially dangerous than mercy killing".[115]

Unintentional making another person commit suicide does not match the features of the crime under Article 151 CC. However, Article 155 CC may be taken into consideration.[116]

3. PUNISHMENT

The crime under Article 151 CC carries a penalty of three months' to five years' imprisonment. It is worth mentioning that, in comparison to the sanction for a misdemeanour laid down in the Criminal Code of 1969, the minimum penalty has been halved. If the sentence does not exceed one year's imprisonment, its execution may be conditionally suspended. It is possible to apply the provision of Article 37a CC

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[111] K. Poklewski-Koziełł, *Postrzeganie eutanazji prawnicze – medyczne – etyczne* [Legal, medical and ethical perception of euthanasia], Państwo i Prawo No. 12, Warsaw 1988, p. 97.

[112] K. Daszkiewicz, *Przestępstwa*... [Crime…], p. 236. According to this author, if an act lacked the features of demand and compassion, the right classification would be under Article 151 CC.

[113] J. Warylewski, *W sprawie karnoprawnego postrzegania eutanazji* [On criminal and legal perception of euthanasia], Państwo i Prawo No. 3, Warsaw 1999, p. 76; P. Góralski, *Pomoc*... [Assistance…], p. 45.

[114] A. Wąsek, *Prawnokarna*... [Criminal law…], p. 63.

[115] P. Góralski, *Pomoc*... [Assistance…], p. 45.

[116] M. Budyn-Kulik, [in:] J. Warylewski (ed.), *System*... [System…], p. 151.

("If the law provides for a penalty not exceeding eight years' imprisonment, the penalty may be exchanged into a fine or depravation of liberty (non-custodial punishment) laid down in Article 34 §1a (1), (2) or (4)") as well as the so-called mixed punishment (Article 37b CC). It is also possible to conditionally discontinue the proceedings against the perpetrator of the crime referred to in Article 151 CC, obviously provided that conditions laid down in Article 66 §1 CC are fulfilled. In some cases, there may be grounds for the extraordinary mitigation of the punishment (Article 60 §2 CC), however, it is not possible to drop its administration (due to the content of Article 59 CC).

In case of conviction for the crime referred to in Article 151 CC, a court may impose penal measures, e.g. deprivation of public rights (in case of not less than three years' imprisonment sentence for a crime committed for motives that deserve special condemnation), interdiction of holding specific posts or performing specific professions (Article 41 §1 CC), and making the sentence publicly known (Article 50 CC). There is also a possibility of imposing an obligation to redress the damage or compensate for the wrong suffered (Article 46 CC), other compensatory damages (Article 47 §1 CC) or sometimes forfeiture of items (Article 44 CC).

Article 19 §2 CC (extraordinary mitigation of the punishment for aiding and abetting) is not applicable to the administration of a penalty for assistance in suicide; and Article 22 CC (concerning mitigated liability of an instigator and an assistant in case the prohibited act has only been attempted and in case it has not been attempted) is not applicable to the two causative forms referred to in Article 151 CC. On the other hand, in a situation when the prohibited act referred to in Article 151 CC has been attempted, regulations concerning abandonment of an attempt or preventing a consequence (Article 15 CC) are applicable.[117] Thus, a perpetrator who persuades another person to suicide or assists him shall not be subject to penalty for the attempt if he/she voluntarily prevents an attempt on that person's life (Article 15 §1 CC); in case his/her behaviour proves to be inefficient, a court may apply an extraordinary mitigation of punishment (Article 15 §2 CC). However, a situation in which a perpetrator has failed to voluntarily prevent a suicidal attempt but voluntarily (and efficiently) has prevented the commission of suicide is still controversial and hard to assess. As A. Wąsek rightly claims, it seems that Article 15 §1 CC should be applied in order to "promote voluntary action that has eventually protected a victim against death". On the other hand, in a situation in which a perpetrator's behaviour proves to be inefficient, there might be grounds for an extraordinary mitigation of punishment (Article 15 §2 CC).[118] Of course, the above-mentioned privileges should be ruled out in case of a perpetrator who intentionally lets a victim make an attempt on their own life in order to save them later.[119]

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[117] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny*... [Criminal Code…], p. 325.
[118] A. Wąsek, *Prawnokarna*... [Criminal law…], p. 64.
[119] *Ibid*.

4. CONCLUSIONS

The number of suicidal attempts resulting in death in Poland is very high (6,165 in 2014). The number of proceedings initiated regarding the crime under Article 151 CC is also considerable (3,535 cases in 2014). In most suicide cases criminal proceedings are initiated in order to verify circumstances matching the statutory features specified in Article 151 CC and to determine whether a person's act of a suicidal attempt has resulted from his/her individual decision or has been a result of persuasion or assistance offered by another person. The number of crimes reported under Article 151 CC accounts for a fraction of one per cent of all proceedings (e.g. 0.006% in 2014) and only a few cases are sent to court. According to the conviction statistics provided by the Ministry of Justice, 23 valid sentences under Article 151 CC were issued in Poland in the period from 1 September 1998 till 31 December 2015. This small number of convictions cannot, however, lead to a conclusion that the maintenance of Article 151 in the Criminal Code is purposeless. Quite the opposite, it must be stated that the presence of this provision is absolutely justified, although *de lege ferenda* proposals that are suggested with regard to the wording of the provision are worth considering.

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CRIME OF PERSUASION TO COMMIT OR ASSISTANCE IN THE COMMISSION OF SUICIDE (ARTICLE 151 CC)

Summary

A specific causative type, i.e. persuasion to and assistance in the commission of suicide, is classified in Article 151 CC. Human life and freedom from exerting destructive influence on the way in which man decides about their life in a social aspect are subject to protection against the discussed misdemeanour. Article 151 CC specifies a causative act as "making a person attempt on their own life" but this influence may be exerted with the use of persuasion or assistance. The crime may be committed through an act, when it consists in persuasion (this form may be only an action), as well as through omission, when it consists in assistance in suicide. The misdemeanour under Article 151 CC is a common and substantive crime. The consequence consists in a victim's suicidal attempt that does not have to result in death. The objective aspect of the analysed crime is intentional in nature; it may be committed in two intentional forms. A misdemeanour under Article 151 CC carries a penalty of three months' to five years' imprisonment.

Key words: suicide, attempt on one's own life, persuasion and assistance in the commission of suicide, features of the crime, substantive criminal law

PRZESTĘPSTWO NAMOWY LUB UDZIELENIA POMOCY DO SAMOBÓJSTWA (ART. 151 K.K.)

Streszczenie

W art. 151 k.k. stypizowany został swoisty typ sprawczy, czyli namawianie i udzielenie pomocy do samobójstwa. Przedmiotem ochrony omawianego występku jest życie człowieka, jak również jego wolność od wywierania destrukcyjnego wpływu na sposób, w jaki człowiek będzie swym życiem dysponować w aspekcie społecznym. Art. 151 k.k. określa czynność sprawczą jako „doprowadzenie człowieka do targnięcie się na własne życie", przy czym owo doprowadzenie może być zrealizowane bądź namową bądź też poprzez udzielenie pomocy. Przestępstwo to może zostać popełnione zarówno przez działanie, gdy polega na doprowadzeniu namową (w tej postaci może to być wyłącznie działanie); jak i przez zaniechanie, gdy polega na udzieleniu pomocy do samobójstwa. Występek z art. 151 k.k. jest przestępstwem powszechnym i materialnym. Skutek polega na podjęciu przez pokrzywdzonego próby samobójczej, która nie musi jednak prowadzić do śmierci pokrzywdzonego. Strona podmiotowa analizowanego przestępstwa charakteryzuje się umyślnością: może zostać ono popełnione w obu postaciach zamiaru. Występek z art. 151 k.k. zagrożony jest karą pozbawienia wolności od trzech miesięcy do pięciu lat.

Słowa kluczowe: samobójstwo, targnięcie się na życie, namawianie i pomoc do samobójstwa, znamiona przestępstwa, prawo karne materialne

INVOICE-RELATED CRIMES: THEIR SIGNIFICANCE, LEGAL CLASSIFICATION AND PLACE IN THE SYSTEM OF POLISH CRIMINAL LAW

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The need for counteracting a large scale and highly detrimental phenomenon of obtaining undue VAT return and other types of tax fraud in relation to VAT was the reason for criminalising some kinds of blameworthy behaviour and classifying them as separate crimes in the Criminal Code of 1997, i.e. in the field of common criminal law. Placing these new invoice- and VAT-related crimes in the Criminal Code (CC) instead of the Fiscal Penal Code of 1999 (FPC) might puzzle and raise doubts. The justification for the bill of 10 February 2017 that entered into force on 1 March 2017,[1] which introduced new crimes and felonies, the so-called invoice (VAT)-related ones, explains that the phenomenon of VAT fraud in Poland has become a serious economic and social problem resulting in losses to the state budget accounting for dozens of billions of zlotys annually. The scale of this fraud is growing every year and in 2013 fiscal control authorities revealed PLN 19.7 billion worth of false invoices, in 2014 – PLN 33.7 billion, and in 2015 – as much as PLN 81.9 billion[2]. The justification for the Bill introducing those blameworthy offences connected with the issue of fictitious or unreliable VAT invoices to the Criminal Code suggests that the large-scale of the phenomenon posing a threat to the state budget and the involvement of organised criminal groups in that activity require the use of legal penal instruments of common criminal law. According to the legislator, fiscal penal law applies too lenient penalties, including deprivation of liberty from five days to

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1 Amendment to the Act: Criminal Code and some other acts of 10 February 2017, Journal of Laws [Dz.U.] of 2017, item 244.

2 See, Justification for the Bill amending the Act: Criminal Code and some other acts of 10 February 2017, Sejm paper VIII. 888, p. 3.

five years, and in case of extraordinarily strict penalty – up to 10 years, which is insufficient because of the substantial loss to the budget revenues. Moreover, courts' adjudication practice in fiscal penal cases is too liberal because a penalty of absolute deprivation of liberty is imposed too rarely. The introduction of new types of crimes, referred to as invoice ones, to CC and stipulating adequately severe penalties are to "make this type of behaviour aimed at obtaining financial benefits at the State budget's expense unprofitable, and adequately severe punishment act as a deterrent against potential perpetrators. For it is obvious that people committing fiscal crimes to a greater extent than other criminals plan their activities and make a specific profit and loss analysis with regard to their commission."[3]

The above-mentioned *ratio legis* concerning the including of the new types of invoice (VAT)-related crimes in the Criminal Code instead of the Fiscal Penal Code does not eliminate doubts about some of the reasons. Firstly, as it is indicated in the justification for the Act of 10 February 2017, which introduced invoice-related crimes to CC, it maintains the possibility of "classifying behaviour of lesser social harmfulness of an act (especially where it results in smaller loss to the budgetary revenues) under the provisions of the Fiscal Penal Code, especially its Article 62 §1 and §2". It may also concern a possibility of legal classification of concurrence under CC and FPC in connection with the same prohibited act, i.e. the application of the so-called perfect concurrence of a common crime and a fiscal crime in accordance with Article 8 §1 FPC.[4] This means a conscious and fully intended division of socially harmful acts posing threats to the State finance into common crimes and fiscal crimes, and making the perpetrators of those prohibited acts subject to liability in accordance with two different criminal liability regimes with a possibility (and more often necessity) of using both of them together.

It is purposeful here to present blameworthy behaviour connected with VAT invoices and VAT, which were included in FPC and recently also in CC, and to indicate the object of protection, which these types of crime harm.

The types of blameworthy behaviour in relation to VAT invoices are penalised under Article 62 FPC and those connected with obtaining undue VAT return under Article 76 FPC. The objects of protection against these fiscal crimes are tax liabilities and their proper execution.

Tax reliability of invoices or bills documenting economic operations is an individual object of protection based on Article 62 FPC, including Article 62 §2 and §2a (as well as Article 62 §5 FPC laying down fiscal misdemeanours), which are especially interesting for us because they are important from the point of view of tax liabilities, including VAT.[5] An act penalised under Article 62 §2 FPC consists in the unreliable (i.e. not in conformity with the actual state; compare Article 53 §22 FPC) issue of an invoice or a bill, or using such a false document, which carries,

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[3] *Ibid*.

[4] *Ibid*., p. 4.

[5] Compare, I. Zgoliński, *Wystawienie lub posługiwanie się nierzetelnym dokumentem podatkowym* [Issue or use of a false fiscal document], Prokuratura i Prawo No. 3, Warsaw 2012, pp. 163 and 167; and L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], C.H. Beck, Warsaw 2016, pp. 314–315.

after the amendment of 1 December 2016,[6] a penalty of a fine of 720 daily rates or a penalty of deprivation of liberty for at least one year (up to five years), or both penalties together. In case of a similar act, where an amount on an invoice is of small value, the sanction is more lenient: 720 daily rates or a penalty of deprivation of liberty (from five days to five years), or both penalties together (added Article 62 §2a FPC). Issuing a false invoice or a bill is an intellectual forgery consisting in the development of a document that is not in conformity with the truth concerning important data included in it, i.e. first of all the issuer, the type and volume of an economic operation and its value and due tax. A small value of tax indicated on an invoice or invoices typical of a privileged type of a crime under Article 62 §2a FPC accounts for 200-fold value of a minimum salary at the time of commission of the prohibited act (see Article 53 §14 FPC, which means that in case of acts committed in 2017, it will be up to PLN 400,000). An act will be classified as a basic type of this crime under Article 62 §2 FPC when the tax amount indicated on an invoice or a sum of amounts indicated on invoices exceeds that small value (i.e. PLN 400,000), however, the maximum limit is not laid down, which means that it may be substantial (i.e. exceed 500-fold value of a minimum salary, which in 2017 is an amount exceeding PLN 1,000,000) or even great (i.e. exceed 1,000-fold value of a minimum salary, which means PLN 2,000,000 in 2017).

On the other hand, individual objects of protection under Article 76 FPC against their unauthorised exposure to reduction or actual reduction include financial resources of the given public entities resulting from the due taxes settled. An act prohibited under Article 76 FPC consists in deceiving a given body by providing data that are inconsistent with the real state of facts (i.e. unreliable, untrue, false) or concealing a real state and constituting an exposure to a risk of undue return of tax, especially VAT, or counting it as an appropriation for a tax debt or current or future tax liabilities. A basic type of this crime carries a penalty of a fine of up to 720 daily rates or deprivation of liberty (from five days to five years) or both penalties together. Article 76 §2 FPC envisages a privileged form of this crime carrying a fine of 720 daily rates because of a small value (i.e. not exceeding a 200-fold minimum salary – see Article 53 §14 FPC, i.e. PLN 400,000) exposed to undue return. If the amount of tax subject to undue return does not exceed the statutory threshold (i.e. a fivefold minimum salary – see Article 53 §6 in connection with §3 FPC), an act is classified as a fiscal misdemeanour carrying a penalty of a fine of 1/10 to 20-fold minimum salary (see Article 76 §3 and Article 47 §1 and Article 48 §1 FPC). Fiscal crimes under Article 76 §1 and §2 FPC (like misdemeanours under Article 76 §3 FPC) are intentional acts of material nature, which result in posing a risk of an undue return of tax or counting it as an appropriation for tax debt or current or future tax liabilities, i.e. in causing actual risk of such a return or appropriation, which means that the occurrence of a financial loss was highly probable although it did not have to take place (compare Article 53 §28 in connection with §29 FPC). Anybody, not only a person having a status of a tax payer, can be a perpetrator of acts under Article 76 FPC if she/he behaves in the blameworthy way described. This means

[6] Journal of Laws [Dz.U.] of 2016, item 2024.

that, based on this provision, a person involved in business operations and obliged to pay taxes, including e.g. VAT, as well as someone who is not involved in business but issues false VAT invoices and based on them applies for an undue return of tax may be liable.[7] Acts under Article 76 FPC are committed, as T. Oczkowski rightly notices, "at the moment of submission of an application for a return based on false data to a competent tax authority, which poses a real risk of undue return of VAT."[8]

The invoice crimes recently introduced to CC were incorporated in Chapter XXXIV listing crimes against reliability of documents. This means that reliability of documents that can be found or are in public use is the object of protection against all the crimes listed therein. In accordance with the statutory definition laid down in Article 115 §1a CC, an invoice is a document defined in Article 2(31) of the Value Added Tax Act of 11 March 2004,[9] i.e. a document in a paper or electronic form containing data required by the Act and provisions that were passed based on it. In case of invoice-related crimes, a document in the form of an invoice is an object of a prohibited activity. In case of a crime under Article 270a CC, the activity is a form of material forgery jeopardising the authenticity of the document that a given entity is not entitled to issue or it consists in the use of such a document. Thus, in case of this crime, authenticity and reliability of the content of an issued invoice are individual objects of protection. In case of the type of crime under Article 271a CC, an invoice or invoices are objects of prohibited activities, and intellectual forgeries consisting in issuing an invoice containing false content or using such an invoice or invoices are penalised acts. It is an individual crime (in the first of the listed forms) the perpetrator of which is a person entitled to issue invoices but an issued invoice contains false data. In case of a criminal act under Article 271a CC, reliability and trust in the content of the issued invoice is an individual object of protection. As far as both types of the above-mentioned crimes are concerned, the financial interest of the State related to the fact that in order to obtain due revenue in VAT and avoid losses to the State Treasury resulting from claiming undue return of VAT or other tax obligations is another object of protection, which was the main reason for establishing this new category of invoice-related crimes. Closer and further individual objects of protection against the crime under Article 271a CC and the fiscal crime under Article 62 §2 and §2a FPC are the same. Thus, a question arises why the type of crime under Article 271a CC was included in CC instead of FPC, while the latter code was created especially to protect interests and financial resources of the State (and units of territorial self-government and the European Union). What is the mutual relation between those two types of crimes: common and fiscal ones? What are the difference and the relation between the type of crime under Article 271a CC and the type of fiscal crime under Article 76 §1 and §2 FPC?

The new Article 270a added to CC lays down a common crime consisting in forging or altering an invoice in order to use it as an authentic one in the scope of

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[7] See, e.g. L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy*... [Fiscal Penal Code...], pp. 368–369.

[8] T. Oczkowski, [in:] V. Konarska-Wrzosek, T. Oczkowski, J. Skorupka, *Prawo i postępowanie karne skarbowe* [Fiscal penal law and procedure], Wolters Kluwer, Warsaw 2013, p. 239.

[9] Uniform text, Journal of Laws [Dz.U.] of 2016, item 710, as amended.

actual circumstances that may be important for the establishment of the amount of tax liability or its return or the return of another obligation of tax nature, or in using such an invoice as an authentic one. The act has the attributed status of a rather serious crime. It carries a penalty of imprisonment from six months to eight years (see §1 CC). If a perpetrator commits this act in connection with an invoice or invoices containing a total due amount the value of which is great (i.e. exceeds PLN 1,000,000 – Article 115 §6 CC), or makes this crime a permanent source of income, the act has a status of a felony carrying a penalty of deprivation of liberty for at least three years up to 15 years (see §2 CC). Article 270a §3 CC envisages also a privileged type of the crime of forging invoices laid down in §1 where it is an instance of lesser significance. It is a crime carrying a penalty of a fine (from 10 to 540 daily rates), limitation of liberty (from one month to two years) or deprivation of liberty (from one month to up to two years).

The added provision of Article 271a CC penalises the issue of an invoice or invoices where untruth is included with regard to actual circumstances that may be important for establishing the amount of tax liability or its return or a return of another obligation of tax nature if they contain a total amount of liability the value of which or total value is substantial (i.e. exceeding PLN 200,000 – see Article 115 §7 CC). Alternatively, the use of such an invoice or invoices is also penalised. The crime carries a penalty of deprivation of liberty for six months to eight years (§1 CC). If a perpetrator commits that act in connection with an invoice or invoices the value of which or total value is great or makes this crime a permanent source of income, the act is a felony that carries a penalty of deprivation of liberty for at least three years up to 15 years (§2 CC). In case of lesser significance, the perpetrator of the act under §1 CC commits a crime that carries a penalty of imprisonment from one month up to three years (§3 CC).

Article 277a CC defines a common classification of the most serious kind of both types of blameworthy behaviour that are defined in Article 270a §1 CC and Article 271a §1 CC where the object of crime is an invoice or invoices containing a tax amount the value of which or total value exceeds fivefold the amount specified as property of great value, i.e. exceeds PLN 5,000,000 (see Article 115 §6 CC). Acts of issuing such invoices have a status of an aggravated felony that carries a penalty of deprivation of liberty for at least five years up to 15 years or an alternative penalty of 25 years' imprisonment.

In all the recently classified types of invoice-related crimes and their different forms, the objects of crime are invoices and especially their content concerning actual circumstances that may be important for establishing the amount of tax liability or its return or a return of another obligation of tax nature. The significant actual circumstances laid down in Articles 270a, 271a and 277a CC are almost all data that every VAT invoice should contain. They are listed in Article 106e of the Value Added Tax Act, and especially include: the invoicing date, a successive invoice identification number, names of a taxpayer and a buyer of goods or services and their addresses, a taxpayer's and a buyer's tax identification numbers (NIP), the date of goods or services delivery or delivery conclusion and sometimes a payment receipt date, the name (type) of product or service, measurement and amount (number) of goods or

services or the scope of services provided, a product or service unit price without tax (unit net price), amounts of any discounts if applied to a unit net price, value of goods delivered or services provided before adding tax (transaction net value), a tax rate, the net sum of transaction value subdivided into each tax rate and tax exemption, tax amount subdivided into different tax rates, and the total amount of tax liability. In some cases laid down in the Act, an invoice should contain additional information that may be or is important for the establishment of tax liability or its return.

All invoice-related crimes introduced to CC are formal in nature. No effect is their statutory feature. The amounts of tax liability to be settled or returned are nominal values that have been indicated on forged or false invoices and which constitute criteria for classifying particular blameworthy acts as a basic type of crimes when the value is not great (Article 270a §1 and Article 271a §1 CC), as a qualified type of crimes when the value is great or a perpetrator makes this crime a permanent source of income (Article 270a §2 and Article 271 §2 CC) and an aggravated type of crimes when the value is fivefold higher than the one defined as property of great value (Article 277a in connection with Article 270a §1 or in connection with Article 271a §1 CC). Thus, all invoice-related crimes classified in CC belong to a type of crimes posing abstract threats to revenues and financial resources of the State. Their essence and social harmfulness consist in the fact that they are specific preparatory activities and, in case of using a forged or false invoice or invoices, they form a specific fraud attempt on the State revenues. Confronting them, especially with the type of the material crime under Article 76 §1 FPC, which penalises deception of an authority and posing a threat of, inter alia, an undue return of VAT, i.e. causing a particular risk of such a return when the return amount exceeds PLN 400,000 (compare Article 53 §28, §29 and §14 FPC), carrying an alternative-cumulative penalty of a fine of up to 720 daily rates, a penalty of deprivation of liberty (from five days to five years) and a possible adjudication of both penalties together, raises a question why, if such a real and highly probable threat does not exist and it concerns a nominal amount of PLN 200,000 expressed on an invoice, an envisaged sanction is much more severe, as it is a penalty of deprivation of liberty for six months to eight years (see Article 271a §1 CC). Confronting statutory descriptions of crimes under CC and under FPC with envisaged sanctions leads to a conclusion that in the process of criminalisation of invoice-related crimes a few rules are violated. Firstly, they were inadequately included in CC instead of FPC where Article 62 penalises blameworthy acts connected with invoices and bills, so qualified types of crimes could have been added there. Dividing crimes according to political and criminal criteria instead of factual ones makes the system of law inconsistent and unclear. Secondly, assessing criminal and legal aspects of invoice-related crimes, which is reflected in sanctions, the legislator failed to keep proportions between material (effective) crimes under Article 76 §1 and §2 FPC, posing a threat of the calculated tax undue return and formal (ineffective) crimes under CC carrying disproportionally severe penalties. Thirdly, making ineffective invoice-related crimes felonies and, in case of acts under Article 277a CC, aggravated felonies carrying a penalty of even 25-years' imprisonment, violated the axiology and coherence of

the criminal law system with respect to protection of particular legal interests. The level of protection of reliability of documents should not be the same as the level of protection against extermination of such most important interests as human life (Article 118 §1 and §2 CC) or other felonies against humanity (Article 118a CC), or even a single manslaughter (Article 148 §§1-3 CC) or such interests as peace (Article 117 §1 CC), independent State or the State territorial integrity (Article 127 CC). Presenting the necessity of deterring potential perpetrators in justification of purposefulness of classifying forging invoices or using them, or issuing or using false invoices as felonies and imposing very severe penalties for their commission[10] does not take into consideration criminological findings, according to which it is not the severity of punishment but its inevitability that has a real preventive power. And this means that, first of all, the revenue system should be sealed and law enforcement agencies made more active in detecting crimes committed directly against the State finance. Apart from that, it is necessary to remember that the best way of fighting against crime is to use sanctions of the same nature so that crime commission of some kind is financially unprofitable. Thus, the adequate kinds of response to this crime are the penalty of a fine, limitation of liberty, forfeiture of objects, forfeiture of property even if it is obtained indirectly from crime, and penal measures banning a given activity such as: business prohibition, prohibition to exercise a profession or to occupy specified posts. It is also necessary to take into consideration that obligatory execution of financial liabilities is not very efficient. That is why, it is purposeful to use such measures which guarantee that perpetrators of crimes against the financial interests of the State will be subject to more lenient criminal liability and the State tax authorities will recover the lost revenues via their voluntary return. The Fiscal Penal Code envisages such measures and mechanisms. A possibility of adjudicating more severe penalties of deprivation of liberty will not deter criminals, especially members of organised criminal groups, from committing profitable crimes. Adjudication of absolute imprisonment penalties may only worsen the State finance because of very high costs of prison maintenance: PLN 3,150 per convict monthly.[11] Imprisonment sentences for criminals who do not pose any threat to the most precious and non-renewable interests such as human life and health or personal freedom or sexual rights do not pay from the point of view of the society or the State.

For an invoice-related crime, Article 277b CC envisages a possibility of adjudicating, apart from a penalty of deprivation of liberty, also a penalty of an extraordinarily high fine, i.e. higher than the basic one laid down in Article 33 §1 CC, namely accounting for up to 3,000 daily rates. This is a possibility of instituting a maximum fine of PLN 6,000,000 for a common crime (3,000 daily rates x PLN 2,000 – see Article 33 §3 CC). In comparison, a maximum fine imposed for most fiscal crimes, including invoice-related ones under Article 62 §2 FPC and for a crime of obtaining a return of VAT on false pretences under Article 76 §1 or §2

[10] Justification for the Bill of 10 February 2017 amending the Act: Criminal Code and some other acts, Sejm paper VIII. 888, p. 3.

[11] See, data for January 2017 at: finanse.wp.pl/gid,18665993,kat,1033699,title,Ile-tak-naprawde-kosztuje-utrzymanie; accessed on 27 March 2017.

FPC, may reach PLN 19,200,000 (720 daily rates x 400 x PLN 66,666 – compare Article 23 §3 FPC). This means that fines envisaged in fiscal penal law are more likely to show that crimes against the interests and financial resources of the State are not profitable. Moreover, fines constitute revenue of the State Treasury. Failure to settle them does not pay either because then they are exchanged for deprivation of liberty (compare Article 46 of the Criminal Procedure Code in connection with Article 178 §1 FPC). This way and this mechanism of punishing perpetrators are much better and should not be substituted by penalties laid down in the Criminal Code for common crimes perpetrators.

Penalisation of invoice-related crimes in accordance with FPC instead of CC would not have required the development of further casuistic solutions with doubtful results laid down in Article 277c and Article 277d CC, concerning the penalty for perpetrators who decided to self-denounce or cooperate with law enforcement agencies in connection with the detection of an act committed and its perpetrator, because FPC has much better regulations to deal with such cases that constitute real, not illusory, encouragement to act in such a desirable way (see Articles 16 and 36 FPC). Also Article 66 CC regulating extraordinary mitigation of punishment envisages a special solution for the remorseful criminals. Therefore, it seems that there is no need to develop special regulations of extraordinary mitigation of punishment for perpetrators of invoice-related crimes if they deserve it. The introduction of only slightly different solutions and directives concerning extraordinary mitigation of punishment for perpetrators of particular types of crimes to the Special Part of the Criminal Code disturbs the established division of matters regulated in the Criminal Code into provisions and institutions of the General Part and the Special Part of the Criminal Code. Apart from useless casuistry, it introduces a certain normative chaos, which may mislead not only the addressees of legal norms but also professionals involved in their application. The originators and legislators' belief that locating special solutions allowing extraordinary mitigation of punishment directly next to the types of crimes they concern to a greater extent influences perpetrators' behaviour after their commission is based on an unconfirmed assumption that perpetrators of specific types of crimes, specifically those intended to obtain financial benefits at the State budget's expense, on their own, without the assistance of lawyers, analyse their legal situation in case of their crime detection, especially as they do this after the commission of a crime and before its detection.

The new Article 277c §1 CC regulates the specific active repentance after the commission of an invoice-related crime laid down in Article 270a §1 or §2 or in Article 271a §1 or §2 CC. As far as the required prerequisites for its expression are concerned, it is similar to fiscal active repentance under Article 16 FPC (see especially Article 16 §1 and §5(1) FPC). However, the legal consequences differ totally. Active repentance in fiscal law results in no penalty for a committed crime, and active repentance under Article 277c §1 CC results in obligatory extraordinary mitigation of punishment, provided a prosecutor files such a motion (i.e. extraordinary mitigation of punishment is relatively obligatory depending on a prosecutor's discrete decision). The condition for more lenient treatment of a perpetrator of the discussed type of crime is self-denunciation after its commission, i.e. reporting it by

the perpetrator before an entitled fiscal law enforcement body detects it. Moreover, the perpetrator is obliged to reveal all significant circumstances of this crime and indicate all acts in connection with the invoice-related crime and their perpetrators. It is naive to assume that the perpetrator of an invoice-related crime is going to self-denounce if she/he has no guarantee of impunity (as in the case of active repentance in fiscal penal law – see Article 16 §1 FPC) and just the opposite, has a guarantee she/he will be convicted for a highly penalised crime with a potential possibility of extraordinary mitigation of punishment, which she/he might avoid not revealing that crime.

Another illusory incentive to self-denouncement in the form of a further reaching possibility of mitigation of punishment for a perpetrator of an invoice-related crime is laid down in Article 277c §2 CC. It stipulates a facultative possibility that a court renounces inflicting a penalty if a prosecutor files such a motion. This possibility concerns prosecuting in any invoice-related crime and is laid down in Article 270a or Article 271a CC. However, it is not applicable in case of the most aggravated invoice-related felony under Article 277a CC (i.e. where the amount of tax liability resulting from false invoices exceeds fivefold the value specified as property of great value). The condition for a prosecutor's motion and a court's decision to renounce inflicting a penalty is, firstly, self-denunciation and revealing all significant circumstances of the crime before a law enforcement body detects it, as well as the indication of acts connected with that crime and their perpetrators, and secondly, a return of all or a significant part of financial benefits obtained from that crime.

Meeting the above-mentioned conditions laid down in Article 277c §2 CC by a perpetrator of the most aggravated invoice-related felony under Article 277a CC constitutes grounds for possible application of extraordinary mitigation of punishment by a court (see Article 277c §3 CC).

Article 277d CC extends the possibility of inflicting a penalty with the application of its extraordinary mitigation to perpetrators of invoice-related crimes who did not self-denounce after their commission, but when criminal proceedings were initiated they decided to cooperate with law enforcement bodies and revealed all circumstances of their crimes that were not known to the law enforcement bodies and indicated other acts in connection with crimes committed and their perpetrators. In case of the most serious invoice-related felonies laid down in Article 277a CC, the application of extraordinary mitigation of punishment also requires an additional return of all or at least a substantial part of financial benefits obtained from the committed crime. It must be emphasised that this is the only one of the four recently introduced criminal law regulations laid down in Article 277c §1, §2 and §3 and Article 277 CC which may meet the expected criminal policy function of assisting in detection of invoice-related crimes, mechanisms and their perpetrators.

It must be noticed, however, that the regulation of Article 277d CC is quite similar to the norm of a general nature laid down in Article 60 §4 CC, which is universally applicable, regardless of the type of a crime for which a perpetrator is prosecuted, and it should be used or other similar solutions with possible modifications should be placed next to it where purposeful. Dispensing institutions with similar aims and functions is not a good solution.

What still needs closer consideration is the issue of proportionality and coherence of the legal assessment of acts of issuing an invoice or invoices in a fraudulent way or using such a document, which matches the statutory features of a fiscal crime (and sometimes a fiscal misdemeanour) laid down in Article 62 §2 or §2a FPC, and at the same time of a common crime under Article 271a CC or Article 277a CC. Where the amount of tax on an invoice or the sum of tax amounts on invoices:

1) is of small value, i.e. in 2017 does not exceed PLN 400,000 (compare Article 53 §14 FPC), the prohibited act matches the features of a fiscal crime laid down in Article 62 §2a FPC and carries a penalty of a fine of up to 720 daily rates or a penalty of deprivation of liberty (from five days to five years) or both penalties together;
2) exceeds the defined small value, i.e. in 2017 exceeds the amount of PLN 400,000 (compare Article 53 §14 FPC), the prohibited act matches the features of a fiscal crime laid down in Article 62 §2 FPC and carries a penalty of a fine of up to 720 daily rates, a penalty of deprivation of liberty for at least one year up to five years, or both penalties together;
3) is substantial, i.e. exceeds PLN 200,000 (see Article 115 §7 in connection with §5 CC), the act matches the features of a common crime laid down in Article 271a §1 CC and carries a penalty of deprivation of liberty from six months to eight years;
4) is great, i.e. exceeds PLN 1,000,000 (see Article 115 §6 CC) or a perpetrator makes it a source of permanent income, the act matches the features of a common crime laid down in Article 271a §2 CC and carries a penalty of deprivation of liberty for at least three years up to 15 years;
5) is bigger than fivefold amount of property of great value, i.e. exceeds the value of PLN 5,000,000, the act matches the features of a common crime laid down in Article 277a CC and carries a penalty of deprivation of liberty for at least five years or deprivation of liberty for 25 years.

The provision of Article 271a §3 CC also envisages the instance of lesser significance in relation to an invoice-related crime under Article 271a §1 CC, which carries a penalty of deprivation of liberty from one month up to three years. Under this provision, invoice-related crimes can be aggravated, as a rule but not only, when they consist in issuing fraudulent invoices or their use when the total tax liability resulting from them does not constitute a substantial value, i.e. does not exceed PLN 200,000.

The above presentation clearly shows that the legal assessment demonstrated in the sanctions is really differentiated and not always coherent, and sometimes even disproportionally severe.

The above closer presentation of characteristics of invoice-related fiscal misdemeanours and invoice-related common crimes evoke consideration of the issue of legal classification of particular blameworthy acts consisting in issuing false invoices or using them. Having in mind the institution of a perfect concurrence of crimes (or misdemeanours) that are subject to two different areas of law, fiscal penal law and common criminal law, in accordance with Article 8 FPC, a conclusion must be drawn that there may be a perfect concurrence between the following fiscal misdemeanours or fiscal crimes and common crimes:

- a misdemeanour under Article 62 §5 FPC constituting an instance of lesser significance where, inter alia, the amount of tax resulting from an invoice or invoices or the sum of amounts does not exceed PLN 10,000 in 2017 (see Article 53 §8, §6 and §4 FPC) and a crime under Article 271a §3 CC constituting an instance of lesser significance, which can be (with some simplification) such one where the amount of tax resulting from an invoice or the sum of amounts does not exceed PLN 200,000;); or
- a crime under Article 62 §2a FPC, where the amount of tax resulting from an invoice or invoices or the sum of amounts is of small value (i.e. in 2017 exceeds PLN 10,000 but does not exceed PLN 400,000) and is a crime under Article 271a §1 CC where this amount or the sum of amounts exceeds PLN 200,000 but does not exceed PLN 400,000; or
- a crime under Article 62 §2 FPC where the amount of tax resulting from an invoice or the sum of the amounts exceeds the defined small value (i.e. PLN 400,000 in 2017) and a crime under Article 271a §1 CC where it does not exceed PLN 1,000,000; or
- a crime under Article 62 §2 FPC where the amount of tax resulting from an invoice or the sum of amounts exceeds the defined small value (i.e. PLN 400,000 in 2017) and under Article 271a §2 CC where the amount of tax resulting from an invoice or the sum of amounts exceeds PLN 1,000,000 but does not exceed PLN 5,000,000; or
- a crime under Article 62 §2 FPC where the amount of tax resulting from an invoice or the sum of amounts exceeds the defined small value (i.e. PLN 400,000 in 2017) and a crime under Article 277a CC where the amount of tax resulting from an invoice or the sum of amounts exceeds PLN 5,000,000.

The above analysis of regulations of invoice-related crimes in the Criminal Code and similar fiscal crimes and misdemeanours in the Fiscal Penal Code indicates a few possible perfect concurrences, which will always result in the necessity of convicting a perpetrator in accordance with every of the concurring provisions and imposing adequate penalties in accordance with each of them (see Article 8 §1 FPC). For it must be noticed that elimination of multiplicity of assessments based on particular principles, including the principle of *lex specialis derogat legi generali*, takes place only within the same areas of criminal law and not between the different areas.[12] The essence of the perfect concurrence of prohibited acts consists in the fact that concurring provisions are not eliminated but they are all applied and a perpetrator is

[12] See, V. Konarska-Wrzosek's explanatory notes to Article 8 FPC, [in:] I. Zgoliński (ed.), *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2017 (in press), and G. Łabuda, *Nierzetelne wystawianie faktur – oszustwo pospolite czy oszustwo podatkowe? Glosa do uchwały Sądu Najwyższego z 30 września 2003 r., I KZP 22/03* [Issue of false invoices: common fraud or fiscal fraud? Gloss on the Supreme Court resolution of 30 September 2003, I KZP 22/03], Monitor Podatkowy No. 6, Warsaw 2004, pp. 50–52. Differently: L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy...* [Fiscal Penal Code...], pp. 53–55. Also on this issue, compare I. Zgoliński, *Wystawienie lub posługiwanie się...* [Issue or use of a false...], p. 167; P. Kardas, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], LEX, Warsaw 2012, and A. Wielgolewska, [in:] A. Piaseczny, A. Wielgolewska, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], LEX, Warsaw 2012.

convicted and penalties are imposed based on particular sanctions.[13] In accordance with Article 8 §2 FPC, only the most severe of the adjudicated penalties will be executed, which in case of the concurrence with an invoice-related common crime under Article 271a CC or Article 277a CC and adjudication of penalties by a court based on the sanctions envisaged therein, containing only penalties of deprivation of liberty, will always be a penalty of deprivation of liberty and must be the one that is adjudicated in the most severe degree. Apart from those adjudicated penalties, in case a fine is also adjudicated, the highest of them will be subject to execution. Also penal measures and preventive measures will be subject to execution even where they are adjudicated only for one of the concurring crimes (see Article 8 §2 and §3 FPC).

Due to perfect concurrence of crimes in every case of issuing a false invoice or invoices or using them, thus also due to the necessity of adjudicating based on all the concurring provisions and finally the execution of only the most severe penalties, a question arises about the sense of introducing such always overlapping normative solutions. The purpose of developing the idea of perfect concurrence of crimes was different. It seems that establishing adequate aggravated types in the Fiscal Penal Code or repealing the provisions of Article 62 §2 and §2a FPC concerning invoice-related crimes that were penalised in the Criminal Code would be a simpler, and thus a better, solution to invoice-related crimes. The introduction of the above-discussed new solutions to the criminal law does not deserve positive assessment.

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[13] The Supreme Court drew attention to that many times, see the resolution of seven judges of the Supreme Court of 24 January 2013, KZP 19/12, OSNKW 2013, Vol. 2, item 13; the Supreme Court ruling of 24 January 2013, I KZP 21/12, OSNKW 2013, Vol. 2, item 14; the Supreme Court ruling of 8 April 2009, IV KK 407/08, LEX No. 503265; see also the Supreme Court judgement of 10 October 2016, IV KK 152/16, LEX No. 2148637.

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INVOICE-RELATED CRIMES: THEIR SIGNIFICANCE, LEGAL CLASSIFICATION AND PLACE IN THE SYSTEM OF POLISH CRIMINAL LAW

Summary

The article is devoted to the invoice-related crimes that the Act of 10 February 2017 (Journal of Laws [Dz.U.], item 244) recently introduced to the Criminal Code, incorporating them in the new Articles 270a, 271a and 277a CC in Chapter XXXIV, which lists crimes against reliability of documents. The author analyses *ratio legis* of those new amendments to the Criminal Code, taking into consideration a closer and further object of protection of invoice-related crimes that are also penalised in the Fiscal Penal Code. She also indicates legal consequences of penalisation of issuing false invoices or using them in both CC and FPC, which in every case inevitably leads to what is called the perfect concurrence of invoice-related fiscal crimes (under Articles 62 §1 and 62a §1 FPC) and fiscal-related common crimes (under Articles 271a and 277a CC). The author is critical of the adopted solutions and assigning the new ineffective crimes added to CC in order to protect reliability of issued invoices (and, in fact, the financial interests and resources of the State), a status of common crimes, and in some cases even a status of a felony, including aggravated felony alternatively carrying a penalty of deprivation of liberty for 25 years (see Article 277a CC). What the author also criticises in the added Articles 277c and 277d CC is the introduction of special regulations stipulating a possibility of extraordinary mitigation of punishment for perpetrators of invoice-related crimes who self-denounce and/or decide to cooperate with law enforcement bodies, because she believes that a bonus of extraordinary mitigation of punishment for self-denunciation is an illusory incentive, and the decision that extraordinary mitigation of punishment for perpetrators who decide to cooperate with the law enforcement bodies after the detection of their illegal activities should be within the competence of a court is useless casuistry because it might be adequately amended in Article 60 CC.

