ISSN 1897-5577

Ius Novum

Vol. 12
Number 2
2018

APRIL-JUNE

DOI: 10.26399/iusnovum.v12.2.2018

ENGLISH VERSION

QUARTERLY OF THE FACULTY OF LAW AND ADMINISTRATION
OF ŁAZARSKI UNIVERSITY

Warsaw 2018

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Tłumaczenie opublikowanych materiałów oraz redakcja anglojęzyczna czasopisma w latach 2017/2018 zostały sfinansowane z grantu przyznanego przez Ministerstwo Nauki i Szkolnictwa Wyższego (Decyzja nr 769/P-DUN/2017).

The translation of the publications and linguistic editing of the English version of this journal in 2017/2018 were financed from the grant awarded by the Polish Ministry of Science and Higher Education (Administrative decision 769/P-DUN/2017).

DOM WYDAWNICZY ELIPSA

Desktop publishing, print and cover:
Publishing House ELIPSA
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DOI: 10.26399/iusnovum.v12.2.2018.12/r.a.stefanski

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1. INTRODUCTION

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

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

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

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

3 Journal of Laws [Dz.U.] No. 206, item 1589.

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

2. *RATIO LEGIS* OF IMMUNITY FROM PROSECUTION

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

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

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

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

– "An attacked person does not have a duty to retreat or hide from an assailant in a shut enclosure or suffer from an assault limiting one's liberty, but has the right to fight against that assault with the use of all available means that are necessary to make an assailant abandon the continuation of an assault".[9]

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

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

[6] *Ibid.*, p. 2.

[7] *Ibid.*, pp. 2–3.

[8] *Ibid.*, p. 3.

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

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

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

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

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

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

[11] Judgement of the Appellate Court in Katowice of 15 October 1998, II AKa 53/98, Przegląd Orz. PA w Katowicach 1998, No. 4, item 14; judgement of the Appellate Court in Łódź of 7 May 1999, II AKa 26/99, Biul. PA w Łodzi 1999, No. 9, p. 3; judgement of the Appellate Court in Lublin of 28 September 1999, II AKa l01/99, Prok. i Pr. No. 3 – supplement 2000, item 22.

[12] The Supreme Court judgement of 8 October 1973, I KR 145/73, LEX No. 2177070.

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

[14] Judgement of the Appellate Court in Gdańsk of 31 March 1999, II AKa 2/99, KZS 2000, No. 3, item 42.

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

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

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

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

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

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

[18] T. Tabaszewski, *Eksces intensywny…*, p. 86.

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

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

3. CONDITIONS OF IMMUNITY FROM PROSECUTION

The clause on immunity from prosecution laid down in Article 25 §2a CC is applicable when a defendant:
– has exceeded the limits to the right of self-defence;
– has repulsed an assault consisting in a break-in to a flat, premises, a house or the adjoining fenced area; or
– has repulsed an assault preceded by a break-in to those places (positive requirements).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[27] The Supreme Court judgement of 23 July 1980, V KRN 168/80, LEX No. 17294.

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

3.2. TYPE OF ASSAULT

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

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

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

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

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

[30] L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2014, p. 148.

[31] J. Warylewski, *Czy zmiany…*, p. 99.

[32] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 45, Poznań 2004, pp. 92 and 189.

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

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

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

In the judicature, it is assumed that:

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

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

[34] J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 880.

[35] *Ibid.*, p. 881.

[36] The Supreme Court ruling of 14 August 2001, V KKN 338/98 LEX No. 52067.

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

[38] Motywy Komisji Kodyfikacyjnej. Komisja Kodyfikacyjna, Vol. V, issue 4, p. 202.

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

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

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

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

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

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

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

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

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

[43] L. Peiper, *Komentarz do Kodeksu karnego*, Kraków 1936, p. 515.

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

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

[46] The Supreme Court ruling of 14 August 2001, V KKN 338/98, LEX No. 52067.

[47] L. Peiper, *Komentarz*…, p. 514.

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

3.3. OBJECT OF ASSAULT

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

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

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

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

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

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

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

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[49] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 9, Poznań 1996, p. 79.
[50] M. Mozgawa, *Kilka uwag…*, p. 176.
[51] Journal of Laws [Dz.U.] of 2013, item 1222, as amended.
[52] Journal of Laws [Dz.U.] of 2016, item 1610, as amended.
[53] Journal of Laws [Dz.U.] No. 74, item 836, as amended.
[54] Journal of Laws [Dz.U.] of 2015, item 1892, as amended.
[55] Journal of Laws [Dz.U.] of 2013, item 1222, as amended.

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

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

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

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

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

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

[57] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warsaw 2010, p. 331.

[58] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 19, Poznań 1998, p. 285.

[59] L. Morawski, *Zasady wykładni prawa*, Toruń 2006, p. 106.

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

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

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[60] J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…*, p. 879.

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

[62] M. Mozgawa, *Kilka uwag…*, p. 178.

[63] L. Peiper, *Komentarz…*, p. 515.

[64] The Supreme Court judgement of 19 February 1934, 3 K 20/34, OSP 1934, item 394.

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

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

[67] I. Andrejew, *Polskie prawo karne w zarysie*, Warsaw 1989, p. 402.

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

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

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

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

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

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

[70] J. Warylewski, *Czy zmiany…*, p. 99.

[71] Journal of Laws [Dz.U.] No. 112, item 1316.

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

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

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

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

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

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

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

[75] M. Warchoł's statement…, p. 19.

[76] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 34, Poznań 2001, pp. 270–271.

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

[78] M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks karny…*, p. 1195.

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

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

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

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

5. CONCLUSIONS

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

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

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

[81] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 35, Poznań 2002, p. 265.