Key words: VAT invoices, material forgery, intellectual forgery, invoice-related crimes, common crimes, fiscal crimes, legal classification, perfect concurrence of common and fiscal crimes

PRZESTĘPSTWA FAKTUROWE: ICH ZNACZENIE, KLASYFIKACJA PRAWNA ORAZ MIEJSCE W SYSTEMIE POLSKIEGO PRAWA KARNEGO

Streszczenie

Treść artykułu została poświęcona nowo wprowadzonym do Kodeksu karnego, ustawą z dnia 10 lutego 2017 r. (Dz.U. poz. 244), typom przestępstw tzw. fakturowych, które usytuowano w dodanych art. 270a, 271a i 277a k.k. w rozdziale XXXIV k.k. grupującym przestępstwa przeciwko wiarygodności dokumentów. Autorka analizuje ratio legis wprowadzenia tych nowych uregulowań do k.k., mając na uwadze bliższy i dalszy przedmiot ochrony tzw. przestępstw fakturowych, które są spenalizowane także w k.k.s. Wskazuje również na prawnokarne konsekwencje penalizacji wystawiania nierzetelnych faktur lub ich używania, zarówno w k.k., jak i w k.k.s., co nieuchronnie prowadzi w każdym wypadku do tzw. idealnego zbiegu przestępstw fakturowych skarbowych (z art. 62 § 1 i 62a §1 k.k.s.) i przestępstw fakturowych powszechnych (z art. 271a i 277a k.k.). Autorka krytycznie ocenia przyjęte rozwiązanie oraz nadanie tym nowym, bezskutkowym przestępstwom dodanym do k.k., mającym chronić wiarygodność wystawianych faktur (a de facto interesy i zasoby finansowe państwa), statusu przestępstw powszechnych i to w niektórych wypadkach o randze zbrodni, w tym zbrodni najcięższej, zagrożonej alternatywnie karą 25 lat pozbawienia wolności (zob. art. 277a k.k.). Autorka krytycznie ocenia także wprowadzenie w dodanych art. 277c i 277d k.k. specjalnych uregulowań przewidujących możliwość nadzwyczajnego złagodzenia kary sprawcom przestępstw fakturowych, którzy dokonali samodenuncjacji i/lub zdecydowali się na podjęcie współpracy z organami ścigania, gdyż premię w postaci nadzwyczajnego złagodzenia kary za akt samodenuncjacji uważa za iluzoryczną zachętę, a ustanowienie kompetencji dla sądu do nadzwyczajnego złagodzenia kary sprawcom, którzy po ujawnieniu ich działań sprzecznych z prawem zdecydowali się na współpracę z organami ściągania – za zbędną kazuistykę, ponieważ mogłoby to zostać odpowiednio doregulowane w art. 60 k.k.

Słowa kluczowe: faktury VAT, fałszerstwo materialne, fałszerstwo intelektualne, przestępstwa fakturowe, przestępstwa powszechne, przestępstwa skarbowe, kwalifikacja prawna, idealny zbieg przestępstwa powszechnego i skarbowego

ON INSTABILITY AND OTHER DEFICIENCIES OF LAW IN GENERAL AND EXEMPLIFIED BY POLISH CRIMINAL PROCEDURE LAW

MARIA ROGACKA-RZEWNICKA*

Legal security, i.e. a state that aims to protect citizens against the consequential negative results of such phenomena as incoherence of law, its frequent amendments and excessive amount, a lack of a stable vision of law and its overall perception, lawmakers' submission to political and spontaneous needs, or law ambiguity with the result that the addressees misunderstand it, is an inseparable attribute of law. It must be pointed out that the indicated threats inseparably accompany enactment and application of law and are not only a characteristic feature of our times,[1] although the scale certainly exceeds the examples of historical legislation. It is at the same time typical that most of these threats were known even in ancient times. Since law became a subject matter of scientific analysis, which started in the Roman times, it has not only been a collection of rules and solutions without, as before, mutual logical links and logical systematics.[2] In Rome, law was systematised for the first time. The conception of law based on the search for deeper logical links between particular provisions and formulation of general and abstract principles of law was developed in this process. The search was accompanied by the awareness of threats reflected in the opinions of Roman thinkers. Most of them are still valid today. It is enough to remind that already then it was known that numerous laws are enacted in the most "corrupt" state. The most outstanding historian of ancient times, Publius Cornelius Tacitus (AD 56–AD 120)[3] formulated the famous truth about a state's decomposition because of an excess of law: *Plurimae leges, corruptissima respublica.* It

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1 Ch. Guy-Ecabert, A. Flückiger, *La bonne loi ou le paradis perdu?*, Législation & évaluation 2015, Vol. 26, No. 1, p. 21, see also: https://archive-ouverte.unige.ch/unige:73929/ATTACHMENT01.

2 G. Cuniberti, *Grands systèmes de droit contemporains. Introduction au droit comparé*, LGDJ 2015, p. 35.

3 Tacitus, *Annales*, III, 27.3.

seems to be especially accurate and true today. There is another Roman saying: *Ubi ius incertum, ibi ius nullum*, meaning: "Where the law is uncertain, there is no law". Referring to the present time experiences, one can add that such a situation inspires to non-compliance with the law, not to speak about such attitudes as disregard and contempt for law. In the ancient times, the need for concise law was expressed, inter alia, in a statement that law should be brief so that it may be more easily understood by the unlearned (*Legem brevem esse oportet, quo facilius ab imperitis teneatur*). On the other hand, the saying *Lex prospicit, non rescipit*, meaning "The law looks forward, not backward", expressed another condition of legal security. The cited examples prove that modern perception of law was accompanied by the awareness of threats in the process of law enactment and enforcement. Referring to the opinions of Roman jurists and in accordance with G. Guniberti's claim that modern law was born in Rome,[4] one should be accurate and add that Greek philosophers had previously noticed the importance of law stability and dangers resulting from its instability. In his *Politics*, Aristotle wrote: "The mere establishment of a democracy is not the only or principal business of the legislator, or those who wish to create such a state, a far greater difficulty is the preservation of it (…). The legislator should, therefore, endeavour to ensure a firm preservation of the state and guard against destructive elements (…)".[5]

The ancient cult of law finished with the collapse of the Roman Empire in 476. The first stage of the Middle Ages brought a deep crisis of law. The first symptoms of a revival occurred in the early 11th century when Roman law gradually started to be taught again, first in Italy, then in France and German territories, and finally elsewhere. Slowly but gradually, the knowledge of Roman jurists' works was acquired again in Western Europe. However, it was not until the Enlightenment that law regained its real significance and its modern cult started. This way, history, which is not the main subject matter of the article, took a very long and roundabout route. It must be added that many outstanding figures, including, inter alia, T. More (1478–1535),[6] M. Luther (1483–1546),[7] Descartes (1596–1650)[8] and F. Bacon (1561–1478)[9], had discussed the issue of law imperfectness in their works in the period before the Enlightenment.

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[4] G. Cuniberti, *Grands systèmes de droit contemporains…*, p. 35.

[5] Aristotle, *Polityka* [Politics], Polish translation by L. Piotrowicz, [in:] *Dzieła wszystkie* [Collected works], Vol. 6, Wydawnictwo Naukowe PWN, Warsaw 2001, Book III, p. 290.

[6] In his most famous work entitled *Utopia*, he complained about the excessive number of acts and wrote they were so that nobody could ever read and understand them.

[7] M. Luther, *Lettre à Philippe de Hesse*, 1527, [in] J. Carbonnier, *Essais sur les lois*, Defrénois, Paris 1995, p. 298.

[8] R. Descartes, *Discours de la méthode pour bien conduire sa raison et chercher la vérité dans les sciences, plus la dioptrique, les météores et la géométrie qui sont des essais de cette méthode*, Leyde 1637, Part II, p. 19 (citation after Ch. Guy-Ecabert, A. Flückiger, *La bonne loi…*, p. 44).

[9] F. Bacon, *Oeuvres philosophiques, morales et politiques de François Bacon*, translation by J.A. Buchon, Paris 1838, Vol. VIII, Chapter III, p. 246 (citation after Ch. Guy-Ecabert, A. Flückiger, *La bonne loi…*, p. 44).

In the Enlightenment, the indispensability of law was emphasised. J. J. Rousseau wrote that laws refer justice to its object[10] and this motivation was often present in deliberations on law. The Enlightenment's universal definition of law (*ius*) assumes that it is "everything that seems to be reasonable, just and right as well as to comply with the art of what is *aequi et boni* (…). The essence of law is expressed in these three principles: be honest, do not harm anybody and give to each his/her own".[11] The similarity of these expressions to ancient terminology defining law, including the famous statement that it is *ars boni et aequi*[12], is meaningful although it is well known that the Roman law doctrine did not work out a uniform definition of law.[13]

Despite the dominant position of the idealistic vision of law in the Enlightenment, there are examples of threats realised in connection with law enactment and application. This awareness resulting from the significance of the role and importance assigned to law in individual and community life was the consequence of negative experiences with the functioning of law in the former period. The postulates of the Roman jurists were to be a remedy, which is in accord with the general ideological attitude of the Enlightenment to ancient times. The philosophical and legal works of the Enlightenment contain calls for enacting law that is clear, complete, precise, indispensable and understandable to everyone. We can find a lot of those directives in C. Beccaria's (1738–1794) work *On Crimes and Punishments* of 1764. This famous Italian author and humanitarian argued that there was a need for developing clear laws and rigorous observance of the letter of the law, without comparing it to its interpretation. He wrote: "If the power of interpreting laws be evil, obscurity in them must be another, as the former is the consequence of the latter".[14] M. Robespierre's (1758–1794) approach to interpretation of law was similarly critical. In his famous speech in the Court of Cassation given on 18 November 1790, he said: "*ce mot de jurisprudence* (…) *doit être effiacé de notre langue*" ("the word jurisprudence must be erased from our language").[15] As far as this aspect is concerned, it is different from the opinions of Roman jurists. The latter spoke about the necessity of jurisprudence and emphasised that it was the only knowledge about the institution of law, which requires not only the knowledge of acts and customs but also what makes it possible to adjudicate cases in accordance with justice and equitability.[16] On the other

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[10] J.J. Rousseau, *O umowie społecznej* [The Social Contract], Polish translation by M. Starzewski, Warsaw 2002, Book II, Chapter VI, p. 67.

[11] Quotation after: G. Bałtruszajtys, J. Kolarzowski, M. Paszkowska, K. Rajewski, *Wybór źródeł do historii prawa sądowego czasów nowożytnych* [Selection of sources for the modern history of court law], Liber, Warsaw 2002, p. 18.

[12] A Roman jurist, Publius Iuventius Celsus (the first century AD), is the author of the saying *ius est ars boni et aequi*, but another Roman jurist, Ulpian (170–223), made it commonly known, which sometimes causes that the authorship of this significant saying is wrongly attributed to him.

[13] G. Hanard, *Droit Romain*, Vol. I, *Notions de base. Concept de droit. Sujets de droit*, Brussels 1997, pp. 14–15.

[14] C. Beccaria, *O przestępstwach i karach* [On crimes and punishments], Polish translation by E.S. Rappaport, Wydawnictwo Prawnicze, Warsaw 1959, p. 66.

[15] *Archives parlementaires*, Vol. XIX, *Du 23 octobre au 26 novembre 1790,* p. 516.

[16] Quotation after: G. Bałtruszajtys, J. Kolarzowski, M. Paszkowska, K. Rajewski, *Wybór źródeł…* [Selection of sources...], p. 19.

hand, the ideology of legalism requiring rigorous institution of law supported the disapproval of the interpretation of law expressed in the 18th century. As Beccaria wrote: "These are the means by which security of person is best obtained",[17] and "The disorders that may arise from a rigorous observance of the letter of penal laws are not to be compared with those produced by the interpretation of them".[18] He also wrote: "There is nothing more dangerous than the common axiom: the spirit of the laws is to be considered. (…) The spirit of the laws will then be the result of the good or bad logic of the judge, and this will depend on his good or bad digestion; on the violence of his passions; on the rank and condition of the abused, or on his connections with the judge; and on all those circumstances which change the appearance of objects in the fluctuating mind of man. Hence we see the fate of a delinquent changed many times in passing through the different courts of judicature (…)".[19] It must be added that the reason behind this common criticism of law interpretation was an undisguised dislike of judges.[20] In the Enlightenment, they were assigned the task to examine actions and assess whether they were legal or illegal.

Montesquieu (1689–1755), the most famous French jurist of the Age of Enlightenment, in his works, especially in *(On) The Spirit of the Laws*, presented an instruction in enacting laws in which he also described inappropriate techniques. He wrote about the need to enact clear, concise and equally understandable laws like the Law of the Twelve Tables and other Roman foundations of law. He recommended avoiding exceptions to general legal rules because, in his opinion, they only provoke successive exceptions. He called for maintaining legislative moderation and wrote: "As useless laws debilitate such as are necessary, so those that may be easily eluded weaken the legislation" ("*Comme les lois inutiles affaiblissent lois nécessaires, celles qu'ont peut éluder affaiblissent la législation*").[21] On the other hand, in *Pensées divers* (1717–1755), Montesquieu presented an opinion that what can be done through customs should not be done through laws ("*Il ne faut point faire par les lois ce que l'on peut faire par les moeurs*"), supporting the limitation of the matters of law to the necessary scope that cannot be filled with other rules of adequate procedure.

Other great jurists of the Age of Enlightenment, J.J. Rousseau (1712–1778), J.-E.-M. Portalis (1746–1807) or G. Filangieri (1753–1788), expressed similar opinions, however, it is not possible to present their views in detail. On the other hand, the 19th century, which in the field of penal law distinguished itself by looking for model legal concepts and creating great juridical theories, was not free from the risks of legislative activities. Such 19th century authors as F.-R. Chateaubriand

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[17] C. Beccaria, *O przestępstwach…* [On crimes…], p. 65.

[18] *Ibid.*, p. 64.

[19] *Ibid.*, pp. 62–63.

[20] M. Porret, *Beccaria et sa modernité,* [in:] M. Porret (ed.), *Beccaria et la culture juridique des Lumières (Actes du colloque européen de Genève 25–26 novembre 1995),* Librairie Droz, Geneva 1997, p. 16.

[21] Ch.-L. de Montesquieu, *O duchu praw* [(On) The Spirit of the Laws], Polish translation by T. Boy-Żeleński, Warsaw 2002, Vol. 29, Chapter XVI, p. 614 ff.

(1768–1848),[22] L.-M. de Lahay Cormenin (1788–1868),[23] P.J. Proudhon (1809–1865),[24] R. von Ihering (1818–1892),[25] H. Capitant (1865–1937)[26] and others drew attention to those risks. Their dominating opinions concern poor quality of law enacted in their times resulting from the excessive number of statutes, lack of diligence in designing law and insufficient legal competence. H. Capitant described the sum of these disadvantageous facts as legislative decadence. Possibly, the cause of the problems is that the 19th century – as it was written – was the epoch in which "much is reformed, little is codified" ("*on réorme beaucoup et on codifie peu*").[27]

The issue of negative consequences of law enactment was also noticed in the common law system. F. Bacon (1561–1626) wrote about the excessive amount of statutes, mainly penal ones, and incomprehensible language of law and its bad expression.[28] J. Bentham (1748–1832) pointed out a general deprivation of style in English statutes. He regretted that the language used by English jurists differed from the common language, which did not give positive results.[29]

According to Ch. Guy-Ecabert and A. Flückiger, there is no golden epoch of legislation[30] and this synthetic statement probably accurately diagnoses the reality of law functioning, although there are many aspects of it in the history of legislation. Apart from the extreme periods: vulgarisation of law on the one hand, and on the other hand the times when law was called the art (of the good and justice) and this ideal was chased, intermediate reality dominates legislation. Perhaps because of archetypal inclinations people have to overestimate negative phenomena in the surrounding world and insufficiently appreciate the positive ones, pessimistic assessment of legislation dominates in some periods and it constitutes an exemplary but authoritative confirmation of the statements made by well-known jurists and philosophers of different epochs.

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[22] F.-R. Chateaubriand emphasised the lack of diligence in enactment of law, which he thought to be the main defect of legislation (*Mélanges politiques*, [in:] *Oeuvres complètes*, Vol. V, Paris 1836, p. 138).

[23] L.-M. de Lahay Cormenin wrote about fear for new acts, which he called *légomanie*. He vividly stated: "*malhereusement nous sommes mordus du chien de la légomonie*" (*La légomanie*, Paris 1844, p. 5).

[24] P.J. Proudhon wrote in a similar spirit: "*Les lois, les décrets, les édits, les ordonnances, les arrêtés tomberont comme grêle sur la pauvre peuple*", which means "Acts, decrees, edicts, ordinances, judgements fall down like hail on poor people" (P.J. Proudhon, *Idée générale de la révolution au XIXe siècle – choix d'études sur la pratique révolutionnaire et industrielle*, Paris 1851, p. 147).

[25] R. von Ihering spoke about the lack of sufficient intellectual strength on the part of the legislators, necessary to formulate a logical quintessence of the sum of rules (*L'esprit du droit romain dans les diverses phases de son développement*, Bologne, Vol. 1, translation by O. de Meulenaere, Paris 1880, p. 42.

[26] H. Capitant wrote about the decadence of legislation based on the example of civil legislation he knew very well (*"Malhereusement l'art des faire les lois est en pleine décadence et jamais le législateur n'a apporté moins de soin"*, [in:] *Comment on fait les lois aujourd'hui*, Revue politique et parlementaire 1917, Vol. 91, p. 307.

[27] B. Dubois, T. Le Marc'Hadour, *Un code pour la notion. La codification du droit pénal au XIXe siècle: France, Belgique, Angleterre*, Centre d'Histoire Judiciaire, Lille 2010, p. 69.

[28] F. Bacon, *Oeuvres philosophiques…*, Vol. VIII, Chapter III, p. 246, No. 53 and p. 248 No. 66 (citation after Ch. Guy-Ecabert, A. Flückiger, *La bonne loi…*, p. 44).

[29] *The works of Jeremy Bentham,* (ed.) John Bowring, Edinburg 1843, p. 241.

[30] Ch. Guy-Ecabert, A. Flückiger, *La bonne loi…*, p. 21.

Whatever the approach to the issue is, the level of contemporary legislation is far from perfect and its original sin is the legislators' objective and instrumental attitude to law. In their hands, law is a too easy and too common an instrument for tailoring reality for which other measures might prove to be more efficient or at least more adequate. In addition, there is a conviction that legal norms play a causative and definitive role in solving complicated individual and social situations. Similar thinking can be seen in the sphere of penal legislation. On the other hand, it was already well known in ancient times that law had its limits, which was not an obstacle to believe that the commands of the law were more powerful than the commands of men (*imperia legum potentiora quam hominum*). The importance of other regulators of reality was also noticed. It was known that there were values more important than law such as justice (*aequitas sequitur legem*), customs (*mos pro lege*), contracts (*pacta sunt servanda*) or promises (*quod iuratum est, id servandum est*). There was no recognition of the need to codify these values due to their power *de facto* and their self-contained executive power.

Diagnosing the state of contemporary legislation is a complicated task but it is certain that there are many causes of the present crisis. Objective reasons such as the complexity and multi-dimensional character of contemporary reality may also be the source of that. The crisis of traditional values, including the sphere of social relations, may be another sociological factor. The former factor is demonstrated in compulsive creation of law and results in its overproduction. The latter, on the other hand, influences the quality of law connected with insufficient determination of the system of vales it is to express.

The weakness of contemporary law results in its concentration on temporary individual and detailed problems, which should be solved within the general rules and directives of the system, rather than within particular regulations. The phenomenon denotes not only a casuistic increase in the number of normative acts but, first of all, a decrease in the quality of law in the situation where the role of quantity dominates, and in the addressees' perception – a decrease in the power of its imperative influence. The phenomena result in progressive devaluation of law. These, of necessity, general diagnoses presented above require specification taking into careful consideration particular branches of law.

In case of criminal law, it is evident that lawmakers are looking for a new conception of regulating the reality resulting from occurring crime. Contemporary systems follow a new philosophy of imposing punishment based on the idea of re-establishing social links broken by the commission of crime. This has resulted in a deep reconstruction of criminal law in both its substantive and procedural content. The new axiology of adjudicating criminal cases assumes re-establishment of relations between the accused and the victim and allows a dialogue between them in the conditions of diversification of conflict resolution measures and simplified and de-formalised procedure laid down in the legal systems. While in the two previous centuries the process of humanisation of criminal law was the main engine of its development and the most important axiological mode, after the achievement of this aim in general, criminal law was based on new aims and new philosophy. It seems that the clearly marked stability of the present directions of criminal law

development should have positive legislative consequences. Based on the example of Polish criminal law, it can be stated that that this kind of dependence is not so obvious and unambiguous.

The estimation of threats accompanying the process of law enactment and institution discussed so far is exemplary but depicts reality of a broad spatial range.[31] Referring this statement to present times, it is necessary to emphasise the universal character of law destruction with respect to the used forms of its expression as well as its substantive content. M. Delmas-Marty summed this reality up in the following way: "what dominates the legal landscape in the early 21st century is imprecision (*imprécis*), uncertainty (*incertain*) and instability (*instable*)".[32] The above-mentioned dangers are too often present in the contemporary legal systems and are a typical "*signum temporis*".[33] In the circumstances of such a huge process of law deformation and its contemporary internationalisation, the randomness of this phenomenon should be excluded. It is colloquially called "law debasement" but it is more complex than the old practice of coinage debasement by lowering the noble metal content and the reduction of its weight.

The category of "legal security", apart from juridical meaning, also has its axiological context. J. Kochanowski wrote: "An individual's legal security is connected with certainty of law, thus it makes it possible to predict state bodies' activities and forecast one's own activities. It is not just a manifestation of callous legalism but a necessary condition of a citizen's freedom in the state. Predicting and making choices based on reliable knowledge of the law in force enables an individual to organise their life and take responsibility for their own decisions. In a way, legal security is also correlated with an individual's dignity because it constitutes the manifestation of respect of the legal order for an individual as an

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[31] V. Malabat, B. de Lamy, M. Giacopelli (ed.), *Droit pénal: le temps de réformes. Colloques & débats*, LexisNexis 2011.

[32] M. Delmas-Marty, *Les forces imaginantes du droit*, Vol. II, *Le pluralisme ordonnée*, Paris 2006, p. 7.

[33] In France, the regulations of the labour law are most often quoted as an example of excessive laws as it has over 10,000 articles while, in comparison, its Swiss equivalent has only 50 articles. Additional data concern the number of contracts based on labour law. While in France there are 38, in England there is only one form of contract. In relation to the example of Switzerland, it must be noted that many negative examples of legislation are observed; for more on that issue, see: Ch. Guy-Ecabert, A. Flückiger, *La bonne loi…*, p. 22 and the following. It should be added that the French Code of criminal procedure might also be an example of a very abundant act. Its legislative part only accounts for 935 articles. The French *Code de procédure pénale* of 2013, 25th edition, published by LexisNexis, has 2,196 pages providing the basic criminal procedure regulation and related matters with short commentaries. In the 16th century, M. de Montaigne wrote that the French had more statutes than the whole world altogether (*De l'expérience. Essais*, Book III, Chapter XIII, 1588). Even if the assessment is exaggerated, it rightly highlights the extraordinary wealth of French legislation. According to the statistics of Légifrance (2013), there are 64 codes in France, 10% of which are amended every year. Henri Altan commented on this situation this way: "Complexity is an order a code does not know" ("*La complexité est un ordre dont ne connaît pas le code*"). Apart from that, there are over 11,500 statutes, 280,000 decrees, and many other legal acts. The cost of legislative bureaucracy is estimated at 100 billion euros.

autonomous and rational entity".[34] The imposed framework of the article does not allow elaborating on the issue but it does not disappear from the field of vision and interest.

In the context of the title, the concept of "legal security" has a conventional meaning, i.e. a group of characteristic features of appropriate legislation being a condition for citizens' sense of security resulting from simplicity and clarity of law, its predictability and comprehensive logics, moderation in indispensability of regulations, existence of general and unquestionable norms, clear and unambiguous communication of rights and duties and other similar attributes. At present, the concept of "legal security" constitutes one of the most common and, at the same time, basic individual and social needs connected with the functioning of law. Striving to give law adequate content and form in accordance with classical directives defining this category focuses on this need. It must be highlighted that the idea of "legal security" originates from the 19th century German juridical tradition,[35] but it was a commonly recognised condition of the state of law and a factor ensuring the quality of law in the 20th century. In France, "legal security" was classified as a constitutional value derived from the constitutional category of security (Article 2 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789) belonging to the sphere of natural rights inalienable in the same way as liberty, property and the right of revolution.[36] At present, the clause is perceived similarly, but emphasis is placed on the necessity to re-activate the values that form its content. This pursuit has the strength of one of the most important calls addressed at lawmakers in the face of the prevalence and accumulation of negative phenomena in the process of law enacting and institution.

The concept of "legal security" is rich in theory and abundant judgements at the level of both domestic and international systems. It has been developed by the European Court of Human Rights, which identifies this category with conditions constituting the conception of a fair trial. The fundamental character of the principle of "legal security" was emphasised in the ECtHR judgement of 6 April 1962.[37] The Court of Justice of the European Union, on the other hand, in its judgement of 14 July 1972[38] precisely defined the attributes of legal security identifying the principle with the requirement of clarity and precision of a legal act, a condition of communicating it to the addressee, and readable and unambiguous specification of the addressees' rights and obligations resulting from it.[39] Then the category was developed in numerous successive judgements. It has been also referred to in many judgements of the Polish Constitutional Tribunal.[40]

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[34] Speech given at the conference on the language of Polish legislation: https://www.rpo.gov.pl/pliki/1165502902.pdf.

[35] P. Jestaz, C. Jasmin, *La doctrine*, Dalloz 2004, p. 139 ff.

[36] Déc. CC No. 99–421 of 16 December 1999.

[37] Case *Kledingverkoopbedriif de Geus en Vitdenbogenrd v. Robert Bosch GmbH*, 13/61, ECLI:EU:C:1962:11.

[38] *ICI v. Commission* 48/69, ECLI:EU:C:1972:70.

[39] J. Molinier, *Les principes généreaux du droit*, Répertoire de droit européen, October 2014.

[40] Inter alia, the rulings of 30 November 1988 (K 1/88); 2 March 1993 (K 9/92); 5 January 1999 (K 27/98).

It must be emphasised that different forms of law destruction have been very well diagnosed and described.[41] Thus, there is no need to present them and analyse again. In fact, all the defined factors having a negative impact on the quality of legislation are revealed in the regulations of particular areas of law although their share may be different in each case. The first criterion for differentiation results from the division of law into the private and public ones. Disciplines belonging to the sphere of public law are characterised by a relatively lower level of security. They are more exposed to threats connected with legislative populism or temporary political needs, which is shown by the examples of numerous amendments to substantive and procedural law. In case of many of them, striving to implement particular ideas, in isolation from objective and rational arguments, is revealed. Most often, the political majority parity is a factor legitimising this type of legislative choices. The problem of demagogy in law-enacting is as old as mankind. Aristotle perfectly described it in *Politics* based on examples of specific legal solutions (e.g. concerning the use of confiscation and fines or tax surplus).

Particular branches of law provide individual typical proofs of the reality of contemporary threats to law enactment and institution. In the part of the article that follows, the main attention will be focused on criminal procedure law, which is characterised by greater legislative mobility and susceptibility to amendments because of the general necessity to ensure functionality of criminal procedure. The requirement to ensure efficient course of the proceedings and regard to its pragmatism and economy usually constitute justified grounds for legal change. Aiming at simple and utilitarian solutions where they are in adequate balance with the sphere of the rights of the parties to the proceedings is usually approved of. Basically, in case of amendments introducing constructive improvement of the procedure logics and rationality, one can assume that they will be approved of. Many amendments to the criminal procedure regulations of 6 June 1997 were evidently aimed at the indicated objectives. There were also chaotic and totally unconsidered reforms.

All in all, from 1 September 1998 when the Criminal Procedure Code (CPC) entered into force until the end of 2016, there were 120 amendments to this Act, which means that seven of them were passed annually on average. In some years, the number was higher. 2011 was a record year with 12 amendments to the CPC. In 2009 there were 11 and in 2008 and 2006 there were 10 each year. 37 amendments concerned only or mainly (first of all) the CPC regulations, in other 50 amendments the CPC regulations took the second or subsequent place. The changes marked on the margin of the CPC take two pages although they are only publication references to successive amendments. It is really difficult to list the CPC regulations changed from 1 September 1998 until 31 December 2016. It is a little easier to sum up changes resulting from the adaptation of the European Union criminal procedure solutions, although the reason indicated has had its substantial statistical share in the

[41] R. Piotrowski presented an abundant diagnosis of the phenomenon in *Uwagi o stanowieniu prawa* [Comments on law-making], [in:] *Rozwój kraju a jakość stanowionego prawa. Materiały i opinie* [Development of a country versus the quality of enacted law. Materials and opinions], Warsaw, 16 April 2012, pp. 15–25, http://www.kongresbudownictwa.pl/pliki/rozwoj%20kraju%20a%20jaksosc%20stanowionego%20prawa.pdf.

transformation of the criminal procedure since Poland's accession to the European Union on 1 May 2004. The legal transformations introduced as a result are generally justified, although one can also point out examples of unconsidered changes.

Finally, the third factor of the transformation of criminal procedure regulations is connected with the recognition of unconstitutionality of the provisions in force. Since the Criminal Procedure Code entered into force, the Constitutional Tribunal has issued 33 judgements on the Act's conformity with the Constitution of the Republic of Poland of 2 April 1997, adjudicating unconstitutionality of the challenged provisions 22 times, including two provisions of the CPC simultaneously three times. In 10 cases, the Constitutional Tribunal judged that the challenged provisions were partially constitutional and partially unconstitutional. In one case, unconstitutionality concerned two criminal procedure provisions at the same time. In total, in the period the CPC was in force, the Constitutional Tribunal adjudicated unconstitutionality of 36 CPC provisions, which means that there were two such judgements annually on average. 2008 was a record year as the Constitutional Tribunal examined the CPC provisions six times and judged the breech of the Constitution five times. Although the Constitutional Tribunal issued the highest number of judgements (eight) in 2004, most of them recognised constitutionality of the challenged provisions. The activeness of the Constitutional Tribunal exceeded the average in 2006 and 2012 (five judgements issued each year).

Going on with statistical data, it must be said that Polish Criminal Procedure Code contains 673 articles, however, the number does not represent the real abundance of the Act. Most articles are divided into smaller editorial units, which extends the scope of the regulation considerably. Some provisions cover two A4 format pages (e.g. Article 237 CPC). Where all the letters of the alphabet have been used to mark the subsections, double-letter or triple-letter marking is used. It especially concerns provisions of Part XIII CPC – International Relations Procedure. For example, the provisions of Chapter 66d – European Union Member State's motion to execute forfeiture ruling are marked as Article 611fu to Article 611fzu. Although §57(5) of the Regulation of the President of the Council of Ministers of 20 June 2002 on the rules for law-making techniques[42] envisages such a situation, its real occurrence is rightly criticised. Since the Code that is in force now was passed, there has been a tendency to extend its volume. 111 executive acts have been added to the basic criminal procedure regulation. Some of them were repealed or recognised as repealed but most of them are still binding.

The information presented above makes it possible to form opinions on the state of the Polish criminal procedure legislation but the knowledge of the successive amendments must have even greater influence on them. The considerable number of those amendments makes even cursory presentation of them all impossible. Thus, the facts mainly indicating the instability of Polish criminal procedure law will be selectively presented in the final part of the article.

The data presented so far are certainly not grounds for optimism from the perspective of the value of the stable and reliable law. Undoubtedly, they indicate

[42] Journal of Laws [Dz.U.] of 2016, item 283, uniform text.

destabilisation of the Polish criminal procedure law but are only formal proofs of the phenomenon. The real scope of particular changes and their complex character show its actual limits and progress rate. Some of the 120 amendments to the Criminal Procedure Code in force introduced systemic changes that cause considerable reconstruction of the former legal conceptions. Their list given below is just exemplary and covers the most important instances of the criminal procedure reform. Let me present them in a chronological order: the change of the original model of cassation introduced in the Act of 20 July 2000 amending Act: Criminal Procedure Code, the Act on regulations instituting Criminal Procedure Code and the Act on penal law concerning offences against the Treasury;[43] the introduction of mediation and structural changes at the stage of the preparatory proceedings resulting from the Act of 10 January 2003 amending the Act: Criminal Procedure Code, Regulations instituting Criminal Procedure Code, the Act on turning state's evidence and the Act on the protection of classified information;[44] as a rule, the elimination of lay judges from Polish criminal courts in accordance with the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts;[45] changes in the stage of the preparatory proceedings introduced in the Act of 29 March 2007 amending the Act on Public Prosecution, the Act: Criminal Procedure Code and some other acts;[46] changes in military courts competence introduced in the Act of 5 December 2008 amending the Act: Criminal Procedure Code and some other acts;[47] fundamental and multi-directional model changes introduced in the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts;[48] restitution of the Minister of Justice competence to lodge the extraordinary cassation in accordance with the Act of 10 October 2014 amending the Act: Criminal Procedure Code and some other acts;[49] the continuation of changes initiated in the Act of 27 September 2013 in the Act of 20 February 2015 amending the Act: Criminal Code and some other acts;[50] the changes reversing the direction of reforms introduced on 1 July 2015 in connection with the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts;[51] restitution of a social representative in accordance with the Act of 10 June 2016 amending the Act: Criminal Procedure Code, the Act on the profession of a physician and a dentist and the Act on patients' rights and the Children's Ombudsman[52].

In the period of over 18 years of the Polish Criminal Procedure Code being in force, the reform introduced in the Act of 27 September 2013[53] was of crucial

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43 Journal of Laws [Dz.U.], No. 62, item 717.
44 Journal of Laws [Dz.U.], No. 17, item 55.
45 Journal of Laws [Dz.U.], No. 112, item 766.
46 Journal of Laws [Dz.U.], No. 64, item 432.
47 Journal of Laws [Dz.U.], No. 237, item 1651.
48 Journal of Laws [Dz.U.], item 1247.
49 Journal of Laws [Dz.U.], item 1556.
50 Journal of Laws [Dz.U.], item 396.
51 Journal of Laws [Dz.U.], item 437.
52 Journal of Laws [Dz.U.], item 1070.
53 Journal of Laws [Dz.U.], item 1247.

importance. Although its provisions were in force only between 1 July 2015 and 15 April 2016,[54] they cannot be called episodic because of their scope of influence on the former conception of the criminal proceedings and multidirectional legal transformations. According to the legislator's declaration expressed in the Bill, the reform aimed to remodel juridical proceedings towards contradictoriness, which created the best conditions for establishing the substantive truth and best serves respect of the rights of the parties to the proceedings. To that end, it was assumed that it was necessary to: (1) remodel the preparatory proceedings within the limits adequate to the needs of building a model of an adversarial trial, especially the objectives the proceedings want to achieve; (2) improve and accelerate the proceedings by creating legal frameworks for broader use of consensual ways of concluding criminal proceedings and use of the idea of remedial justice in a broader way also thanks to the institution of mediation; (3) eliminate seeming proceedings by specifying a new way of proceedings based on abandoning a series of activities that do not serve establishing the truth during the trial and respecting guarantees for the parties to the proceedings and the principle of just repression; (4) develop new grounds for the use of preventive measures in a way preventing their excessive use in the procedural practice and ensuring the achievement of their basic objective, i.e. ensuring the appropriate course of the proceedings, as well as better safeguarding the suspect's procedural guarantees, and broader than present possibility of claiming damages and compensation for damage and harm caused by the institution of these measures during the proceedings; (5) limit the excessive length of proceedings by re-shaping the model of the appellate proceedings in the way allowing reformatory adjudication, and thus limiting a remand procedure that contributes to the lengthening of the criminal proceedings; (6) lighten the workload of judges, presidents of courts and heads of departments by constituting a possibility of taking decisions on keeping order and technical matters (as well as less significant judicial decisions) by judicial officers, which would let judges use their time more efficiently; (7) achieve full conformity of statutory solutions with the standards revealed in the light of judgements of the Constitutional Tribunal and the European Court of Human Rights; (8) repeal defects of the regulations in force that are obvious and revealed in court judgements.

The most important conception of the reform introducing a fully adversarial criminal proceedings in Poland was abandoned after eight months of being in force before it was actually used in the court practice. Regardless of the attitude toward the reform of 1 July 2015, just the decision to abandon it laid down in the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts[55] is astonishing. The dynamics of this event went beyond the former legislative reality in the sphere of criminal procedure and showed that the change of law is a matter of adequate motivation and determination on the part of the legislator. Substantive

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[54] In accordance with Article 28 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.], item 437), the Act was to enter into force on 15 April 2016, with the exception of Article 1(5), (81) and (109), which was to enter into force on 1 January 2017.

[55] Journal of Laws [Dz.U.], item 437.

assessment of implemented reforms is of secondary importance. What matters is how easy it is to take decisions on an act that is a code. The idea of ensuring that acts-codes are more stable is implemented with the use of a special legislative mode envisaged for enacting and amending this type of acts, as stipulated in Articles 87–95 of the Resolution of the Sejm of the Republic of Poland of 30 July 1992 – Rules and Regulations for the Sejm of the Republic of Poland.[56] However, it proves to be a relative solution.

The conclusions will be mainly pessimistic. Firstly, according to Ch. Guy-Ecaber and A. Flückiger's diagnosis, there was no golden era of legislation in history. The ancient Roman law, in spite of many positive examples, was not ideal. According to M. Jońca, rightly praised for its insight and clarity, it never achieved the level of dogmatic clarity and consistency from the linguistic perspective.[57] The conditions for appropriate legislation were well diagnosed in the Enlightenment but the ideal was not reached, neither at that time nor in the next epochs, which is confirmed by outstanding figures' critical opinions on the state of law enacted in their times. Regardless of the period in history, the articulated weaknesses of law are standard and cause the same resentment. With respect to this, the contemporary reality is not extraordinary, although its characteristic feature certainly is the existence of a much broader scope of disadvantageous phenomena in the field of law functioning. The criminal procedure law is a branch that, unfortunately, expressively confirms this observation.

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[56] Monitor Polski of 2016, item 1178. The Speaker of the Sejm takes a decision on the form of a code. In accordance with the Rules and Regulations of the Sejm, special (ad hoc) committees are appointed. MPs have to get acquainted with the code within 30 days. In the course of work, a standing expert committee is appointed. Facultative expert committees may be appointed. Their function is usually advisory. A group of at least five MPs of the committee is entitled to propose amendments. On the second reading, amendments may be proposed only in writing with justification by at least 15 MPs.

[57] M. Jońca, *Codex i kodeks* [Codex and code], Temidium No. 4 (87), 2016, p. 82.

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ON INSTABILITY AND OTHER DEFICIENCIES OF LAW IN GENERAL AND EXEMPLIFIED BY POLISH CRIMINAL PROCEDURE LAW

Summary

The article discusses the issue of cardinal deficiencies of legislation from a broad historical perspective. It is an attempt to demonstrate that the sphere of enacting law is burdened with many risks and, regardless of the epoch, there are threats the number of which has been continually increasing in history. The considerations lack optimism, which is already suggested by the title, but also the presented reality. The current level of imperfection of law exceeds the level of historical examples and results in dangerous consequences such as social depreciation of law. The criminal procedure law is used in the article to serve as an example of disadvantageous phenomena in the sphere of legislation.

Key words: law, legislation, instability of law, law depreciation, criminal proceedings (trial)

O NIESTABILNOŚCI I INNYCH WADACH PRAWA OGÓLNIE ORAZ NA PRZYKŁADZIE POLSKIEGO PRAWA KARNEGO PROCESOWEGO

Streszczenie

Niniejsze opracowanie podejmuje problematykę kardynalnych wad legislacji w szerokiej perspektywie historycznej. Jest ono próbą wykazania, że sfera stanowienia prawa jest obarczona wieloma ryzykami i bez względu na epokę występują zagrożenia, których liczba nieustannie w historii narasta. W tych rozważaniach brak jest miejsca na optymizm, co sugeruje już sam tytuł, ale przede wszystkim opisywana rzeczywistość. Obecny poziom niedoskonałości prawa przewyższa skalą historyczne przykłady, prowadząc do groźnego skutku, w postaci społecznej deprecjacji prawa. Za egzemplifikację niekorzystnych zjawisk w sferze legislacji posłużył przykład prawa karnego procesowego.

Słowa kluczowe: prawo, legislacja, niestabilność prawa, deprecjacja prawa, proces karny

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PROCEDURAL CONSEQUENCES OF THE VIOLATION OF COMMON COURTS' COMPETENCE IN CRIMINAL PROCEEDINGS

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The Constitution of the Republic of Poland[1] guarantees everybody the right to fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. The cited provision not only includes the statement that "everyone shall have the right to a fair hearing of his case, without an undue delay, before a (…) court" but also defines additional features which the body entitled to adjudicate should have. It should be "competent", "impartial" and "independent".[2] A competent court as meant in Article 54(1) of the Constitution is a court entitled by the Constitution or a statute to adjudicate a given case.[3] In accordance with Article 45(1) of the Constitution, a competent court is also a court which meets all the features of competence, guarantees the issue of a just judgement,[4] and also

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1 *arg. ex* Article 45(1) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.] No. 78, item 483 as amended.

2 D. Szumiło-Kulczycka, *Prawo do sądu właściwego w polskim procesie karnym i gwarancje jego realizacji* [Right to a competent court in Polish criminal proceedings and guarantees of its institution], [in:] J. Czapska, A. Gaberle, A. Światłowski, A. Zoll (ed.), *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia* [Principles of criminal proceedings in the face of contemporary challenges. Book in honour of Professor Stanisław Waltoś], Warsaw 2000, p. 247.

3 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland: Commentary], C.H. Beck, Warsaw 2009, p. 241.

4 K. Marszał, *Badanie właściwości sądu w sprawach o przestępstwa* [Research into a court's competence in criminal cases], [in:] A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (ed.), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi* [Adversarial model of criminal proceedings. Book presented to Professor Stanisław Stachowiak], Wolters Kluwer, Warsaw 2008, p. 244.

a court determined in special regulations of a statute.[5] In accordance with the above-presented meaning, a court's competence reflects the subjective aspect of jurisdiction, i.e. the entitlement of a particular common or special court to hear a particular case.[6] It is important not only for organisational reasons but has consequences in the sphere of an individual's rights. The treatment of "the right to a fair hearing before a competent court" as one of an individual's constitutional rights leads to a conclusion that the competence of a court must be determined without any defects because one can bring any case before a court.[7] The Constitution of the Republic of Poland does not regulate directly the competence of a court to adjudicate in a case. The regulation of this matter may be drawn from Article 176(2) of the Constitution, which stipulates that: "The organizational structure and jurisdiction as well as the procedure of the courts shall be specified by statute". The Criminal Procedure Code (CPC) is the statute that determines courts' competence. The provisions of the Code regulating a court's competence aim to safeguard optimum conditions for efficient operation of the justice instituting bodies on the one hand, and they are crucial from the point of view of lawfulness and guarantees for the parties to proceedings on the other hand.