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

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

Summary

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

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

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

NIEKARALNOŚĆ PRZEKROCZENIA GRANIC OBRONY KONIECZNEJ

Streszczenie

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

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

Cytuj jako:

Stefański R.A., *Niekaralność przekroczenia granic obrony koniecznej*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 5–24. DOI: 10.26399/iusnovum.v12.2.2018.12/r.a.stefanski

Cite as:

Stefański, R.A. (2018) 'Immunity from prosecution for exceeding the limits to the right of self-defence'. *Ius Novum* (Vol. 12) 2, 5–24. DOI: 10.26399/iusnovum.v12.2.2018.12/r.a.stefanski

ISSUES CONCERNING ADJUDICATION AND EXECUTION OF A FINE AFTER THE 2015 REFORM OF CRIMINAL LAW

DOI: 10.26399/iusnovum.v12.2.2018.13/m.melezini

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One of the main penal policy aims of the broad criminal law reform on the basis of the Act of 20 February 2015,[1] which entered into force on 1 July 2015, was to rationalise penal policy via changes in the structure of penalties adjudicated for crimes with emphasis placed on non-custodial penalties (a fine and limitation of liberty).

In the justification for the Bill, it was clearly indicated that it is necessary to change the former practice of justice administration, which was characterised by excessive use of the penalty of deprivation of liberty with conditional suspension of its execution (circa 60% of convictions), with a small share of self-standing fines (circa 20%) and the penalty of limitation of liberty (circa 13%). At the same time, attention was drawn to the low rate of self-standing fines in comparison with most of the European Union countries, where a self-standing fine is a dominating penalty (e.g. in the UK it accounts for over 70%, in Germany – over 60%, in Belgium – over 91%, in Finland and Denmark – over 87%), and the very "scarce value of such penalties adjudicated, even if limited wealth of Polish society was taken into consideration" was emphasised.[2]

This diagnosis together with inappropriateness of the application of the penalty of deprivation of liberty with conditional suspension of its execution occurring sometimes[3] determined the adoption of a new strategy in penal policy in which

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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 for the government Bill amending the Act: Criminal Code and some other acts with draft secondary regulations of 15 May 2014, paper no. 2393, pp. 1–5; also see, Part IX of the document entitled "Ocena skutków regulacji", pp. 97–98.

3 For more, see Justification for the government Bill, pp. 1–4; *Uzasadnienie projektu ustawy o zmianie ustawy Kodeks karny*, Czasopismo Prawa Karnego i Nauk Penalnych No. 4, 2013, pp. 45–47.

"it is necessary to quickly adjudicate penalties that are really painful". It was assumed that "the penalty of deprivation of liberty with conditional suspension of its execution should be almost completely exchanged for a fine or a more broadly applied penalty of limitation of liberty".[4] It is expected that, as a result, the penalty of a fine will constitute 60% of penalties, limitation of liberty – 20%, and the penalty of deprivation of liberty, mostly suspended, will constitute the rest.[5] Thus, a fine is to become the main measure of penal response to petty and medium-gravity crimes.

The above assumptions were translated into specific normative solutions, which created a realistic opportunity to implement them.

Among the regulations that are to be conducive to the rebuilding of the system of punishment in the adopted direction, the most important solutions are those creating broad opportunities to adjudicate non-custodial penalties, including a fine, with the simultaneous limitation of the scope of application of the penalty of deprivation of liberty, especially the one with conditional suspension of its execution. They are to guarantee real restoration of the priority to non-custodial penalties in relation to the petty and medium-gravity crimes and strengthen the principle of *ultima ratio* of the penalty of deprivation of liberty in order to reduce prison population, and especially to considerably decrease the quota of people waiting for the execution of a valid imprisonment sentence, the number of whom (over 40,000) undoubtedly questions the rationality of the penal policy.

In order to achieve the aim, a new provision was introduced to the Criminal Code (hereinafter: CC): Article 37a, which changed the system of statutory penalties for crimes. By the way, it should be noticed that in the doctrine, the legal nature of the provision laid down in Article 37a is questioned. Some scholars say that the regulation envisages a directive on the length of penalty.[6] In accordance with this provision, if statute envisages the penalty of deprivation of liberty for up to eight years, a fine or the penalty of limitation of liberty may be imposed. This means that a fine and the penalty of limitation of liberty have been introduced to all statutory exposures to punishment laid down in codes and in other acts in case of the penalty of deprivation of liberty for up to eight years, in which they were non-existent in the past. This legislative step considerably extended the grounds for imposing fines (as well as the penalty of limitation of liberty).[7] It is rightly emphasised in the doctrine that the modification of the statutory exposure to punishment developed in the new legal state for a given type of crime by the introduction of an alternative penalty of a fine or limitation of liberty is "one of the most fundamental changes in the whole reform".[8]

A very important change in the provision of Article 58 §1 CC strongly corresponds to the newly adopted solution. In the original version, it laid down the principle of

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4 Justification for the government Bill, pp. 4–5.

5 See, Justification for the government Bill, Part IX "Ocena skutków regulacji", pp. 126–127.

6 See, V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.) *Kodeks karny. Komentarz*, Warsaw 2016, pp. 225–227; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, pp. 321–324.

7 See, J. Majewski, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna*. Vol. I: *Komentarz do art. 1–52*, Warsaw 2016, pp. 736–742.

8 J. Giezek, *O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzanej kary*, Palestra No. 7–8, 2015, p. 25.

treating the penalty of deprivation of liberty in its absolute form as *ultima ratio* in case of crimes carrying alternative non-custodial penalties (a fine or limitation of liberty). The new version of Article 58 §1 CC, which stipulates that if statute does not stipulate a possibility of choosing the type of punishment and a crime carries the penalty of deprivation of liberty for up to five years, a court must impose the penalty of deprivation of liberty only if another penalty or a penal measure cannot meet the aim of punishment, changed the principle of the absolute penalty of deprivation of liberty into the principle of *ultima ratio* of the penalty of deprivation of liberty in general, i.e. also in case of conditional suspension of its execution. It is easy to notice that the penalty of deprivation of liberty with conditional suspension of its execution was excluded from the directive on the priority to non-custodial penalties in case of alternative exposure to punishment, which obviously, in conformity with the aim of the reform, limits the application of conditional suspension of the penalty of deprivation of liberty execution and increases the preference for non-custodial penalties, including a fine.