It is worth mentioning that in accordance with the Constitutional Tribunal judgements, the right to have a case heard by a competent court means the necessity to tailor courts in such a way that will always make one of them competent to hear a case concerning freedoms and rights of an individual.[8] From the perspective of a court's competence, in accordance with Article 45(1) of the Constitution, it is necessary to determine in the regulations in force which court is competent to hear a case.[9] Thus, the regulations determining which court is competent are guarantee-related, rather than orderly in nature. This characteristic results from the constitutional right to be tried before a competent court. The right to a competent court is to constitute a guarantee that a case is appropriately heard and an adequate judgement issued. That is why, the judicial review of a given category of cases should be assigned to a court that is best prepared to adjudicate on it, due to its expertise or the position in the structure of the courts system.[10]

Therefore, a question arises what a court's competence is. A court's competence is explained in various ways in the literature on criminal proceedings. From the

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[5] G. Artymiak, *Realizacja prawa do sądu właściwego w sprawach karnych, jako gwarancja rzetelnego procesu. Zagadnienia wybrane* [Institution of the right to a competent court in criminal proceedings as a guarantee of a fair trial: Selected issues], [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy* [Fair criminal trial. Professor Zofia Świda jubilee book], Wolters Kluwer, Warsaw 2009, p. 249.

[6] G. Artymiak, *Realizacja prawa do sądu...* [Institution of the right...], p. 249.

[7] P. Sarnecki, [in:] L. Garlicki (ed.), *Konstytucja Rzeczpospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland: Commnetary], Vol. 3, Warsaw 2003, p. 4.

[8] See, the judgement of the Constitutional Tribunal of 10 June 2008, SK 17/07, OTK-A 2008, No. 5, item 75.

[9] P. Wiliński, *Proces karny w świetle Konstytucji* [Criminal proceedings in the light of the Constitution], Wolters Kluwer, Warsaw 2011, p. 123.

[10] See, the judgement of the Constitutional Tribunal of 10 June 2008, SK 17/07, OTK-A 2008, No. 5, item 75. See also the ruling of the Constitutional Tribunal of 6 July 2004, Ts 59/03, OTK-B 2004, No. 3, item 176.

point of view of the discussed subject matter, it is not necessary or purposeful to present the opinions of particular authors or a detailed discussion of specific typical features because it has been widely discussed in the doctrine.[11] Thus, it should be assumed that a court's competence is its entitlement to perform specified procedural activities or a group of such activities, which at the same time are obligatory in case a court recognises its competence.[12] Such competence concerns a crime, the place where it has been committed and other activities performed by a court. In a broader sense, a court's competence is also regulated based on the state of being an accused assigned to common courts and military courts.[13]

In the criminal proceedings doctrine,[14] there are two basic types of a court's competence:

1) general competence that covers *ratione materiae* (reason of the matter), *ratione loci* (reason of the venue) and functional competence (jurisdiction);
2) special competence that covers jurisdiction arising from the conjunction of matters and jurisdiction resulting from a case transfer.

Another question arises about the issue what proceeding-related consequences result from the violation of the above-mentioned types of competence. Analysing this issue, one should mention M. Cieślak's[15] division of these consequences into two groups:

1) absolute incompetence;
2) relative incompetence.

According to this author, absolute incompetence takes place where a lower-level court adjudicates in a case that is under jurisdiction of a higher-level court; and relative incompetence takes place in a reversed situation.[16] Thus, another question arises concerning the issue on violation of which types of competence results in absolute incompetence.

There is no consensus of opinion on this matter in the literature on criminal proceedings. Some authors state that absolute incompetence, being an absolute reason for quashing a judgement, [in accordance with Article 439 §1(4) CPC, note by Z.K.], takes place where a lower-level court having *ratione materiae* competence under the above provision adjudicates in a case that is under jurisdiction of

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[11] Z. Kwiatkowski, *Właściwość sądów powszechnych w sprawach karnych* [Common courts' competence in criminal cases], [in:] Z. Kwiatkowski (ed.), P. Hofmański (ed.-in-chief), *System Prawa Karnego Procesowego.* Tom V: *Sądy i inne organy postępowania karnego* [Criminal procedure law system. Vol. V: Courts and other bodies in criminal proceedings], Wolters Kluwer, Warsaw 2015, pp. 296–396.

[12] S. Waltoś, [in:] S. Waltoś, P. Hofmański (ed.), *Proces karny. Zarys systemu* [Criminal trial: System overview], Wolters Kluwer, Warsaw 2016, p. 157.

[13] *Ibid*.

[14] Z. Kwiatkowski, *Właściwość sądów powszechnych…* [Common courts' competence…], p. 300.

[15] M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne.* Wydanie III zmienione i rozszerzone [Polish criminal procedure: Basic theoretical assumptions. 3rd edition. Revised], PWN, Warsaw 1984, p. 239.

[16] M. Cieślak, *Polska procedura karna…* [Polish criminal procedure…], pp. 239–240.

a higher-level court.[17] The dominating opinion[18] is that "absolute incompetence constituting an absolute reason for appeal, [i.e. an absolute reason for quashing a judgement, note by Z.K.], in accordance with Article 439 §1(4) CPC, takes place where the provisions on *ratione materiae* competence are violated as well as where the provisions on functional competence are breached". The judicature has the same opinion on this matter.[19] The above-quoted opinions deserve approval.

A court's *ratione materiae* competence is a court's entitlement to adjudicate in a case concerning a specified crime at the first instance level because of the type of crime. In other words, *ratione materiae* competence allows determining a court that is to hear a case at the first instance level, and thus indicates whether it is to be a district or a regional court. Based on *ratione materiae* competence, a lower-level court or a higher-level court to adjudicate at the first instance level is designated. Thus, it is vertical competence. The adequate division results from the provisions of Article 24 §1 CPC and Article 25 §1 CPC.

There is a consensus in the doctrine[20] and the judicature[21] that "what decides about a court's *ratione materiae* competence in the course of judicial proceedings is a criminal act committed by the accused as seen in the light of circumstances of the given case and not its erroneous classification by a prosecutor in an indictment". In criminal proceedings, a court is to conduct a formal preliminary review of an accusation and verify whether the legal classification of an act the accused is charged

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[17] K. Marszał, [in:] K. Marszał et al., *Proces karny. Przebieg postępowania*. Wydanie III uzupełnione [Criminal trial: Course of the proceedings. 3rd edition. Revised], Wydawnictwo Volumen, Katowice 2012, p. 296,

[18] P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do artykułów 297–467*. Tom II, Wyd. IV [Criminal Procedure Code: Commentary on Articles 297–467. Vol. II, 4th edition], C.H. Beck, Warsaw 2011, p. 837; W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz*. Wyd. X [Criminal Procedure Code: Commentary. 10th edition], LexisNexis, Warsaw 2014, p. 592; T. Grzegorczyk, *Kodeks postępowania karnego*. Tom I: *Komentarz do artykułów 1–467*. Wyd. VI [Criminal Procedure Code. Vol. I. Commentary on Articles 1–467. 6th edition], Wolters Kluwer, Warsaw 2014, p. 1483; Z. Muras, *Bezwzględne przyczyny odwoławcze w polskim procesie karnym* [Absolute reasons for appeal in Polish criminal proceedings], Toruń 2004, p. 111 and literature referred to therein; D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*. Tom I. Wyd. II [Criminal Procedure Code: Commentary. Vol. I. 2nd edition], Wolters Kluwer, Warsaw 2015, p. 150; S. Zabłocki, *Postępowanie odwoławcze w kodeksie postępowania karnego po nowelizacji*. Wyd. II [Appellate proceedings in the Criminal Procedure Code after the amendment. 2nd edition], Wolters Kluwer, Warsaw 2003, p. 220.

[19] See, the ruling of the Supreme Court of 1 February 1989, V KRN 8/89, OSNPG 1989, No. 10, item 107.

[20] P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…* [Criminal Procedure Code…], Vol. II, p. 837; W. Grzeszczyk, *Kodeks postępowania karnego…* [Criminal Procedure Code], p. 592; J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki (ed.), S. Steinborn, *Kodeks postępowania karnego*. Tom II: *Komentarz do artykułów 425–673*, Wyd. III [Criminal Procedure Code: Vol. II: Commentary on Articles 425–673. Vol. II, 3rd edition], Wolters Kluwer, Warsaw 2013, p. 102; Z. Muras, *Bezwzględne przyczyny odwoławcze…* [Absolute reasons for appeal…], p. 112 and the opinions from the doctrine referred to therein.

[21] See, the judgement of the Supreme Court of 14 November 1984, V KRN 371/80, OSNPG 1985, No. 7, item 101; the ruling of the Appellate Court in Poznań of 28 April 1992, II AKz 112/92, OSA 1992, Vol. 9, item 1; the judgement of the Supreme Court of 9 January 2013, V KK 382/12, LEX No. 5043059; the judgement of the Supreme Court of 23 May 2000, IV KKN 580/99, LEX No. 392267.

with in an indictment is appropriate. This is of crucial importance, especially in case of aggravated crime where, e.g. in accordance with Article 294 §1 of the Criminal Code (CC), a first instance court's competence depends on it.

Violation of a court's *ratione materiae* competence, which is an absolute reason for quashing a judgement laid down in Article 439 §1 CPC, is applicable only in one direction, i.e. only where a lower-level court adjudicates in a case under jurisdiction of a higher-level court. The provision refers to the structure of the common courts system by the mutual relationship between the "a lower-level court" and "a higher-level court". The Act of 27 July 2001: Law on the common courts system (LCCS)[22] does not use the terms "a lower-level court" and "a higher-level court"; however, if we take into consideration the way in which common courts are founded, laid down in Article 10 LCCS, it is necessary to assume that, while a district court is founded for *ratione loci* competence of at least two regional courts, called "a court district", (*arg. ex* Article 10 §2 LCCS), and an appeal (appellate) court is founded for *ratione loci* competence of at least two court districts, called "an appeal area" (*arg. ex* Article 10 §3 LCCS), and a regional court is founded for one or a few communes [*gmina*] (*arg. ex* Article 10 §1 LCCS), in the common courts system a district court is a higher-level court in relation to a regional court and an appeal court is a higher-level court in relation to a district court.

The same relation exists in the structure of the military courts system, where a district military court is a higher-level court in relation to a garrison court (*arg. ex* Article 3 §1 of the Law on the military courts system, henceforth LMCS),[23] and the Supreme Court Military Chamber is a higher-level court in relation to a district military court.

However, there is not an absolute reason for quashing a judgement in accordance with Article 439 §1(4) CPC where a higher-level court adjudicates in a case under jurisdiction of a lower-level court. In such a case, the violation of a lower-level court's competence and adjudication by a higher-level court may be regarded as contempt of the procedural provisions that is a relative reason for appeal (Article 438(2) CPC), provided that a higher-level court notices its incompetence before a trial starts and, despite that fails to make an adequate decision in accordance with Article 35 §1 CPC. However, if a court's *ratione materiae* incompetence is revealed in the course of judicial proceedings, the mode of action to be taken depends on how advanced the hearing is and the bench composition. Then, a court is not obliged to transfer a case to a lower-level court because it is entitled to hear it, unless there is a need to adjourn a trial.

Thus, if a public prosecutor adopts legal classification in an indictment that indicates a district court's *ratione materiae* competence as the first instance court, but a regional court hears a case adopting legal classification in accordance with

[22] Act of 27 July 2001 on Law on the common courts system (uniform text), Journal of Laws [Dz.U.] of 2015, item 133.

[23] Act of 21 August 1997 on Law on the military courts system, Journal of Laws [Dz.U.] of 2016, item 358, as amended.

a provision indicating its *ratione materiae* competence, it is not an infringement laid down in Article 439 §1(4) CPC.[24]

Another question arises here. In what proceeding-related situations does the violation of a court's functional competence result in an absolute reason for quashing a judgement in accordance with Article 439 §1(4) CPC? Functional competence constitutes a range of activities a court is entitled to undertake. It includes *ratione materiae* competence and other activities a court is authorised to by statute.[25] In the literature[26] on criminal proceedings, it is rightly emphasised that the violation of functional competence constitutes an absolute reason for quashing a judgement in accordance with Article 439 §1(4) CPC, however, in view of the discussed issues, it is not necessary to discuss various proceeding-related situations where violation of a higher-level court's functional competence may take place. It is only required to indicate that such a situation is connected with a lower-level court's failure to observe the competence of a higher-level court.[27] The Supreme Court expressed this opinion in its judgement of 30 December 1983,[28] stating that: "In proceedings conducted in accordance with Article 368 §1 CPC, [at present Article 420 §1 CPC, note by Z.K.], a first instance court may 'supplement' only a judgement of a first instance court. Thus, if there is a need to supplement a judgement of an appeal court, it must be adjudicated by the same appeal court in accordance with Article 407 CPC, applying Article 368 §1 CPC" [at present Article 458 CPC in connection with Article 420 §1 CPC, note by Z. K.]. The opinion cited was approved of in the doctrine[29] but there were also some doubts concerning it.[30]

The violation of a higher instance court's functional competence to issue a cumulative sentence is also an absolute reason for quashing a judgement in accordance with Article 439 §1(4) CPC. The competence is referred to in the doctrine[31] as competence arising from the conjunction of matters (*forum connexitatis causarum*) and it also constitutes functional competence of a regional or a district court. Thus, if the first instance courts adjudicating were courts of different level, a higher-level court shall issue a cumulative sentence (*arg. ex* Article 569 §2 CPC). The provision should be interpreted, however, in connection with Article 569 §1 CPC, which determines a court's competence to issue a cumulative sentence by

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[24] P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…* [Criminal Procedure Code…], Vol. II, p. 837, and literature and the Supreme Court judgements referred to therein.

[25] Z. Kwiatkowski, *Właściwość sądów powszechnych…* [Common courts' competence…], p. 367 and literature referred to therein.

[26] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed.), *Kodeks postępowania karnego…* [Criminal Procedure Code…], p. 151.

[27] Z. Kwiatkowski, *Właściwość sądów powszechnych…* [Common courts' competence…], pp. 379–389.

[28] The Supreme Court judgement No. Z 167/83, OSNKW 1984, Vol. 7–8, item 83.

[29] S. Zabłocki, *Postępowanie odwoławcze…* [Appellate proceedings…], pp. 222–223.

[30] Z. Doda, A. Gaberle, *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz.* Tom. II [Appellate review in a criminal trial: Supreme Court judgements. Commentary. Vol. II], Wolters Kluwer, Warsaw 1997, p. 212.

[31] Z. Kwiatkowski, *Właściwość sądów powszechnych…* [Common courts' competence…], p. 377 and the opinions from the doctrine referred to therein.

referring to the existence of conditions for adjudicating a cumulative sentence towards a person validly sentenced by other courts on the one hand, and by indicating a court that issued the last first-instance sentence, on the other hand. As a consequence, this connection between §1 and §2 of Article 569 CPC means that Article 569 §2 CPC, stipulating that: "if the first instance courts that adjudicated were different-level courts, a court of a higher level issues a cumulative sentence", does not make a higher-level court's competence to issue a cumulative sentence dependent on meeting material and legal conditions for adjudicating a cumulative sentence by a higher-level court. This is because the fact whether these conditions occur is a matter of the assessment of which sentences and of which courts meet these conditions.[32] Thus, in order to determine a court's functional competence to issue a cumulative sentence, it is not important which penalties adjudicated in particular sentences are subject to accumulation but sentences of which courts are examined for meeting conditions laid down in Article 83 and the following CC.[33]

Inappropriate interpretation of inter-polar legal norms may also be the reason for the violation of a court's functional competence constituting contempt of Article 439 §1(4) CPC. Such a situation often took place after the presently binding Criminal Procedure Code came into force because it caused a problem of a relationship between the provisions of Articles 7 and 8 of the Act of 6 June 1997: Regulations instituting the Criminal Procedure Code.[34] The issue was the subject matter of a Resolution of the bench of seven judges of the Supreme Court of 30 September 1998,[35] where the following legal opinion was expressed: "the expression used in Article 8 sentence II of the provisions instituting the Criminal Procedure Code stating that in situations described in this provision 'proceedings are being conducted in accordance with the provisions of the Criminal Procedure Code' does not refer to a court's competence but to other provisions concerning proceedings 'being conducted', and a court's competence is referred to only in Article 7 of the provisions". The stand was approved of in the literature.[36]

Summing up the considerations so far, it is necessary to conclude that the provision of Article 439 §1(4) CPC, formulating one of the absolute reasons for appeal, [quashing a sentence, note by Z.K.], requires that there was a violation of specified provisions on a court's *ratione materiae* or functional competence. Thus, one cannot speak about "contempt" of the provision of Article 439 §1(4) CPC but about contempt of special provisions stipulating that a particular case is subject to hearing in a higher-level court and the infringement of this provision gives grounds for quashing a judgement appealed against, regardless of the limits of the appellate

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[32] T. Grzegorczyk, *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz* [Criminal Procedure Code and the Act on the state's evidence: Commentary], Wolters Kluwer, Warsaw 2008, p. 1198; see also justification for the judgement of the Supreme Court of 17 March 2010, IV KK 271/09, OSNKW 2010, Vol. 7, pp. 74–75.

[33] See, the judgement of the Supreme Court of 17 March 2010, IV KK 271/09, OSNKW 2010, Vol. 7, item 64.

[34] Journal of Laws [Dz.U.] No. 89, item 556.

[35] The Supreme Court judgement, I KZP 14/98, OSNKW 1998, Vol. 9–10, item 42.

[36] S. Zabłocki, *Postępowanie odwoławcze…* [Appellate proceedings…], p. 223.

measure and the influence of the infringement on the content of the judgement.[37] The provision of Article 439 §1(4) CPC determines only a violation concerning other provisions of the Criminal Procedure Code regulating a court's competence. The violation of these provisions results in absolute quashing of a sentence. Alone, it only, as it were, sanctions a violation of a court's *ratione materiae* or functional competence in the course of hearing a case by an adjudicating body. As it has been already discussed, everyone shall have the right to a hearing of his/her case before a competent, impartial and independent court determined by statute (*arg. ex* Article 45(1) of the Constitution of the Republic of Poland). Thus, not without reasons, the legislator assumed that, in case a perpetrator commits a crime that is a more socially harmful act where the facts and their legal status are more complex, a higher-level (district) court should adjudicate, and in case a perpetrator commits a crime that is less socially harmful and thus where the facts and their legal status are less complex, a lower-level (regional) court should adjudicate. A violation of this obligation and adjudicating by a lower-level court in a case under jurisdiction of a higher-level court is an absolute reason for quashing a judgement, regardless of this infringement's influence on the content of the judgement.

The issue of adjudicating by a common court in a case under jurisdiction of a special court or vice versa, constituting absolute reasons for quashing a judgement in accordance with Article 439 §1(3) and (4) CPC must be discussed separately. *Ratio legis* of this provision is based on strict separation of common courts from special courts.

The common courts administer justice in all matters save for those statutorily reserved to other courts (Article 177 of the Constitution of the Republic of Poland). Common courts embrace regional, district and appeal courts and they administer justice in matters that are not under the jurisdiction of administrative and military courts and the Supreme Court (Article 1 §1 and §2 LCCS). Special courts include, in accordance with the Criminal Procedure Code, only military courts, which administer justice in the Armed Forces of the Republic of Poland in criminal matters envisaged by statute and adjudicate in other matters if they are transferred to their jurisdiction in accordance with other acts (*arg. ex* Article 1 §1 LMCS). These are special courts operating as district military courts and garrison military courts (*arg. ex* Article 3 §1 LMCS). Article 12 of the Act of 6 June 1997: Regulations instituting the Criminal Procedure Code and the provisions of Article 647 CPC and Article 650 CPC lay down these courts' competence.

The Criminal Procedure Code that is in force at present strictly separates the competence of common courts and special courts, i.e. military courts. As far as common courts are concerned, there is a principle of universal competence, which means that they cannot refuse to hear a case if their competence has not been explicitly limited to a military court or another body. As far as military courts are concerned, the principle is quite the opposite. They are entitled to hear cases only

[37] See, the ruling of the Supreme Court of 5 March 1997, V KKN 183/96, Prokuratura i Prawo – annex 1997, No. 9, item 12.

based on the specified provision in accordance with which a case is under their jurisdiction.[38]

In the literature[39] on criminal proceedings, there is an established opinion that if a case filed for the reason of the matter and a person involved is subject to hearing by a common court or a military (special) court, and there has been a violation of competence in connection with one of the co-accused or one of the acts, the provision of Article 439 §1(3) CPC constitutes grounds for quashing a part of the judgement concerning an act that is not in the competence of the given court or a person that is not under the jurisdiction of the given court. The Supreme Court expressed a different stand on this issue in its judgement of 30 April 1982,[40] stating that: "in a situation where a first instance voivodeship court has issued a judgement in a case that is under jurisdiction of a military court (Article 388(7) CPC) and a standard or extraordinary appeal has been filed against it, the Supreme Court Criminal Chamber has competence to adjudicate in accordance with Article 388 CPC". The stand has not been approved of in the literature.[41]

On the other hand, the Supreme Court was right to state that where a common court has adjudicated in a case under jurisdiction of a military court (Article 439 §1(3) CPC), unless the judgement is quashed, it constitutes an adjudicated matter (Article 17 §1(7) CPC), which makes hearing of the case before a competent military court impossible.[42] This opinion has been approved of in the doctrine.[43]

It is rightly claimed in the judicature[44] that "in case of concurrence of sentences issued by a regional court and a district military court, establishing which of these courts is competent to issue a cumulative sentence, one cannot refer to the criterion laid down in Article 569 §2 CPC because it is not applicable to a relationship between a common court and a military court, and the decision which court is competent is based on the criterion laid down in Article 569 §3 CPC". Thus, there is an infringement indicated in Article 439 §1(3) CPC because in case of concurrence of sentences issued by a regional common court and a district military court, a court that has issued a more severe sentence shall issue a cumulative sentence (*arg. ex* Article 569 §3 CPC).

Therefore, a violation of the specified type of special courts' competence and hearing a case before a common court as well as adjudicating in a case under

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[38] S. Zabłocki, *Postępowanie odwoławcze…* [Appellate proceedings…], p. 217.

[39] P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…* [Criminal Procedure Code…], Vol. II pp. 886–887; J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki (ed.), S. Steinborn, *Kodeks postępowania karnego…* [Criminal Procedure Code…], p. 673; D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed.), *Kodeks postępowania karnego…* [Criminal Procedure Code…], p. 150.

[40] The Supreme Court judgement, I KR 121/82, OSNKW 1982, Vol. 9, item 64.

[41] P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…* [Criminal Procedure Code…], Vol. II, pp. 886–887 and literature referred to therein.

[42] See, the ruling of the Supreme Court of 4 February 1997, WZ 82/98, OSNKW 1999, No. 5–6, item 32.

[43] T. Grzegorczyk, *Kodeks postępowania karnego…* [Criminal Procedure Code…], p. 1483.

[44] See, the judgement of the Supreme Court of 24 June 2004, WA 11/04, OSNKW 2004, No. 7–8, item 78.

jurisdiction of common courts by a military court constitute an absolute reason for quashing a judgement in accordance with Article 439 §1(3) CPC.

There is one more issue to discuss. It is a question in what proceeding-related situations the violation of general and special competence may be a relative reason for appeal under Article 438(2) CPC.

Analysing this issue, it must be highlighted that the provision of Article 438(2) CPC requires that there should be a causative relationship between the infringement in the proceedings and the issued judgement. Consequently, in every case it is necessary to establish whether the violation of procedural provisions on court competence might have influence on the judgement. Thus, it is rightly claimed in the doctrine[45] that the regulation laid down in Article 438(2) CPC should be deemed to be appropriate as it would be hard to recognise as convincing a solution that would allow quashing or amending a judgement, due to infringement of proceeding-related regulations that could have no impact on the content of the judgement appealed against.

Thus, analysing the issue of the violation of a specific type of court's competence from the perspective of a relative reason for appeal in accordance with Article 438 §2 CPC, first of all, it should be argued that the infringement of every type of a court's competence, i.e. general (*ratione materiae*, *ratione loci* and functional) competence as well as special competence (arising from the conjunction of matters and a transfer of a case) may constitute a relative reason for appeal in accordance with Article 438(2) CPC, unless it classified as absolute incompetence constituting an absolute reason for quashing a judgement under Article 439 §1(3) and (4) CPC.

Therefore, if a higher-level court hears a case that is in *ratione materiae* competence or functional competence of a lower-rank court, it may constitute contempt of proceeding-related regulations that is a relative reason for appeal (Article 438(2) CPC). However, when a higher-level court recognises a lower-level court as the one that has *ratione materiae* or functional competence to hear a case in the course of the first instance hearing, a transfer of a case in accordance with a court's competence may take place if there is a necessity of adjournment.[46] However, in case of *ratione loci* competence, which determines which court of the given level has *ratione materiae* and functional competence to adjudicate in a given case because of the venue where a crime was committed,[47] the recognition of its lack before a trial obliges a court to transfer the case to a court that has *ratione loci* competence (*arg. ex* Article 35 §1 CPC), and the conditions for transferring a case because of *ratione loci* incompetence are applicable to a higher-level court as well as a lower-level court. Recognition of lack of competence after a trial starts obliges a court to take the above steps only in case of a trial adjournment (*arg. ex* Article 35 §2 *in fine* CPC). This means that,

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[45] K. Marszał, [in:] K. Marszał at al., *Proces karny…* [Criminal trial…], p. 233.

[46] S. Zabłocki, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński (ed.), S.M. Przyjemski, R.A. Stefański (ed.), S. Zabłocki (ed.), *Kodeks postępowania karnego. Komentarz.* Tom III [Criminal Procedure Code: Commentary. Vol. III], Wolters Kluwer, Warsaw 2004, p. 164, and opinion from the doctrine and the Supreme Court judgements referred to therein.

[47] Z. Kwiatkowski, *Właściwość sądów powszechnych…* [Common courts' competence…], p. 355 and the opinions from the doctrine referred to therein.

despite the recognition of *ratione loci* incompetence in the course of the first instance hearing, a court does not transfer a case to another court or another body if a court's competent to adjudicate is a lower-level court or a court of the same level and it is not necessary to adjourn the trial. Thus, the infringement of a court's *ratione loci* competence may also be a relative reason for appeal.[48]

It is worth drawing attention to the fact that Articles 33 and 34 CPC regulate special competence (competence arising from conjunction of matters) which is an exception to *ratione loci* competence laid down in Articles 31 and 32 §1 CPC as well as *ratione materiae* competence laid down in Articles 24 and 25 §2 CPC. The infringement of the rule laid down in Article 33 §1 CPC may be a relative reason for appeal laid down in Article 438(2) CPC.[49] The provisions of Article 36 CPC and Article 37 CPC regulating special competence resulting from a case transfer may result in the change of a court's competence laid down in statute but only in relation to *ratione loci* competence.[50] Therefore, as it has been already discussed, if the infringement of a court's *ratione loci* competence may be only a relative reason for appeal, it should be assumed that the infringement of special competence resulting from a case transfer may also be a relative reason for appeal under Article 438(2) CPC. Thus, in every case of a violation of the above-mentioned types of a court's competence, it is necessary to establish whether contempt of the provisions of Article 36 CPC and Article 37 CPC may have an impact on the judgement.

The above considerations lead to a conclusion that the violation of the provisions regulating common courts' competence may result in two types of consequences: firstly, it may constitute an absolute reason for quashing a judgement in accordance with Article 439 §1(3) and (4) CPC, and secondly, it can be a relative reason for appeal laid down in Article 438(2) CPC.

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[48] J. Bratoszewski, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz.* Tom I [Criminal Procedure Code: Commentary. Vol. I], Warsaw 2003, p. 387.

[49] P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do artykułów 1–296.* Tom I, Wyd. IV [Criminal Procedure Code: Commentary on Articles 1–296. Vol. I, 4th edition], C.H. Beck, Warsaw 2011, p. 295.

[50] P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…* [Criminal Procedure Code…], Vol. I, p. 304.

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PROCEDURAL CONSEQUENCES OF THE VIOLATION OF COMMON COURTS' COMPETENCE IN CRIMINAL PROCEEDINGS

Summary

The infringement of common courts' jurisdiction causes two types of effects. Firstly, it constitutes absolute non-competence, which takes place when a lower instance court adjudicates in a case that is in a higher instance court's jurisdiction or when a common court adjudicates in a case that is in a specialised court's jurisdiction, or a specialised court adjudicates in a case that is in a common court's jurisdiction. Absolute non-competence constitutes an absolute reason for appeal, i.e. an absolute reason for quashing a judgement in accordance with Article 439 § 1 (3) and (4) CPC, and takes place when material jurisdiction as well as functional competence have been infringed. Secondly, it causes an effect in the form of relative non-competence, which takes place when a higher instance court adjudicates in a case that is in a lower instance court's jurisdiction. It concerns every type of jurisdiction infringement, i.e. general jurisdiction (*ratione materiae* jurisdiction, *ratione loci* jurisdiction, functional competence) as well as special jurisdiction (related to conjunction of cases and remand of a case), and may constitute a relative reason for appeal in accordance with Article 438 (2) CPC, which causes an effect in the form of quashing or changing a judgement appealed against if it might have influence on the content of the judgement.

Key words: court's *ratione materiae* competence, court's functional competence, absolute reason for appeal, relative reason for appeal

SKUTKI PROCESOWE NARUSZENIA WŁAŚCIWOŚCI SĄDÓW POWSZECHNYCH W POSTĘPOWANIU KARNYM

Streszczenie

Naruszenie właściwości sądów powszechnych powoduje dwojakiego rodzaju skutki. Po pierwsze, stanowi niewłaściwość bezwzględną, która występuje wtedy, gdy sąd niższego rzędu orzekł w sprawie należącej do właściwości sądu wyższego rzędu, bądź sąd powszechny orzekł w sprawie należącej do właściwości sądu szczególnego, albo sąd szczególny orzekł w sprawie należącej do właściwości sądu powszechnego. Niewłaściwość bezwzględna stanowi bezwzględną przyczynę odwoławczą – bezwzględną przyczynę uchylenia orzeczenia, w rozumieniu art. 439 par. 1 pkt 3 i 4 k.p.k. i zachodzi wtedy, gdy naruszono przepisy dotyczące zarówno właściwości rzeczowej, jak i funkcjonalnej sądu. Po wtóre, powoduje skutek w postaci niewłaściwości względnej, która zachodzi wtedy, gdy sąd wyższego rzędu orzekł w sprawie należącej do właściwości sądu niższego rzędu. Dotyczy to także naruszenia każdego rodzaju właściwości, a więc zarówno właściwości ogólnej (rzeczowej, miejscowej i funkcjonalnej), jak i właściwości szczególnej (z łączności spraw i z przekazania) oraz może stanowić względną przyczynę odwoławczą, w rozumieniu art. 438 pkt 2 k.p.k., która powoduje uchylenie lub zmianę zaskarżonego wyroku, jeżeli mogła ona mieć wpływ na treść orzeczenia.

Słowa kluczowe: właściwość sądu, właściwość rzeczowa sądu, właściwość funkcjonalna sądu, bezwzględna przyczyna odwoławcza, względna przyczyna odwoławcza

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ACCESS TO DETAINEES' FILES IN THE LIGHT OF DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2012 ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS AND UNDER POLISH LAW

JERZY SKORUPKA*

1.

The Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[1] (hereinafter referred to as the Directive) is an element of the European Union activities aimed at the maintenance and development of an area of freedom, security and justice, including the implementation of the principle of mutual recognition of judgements in criminal matters, which assumes that the European Union Member States have trust in each other's criminal justice system. The scope of this principle, including mutual recognition of decisions in criminal matters, is dependent inter alia on mechanisms of safeguarding the rights of suspects, as well as the accused persons, in criminal proceedings. The necessity to maintain and strengthen mutual Member States' trust results, among others, from Article 47 and Article 48(2) of the Charter of the Fundamental Rights of the European Union[2] (the right to a fair trial and the rights of the defence) and Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental

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1 Official Journal of the European Union, L 142/1 of 1 June 2012.

2 Official Journal of the European Union, C 364/1 of 18 December 2000.

Freedoms of 4 November 1950[3] (hereinafter referred to as the ECHR) on the right to freedom and personal security as well as a fair trial.

The adoption of the Directive was preceded by the adoption of the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[4] (hereinafter the Roadmap). The Roadmap called the European Union Member States to gradually adopt measures concerning the right to translation and interpretation (Measure A), the right to information on rights and information about the charges (Measure B), the right to legal advice and legal aid (Measure C), the right to communication with relatives, employers and consular authorities (Measure D), and special safeguards for suspected or accused persons who are vulnerable (Measure E).

The Directive refers to Measure B of the Roadmap. In order to strengthen the Member States' mutual trust, it establishes minimum common rules applicable to the rights of suspected and accused persons in criminal matters to information on their rights and information about the charges. The Directive is based on the rights laid down in the Charter of Fundamental Rights of the European Union, especially Articles 6, 47 and 48, and Articles 5 and 6 ECHR, which should be understood in accordance with the interpretation of the European Court of Human Rights (hereinafter referred to as the ECtHR). The Directive is applicable to suspected and accused persons, regardless of their legal status, citizenship or nationality, and the concept of "being charged" should be understood in the way it is used in Article 6(1) ECHR and the ECtHR judgements. The Directive is applicable from the moment persons are informed they are suspected or accused of committing crime by competent bodies of the Member State till the end of the proceedings understood as the final judgement on whether a suspected or accused person has committed crime, including, where appropriate, the issue of a sentence and judgements in connection with all possible appeal measures.

The discussed Directive is composed of two parts. The first contains the provisions constituting the right to information in criminal proceedings. The second consists of Annexes providing indicative model Letters of Rights. The first part of the Directive regulates the following rights: Article 3 – the right to information about rights, Article 4 – the Letter of Rights on arrest, Article 5 – the Letter of Rights in European Arrest Warrant proceedings, Article 6 – the right to information about the accusation, Article 7 – the right to access to the materials of the case. Further comments refer to the issues that are subject to Article 7 of the Directive. In accordance with this provision, where a person is arrested and detained at any stage of the criminal proceedings, it shall be ensured that documents related to the specific case in the possession of the competent authorities, which are essential to effectively challenge the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. Documents as well as photographs, audio and video recordings that are essential to effectively challenge the lawfulness of the arrest or detention are to be made available to arrested persons or to their lawyers at the latest upon submission of the merits of the accusation to the judgement of

[3] As amended, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[4] Official Journal of the European Union, C 295 of 4 December 2009.

a court in accordance with Article 5(4) ECHR in due time to allow the effective exercise of the right to effectively challenge the lawfulness of the arrest or detention.

Suspected or accused persons or their lawyers are granted access at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons in order to safeguard the fairness of the proceedings and to prepare the defence. Access to the materials is granted in due time to allow the effective exercise of the right of the defence, and at the latest upon submission of the merits of the accusation to the judgement of a court (an indictment or its substitute and an arrest motion). Where further material evidence comes into the possession of the competent authorities, access is granted to it in due time to allow for it to be considered by the accused and his lawyer.

By way of derogation, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. A decision to refuse access to certain materials is taken by a judicial authority or is at least subject to judicial review. Every decision is weighed in the light of the right of the defence of the accused (a suspect) taking into consideration various stages of the criminal proceedings. Limitation of this access is interpreted strictly in accordance with the right to a fair trial laid down in Article 6 ECHR and ECtHR judgements. Moreover, the accused (a suspect) and their lawyers have the right to challenge the refusal to provide information or give access to some materials of the case.

In accordance with Article 7 of the Directive, the reason for refusal to grant access to some material (evidence) in the preparatory proceedings is "serious threat" to the life or the fundamental rights of another person or if such refusal is "strictly necessary" to safeguard an important public interest. Access to the material may be refused in "extraordinary situations" where circumstances indicate serious threat to the above-mentioned legal interests and there is a strict necessity to protect an important public interest. A court shall make a decision to refuse access to the material related to the arrest or detention, and – in case it takes place – the accused and his lawyers at least have the right to appeal to a court against the decision. The condition for the appeal to a court against such decision is awareness of the refusal of access to some material, which requires that the accused and/or his judge be notified about the fact.

2.

In Polish criminal proceedings, access to material in the course of preparatory proceedings related to detention is regulated in Article 156 §5a Criminal Procedure Code[5] (hereinafter CPC). Until 28 August 2009, it had been provided for in Article 156 §5

[5] *Kodeks postępowania karnego*, Act of 6 June 1997, Journal of Laws [Dz.U.] of 1997, No. 89, item 555, as amended.

CPC. It is indicated in the Polish legal literature that in accordance with the ECtHR standards, in the light of Article 5(4) ECHR, the review proceedings concerning rightfulness and lawfulness of detention shall safeguard the fundamental principles of a fair trial, including the requirement for being judicial and contradictory in character, and shall respect the principle of equality of arms. Thus, formal equality of the parties should be ensured by providing them with equal opportunity to participate in the detention-related proceedings and equal access to the files of the case where detention has been applied, in order to safeguard the right to effectively challenge the arguments for the use of detention. As a result, information that is essential for the assessment of rightfulness and lawfulness of detention must always be made available to the counsel for the defence.[6] Reviewing the detention decision, a court cannot be exempt from the assessment whether refusal of access to case files violates a detainee's fundamental right to review the lawfulness and rightfulness of deprivation of liberty.[7]

The Constitutional Tribunal in its judgement K 42/07[8] of 3 June 2008 on the conformity of Article 156 §5 CPC with the Constitution of the Republic of Poland stated that the scope of files that should be made available to a detainee and his counsel for the defence must be determined by the effectiveness of the right of defence. Thus, all the material of preparatory proceedings that substantiates a prosecutor's motion to apply or prolong the application of detention must be overt. In case a prosecutor files a motion to apply or prolong detention, "the accused (…) has the right to review the material of the preparatory proceedings (this part of files), which constitutes the substantiation of the prosecutor's motion". The Supreme Court expressed a similar position and stated that when filing a motion to apply or prolong detention, a prosecutor should safeguard the right of the accused or his counsel for the defence to get to know at least that part of the preparatory proceedings files that contains material constituting grounds for the motion, because this is the requirement of the right of defence.[9]

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[6] See M. Wąsek-Wiaderek, *Dostęp do akt sprawy oskarżonego tymczasowo aresztowanego i jego obrońcy w postępowaniu przygotowawczym – standard europejski a prawo polskie* [Access of the remanded and accused and his counsel for the defence to the files in preparatory proceedings – European standard versus Polish law], Palestra Vol. 3–4, 2003, pp. 56–59; S. Steinborn, *Dostęp obrony do akt postępowania przygotowawczego w związku z procedurą habeas corpus – standard strasburski i jego realizacja w polskim procesie karnym* [Access of the counsel for the defence to files in preparatory proceedings due to *habeas corpus* principle – Strasbourg standard and its implementation in the Polish criminal procedure], [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska (ed.), *Problemy wymiaru sprawiedliwości karnej. Księga jubileuszowa Profesora Jana Skupińskiego* [Criminal justice issues. Professor Jan Skupiński jubilee book], Wolters Kluwer, Warsaw 2013, pp. 528–537; J. Skorupka, *W kwestii dostępu tymczasowo aresztowanego do wniosku w przedmiocie tymczasowego aresztowania oraz do akt sprawy w postępowaniu przygotowawczym na marginesie orzeczeń sądów powszechnych* [On the issue of access of the remanded to the motion for pre-trial detention and to case files in preparatory proceedings in the light of common court rulings], Palestra No. 7–8, 2008, p. 39.

[7] See the decision of the Appellate Court in Wrocław of 23 August 2007, II AKz 412/07, LEX No. 301497.

[8] OTK-A 2008, No. 5, item 77; Journal of Laws No. 100, item 648.

[9] See the decision of the Supreme Court of 11 March 2008, WZ 9/08, OSNKW 2008, No. 7, item 55 with a gloss of approval by W. Grzeszczyk, Prokuratura i Prawo No. 1, 2009.

As a result of the Constitutional Tribunal judgement K 42/07, the Act of 16 July 2009 amended Article 156 CPC adding §5a to it, because the provision had been unequivocally criticised from the very beginning due to the mode of determining conditions for refusal to make preparatory proceedings files available that infringed the standard laid down in the Constitution of the Republic of Poland, ECHR and ECtHR judgements.[10]

The Act of 27 September 2013 amended the provision of Article 156 §5a CPC. After the change, it laid down the principle that in case, in the course of preparatory proceedings, a prosecutor files a motion to apply or prolong detention, the accused and his counsel for the defence are immediately granted access to case files concerning the contents of evidence indicated in the motion. However, the possibility of exercising real (effective) defence in the detention proceedings depends, inter alia, on possessing the information about evidence indicating that the accused has committed crime he is charged with as well as circumstances indicating a threat of his obstructing the proceedings. The resource of this information limits the exercise of defence at the stage of the detention proceedings. Thus, access to preparatory proceedings files is essential for the accused and his counsel for the defence.

The provision of Article 156 §5a CPC referred not only to evidence in the case files but also to evidence stored on carriers attached to the files (e.g. a hard disc, CD-ROM, DVD) if they are listed in the prosecutor's motion. On the other hand, it is indicated in the legal literature that if there are a few separate means of evidence originating from the same evidence source (e.g. a witness has been interviewed several times in the course of a preparatory proceedings in connection with different circumstances), there is no obligation under Article 156 §5a CPC to make access available to all these means, and in case of a very extensive and multi-threaded witness's testimony, it is admissible to make access available only to some fragments of the testimony, provided they refer to different circumstances and a prosecutor uses the evidence in this scope as grounds for a motion to apply or prolong detention. Such selection of evidence is admissible, provided that its aim is to safeguard the appropriate course of the proceedings and not to obstruct the defence of the accused.

The provision of Article 156 §5a CPC was connected with the provision of Article 249a CPC added by the Act of 27 September 2013, in accordance with which only the establishment of facts based on overt evidence may constitute grounds for ruling on applying or prolonging detention. Having informed a prosecutor about it, a court was obliged to reveal circumstances not revealed by the prosecutor and

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[10] See, P. Hofmański, *Dostęp do akt postępowania przygotowawczego. Uwagi na tle nowelizacji art. 156 k.p.k.*, [Access to preparatory proceedings files. Comments in the light of Article 156 CPC amendment], [in:] V. Konarska-Wrzosek, J. Lachowski, J. Wójcikiewicz (ed.), *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi* [Key issues of criminal law, criminology and criminal policy. Professor Andrzej Marek jubilee book], Wolters Kluwer, Warsaw 2010, pp. 576–577; A. Tęcza-Paciorek, K. Wróblewski, *Dostęp podejrzanego do akt postępowania w przedmiocie tymczasowego aresztowania* [Access of the suspect to the proceedings files concerning pre-trial detention], Prokurature i Prawo No. 5, 2010, pp. 75–76.

take them into consideration in session if they were advantageous for the accused. Thus, Article 249a CPC laid down that a court could not rule detention based on circumstances constituting evidence included in the files that were not revealed to the accused and his counsel for the defence. Covert evidence included in the files submitted to a court did not constitute grounds for establishing general and specific reasons for detention. The provision of Article 249a CPC laid down formerly unknown evidence-related grounds for the detention decision.

The Act of 11 March 2016 amended both regulations. In accordance with Article 249a CPC, the grounds for ruling on the applying or prolonging detention may be findings established based on: (1) evidence revealed to the accused and his counsel for the defence, and (2) evidence originating from witnesses' testimonies laid down in Article 250 §2b CPC. In accordance with Article 250 §2b added by the Act of 11 March 2016, where there is a reasonable threat to the witness's or his relation's life, health or freedom, a prosecutor attaches evidence from the witness's testimony to the motion to apply or prolong detention. According to the quoted provision, the evidence indicated in it is not presented in the detention motion but is attached to this motion. The above-mentioned evidence is attached to the motion in a separate set of documents. On the other hand, the amended Article 156 §5a lays down an obligation to make available to the accused and his counsel for the defence the part of files containing evidence indicated in the detention motion, with the exception of evidence originating from witnesses' testimonies referred to in Article 250 §2b CPC.

In accordance with the new Article 249a §1 CPC, a detention court may use circumstances arising from evidence included in the files that have not been revealed to the accused (a suspect) and his counsel for the defence as real grounds for the detention decision. Thus, the evidence not revealed to the above-mentioned parties will constitute grounds for the findings concerning general and special reasons for detention. Evidence from witnesses' testimonies referred to in Article 250 §2b CPC may constitute grounds for the detention decision in spite of the fact that they have not been revealed to the accused and his counsel for the defence.

Article 249a §2 CPC obliges a court *ex officio* to also take into consideration circumstances a prosecutor has not revealed to the accused and his counsel for the defence, but only these that are advantageous to the accused. In such a case, having informed the prosecutor about that, the court reveals the circumstances in session, which allows the accused to defend and the prosecutor to take a position on the circumstances. Thus, the above-mentioned solution requires that the court takes cognisance not only of the prosecutor's motion but also case files submitted to the court together with the motion and the set of documents referred to in Article 250 §2b CPC. The counsel for the defence, on the other hand, may draw the court's attention to evidence in the case files that is advantageous to the suspect and has been ignored by the prosecutor.

If a witness's testimonies that a prosecutor has not revealed to the accused and his counsel for the defence based on Article 156 §5a CPC in connection with Article 250 §2b CPC results in circumstances advantageous to the accused, the court is obliged to reveal them in session and, having informed the prosecutor, consider them *ex officio*.

3.

Due to the obligation to interpret the provisions of the Directive 2012/13/EU in the way conforming to the judgements of the Court in Strasbourg, it must be reminded that the ECtHR in its judgement of 25 June 2002, in the case *Migoń v. Poland*,[11] referring to the principle of equality of arms between the parties, i.e. a prosecutor and a detained person, emphasised that in fact, "a certain degree of access to the case-file to such an extent as to afford the detainee an opportunity of effectively challenging evidence on which his detention was based may in certain instances be envisaged in proceedings concerning review of the lawfulness of detention on remand. (...) It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 §4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to adversarial procedure. (...) Whatever method is chosen should ensure that the detained person will be aware that observations have been filed and will have a real opportunity to comment thereon".[12] Referring to the issue of granting access to preparatory proceedings files, the Court stated in the cited judgement that the need for criminal investigation to be conducted effectively may imply that part of the information collected during it is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. "However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer".[13] The ECtHR expressed an identical position in its judgement 34091/96 of 28 January 2003 in the case of *M.B. v. Poland*[14].

In another judgement, the European Court of Human Rights in Strasbourg states that the entitlement to be granted access to all evidence is not an absolute law. In each proceedings there may be competing (with the above-mentioned rights) interests such as national security, the necessity to protect witnesses against a risk of revenge or to keep police methods of investigation secret. These interests must be juxtaposed with the rights of the accused. Therefore, in some cases, it may be essential to refuse to grant the defence assess to some part of the evidence in order to protect fundamental rights of another person or important public interest. However, only such measures limiting the right of defence are admissible which are absolutely necessary.[15]

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[11] The ECtHR judgement of 25 June 2002, 24244/94, Case *Migoń v. Poland*, Lex No. 53649; see also B. Gronowska, *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 25 czerwca 2002 r. w sprawie Migoń przeciwko Polsce (dot. gwarancji procesowych dla osoby tymczasowo aresztowanej)* [Judgement of the European Court of Human Rights in Strasbourg of 25 June 2002 in case *Migoń v. Poland* (concerning procedural guarantees for the detained on remand)], Prokuratura i Prawo No. 12, 2002, p. 143.

[12] The ECtHR judgement of 25 June 2002, 24244/94, *Migoń v. Poland*, para. 79.

[13] *Ibid*., para. 80.

[14] Lex No. 74761.

[15] See the ECtHR judgement of 1 February 2000, 27052/95, Case *Jasper v. the United Kingdom*, Lex No. 76902; and the ECtHR judgement of 16 February 2000, 28901/95, Case *Rowe & Davis v. the United Kingdom*, Lex No. 76903.

The above-discussed judgements provide grounds for claiming that the ECtHR does not require that the detained on remand should be granted access to all materials of preparatory proceedings. However, the accused and his counsel for the defence should be granted access to files to the extent necessary to effectively challenge the rightfulness and lawfulness of detention.[16] The position is justified in the ECtHR judgement in the case of *Lamy v. Belgium*[17], which stipulates that ensuring the possibility of effective challenging statements or opinions, which the prosecution bases on documents included in the case files, may in some cases require that the defence should be granted access to those documents.[18] In the case of *Lamy v. Belgium*, the applicant and his lawyer did not have any access to the preparatory proceedings files for 30 days after the applicant had been detained. This way, the suspect and his lawyer were deprived of a possibility of effective challenging of the prosecutor's statements based on the material contained in the case files and the lawfulness of detention before court. The Court assessed that access to the case files was essential for the applicant when the court was taking the decision whether to prolong the detention or release the accused.

On the other hand, in the case of *Garcia Alva v. Germany*,[19] *Lietzow v. Germany*,[20] and *Schöps v. Germany*,[21] the ECtHR assumed that the proceedings in which a counsel for the defence of the accused has no access to the documents in the case files that are essential to effectively challenge the lawfulness of detention of the accused do not ensure the principle of equality of arms.[22] In the case of *Garcia Alva v. Germany*, the Court in Strasbourg drew attention to the fact that the most important thing for the court taking the decision to prolong detention was the testimony of a witness who had been convicted before and who was subject to successive proceedings concerning smuggling drugs. However, the counsel for the defence was deprived of the possibility of taking cognisance of those testimonies and challenging adequately their reliability, which was judged to be unfair proceedings and a violation of the principle of equality of arms. The ECtHR expressed the same position in the case of *Mooren v. Germany*,[23] where it indicated again that information that is essential for the assessment of lawfulness and rightfulness of detention on remand should be made available to the suspect's lawyer. In the case of *Piechowicz v. Poland*,[24] the Court in Strasbourg reiterated that any restrictions on the right of the detainee

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[16] Compare: M. Wąsek-Wiaderek, *Zasada równości stron w polskim procesie karnym w perspektywie porównawczej* [Principle of equality of the parties in the Polish criminal procedure from a comparative perspective], Zakamycze, Kraków 2003, p. 199.

[17] The ECtHR judgement of 30 March 1989, 10444/83, http://www.worldlii.org/eu/cases/ECHR/1989/5.html.

[18] Similarly, the ECtHR judgement of 22 June 2004, 29687/96, Case *Wesołowski v. Poland*, Biuletyn Biura Informacji Rady Europy 2004/3/117.

[19] The ECtHR judgement of 13 February 2001, 23541/94.

[20] The ECtHR judgement of 13 February 2001, 24479/94.

[21] The ECtHR judgement of 13 February 2001, 25116/94.

[22] See M. Wąsek-Wiaderek, *Zasada…* [Principle…], p. 200.

[23] See §121, 124 and 125 of the ECtHR judgement (Great Chamber) of 9 July 2009, 11364/03, Case *Mooren v. Germany*.

[24] See §203 and 204 of the ECtHR judgement of 17 April 2012, 20071/07, Case *Piechowicz v. Poland*.

or his counsel to have access to documents of the case files which form the basis of the prosecution case against him must be "strictly necessary" in the light of a countervailing public interest.

Thus, the ECtHR does not deny the necessity of keeping some information and evidence collected during the preparatory proceedings secret and unavailable to the counsel. It notes that the need to conduct effective preparatory proceedings may require that some information collected during it should be made secret in order to preclude the suspect from manipulating evidence and undermining the course of court proceedings. However, the ECtHR consistently emphasises that the aim of protecting the interest of the proceedings cannot be achieved at the expense of significant restriction of the right of defence. For this reason, information that is essential for the assessment of rightfulness and lawfulness of detention on remand should be adequately made available to the suspect's lawyer. It is inadmissible to absolutely deprive the defence of access to the material justifying detention on remand. Where full access to files is not possible, the resulting difficulties should be compensated in the way ensuring that the suspect has an opportunity to challenge charges against him.[25]

The German Federal Constitutional Court followed this stand. Namely, it stated that limitation of the procedural guarantee to have access to files makes bodies conducting preparatory proceedings privileged, because the proceedings are temporarily secret. At the same time, if the body conducting the proceedings takes a decision to refuse access to files, it should refrain from using measures that substantially interfere in the fundamental rights such as arrest (German: *Arrest*) or detention on remand (German: *Untersuchungshaft*).[26] The judgements delivered against the Member States of the Council of Europe indicate that for the assurance of the conformity with the principle of equality of arms in the detention proceedings, it is not sufficient that an adjudicating court knows the evidence relevant to the imposition or maintenance of this measure. Full compliance with the principle, thus providing a suspect and his counsel with the knowledge of this evidence is required.[27]

4.

The discussed provisions of Polish law indicate that in case an application for imposition or prolongation of detention is filed in the course of the preparatory proceedings, a suspect and his lawyer are not granted access to all evidence constituting grounds for ruling detention. The suspect and his lawyer are not granted access to evidence from a witness's testimony if there is a justified threat that this would jeopardise the life, health or freedom of the witness or his close relations. In such a case, the prosecutor does not list the evidence in his application for the imposition of detention on remand but attaches it to the application in a separate set of docu-

[25] See S. Steinborn, *Dostęp*... [Access...], p. 536.

[26] See the judgement of 19 January 2006, file No. 2 BvR 1075/05; similarly in the judgement of 11 July 1994, file No. 2 BvR 777/94.

[27] Compare: §33 of the ECtHR judgement of 26 November 2013, 21249/05, Case *Emilian-George Igna v. Romania*.

ments. The prosecutor does not inform a suspect and his counsel for the defence about the fact that there is other evidence than that listed in the application submitted to court. Thus, the suspect and his counsel for the defence take cognisance of such evidence and its submission to court only if the evidence is advantageous to the accused (which practically does not take place), because the court is obliged *ex officio* to take the circumstances into consideration having informed the prosecutor about that.

The only reason for "making this evidence secret" is a justified threat that it would jeopardise the life, health or freedom of a witness or his close relation.

The circumstance that the evidence mentioned is not listed in an application for the imposition of detention on remand but is attached to this application may challenge the standpoint of the Constitutional Tribunal expressed in its judgement K 42/07 of 3 June 2008 that in case a prosecutor applies for the imposition or prolongation of detention, the accused has the right of access to this material (evidence) of the preparatory proceedings that constitutes the justification for the prosecutor's application. However, the Constitutional Tribunal's position cannot be interpreted as referring only to the material (evidence) provided by a prosecutor in his application for the imposition or prolongation of detention, thus it does not concern the material attached to the application in accordance with Article 250 §2b CPC. The intention and essence of the Constitutional Tribunal's standpoint is to emphasise that a suspect and his counsel can be granted access to the material (evidence) that constitutes grounds for a decision to impose or prolong detention, regardless of the fact whether it is listed in the application or only attached to it.

The ECtHR expresses the same stand. The material (evidence) that is essential for the imposition or maintenance of detention on remand and the assessment of lawfulness of this measure should be adequately made available to a suspect and his defence counsel. It should be reiterated that the Court in Strasbourg does not rule on revealing all the material justifying detention to the accused and his counsel and acknowledges a possibility that the defence cannot be granted access to some material. However, it treats restriction on access to evidence essential for justifying the suspicion of committing crime, and thus relevant for the imposition of detention, as inadmissible.

In accordance with the Directive 2012/13/EU, granting a suspect and his defence counsel access to evidence that is essential to effectively challenging lawfulness of detention is a rule. Nevertheless, the Directive envisages a possibility of refusing access to some evidence under the following conditions. Firstly, the refusal to grant access to a part of the investigation material should be treated as an exception to the principle of open access to this material, which requires that this condition is strictly interpreted as "serious threat to the life or fundamental rights of another person" and "an absolute necessity to protect important public interests". Secondly, the refusal to grant access to a part of evidence cannot infringe "the right to a fair trial" understood in accordance with Article 6 ECHR and the ECtHR judgements. Thirdly, the refusal to grant access to some investigation material should be subject to a court decision or judicial review. Fourthly, a suspect and his counsel for the defence must be informed about some evidence secrecy.

Assessing Polish procedural regulations concerning access to "detention files" in the light of the Directive 2012/13/EU, it must be stated that they do not meet the requirements laid down in this Directive. Polish legal regulations envisage the possibility of basing a court's decision on the imposition or prolongation of detention on remand on evidence that is essential for this decision but has not been revealed to a suspect and his counsel. As a result of this regulation, a suspect and his counsel are deprived of a possibility of challenging evidence relevant to a detention ruling that a prosecutor has submitted to court. This deprives the court proceedings of equality of arms and thus is unfair.

Moreover, a suspect and his defence counsel are not notified of the secrecy of some evidence, and thus deprived of the possibility of appealing to court against a prosecutor's decision.

The regulation allowing a refusal to grant a suspect and his counsel access to a witness's testimonies, where there is a justified threat that this would jeopardise the life, health or freedom of the witness or his close relation, does not contain conditions (restrictions) such as "extraordinary situation" or "non-violation of the right to a fair trial" and "serious threat" to a given legal interest.

It is also necessary to note that Polish regulations do not refer to the issue of access to material of the preparatory proceedings in case of arrest of a suspect or the accused and their appeal against arrest and detention under Article 247 §1 CPC (Article 247 §6 in connection with Article 246 CPC), as well as an appeal of the accused against the decision on the application for quashing or changing detention on remand (Article 254 §2 CPC). However, the Directive as well as Article 5(4) ECHR and a standard based on this provision developed in Strasbourg judgements refer not only to court review of detention but also review of arrest.

Non-conformity of the discussed provisions of Polish law with the Directive results in a possibility of referring to the provision of Article 91(3) of the Constitution of the Republic of Poland. In accordance with it, "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws". The cited provision refers, inter alia, to the EU directives. Although the legal regulations enacted by the European Union have not been directly called "sources of common law", the status awarded to these acts by the Constitution allows including them in the catalogue of such sources.[28]

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[28] Compare: the Constitutional Tribunal judgement of 1 December 1998, K 21/98, OTK 1998, No. 7, item 116.

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ACCESS TO DETAINEES' FILES IN THE LIGHT OF DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2012 ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS AND UNDER POLISH LAW

Summary

The author analyses whether the currently binding Polish regulations of the Code of Criminal Procedure concerning access to detainees' files comply with the provisions of the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in the criminal proceedings. Assessing Polish regulations, the author concludes that they do not meet the requirements laid down in the Directive. The provisions of Polish law admit the possibility of making a decision on the imposition or prolongation of detention

on remand by a court based on evidence that is significant for taking this decision but has not been revealed to the accused and his counsel for the defence. As a result, a suspect and his lawyer are deprived of the possibility of challenging evidence submitted by the prosecutor. This makes the proceedings concerning detention on remand stripped of the equality of arms, and thus they are not fair.

Key words: criminal procedure, equality of arms, remand/pre-trial detention, access to preparatory proceedings files

DOSTĘP DO „AKT ARESZTOWYCH" W ŚWIETLE DYREKTYWY PARLAMENTU EUROPEJSKIEGO I RADY 2012/13/UE Z DNIA 22 MAJA 2012 R. W SPRAWIE PRAWA DO INFORMACJI W POSTĘPOWANIU KARNYM ORAZ PRAWA POLSKIEGO

Streszczenie

Autor analizuje zgodność obowiązujących przepisów polskiego Kodeksu postępowania karnego dotyczących dostępu do „akt aresztowych" z przepisami Dyrektywy Parlamentu Europejskiego i Rady 2012/13/UE z dnia 22 maja 2012 r. w sprawie prawa do informacji w postępowaniu karnym. Oceniając polskie regulacje proceduralne, autor stwierdza, że nie spełniają one warunków określonych w wymienionej Dyrektywie. Przepisy prawa polskiego dopuszczają możliwość oparcia decyzji sądu o zastosowaniu lub przedłużeniu tymczasowego aresztowania na dowodach mających istotne znaczenie dla podjęcia takiej decyzji, które nie zostały ujawnione podejrzanemu i jego obrońcy. Konsekwencją tego jest pozbawienie podejrzanego i jego obrońcy możliwości kwestionowania dowodów przedstawionych sądowi przez prokuratora. Powoduje to, że postępowanie sądowe w przedmiocie tymczasowego aresztowania pozbawione jest równości broni, a tym samym, jest nierzetelne.

Słowa kluczowe: proces karny, równość broni, tymczasowe aresztowanie, dostęp do akt postępowania przygotowawczego

Ius Novum
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DEVELOPMENT OF THE INSTITUTION OF COURT PROCEEDINGS DURING THE FIRST INSTANCE MAIN HEARING

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1.

A trial is the most important part of the main hearing[1] before a first instance court, which should be associated with the fact that it is this part of court proceedings where evidence is examined in order to establish the truth concerning a criminal case brought before the court by a competent prosecutor. Both, inter-war doctrine representatives and contemporary authors noticed that.[2] In the period when the Criminal Procedure Code of 1928 (CPC) was in force, according to L. Peiper,[3] the trial was composed of the reading of an indictment, the statement made by the accused and the further hearing of evidence. The above-mentioned reading of the indictment for a long time used to be a point of reference which established precisely the moment of the initial part of the trial within the first instance hearing. A. Mogilnicki recognised only this part of the trial as "an indispensable component", which a court did not have the right to abandon even with the consent of the parties,[4] and S. Glaser classified as activities typical of the course of the first instance hearing.[5] In K. Marszał's

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1 The adjective "main" used to refer to hearing before a first instance court is to distinguish this type of hearing from the hearing in appellate or cassation proceedings; compare, S. Śliwiński, *Proces karny. Przebieg procesu i postępowanie wykonawcze* [Criminal proceedings: course of a trial and executive procedure], Warsaw 1948, p. 57.

2 See, inter alia, W. Jasiński, [in:] K.T. Boratyńska, Ł. Chojniak, W. Jasiński, *Postępowanie karne* [Criminal procedure], Warsaw 2013, p. 300.

3 L. Peiper, *Komentarz do kodeksu postępowania karnego* [Commentary on the Criminal Procedure Code], Kraków 1933, p. 500.

4 A. Mogilnicki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Kraków 1933, p. 625.

5 S. Glaser, *Polski proces karny w zarysie* [Outline of Polish criminal proceedings], Kraków 1934, p. 256.

opinion, the reading of the indictment constituted a stage of a trial which he treated as a sub-stage of the hearing.[6]

Until 1 July 2015, the first instance hearing used to start with the reading of an indictment. This was laid down in the provisions of the successive Criminal Procedure Codes, i.e. Article 333 CPC of 1928, Article 332 §1 CPC of 1969 and Article 385 §1 CPC of 1997 in the wording from before the reform of September 2013. After the September amendment entered into force, "a concise presentation of charges" substituted the reading of the indictment. Despite the changes that took place in this area, this part of the first instance hearing, regardless of the way of presenting the stand of the public prosecution representative, remains – what E. Kruk rightly notices in the doctrine – "an important point in a trial" serving "to highlight its adversarial and contradictory character".[7] Both activities, i.e. the reading of an indictment and the presentation of charges can be analysed as the maintenance of the prosecutor's stand expressed earlier in his written application and, consequently, its further support in the proceedings.

As S. Kalinowski rightly states, a trial starts with the moment of "starting to read an indictment" not with the moment of finishing it,[8] which at present should also concern the presentation of charges. T. Grzegorczyk also believes that a trial starts with the reading of an indictment not after this activity, which means that the beginning of it also means the beginning of a trial.[9] Therefore, the reading of an indictment as well as the current presentation of charges are both activities performed in the course of a trial, not just before it, within the first stage of the first instance hearing (Chapter 44 CPC of 1997), which is confirmed by the statutory system and the placement of Article 385 in Chapter 45 CPC, instead of Chapter 44 CPC.

2.

Neither the reading of the indictment nor the presentation of charges takes place during the sittings, even if they were sessions where a court may adjudicate (*vide*: Article 341 CPC, Article 343 in connection with Article 335 §1 or §2 CPC, Article 343a §1 in connection with Article 339 §3a and Article 338a CPC of 1997). Before 1 July 2015, there was no need to read an indictment again in case of the extension of charges during the proceedings by a prosecutor acting in accordance with Article 398 CPC, i.e. when, based on circumstances that were revealed in the course of a trial, there was a possibility of charging the accused, with his consent, with "another act apart from the one listed in the indictment", and there was no need to conduct preparatory proceedings concerning

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6 K. Marszał, *Proces karny* [Criminal proceedings], Katowice 1997, p. 371.

7 E. Kruk, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżania uprawnionego oskarżyciela w polskim procesie karnym* [Indictment as the implementation of an authorised prosecutor's right to prosecute under the Polish criminal law], Wydawnictwo UMCS, Lublin 2016, p. 225.

8 S. Kalinowski, *Postępowanie karne. Zarys części szczególnej* [Criminal procedure: outline of special part], PWN, Warsaw 1964, p. 178.

9 T. Grzegorczyk, *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz* [Criminal Procedure Code and Act on turning the state's evidence: Commentary], Wolters Kluwer, Warsaw 2008, p. 814.

that act (§1). The reading was useless in the face of the fact that a court proceeded based on a verbal charge formulated by a prosecutor in the course of the hearing in the presence of the accused. The accused not only accepted the state of affairs but could also get acquainted with the charge at the moment of its recording in the minutes, which should take place "in a possibly detailed way" as laid down in Article 148 §2 first sentence CPC with the maintenance of the right of the accused to demand its recording in a more detailed way ("in full detail") because it was a matter undoubtedly concerning his "rights and interests" (Article 148 §2 second sentence CPC).[10] In such a situation, there was also no need to read an indictment again because the act remained unchanged. In the past, however, the legislator decided that there was no need to read an indictment again also in case of filing "a new or additional indictment" by a prosecutor, which took place when the hearing was adjourned. The adjournment of a hearing made a verbal extension of charges in accordance with Article 398 §1 CPC impossible. As a result, in the face of revealing new circumstances being grounds for the extension of the accusation with a charge of another act, a prosecutor had to file an "additional" or "new" indictment in accordance with Article 398 §2 CPC, maintaining the possibility of choosing one of the two forms. In the literature, attention is drawn to the fact that an "additional" indictment should cover only the extended charge, not charges listed in the original indictment. On the other hand, a "new" indictment should accumulate all charges, i.e. the former and the extended ones.[11] Although both indictments, i.e. "additional" and "new" ones, were supervised in accordance with Chapter 40 CPC of 1997,[12] none of them was subject to additional promulgation during the hearing, which was possible and necessary due to their innovative character and the functions of activities in accordance with Article 385 §1 CPC.

Also after 1 July 2015, it has not been envisaged to present charges of one of the indictments filed in accordance with Article 398 §2 CPC in a way indicated in the amended Article 385 §1 CPC. It would be possible, however, with a simultaneous reservation that the activity would not require to re-start court proceedings that started earlier with the presentation of charges listed in the original indictment now substituted (the "new" one) or extended (the "additional" one). All those who doubt whether such a presentation of a new charge is necessary in case of a delivery of an indictment to the accused in accordance with Article 398 §2 CPC with a result from Article 353 §2 CPC should be reminded that also an original indictment must be delivered, which is not in conflict with the presentation of its charges at the beginning of the hearing. Thanks to that, one of the elements of the principle of openness in its external aspect is observed. Only charges laid down in Article 398 §1 CPC are made public. The legislator, however, does not call their verbal presentation during the hearing a "presentation of charges" and does not require that a prosecutor should be "concise".

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[10] *Ibid.*, p. 241.

[11] *Ibid.*, p. 243.

[12] F. Prusak, *Komentarz do kodeksu postępowania karnego* [Commentary on the Criminal Procedure Code], Vol. I, Wydawnictwo Prawnicze, Warsaw 1999, p. 1073.

3.

The activity laid down in Article 385 §1 CPC of 1997 starts a trial not only at the first instance hearing but also when the hearing is conducted again after its adjournment (Article 404 §2 first sentence CPC), after overrunning the deadline for the adjournment of issuing a sentence (Article 411 §2 CPC) and after a reversal and remanding a matter by an appellate court to a lower-level one for further consideration (Article 442 CPC).[13] The reading of an indictment concerned the whole indictment with the exception of the elements referring to technical aspects connected with summoning witnesses or expert witnesses and a list of evidence to be revealed. It was necessary to read this part of an indictment that allowed identification of a prosecutor and the accused as well as determination of charges and their legal classification. The presentation of charges, on the other hand, is an oral quotation of data concerning the accused and acts he/she is accused of from the perspective of facts and norms.

4.

The reading of an indictment or the presentation of charges in the face of a delivery of a copy[14] of the indictment to the accused (Article 338 §1 CPC) might seem a useless element of court proceedings. However, it is not so, because thanks to the presentation of the accusation, a court is ascertained that the content of the accusation, at least from that moment, becomes known to the accused, which is an obligatory condition for effective defence. Also openness of proceedings requires that this part of a trial remains. Only this way, may the public gathered in a courtroom learn what the subject to consideration is and the prosecutor's oral statement strengthens his position and emphasises his prosecuting role.[15] Undoubtedly, the prior delivery of a copy of the indictment to the accused was one of the arguments for giving up its reading and introducing the presentation of charges to substitute for it.[16]

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[13] L.K. Paprzycki, [in:] J. Grajewski, L.K. Paprzycki, M. Płachta, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Kraków 2003, p. 954.

[14] A public prosecutor is obliged to attach to the indictment "one copy of this act for each accused, and in a case laid down in Article 335 §2 [CPC] also for each aggrieved"– Article 334 §2(2) CPC. In case the accused does not have "sufficient" competence in Polish, such an act shall be translated into the language the accused knows – compare Article 72 §3 CPC.

[15] S. Kalinowski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, M. Mazur (ed.), H. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 1976, p. 452. Similarly R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński (ed.), S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. II, Warsaw 2004, p. 683.

[16] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz do art. 1–467* [Criminal Procedure Code: Commentary on Art. 1–467], Vol. I, Wolters Kluwer, Warsaw 2014, p. 1287.

5.

The binding provision of Article 385 §1 CPC of 1997 clearly indicates who is responsible for the presentation of accusation during the first instance main hearing, which was not laid down in Article 333 of the pre-war CPC. As a result, there was a situation in which either a presiding judge or another judge, or even a recording clerk read an indictment,[17] which S. Śliwiński considers to be the result of the document being at a court's disposal. The present legislator to some extent copies the solution of Article 332 §2 CPC of 1969 but uses a more adequate term "counsel for the prosecution" instead of the term "prosecutor", which does not match the procedural status of a person presenting accusation before court. The above-mentioned Article 332 §2 CPC of 1969 made it necessary to read a prosecutor's indictment abandoning this rule "in another case", which should be understood as a situation when a prosecutor did not take part in the hearing. In such a case, the reading of an indictment was the responsibility of "a presiding judge or one of the other members of the bench", however, the choice of one of them was left to their discretion because the legislator did not make any reservations regarding this matter, and the order in which they were listed was not indicative. The reading of the indictment by one of the judges constituted an admissible alternative only when it was possible to conduct a hearing without a public prosecutor's presence.

The introduction of a principle to Article 385 §1 CPC that first a prosecutor used to read an indictment and now he presents charges without indicating that it concerns only a public prosecutor causes that, depending on the mode of the proceedings, this rule may be applied to any other counsels for the prosecution, including an auxiliary (subsidiary) prosecutor or a private prosecutor.[18] L.K. Paprzycki notes that, despite the lack of a clear norm, an agent (proxy) of the auxiliary prosecutor or a private prosecutor may perform this activity based on the granted power of attorney.[19] T. Grzegorczyk also approves of the opinion because in such a case an agent does not act on his behalf but on behalf of this power grantor.[20]

Although most prosecutors perfectly know that after calling the case before the court and checking the balance of persons and assets, there is time to present charges, they cannot start this activity until a presiding judge rules that, which is one of the indicators of his role to manage the hearing and all the procedural activities in the course of it (Article 366 §1 in connection with Article 372 CPC).

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[17] Frankly speaking, the author also admitted a possibility of reading of the indictment by a public prosecutor, however, he considered this from the perspective of infringement of provisions, classifying it within a group of "irrelevant" departures from procedural rules binding in the area. See, S. Śliwiński, *Proces karny...* [Criminal proceedings...], p. 61.

[18] L.K. Paprzycki, [in:] J. Grajewski et al., *Kodeks postępowania...* [Criminal Procedure...], p. 954. Similarly P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do art. 297–467* [Criminal Procedure Code: Commentary on Art. 297–467], Vol. II, C.H. Beck, Warsaw 2007, p. 432.

[19] *Ibid*.

[20] T. Grzegorczyk, *Kodeks postępowania karnego...* [Criminal Procedure Code...], Warsaw 2008, p. 815.

Despite the discretionary power of the body, it is not possible to imagine a situation where a presiding judge does not decide to let a prosecutor present the accusation in an appropriate moment of the hearing.

6.

M. Marszał notices that the reading of an indictment constitutes one of the possible solutions to the presentation of accusation in the course of the hearing.[21] A verbal presentation is a form competitive to it and, as this author notes, is connected with the risk of *a priori* imposing an accusation thesis on a court before it gets acquainted with facts, which depends on powers of persuasion and eloquence of the person presenting an accusation.[22] The Polish legislator responded to this risk on 1 July 2015. The criticism of the former solution – as excessively formal and conducive to excessive length of this early stage of the court proceedings – led to substituting the presentation of charges with the reading of an indictment, provided that the activity cannot be abandoned. The amendment of September 2013 assumed that this stage of the hearing would be improved, which is manifested in the directive that the presentation of charges should be "concise". This requirement was not expressed in relation to a prosecutor reading an indictment at the beginning of a trial because it was the representation of a written form, which could not be shortened. This does not mean that similar attempts to accelerate the activities of the initial stage of the court proceedings had not been made before. The latest were undoubtedly: the consent to give up reading of the justification for an indictment and to quote the most important grounds for the accusation laid down in Article 332 §2 second sentence CPC of 1969 and the original version of Article 385 §2 CPC of 1997. While Article 332 §2 second sentence CPC of 1969 allowed such an operation in connection with every justification, Article 385 §2 CPC of 1997 in the wording laid down in the Act of 10 January 2003 diversified the situation depending on the volume of this justification. As a rule, every type of reading could be skipped but only in case of "especially extensive" justifications it was not necessary to obtain the "consent of the parties present". However, in case of other (not extensive[23]) justifications, consent was necessary in order to omit its reading. The measure used by the legislator in Article 385 §2 CPC in connection with the consent to abandon reading the justification for an indictment was "special extent" of the document and not the level of the matter complexity, which made it possible to practically specify the volume as over "a few dozen (at least thirty) pages of typescript".[24]

In both cases, the abandonment of reading the justification was facultative in character and "the presentation of grounds for accusation" substituted for the unread

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[21] K. Marszał, *Proces...* [Criminal...], p. 371–372.

[22] *Ibid.*

[23] Also called "typical", see P. Piszczek, [in:] B. Bieńkowska, P. Kruszyński (ed.), C. Kulesza, P. Piszczek, *Wykład prawa karnego procesowego* [Lecture on criminal procedural law], Białystok 2003, p. 369.

[24] *Ibid*., p. 955.

justification. The Act did not allow, however, for the limitation of the presentation of grounds for accusation to those "most important".[25] The characteristic feature of the solution under Article 332 §2 second sentence CPC of 1969, apart from the possibility of non-reading of every item of justification for an indictment criticised in the doctrine,[26] was that a prosecutor alone made the adequate decision and a court was deprived of the influence on the form of presentation of this part of the accusation chosen by him, although, as S. Kalinowski noticed, the reading of the justification, because of its descriptive character, was important mainly for the public gathered in court.[27] A prosecutor's discretion and a lack of need for consulting it with a court and the other parties resulted in doubts about the right of the accused to demand that a prosecutor read the full justification of an indictment or at least some of its fragments, which M. Marszał approved of,[28] and R.A. Stefański questioned[29].

Both weaknesses were to some extent resolved in Article 385 §2 CPC of 1997 in the wording of the amendment of 10 January 2003. Although the provision still did not determine who would be to make a decision on using the envisaged possibility, it might be thought that it could not be the same party to the criminal proceedings who had the right to give consent to or deny it. Inclusion of a prosecutor among the parties specified in Article 385 §2 CPC deprived him of the possibility of deciding on the application of the simplified mode of presenting the accusation also where the justification was "especially extensive". In the light of this solution, L.K. Paprzycki notices that "the presentation of grounds for accusation" is nothing else but "indication, in a verbal address, of the most important facts (circumstances) concerning an act a perpetrator is charged with in the indictment and basic evidence confirming a prosecutor's findings concerning the act and its legal classification".[30] In this state of facts, also the opinion that quoting the grounds for accusation cannot cover evidence and arguments not listed in the written justification for an indictment was valid.[31] T. Grzegorczyk, on the other hand, demanded safeguarding the interest of the persons present in the courtroom expressed in "adequate informing [them] about the content of the accusation and evidence that constitutes grounds" for the accusation.[32]

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[25] P. Hofmański (ed.) et al., *Kodeks postępowania...* [Criminal Procedure Code...], p. 433.

[26] There was a proposal to limit such an opportunity in practice and not include cases legally and factually complicated. Compare, S. Kalinowski, *Rozprawa główna w polskim procesie karnym* [Main hearing in the Polish criminal procedure], Wydawnictwo Prawnicze, Warsaw 1975, p. 113.

[27] S. Kalinowski, *Postępowanie karne...* [Criminal procedure...], p. 179.

[28] K. Marszał, *Prawo karne procesowe* [Criminal procedure law], PWN, Warsaw 1988, p. 429.

[29] R.A. Stefański, *Prokurator w postępowaniu karnym przed sądem I instancji* [A prosecutor in criminal proceedings before the first instance court], Prokuratura i Prawo No. 1, Warsaw 1997, p. 52.

[30] L.K. Paprzycki, [in:] J. Grajewski et al., *Kodeks postępowania...* [Criminal Procedure...], p. 954.

[31] R.A. Stefański, *Prokurator...* [A prosecutor...], p. 51.

[32] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal procedure], LexisNexis, Warsaw 2005, p. 711.

7.

Presentation of charges in accordance with Article 385 §1 CPC should be made in a "concise" form. A presiding judge may, within his powers, call to order an excessively eloquent prosecutor if this is the only possible way to implement the "conciseness" of the presentation. This does not mean, however, constant interference in his speech or depriving him of the right to speak. The call for "conciseness" concerns "charges", which means that it must be an element of the accusation and all charges. Striving for "conciseness" in the presentation of the accusation, one cannot omit any charges, even those least serious, because the Act does not provide any grounds for doing that nor does it give grounds for the abandonment of activities under Article 385 §1 CPC, even with the consent of the parties. In the face of the obligation to deliver a copy of the indictment to the accused (Article 338 §1 CPC), a "concise" way of presenting charges cannot be recognised as a form that is in conflict with Article 6(3a) ECHR, which requires that the accused be informed about the accusation "in detail".

Informing about the accusation in detail means the necessity to notify the accused of the grounds for the accusation, i.e. "material facts alleged against him which are at the basis of the accusation" and about the nature of the accusation, i.e. "the legal qualification of these material facts". The Strasbourg authorities recognise this information as "an essential prerequisite" for fair criminal proceedings.[33] A trial must be limited only to persons and acts contained in the accusation, which results from the initiation- and programme-related function of the indictment.[34] However, attention should not be drawn to small differences between orally presented charges (Article 385 §1 CPC) and the indictment (Article 332 §1 CPC) because the content of the latter has a decisive importance. It is where the act the accused is charged with and its legal classification are specified in a "thorough" way (Article 332 §1(2) CPC), which is a synonym of the term "in detail" as used in the Convention.[35]

8.

E. Kruk also notices the changes introduced to Article 385 §1 CPC in 2015, recognising that they were caused by the change of the model of the hearing.[36] Although the author does not define what change she means, it seems that Article 385 CPC in the shape of the regulation from the September amendment was to contribute to the increase of the first instance hearing contradictoriness as well as the strengthening of

[33] ECtHR judgement of 25 July 2000 in the case *Mattoccia v. Italy*, Application No. 23969/94, LEX No. 76748.

[34] M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish criminal procedure: basic theoretical assumptions], Warsaw 1984, p. 282.

[35] P.K. Sowiński, *Uprawnienia składające się na prawo oskarżonego do obrony. Uwagi na tle czynności oskarżonego oraz organów procesowych* [Entitlements giving the accused the right to defence. Comments based on activities performed by the accused and criminal procedure bodies], Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów 2012, p. 105.

[36] E. Kruk, *Skarga oskarżycielska...* [Indictment as the implementation...], p. 227.

a court's position, which was to take place as a result of discharging it from activities that might have impact on its impartiality. Thus, it was decided to abandon a possibility of presenting accusation *in subsidium* by the members of the bench, although at the stage of work on reforming criminal proceedings, there was a proposal, in connection with the changes resulting in the lack of obligation of a prosecutor's participation in the hearing in public prosecution cases (Article 46 CPC), to assign this task to a recording clerk, which was to be performed in accordance with Article 385 §1 second sentence CPC.[37]

Unfortunately, the legislator returned to the idea of a court's participation in the presentation of accusation assumptions in March 2016. In accordance with a new editorial unit §1a added to Article 385 CPC, a presiding judge, substituting for a prosecutor absent from trial, is to present charges and it also is to be done in a "concise" way. This solution, although allows smooth transition to the next stage of the hearing also in the absence of a prosecutor, makes a judge perform activities that are in conflict with the adjudicating function, which weakens the position of a court and introduces a useless inquisitorial element to this part of the court proceedings.[38] And a separation of the procedural functions is conducive to impartial adjudication.[39] Article 385 §1a CPC is undoubtedly a result of liberalised rules for a public prosecutor's participation in the hearing in cases where the preparatory proceedings finished as an investigation (Article 46 §2 first sentence CPC). Ceding the obligation of concise presentation of charges to a presiding judge in accordance with Article 385 §1a CPC does not match the re-interpretation of the principle of §1 of the same provision, which links the commencement of the first instance hearing with the presentation of charges by a public prosecutor and not by any of the entitled parties to the criminal proceedings, even as subsidiary ones. The above should result in a change of the content of subsequent paragraphs of Article 385 CPC. And thus, the provision should have the following wording: "§1. A court hearing shall start with a concise presentation of accusation charges" and "§1a. A prosecutor shall present charges, and in case he does not participate in the hearing, a presiding judge shall do this".

Undoubtedly, the presentation of prosecution charges in a way laid down in the provision of Article 385 §1 CPC amended on 1 July 2015 better matches a verbal model of the hearing laid down in Article 365 CPC. D. Świecki believes that, because of a general character of the norm laid down in Article 385 §1a CPC, the provision should be also applied in the summary proceedings.[40] As a result, the author calls for repealing Article 517a §2 CPC, stipulating the possibility of "reading the charges" by a reporting clerk, because this way "the inconsistency of the normative solutions

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[37] *Uzasadnienie do projektu nowelizacji k.p.k. w redakcji z kwietnia 2011 r.* [Justification for the Bill amending the Criminal Procedure Code, edited in April 2011], p. 49.

[38] See, T. Grzegorczyk, J. Tylman, *Polskie postępowanie...* [Polish criminal...], p. 710.

[39] W. Jasiński, [in:] P. Wiliński (ed.) et al., *System Prawa Karnego Procesowego. t. III, cz. 2: Zasady procesu karnego* [Criminal procedural law system; Vol. III, part 2: Criminal trial rules], LexisNexis, Warsaw 2014, p. 1214.

[40] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz do zmian 2016* [Criminal Procedure Code: Commentary on the amendments of 2016], Vol. I to art. 385, Wolters Kluwer, Warsaw 2016.

adopted" in March 2016 would be eliminated.[41] The inconsistency lies in retaining the activity of "reading" prosecution charges in accordance with the summary proceeding rules, while the "presentation" of them substitutes for "reading" in accordance with standard proceeding rules. Even a preliminary analysis of Article 517a §2 CPC convinces us that we really deal with a solution that is some kind of an anachronism and a relic of the time when such "reading" was a rule, regardless of the mode of the proceedings. Still, is the proposed change necessary and possible? Remembering about the reservations I made in connection with the participation of judges in the presentation of prosecution charges, it seems that in case of assigning a reporting clerk a task of presenting prosecution theses, other solutions are excluded because of functional reasons. It is hard to imagine a situation in which a reporting clerk, not knowing the case, can speak about the accusation. As far as this post is concerned, reading is the only possible form of presenting accusation in this specific mode. Taking into consideration the relatively uncomplicated character of conclusions laid down in Article 517d §1 CPC, the activity should not result in the lengthening of the proceedings. The fact that Article 517a §1 CPC refers to the application of the provisions for standard proceedings to summary proceedings also causes that reading charges in accordance with Article 517a §2 *in fine* CPC commences a trial in a case subject to adjudication in accordance with the provisions laid down in Chapter 54a CPC.