It is worth noticing that in the present legal state, the directive on the priority to non-custodial penalties is applicable to crimes carrying the penalty of deprivation of liberty for up to five years, which at the same time carries a penalty or penalties of more lenient nature. With respect to the content of the provision of Article 37a CC, which changed all statutory exposures including the penalty of deprivation of liberty not exceeding five years (in general eight years) into alternative exposures,[9] the scope of the directive on the priority to non-custodial penalties, also a fine, was considerably extended. Thus, if the statutory exposure to a penalty is an alternative one and envisages a possibility of choosing between imprisonment and non-custodial penalties, a court should first of all consider a possibility of adjudicating a fine or the penalty of limitation of liberty, or a penal measure.

The radical limitation of the possibility of applying conditional suspension of the execution of the penalty of deprivation of liberty also serves the extension of the scope of application of the penalty of a self-standing fine (as well as the penalty of limitation of liberty). It is pointed out in literature that they are of critical importance for the success of the penal policy reform.[10] And although changes covered almost all areas of conditional suspension of the execution of punishment, in the context of new penal philosophy, the most important modifications concern the conditions for the application of this solution. Indeed, the amended provision of Article 69 §1 CC limited the possibility of applying conditional suspension of the execution of punishment exclusively to the penalty of deprivation of liberty for the maximum of one year. In the original version of Article 69 §1 CC, the maximum limit to the penalty of deprivation of liberty, which could be subject to suspension, was two years. Moreover, a new additional condition for the application of conditional suspension of the execution of the penalty of deprivation of liberty was introduced in Article 69 §1 CC, i.e. one concerning the former period of life of a perpetrator as a condition that at the time of committing a crime, a perpetrator was not sentenced to imprisonment (adjudicated as an absolute or conditionally suspended pen-

[9] In some authors' opinion, Article 37a CC lays down a directive on the type of punishment. See, footnote no. 6.

[10] See, A. Zoll, *Środki związane z poddaniem sprawcy próbie i zamiana kary*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Kraków 2015, pp. 429–430 and 436.

alty). The third condition for the application of conditional suspension of the execution of the penalty of deprivation of liberty, which is the criminological prediction concerning a perpetrator of a crime, i.e. an assumption that the conditional suspension of the execution of the penalty not exceeding one year will be sufficient for the achievement of the aim of punishment, especially the prevention of a return to crime, remained unchanged.

Such important changes may play an important role in reducing the application of conditional suspension of the execution of the penalty of deprivation of liberty and the increase in the frequency of adjudicating a fine and the penalty of limitation of liberty. Indeed, they should be perceived in the context of the new regulation of Article 37a CC and the directive of Article 58 §1 CC, which treats the (absolute and conditionally suspended) penalty of deprivation of liberty as *ultima ratio*. Nevertheless, in literature, it is rightly raised that such a drastic limitation on the application of conditional suspension of the execution of the penalty of deprivation of liberty may cause an increase in the number of people sentenced to imprisonment, which can result in a deepened crisis of the penal policy.[11] By the way, it should be added that the amendment to Article 69 §1 CC completely excludes the application of conditional suspension of the execution of non-custodial penalties, i.e. a self-standing fine and the penalty of limitation of liberty, inter alia due to a scarce scope of application of this penal response in the practice of justice administration.

The repealing of Article 58 §2 CC, which laid down the principle that a fine must not be imposed on a perpetrator whose income, financial relations or earning possibilities substantiate a belief that a perpetrator will not pay that fine and there will be no possibility of enforcing it, is also to serve to fulfil the legislator's aim to make a fine a basic means of response to petty and medium-gravity crimes. The introduction of that principle to the Criminal Code of 1997 aimed to prevent adjudicating unenforceable fines and, this way, limit the number of executed substitute penalties of imprisonment and, at the same time, ensure personal painfulness by avoiding the transfer of the obligation to pay a fine onto the family.[12] J. Majewski rightly notices that: "Those reasons did not stop being up-to-date" and he is "absolutely critical" of the decision on the derogation of Article 58 §2 CC.[13]

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[11] See, Oświadczenie Komisji Kodyfikacji Prawa Karnego z dnia 22 maja 2014 r. (copied paper); A. Zoll, *Regulacja warunkowego zawieszenia wykonania kary pozbawienia wolności w ustawie z 20 lutego 2015 r.*, [in:] M. Bojarski, J. Brzezińska, K. Łucarz (ed.), *Problemy współczesnego prawa karnego i polityki kryminalnej. Księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław 2015, p. 412; V. Konarska-Wrzosek, [in:] A. Adamski, M. Bernat, M. Leciak (ed.), *Ustawowe przesłanki stosowania warunkowego zawieszenia wykonania kary w założeniach nowej polityki karnej*, Warsaw 2015, pp. 168 and 180; J. Lachowski, *Ocena wybranych zmian w zakresie instytucji warunkowego zawieszenia wykonania kary w ustawie z 20 lutego 2015 r.*, [in:] M. Bojarski, J. Brzezińska, K. Łucarz (ed.), *Problemy współczesnego prawa…*, pp. 250–251 and 254–255.

[12] Uzasadnienie rządowego projektu kodeksu karnego [Justification for the government Bill amending the Criminal Code], [in:] I. Fredrich-Michalska, B. Stachurska-Marcińczak et al. (ed.), *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Warsaw 1997, pp. 137–138. For more on the issue, see M. Melezini, *Kara grzywny*, [in:] M. Melezini (ed.), *System Prawa Karnego*. Vol. 6: *Kary i inne środki reakcji prawnokarnej*, 2nd edition, Warsaw 2016, pp. 128–132 and literature referred to therein.

[13] See, J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Warsaw 2015, p. 168. Also see, T. Szymanowski, *Nowelizacja Kodeksu karnego w 2015 r.*, Przegląd Więziennictwa Polskiego No. 87, 2015, p. 17.

The justification for the government Bill of 2015 in general does not point out the motives for repealing Article 58 §2 CC, and reference to the effectiveness of enforcement of fines in case of the lack of execution or adducing an argument that adjudication of a fine is equalled to the principle of defining painfulness of financial penalties in other parts of the legal system cannot be treated as the justification of the made change. Moreover, it should be noted that in another part of the justification for the government Bill, concerning changes in the Penalty Execution Code (henceforth: PEC), there is a statement that "It is commonly known that efficiency of enforcement of fines and court fees is very low. It results in lower revenue to the state budget and discontinuation of executive proceedings (especially concerning court fees) as well as the necessity to adjudicate and order execution of substitute penalties of imprisonment, which additionally increases the incarceration rate in our country".[14] And this fact of low efficiency of fines execution induced the legislator to introduce changes to the Penalty Execution Code, which are expressed in two new provisions, i.e. in Article 12a PEC and Article 48a PEC, which is discussed below.

Not earlier than in Part IX of the justification, entitled "Assessment of execution results", arguments for repealing Article 58 §2 CC were pointed out. It was assumed that the directive banning adjudication of a fine laid down in Article 58 §2 CC is "the basic source of problems and pathologies connected with adjudication of fines". It was also emphasised that it was just this provision that contributed to the considerable limitation of the role of a self-standing fine in the penal policy, especially in a situation in which deprivation of liberty with conditional suspension of its execution substitutes for a self-standing fine.[15] There is no justification, as J. Majewski rightly notes, for such a belief.[16] The reasons for the defective structure of adjudicated penalties are more complicated. It is necessary to leave this issue outside the scope of the present discussion because it goes beyond its subject matter, however, it is worth drawing attention to the fact that they are mainly connected with schematic adjudication practice that has been present in our country for dozens of years as well as defectiveness of some statutory solutions concerning, e.g. conditional suspension of the execution of the penalty of deprivation of liberty. If the success of the new penal strategy really depended only on the regulation concerning the ban on adjudicating a fine in the conditions laid down in Article 58 §2 CC, the criminal law reform would not be so broad and in-depth and the change in the legal state would only consist in repealing Article 58 §2 CC.

The justification for the government Bill points out that the repealing of Article 58 §2 CC "frees a court from an obligation to examine a perpetrator's financial position in order to determine grounds for adjudicating a fine".[17] As a result, when a court chooses a fine, it should take into account general directives on imposing penalty and not what the financial position of a perpetrator is.

It should be highlighted that the ban on adjudicating an unenforceable fine laid down in the repealed Article 58 §2 CC was connected with almost the same

[14] See, Justification for the government Bill, paper no. 2393, pp. 14 and 15.
[15] See, Justification for the government Bill, Part IX: "Ocena skutków regulacji", pp. 125–126.
[16] See, J. Majewski, *Kodeks karny. Komentarz…*, p. 169.
[17] Justification for the government Bill, p. 13.

requirements (with the exception of personal features and conditions), which influence the determination of a daily rate of a fine adjudicated in accordance with the rate model or an amount of a fine adjudicated in accordance with the amount model. However, the models of adjudicating a fine remained unchanged. Within the rate model of adjudicating a fine, a court first of all determines the number of daily rates in accordance with the gravity of a crime and the size of guilt in a given case, and then, in the second stage, it determines the daily rate taking into consideration the requirements laid down in Article 33 §3 CC. Pursuant to this provision, a court takes into consideration a perpetrator's income, his personal and family situation, financial position and earning possibilities. Within the amount model of adjudicating a fine, a court also determines a fine amount having considered a perpetrator's income, personal and family situation, financial position and earning possibilities (Article 11 §3 of CC implementation regulations).[18] The indicated circumstances are identical. Thus, a court, determining a daily rate or the amount of a fine, still should take into consideration the broadly understood financial status of a perpetrator and, as W. Górowski emphasises, conduct proceedings to take evidence in order to verify a perpetrator's financial circumstances.[19] Moreover, Article 213 §1a Criminal Procedure Code (henceforth: CPC) introduced a very important procedural instrument making it possible to obtain information concerning a perpetrator's financial relations and sources of income, including conducted and concluded fiscal proceedings, in the form of an obligation to obtain this information from the ICT system of the minister for public finance, which can be done electronically. However, if in the course of proceedings it is determined that a perpetrator has no property and the directives on punishment suggest adjudication of a fine, this penalty may be adjudicated due to the repealing of the ban on adjudicating an unenforceable fine. In such a case, a court must determine a daily rate at the minimum level of PLN 10,[20] and in case of an amount of fine, when determining it, it must take into consideration that fact.

It is worth quoting the latest statistical data concerning the structure of penalties adjudicated in 2014, i.e. in the last full year before the reform, and in 2016, the first full year after the reform,[21] in order to initially verify the results of the 2015 reform of criminal law and establish the role of a self-standing fine in criminal courts case law.

The analysis of case law in 2014 and 2016 proves that the structure of adjudicated penalties considerably changed. First of all, the share of self-standing fines increased (from 21.3% in 2014 to 34.1% in 2016). It should be emphasised that in the period when the Criminal Code of 1997 was in force, i.e. in 1999–2016, it was the highest rate of self-standing fines adjudicated. Earlier (until 2016), it never exceeded 24%.

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[18] See, M. Melezini, *Kara grzywny…*, pp. 122–145.

[19] For more on the issue, see W. Górowski, *Orzekanie kary grzywny po 1 lipca 2015 r.*, Palestra No. 7–8, 2015, pp. 68–74.

[20] See, W. Górowski, *Grzywna*, [in:] W. Wróbel, *Nowelizacja prawa karnego 2015. Komentarz*, Kraków 2015, p. 71.

[21] Statistical data are available on the website of the Department of Managerial Statistics of the Ministry of Justice [Wydział Statystycznej Informacji Zarządczej Ministerstwa Sprawiedliwości]: https://isw.ms.gov.pl/pl/baza-statystyczna/opracowanie-wieloletnie [accessed on 30/01/2018]; calculations made by the author.