9.

The "special importance" of the moment of a court trial commencement[42] is emphasised by the fact that it is an event marking the expiry of some strict procedural time limits. This event differentiates the situation of the aggrieved who desires to withdraw his application for prosecution (Article 12 §3 first sentence CPC), and a public prosecutor who abandons accusation and wants to withdraw the indictment (Article 14 §2 first and second sentence CPC). Moreover, a motion to exclude a judge filed in accordance with Article 41 §1 CPC after the deadline is left without adjudication, unless the reason for exclusion took place or was acknowledged after the date (§2). Only until the commencement of a trial at the first instance hearing in the case where a public prosecutor has filed an indictment, may the aggrieved file a declaration on his will to participate in it as an auxiliary (subsidiary) prosecutor (Article 54 §1 CPC), and in the case where the aggrieved acting as an auxiliary (subsidiary) prosecutor has filed the indictment, another aggrieved may join the pending proceedings (Article 55 §3 CPC). Until that moment, in the case conducted due to a private indictment, another aggrieved as a result of the same act may also join the pending proceedings (Article 59 §2 CPC). In the same proceedings, a private prosecutor does not need to get the consent of the accused to withdraw from accu-

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41 *Ibid*.

42 T. Grzegorczyk, *Kodeks postępowania karnego...* [Criminal Procedure Code...], Warsaw 2014, p. 1286.

sation if the prosecutor files adequate declaration before the trial starts (Article 496 §2 CPC). Until that moment, in the proceedings conducted in that mode, the accused may file a reciprocal indictment concerning the act under the private accusation and being in connection with the act he is charged with (Article 497 §1 CPC). In case the seven-day period between the delivery of a notification of the term of the hearing to the accused or his counsel for the defence and this hearing expires, they may effectively, but only until the activities under Article 385 §1 CPC are initiated, apply for adjournment of this hearing (Article 353 §2 CPC). Recognition that an act the accused committed is a misdemeanour after the commencement of a trial causes that the same bench of a court, not transferring the case to another competent court, continues to hear it in accordance with the Misdemeanour Procedure Code (Article 400 §1 CPC). The commencement of a court trial is, in connection with the occurrence of circumstances laid down in Article 17 §1(1) and (2) CPC, an event separating discontinuance of the proceedings from the acquittal of the accused (Article 414 §1 CPC) and delimiting effective objections to a summary judgement (Article 506 §5 CPC).

10.

It might seem that following a concise presentation of prosecution charges in proceedings based on the principle of contradictoriness, there should also be at least some space for a presentation of a relevant stand of the accused. This does not take place although the provision of Article 338 §2 CPC of 1997 grants this party to the proceedings a possibility of filing a written response to the indictment, which – apart from the response to an appellate measure (Article 428 §2 CPC) – seems to be a manifestation of a broader right to a reply.[43] Although such a reply, due to its facultative nature, is not a necessary element of every criminal proceedings, even where it has been filed, a presiding judge is focused on the information about its content (Article 385 §2 CPC). According to the doctrine, the presentation of information about the content of the reply to an indictment cannot consist in reading the reply *in extensor*, but only in the presentation of the arguments contained in it, which does not exclude citing some fragments.[44] In some sense, it seems to demonstrate the legislator's rather reluctant attitude to this form of a statement made by the accused, and in fact a reply to the indictment gives the accused an opportunity to express his attitude towards the indictment, "preventing one-sidedness of the picture of the proceedings created by this document in the eyes of a court at the starting point of the judicial examination of the case[45]". The Codification Committee working on the reform of 2013 did not do much to increase the importance of a reply to an indictment, although its main assumption was to increase contradictoriness of

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[43] P.K. Sowiński, *Uprawnienia...* [Entitlements...], p. 682.

[44] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Zakamycze, Kraków 2005, p. 942.

[45] R.A. Stefański, [in:] J. Bratoszewski et al., *Kodeks postępowania karnego...* [Criminal Procedure Code...], Vol. I, Warsaw 1998, p. 190 ff.

the first instance hearing, which should result in granting the accused the right to present the most important theses of his/her reply to an indictment or in obliging him/her to submit his/her reply to a court in as many copies as necessary to deliver them to the other parties to the proceedings. Only in such a situation, would maintaining the provision of Article 385 §2 CPC in its present wording make sense as other parties would receive a copy of the reply to an indictment, about which at present a presiding judge just informs.[46]

11.

It is not accidental that not earlier than after a concise presentation of charges at the first instance hearing, a presiding judge addresses[47] a question to the accused whether she/he pleads guilty to an act (Article 386 §1 CPC). In fact, the Act does not specify the kind of act but it seems useless in a situation where the matter of the trial is precisely determined in the prosecutor's accusation.[48] The provisions that are in force now, contrary to Article 332 §1 CPC of 1969, do not require that a presiding judge ask the accused whether she/he has understood the content of the accusation although such an inquiry would be purposeful, especially in the face of the fact that only the accused who understands the accusation can effectively challenge it in the proceedings. From the normative point of view, A. Ważny is not right to state that before continuation of the hearing the accused should declare that "she/he has understood the content of the accusation",[49] because no provision of the CPC of 1997 stipulates such an obligation. As I have mentioned above, if at present judges ask the accused about the level of his/her understanding of the indictment, they do that because they are used to doing it rather than because of an obligation.[50] T. Grzegorczyk is also for asking the accused whether she/he has understood the indictment whenever the issue raises doubts,[51] however, he does not call for an amendment to the provision. On the other hand, according to R.A. Stefański, in case the accused reports any doubts concerning the accusation, a presiding judge should solve the problem "explaining the content of charges to the accused".[52] A chronicler's duty is to remind the furthest reaching solution to this issue laid down in Article 679 of the Russian Act on criminal procedure

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[46] Compare, P.K. Sowiński, *Uprawnienia...* [Entitlements...], p. 690 ff.

[47] From the point of view of the accused and their right to defence, the instruction that they have the right to give evidence and refuse to give evidence or answer questions is also crucial.

[48] Compare the Supreme Court ruling of 13 November 2003, WK 19/03, OSNwSK 1/2003, item 2413.

[49] A. Ważny, *Czy przyznanie się oskarżonego do winy warunkuje stosowanie instytucji określonej w art. 387 k.p.k.?* [Is pleading guilty by the accused a condition for the application of the solution laid down in Article 387 CPC?], Prokuratura i Prawo No. 6, Warsaw 2003, p. 136.

[50] P.K. Sowiński, *Uprawnienia...* [Entitlements...], p. 652.

[51] T. Grzegorczyk, *Kodeks postępowania karnego...* [Criminal Procedure Code...], Warsaw 2008, p. 816.

[52] R.A. Stefański, [in:] J. Bratoszewski et al., *Kodeks postępowania karnego...* [Criminal Procedure Code...], Vol. II, Warsaw 1998, p. 263.

that was temporarily in force on the territory of Congress Poland (Kingdom of Poland), which apart from reading an indictment and a prosecutor's accusation aloud, also assumed additional "summarising of the essence of the accusation" to the accused by a presiding judge.

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DEVELOPMENT OF THE INSTITUTION OF COURT PROCEEDINGS DURING THE FIRST INSTANCE MAIN HEARING

Summary

The paper discusses the development of a part of a trial commencing what is undoubtedly the most important phase of the first instance court hearing. At present, it is the presentation of prosecution charges by the counsel for the prosecution, however, before the amendment of September 2013 to the Criminal Procedure Code came into force, the activity had consisted in the reading of an indictment. The author criticises the possibility of presenting accusation by a member of the bench in case of a prosecutor's absence because it is a solution that is in conflict with the adjudication function and may have a negative impact on the assessment of a court's impartiality. The presentation of accusation is important not only from the point of view of the right of defence of the accused but also from the perspective of the principle of openness, especially in its external aspect. The commencement of a trial alone is an event, which the legislator relates with the passing of deadlines envisaged for some procedural activities. The author discusses the issue of presenting accusation in the context of informing the accused about prosecution charges against him "in detail", which Article 6 (3a) ECHR defines as one of the conditions for a fair trial.

Key words: accusation, indictment, reading of an indictment, presentation of prosecution charges, court's impartiality, contradictoriness and openness of court proceedings, accuracy of accusation, fair trial, prosecutor, the accused, reply to an indictment

KSZTAŁTOWANIE SIĘ INSTYTUCJI ROZPOCZĘCIA PRZEWODU SĄDOWEGO NA PIERWSZOINSTANCYJNEJ ROZPRAWIE GŁÓWNEJ

Streszczenie

Tekst omawia kształtowanie się czynności rozpoczynającej najważniejszą fazę rozprawy głównej przed sądem pierwszej instancji, jaką jest niewątpliwie przewód sądowy. Obecnie czynnością tą jest przedstawienie zarzutów oskarżenia przez oskarżyciela, jednak przed wejściem w życie nowelizacji k.p.k. z września 2013 roku czynność ta polegała na odczytaniu aktu oskarżenia. Krytycznej ocenie poddano możliwość zaprezentowania oskarżenia przez członka składu orzekającego pod nieobecność oskarżyciela, gdyż jest to rozwiązanie niezgodne z funkcją orzekania oraz mogące negatywnie wpływać na ocenę bezstronności sądu. Prezentacja oskarżenia jest ważna nie tylko z punktu widzenia prawa oskarżonego do obrony, lecz również z perspektywy zasady jawności, zwłaszcza w jej zewnętrznym aspekcie. Samo rozpoczęcie przewodu sądowego jest zdarzeniem, z którym ustawodawca wiąże upływ terminów przewidzianych dla dalszych czynności procesowych. Omówiono problematykę prezentacji oskarżenia w kontekście „szczegółowości" przedstawienia zarzutów oskarżenia oskarżonemu, co art. 6 ust. 3 lit. a EKPC czyni jednym z warunków rzetelnego procesu karnego.

Słowa kluczowe: oskarżenie, akt oskarżenia, odczytanie aktu oskarżenia, przedstawienie zarzutów oskarżenia, bezstronność sądu, kontradyktoryjność i jawność procesu sądowego, szczegółowość oskarżenia, rzetelność procesu karnego, oskarżyciel, oskarżony, odpowiedź na akt oskarżenia

PREPARATION OF CONVICTS TO BE RELEASED FROM PRISON UNDER ARTICLE 164 EPC

GRAŻYNA BARBARA SZCZYGIEŁ*

1.

A penalty of deprivation of liberty (imprisonment), as no other measure of penal repression for the commission of crime, accumulates a series of defects, but up to now, despite the systematically growing catalogue of non-custodial penalties, no efficient measure of penal response to the commission of crime has been worked out to substitute for this penalty. This stimulates the search for such methods of treating convicts in prison that would make it possible, if not to eliminate the dysfunction of penitentiary isolation, to at least limit them and transform prisons into places where a convict may be helped to acquire skills of living in the society without coming into conflict with law. The issues are the subject matter of numerous debates and discussions at conferences, which result in the development of successive versions of rules for working with prisoners. On the global scale, these are the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) of 2015,[1] and on the regional scale, these are the European Prison Rules of 2006[2].

Both documents unequivocally indicate that today's tasks are to minimise the negative aspects of prison isolation and organise prison life in such a way that it would match the conditions of life in the society. The Mandela Rules emphasise that meeting the objective of the execution of a penalty of deprivation of liberty, which is deemed to be the protection of the society against criminality, may take

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1 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) adopted on 7 October 2015 by the United Nations General Assembly, available at: https://www.rpo.gov.pl/sites/default/files/Reguly_Mandeli.pdf., in English: https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf.

2 Recommendation Rec(2006)2 of the Committee of Ministers f the Council of Europe to member states on the European Prison Rules adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, Przegląd Więziennictwa Polskiego No. 72–72, 2011, pp. 33–69.

place only when the applied period of imprisonment, as far as possible, ensures that after release a perpetrator will be eager and able to comply with law, earn the living and live on his/her own (Rule 4.1). In accordance with the European Prison Rules, "All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty" (Rule 6). The above recommendations suggest that the whole period of imprisonment should be used to facilitate a convict's re-adaptation, however, the authors of both documents recommend paying attention to the final period of a convict's imprisonment, namely to the intensification of activities preparing a convict to return to the society. The Mandela Rules (Rule 87) emphasise that "it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society". The European Prison Rules give this period more attention. The authors recommend, as soon as possible after admission, drawing up a report concerning a prisoner's situation, proposed sentence plans and the strategy for preparation for release (Rule 103). Before release, a prisoner should get support in the form of procedures and special programmes that facilitate transfer from prison life to law-abiding life in the society. In case of prisoners serving long-term sentences, undertaking steps to ensure their gradual return to life in a free society means implementation of pre-release programmes or partial or conditional release under supervision combined with efficient social assistance. It is believed that close cooperation between prison authorities with services and agencies that supervise and assist released prisoners to re-establish in the society, workplace and family is essential. Therefore, prison authorities are obliged to ensure that representatives of those services have access to the prison and to prisoners to allow them to develop a programme of post-penitentiary assistance and provide it at the moment of a convict's release from prison (Rule 107).

2.

The significance of the preparation of a convict for life after release from prison has been noticed during the work on the Executive Penal Code (EPC) in force. Based on the assumption that "the appropriate preparation of convicts for release from prison may exert significant influence on effective execution of penalty – it may increase it, or quite the opposite, it may sometimes annihilate it", it was decided that the issues must be regulated.[3]

The authors of the Executive Penal Code decided that it was purposeful to define the time necessary to prepare a convict for life after the release. It is a period of six months before the envisaged conditional release or the end of the sentence (Article 164 §1 EPC). It is considered that it is especially important for a convict

[3] See, *Uzasadnienie rządowego projektu kodeksu karnego wykonawczego* [Justification for the government Bill of Executive Penal Code], [in:] I. Fredrich-Michalska, B. Stachurska-Marcińczak (ed.), *Nowe kodeksy karne – 1997 r. z uzasadnieniami. Kodeks karny, Kodeks postępowania karnego, Kodeks karny wykonawczy* [New criminal codes of 1997 with justifications: Criminal Code, Criminal Procedure Code, Executive Penal Code], Wydawnictwo Prawnicze, Warsaw 1997, p. 560.

in this period to make contact with a court's probation officer or associations, foundations, organisations and institutions whose aim is to assist convicts in social re-adaptation.

It should be noted that it is not a new proposal because similar ones occurred when the Executive Penal Code of 1969 was in force and even were practically implemented in Opolszczyzna (Opole region).[4]

Two entities have been entitled to establish the time necessary to prepare a convict for life after the release. These are a penitentiary committee and a penitentiary court. A penitentiary committee establishes this period when necessary and with a convict's consent. This successive prison's offer of assistance in a convict's social re-adaptation should, in the legislator's opinion, be addressed to those convicts who will have difficulties after release from prison.[5] What will be important for evaluating the "need" for establishing such a period is the information on a convict's family environment, the fulfilment of maintenance/alimony obligations by him, a convict's social contacts, behaviour indicating a potential mental disorder or addiction to alcohol, narcotic drugs or psychotropic substances. Periodic appraisals of a convict's rehabilitation performance[6] and personal background surveys[7] are the source of this information as well as other matters important from the perspective of a convict's return to the society. The information collected by a court's probation officer in the course of interviews conducted in a convict's original environment, which can be ordered by a penitentiary committee (Article 14 §1 EPC), is equally important. A probation officer is in direct contact with a convict's family and can assess the environment a convict is to return to, whether and what kind of assistance he can obtain from his family, especially in the first period after release from prison. Of course, the outcome of psychological tests or psychiatric examinations (if performed) may also be used for the assessment of purposefulness of establishing a period of preparation for release.

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[4] For more, see J. Korecki, *Kara 25 lat pozbawienia wolności w Polsce* [Penalty of 25 years' imprisonment in Poland], Warsaw 1988, p. 200 ff; and by the same author: *Uwagi do kilku rozwiązań projektu kodeksu karnego wykonawczego* [Comments on some solutions of the Bill of Executive Penal Code], Państwo i Prawo Vol. 2, 1995, p. 73; *Przygotowanie do wolności skazanych odbywających kary długoterminowe; opolska koncepcja warunkowego przedterminowego zwolnienia* [Preparation of convicts serving long-term sentences for freedom: the Opole region conception of conditional release], [in:] G.B. Szczygieł, P. Hofmański (ed.), *Model społecznej readaptacji w reformie prawa karnego* [Model of social re-adaptation in the criminal law reform], Białystok 1999, pp. 268–270.

[5] W. Liszke, *Przygotowanie skazanego do życia po zwolnieniu z zakładu karnego przez kuratora sądowego* [Preparation of a convict for life after release from prison by a court's probation officer], Probacja No. III/IV, 2009, p. 113; M. Wilanowska, *Problematyka stosowania artykułu 164 k.k.w. w świetle czynności wykonywanych przez Służbę Więzienną i kuratorską służbę sądową* [Issues concerning the application of Article 164 EPC in the light of activities performed by Prison Service and court's probation officers], [in:] P. Szczepaniak (ed.), *Polski system penitencjarny. Ujęcie integralno-kulturowe* [Polish penitentiary system: integral and cultural approach], collective work, Wydawnictwo Forum Penitencjarne, Warsaw 2013, p. 241.

[6] K. Postulski, *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], 3rd edition, Wolters Kluwer, Warsaw 2016, p. 1024.

[7] Announcement of the Minister of Justice of 10 April 2013 on the publication of the uniform text of the ordinance of the Minister of Justice on exerting penitentiary influence in prisons and remand centres, Journal of Laws [Dz.U.] of 2013, item 1067.

Having diagnosed a convict's situation and having assessed his needs, a penitentiary committee offers a convict a release preparation period. A convict may accept the offer or reject it.[8] If he accepts it, a penitentiary committee determines the period of preparation for life after release. A convict's consent, as T. Szymanowski[9] notices, to be covered by the programme of preparation for release is significant because making use of numerous and important entitlements, he must make adequate, although informal, decisions on cooperation with prison administration.

According to the doctrine,[10] a convict can also apply for assigning him a period of preparation for release. This stand should be approved of. It finds justification in subjective treatment of a convict and his right to assistance in the change of attitudes (Article 67 EPC). It is also necessary to point out a convict's right to apply to prison administration/authorities (Article 102(10) EPC).[11] It should be remembered that in accordance with Article 164 §1 EPC, the period is assigned "when required" and, having recognised a convict's situation, a penitentiary committee may judge that there is no such need. However, even then a committee should treat a convict's application favourably. This is a convict who knows best what he can face after release from prison, whether he will manage in the first, for sure the most difficult, period after the release. Obviously, one cannot ignore various motives behind a convict's application for establishment of the period of preparation for release, e.g. prospects for obtaining permission to leave prison.

In accordance with Article 164 §2 EPC, a court can also assign a period necessary for preparation for release, provided it recognises it as indispensable. It can do this issuing a decision on conditional release or a refusal to grant conditional release. In either case, a convict's consent is not necessary.[12] The legislator, as A. Kwieciński[13]

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[8] A. Kwieciński, *Instytucja odroczonego warunkowego zwolnienia (art. 164 §2 k.k.w.) w procesie społecznej readaptacji skazanych* [Institution of postponed conditional release (Article 164 §2 EPC) in the process of social re-adaptation of convicts], Probacja No. I, 2014, p. 24.

[9] T. Szymanowski, [in:] T. Szymanowski, Z. Świda (ed.), *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], Librata, Warsaw 1998, p. 380.

[10] M. Kiryluk, *Przygotowanie skazanego do życia po zwolnieniu (w trybie art. 164 i 165 k.k.w.)* [Convict's preparation for life after release (in accordance with Articles 164 and 165 EPC)], [in:] *Stan i węzłowe problemy polskiego więziennictwa.* Część IV: *Wybrane instytucje kodeksu karnego wykonawczego w praktyce penitencjarnej* [State and key problems of Polish prison service. Part IV: Selected institutions of the Executive Penal Code in penitentiary practice], Biuletyn RPO, Warsaw No. 42, 2000, p. 356; J. Migdał, *Polski system penitencjarny w latach 1956–2008 w ujęciu doktrynalnym, normatywnym i funkcjonalnym. Kontynuacja czy zmiana?* [Polish penitentiary system in 1956–2008 in doctrinal, normative and functional aspects. Continuation or a change?], Arche, Gdańsk 2008, pp. 518–525.

[11] G.B. Szczygieł, *Społeczna readaptacja skazanych w polskim systemie penitencjarnym* [Social re-adaptation of convicts in the Polish penitentiary system], Temida 2, Białystok 2002, p. 188.

[12] See, S. Lelental, *Odroczone warunkowe zwolnienie na czas niezbędny na przygotowanie skazanego do życia po zwolnieniu z zakładu karnego (art. 164–165 k.k.w.)* [Conditional release postponed until the end of period necessary to prepare a convict for life after release from prison (Articles 164–165 EPC)], [in:] G.B. Szczygieł, P. Hofmański (ed.), *Model społecznej readaptacji...* [Model of social re-adaptation...], p. 29; G.B. Szczygieł, *Społeczna readaptacja skazanych...* [Social re-adaptation...], p. 189; J. Potulski, [in:] J. Lachowski (ed.), *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], 2nd edition, C.H. Beck, Warsaw 2016, p. 614; S. Lelental, *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], 4th edition, C.H. Beck, Warsaw 2012, p. 746.

[13] A. Kwieciński, *Instytucja odroczonego...* [Institution of postponed...], p. 25.

notices, "does not require that a court hear his (convict's) opinion on this matter, or his consent".

Where a penitentiary court decides to conditionally release a convict and assigns in the decision the time necessary to prepare a prisoner for life after the leave, the release decision is not executed until the end of the period. One can speak, as S. Lelental[14] described it, about a "postponed enforceability" of the sentence by the time indicated therein. Obviously, it cannot exceed six months. There may be doubts concerning the purposefulness of a convict's stay in prison when a positive criminological forecast justifies conditional release. J. Lachowski[15] rightly notes that the concept of positive criminological forecast cannot be identified with a convict's social re-adaptation when he is freed. "The fact that there is a positive criminological forecast of a convict does not mean, in fact, that the decision on conditional release should be positive. A conclusion that a convict already has his free life organised cannot be drawn from a positive forecast. The postponed conditional release is aimed at preparing a process of social re-adaptation in non-custodial conditions". It should be mentioned that appropriate preparation of a convict to leave prison and assistance provided in the first period of being free may contribute not only to positive performance in the probation period but also prevent relapse to crime when it ends. Obviously, when a convict does not agree with a court's decision, he may appeal against the decision on conditional release in accordance with the provisions laid down in Article 162 §2 and §3 EPC.[16]

It is assumed in the doctrine[17] that during the period of a convict's preparation for release, a court may annul the decision on conditional release in accordance with Article 24 EPC in case new or formerly unknown circumstances essential for the decision are revealed. However, A. Kwieciński[18] warns against excessive rigourism and automatism, and refers to the ruling of the Appellate Court in Kraków, which pointed out that "preparation of a convict for life after conditional release is not aimed at checking his behaviour in prison but at dealing with matters facilitating his social re-adaptation".

Considering the period to be time necessary to prepare a convict for life after release, one should share S. Lelental's[19] opinion on the possibility of prolonging (of course, not exceeding six months) or shortening the preparation period in case of the postponed conditional release in accordance with Article 24 EPC. A court may do this provided the activities connected with the preparation of a convict for release and first of all establishing relations with a probation officer or institutions that

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[14] S. Lelental, *Kodeks karny wykonawczy...* [Executive Penal Code...], p. 745.

[15] J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności* [Conditional release from imprisonment], C.H. Beck, Warsaw 2010, p. 154.

[16] K. Postulski, *Kodeks karny wykonawczy...* [Executive Penal Code...], p. 1027.

[17] S. Lelental, *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], 5th edition, C.H. Beck, Warsaw 2014, p. 552; K. Postulski, *Kodeks karny wykonawczy...* [Executive Penal Code..., p. 1026.

[18] A. Kwieciński, *Instytucja odroczonego...* [Institution of postponed...], p. 25.

[19] S. Lelental, *Odroczone warunkowe zwolnienie...* [Conditional release postponed...], [in:] G.B. Szczygieł, P. Hofmański (ed.), *Model społecznej readaptacji...* [Model of social re-adaptation...], p. 32.

assist prisoners in their social re-adaptation have been performed. In S. Lelental's opinion, a court may take the decision on conditional release in the part concerning the period of preparation for release *ex officio* or on the request from the prison governor, a convict, a probation officer and organisations that offer assistance to convicts in their social re-adaptation.

A court may also assign a period of a convict's preparation for release but deny conditional release. This may mean that a court recognises it to be purposeful to motivate a convict to change his attitude, to come into contact with his relations or to undertake other steps important for the criminological forecast but it does not mean that after the period a convict will be conditionally released.

The assignment of time necessary for the preparation of a convict for life after release is connected with a series of obligations for the prison administration. In accordance with Article 165 §1 EPC, a convict should in this period, as far as possible, serve the sentence in the prison that is closest to his future domicile. It is worth pointing out that a convict should serve the whole sentence in an appropriate type of prison. It explicitly results from the aims of convicts' classification (Article 82 §1 EPC). From the perspective of the aim of the discussed period, the best solution would be, provided it does not pose serious social risk or threat to prison security, to place a convict for the period of preparation for release in an open prison. This type of prison creates broad opportunities to have contact with the world outside prison and brings a convict closer to the life that he will live after release. It should be, first of all, pointed out here that there is a possibility of working outside the prison, taking part in education or training, or other activities outside prison facilities. Unlimited number of visits, where the prison is close to the family's domicile, allows frequent contacts with a convict.

Another task of the prison administration, in accordance with the prison rules for organisation and order[20] (§57.1), is to update data collected during personal background surveys and information on a convict's needs. Verification of the data and information obtained from a convict concerning changes in his life situation that have an impact on the preparation for release allows establishing the scope of necessary assistance that a convict should be provided with. In order to supplement or verify the information collected so far, the prison governor may order the collection of information about a convict by conducting interviews in the original environment by a probation officer, which in many cases can confirm or not the information obtained from convicts.

The administration is also responsible for facilitating a convict's contacts with a probationer officer and representatives of foundations, associations, organisations and institutions assisting in social re-adaptation of convicts. This facilitation consists in enabling a probation officer and other entities to meet a convict in the prison.

Directly before release from prison, the prison administration should provide a convict with information, especially addresses and the scope of duties of government

[20] Regulation of the Minister of Justice of 21 December 2016 on rules for organisation and order concerning execution of a penalty of deprivation of liberty, Journal of Laws [Dz.U.] of 2016, item 2231.

units and territorial self-government, institutions and social organisations offering financial, medical, employment and accommodation as well as legal assistance to the released.

A court's professional probation officer is one of the entities whose duties are to organise and perform activities aimed at assisting a convict in social re-adaptation. The legislator indicates that the duties include undertaking activities aimed at preparing a convict to release from prison (Article 173 §2(12) EPC). The regulation on the manner and mode of performing duties by court's probation officers with respect to executive penal cases (§41)[21] precisely defines a probation officer's duties within activities connected with a convict's preparation for life after release from prison. Having received the decision of a penitentiary committee or a penitentiary court, a probation officer is obliged to come into direct contact with a convict. It should take place in the prison because in accordance with the Act on court's probation officers (Article 9(1)),[22] performing his duties, a probation officer has the right to visit a convict in the prison. During the visit, a probation officer should get acquainted with the documents concerning a convict in order to recognise his family and environment-related situation, difficulties he may face after the release and a convict's needs. Obviously, cooperation with a penitentiary committee will be indispensable. A professional probation officer who is competent with regard to the location of the prison where a convict serves the sentence shall perform the activities connected with the preparation of a convict for life after release from prison. The location is not always a convict's domicile after release. A professional probation officer may then apply to a court or the prison governor to order an interview in the original environment concerning a convict's family and environment-related situation by another probation officer who is competent with regard to a convict's domicile. A probation officer should collect all the information about a convict's family situation and the environment to which he will return before the first meeting with him because then he will be able to confront it with the information from a convict. After the meeting and having diagnosed potential problems and a convict's expectations, a probation officer shall develop a non-custodial programme.

Another task of a court's professional probation officer is to prepare the family and social environment for a convict's return. Thus, it is necessary to meet a convict's family and it seems to be the most appropriate solution to visit the family because then a probation officer can learn about the financial situation and relations between the members. A professional probation officer cooperates with government administration units and territorial self-government, associations, foundations, organisations, institutions and other entities assisting in social re-adaptation of convicts. This cooperation is especially important when establishing, together with a convict, and organising the range of assistance and the way of its provision.

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[21] Regulation of the Minister of Justice of 13 June 2016 on the manner and mode of performing duties by a court's probation officers with respect to executive penal cases, Journal of Laws [Dz.U.] of 2016, item 969.

[22] Act of 27 July 2001 on a court's probation officers, Journal of Laws [Dz.U.] of 2001, no. 98, item 1071 (uniform text).

Obviously, as W. Liszke[23] rightly notes, in the period of the release programme implementation, a probation officer should not act for a convict but only activate and assist him suggesting what activities a convict can undertake and to whom and for what kind of assistance he may apply.

The period of preparation for freedom provides a convict with additional rights but, as it is emphasised in the doctrine,[24] also imposes additional obligations. In accordance with the aim of the period, a convict should demonstrate initiative to come into contact and maintain it with a court's professional probation officer, organisations, associations and foundations whose aim is to assist convicts in their social re-adaptation. A convict, in accordance with the prison rules for organisation and order in relation to execution of the penalty of deprivation of liberty (§58), is obliged to notify about the changes in his life situation that have impact on the preparation for life after release and the establishment of forms and the scope of necessary assistance after release from prison.

A possibility of being granted a permission to leave the prison for the maximum of 14 days (Article 165 §2 EPC) is another important right. This permission may be obtained especially in order to make arrangements connected with future accommodation and employment. T. Szymanowski[25] is right to note that a convict may be granted permission to leave because of other reasons important for the future free life. But not every convict shall be entitled to such permission.

It is worth mentioning that introducing a period of preparation for release, the legislator has not determined conditions for granting permission to leave the prison, indicating only the purpose of this permission. The amendment to the Executive Penal Code of 2003[26] introduced changes in the form of the forecast of a convict's behaviour after release from prison that should be formulated based on a convict's conduct demonstrated in prison.[27] It must be pointed out that in accordance with the regulation on the methods of exerting penitentiary influence in prisons and remand centres (§25 EPC), a criminological and social forecast is developed before granting a convict permission to leave the prison in the period of preparation for release where a convict has not been given a pass in a semi-open or open prison before or awarded permission to meet a close relation or a trustworthy person without supervision, outside the prison for a period not exceeding 30 hours, or permission to leave the prison for a period not exceeding 14 days. If a convict betrays the trust while on leave or using permissions, or if there are changes in

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[23] W. Liszke, *Przygotowanie skazanego...* [Preparation of a convict...], p. 119.

[24] E. Rokosz, *Przygotowanie skazanych do zwolnienia. Wyniki badań na temat oddziaływań penitencjarnych w polskich zakładach karnych* [Preparation of convicts for release. Findings of research into penitentiary influence in Polish prisons], Analizy. Raporty. Ekspertyzy (Stowarzyszenie Interwencji Prawnej) No. 3, 2010, p. 6.

[25] T. Szymanowski, [in:] T. Szymanowski, Z. Świda (ed.), *Kodeks karny wykonawczy...* [Executive Penal Code...], p. 382.

[26] Act of 24 July 2003 amending the Executive Penal Code and some other acts, Journal of Laws [Dz.U.] No. 142, item 1380. See, G.B. Szczygieł, *Zezwolenia na czasowe opuszczenie zakładu karnego w polskim systemie penitencjarnym* [Permission for temporary leave from prison in the Polish penitentiary system], Temida 2, Białystok 2013, p. 137.

[27] For more, see G.B. Szczygieł, *Zezwolenia na czasowe...* [Permission for temporary...], pp. 120–129.

a convict's behaviour, his family situation or other important changes in his legal situation, the forecast shall be updated.

In case of "suspended conditional release", as the legislator has granted conditional release, it means that criminological and social forecast gives grounds for the supposition that after release from prison a convict will comply with the legal order. This justifies granting permission to leave the prison. On the other hand, where a court refuses to grant conditional release and decides it is purposeful to assign a period necessary to prepare a convict for release, a forecast does not give grounds for the supposition that a convict will comply with the legal order after release from prison. Of course, this does not exclude a possibility of granting permission to leave the prison but requires its more thorough preparation.

The prison governor shall grant permission to leave. The decision should be in writing and contain information about the time for which a convict has been granted permission and obligations imposed on a convict as well as consequences resulting from failure to comply with them or failure to return to prison. A convict is obliged to promptly report to the police unit operating in the region of his domicile in order to confirm his stay there. The prison governor may oblige a convict to behave in a specific manner, especially to stay in places determined in the permission or to frequently report to the police unit. It is worth emphasising that in case of the discussed permission, especially as it is granted in order to undertake steps to arrange accommodation or employment after release from prison, it seems purposeful to oblige a convict to perform such activities. A convict who has been granted permission to leave may apply in writing for payment of the money from his account. If a convict does not work in prison and does not have any financial resources, he may apply for a benefit. The prison governor may grant a benefit of one-tenth of an average worker's remuneration in accordance with Article 114 EPC.

In case of refusal to grant permission to leave the prison, it seems reasonable to share an opinion that a convict is entitled to appeal[28] in accordance with Article 7 EPC, due to non-conformity of the decision with law, unless the Act stipulates otherwise. Although the decision on granting permission to leave the prison is discretionary, it is not arbitrary and must be based on established facts.[29] The time spent outside prison is not deducted from sentence service, unless a penitentiary judge rules otherwise because a convict has betrayed trust. If, after granting permission to leave

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[28] K. Postulski, *Kodeks karny wykonawczy...* [Executive Penal Code...], p. 1029; Z. Hołda, [in:] Z. Hołda, K. Postulski (ed.), *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], Arche, Gdańsk 2005, pp. 86–87; J. Lachowski, T. Oczkowski, *Skarga skazanego w postępowaniu wykonawczym (art. 7 k.k.w.)* [Convict's appeal in executive procedure (Article 7 EPC)], Przegląd Więziennictwa Polskiego No. 60, 2008, p. 18; See a different opinion: T. Szymanowski, [in:] T. Szymanowski, Z. Świda, *Kodeks karny wykonawczy...* [Executive Penal Code...], p. 325; S. Lelental, *Skarga skazanego na decyzję organu wykonawczego w polskim prawie karnym wykonawczym* [Convict's appeal against a decision of an executive body in Polish executive penal law], [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy* [Fair trial. Professor Zofia Świda jubilee book], Warsaw 2009, pp. 666–667.

[29] See, the Constitutional Tribunal ruling of 29 September 1993, K17/92, OTK 1993, part II, p. 305.

prison, new circumstances occur that justify a supposition that a convict will not comply with the legal order in prison or if he is arrested because of a violation of the legal order, the prison governor shall decide to withdraw the permission.

3.

Defining of the period of preparation for life after release is absolutely justified. It refers to the aim of a penalty of deprivation of liberty and is a successive offer of activities that may assist convicts in social re-adaptation. This kind of help is indispensable because of most convicts' diagnosed adaptation difficulties occurring upon release from prison and connected with such problems as homelessness, no professional experience, addiction to alcohol or narcotic drugs, family conflicts, lack of financial resources, maintenance/alimony-related indebtedness, acquired helplessness, lack of plans for the future, low self-assessment or a low level of social skills such as: assertiveness, self-presentation or teamwork skills.[30] Assistance in solving these problems and activating convicts to solve them is especially important in case of convicts serving long-term imprisonment sentences. These convicts after a few or several years return to a new reality outside prison, new social, economic and family conditions. In fact, the period of preparation for release should be applicable to all convicts. They should serve imprisonment sentence – of course, except for those who pose a serious threat to the society and security in prison – in a semi-open prison, because in such a facility the conditions for serving a sentence are most similar to the conditions outside, and make it possible to activate convicts in preparation for release and teach them to take matters into their own hands.

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[30] I. Dybalska, *Trudności w przystosowaniu do życia po zwolnieniu z zakładu karnego – między diagnozą a działaniem* [Difficulties in adapting to life after release from prison – between a diagnosis and action], publication available at: www.irss.pl/wp-content/uploads/2013/11/Trudności w przystosowaniu do życia po zwolnieniu z zakładu karnego.pdf.

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PREPARATION OF CONVICTS TO BE RELEASED FROM PRISON UNDER ARTICLE 164 EPC

Summary

A penalty of deprivation of liberty (imprisonment), in spite of its numerous deficiencies, will undoubtedly remain in the catalogue of measures of response to crime for a long time. Therefore, a task for today is to minimise the negative aspects of prison isolation and to organise prison life in such a way that it would match the positive conditions of life in the society.

Although the whole stay in prison should be used to facilitate a convict's social re-adaptation, the authors of the Executive Penal Code considered it purposeful to select time necessary for preparing a convict for life after release, in order to undertake activities that may help a convict to re-integrate with the society and function in it without coming into conflict with law.

Key words: penalty of deprivation of liberty (imprisonment), preparation for release from prison, convicts' social re-adaptation

PRZYGOTOWANIE SKAZANYCH DO OPUSZCZENIA ZAKŁADU KARNEGO W TRYBIE ART. 164 K.K.W.

Streszczenie

Kara pozbawienia wolności z pewnością, mimo rozlicznych wad, długo jeszcze pozostanie w katalogu środków reakcji na przestępstwo. Zadaniem obecnie jest więc minimalizowanie negatywnych aspektów izolacji więziennej i organizowanie życia w więzieniu, tak by odpowiadało pozytywnym warunkom życia w społeczeństwie. Wprawdzie cały pobyt w zakładzie karnym powinien być wykorzystany w celu ułatwienia skazanemu społecznej readaptacji, jednak twórcy kodeksu karnego wykonawczego uznali za celowe wyodrębnienie czasu niezbędnego do przygotowania skazanego do życia po zwolnieniu, w celu aktywizacji działań mogących pomóc skazanemu w reintegracji ze społeczeństwem i funkcjonowania w nim bez wchodzenia w konflikty z prawem.

Słowa kluczowe: kara pozbawienia wolności, przygotowanie do zwolnienia z zakładu karnego, społeczna readaptacja skazanych

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NEW EUROPEAN UNION LAW ON PROTECTING EUROPEAN UNION CLASSIFIED INFORMATION

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The issue of protecting the European Union classified information has been discussed in the literature[1] and institutions responsible for the protection of classified information based on the Act of 5 August 2010 on protecting classified information,[2] the development of which was accelerated due to the fact that the Republic of Poland was soon to hold the Presidency of the Council of the European Union. It is worth emphasising that the statute meets very high legislative standards.

The regulation that was binding in the EU, i.e. the Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations,[3] was subsequently repealed and replaced by the Council Decision 2011/292/EU of 31 March 2011 on

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1 S. Hoc, *Ochrona informacji niejawnych i innych tajemnic ustawowo chronionych. Wybrane zagadnienia* [Protecting classified information and other secret data under statutory protection: Selected issues], Wydawnictwo Uniwersytetu Opolskiego, Opole 2006, pp. 161–168; S. Hoc, *Ochrona informacji niejawnych pochodzących od organów Unii Europejskiej, NATO oraz innych państw* [Protection of classified information of the European Union, NATO and other states], [in:] M. Gajos (ed.), *Ochrona informacji niejawnych i biznesowych*, Materiały II Kongresu [Protection of classified and business information: 2nd Congress material], Katowice 2006, pp. 33–46; S. Hoc, *Ochrona informacji niejawnych Unii Europejskiej* [Protection of European Union classified information], Przegląd Prawa Publicznego No. 10, 2011, pp. 43–54; S. Hoc, *Ochrona informacji niejawnych wymienianych w interesie Unii Europejskiej* [Protection of classified information exchanged in the interest of the European Union], Przegląd Prawa Publicznego No. 7–8, 2013, pp. 43–54; S. Zalewski, *Przepisy odnoszące się do informacji niejawnych w UE i NATO oraz ich implementacja do prawa polskiego* [Regulations regarding classified information in the EU and NATO, and their implementation in Polish law], [in:] G. Szpor (ed.), *Jawność i jej ograniczenia* [Openness and its limitation], Volume VI: A. Gryszczyńska (ed.), *Struktura tajemnic* [Structure of secrets], C.H. Beck, Warsaw 2014, pp. 77–143.

2 Journal of Laws [Dz.U.] of 2016, item 1167; see, S. Hoc, *Ustawa o ochronie informacji niejawnych. Komentarz* [Act on protecting classified information: Commentary], LexisNexis, Warsaw 2010; I. Stankowska, *Ustawa o ochronie informacji niejawnych. Komentarz* [Act on protecting classified information: Commentary], LexisNexis, Warsaw 2014.

3 Official Journal of the European Union of 11.4.2001, L 101/1 with subsequent amendments.

the security rules for protecting EU classified information,[4] which entered into force on the day of its publication, i.e. 27 May 2011. Currently applicable are: the Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information[5] and the Commission Decision (EU, Euratom) 2015/443/EU of 13 March 2015 on security in the Commission[6] and Commission Decision (EU, Euratom) 2015/444 on protecting EU classified information[7].

It is worth emphasising that the Agreement between the Member States of the European Union, meeting within the Council, regarding the Protection of Classified Information Exchanged in the Interests of the European Union of 25 May 2011[8] is a legal document introducing a coherent and complex policy of protecting classified information that is in force beside, not instead of, the regulations on the security of the Council.

The preamble to the Decision 2013/488/EU indicates that in order to develop the Council activities in all areas which require handling classified information, it is appropriate to establish a comprehensive security system for protecting classified information covering the Council, its General Secretariat and the Member States. The Decision should apply where the Council, its preparatory bodies and the General Secretariat of the Council (GSC) handle the EU classified information (EUCI). It is emphasised that in accordance with national laws and regulations and to the extent required for the functioning of the Council, the Member States should respect this Decision where their competent authorities, personnel or contractors handle EUCI, so that each may be assured that an equivalent level of protection is afforded to EUCI. It is emphasised that the Council, the Commission and the European External Action Service (EEAS) are committed to applying equivalent security standards for protecting EUCI. The Council underlines the importance of associating, where appropriate, the European Parliament and other Union institutions, bodies or agencies to observe the principles, standards and rules for protecting classified information which are necessary in order to protect the interests of the Union and its Member States. The Council has been obliged to determine the appropriate framework of sharing EUCI held by the Council with other Union institutions, bodies or agencies, as appropriate, in accordance with the Decision 2013/488/EU and inter-institutional arrangements in force.