The number of self-standing fines increased from 63,078 in 2014 to 98,778 in 2016, i.e. by 35,700 sentences. Therefore, one can state that the importance of a self-standing fine in the penal policy greatly increased, which should be recognised as an absolutely positive tendency.

At the same time, in that period, the rate of penalties of limitation of liberty also rose (from 11.2% in 2014 to 21.3% in 2016). The number of such sentences rose from 33,009 in 2014 to 61,720 in 2016, i.e. by 28,711.

Such a considerable increase in non-custodial sentences makes it possible to state that in 2016 non-custodial penalties (a self-standing fine and limitation of liberty) played a dominating role in the penal policy. Their share in the structure of sentences in 2016 exceeded 50% (it rose from 32.5% in 2014 to 55.4% in 2016).

Significant changes took place in relation to the penalty of deprivation of liberty. Attention should be drawn to a significant decrease in the number of this type of penalties (from 199,167 in 2014 to 125,368 in 2016), i.e. by 73,799. The rate of sentences of deprivation of liberty fell from 67.4% in 2014 to 43.3% in 2016. What is important, the number of the penalties of deprivation of liberty with conditional suspension of execution fell considerably (from 163,534 in 2014 to 81,673 in 2016), i.e. by as many as 81,861 sentences. The percentage of the penalty of deprivation of liberty with conditional suspension of its execution fell from 55.4% in 2014 to 28.2% in 2016. The penalty of deprivation of liberty with conditional suspension of its execution stopped playing the dominating role in penal policy and its share in the structure of penalties (28.2%) was lower than the share of a self-standing fine (34.1%).

The picture of adjudication practice in relation to the penalty of absolute deprivation of liberty is alarming. The share of this type of punishment in the structure of sentences increased from 12.1% in 2014 to 15.1% in 2016. The number of sentences of absolute deprivation of liberty rose from 35,633 in 2014 to 43,695 in 2016, i.e. by 8,062 sentences. It can be presumed that in some cases the penalty of absolute deprivation of liberty was adjudicated instead of the penalty of deprivation of liberty with conditional suspension of its execution because of the drastic limitation of the scope of application of this probation instrument.

The brief analysis of the penal policy in 2014 and 2016[22] and the role of a self-standing fine in the structure of sentences makes it possible to formulate a careful conclusion that the direction of changes in case law is in general in conformity with the assumptions of the criminal law reform. This is because the importance of a self-standing fine (as well as the penalty of limitation of liberty) is growing and the role of the penalty of deprivation of liberty with conditional suspension of its execution is decreasing. However, at the same time, courts more often apply a more painful penal response, i.e. a penalty of absolute deprivation of liberty. At present, it is not possible to unambiguously answer the question whether it results from aggravation of penal repression, or changes in the requirements for the application of the penalty of deprivation of liberty with conditional suspension of its execution, or perhaps the changes in the structure of criminality. We should hope that successive years

[22] I will present a broad analysis of the penal policy after the 2015 criminal law reform in a separate paper.

would bring further positive changes in case law, including an increase in the share of a self-standing fine to the level expected, i.e. 60% of all sentences.

It is necessary to take into account that the success of the whole criminal law reform depends not only on changes in case law, including the increase in the significance of a self-standing fine as a means of fighting against petty and medium-gravity crimes. Execution proceedings also play an important role in achieving the legislator's assumptions.

In case of a fine, the issue of fundamental importance is to develop such a statutory model of its execution that the form of painfulness of a fine (an economic nature) will not basically change and become different in terms of quality, especially a substitute penalty of deprivation of liberty. A considerable increase in the execution of substitute penalties of deprivation of liberty may have a negative impact on prison population, contributing to the rise in the number of convicts. It is worth reminding that the main assumption of the 2015 criminal law reform was the reduction of prison population and a decrease in the number of people waiting for the execution of valid imprisonment sentences.[23]

On the other hand, in literature, an "increase in the number of adjudicated and executed substitute penalties, which had already been high", was reported.[24] The statistical data presented by K. Postulski indicate that, while in 2011 the number of substitute penalties of deprivation of liberty ruled and ordered to be executed instead of a fine, in relation to convicts who were not in prison, accounted for 40,324 (5.7% of concluded proceedings), in 2012 it rose to 59,162 (8.9% of concluded proceedings). At the same time, this author established that "15% of convicts serving a sentence in 2011 were people who should have paid a fine and/or immediately leave prison, or reduce the time of staying there in connection with the execution of other penalties of deprivation of liberty".[25]

The diagnosis indicating the deteriorating efficiency of executing fines and a concern about a further increase in the number of substitute penalties as well as a critical opinion about rules of ordering execution of substitute penalties aggravated by the Act of 16 September 2011 amending the Act: Penalty Execution Code and some other acts indicated an urgent need of changes to the legal state. They were introduced by the already mentioned Act of 20 February 2015 within an in-depth criminal law reform.

The scale of change in relation to the execution of a fine was not big. In general, it was connected with the introduction of two new provisions, i.e. Article 12a PEC and very important Article 48a PEC.

The solution laid down in Article 12a PEC is connected with the need to improve the efficiency of enforcing fines, which the legislator noted. Having that in mind, the legislator introduced an additional instrument motivating a convict to settle liabilities resulting from fines (and other court fees). Namely, Article 12a PEC

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[23] See, Justification for the government Bill, pp. 1–4.

[24] See, K. Postulski, *Zmiany dotyczące wykonywania kary grzywny obowiązujące od 1 lipca 2015 r.*, Palestra No. 5–6, 2015, p. 61.

[25] *Ibid*., p. 56. Also see, K. Postulski, *Orzekanie i wykonywanie zastępczej kary pozbawienia wolności (stan prawny, obawy, propozycje)*, Probacja No. II, 2013, pp. 57–71.

obliges a court, in case a convicted person does not settle a fine in time laid down in the provisions of PEC, to immediately pass the information about the debt to offices of economic information, operating on the basis of the Act of 9 April 2010 on the provision of economic information and exchange of economic data.[26] A court is obliged to pass the information to all such operating offices. In case of partial or full settlement of liabilities or their enforcement, a court is obliged to immediately, not later than in 14 days, request that those offices update the economic information. It should be added that the provision of Article 12a PEC at the same time imposed an obligation on a court to inform the convicted person in the call for a fine payment that in case the full amount is not settled in time laid down in PEC, the economic information will be passed to those offices.[27] The justification for the government Bill expresses a hope that this information will result in the expected way and motivate a considerable group of the convicted to settle their liabilities.[28]

Article 48a PEC introduced a significant and expected change. It took into consideration one of many proposals of the doctrine concerning moderation of rigours connected with ordering the execution of substitute penalty of deprivation of liberty. The provision introduced a possibility of a stay of the execution of the substitute penalty of deprivation of liberty at any time, provided the convicted declares in writing that he/she will perform community service and succumb to its rigours. As far as the motives for the new solution of Article 48a PEC are concerned, the legislator indicated the pursuit of substitute execution of a fine, especially in the form of community service and pointed out that this form of the execution of a fine has an educational, creative value and reduces prison population and budgetary spending in this area.[29]

The stay of the execution of the substitute penalty of deprivation of liberty takes place until community service is performed or the remaining amount of money to be paid as a fine is settled. At the same time, a court determines the type of community service to be performed by the convict. If he/she evades the responsibility to perform community service, a court must order the substitute penalty of deprivation of liberty. It should be added that, in accordance with Article 48 §6 PEC, it is inadmissible to re-apply a stay of the execution of the same substitute penalty of deprivation of liberty.[30]

The regulation adopted should result in the reduction of the number of substitute penalties of deprivation of liberty served. Undoubtedly, it makes the model of fines execution more flexible. It must be emphasised at the same time that, in practice, community service constitutes a significant alternative to the substitute penalty of deprivation of liberty. The statistical data presented by K. Postulski show that the number of decisions concerning the exchange of a fine for community service to be

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[26] Journal of Laws [Dz.U.] No. 81, item 530, as amended.

[27] For more on the issue, see W. Górowski, *Grzywna*, [in:] W. Wróbel, *Nowelizacja…*, pp. 77–80; K. Postulski, *Zmiany dotyczące wykonywania…*, pp. 56–57.

[28] Justification for the government Bill, pp. 45–48.

[29] Justification for the government Bill, p. 53.

[30] See, K. Postulski, *Kodeks karny wykonawczy. Komentarz*, 3rd edition, Warsaw 2016, pp. 472–476.

performed is considerable and accounts for: 92,514 in 2010, 25,496 in 2011, 45,541 in 2012, and 83,465 in 2013.[31]

To sum up, it should be emphasised that the nearest future will show whether the introduced changes concerning the statutory model of fine execution will increase its efficiency and reduce the number of substitute penalties of deprivation of liberty served. A hope may be expressed that with the increase in the role of a fine in the penal policy, the efficiency of fine execution will rise, too.

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[31] See, K. Postulski, *Zmiany dotyczące wykonywania…*, p. 58.

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ISSUES CONCERNING ADJUDICATION AND EXECUTION OF A FINE AFTER THE 2015 REFORM OF CRIMINAL LAW

Summary

The article discusses the issue of new solutions concerning a fine introduced to the Criminal Code and the Penalty Execution Code by an abundant amendment to criminal law of 20 February 2015. The discussion focuses on the analysis of regulations that, in compliance with the legislator's assumptions, are to make a fine the basic means of penal response to petty and medium-gravity crimes. The article also attempts to present a preliminary evaluation of case law in 2014 and 2016. The confrontation of the 2015 criminal law reform assumptions with the practice made it possible to state that the significant changes that took place in case law in general go in the right direction and should be positively assessed. Undoubtedly, the importance of a fine in the penal policy considerably rose and its share increased from 21.3% to 34.1%. It has also been established that non-custodial penalties dominated the structure of sentences. They accounted for 55.4% of convictions. In conformity with the reform assumptions, the share of the penalty of deprivation of liberty with conditional suspension of its execution clearly decreased (from 67.4% to 43.3%). What is alarming, there is an increase in the percentage of the adjudicated penalty of absolute deprivation of liberty (from 12.1% to 15.1%). Finally, the article analyses selected issues concerning the execution of a fine, especially the new regulation laid down in Article 12a PEC and Article 48a PEC, which are aimed at raising the efficiency of fine execution and reducing the scope of application of the substitute penalty of deprivation of liberty.

Keywords: a fine, criminal law reform, non-custodial penalties, *ultima ratio* of the penalty of deprivation of liberty, substitute penalty, penal policy

Z PROBLEMATYKI ORZEKANIA I WYKONYWANIA GRZYWNY PO REFORMIE PRAWA KARNEGO Z 2015 R.

Streszczenie

Przedmiotem artykułu są nowe rozwiązania dotyczące grzywny, wprowadzone do kodeksu karnego i kodeksu karnego wykonawczego obszerną ustawą nowelizującą prawo karne z dnia 20 lutego 2015 r. Rozważania koncentrują się na analizie uregulowań, które zgodnie z założeniami ustawodawcy mają uczynić z kary grzywny podstawowy środek reakcji karnej na przestępstwa drobne i średniej wagi. W opracowaniu podjęto również próbę przedstawienia wstępnych ocen orzecznictwa sądów w 2014 r. i w 2016 r. Konfrontacja założeń reformy prawa karnego z 2015 r. z praktyką pozwoliła stwierdzić, że istotne zmiany, które nastąpiły w orzecznictwie sądów, zasadniczo zmierzają w dobrym kierunku i należy je ocenić pozytywnie. Nie ulega wątpliwości, że wydatnie wzrosło znaczenie grzywny w polityce karnej, której udział powiększył się z 21,3% do 34,1%. Ustalono też, że kary nieizolacyjne dominowały w strukturze kar orzeczonych. Stanowiły 55,4% ogółem skazań. Zgodnie z założeniami reformy wyraźnie zmniejszył się udział kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania (z 67,4% do 43,3%). Niepokoi wzrost odsetka orzeczonych kar bezwzględnego pozbawienia wolności (z 12,1% do 15,1%). W końcowej części artykułu analizie poddano wybrane problemy związane z wykonywaniem grzywny, a w szczególności nowe uregulowania ujęte w art. 12a k.k.w. i art. 48a k.k.w., które mają na celu zwiększenie efektywności wykonywania grzywny i ograniczenie zakresu stosowania zastępczej kary pozbawienia wolności.