The Decision 2013/488/EU is composed of 19 articles discussed below.

Article 1 applies to the purpose, scope and definitions. The Decision lays down the basic principles and minimum standards of security for protecting EUCI. The basic principles and minimum standards apply to the Council and the General Secretariat of the Council and are respected by the Member States in accordance with their respective national laws and regulations, so that each may be assured that an equivalent level of protection is afforded to EUCI. For the purposes of

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4 Official Journal of the European Union of 27.5.2011, L 141/1.

5 Official Journal of the European of Union 15.10.2013, L 274/1.

6 Official Journal of the European Union of 17.3.2015, L72/41.

7 Official Journal of the European Union of 17.3.2015, L72/53.

8 Official Journal of the European Union 8.7.2011, C 202/13 and Journal of Laws [Dz.U.] of 2015, item 2159.

the Decision 2013/488/EU, the definitions set out in Appendix A shall apply. It contains 51 terms, inter alia accreditation, document, TEMPEST, classified contract, originator, material, etc.

Article 2 concerns the definition of EUCI, security classifications and markings. The European Union Classified Information means any information or material designated by an EU security classification, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union or one or more of the Member States. EUCI is classified at one of the following levels:

1) TRÈS SECRET UE/EU TOP SECRET: information and material the unauthorised disclosure of which could cause exceptionally grave prejudice to the essential interests of the European Union or of one or more of its Member States;
2) SECRET UE/EU SECRET: information and material the unauthorised disclosure of which could seriously harm the essential interests of the European Union or of one or more of its Member States;
3) CONFIDENTIAL UE/EU CONFIDENTIAL: information and material the unauthorised disclosure of which could harm the essential interests of the European Union or of one or more of its Member States;
4) RESTREINT UE/EU RESTRICTED: information and material the unauthorised disclosure of which could be disadvantageous to the interests of the European Union or of one or more of its Member States.

Classified information bears the above security classification marking, however, it may bear additional markings to designate the field of activity to which it relates, identify the originator, limit distribution, restrict use or indicate releasability.

Article 3 concerns classification management. The competent authorities ensure that EUCI is appropriately classified, clearly identified as classified information and retains its classification level for only as long as necessary. EUCI shall not be downgraded or declassified nor shall any of the markings be modified or removed without the prior written consent of the originator. The Council shall approve a security policy on creating EUCI, which shall include a practical classification grade.

Article 4 applies to the protection of classified information. It states that the EU classified information shall be protected in accordance with the Decision 2013/488/EU, and the holder of any item of EUCI shall be responsible for protecting it in accordance with this Decision. Where Member States introduce classified information bearing a national security classification marking into the structures or networks of the Union, the Council and the General Secretariat of the Council shall protect that information in accordance with the requirements applicable to EUCI at the equivalent level as set out in the table of equivalence of security classifications contained in Appendix B to the Decision. An aggregate of EUCI may warrant a level of protection corresponding to a higher classification than that of its individual components.

Article 5 refers to security risk management. Risk to EUCI is managed as a process. This process is aimed at determining known security risks, defining security measures to reduce such risks to an acceptable level in accordance with the basic principles and minimum standards set out in the Decision 2013/488/EU and at applying those measures in line with the concept of defence in depth as

defined in Appendix A to the Decision. The effectiveness of such measures is continuously evaluated. It must be underlined that security measures for protecting EUCI throughout its life-cycle shall be commensurate in particular with its security classification, the form and the volume of the information or material, the location and construction of facilities housing EUCI and the locally assessed threat of malicious or criminal activities, including espionage, sabotage and terrorism. Contingency plans take account of the need to protect EUCI during emergency situations in order to prevent unauthorised access, disclosure or loss of integrity or availability. On the other hand, preventive and recovery measures to minimise the impact of major failures or incidents on the handling and storage of EUCI are included in business continuity plans.

Article 6 applies to implementation of the Decision 2013/488/EU. Where necessary, the Council, on recommendation by the Security Committee, shall approve security policies setting out measures for implementing this Decision. The Security Committee may agree at its level security guidelines to supplement or support the Decision 2013/488/EU and any security policies approved by the Council.

Article 7 concerns personnel security. Personnel security is the application of measures to ensure that access to EUCI is granted only to individuals who have:

1) a need-to-know,
2) been security cleared to the relevant level, where appropriate, and
3) been briefed on their responsibilities.

Personnel security clearance procedures are designed to determine whether an individual, taking into account his loyalty, trustworthiness and reliability, may be authorised to access EUCI. All individuals in the General Secretariat of the Council whose duties require them to have access to or handle EUCI classified as CONFIDENTIEL UE/EU CONFIDENTIAL or above shall be security cleared to the relevant level before being granted access to such EUCI. Such individuals must be authorised by the GSC Appointing Authority to access EUCI up to a specified level and up to a specified date. Member States' personnel whose duties may require access to EUCI classified as CONFIDENTIEL UE/EU CONFIDENTIAL or above shall be security cleared to the relevant level or otherwise duly authorised by virtue of their functions, in accordance with national laws and regulations. Before being granted access to such EUCI and at regular intervals thereafter, all individuals shall be briefed on and acknowledge their responsibilities to protect EUCI in accordance with the Decision 2013/488/EU.

Article 8 applies to physical security, i.e. the application of physical and technical protective measures to prevent unauthorised access to EUCI. Physical security measures are designed to deny surreptitious or forced entry by an intruder, to deter, impede and detect unauthorised actions and to allow segregation of personnel in their access to EUCI on a need-to-know basis. Such measures shall be determined based on a risk management process. Physical security measures are put in place for all premises, buildings, offices, rooms and other areas in which EUCI is handled or stored, including areas housing communication and information systems. Areas in which EUCI classified as CONFIDENTIEL UE/EU CONFIDENTIAL or above is stored are established as Secured Areas in accordance with Annex II to the Decision

and approved by the competent security authority. Only approved equipment or devices are used for protecting EUCI at the level of CONFIDENTIEL UE/EU CONFIDENTIAL or above.

Article 9 concerns the management of classified information. The management of classified information is the application of administrative measures for controlling EUCI throughout its life cycle to supplement the measures provided for in Articles 7, 8 and 10, and thereby help deter and detect deliberate or accidental compromise or loss of such information. Such measures relate in particular to the creation, registration, copying, translation, downgrading, declassification, carriage and destruction of EUCI. Information classified as CONFIDENTIEL UE/EU CONFIDENTIAL or above shall be registered for security purposes prior to distribution and receipt. The competent authorities in the GSC and in the Member States shall establish a registry system for this purpose. Information classified as TRÈS SECRET UE/EU TOP SECRET shall be registered in designated registries. Services and premises where EUCI is handled or stored are subject to regular inspection by the competent security authority. EUCI shall be conveyed between services and premises outside physically protected areas as follows: by electronic means protected by cryptographic products or on electronic media (e.g. USB sticks, CDs, hard drives) protected by cryptographic products, or, in all other cases, as prescribed by the competent security authority in accordance with the relevant protective measures laid down in Annex III to the Decision.

Article 10 applies to the protection of EUCI handled in communication and information systems. It is detailed and contains nine paragraphs. Information assurance (IA) in the field of communication and information systems is the confidence that such systems will protect the information they handle and will function as they need to, when they need to, under the control of legitimate users. Effective information assurance shall ensure appropriate levels of confidentiality, integrity, availability, non-repudiation and authenticity. Information assurance is based on a risk management process. A Communication and Information System (CIS) means any system enabling the handling of information in electronic form. The CIS shall comprise the entire assets required for it to operate, including the infrastructure, organisation, personnel and information resources. The Decision 2013/488/EC applies to a CIS handling EUCI. The CIS shall handle EUCI in accordance with the concept of information assurance. All CIS shall undergo an accreditation process. Accreditation aims at obtaining assurance that all appropriate security measures have been implemented and that a sufficient level of protection of EUCI and of a CIS has been achieved in accordance with the Decision. The accreditation statement shall determine the maximum classification level of the information that may be handled in a CIS as well as the corresponding terms and conditions. Security measures (referred to as TEMPEST security measures) shall be implemented to protect CIS handling information classified as CONFIDENTIEL UE/EU CONFIDENTIAL and above against compromise of such information through unintentional electromagnetic emanations. Such security measures shall be commensurate with the risk of exploitation and the level of classification of the information. Article 10(6) lays down how cryptographic product shall be approved.

During the transmission of EUCI by electronic means, approved cryptographic products shall be used. Notwithstanding this requirement, specific procedures may be applied under emergency circumstances or specific technical configurations as specified in Annex IV to the Decision. The competent authorities of the GSC and of the Member States respectively shall establish the following information assurance functions: an Information Assurance Authority (IAA), a TEMPEST Authority (TA), a Crypto Approval Authority (CAA), and a Crypto Distribution Authority (CDA). For each system, the competent authorities of the GSC and of the Member States, respectively, shall establish: a Security Accreditation Authority (SAA), and an IA Operational Authority.

Article 11 applies to industrial security, i.e. the application of measures to ensure the protection of EUCI by contractors or subcontractors in pre-contract negotiations and throughout the life cycle of classified contracts. Such contracts shall not involve access to information classified as TRÈS SECRET UE/EU TOP SECRET. The GSC may entrust by contract tasks involving or entailing access to or the handling or storage of EUCI by industrial or other entities registered in a Member State or in a third State which has concluded an agreement or an administrative arrangement in accordance with point (a) or (b) of Article 13(2). The GSC, as contracting authority, shall ensure that the minimum standards on industrial security set out in the Decision, and referred to in the contract, are complied with when awarding classified contracts to industrial or other entities. The National Security Authority (NSA), the Designated Security Authority (DSA) or any other competent authority of each Member State shall ensure, to the extent possible under national laws and regulations, that contractors and subcontractors registered in their territory take all appropriate measures to protect EUCI in pre-contract negotiations and when performing a classified contract. The NSA, DSA or any other competent security authority of each Member State shall ensure, in accordance with national laws and regulations, that contractors or subcontractors registered in the respective Member State participating in classified contracts or sub-contracts which require access to information classified as CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET within their facilities, either in the performance of such contracts or during the pre-contractual stage, hold a Facility Security Clearance (FSC) at the relevant classification level. The contractor or subcontractor personnel who, for the performance of a classified contract, require access to information classified as CONFIDENTIEL UE/EU CONFIDENTIAL or SECRET UE/EU SECRET shall be granted a Personnel Security Clearance (PSC) by the respective NSA, DSA or any other competent security authority in accordance with national laws and regulations and the minimum standards laid down in Annex I to the Decision.

Article 12 applies to sharing EUCI. The Council shall determine the conditions under which it may share EUCI held by it with other Union institutions, bodies, offices or agencies. An appropriate framework may be put in place to that effect, including by entering into inter-institutional agreements or other arrangements where necessary for that purpose. Any such framework shall ensure that EUCI is given protection appropriate to its classification level and according to basic

principles and minimum standards, which shall be equivalent to those laid down in the Decision.

Article 13 refers to the exchange of classified information with third States and international organisations. Where the Council determines that there is a need to exchange EUCI with a third State or an international organisation, an appropriate framework shall be put in place to that effect. The Union shall conclude agreements with third States or international organisations on security procedures for exchanging and protecting classified information (called "security of information agreements"), or the Secretary-General may enter into administrative arrangements on behalf of the GSC in accordance with paragraph 17 of Annex VI where the classification level of EUCI to be released is as a general rule no higher than RESTREINT UE/EU RESTRICTED. The decision to release EUCI originating in the Council to a third State or an international organisation shall be taken by the Council on a case-by-case basis, according to the nature and content of such information, the recipient's need-to-know and the measure of advantage to the Union. If the originator of the classified information for which release is desired is not the Council, the GSC shall first seek the originator's written consent to release. If the originator cannot be established, the Council shall assume the former's responsibility. Assessment visits shall be arranged to ascertain the effectiveness of the security measures in place in a third State or an international organisation for protecting EUCI provided or exchanged.

Article 14 refers to breaches of security and compromise of EUCI. A breach of security occurs as a result of an act or omission by an individual, which is contrary to the security rules laid down in the Decision. Compromise of EUCI occurs when, as a result of a breach of security, it has wholly or in part been disclosed to unauthorised persons. Any breach or suspected breach of security shall be reported immediately to the competent security authority. Where it is known or where there are reasonable grounds to assume that EUCI has been compromised or lost, the NSA or other competent authority shall take all appropriate measures in accordance with the relevant laws and regulations to:

1) inform the originator,
2) ensure that the case is investigated by personnel not immediately concerned with the breach in order to establish the facts,
3) assess the potential damage caused to the interests of the Union or of the Member States,
4) take appropriate measures to prevent a recurrence, and
5) notify the appropriate authorities of the action taken.

Any individual who is responsible for a breach of the security rules laid down in the Decision may be liable to disciplinary action in accordance with the applicable rules and regulations. Any individual who is responsible for compromising or losing EUCI shall be liable to disciplinary or legal action in accordance with the applicable laws, rules and regulations. In case of the commission of crime of the EU classified information disclosure, law enforcement bodies in Belgium (EU headquarters) or a Member State concerned (e.g. Poland) shall initiate prosecution.

Article 15 lays down the principles of responsibility for implementation. The Council shall take all necessary measures to ensure overall consistency in the application of the Decision 2013/488/EU. The Secretary-General shall take all necessary measures to ensure that, when handling or storing EUCI or any other classified information, the Decision is applied in premises used by the Council and within the GSC, by GSC officials and other servants, by personnel seconded to the GSC and by GSC contractors. Member States shall take all appropriate measures, in accordance with their respective national laws and regulations, to ensure that when EUCI is handled or stored the Decision is respected.

Article 16 lays down the organisation of security in the Council. As part of its role in ensuring overall consistency in the application of the Decision, the Council approves:

1) security of information agreements,
2) decisions consenting to the release of EUCI to third States and international organisations,
3) an annual assessment visit programme proposed by the Secretary-General and recommended by the Security Committee,
4) security policies.

The Secretary-General is the GSC's Security Authority. In that capacity, the Secretary-General:

1) implements the Council's security policy and keeps it under review,
2) coordinates with Member States' NSAs on all security matters relating to the protection of classified information relevant for the Council's activities,
3) grants the EU officials and other GSC servants Personnel Security Clearance (PSC),
4) as appropriate, orders investigations into any actual or suspected compromise or loss of classified information held by or originating in the Council and requests the relevant security authorities to assist in such investigations,
5) undertakes periodic inspections of the security arrangements for protecting classified information on GSC premises,
6) undertakes periodic visits to assess the security arrangements for protecting EUCI in Union bodies, agencies, Europol and Eurojust as well as in the course of crisis management operations and assurance measures used by EU special representatives (EUSRs) and their teams,
7) undertakes jointly and in agreement with the NSA concerned periodic assessment of the security arrangements for protecting UECI in Member States' services and premises,
8) coordinates security measures as necessary with the competent authorities of the Member States responsible for protecting classified information and, as appropriate, third States or international organisations, including on the nature of threats to the security of EUCI and the means of protection against them,
9) enters into the administrative arrangements.

The Security Office of the GSC is at the disposal of the Secretary-General to assist in those responsibilities.

For the purposes of implementing Article 15(3), regarding Member States' responsibility to ensure that the Decision is respected, Member States should:

1) designate a National Security Authority (NSA) responsible for security arrangements for protecting EUCI in order that:
   a) EUCI held by any national department, body or agency, public or private, at home or abroad, is protected in accordance with the Decision 2013/488/EU,
   b) security arrangements for protecting EUCI are periodically inspected or assessed,
   c) all individuals employed within a national administration or by a contractor who may be granted access to information classified as CONFIDENTIEL UE/EU CONFIDENTIAL or above are appropriately security cleared or are otherwise duly authorised by virtue of their functions in accordance with national laws and regulations,
   d) security programmes are set up as necessary in order to minimise the risk of EUCI being compromised or lost,
   e) security matters related to protecting EUCI are coordinated with other competent national authorities, including those referred to in the Decision 2013/488/EU,
   f) responses are given to appropriate security clearance requests in particular from any Union bodies, agencies, entities;
2) ensure that their competent authorities provide information and advice to their governments, and through them to the Council, on the nature of threats to the security of EUCI and the means of protection against them.

Article 17 lays down the tasks of the Security Committee, which examines and assesses any security matter within the scope of the Decision 2013/488/EU and gives recommendations to the Council as appropriate. The Security Committee is composed of representatives of the Member States' NSAs and is attended by a representative of the Commission and of the EEAS. It is chaired by the Secretary-General or by his designated delegate. The Committee meets as instructed by the Council, or at the request of the Secretary-General or of an NSA. Representatives of the Union bodies, agencies and entities that apply this Decision or the principles thereof may be invited to attend when questions concerning them are discussed.

The Security Committee organises its activities in such a way that it can give recommendations on specific areas of security. It establishes an expert sub-area for IA issues and other expert sub-areas as necessary. It also draws up terms of reference for such expert sub-areas and receives reports from them on their activities including, as appropriate, any recommendations for the Council.

In accordance with Article 19, the Decision 2013/488/EU entered into force on the date of its publication in the Official Journal of the European Union, i.e. on 15 October 2013.

The Decision is supplemented with annexes and appendices, which are its integral parts. Those concern the following areas.

Annex I: Personnel security is composed of 43 paragraphs. It lays down criteria for determining whether an individual, taking into account his loyalty, trustworthiness

and reliability, may be authorised to have access to EUCI, and the investigative and administrative procedures to be followed to that effect.

Annex II: Physical security consists of 31 paragraphs. It lays down minimum requirements for the physical protection of premises, buildings, offices, rooms and other areas where EUCI is handled and stored, including areas housing a CIS.

Annex III: Management of classified information consists of 63 paragraphs. It lays down the administrative measures for controlling EUCI throughout its life cycle in order to help deter and detect deliberate or accidental compromise or loss of such information.

Annex IV: Protection of EUCI handled in a CIS consists of 52 paragraphs. Provisions set out in this annex form a baseline for the security of any CIS handling EUCI. Detailed requirements for implementing these provisions are defined in IA security policies and security guidelines.

Annex V: Industrial security consists of 36 paragraphs. It lays down general security provisions applicable to industrial or other entities in pre-contract negotiations and throughout the life cycle of classified contracts let by the GSC.

Annex VI: Exchange of classified information with third States and international organisations consists of 39 paragraphs.

Appendix A contains definitions applying to the terms used for the purpose of the Decision. Appendix B contains equivalent classification of classified information in the 28 EU Member States. Appendix C contains a list of National Security Authorities (NSAs). It is worth mentioning that only in two EU Member States, there are two NSAs designated: in Denmark this is the Danish Security Intelligence Service and the Danish Defence Intelligence Service, and in the Netherlands Ministerie van Binnenlandes Zaken en Koninkrijksrelaties and Ministerie van Defensie Beveiligingsautoriteit. Appendix D contains a list of 30 abbreviations.

In Poland, the Head of the Internal Security Agency (ISA) is designated to perform the role of National Security Authority. In the military, the Head of the Military Counterintelligence Service (MCS) performs the function on his behalf. It should be noted that, in accordance with Article 32(4) of the Act on protecting classified information, in case of a motion to initiate a security clearance procedure in order to grant an international organisation security clearance to a person holding a (national) security clearance issued by ISA, MCS, the Intelligence Agency (IA) or the Military Intelligence Service (MIS), a questionnaire completion is not required and an international organisation security clearance is issued only up to the date designated in the national security clearance.

In accordance with the NSA Guidelines, if it is necessary to confirm Polish citizens' capability to protect international classified information, the Head of ISA shall issue a relevant certificate in English. The Head of ISA may also confirm this capability in the way required by the given State or international organisation. Certificates are granted based on a valid appropriate security clearance (NATO, ESA or EU). Persons seconded to services and work abroad and members of permanent and working NATO or EU teams are granted security certificates, referred to as NATO Personnel Security Clearance Certificate or EU Personnel Security Clearance Certificate. Individuals who are assigned to participate in conferences, workshops

and visits to the EU or NATO institutions abroad are granted Certificates of Security Clearance for the period covering the implementation of the task not exceeding the security clearance validity date, provided the international partner requires it. In substantiated circumstances (e.g. an urgent visit abroad), the EU or NATO certificate may be granted based on the valid (national) security clearance certificate issued by ISA, MCS, IA or MIS, authorising an individual to access Polish classified information at a relevant level, and a clearance procedure initiated in accordance with Article 32(4) of the Act on protecting the EU or NATO classified information.

In order to obtain access to the EU or NATO classified information, beside the obligation to hold a security authorisation (or certificate), an individual has to be briefed on the protection of CI and sign a declaration of such training completion and acknowledging effects and consequences of intended and unintended disclosure or use of CI in the way breaching the regulations in force.

Summing up, the Decision 2013/488/EU utilises the experience gained from the application of former Decisions. It contains more synthetic provisions, although also casuistic ones, and can contribute to more efficient protection of EUCI. Due to the use of modern solutions in the regulations of the Act of 5 August 2010 on protecting classified information, there is no need for amendment.

What must be emphasised is a high level of national solutions' convergence with the Council and Commission Decisions as well as NATO standards concerning classified information, although some national solutions demonstrate certain specificity with regard to personnel and industrial security.

Regulation of criminal liability for the commission of crimes against the protection of information (Chapter XXXIII of the Criminal Code) as well as the issue of granting access to classified information in criminal and civil proceedings are subject to the State's assessment.

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NEW EUROPEAN UNION LAW ON PROTECTING EUROPEAN UNION CLASSIFIED INFORMATION

Summary

The paper presents the EU binding regulations concerning the principles of the EU classified information protection laid down in the Council Decision 2013/488/EU. It refers, first of all, to the definition of classified information, protection, personnel, physical and industrial security, communication and information systems, exchange of classified information, cases of compromising or losing the EU classified information and organisation of security in the Council. Due to Poland's membership in the EU, the knowledge of the issues of the EU classified information protection is essential. It must be pointed out that the Head of the Internal Security Agency is designated to perform the tasks of a National Security Authority.

Key words: accreditation, Decision 2013/488/EU, classified information, security classification, National Security Authority

NOWE PRAWO O OCHRONIE INFORMACJI NIEJAWNYCH UNII EUROPEJSKIEJ

Streszczenie

Przedmiotem rozważań jest aktualna regulacja prawna Unii Europejskiej określająca zasady ochrony informacji niejawnych UE, która została zawarta w decyzji Rady 2013/488/UE. Odniesiono się przede wszystkim do definicji informacji niejawnych, ochrony, bezpieczeństwa: osobowego, fizycznego, przemysłowego, systemów teleinformatycznych, wymiany informacji niejawnych, przypadków naruszenia i narażenia na szwank bezpieczeństwa informacji niejawnych UE, a także organizacji bezpieczeństwa w Radzie. Ze względu na udział Rzeczpospolitej Polskiej w UE znajomość problematyki ochrony informacji niejawnych Unii ma ważne znaczenie praktyczne. Zwrócić przy tym należy uwagę na Krajową Władzę Bezpieczeństwa, której zadania wykonuje Szef Agencji Bezpieczeństwa Wewnętrznego.

Słowa kluczowe: akredytacja, decyzja 2013/488/UE, informacje niejawne, klauzule tajności, Krajowa Władza Bezpieczeństwa

A PENAL TICKET FOR COMMON AND FISCAL MISDEMEANOURS IN POLISH LAW AND THIS PUNISHMENT QUASHED BY COURT AFTER THE AMENDMENTS OF 2013 AND 2015

TOMASZ GRZEGORCZYK*

1.

In Polish law, misdemeanours are prohibited acts carrying a punishment and are subject to adjudication by criminal courts, however, due to the level of their harmfulness, they are not crimes but constitute a separate category of punishable behaviour. They are subject to prosecution by the authorised state bodies, and in case of misdemeanours violating common law (common, non-fiscal ones) also by the aggrieved. The bodies authorised to prosecute are also competent to fine perpetrators by issuing a ticket or a fiscal ticket, i.e. a pecuniary penalty, and in case of a perpetrator's refusal to accept it, to bring a prosecution before court.

In common offence cases, presently laid down in the Misdemeanour Code of 1971[1] (hereinafter referred to as MC) and over 150 other acts,[2] a penal ticket was known in the inter-war period as well as after World War II. On the other hand, it has been used in the fiscal penal law since the fiscal penal codification of 1999. The Fiscal Penal Code of 10 September 1999[3] (hereinafter referred to as FPC), penalising crimes and misdemeanours against tax and duty obligations in relation to foreign trade, currency

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1 Journal of Laws [Dz.U.] of 1971 No. 12, item 114; uniform text in Journal of Laws of 2015, item 1094, as amended.

2 For more, see e.g. M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz* [Misdemeanour Code: Commentary], C.H. Beck, Warsaw 2011, pp. 37–47, or W. Kotowski, B. Kurzępa, *Wykroczenia pozakodeksowe. Komentarz* [Non-statutory offences: Commentary], LexisNexis, Warsaw 2008.

3 Journal of Laws [Dz.U.] of 1999 No. 83, item 930; at present uniform text in Journal of Laws of 2013, item 186, as amended; for more about the ticketing proceedings in FPC at that time, see T. Grzegorczyk, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Wolters Kluwer, Warsaw 2000, pp. 452–461.

exchange and organisation of gambling and lotteries, adopted a penal ticket for misdemeanours basing on the Misdemeanour Procedure Code of 1971[4] (hereinafter referred to as former MPC), which was amended in August 1998[5] with respect to the new codes: the Criminal Code and the Criminal Procedure Code coming into force on 1 September 1998, introducing such a fine as non-judicial prosecuting bodies' response to a fiscal misdemeanour. A penal ticket as such was obviously maintained in the new Misdemeanour Procedure Code of 24 August 2001[6] (hereinafter referred to as MPC).

A penal ticket is issued to a perpetrator of a misdemeanour in non-judicial proceedings but, as a rule, its amount is lower than the penalty for an act adjudicated by a court after a trial. In case of common offences, a fine adjudicated by a court may reach PLN 5,000 (Article 24 §1 MC) and in case of offences against employees' rights even PLN 30,000 (Articles 281–283 Labour Code). However, if the penalty is imposed as a ticket, the maximum amount is PLN 500 or PLN 1,000, or exceptionally PLN 2,000, and in case of offences against employees' rights up to PLN 5,000 (Article 96 §1-1c MPC). In case of fiscal offences, a penalty is always a fine accounting for up to 20-fold minimum remuneration[7] (Article 48 §1 FPC), but a maximum fiscal penal ticket may be up to twofold minimum remuneration (Article 48 §2 FPC). Thus, a fine for a fiscal offence imposed as a ticket is favourable for the perpetrator, however, it is a fast penal response to an infringement and meets the preventive aim of a penalty. A ticket is a non-judicial adjudication of a perpetrator's liability, which is not, however, the same as a court's sentence for this liability and is not a conviction.

2.

The condition for ticketing a perpetrator, provided it is admissible and in the opinion of the authorised body constitutes an adequate response to an act, in accordance with both discussed regulations, is the perpetrator's consent to it (Article 97 §2 MPC and Article 137 §3 FPC). If the perpetrator refuses to accept it, a motion to

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[4] Journal of Laws [Dz.U.] of 1971, No. 12, item 116; for more about this code, see M. Siewierski, J. Lewiński, Z. Leoński, J. Gościcki, *Komentarz do kodeksu postępowania w sprawach o wykroczenia oraz do ustawy o ustroju kolegiów do spraw wykroczeń* [Commentary on Misdemeanour Procedure Code and Act on the system of misdemeanour boards], Warsaw 1973; T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], Warsaw 1995.

[5] It was the Act amending the Act: Misdemeanour Procedure Code, the Act on the system of misdemeanour boards, the Act: Labour Code and some other acts, Journal of Laws [Dz.U.] of 1998, No. 113, item 717; for more, see T. Grzegorczyk, *Nowela do prawa wykroczeń. Komentarz* [Amendment to misdemeanour law: Commentary], Zakamycze, Kraków 1999, and by the same author, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], Warsaw 1999, pp. 283–285.

[6] Journal of Laws [Dz.U.] of 2001, No. 106, item 1149; at present uniform text in Journal of Laws of 2013, item 395, as amended.

[7] In 2017, the remuneration was PLN 2,000 per month (see, the Regulation of the Council of Ministers of 9 September 2016, Journal of Laws [Dz.U.] of 2016, item 1456), which means that a fine for a fiscal misdemeanour may reach PLN 40,000 but a fiscal penal ticket may impose a fine of up to PLN 4,000.

punish is brought before court (Article 99 MPC), and in fiscal cases, proceedings are conducted in accordance with general rules (Article 139 §1 FPC), i.e. an indictment is placed before court.

Bodies authorised to issue a penal ticket for common offences include: (a) in accordance with the Misdemeanour Procedure Code, the Police (police officers) in cases concerning all types of misdemeanours and the Labour Inspector in cases concerning violation of employees' rights and relating to work, and against regulations promoting work and labour market institutions (Article 95 §1 and §3 MPC), and (b) under special acts and the executive regulation to the Code of the Prime Minister (Article 95 §5 MPC), more than 20 other bodies, including Military Police, Border Guard, municipal police forces, Trade Inspectorate, Sanitary Inspectorate, Road Transport Inspectorate, Environment Protection Inspectorate, State Fire Brigade, State Fishery Guard and State Hunting Guard, however, only in relation to offences that are under their jurisdiction.[8]

On the other hand, in case of fiscal offences, imposing a fine in the form of a fiscal penal ticket is within the competence of a financial body conducting preparatory proceedings, i.e. the head of the tax office or the customs office and a fiscal control inspector or an authorised representative of such a body, i.e. an authorised employee of a tax office or a customs officer (Article 136 §1 *in principio* FPC). It is also admissible that non-financial bodies conducting preparatory proceedings in relation to misdemeanours are the Police, the Border Guard and the Military Police (Article 118 §1 (4)–(6) FPC), but only if a special provision stipulates that (Article 136 §1 *in medio* FPC), and such a special provision has not been passed so far,[9] although there were such proposals.[10]

The mode of imposing a fine by issuing a ticket laid down in those codifications is also different. In the law on misdemeanours, the proceedings are initiated when a president of a court receives a motion to punish an act filed by a competent prosecutor and directs it to adjudication (Article 59 §2 MPC). No formal pre-judicial proceedings are conducted in relation to the revealed misdemeanour. The only preparatory proceedings admissible are the explanatory proceedings conducted at the scene in order to establish grounds for the motion to punish the act and to collect data necessary to its development, which should be completed, as a rule, in a month's time from the moment they were undertaken (Article 54 §1 MPC). If the circumstances of the act do not raise any doubts, they are filed in an official record. If there are doubts, the collection of necessary evidence should be performed by

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[8] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], Wolters Kluwer, Warsaw 2012, pp. 331–336; or J. Lewiński, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], LexisNexis, Warsaw 2011, pp. 291–204.

[9] For more, see e.g. T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal procedure], LexisNexis, Warsaw 2014, pp. 923–924; see also, e.g. T. Oczkowski, [in:] V. Konarska-Wrzosek, T. Oczkowski, J. Skorupka, *Prawo i postępowanie karne skarbowe* [Fiscal penal law and procedure], Wolters Kluwer, Warsaw 2013, pp. 401–402.

[10] See, e.g. M.R. Tużnik, *Postępowania szczególne w postępowaniu karnym skarbowym* [Special procedures in fiscal penal proceedings], Wolters Kluwer, Warsaw 2013, p. 330.

interviewing the aggrieved, witnesses and the accused and taking the minutes of the interviews still before a trial (Article 54 §3–7 MPC).

Due to such a solution, it was laid down in Article 97 §1 MPC that a penal ticket is applicable only: (a) where a perpetrator was caught red-handed or just after the commission of a misdemeanour, thus in a pursuit after an offence, or (b) where an officer authorised to issue a ticket recognises a misdemeanour personally but in a perpetrator's absence, and there is no doubt who the perpetrator was, and (c) where the commission of a misdemeanour was established with the use of a measurement-monitoring or registering devices, a perpetrator was not caught red-handed or just after an offence commission but there are no doubts who he was. In cases when a perpetrator was caught red-handed or directly after the commission, a ticket as a sort of penal response is admissible only if the explanatory proceedings after the apprehension of a perpetrator take up to 14 days, when a misdemeanour is established by an officer in person but in a perpetrator's absence – 90 days, and a misdemeanour is established with the use of the above-mentioned devices – 180 days (Article 97 §1 *in fine* MPC).

On the other hand, in accordance with the fiscal penal law, where in cases of both fiscal crimes and misdemeanours, as a rule, the provisions of the Criminal Procedure Code are applied (Article 113 §1 FPC), pre-trial preparatory proceedings are carried out, however, in misdemeanour cases it is just an inquiry limited to an interrogation of a suspect and other activities necessary in order to file an indictment or close the proceedings in another way, e.g. discontinue them (Article 152 FPC). Due to that, it is assumed that a former initiation of such an inquiry does not prevent the application of ticketing proceedings and fining a perpetrator (Article 136 § 1 *in fine* FPC). As a result, there are doubts what should be done with the formerly initiated inquiry when the ticketing proceedings are used in its course. Some authors believe that a ticket alone finishes the initiated fiscal penal proceedings.[11] Others believe that the inquiry should be discontinued due to a procedural obstacle such as another circumstance excluding prosecution (Article 17 §1 (11) CPC in connection with Article 113 §1 FPC). This is because in the situation discussed a ticket was issued in separate proceedings initiated in the course of a formerly initiated inquiry, so it should be discontinued due to the fact that imposing a fine in the form of a ticket excludes further prosecution of the perpetrator.[12]

Nevertheless, in accordance with the fiscal penal law, a ticket is applicable directly when a fiscal body or its officer (employee) reveals a fiscal misdemeanour, e.g. minor smuggling (Article 86 §4 FPC), failure to submit a tax return (Article 56 §4 FPC) or impeding a less important fiscal control (Article 83 §2 FPC), also in the course of an inquiry into the case concerning a given person. On the other hand, the conditions for *in concreto* ticketing are: (a) a requirement that the circumstances of

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[11] See, e.g. G. Skowronek, *Ewolucja instytucji procesowych w prawie karnym skarbowym* [Evolution of procedural institutions in fiscal penal law], C.H. Beck, Warsaw 2005, p. 170; or J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], C.H. Beck, Warsaw 2007, p. 666.

[12] See, e.g. T. Grzegorczyk, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Wolters Kluwer, Warsaw 2009, p. 570.

a fiscal misdemeanour and its perpetrator should be unquestionable, and (b) there is no need to impose *in concreto* a fine that is higher than the amount admissible in the ticketing proceedings (Article 137 §1 FPC).

In both discussed regulations, some restrictions on the application of penal tickets are also envisaged.

In the misdemeanour law, ticketing is excluded:

a) if a given misdemeanour also carries, apart from a fine, another penal measure, e.g. a ban on driving, forfeiture of objects, compensation or damages (Article 96 §2 second sentence *in principio*), thus always when such a measure is obligatory (e.g. a ban on driving in case of driving under the influence of alcohol or a narcotic drug – Article 87 §3 MC, or redress to theft or appropriation of wood from a forest – Article 120 §3 *in principio* MC), and when it is facultative (e.g. forfeiture of goods sold in a prohibited place Article 60^3 §2 MC or a ban on driving because of careless driving on a public road – Article 86 §3 MC), if in a ticketing body's opinion, it should be applied in the case; and
b) where there is the concurrence of a misdemeanour and a crime (Article 96 §2 first sentence *in fine* CPC in connection with Article 10 §1 MC), i.e. when a perpetrator violated the provisions of the criminal law and misdemeanour law at the same time, which is connected with the fact that in such cases there is a separate "adjudication" on a crime and on a misdemeanour, thus a case must be heard before court; and also
c) if there is a concurrence of the provisions of the same misdemeanour law, i.e. when a perpetrator has violated a few provisions of the same law at the same time and ticketing proceedings are not applicable to some of them (Article 96 §2 second sentence MPC in connection with Article 9 §1 MC), which is applicable to situations where a ticketing body recognising a misdemeanour violating a few provisions of the misdemeanour law is not authorised to prosecute all the committed *in concreto* violations as well as where it is an authorised body to prosecute all the violations but the ticketing proceedings are not admissible in all these cases because of the reasons mentioned earlier, e.g. because of the obligation to use a penal measure for one of the misdemeanours.

However, if it is recognised that a given person has committed a few misdemeanours and a fine imposed in the ticketing proceedings is a sufficient response, a ticketing body authorised to prosecute in each case issues a separate ticket for each misdemeanour. It is also applicable to fiscal misdemeanours.

On the other hand, statutory limitations to the application of a ticket in accordance with the fiscal penal law are the following:

a) where diminution in dues to the State (e.g. tax or duty) occurs in connection with this misdemeanour, unless it has been already fully settled (Article 137 §2(1) FPC); and
b) where there is a concurrence of fiscal penal provisions, thus where a perpetrator violates a few provisions of FPC at the same time, some of which are misdemeanours and some constitute fiscal crimes (Article 137 §2(2) in connection with Article 7 §1 FPC), when he/she should be liable for one fiscal misdemeanour or one fiscal crime; and

c) where a penal measure of forfeiture of objects (Article 137 §2(4) FPC) should be a penalty imposed for a fiscal misdemeanour, however, with regard to fiscal misdemeanours, forfeiture is obligatory only in case of a misdemeanour committed in the activity of an exchange office that is not registered or in case of statutory violation if it is an act of minor significance (Article 49 §4 in connection with Article 106d §2 FPC), and in other cases the forfeiture is facultative. Thus, a ticketing body decides whether its adjudication is necessary *in concreto*, which excludes the application of a ticket, or whether it is not necessary, which allows the limitation of the penal response to imposing a fine in the form of a ticket.

The differences between the misdemeanour law and the fiscal penal law also concern the types of tickets applicable to perpetrators of common misdemeanours and fiscal misdemeanours. In case of common misdemeanours, there are three types of tickets: a cash payment ticket, a credit ticket and an *in absentia* ticket (Article 98 §1 MPC), and in fiscal penal law, there are only the first two types of tickets applicable (Article 138 §1 FPC).

A cash ticket is, in accordance with both regulations, a ticket issued after a fine is paid directly to an officer (an authorised body) who has imposed it. It becomes valid and final with the moment of its settlement, however, it can "only" be applied to persons who stay in Poland temporarily or do not have a permanent domicile or place of residence (Article 98 §2 MPC and Article 138 §2 and §4 FPC), and in case of fiscal misdemeanours committed by persons who stay in Poland permanently but are leaving the country temporarily (Article 138 §3 FPC), e.g. tourists and persons leaving the country to take part in internships or conferences who commit customs- or currency-related misdemeanours while crossing the Polish border.

On the other hand, a credit ticket, also in accordance with both statutes, is issued to fine a perpetrator signing its receipt, with an obligation to settle it within seven days from the date of receipt. It becomes valid and final with the moment the perpetrator signs its receipt so, in case of his/her failure to settle it on time, it is subject to enforcement following the administrative execution mode (Article 98 §3 and Article 100 §12 MPC and Article 138 §4 *in fine* and §5 and Article 187 §2 FPC). The ticket is issued in cases of fiscal misdemeanours only to fine a person different than the one who can be punished with a cash ticket (Article 138 §4 in connection with §2 FPC), i.e. has a permanent domicile or place of residence. The same situation took place under the misdemeanour law[13] before the Act of 10 March 2014 amending the Act: Law on road traffic and some other acts.[14] Due to this Act, passed in order to implement the Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences, since 30 April 2014 the number of entities who may be punished with a credit ticket instead of only a cash ticket, as it was before, has increased.[15] At present, in case of common misdemeanours, a credit ticket may

[13] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], 2012, pp. 347–348.

[14] Journal of Laws [Dz.U.] of 2014, item 486.

[15] For more on the same change, see T. Grzegorczyk, *Postępowanie w sprawach o wykroczenia po zmianach z końca poprzedniej dekady i z lat 2011–2016* [Misdemeanour procedure after amendments

be applied to punish a person who has a permanent domicile or place of residence in Poland and a person who does not have it in Poland but has it in another EU state (new §3 of Article 98 MPC).

An *in absentia* ticket, on the other hand, provided for only in the misdemeanour law, is applicable in situations where a ticketing body visually recognises a misdemeanour while a perpetrator is not present at the scene (e.g. an owner's or administrator's failure to mark the real estate or to illuminate its number – Article 64 MC, or parking a vehicle in a way that obstructs traffic on a public road or in a prohibited place – Article 90 or Article 97 MC), provided that there is no doubt who that person is. A ticket is then left in a place visible to the perpetrator immediately when he/she returns and can collect it (Article 96 §4 MPC). It must be settled within seven days from the date of issue, not the date of receipt. Thus, the document must clearly indicate this date and the place where the ticket may be settled, i.e. into which institution's account the money is to be paid, as well as instruct the perpetrator about the consequences of failing to settle the fine in time (Article 96 §5 first sentence MPC). The consequence is bringing a motion to punish the perpetrator before court (Article 99 MPC). However, in case of settling a ticket in the place and time indicated, it becomes valid and final (Article 96 §5 second sentence MPC). In case of late settlement of a ticket but before a ticketing body, which is a prosecuting one, files a motion at court, further prosecution should be abandoned. However, if a fine is paid after a motion to punish was filed, the fact that the fine was settled is not an obstacle to judicial proceedings because the ticket is not valid and final as it was not settled in due time laid down in statute.[16]

3.

If a ticket becomes valid and final when it is settled/paid directly to the body imposing a fine or when it is settled within the time indicated, or at the moment of signing its receipt, a question arises concerning situations when it turns out that it has been defectively issued with a violation of law.

In accordance with the former MPC of 1971, from March 1991 there was a solution, introduced by the Regulation of the Minister of the Interior of 5 March 1991 on imposing, settling and enforcing fines within the ticketing proceedings,[17] which was an executive regulation to this Code. Based on it, in case of imposing a fine "for an act not being a misdemeanour", the settled amount should be returned

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of the late 2000s and 2011–2016], [in:] T. Grzegorczyk and R. Olszewski (ed.), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga Pamiątkowa poświecona Profesor Monice Zbrojewskiej* [Verba volant scripta manent. Criminal trial, fiscal penal law and misdemeanour law after the amendments of 2015–2016. Commemorative book dedicated to Professor Monika Zbrojewska], Wolters Kluwer, Warsaw 2016, p. 75.

[16] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], 2012, p. 350; M. Rogalski, [in:] A. Kiełtyka, J. Praśkiewicz, W. Rogalski (ed.), A. Ważny, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], Wolters Kluwer, Warsaw 2009, pp. 168–169.

[17] Journal of Laws [Dz.U.] of 1991, No. 20, item 87.

to the punished person (§6(2) of the Regulation) by the ticketing body that imposed the fine. In case a fine was imposed with the infringement of other provisions concerning the ticketing proceedings, e.g. concerning the grounds for its imposition, the party involved had to institute an administrative or civil law action in order to recover the amount settled due to the receipt of the ticket.[18]

No sooner than on 1 September 1998, did the amendment to the Code of August 1998 introduce a possibility of quashing a valid penal ticket directly to the common misdemeanour procedure. The new Article 67a §1 of the former MPC laid down that a valid penal ticket "is subject to quashing" if a fine was imposed "for an act not being a misdemeanour", and that the quashing shall be done on the punished person's demand within seven days from the moment when it became valid or *ex officio*, and that the body that is authorised to quash a ticket is the one at that time adjudicating on misdemeanours, i.e. the misdemeanour board, under the jurisdiction of which the fine was imposed. It adjudicated on this during a session and could order checking the grounds for quashing a ticket (Article 67a §2 of the former MPC). When the ticket was quashed, the board should order the institution that collected a fine to return it to the punished person (§3 of Article 67a of the former MPC). Thus, quashing a ticket was obligatory but, as it was indicated, it did not concern a ticket defectively issued, e.g. with the infringement of the ticketing rate or a defective classification of a given act or even in relation to an act that was not subject to then limited ticketing proceedings, but only concerned a ticket imposing a fine for an act that was not a misdemeanour in the light of misdemeanour law,[19] therefore it constituted either non-punishable behaviour or a crime.

The Fiscal Penal Code adopted the solution in 1999 and laid down that quashing of a valid ticket was possible in case it imposed a fine "for an act not being a fiscal misdemeanour", where the requirement was interpreted in the way similar to common misdemeanour interpretation as the one concerning a situation in which the given behaviour was neutral from the point of view of criminal law, i.e. it constituted a fiscal crime or a common crime, or a common misdemeanour.[20] However, quashing of a ticket was in the competence of courts, which were entirely authorised to adjudicate in fiscal penal cases.

Also the Misdemeanour Code of 2001, as a rule, adopted the solution introduced to the ticketing proceedings of 1998. Quashing of a valid ticket, due to the dissolution of misdemeanour boards, was assigned to a regional court under the jurisdiction of

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[18] For more, see T. Grzegorczyk, *Kształtowanie się instytucji uchylania prawomocnego mandatu karnego w sprawach o wykroczenia i jego postać po nowelizacji z 20 lutego 2015 r.* [Development of the institution of quashing a valid ticket for misdemeanours and its form after the amendment of 20 February 2015], [in:] J. Sawicki and K. Łucarz (ed.), *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu* [At the contact point of criminal law and misdemeanour law: substantive and procedural legal issues. Professor Marek Bojarski jubilee book], Wrocław 2016, Vol. I, pp. 331–332.

[19] See, T. Grzegorczyk, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], 1999, pp. 283–284.

[20] See, e.g. A. Światłowski, [in:] G. Bogdan, A. Nita, Z. Radzikowska, A. Światłowski, *Kodeks karmy skarbowy z komentarzem* [Fiscal Penal Code with commentary], Info-Trade, Gdańsk 2000, p. 480; T. Grzegorczyk, *Kodeks karny skarbowy...* [Fiscal Penal Code...], 2000, p. 459.

which a ticket was issued (Article 101 §2 first sentence in connection with Article 9 MPC). It adjudicated on the matter upon the punished person's demand filed before the end of the absolute seven-day period from the date when a ticket became valid or *ex officio* (Article 101 §1 MPC). In the latter case, it also concerned a punished person's late motion, without justified reasons for re-establishing the missed deadline, as well as a court's activity *ex officio* as a result of e.g. adequate information from a ticketing body or a prosecutor about imposing *in concreto* a fine for the behaviour that was not prohibited as a misdemeanour. Quashing *ex officio* was not restricted to any time limit, thus it could take place also after the limitation of a misdemeanour prosecution as laid down in Article 45 §1 MC.[21] Before adjudication on the matter of quashing a ticket, a court could order respective activities be undertaken in order to check the grounds for this decision (Article 101 §2 third sentence MPC). These involved evidence collection supervisory activities envisaged in the newly introduced Article 97 MPC (Article 32 §5 MPC), hence e.g. interrogation of an officer who issued a ticket or a witness of the incident, including the aggrieved or the punished person, as well as getting acquainted with the documents submitted by these parties, which might be important for the adjudication.[22]

At the beginning a court adjudicated, as the misdemeanour board before, during a session in the parties' absence (Article 101 §2 second sentence in connection with Article 33 MPC). However, as of 3 August 2005, the punished person as well as a body or its officer who issued a ticket imposing a fine, or a representative of this body as well as the aggrieved by this act (a new third sentence added in §2 of Article 101 MPC) have had the right to take part in the session. This is a result of the Act of 6 May 2005 amending the Misdemeanour Procedure Code[23] passed as a consequence of the Constitutional Tribunal judgement No. SK 38/03 of 18 May 2004,[24] recognising this provision as incompliant with Article 45 of the Constitution because it did not provide the aggrieved with an opportunity to take part in the discussed court's session, which infringes their right to a court hearing.

In the regulation introduced by MPC of 2001, it was clearly emphasised that it concerned quashing of a ticket imposing a fine for an act "not being an act prohibited as a misdemeanour", and not for an act "not being a misdemeanour" as it had been formulated before. It was the legislator's response to legal practitioners' opinions that a requirement that the ticket should be issued for an act "not being a misdemeanour" provides an opportunity to refer, in a motion to a court to quash it, to such circumstances as the lack of guilt or the exclusion of unlawful behaviour or the lack

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[21] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], Warsaw 2002, p. 342; or J. Lewiński, *Mandat karny* [Penal ticket], LexisNexis, Warsaw 2003, p. 35.

[22] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach…* [Misdemeanour Procedure Code...], 2002, p. 343; J. Lewiński, *Mandat…* [Penal ticket…], p. 35.

[23] Journal of Laws [Dz.U.], No. 132, item 1103.

[24] OTK ZU 5A/2004, item 45; Journal of Laws [Dz.U.] of 2004, No. 128, item 1351, Lex No. 1130–1; for more, see e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], DW ABC, Warsaw 2005, p. 354 and by the same author, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* [Misdemeanour Procedure Code: Commentary], Wolters Kluwer, Warsaw 2008, pp. 382–383.

of *in concreto* social harmfulness of an act, which could change the proceedings aimed at quashing the ticket voluntarily accepted by a perpetrator into a trial concerning liability for a misdemeanour which the perpetrator already accepted when receiving the ticket.[25] Therefore, from September 2001, a ticket subject to quashing has been the one imposing a fine for an act that does not have the features of an act prohibited by misdemeanour law, i.e. imposed for behaviour that is legally neutral or penalised but not as a common misdemeanour, but e.g. as a fiscal misdemeanour or a common crime or a fiscal crime.[26] The solution was also introduced to the Fiscal Penal Code but not sooner than on 17 December 2005 as a result of the Act of 28 July 2005 amending Fiscal Penal Code.[27] Thus, it started to be applicable to fiscal misdemeanours.[28]

In connection with that, mainly based on common misdemeanours, it was raised that there were still no grounds for quashing a ticket in case a given behaviour was classified under a different provision of the misdemeanour law than the one used by a ticketing body as well as where a body imposing a fine in this mode was not entitled to issue a ticket in connection with the prohibited behaviour concerned or where the imposed fine exceeded the limit for a punishment admissible in ticketing proceedings, and where it was imposed in conflict with limitations laid down in the provisions regulating this proceedings.[29] Thus, the solution raised various doubts in the literature, where far-reaching proposals *de lege ferenda* were sometimes made, e.g. to limit the issue of tickets in misdemeanour law to *in absentia* tickets, which, if failed to be settled in time, results in placing a case before court and so eliminates a ticket.[30] This suggestion, however, is difficult to be recognised as well-grounded. At that time, however, some of the doubts could be solved with the use of systemic and not linguistic interpretation.[31]

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[25] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], 2002, p. 343; J. Lewiński, *Mandat...* [Penal ticket...], p.34.

[26] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], 2002, p. 343, and *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], 2008, p. 381; Z. Świda, [in:] M. Bojarski, Z. Świda, *Podstawy materialnego i procesowego prawa o wykroczeniach* [Substantive and procedural misdemeanour law], UW, Wrocław 2002, p. 293; M. Rogalski, [in:] A. Kiełtyka, J. Paśkiewicz, M. Rogalski (ed.), A. Ważny, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], pp. 370–371; J. Lewiński, *Mandat...* [Penal ticket...], p. 34; J. Lewiński, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], pp. 313–314; M. Zbrojewska, [in:] M. Błaszczyk, W. Jankowski, M. Zbrojewska, *Prawo i postępowanie w sprawach o wykroczenia* [Misdemeanour law and procedure], C.H. Beck, Warsaw 2013, p. 314.

[27] Journal of Laws [Dz.U.] of 2005, No. 178, item 1479.

[28] For more about this change in FPC, see, e.g. G. Skowronek, *Kodeks karny skarbowy. Art. 113–191. Komentarz* [Fiscal Penal Code: Articles 113–191. Commentary], C.H. Beck, Warsaw 2006, p. 270, or T. Grzegorczyk, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2006, p. 572.

[29] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], 2008, p. 381; M. Rogalski, [in:] A. Kiełtyka, J. Paśkiewicz, M. Rogalski (ed.), A. Ważny, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], p. 371; J. Lewiński, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], p. 314.

[30] See, e.g. J. Jodłowski, *Postępowanie mandatowe – wątpliwości konstytucyjne* [Polish ticketing proceedings – constitutional doubts], Palestra 2008, No. 1–2, pp. 92–98.

[31] For more, see T. Grzegorczyk, *Kształtowanie się instytucji...* [Development of the institution...], [in:] J. Sawicki and K. Łucarz (ed.), *Na styku prawa karnego...* [At the contact point...], pp. 134–135.

The Constitutional Tribunal drew attention to one more aspect of quashing a valid ticket in its judgement No. P 13/06 of 15 May 2007,[32] in which it was stated that "the concept of 'an act not being an act prohibited as a misdemeanour' requires taking into consideration that a punishable act must be a culpable one, i.e. at the moment of commission, a perpetrator may be required to comply with an obligation or prohibition resulting from a legal norm", which was connected with the fact that *in concreto* a ticket accepted by the perpetrator imposed a fine on a totally incapacitated person due to a serious mental disorder. The Tribunal, although it discontinued the proceedings in the case, indicated that the subject matter of the judicial review in the ticket quashing proceedings should also include consideration whether a given act committed by a person "may be classified as a misdemeanour" and highlighted that a prohibited act is not one if guilt cannot be attributed to a perpetrator in the course of its commission, and that maybe also an issue concerning "quashing unlawfulness or social harmfulness of an act" should be analysed.[33] As far as the latter issue is concerned, i.e. the need to analyse social harmfulness of an act during the ticket quashing proceedings, the Constitutional Tribunal's opinion cannot be approved of. In accordance with misdemeanour law, unlike in criminal common and fiscal law, there is no gradation of harmfulness, thus there is no minimum limit excluding liability, i.e. the so-called insignificant harmfulness (Article 1 §2 CC and Article 1 §2 FPC) is absent in the Misdemeanour Code (Article 1 MC). This area of law deals with insignificant acts, i.e. resulting in harmfulness that is lower than negligible, and legal liability may only be excluded in case of total lack of *in concreto* this harmfulness of the given behaviour.[34] However, a perpetrator can refuse to collect a ticket if he/she believes that his/her behaviour is totally harmless, and this way makes a ticketing body agree with him/her or place the case before court where the accused can prove harmlessness of his/her act.

Regardless of the above-mentioned reservations, it is not possible to approve of the solution adopted in this subject matter in 2001 because it raised justified doubts in the doctrine and in practice, and required systemic interpretation and intervention of the Constitutional Tribunal. However, the activities were insufficient to eliminate all problems occurring in the practical application of law. The state required the intervention of the legislator, as this was the only way to eliminate deficiencies of the vague regulation adopted in 2001.

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[32] OTK–A 2007, No. 8, item 57; for more about this judgement see also, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], 2012, p. 354.

[33] For more about this judgement, see T. Grzegorczyk, *Kształtowane się instytucji*... [Development of the institution...], [in:] J. Sawicki and K. Łucarz (ed.), *Na styku prawa karnego*... [At the contact point...], pp. 135–136.

[34] For more, see e.g. M. Bojarski, [in:] M. Bojarski, W. Radecki, *Kodeks wykr*oczeń... [Misdemeanour Code...], pp. 99–105; T. Bojarski, [in:] T. Bojarski, J. Michalska-Warias, J. Piórkowska-Flieger, M. Szwarczyk, *Kodeks wykroczeń. Komentarz* [Misdemeanour Code: Commentary], Warsaw 2007, p. 29, or T. Grzegorczyk, [in:] T. Grzegorczyk, W. Jankowski, M. Zbrojewska, *Kodeks wykroczeń. Komentarz* [Misdemeanour Code: Commentary], Wolters Kluwer, Warsaw 2013, pp. 32–34; see also the Supreme Court judgement of 17 December 2003, V KK 222/03, Lex No. 83772.

4.

This was the direction of work of the Criminal Law Codification Committee appointed in 2009 to prepare the amendment to the substantive and procedural criminal law *sensu largo*, which also covered the substantive and procedural misdemeanour law and fiscal penal law. The work resulted in the development of Bills amending procedural law and substantive law of 2012 and 2014, respectively, which were adopted by the government and passed by the Sejm as two acts: the Act of 17 September 2013 amending Act: Criminal Procedure Code and some other acts[35] (hereinafter referred to as the Amendment of September 2013) and the Act of 20 February 2015 amending Act: Criminal Code and some other acts[36] (hereinafter referred to as the Amendment of February 2015). Both amendments entered into force on 1 July 2015. At the same time, the latter also modified some solutions adopted in the former amendment, including in the field of quashing of valid tickets issued for common misdemeanours (Article 8(2) of the Amendment of February 2015).

The changes concerning quashing of a penal ticket issued in cases concerning common misdemeanours, however, entered into force earlier than other solutions of those amendments, because already 14 days after the publication of the Amendment of February 2015 (Article 29(2) of the Act in connection with its Article 8(2)), i.e. on 4 April 2015. Since that date on, quashing of tickets in accordance with misdemeanour law has had a new form. However, the new solution in fiscal penal law adopted in the Amendment of September 2013 entered into force on 1 July 2015.

Due to the fact that the solution concerning quashing of valid penal tickets adopted in the Amendment of September 2013 was the same in the two fields of law where they are applicable and then the Amendment of February 2015 changed the way of quashing tickets for common misdemeanours, the analysis of these solutions should be started with the presentation of the solution adopted in the Amendment of September 2013.

The Bill of the Amendment of September 2013 assumed the same solution in the new wording of Article 101 §1 MPC and Article 140 §1 FPC,[37] laying down that a penal ticket shall be quashed in case "a fine was imposed for an act not being prohibited as a misdemeanour or on a person who did not commit that act or who is not liable for a misdemeanour".[38] Justifying the need to adopt such a solution, the

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35 Journal of Laws [Dz.U.] of 2013, item 1247.

36 Journal of Laws [Dz.U.] of 2015, item 396.

37 On the assumptions of this Bill with respect to the scope discussed, see T. Grzegorczyk, *Postępowanie mandatowe jako pozasądowy sposób rozstrzygania spraw o wykroczenia po ponad 10 latach obowiązywania procedury wyktoczeniowej z 2001 r.* [Ticketing proceedings as a non-judicial way of settling misdemeanour cases after over 10 years of Misdemeanour Code of 2001 being in force], [in:] A. Błachnio-Parzych et al. (ed.), *Problemy wymiaru sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiego* [Criminal justice issues. Professor Jan Skupiński jubilee book], Wolters Kluwer, Warsaw 2013, p. 687.

38 See Article 101 §1 first sentence MPC in the wording suggested in Article 16(22) of the government Bill and Article 140 §1 FPC in the wording suggested in Article 14(13) of the Bill – VII term Sejm paper No. 870.

legislator then[39] referred to the above-mentioned judgements of the Constitutional Tribunal and the opinions of the doctrine and agreed that the grounds for quashing a ticket, apart from a situation when it was issued for an act that is not prohibited as a misdemeanour, should also cover, in accordance with the constitutional requirements, cases where it was issued for an act prohibited as a misdemeanour but imposed on a person who was actually not a perpetrator, as well as where it was imposed on a perpetrator who cannot be attributed with liability, including guilt. Thus, it was raised that in the former regulation "it is difficult to find, without special interpretation and regardless of the historical interpretation and the former wording of the statute, requirements indicated by the Constitutional Tribunal in the present grounds for quashing a ticket", and that was the reason for amending it. The provision also assumed clarification that this quashing takes place "on the punished person's or his/her statutory representative's or his/her guardian's motion, filed seven days after a ticket became valid at the latest or *ex officio*" (new second sentence of §1 of both discussed provisions). It was connected with the assumption of admissibility of applying for quashing a ticket also when it was issued to a minor or another person who is not liable for a misdemeanour (e.g. an insane person), but also meant the abandonment of the attitude that the time limit for filing this motion is absolute, i.e. non-extendable but subject to reinstatement.

The discussed Bill also proposed supplementing Article 101 MPC with a new §1a, which stipulated that a valid penal ticket should be quashed also in case a fine was imposed against bans laid down in the formerly discussed Article 96 §2 MPC (§1a first sentence) and in case it was imposed in the amount exceeding what is laid down in Article 96 §1–1b MPC presented above, however, in this case only in the amount exceeding the admissible volume of punishment (§1a second sentence). The same assumption constituted grounds for supplementing Article 140 FPC discussed above with the new §1a introducing quashing of a penal ticket in case it was issued against bans laid down in Article 137 §2(2) and (4) FPC, and in case it imposed a fine higher than the one stipulated in Article 48 §2 FPC, i.e. higher than admissible in the ticketing proceedings.

The legislator in general accepted the above-mentioned proposals passing the amending Act of 27 September 2013. No changes were introduced to the suggested new provisions of §1a of Article 101 MPC and Article 140 FPC. However, as far as the new §1 of Article 101 MPC and §1 of Article 140 FPC are concerned, the first sentence about the grounds for quashing a ticket adds a clear indication that a valid penal ticket "is subject to immediate" quashing, indicates the necessity of fast judicial response to a motion to quash it or any information on the grounds for quashing it and obliging a court to act *ex officio*. Also the second sentence but only of §1 of Article 101 MPC was supplemented with respect to initiating ticket quashing proceedings by authorising a body whose officer issued a ticket imposing a fine to file a motion to quash the ticket, however, this body is not bound by the seven-day period after the ticket became valid, which means the time limit is applicable only to a person punished. Also the form of one of the new prerequisites

[39] See justification for the Bill in the Sejm paper No. 870 (17).

for quashing a ticket proposed in the Bill was modified in both codes. The legislator adopted a solution that, instead of the suggested circumstances of imposing a fine "on a person who has not committed a misdemeanour", the fact that a fine was imposed "on a person who did not sign a penal ticket" constituted grounds for quashing.

Therefore, after the amendment entered into force, the grounds for quashing a valid ticket for a common as well as fiscal misdemeanour by court were to take place "in case a fine was imposed for an act not being prohibited as a misdemeanour or on a person who did not sign a penal ticket, or who is not liable for a misdemeanour". However, the indication of a person who did not sign a ticket was misleading. It might suggest that it concerned a situation when a fine was imposed without the punished person's consent to collect a ticket because the person punished signs a ticket to confirm his/her consent to the ticketing proceedings applied to a misdemeanour in question, so the ticket cannot be issued if a perpetrator refuses to give this consent. However, the Bill aimed to create a possibility of quashing a ticket in case it was issued for an act prohibited as a misdemeanour but imposed a fine on a person who did not commit the act due to the fact that the real perpetrator provided a ticketing body with false personal data as his/her own and signed the document with somebody else's name. It does not raise any doubts, however, that in the Amendment of September 2013, the legislator abandoned the idea behind the codification of 2001 that quashing of a valid ticket should be applicable only to cases where a fine was imposed for an act not carrying a penalty as a misdemeanour. Maintaining this reason for quashing, the legislator also added other specific situations in which a ticket is issued for an act prohibited as a misdemeanour but with the infringement of substantive or procedural misdemeanour law or fiscal penal law.

However, as has been mentioned earlier, still before the solution entered into force, the Amendment of February 2015 modified it with respect to common misdemeanours and the earlier date of its entry into force. Formally, Article 8 of the Act changed all the editorial units of Article 101 CPC, which were subject to the Amendment of September 2013, and added the new §1b. However, the new solutions were in fact included in §1, §1b and §4 of Article 101 MPC and the present §1a is equivalent to the provision adopted in the Amendment of 2013, but as far as the mode of quashing is concerned, it refers to §1 of Article 101 MPC. On the other hand, in the provision of §1 of Article 101 MPC, maintaining the requirement of quashing a ticket "without delay" and stipulating that it concerns first of all a situation in which a fine was imposed for an act not being a misdemeanour, the legislator broadened and defined grounds for its quashing by adding the following situations: (a) where a fine was imposed on a perpetrator who is under 17 years of age, and (b) where a punished perpetrator is over 17 years of age but he/she is not liable for the commission of a misdemeanour because of the reasons laid down in Articles 15–17 MC, i.e. due to the right of self-defence, necessity or insanity. The solution is still supplemented by new grounds for quashing a ticket stipulated in §1a of Article 101 MPC adopted in the Amendment of September 2013, i.e. where it was issued to impose a fine against limitations under Article 96 §2 MPC or over

the penalty limit admissible in this mode laid down in Article 96 §1–1b MPC. The legislator also adopted the modified solutions for initiating court proceedings to quash a ticket, which was provided for in the Amendment of September 2013, including the one based on a motion filed by a ticketing body that issued a defective ticket (Article 101 §1 second sentence MPC).

On the other hand, the new provision of §1b of Article 101 MPC added by the Amendment of February 2015 is connected with the controversial issue of reopening the ticket quashing proceedings.[40] In the above-mentioned Constitutional Tribunal judgement No. SK 38/03 of 18 May 2004 in relation with the recognition of Article 101 §1 MPC as unconstitutional, the Tribunal indicated a possibility of making use of the right laid down in Article 190(4) of the Constitution of the Republic of Poland, i.e. the basis for reopening quashing proceedings. However, the Supreme Court expressed a justified opinion that neither reopening of the ticketing proceedings nor the proceedings ending with the issue of a decision refusing to quash a ticket is admissible; the latter because the refusal does not finish court proceedings in accordance with Article 113 §1 MPC.[41] A refusal to quash a ticket means that the ticket validly finished the proceedings at the prejudicial stage and there are no grounds for quashing it. The problem was noticed in connection with the Amendment of September 2013. As it was indicated in the justification for the Bill,[42] "in order to eliminate these differences", it was proposed to "change the content of Article 113 §1 MPC so that it clearly showed that it concerned reopening of the validly finished proceedings in accordance with the provisions of Chapters 11–16, i.e. in the standard (…) and summary as well as writ proceedings (…), and under Part X MPC, i.e. appellate proceedings". The legislator approved of the solution and since 1 July 2015, i.e. since the Amendment of September 2013 (in the scope not changed by the Amendment of February 2015) entered into force, there should be no doubts that neither ticketing proceedings nor court proceedings to quash a valid ticket are subject to reopening due to the provisions of CPC on reopening proceedings.

In accordance with the above, in the Amendment of February 2015, it was decided to create procedural possibilities for the court to interfere in ticketing proceedings finished with a valid receipt of a ticket in relation to some situations, which are grounds for reopening of the criminal proceedings. The circumstances recognised as such are laid down in Article 540 §2 and §3 of the Criminal Procedure Code (CPC) and they are, in relation to misdemeanour law, a judgement of the Constitutional Tribunal on the incompliance with the Constitution, an international agreement or statute of a normative act on the basis of which a ticket imposing

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[40] See, e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], 2005, p. 355.

[41] Already so in the Supreme Court judgement of 30 September 2003, I KZP 25/03, OSNKW 2003, No. 9–10, item 81, or in the Supreme Court judgement of 1 December 2003, II KZ 46/03, LEX No. 185473; for approval of this opinion, see e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], 2005, p. 355; M, Rogalski, [in:] A. Kiełtyka, J. Paśkiewicz, M. Rogalski (ed.), A. Ważny, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], p. 373; or J. Lewiński, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], pp. 315–317.

[42] See justification for the Bill in VII term Sejm paper No. 870.

a fine was issued (new §1b(1) of Article 101 MPC), and a case where the need to reopen the proceedings results from the settlement issued by an international body acting in accordance with an international agreement ratified by Poland (§1b(2) of Article 101 MPC). At the same time, it was decided that in both cases a valid penal ticket should be subject to quashing "at any time" upon the punished person's or his/her statutory representative's or his/her legal guardian's motion or a motion of the body whose officer imposed a fine, and *ex officio*. In addition, the new §4 of Article 101 MPC made a reservation that in case of quashing a ticket due to reasons laid down in §1b, when a new judgement is issued in the case in which a ticket was quashed, it cannot be unfavourable for the accused, i.e. that the prohibition of *reformationis in peius* is applicable.[43]

However, the solution was not adopted into the field of quashing tickets for fiscal misdemeanours. Although adequate application of the provisions of CPC to misdemeanours is laid down in FPC (Article 113 §1 FPC), for instance in connection with reopening criminal proceedings, it must be remembered that such reopening is tantamount to the return to a validly finished trial in which a "judgement" was issued based on a provision then recognised by the Constitutional Tribunal as not being in conformity with the Constitution of the Republic of Poland or an international agreement ratified by Poland or when the need to reopen the proceedings results from a judgement of an international court. However, in accordance with fiscal penal law, a fiscal penal ticket is not a "judgement" as provided for in Article 540 §2 CPC in connection with Article 113 §1 FPC, regardless of whether it imposed a fine just after the recognition of a fiscal misdemeanour or whether the ticketing procedure, as a prejudicial response to a misdemeanour, was applied in the course of an inquiry conducted in a given case. A court judgement that earlier refused to quash a ticket is not subject to reopening because it is an extraordinary measure of appeal against the judgement that became valid and final earlier, and there is no provision in FPC that allows reopening of the ticketing proceedings because it is not provided for in Article 540 §2 and §3 CPC in connection with Article 13 §1 FPC.

5.

As a result of the amendments presented above, two different models of quashing valid penal tickets by a court are present in Polish law.

As far as common misdemeanours are concerned, the grounds for quashing a valid ticket include the following circumstances:

a) as before, imposing a fine for an act not carrying a penalty as a misdemeanour (Article 101 §1 first sentence *in principio* MPC), i.e. for the behaviour that is legally neutral, does not match the features of any punishable acts laid down in

[43] On this solution, see e.g. T. Grzegorczyk, *Kształtowanie się instytucji...* [Development of the institution...], [in:] J. Sawicki and K. Łucarz (ed.), *Na styku prawa karnego...* [At the contact point...], pp. 139–145; or P. Gensikowski, *Postępowanie w sprawach o wykroczenia. Komentarz* [Misdemeanour procedure: Commentary], C.H. Beck, Warsaw 2017, pp. 398–400.

the provisions of misdemeanour law or punishable but not as common misdemeanours; and

b) imposing a fine for an act punishable as a misdemeanour but on a person who at the moment of its commission was not yet 17 years old (Article 101 §1 first sentence *in medio* MPC), thus a minor, i.e. a person who is not liable for misdemeanours in accordance with misdemeanour law but in the mode and following the rules laid down in the Act on proceedings concerning minors of 1982;[44] or

c) imposing a fine where a statute stipulates that a perpetrator does not commit a misdemeanour because of the reasons laid down in Articles 15–17 MC (Article 101 §1 first sentence *in fine*), i.e. due to self-defence (Article 15), necessity (Article 16) or insanity (Article 17 §1 MC[45]);[46] thus, the situation discussed earlier, i.e. where a ticket was issued to a person other than the actual perpetrator who accepting a ticket used somebody else's identity documents, is not envisaged here as possible and justified; however, it should be acknowledged, with the use of systemic and functional interpretation, that there are grounds for quashing a ticket even in such a situation because a fine was imposed on a person who did not commit an act indicated in the decision, and as a ticket is to be a penalty for an actual perpetrator and it can be quashed if it is issued for an act that is not punishable as a misdemeanour, it should also be done if a person indicated in a ticket as a perpetrator is not one because has not committed any punishable act at all; as well as

d) in case of imposing a fine for an act being a misdemeanour but against a ban on its application laid down in Article 96 §2 MPC, i.e. when (1) it concerns a misdemeanour carrying a penal measure (e.g. ban on driving or forfeiture of objects) because this is in the competence of a court and a ticket would eliminate a possibility of such adjudication; and (2) where given behaviour matches the features of a misdemeanour and a crime (Article 10 MC) as it requires separate adjudication of every aspect of that act by court; as well as (3) when a perpetrator's behaviour matches the features of misdemeanours laid down in more than one provision of misdemeanour law (Article 9 §2 MC) and ticketing proceedings by a given body are not possible in connection with all the infringed provisions (new §1a *in proncipio* of Article 101 MPC);[47] and

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[44] See Article 1 §2(2)(b) and Articles 2 and 6 of the Act of 26 October 1982, uniform text: Journal of Laws [Dz.U.] of 2010, No. 33, item 179; see also, e.g. T. Bojarski, [in:] T. Bojarski, E. Kruk, E. Skrętowicz, *Ustawa o postępowaniu w sprawach nieletnich. Komentarz* [Act on proceedings concerning minors: Commentary], LexisNexis, Warsaw 2014, pp. 36–80.

[45] Although in the provision of Article 101 §1 MPC there is a general reference to Article 17 MC, regardless of the fact that only §1 of this provision concerns exclusively liability in connection with insanity, as Article 101 §1 MPC lays down cases where the statute stipulates that a perpetrator "does not commit a misdemeanour", the reason for quashing a ticket is applicable only in a situation indicated in §1 of Article 17 MC, and limited sanity (Article 17 §2 MC) as well as insobriety or drug intoxication resulting in temporary insanity (§3 of Article 17 MC) do not constitute such grounds.

[46] On these reasons, see e.g. M. Bojarski, [in:] M. Bojarski, W. Radecki, *Kodeks wykroczeń*... [Misdemeanour Code...], pp. 178–202; or T. Grzegorczyk, [in:] T. Grzegorczyk, W. Jankowski, Z. Zbrojewska, *Kodeks wykroczeń*... [Misdemeanour Code...], pp. 83–95.

[47] On this, see e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], 2012, p. 342; J. Lewiński, *Kodeks postępowania w sprawach*... [Misdemeanour

e) where a fine was imposed in the amount higher than defined in Article 96 §1–1b MPC (Article 101 §1a *in fine* MPC); thus, this does not concern a ticket imposing a fine higher than envisaged in the list of fixed fines[48] (therefore, a motion in this area is not legally admissible) but imposing it at the level that exceeds the limits of the penalty laid down in the statute[49] and, at the same time, only in the scope of the amount that exceeds those limits, without any considerations and arguments whether the limit of punishment resulting from the statute was *in concreto* adequate; and
f) where the provision on the basis of which a fine was imposed was considered by the Constitutional Tribunal incompliant with the Constitution, an international agreement or a statute (new §1b(1) of Article 101 MPC), and where the need to quash the penalty results from a judgement of an international body acting based on an international agreement ratified by Poland (Article 101 §1b(2)), hence in situations that, in a criminal trial, are grounds for reopening proceedings laid down in Article 540 §2 and §3 CPC, respectively.

As concerns the last of the conditions, it should be noted that, as it was indicated in the Supreme Court resolution No. I KZP 14/14 of 16 June 2014,[50] the "need" to reopen criminal proceedings specified in §3 of Article 540 CPC, i.e. in the equivalent of present Article 101 §1b(b) MPC, may result not only from proceedings in a case referred to in a judgement of the European Court of Human Rights (ECtHR) on the infringement of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) but also from other criminal proceedings [here on common misdemeanours – note by T.G.], in which an infringement of the provisions of ECHR took place, as far as factual and legal circumstances are concerned, identical with the ECtHR judgement issued against Poland. Thus, the above opinion is binding at present not only in connection with reopening validly finished proceedings in cases concerning misdemeanours (Article 113 §1 MPC) but also in connection with quashing valid penal tickets. Therefore, it is important whether the ECtHR judgement indicating that a given body's action constituted an infringement of the

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Procedure Code...], pp. 299–301, M. Rogalski, [in:] A. Kiełtyka, J. Paśkiewicz, M. Rogalski (ed.), A. Ważny, *Kodeks postępowania w sprawach...* [Misdemeanour Procedure Code...], pp. 359–360.

[48] See the Regulation of the Prime Minister of 24 November 2003 on the amount of fines imposed in ticketing proceedings for selected misdemeanours issued in accordance with Article 95 §6 MPC, Journal of Laws [Dz.U.] of 2003, No. 208, item 2023.

[49] On the other hand, the Code stipulates at present, after the amendments of this decade, that a fine for a misdemeanour as a rule cannot exceed PLN 500, and in case of the infringement of a few provisions of the statute at the same time – PLN 1,000 (§1 of Article 96 MPC); however, in case of misdemeanours where State Labour Inspectorate is a prosecuting body and in case of some infringements of obligations and conditions of road transport where Road Transport Inspectorate or the Police are prosecuting bodies, and in some infringements of construction law – PLN 2,000 (§1a and §1c of Article 96 MPC); a fine in such an amount is also envisaged for misdemeanours under the Act on mass gatherings security of 2009 (§1aa of Article 96 MPC), and in case of a relapse into misdemeanour involving infringement of employees' rights – even PLN 5,000 (§1b of Article 96 MPC). On this, see e.g. T. Grzegorczyk, *Kodeks postępowania w sprawach*... [Misdemeanour Procedure Code...], 2012, pp. 338–341; T. Grzegorczyk, *Postępowanie w sprawach o wykroczenia po zmianach...* [Misdemeanour procedure after amendments...], pp. 75–76; and P. Gensikowski, *Postępowanie...* [Misdemeanour procedure...], pp. 382–385.

[50] OSNKW 2014, No. 8, item 59.

ECHR provisions, which is also raised in another case, has been issued against Poland.

On the other hand, as far as fiscal penal tickets are concerned, quashing of a valid ticket by court is presently possible only where it has imposed a fine: (a) for an act that is not prohibited as a fiscal misdemeanour; or (b) on a person who did not sign a ticket (in the sense indicated above); or (c) on a person who is not liable for a fiscal misdemeanour (including e.g. because of being a minor); and where it was imposed (d) although an act should have been punished with the use of forfeiture of objects or there was a concurrence of a fiscal misdemeanour and a fiscal crime; or (e) where a fine was imposed in the amount higher than admissible in ticketing proceedings (Article 140 §1 and §2 in connection with Article 7, Article 48 §2(2) and (4) FPC).

6.

In both proceedings, the body competent to quash a ticket is a regional court that has jurisdiction in the area where a fine was imposed. Thus, it adjudicates based on different prerequisites for quashing a ticket, depending on whether it is a ticket for a common misdemeanour or a fiscal misdemeanour. A court may act based on a motion filed by the person punished or his/her statutory representative or a legal guardian before the expiry of the preclusive time limit of seven days after the ticket becomes valid, or *ex officio*, and in cases concerning common misdemeanours also upon the motion of a body or its officer who imposed a fine in penal ticketing proceedings. A court's action *ex officio* takes place, inter alia, as a result of information provided by a person punished when he/she fails to meet the deadline to apply for quashing a ticket, or by a ticketing body when it is not entitled to apply for quashing a ticket (in accordance with FPC). A person punished (and his/her representative) and a representative of a ticketing body that imposed a fine, and in cases concerning common crimes also the aggrieved party, and in fiscal penal cases the revealed intervening party, i.e. a person who brought claims to objects that are subject to forfeiture[51] (Article 101 §2 second sentence MPC and Article 140 §2 second sentence FPC) may take part in a court session in both proceedings. Should a ticket be quashed, the ticketing body is ordered to return a fine to the punished person (Article 101 §3 MPC and Article 140 §3 *in principio* FPC). However, in fiscal penal cases, when this takes place because a given act is found to be a fiscal crime or a common crime or a misdemeanour, the settled fine is retained until the end of the proceedings concerning this act as an advance settlement of the future penal measures and cost of the trial (Article 140 §3 *in fine* FPC).

[51] On this issue, see e.g. R. Olszewski, *Pozycja procesowa interwenienta w postępowaniu karnym skarbowym* [Procedural position of an intervening party in fiscal penal proceedings], [in:] T. Grzegorczyk, J. Izydorczyk and R. Olszewski (ed.), *Z problematyki funkcji procesu karnego* [Some issues concerning criminal trial functions], Wolters Kluwer, Warsaw 2013, pp. 455–462.

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A PENAL TICKET FOR COMMON AND FISCAL MISDEMEANOURS IN POLISH LAW AND THIS PUNISHMENT QUASHED BY COURT AFTER THE AMENDMENTS OF 2013 AND 2015

Summary

The paper presents the current Polish ticketing proceedings for misdemeanours in the field of common misdemeanour law and fiscal penal law. Misdemeanours are not a category of crimes in Poland but separate offences carrying punishment regulated by statute and also subject to adjudication by courts. At the same time, as they can be punished by fines, and ruling imprisonment or limitation of liberty is only possible in accordance with the common misdemeanour law, there is a possibility of imposing a fine in a non-judicial mode by penal ticket and fiscal penal ticket issuing bodies, based on different prerequisites and in different amounts. A ticket becomes valid when a perpetrator signs its receipt or settles it, but he/she can then apply to court for quashing it for different reasons defined by law. Over the last decade, many important changes have been introduced to the ticketing proceedings in both discussed regulations and the paper presents the current picture of the mode of ticketing and quashing of such tickets by courts.

Key words: misdemeanours, fiscal misdemeanours, ticket, penal ticket, fiscal penal ticket, quashing of a ticket

MANDAT KARNY ZA WYKROCZENIA POWSZECHNE I SKARBOWE W PRAWIE POLSKIM ORAZ UCHYLANIE TAKIEGO MANDATU PRZEZ SĄD PO NOWELIZACJACH Z 2013 I 2015 R.

Streszczenie

W opracowaniu zaprezentowano funkcjonujące w prawie polskim postępowanie mandatowe za wykroczenia ze sfery powszechnego prawa wykroczeń i prawa karnego skarbowego. Wykroczenia nie są w Polsce kategorią przestępstw, lecz odrębnymi czynami zagrożonymi przez ustawę pod groźbą kary, ale podległymi obecnie także orzecznictwu sądów. Jednoczenie, ponieważ grozi za nie grzywna i tylko w powszechnym prawie wykroczeń możliwe jest też orzeczenie tu także kary aresztu lub ograniczenia wolności, przewiduje się możliwość nakładania grzywny pozasądowo przez organy ścigania na drodze mandatu karnego i karnego skarbowego, ale w oparciu o różne przesłanki i w zróżnicowanych rozmiarach. Mandat taki staje się prawomocny z chwilą jego przyjęcia lub zapłacenia, ale można następnie wystąpić do sądu o jego uchylenie z określonych przez prawo powodów. W ostatniej dekadzie doszło jednak do istotnych zmian postępowania mandatowego w obu tych regulacjach, a opracowanie to przedstawia aktualny obraz trybu mandatowego i uchylania przez sąd takich mandatów.

Słowa kluczowe: wykroczenia, wykroczenia skarbowe, mandat, mandat karny, mandat karny skarbowy, uchylenie mandatu

Ius Novum
2/2017

PARENTAL LEAVES AS A FORM OF PROTECTION OF FAMILY LIFE UNDER THE LABOUR LAW IN POLAND AND SELECTED EUROPEAN UNION MEMBER STATES

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1. INTRODUCTION

The subject of this paper concerns broadly understood paid, both maternity and paternity, leaves granted due to the need of providing personal care to the child, as well as supplementary leaves related to parenthood, excluding childcare (child-raising) leaves, and their impact on fertility ratios and on attaining the balance between work and family life.

First, it should be emphasized that in many EU member states the concept of a parental leave is often associated with the leave available to mothers/fathers for providing a long-term care to their children following the initial maternity/paternity leave.[1] The expression "parental leave" does not define the parent's gender and means the time off work during which the employee is protected against the termination of an employment contract due to providing care to his/her child. In case of female employees, the parental leave is usually a continuation of their maternity leave. The leaves granted for the need of providing personal care to the child include mostly maternity, paternity and childcare leaves.

Numerous studies confirm the fact that family gives sense to our life and for the majority of us is the most significant value. For instance, according to a survey conducted by Centrum Badania Opinii, an opinion poll agency, in the period 2–9 March 2017 on a representative sample of 1,020 randomly selected adult Poles,

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[1] R. Ray, J.C. Gornick et al., *Parental leave policies in 21 countries*, Washington DC 2008.

over a half of the respondents (54%) regards family and its well-being (48%) as the most important value. In the view of one-seventh of the surveyed Poles (14%), children or grandchildren give the meaning to life.[2]

In *Diagnoza Społeczna* survey of 2013, the respondents were asked which of the family-friendly solutions were, in their opinion, most important. Women indicated mostly flexible working time (56.9%), better possibilities of childcare provided outside home for children up to seven years of age (37.1%), the possibility of performing some work from home (24.1%), and longer maternity leave (24%).[3]

Poland has been recording a fall in the births number since 1984, while the deaths rates have remained almost unchanged. The years 1991–2000 alone noted a slight, 0.48% natural increase.[4] The decrease in the population in Poland is also largely influenced by the deficit of migration.[5] Based on the Central Statistical Office of Poland (GUS) study, all scenarios envisage a gradual fall in the population in Poland. In extreme scenarios, the population of the country in 2050 is estimated to account for 32.1 million to 36.3 million.[6]

The popularisation of the negative demographic forecasts for Poland and the societal and economic consequences of the deep birth fall and the migration deficit

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[2] *Sens życia – wczoraj i dziś, Komunikat z Badań Nr 41/2017* [Sense of life – the past and present. Communication on research No. 41/2017], http://www.cbos.pl/PL/publikacje/raporty.php; accessed on 15 March 2017.