Słowa kluczowe: kara grzywny, reforma prawa karnego, kary nieizolacyjne, *ultima ratio* kary pozbawienia wolności, kara zastępcza, polityka karna

Cytuj jako:

Melezini M., *Z problematyki orzekania i wykonywania grzywny po reformie prawa karnego z 2015 r.*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 25–36. DOI: 10.26399/iusnovum.v12.2.2018.13/m.melezini

Cite as:

Melezini, M. (2018) 'Issues concerning adjudication and execution of a fine after the 2015 reform of criminal law'. *Ius Novum* (Vol. 12) 2, 25–36. DOI: 10.26399/iusnovum.v12.2.2018.13/m.melezini

SUBSTANTIVE PREREQUISITE FOR CONDITIONAL RELEASE: SOME REFLECTIONS

DOI: 10.26399/iusnovum.v12.2.2018.14/g.b.szczygiel

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In the 19th century, S. Budziński[1] wrote that thanks to conditional release from serving the full sentence "a penalty does not extend beyond the need and this way the inconveniences of long imprisonment may be avoided; moreover, the hope for better fate inspires a convict to better conduct and fear of coming back to prison prevents him from unlawful acts, which is a guarantee of public security". This opinion has not lost its validity, which is confirmed by the standpoint of the Committee of Ministers of the Council of Europe. In the Committee's opinion,[2] conditional release "is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community".

It is worth adding that conditional release confirms respect for the principles of humanism and individual treatment of the execution of the most painful measure in the penal response to the crime catalogue, i.e. the penalty of deprivation of liberty.

In accordance with the binding regulations, conditional release from serving the full sentence is subject to a discretionary decision. The Criminal Code (henceforth: CC)

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1 S. Budziński, *Myśli do ułożenia nowego prawa karnego w formie projektu z motywami*, Warsaw 1865, p. 65.

2 Recommendation Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole) (adopted by the Committee of Ministers on 24 September 2003 during the 853rd Meeting of the Ministers' Deputies), text [in:] Przegląd Więziennictwa Polskiego No. 72–73, 2011, pp. 291–301. Also see, Recommendation No. R(99)22 concerning prison overcrowding and prison population inflation (adopted by the Committee of Ministers on 30 September 1999 during the 681st Meeting of the Ministers' Deputies), text [in:] Przegląd Więziennictwa Polskiego No. 72–73, 2011, pp. 131–137; Recommendation 1741(2006) of the Parliamentary Assembly of the Council of Europe on social reintegration of prisoners, text [in:] Przegląd Więziennictwa Polskiego No. 72–73, 2011, pp. 221–224.

and the Penalty Execution Code (henceforth: PEC) do not lay down the instrument of conditional release as a convict's right. As the Constitutional Tribunal emphasised in its judgement,[3] the passage of a certain quantum of punishment "constitutes only one of the prerequisites for conditional release that is necessary for the examination of a motion. However, the fulfilment of this criterion does not mean that a convict will be conditionally released. The substantive prerequisites laid down in Article 77 Criminal Code are decisive".

In accordance with Article 77 §1 CC, a convict sentenced to the penalty of deprivation of liberty can be released from serving the rest of the sentence only when his attitude, features and personal conditions, circumstances of the crime commission and conduct after the commission of a crime and during his service in prison justify the belief that the convict will comply with the ordered penal or preventive measures and will abide by the legal order, in particular, he will not commit a crime. The substantive prerequisite for conditional release focuses on the fulfilment of individual preventive aims.

The content of the provision discussed does not give grounds for stating in the justification, as some courts do,[4] indicating the legislator's use of the phrase "only when", that conditional release from serving the full sentence constitutes an exception to the rules of serving the full sentence. The phrase should be referred to the criminological prognosis. Conditional release is inadmissible when a criminological prognosis cannot be determined.[5]

The Appellate Court in Wrocław[6] rightly noticed that "adjudicating on conditional release is facultative in nature and is limited to determination, based on the grounds laid down in Article 77 §1 CC, of a social and criminological prognosis. On the other hand, in case of recognition that a convict will comply with the law after the release (positive prognosis), a court is obliged to decide on conditional release. In case of refusal to conditionally release a convict, it can be effectively raised in appeal that the substantive right laid down in Article 77 §1 CC was violated".

In the opinion of the Appellate Court in Kraków,[7] "Refusal to release a convict who deserves it undermines the penitentiary activities because it may indicate that even a basic change of convicts' attitudes, perfect conduct in prison, involvement in prison initiatives, etc. do not receive courts' recognition. Such a belief might lead to a conviction that courts are too rigorous, incompliant with justice, and frustrate the

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[3] Constitutional Tribunal judgement of 10 July 2000, SK 21/99, OTK 2000/5/144.

[4] Ruling of the Appellate Court in Łódź of 23 March 1999, II AKzw 114/99, LEX No. 4123; ruling of the Appellate Court in Kraków of 21 June 2000, II AKz 217/00, LEX No. 41735; ruling of the Appellate Court in Kraków of 27 June 2000, II AKz 214/00, LEX No. 42967; ruling of the Appellate Court in Gdańsk of 22 August 2000, II AKz 630/00, LEX No. 144270; ruling of the Appellate Court in Kraków of 2 October 2012, II AKzw 1066/12, LEX No. 1274943; ruling of the Appellate Court in Kraków of 10 May 2012, II AKzw 421/12, LEX No. 1227527 [accessed on 26/01/2018].

[5] E. Bieńkowska, [in:] G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 1999, p. 1174.