[3] I. Kotowska (ed.), *Diagnoza Społeczna 2013 – Rynek pracy i wykluczenie społeczne w kontekście percepcji Polaków* [Social Diagnosis research 2013: Labour market and social exclusion as perceived by Poles], Warsaw 2013, p. 42.

[4] Poland since 1989 has been experiencing a deep fall in birth rates; see, Z. Strzelecki (ed.), *Sytuacja demograficzna Polski*. Raport GUS 2010–2011 [Demographic situation of Poland. GUS report of 2010–2011], http://stat.gov.pl/cps/rde/xbcr/bip/BIP_raport_2010-2011.pdf; accessed on 15 March 2017.

[5] It is assumed that the fertility rate ensuring generation replacement is around 2.1. In Poland, this rate stands at around 1.3 births per woman, which places the country at the end of the world rank (in 2015 Poland was ranked 216 out of 224 surveyed countries). It is forecasted that if the current trend is maintained, the population in Poland will decrease to 32 million before 2060 from the present 39 million. The population structure will also change as there will be more people in the retirement age, whereas the number of working-age people will fall. One-third of the population will work to provide for the remaining two-thirds (children and pensioners) (cf. the latest data on the fertility level in Poland in the article: *Najnowsze dane. Poziom dzietności w Polsce dramatycznie niski* [Latest data. Fertility rates in Poland are dramatically low], Wprost, https://www.wprost.pl/523361/Najnowsze-dane-Poziom-dzietnosci-w-Polsce-dramatycznie-niski; accessed on 15 December 2016.

The permanent emigration balance (for a permanent stay) has increased over the recent years and in 2013 reached almost -20,000; in 2014 the permanent migration balance was estimated at -15,000. The highest permanent emigration values were recorded in 2006 and 2007 (-36,000 and -20,500, respectively) (cf. *Podstawowe informacje o rozwoju demograficznym Polski do 2014 roku* [Basic information on demographic development in Poland until 2014], GUS information notice, p. 2, http://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5468/12/5/1/podstawowe_informacje_o_rozwoju_demograficznym_polski_do_2014.pdf; accessed on 15 March 2017.

[6] See, Central Statistical Office (2014), *Population forecast for 2014–2050*, file:///C:/Users/Biuro/Downloads/prognoza_ludnosci_na_lata____2014_-_2050.pdf, pp. 146–156.

gave rise to the increased interest in legal (yet not only) solutions which would contribute to the reversal of those disadvantageous trends.[7]

The labour law solutions which are aimed, among others, at making it easier for employees to reconcile their work with family life include a wide range of parental leaves. Those leaves allow first of all discontinuation of work in order to provide personal care to children without termination of the employment relationship. Maternity leaves make it possible to mothers to recover after giving birth. The allowances paid during such leaves provide sufficiently for mothers over the period of taking care of their children. Parental leaves are also part of the state's family-friendly policy, which is an attempt at increasing the fertility rate.[8]

The necessity to ensure that employees have a defined length of parental leaves and financial support during them and to protect the continuity of their employment over the leave and after coming back to work results not only from demographic data but also from international and EU legal standards and from the constitutional protection of family, maternity and parenthood.[9]

Children benefit the society and this is another reason why statutory solutions such as parental leaves are introduced. Those relieve parents of the financial burden and thus some costs of child care and child-raising are also shared by the society, including employers. It should be noted that in recent years, the OECD and the European Union propagate the ides of children seen as "social investment". Early childcare supported by the state is one of the significant foundations of "social investment states".[10]

In recent years the role of women has evolved from "carer of hearth and home", through "co-breadwinner" up to often the main or the only "income provider".[11] The increase in women's activity and the widespread family model where the living is earned by both spouses are the socio-economic phenomena which have established in the cultural consciousness in Poland and Europe. At present, income earned by women is ever similar to, and at times even higher than, men's income. Therefore, women's labour is often not supplementary but of equal rank to men's work. Women's professional activity frequently is the main source of income for

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[7] M. Gładoch (ed.), *Raport o pracy* [Report on labour], Pracodawcy RP 2016, p. 57.

[8] The value of the rate indicates the number of births per woman in the childbearing age. It is assumed that the minimum rate allowing the generation replacement ranges from 2.10 to 2.15. In Poland, in 2013 the fertility rate stood at 1.29, which places the country third from the end among all the European Union states (cf. J. Stańczak, K. Stelmach, M. Urbanowicz, *Małżeństwa oraz dzietność w Polsce* [Marriages and fertility rates in Poland], GUS, Warsaw 2016, p. 6, file:///C:/Users/Biuro/Downloads/malzenstwa_i_dzietnosc_w_polsce%20(1).pdf; accessed on 15 March 2017.

[9] See, Arts. 18 and 71 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.] No. 78, item 483.

[10] See, K. Davaki, *Benefits of a maternity/parental leave in the EU-27*, Brussels 2010, http://www.europarl.europa.eu/studies; accessed on 20 March 2017.

[11] M. Półtorak, M. Lekston, *Work-life balance jako przestrzeń do dialogu pomiędzy pracownikiem a (odpowiedzialnym) pracodawcą* [Work-life balance as a sphere of dialogue between an employee and a (responsible) employer], p. 256, the paper available at http://www.sbc.org.pl/Content/134304/P%C3%B3%C5%82torak_Lekston.pdf; accessed on 10 March 2017.

family.[12] The traditional man's role as the sole breadwinner in the family may be regarded as outdated.[13]

Numerous studies prove that countries which have better adapted to the change in the traditional role performed by women in relationships, e.g. France or the Scandinavian states, report currently higher fertility rates than, for instance, Germany or Austria which favour the single breadwinner model.[14]

The assumption that fertility rates fall mainly due to the fact that women cannot afford staying at home to raise children and promotion of schemes which would encourage professionally active women to give up their jobs and devote themselves to raising children are not supported by evidence. Women in the 21st century, when the divorce rates are high, if faced with a choice between work and founding a family, would usually prefer to select employment. Birth rates go up when both the government and employers support families in which both parents are in employment. The probability of having a larger family increases along with the growing number of solutions which make it easier for both parents to combine the professional and family responsibilities.[15]

Aiming at ensuring equal rights to men and women, including in their parental responsibilities, leads to "fathers becoming co-responsible" to a larger extent, for example by allowing them to use part of the parental leave in order to take personal care of their child. As rightly claimed by M. Latos-Miłkowska, total equality of rights of fathers with those of mothers with respect to parental leaves is not entirely possible due to the fact that it is women who get pregnant and give birth.[16] It is the physiological reasons that decide about the larger protection in the labour law of motherhood responsibilities than of parental roles performed by men.

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[12] D. Graniewska, *Praca zawodowa kobiet a warunki życia rodzin* [Women in employment and living conditions of families], [in:] P. Błędowski (ed.), *Między transformacją a integracją: polityka społeczna wobec problemów współczesności. Księga pamiątkowa z okazji 70. urodzin Profesora Adama Kurzynowskiego*, [Between transformation and integration: Social policy and contemporary problems. Professor Adam Kurzynowski 70th birthday jubilee book], SGH, Warsaw 2004, p. 143; and B. Balcerzak-Paradowska, D. Graniewska, B. Kołaczek, J. Mirosław, *Kobiety na stanowiskach kierowniczych. Polska na tle Unii Europejskiej i OECD* [Women at managerial positions. Poland vs. the EU and OECD states], [in:] B. Balcerzak-Paradowska (ed.), *Kobiety na stanowisku kierowniczym w sektorze publicznym* [Women at managerial positions in the public sector], Instytut Pracy i Spraw Socjalnych, Warsaw 2014, p. 35.

[13] A. Giddens, *Socjologia* [Sociology], PWN, Warsaw 2010, pp. 420–421.

[14] J. Sleebos, *The Low Fertility Rates in OECD Countries*, OECD Labour Market and Social Policy Occasional Papers No. 15, 2003, p. 20; D. Coleman, *The Road to Low Fertility*, Aging Horizons No. 7, Oxford 2007, pp. 10–11; and A. Matysiak, A. Baranowska T. Słoczyński, *Kobiety i mężczyźni na rynku pracy* [Men and women on the labour market], [in:] M. Bukowski (ed.), *Zatrudnienie w Polsce 2008. Praca w cyklu życia*, [Employment in Poland 2008. Work in the lifecycle], Warsaw 2009, p. 113.

[15] A. Wittenberg-Cox, A. Maitland, *Kobiety i ich wpływ na biznes. Nowa rewolucja gospodarcza*, transl. based on: *Why women mean business. Understanding the emergence of our next economic revolution*, Wolters Kluwer, Warsaw 2013, pp. 44–45.

[16] M. Latos-Miłkowska, *Przemiany stosunku pracy związane z rodzicielstwem* [Changes in employment relationship related to parenthood], [in:] L. Florek, Ł. Pisarczyk (eds.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych* [Contemporary labour and social security law problems], LexisNexis, Warsaw 2011, p. 223.

2. PARENTAL LEAVES AS PROVIDED FOR IN THE INTERNATIONAL AND EUROPEAN UNION LAW

The protection of motherhood and parenthood results from the numerous international and EU law standards.

The International Labour Organization (ILO) dealt with the problem of maternity leaves in its Maternity Protection Convention No. 183 (revised) of 1952.[17] Article 4 stipulates the maximum period of maternity leave of not less than 14 weeks. Such leave should include at least six weeks' compulsory leave after childbirth, unless otherwise agreed at the national level by the government and the representative organizations of employers and workers.

Article 6 of the Convention No. 183 provides for financial benefits for women who are absent from work on maternity leave. Women on maternity leave are entitled to cash benefits at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.

If under national law or practice, cash benefits paid with respect to maternity leave are based on previous earnings, the amount of such benefits may not be lower than two-thirds of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing the benefits. When a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she is entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance. Medical benefits are to be provided to the woman and her child, which include prenatal, childbirth and postnatal care, as well as hospitalization care when necessary.

Under Art. 8 of the ILO Convention No. 183, a woman at the end of her maternity leave is guaranteed the right to return to the same position or equivalent position paid at the same rate.

The provisions of the discussed Convention impose also on the member states the duty of counteracting discrimination by reason of maternity and of ensuring breastfeeding breaks (under Arts. 9 and 10 of the ILO Convention No. 183).

The female workers' right to paid maternity leave (or the relevant benefit from the social assistance fund) of at least 14 weeks has been also provided for in Art. 8 of the Revised European Social Charter.[18]

The European Union for years has undertaken steps in order to protect family life of employees, which include support for them in fulfilling parental responsibilities. The legal grounds for support and complementing of the member states' initiatives,

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[17] The Convention has not been ratified by Poland.

[18] The Revised European Social Charter is an international treaty of 1996, a normative document of the Council of Europe, setting out social rights and freedoms in Europe. Poland is bound by the European Social Charter – the treaty of 1961. The country did not ratify 14 out of 72 paragraphs of the European Social Charter: Art. 2 §2, Art. 4 §1, Art. 6 §4, Art. 7 §1, 3 and 5, Art. 10 §3–4, Art. 13 §1 and 4, Art. 14 §1 and Art.. 18 §1–3. It did not ratify two of seven absolutely binding provisions of the European Social Charter: Art. 6 §4, Art. 13 §1 and 4.

also with respect to ensuring equal opportunities for men and women on the labour market and equal treatment in employment, are provided in Art. 153 of the Treaty on the Functioning of the European Union[19].

Protection of family life is one of the fundamental rights guaranteed in Art. 33 of the Charter of Fundamental Rights of the European Union of 30 March 2010,[20] referred to as the Charter of Fundamental Rights. In accordance with Art. 33(2) of the Charter, in order to reconcile family and professional life, everyone has the right to protection from dismissal due to reasons related to maternity and the right to paid maternity leave as well as to parental leave following birth or adoption of a child.

The above-mentioned regulation covers not only people with the employee status but "everyone", i.e. also those who pursue activities as the self-employed. The protection of family life is guaranteed to both women and men.

The recommendation of the Council of Europe of 31 March 1992[21] on child care includes a suggestion that the member states should develop and encourage initiatives helping women and men to balance their professional, family and upbringing responsibilities. The proposed solutions cover various childcare services, parental leaves, family-friendly options at the workplace and other types of actions supporting men's participation in taking care of children.[22]

At the beginning of the 1990s, the idea of "work-family life balance" started to be promoted as transition from equal rights of men and women on the labour market towards assisting women by creating flexible working conditions. At present, the EU policy of supporting an increase in fertility rates consists in the statutory right to maternity and parental leaves, financial benefits for working parents and for early education of all children. The promotion of gender equality has been of secondary importance, and the EU policy is focused on ensuring childcare facilities rather than on longer child-raising leaves.[23]

The priority actions of the Lisbon Strategy[24] to stimulate economic growth and employment include, among others, the increase of total employment rate up to 70%, the female in employment rate up to 60% and of senior workers in employment rate up to 50%.[25] The Lisbon Strategy reviewed in 2005,[26] focused more on economic growth and employment, and it was concluded that if the strategy was

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19 Official Journal of the European Union C 326 of 26.10.2012.

20 Official Journal of the European Union, C 83/389 of 30.03.2010.

21 92/241/EEC, Official Journal of the European Communities L 123 of 8.5.1992.

22 See, K. Davaki, *Benefits of a maternity/parental leave...*, p. 6.

23 G. Pascall, J. Lewis, *Emerging gender regimes and policies for gender equality in a wider Europe*, Journal of Social Policy No. 33(3), 2004, pp. 373–394; and J. Lewis, *Work-family balance. Gender and social policy*, Edward Elgar Publishing, Cheltenham 2009.

24 The action plan adopted for the European Union by the European Council at the seating in Lisbon in 2000.

25 See, A. Budzyńska et al., *Strategia Lizbońska. Droga do sukcesu zjednoczonej Europy* [Lisbon Strategy. A path to the success of the united Europe], Departament Analiz Ekonomicznych i Społecznych, Urząd Komitetu Integracji Europejskiej, https://www.slaskie.pl/STRATEGIA/strat_L.pdf; accessed on 10 November 2016.

26 COM(2005) 24.

to be successful, a better use should be made of a great potential of women on the labour market.

Reconciliation of work, family and private life is one of the priority areas defined by the European Commission in its "Roadmap for equality between women and men" adopted in March 2006.[27] The Commission lists three issues of key importance to better balancing of professional, family and private life:

1) flexible working arrangements for both women and men;
2) increasing care services;
3) better reconciliation policies for both women and men.

In the Communication of 3 October 2008 on "A better work-life balance: stronger support for reconciling professional, private and family life",[28] the European Commission defined the support for balancing work and private life as one of the priorities in the "Roadmap for equality between women and men 2006–2010". The fundamental policy measures in this area are, according to the European Commission, childcare facilities, right to take leave and flexible working hours.[29]

The legislative measures that should be mentioned include the adoption of the Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.[30] Under its Art. 8, Member States must take the necessary measures to ensure that pregnant workers or workers who have recently given birth are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice. The maternity leave should include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice (and only this part of the maternity leave is compulsory which cannot be waived).

The Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by the Union of Industrial and Employers' Confederations of Europe (UNICE), European Centre of Employers and Enterprises providing Public Services (CEEP) and the European Trade Union Confederation (ETUC)[31] was adopted in 1996 and granted both parents the right to parental leave (irrespective of maternity leave available only to women).

The Preamble of the above-mentioned Directive quotes paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers on equal treatment for men and women which provides that measures should be developed enabling men and women to reconcile their occupational and family obligations. The Preamble also invokes the Council Resolution of 6 December 1994, in line with which effective policy of equal opportunities requires an integrated, general strategy allowing better

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[27] COM(2006) 92 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0092:FIN:en:PDF; accessed on 20 March 2017.

[28] COM(2008) 635 final, http://ec.europa.eu/eu2020/pdf/1_PL_ACT_part1_v1.pdf; accessed on 15 November 2016.

[29] *Ibid*., p. 2.

[30] Official Journal of the European Communities L 348/1 of 28.11.1992.

[31] Official Journal of the European Communities L 145 of 19.06.1996.

working time arrangement, greater flexibility of the working hours and easier return to professional life, while considering the significant role of social partners in this respect and offering both men and women opportunities of reconciling occupational and family responsibilities. The Preamble recommends that the family-friendly policy should be shaped based on the context of demographic changes, the effect of the population aging, closing in the generation gap and promoting women's participation in the labour force. Men in turn should be encouraged to assume an equal share of family responsibilities, for example to take parental leave. Clause 2 under Section II of the Council Directive 96/34/EC stipulates the entitlement to the at least three-month parental leave, both for men and women, on the grounds of the birth or adoption of a child to enable them to take care of that child until the defined age of up to eight years, as envisaged by member states and/or management and labour social partners. The right to parental leave should, in principle, be granted on a non-transferable basis. Member states may decide on their own, for example, such issues as: conditions of access and detailed rules for applying for parental leave, whether parental leave is granted on a full-time or part-time basis, making the entitlement to parental leave subject to a period of work qualification and/or a length of service (which period may not exceed one year), conditions of access and detailed rules for applying for parental leave in the special circumstances of adoption, specifying the beginning and the end of the period of the leave, defining the circumstances in which an employer, following consultation in accordance with national law, collective agreements and practices, is allowed to postpone granting of parental leave for justifiable reasons related to the operation of the undertaking (e.g. where work is of seasonal nature, where a replacement cannot be found within the notice period, where a significant proportion of the workforce applies for parental leave at the same time, where a specific function is of strategic importance).

The European Commission (in accordance with Art. 138 paras. 2 and 3 of the Treaty establishing the European Community) conducted consultations with the European management and labour social partners (ETUC, CEEP and BUSINESSEUROPE, formerly UNICE, and the European Association of Craft, Small and Medium-Sized Enterprises – UEAPME) in the years 2006 and 2007 on the better ways of reconciling professional, private and family life, in particular on the applicable Community regulations with respect to parental leave and protection of maternity, as well as on the possibility of introducing new types of family leaves, such as paternity leave, adoption leave and the leave to provide care to family members. The European social partners reviewed thoroughly the Framework Agreement of 1995 on parental leave, which resulted in signing on 18 June 2009 of a revised framework agreement on parental leave and repealing of the Directive 96/34/EC by means of the Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.[32]

The agreement forming Annex to the Directive 2010/18/EU provides for the minimum requirements concerning parental leave as an important measure

[32] Official Journal of the European Union L 68/13 of 18.3.2010.

for reconciling professional and family responsibilities and promoting equal opportunities and treatment between men and women. Clause 1 of the Framework Agreement defines its purpose and scope, which is laying down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, taking into account the increasing diversity of family structures, while respecting national law, collective agreements and practice. The agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each member state. The agreement does not exclude from the scope and application of the agreement workers employed part-time, under fixed-term contracts or persons with a contract of employment or employment relationship with a temporary agency.

Clause 2 of the Framework Agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age of up to eight years to be defined by member states and/or social partners. The leave is granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months is to be provided on a non-transferable basis. The particular rules of application of the non-transferable period are to be set down at the national level through legislation and/or collective agreements taking into account existing leave arrangements in the member states.

The conditions of access and detailed rules for applying for parental leave are stipulated under Clause 3 of the Framework Agreement annexed to the Directive 2010/18/EU. Those conditions and rules are defined by law and/or collective agreements in the member states, provided that the minimum requirements of the discussed agreement are respected. Member states and/or social partners, taking into account the needs of both employers and workers, may, in particular, decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system. Member states may also make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification, which may not exceed one year. Basing on this provision, member states and/or social partners ensure that in case of successive fixed-term contracts with the same employer the sum of these contracts should be taken into account for the purpose of calculating the qualifying period. Moreover, member states and/or social partners should also define the circumstances in which an employer, following consultation in accordance with national law, collective agreements and/or practice, is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the organisation. Any problems arising from the application of the above provision should be dealt with in accordance with national law, collective agreements and/or practice. Member states and/or social partners establish also notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave. When defining the length of the notice periods, member

states and/or social partners should have regard to the interests of workers and of employers. Moreover, they should assess the need to adjust the conditions for access and specific rules of application of parental leave to the needs of parents of children with a disability or a long-term illness (Clause 3 para. 3).

Clause 4 of the Framework Agreement requires that member states and/or social partners should assess the need for additional measures to address the specific needs of adoptive parents.

Clause 5 provides for employment rights related to parental leaves and non-discrimination of workers for reason of their fulfilling parental responsibilities. At the end of parental leave, workers have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship. Rights acquired or in the process of being acquired by the worker on the date on which parental leave has started are to be maintained until the end of parental leave. At the end of parental leave, those rights still apply, including any changes arising from national law, collective agreements and/or practice.

Under the provisions of Clause 6 of the Framework Agreement, workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers consider and respond to such requests, taking into account both employers' and workers' needs. Moreover, workers and employers are encouraged to maintain contact during the period of leave.

Clause 7 of the above Agreement sets out the time off from work on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable. In such a case, member states and/or social partners should specify the conditions of access and detailed rules for applying such time off and limit this entitlement to a certain amount of time per year or per case.

Member states, under Clause 8 of the Framework Agreement, may introduce more favourable provisions than those set out in the Agreement.

3. EVOLUTION OF MATERNITY AND PARENTAL LEAVES IN THE POLISH LABOUR LAW

The provisions of the Labour Code regulating the duration of maternity leave belong to the most frequently amended over the whole 40-year history when the Labour Code has been in force (the Act of 26 June 1974).[33] In its original version Art. 180 of the Labour Code provided for 16, 18 or 26 weeks of maternity leave. The length of the leave depended on three factors: number of births, number of children born at one birth, and an adoptive child raised by the mother. The maternity leave lasted 16 weeks in case of the first childbirth and 18 weeks at subsequent pregnancies. The leave of 18 weeks was also available to a worker who, before the first childbirth, had already been raising an adoptive child. The 26-week leave was allocated to a worker

[33] Consolidated text: Journal of Laws [Dz.U.] of 2016, item 1666.

who gave birth to more than one child at one childbirth. The minimum, compulsory maternity leave covered eight weeks. The labour law provisions for a long time, up to 2001, did not stipulate the respective rights for fathers.

Article 180 of the Labour Code was amended after 25 years. On 1 January 2000, the provisions of the Act of 19 November 1999 on amendment to the Act – Labour Code[34] came into force and increased the duration of maternity leave up to 26 weeks in case of single childbirth (irrespective of the number of prior pregnancies) and 39 weeks (irrespective of number of children born at one childbirth). The worker could use at least four weeks of maternity leave before the planned date of predicted childbirth. The opponents of the introduced changes highlighted the too excessive burden for the state budget and the difficulties of women with returning to the labour market resulting from the employers' reluctance to employ them. Some women complained also about being deprived of the right to decide how long to provide personal care to their child after childbirth. Due to the above, the legislator introduced, under the Act of 25 April 2001 on amendment to the Act – Labour Code,[35] a possibility to waive a part of maternity leave after the lapse of 16 weeks (Art. 180 §5 of the Labour Code). The remaining part of the maternity leave could be used by the child's father. Under the Act of 21 December 2001 on amendment of the Act – Labour Code, the possibility of shortening of maternity leave by the mother was made subject to the use of the remaining part of the leave by the working father raising his child. The provisions of the last of the discussed acts marked the return to the previous shorter maternity leave.

In subsequent years, based on the Act of 16 November 2006 on amendment of the Act – Labour Code and the Act on pecuniary benefits from the social security fund in case of illness and maternity[36] and the Act of 6 December 2008 on amendment of the Act – Labour Code and some other acts,[37] the maternity leave became gradually longer and diversified from three to five weeks, depending on the number of children born at one childbirth. The shortest leave amounted to 20 weeks (whether in case of the first childbirth or a subsequent one), and the longest lasted 37 weeks (when five or more children were born). The Act of 6 December 2008 introduced also an improvement of optional supplementary maternity leave which initially was available only to mothers, and later (under the Act of 28 May 2013 on amendment of the Act – Labour Code and some other acts[38]) also to fathers. However, the priority right to use the supplementary maternity leave was granted to mothers.

The provisions of the Act of 28 May 2013 on amendment of the Act – Labour Code and some other acts[39] came into force on 17 June 2013. The act increased the length of the supplementary maternity leave by two weeks, and introduced a new, 26-week parental leave. As a result of those changes, parents (yet mothers,

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34 Journal of Laws [Dz.U.] No. 99, item. 1152.
35 Journal of Laws [Dz.U.] No. 52, item 538.
36 Journal of Laws [Dz.U.] No. 221, item 1615.
37 Journal of Laws [Dz.U.] No. 237, item 1654.
38 Journal of Laws [Dz.U.], item 675.
39 Journal of Laws [Dz.U.] of 2016, item 960.

in particular) gained an opportunity of spending a year in total with their child, being on paid leaves related with parenthood.

The provisions of the Act of 15 May 2015 on amendment to the Act on pecuniary benefits from the social security fund in case of illness and maternity and some other acts[40] brought a number of significant changes in terms of maternity and parental leave entitlements, extended the scope of rights available to fathers raising children, and introduced new rules of determining maternity allowance for enterprises. Those changes became effective on 14 August 2015.

Article 180 of the Labour Code supplemented by §8 and §7 was amended so that fathers could use the remainder of maternity leave not only in case of the employed mother's death but also upon abandonment of the child by the mother during maternity leave. With respect to a working woman who holds a certificate confirming her incapability to lead an independent life, whose medical condition makes it impossible for her to provide personal care to her child, upon using eight weeks of maternity leave after childbirth, the new regulations allowed that the remaining leave be waived. In such case, the unused part of the leave was granted to the working father who raised the child, upon his written request.

The Act of 24 July 2015 on amendment to the Act – Labour Code and some other acts came into force on 2 January 2016. The new provisions are to make it even easier for parents to reconcile professional and family life, among others due to the change of the time limit for filing an application for maternity leave, or a prohibition of discrimination by reason of fulfilling family responsibilities. The parental leave has been supplemented by additional maternity leave (previously cancelled), and consequently it lasts currently 32 weeks in case of single childbirth at one birth and 34 weeks with respect to more than one child born at one childbirth. The right to parental leave is acquired upon using maternity leave or the maternity allowance for a period equivalent to maternity leave. The amendment to the act has introduced also a possibility of dividing paternity leave, the proportional extension of parental leave when it is combined with work, and allows both parents (carers) to use the child-raising leave at the same time over its whole duration.

The number of changes to the regulations concerning parenthood-related leaves after 25 years of their application in a basically unchanged form should in principle deserve approval. Their aim is to assist working parents in reconciling their professional and family responsibilities, and to ensure equal rights to men and women on the labour market. In particular, solutions helping to combine part-time work and parental or child-raising leave should be welcomed as this allows employees to both maintain a close contact with their children and work.

It should be noted though that the compulsory, in case of mothers, 14-week maternity leave[41] is not grounded in either the European Union or international labour law. The ILO Convention No. 183 stipulates only that maternity leave

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[40] Journal of Laws [Dz.U.], item 1066.

[41] In accordance with Art. 180 §5 and 9 of the Labour Code, 14 weeks after childbirth are compulsory for a mother, while the remaining part may be waived by the mother if the working father raising the child or another worker – a close family member – "assumes" the remainder of the maternity leave.

(of at least 14 weeks) should include six weeks of compulsory leave (based on the agreement between representatives of the government and employers and employees organisations, this period may be different, also shorter). The Council Directive 92/85/EEC provides only for two weeks of compulsory maternity leave allocated prior to and/or after childbirth. The medically justified maternity leave comprises exclusively the compulsory period of six weeks as it covers confinement, or a postnatal period when anatomic, morphological and functional changes experienced at pregnancy gradually abate and the female body returns to a pre-pregnant state.[42] Therefore, the 14-week compulsory maternity leave is not medically or legally justified. Moreover, it makes the legal circumstances less advantageous for women workers who for various reasons have decided to raise their children as single parents and have nobody to share their maternity leave with.

In the majority of the European Union member states, the compulsory maternity leave after childbirth is shorter than in Poland and lasts two weeks in the United Kingdom, Denmark and Island. The six-week compulsory leave is available in Portugal, Spain and Romania. Longer than six weeks compulsory maternity leaves are provided in Belgium (allocated as one week before and nine weeks after childbirth), Slovakia (14 weeks) and Austria (eight weeks before and eight weeks after childbirth).[43]

4. PARENTAL LEAVES IN SELECTED EUROPEAN UNION MEMBER STATES

A special attention should be paid to France successfully protecting workers' family life, which spends 3.8% of its GDP on family-friendly policy, compared to 2.4% on average in the OECD member countries. France ranks second in the European Union (behind Ireland) in terms of fertility rates (2.01 births per woman). 85% of women in France are professionally active. The social perception of a working mother is extremely positive in this country. She is regarded as pro-active and participating all spheres of life.[44]

France for years has been pursuing family-friendly policy which is reflected, for instance, in a broad range of different family benefits and allowances, such as housing allowance, child benefit, child birth/adoption grant, parental leave for both parents of a child up to three years of age, free pre-school care for all children

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[42] G.H. Bręborowicz, *Położnictwo i ginekologia* [Obstetrics and gynaecology], Ed. I, Vol. 2, PZWL, Warsaw 2010, after A. Kurowska, *Ocena zasadności założeń reformy urlopów i zasiłków związanych z opieką nad małym dzieckiem* [Assessment of principles of new reform with respect to leaves and benefits related to providing care to young children], Problemy Polityki Społecznej. Studia i Dyskusje, Vol. 2, No. 21, 2013, pp. 157–158, http://problemypolitykispolecznej.pl/images/czasopisma/21/Kurowska%20PPS%2021-13-12.pdf; accessed on 10 April 2017.

[43] A. Kurowska, *Ocena zasadności założeń...* [Assessment of principles...], p. 158.

[44] See, *Francja, kraj o jednym z najwyższych współczynników dzietności w Europie* [France as a country with one of the highest birth rates in Europe], http://www.ambafrance-pl.org/Francja-kraj-o-jednym-z; accessed on 10 November 2016.

above three years of age, availability and high quality of childcare in nurseries, tax reliefs, supplementary pension entitlements and special entitlements for families.[45]

The country pays special attention to institutional solutions allowing parents to combine work and care of children. Such solutions include various sorts of collective nurseries, stay-in, family and parental day care, professional nannies or family assistants.[46] The state participates to a large extent in covering the cost of the above care. Parents of two or more children may give up work or reduce its time after childbirth and receive a flat-rate allowance due to providing care to the child until three years of age.

Maternity leave is mandatory and lasts for 16 weeks (two weeks of which must be taken before childbirth). The allowance paid during maternity leave amounts to 100% of the regular pay. The entitlement to benefits and allowances due to parenthood is available in respect of every person covered by social insurance for at least ten months before the predicted childbirth.

The state provides support also to parents taking care of ill or disabled children. Parents of a child with a grave illness or disability are entitled to paid leave or reduced working time (up to three years) until the child reaches 20 years of age. Single parents receive increased disability allowance for that period. A similar leave is available to workers who look after an elderly or ill family member residing with them in the same household.[47]

An example of a country where relatively long paid parental leaves do not translate directly into higher fertility rates is Germany. This country with a population of 82.3 million has been recording, since the 1990s, a continuously shrinking average household size and the lowering number of young children per household (only 22% of households are composed of children under 18 years of age, of which 52% of households have only one child, 36% two children, and 11% three children or more). The fertility rate in 2014 amounted to 1.41, which ranks Germany at one of the last places among the OECD states in terms of fertility rates. The reasons of such a situation are seen in the traditional family model prevailing in this country, where care of children is basically women's responsibility. German mothers spend over twice more time on childcare than men. The difference in wages between men and women is 17% (against the OECD average of 15%).[48]

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[45] See, *Skąd we Francji tak wysoki przyrost naturalny?* [What is the cause of such high natural increase rates in France?], interview with Hélene Périvier, http://wyborcza.pl/1,76842,12018854,Skad_we_Francji_tak_wysoki_przyrost_naturalny_.html; accessed on 10 November 2016.

[46] M. Gładoch (ed.), *Raport…* [Report…], p. 59.

[47] J. Mirosław, A. Smoder, *Zatrudnienie przyjazne rodzinie w krajach konserwatywnego modelu welfare state* [Family-friendly employment in conservative welfare states], [in:] B. Balcerzak-Paradowska (ed.), *Zatrudnienie przyjazne rodzinie. Doświadczenia międzynarodowe. Realia polskie* [Family-friendly employment. International experience. Polish reality], IPiSS, CPS "Dialog", Warsaw 2014, pp. 119–123.

[48] *Ibid.*, pp. 105–109.

5. LEAVES RELATED TO PARENTHOOD AS PART OF THE STATE FAMILY-FRIENDLY POLICY – CONCLUSIONS

The leaves related to parental responsibilities form an important part of the state family-friendly policy which aim is to help working parents in reconciling their professional and family responsibilities. The leaves, even if longer, do not resolve all the problems with low fertility rates or the conflicts resulting from work-life imbalance. Workers, including women, should have the right to decide how long they intend to avail themselves of the entitlement to paid parental leaves (within the maximum time limits provided for in the law). Special employee entitlements related to providing care and raising children should not be regarded then as employment privileges but as a "compensation for additional burden which some employees assume not only for their own benefit".[49]

The results of research on effectiveness of institutional solutions aiming to support workers in reconciliation of their professional and family responsibilities, such as longer paid parental leaves, prove that such schemes do not bring the expected effects.[50] Longer paid parental or child-raising leaves may reduce the work-family life conflict but they do not eliminate the problem in a manner satisfactory to workers.[51] Without eliminating or reducing all the barriers to parental plans of employees, it would be difficult to achieve a demographic success, or at least the reduction of the work-life imbalance. The discussed barriers include limitations of the world-view nature, insufficient support of families by the state family-friendly policy, financial difficulties, unemployment (or threat of job loss), as well as objective issues, such as problems getting pregnant or risk of genetic disorders.[52]

Labour law solutions, such as longer parental leaves, which do not coincide with counteracting stereotypical attitudes towards the division of roles in the family are not sufficient measures which would effectively encourage women's decisions on childbearing. In Poland, there are still persisting stereotypes that it is exclusively women who are liable for child care in the family, especially in case of a child's illness or using parental leaves. Those views are unfortunately reflected in the employers' decisions concerning employment of young women. They usually prefer to employ men as (in the employers' opinion) they are not that burdened with parental responsibilities. Negative perception of women trying to combine work and family life is related to another stereotypical view that those spheres are irreconcilable and women should make a choice what is more important for them.

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[49] T. Liszcz, *Prawo pracy* [Labour law], Info-Trade, Gdańsk 1998, p. 381.

[50] A. Zalewska, *Konflikty praca-rodzina – ich uwarunkowania i konsekwencje. Pomiar konfliktów* [Work-family conflicts, their causes and consequences. Measurement of conflicts], [in:] L. Golińska, B. Dudek (eds.), *Rodzina i praca z perspektywy wyzwań i zagrożeń* [Family and work from the perspective of challenges and threats], Wydawnictwo Uniwersytetu Łódzkigo, Łódź 2008, pp. 418–430.

[51] T.D. Allen, L.M. Lapierre, P.E. Spector, S.A.Y. Poelmans, M. O'Driscoll, J.I. Sanchez et al., *The link between national paid leave policy and work-family conflict among married working parents*, Applied Psychology, Vol. 63, 2014, pp. 5–28.

[52] A. Grabowska, *Praca i życie rodzinne – czy i dlaczego musimy wybierać?* [Work and family life: do, and why, we have to choose?], Dialog No. 1(40), 2014, pp. 99–100.

The insufficient number of inexpensive nurseries and pre-school facilities is also a barrier to making the decision on increasing a family.[53]

A change in the stereotypical perception of the role of women in providing care to children could start with solutions relieving employers of parents, in particular women having or planning a family, from some of the financial burden, such as paid annual leaves granted after the maternity, parental or child-raising leaves, the requirement of prolonging employment contracts until the childbirth even if an employer cannot offer the appropriate position for the female worker (Art. 177 of the Polish Labour Code), paid breaks for breastfeeding (Art. 187 of the Labour Code), paid leaves to take care of the healthy child (Art. 188 of the Labour Code), or the need to cover sick leave for a total period of 33 days in a year (Art. 92 §1(1) of the Labour Code). Such costs taken over by the state could impact a more positive attitude of employers towards employing workers who try to combine work and care of children. The solutions of this type would definitely contribute to creating better opportunities for women in the childbearing age on the labour market. One must agree with the standpoint expressed by A. Sobczyk that burdening employers with responsibilities for protecting family life of workers, in particular maternity, is disproportionate to their means.[54]

It seems that longer maternity, parental and child-raising leaves alone are not an effective measure in the strive to achieve higher fertility rates and higher activity of women on the labour market. Particularly low (against the background of other European Union member states) employment rates among women in Poland give rise to the need of wider and more effective actions in order to provide better access to institutional childcare facilities[55] and increase social acceptance for women who do not give up or suspend professional career for the sole reason of giving birth to their child.

As evidenced by the experience of many countries, a high number women in employment combined with the state family-friendly policy is often related with high fertility rates. According to data published by the Financial Times, in some of the developed countries with the highest birth rates, such as Sweden or the United States,[56] the paid employment level among women much exceeds that in, for instance, Japan or Italy which report lower birth rates.[57] This would mean that the appropriate family-friendly policy may contribute to the expected fertility rates, even if the women-in-employment rate is high.

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53 A. Kacprzak, M. Żemigała, *Wyzwania stojące przed rodzicami w miejscu pracy* [Challenges that parents face in the workplace], [in:] D. Walczak-Duraj (ed.), *Humanizacja pracy. Jakość życia pracownika w perspektywie work-life balance?* [Huminisation of work. Quality of employees' life in the context of work-life balance?], No. 4 (274) (XLVI), Płock 2013, pp. 99–103.

54 A. Sobczyk, *Prawo pracy w świetle Konstytucji RP* [Labour law in the light of the Constitution of the Republic of Poland], Vol. II: *Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka* [Selected issues and institutions of labour law vs. constitutional human rights and freedoms], C.H. Beck, Warsaw 2013, pp. 195–198.

55 M. Gładoch (ed.), *Raport…* [Report…], p. 97.

56 The fertility in the US is currently 40% higher than in Europe (cf. C. Freeland, *Women are the hidden engine of world growth*, Financial Times, 28 August 2006, quoted after A. Wittenberg-Cox, A. Maitland, *Kobiety i ich wpływ.*. [*Why women mean…*], p. 42).

57 C. Freeland, *Women are the hidden engine...*, p. 42.

Parenthood-related leaves should correspond to other labour law solutions supporting the family-friendly policy, such as equal rights of men and women, flexible and task-based working time, regular increase of the minimum wage so that providing for a family was possible, telework, unlimited-term contracts, limits on work performed by parents at night, on Sundays and public holidays, and overtime, or on delegating such workers to perform work outside their regular workplace.

The state family-friendly policy with respect to eliminating discrimination in employment of women in the childbearing age or those taking care of small children could focus not only on labour law provisions but also on other branches of law, e.g. tax law. A noteworthy idea is the solution proposed by two professors of economics, A. Alesin and A. Ichino, who suggest a reform of the tax system consisting in lowering income tax for women, and its slight rise in case of men. In their opinion, such solution would contribute to increasing the women-in-employment rate and discrimination due to gender would become more costly for employers.[58]

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[58] A. Wittenberg-Cox and A. Maitland, *Kobiety i ich wpływ…* [*Why women mean…*], pp. 281–282.

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PARENTAL LEAVES AS A FORM OF PROTECTION OF FAMILY LIFE UNDER THE LABOUR LAW IN POLAND AND SELECTED EUROPEAN UNION MEMBER STATES

Summary

The subject of the paper concerns broadly understood paid, both maternity and paternity, leaves granted in order to provide personal care to a child, as well as supplementary parental leaves, excluding childcare (child-raising) leaves and their impact on fertility rates and attaining the work-family balance. The study offers a negative assessment of the solutions encouraging women who are professionally active to give up employment and devote themselves to child-rearing. The discussion presented in the paper covers an analysis of provisions on parental leaves in the international and European Union law, the evolution of maternity and parental leaves in the Polish labour law, regulations on parental leaves in selected European Union member states, and the issue of parenthood-related leaves as part of the state family-friendly policy. The final section presents the key conclusions resulting from to the above discussion.

Key words: parental leave, maternity leave, paternity leave, childcare (child-raising) leave, fertility rates, work-life balance, work-family conflict, length of parental leaves, Council Directive 92/85/EEC, Council Directive 96/34/EC, Council Directive 2010/18/EU

URLOPY RODZICIELSKIE JAKO PRZEJAW OCHRONY ŻYCIA RODZINNEGO W PRAWIE PRACY W POLSCE I W WYBRANYCH PAŃSTWACH CZŁONKOWSKICH UNII EUROPEJSKIEJ

Streszczenie

Tematyka niniejszego artykułu dotyczy szeroko pojętych płatnych urlopów udzielanych ze względu na konieczność sprawowania osobistej opieki nad dzieckiem, zarówno macierzyńskich, ojcowskich, jak i dodatkowych urlopów związanych z rodzicielstwem, z wyłączeniem urlopów wychowawczych i ich wpływu na wskaźniki dzietności oraz osiągnięcie równowagi na linii praca-życie rodzinne. W opracowaniu poddano krytycznej analizie propagowanie rozwiązań, które zachęcałyby aktywne zawodowo kobiety do rezygnacji z pracy i poświęcenia się wychowywaniu dzieci.

Rozważania podjęte w artykule obejmują analizę regulacji urlopów rodzicielskich w prawie międzynarodowym oraz w prawie Unii Europejskiej, ewolucji regulacji instytucji urlopów macierzyńskich i rodzicielskich w polskim prawie pracy, regulacji urlopów rodzicielskich

w wybranych państwach członkowskich Unii Europejskiej oraz problematykę urlopów związanych z rodzicielstwem jako elementu polityki rodzinnej państwa. W części końcowej przedstawione zostały najważniejsze wnioski wynikające z przeprowadzonych rozważań.

Słowa kluczowe: urlop rodzicielski, urlop macierzyński, urlop ojcowski, urlop wychowawczy, wskaźniki dzietności, work-life balance, konflikt na linii praca-życie rodzinne, wymiar urlopów rodzicielskich, dyrektywa Rady 92/85/EWG, dyrektywa Rady 96/34/WE, dyrektywa 2010/18/WE

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