[6] Ruling of the Appellate Court in Wrocław of 31 January 2006, II AKzw 1238/06, LEX No. 211707 [accessed on 26/01/2018].

[7] Ruling of the Appellate Court in Kraków of 24 March 2009, II AKzw 195/09, LEX No. 504069 [accessed on 26/01/2018].

effects of rehabilitation of prisoners, and the whole penitentiary activity". It should be added that the refusal to conditional release in case of a positive prognosis would be in conflict with the principle of humanitarianism laid down in Article 4 PEC.

A prognosis, and thus predicting future events, involves a certain degree of risk.[8] Therefore, the legislator's use of the term "conviction", which is a synonym of certainty, a belief, cannot be assessed as appropriate.[9] It is hard to provide arguments for the substitution for the term "supposition", which was used in the Criminal Code of 1932 (Article 65 §1 "allows supposing") and the Criminal Code of 1969 (Article 90 §1 "substantiate supposition"). It may be assumed that the legislator could not provide arguments for this change because it was not justified.

A convict's conduct after the release from prison can be assessed with the use of a set of available information only as probable. It is not possible to predict all circumstances and factors that can determine conduct. It should also be taken into consideration that a convict does not have influence on some of them. The Appellate Court in Kraków[10] rightly noticed that: "Positive criminological and social prognosis, as any other prognosis, involves an element of risk connected with the possibility of non-performance. It is obvious that nobody can fully guarantee the accuracy of a prognosis. The point is to limit the risk connected with non-performance to a certain acceptable level, i.e. such one that does not negate the sense of rehabilitation and reduces the risk to predictable and reasonable limits".

Conditional release from serving the full sentence is adjudicated at the stage of serving the penalty of deprivation of liberty. The aim of the penalty is, in accordance with Article 67 §1 PEC, to "induce a convict to cooperate in the shaping of his socially desired attitude, especially the sense of responsibility and the need to comply with the legal order". The use of the phrase "the shaping of socially desired attitude" and not "the development" suggests that the legislator assumes that it is a certain complex process taking place over a period of time and not limited exclusively to the period of a convict's service in prison. It may be continued in non-custodial conditions. The legislator really notices, as many years' experience shows, that rehabilitation in prison is difficult to achieve. If a convict undertakes steps to change his anti-social attitude to a pro-social one, conditional release from serving the rest of the sentence, for a probation period, the duties and supervision imposed on him make it possible to continue this process in non-custodial conditions and to supervise it at the same time.

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[8] G. Wiciński, *Podstawy stosowania warunkowego zwolnienia z odbycia reszty kary*, Przegląd Więziennictwa Polskiego No. 24–25, 1999, p. 38; V. Konarska-Wrzosek, *Teza 3 do art. 77 k.k.*, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, WK 2016, Lex/el; J. Lachowski, *Teza 73 do art. 77 §1 k.k.*, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, 4th edition, WK 2017, Legalis/el; A. Zoll, *Teza 16 do art. 77 k.k.*, [in:] W. Wróbel (ed.), A. Zoll (ed.), *Kodeks karny. Część ogólna*. Vol. II, part 2: *Komentarz do art. 53–116*, 5th edition, Legalis/el; T. Kalisz, *Warunkowe zwolnienie z reszty kary pozbawienia wolności z perspektywy problemów z ustaleniem treści i kierunku prognozy kryminologicznej*, Nowa Kodyfikacja Prawa Karnego, Vol. XXX, Wrocław 2013, p. 180; S. Lelental, *Warunkowe przedterminowe zwolnienie*, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i inne środki reakcji prawnokarnej*, 2nd edition, Warsaw 2016, p. 1175.

[9] J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności*, Warsaw 2010, p. 249.

[10] Ruling of the Appellate Court in Kraków of 28 August 2015, II Kzw 799/15, LEX No. 1997429 [accessed on 27/01/2018].

A criminological and social prognosis is to justify the belief that after the release a convict will comply with the penal or preventive measures adjudicated and the legal order, especially that he will not commit a crime again. The legislator often uses a phrase "legal order" but does not define it. In the doctrine[11] and judicature[12], it is indicated that it is the entirety of norms, obligations and bans resulting from various branches of law. Such a broad approach to this prerequisite in relation to a convict's future conduct does not seem to be realistic. In S. Strycharz's[13] opinion, as the legislator refers to the unclear term of "legal order", it is necessary to consider its content and scope within the instrument the regulation of which refers to the concept; it is necessary to assume that it covers norms laid down in criminal law and not in other branches of law. J. Lachowski,[14] in the justification for the opinion that "a decision on conditional release should mainly depend on the evaluation of the probability of reoffending and not on the violation of other branches of law", indicates the guarantee function of criminal law.

It is worth mentioning the opinion that "The belief that a convict will not commit a crime in the future may be practically relativized only to acts similar to the one in connection with which the release is to be applied".[15] It seems that the authors of the opinion excessively narrow the expectations concerning a convict's conduct. Although the legislator expects that a convict will comply with the legal order, noticing difficulties that may occur in the assessment of complying with bans and obligations of different branches of law, pays particular attention to lack of reoffending, however, does not indicate its connection with the crime for which the convict has served the sentence.

Article 77 §1 CC lays down criteria that a court should use to formulate a prognosis. These are: attitude, personal features and conditions, circumstances of crime commission and conduct after the commission of a crime and in the course of serving the sentence. It is a closed catalogue. The Supreme Court[16] rightly noted that "the directives of imposing a penalty laid down in Article 53 CC, Article 54 §1 CC and Article 55 CC (Article 56 CC)" are not the prerequisites for taking a decision on conditional release.

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[11] See, T. Szymanowski, [in:] T. Szymanowski, W. Świda, *Kodeks karny wykonawczy, Komentarz*, Warsaw 1999, pp. 323–324; Z. Hołda, [in:] Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Gdańsk 1998, p. 475; K. Postulski, *Kodeks karny wykonawczy*, 3rd edition, Warsaw 2016, pp. 575–576.

[12] Ruling of the Appellate Court in Kraków of 25 June 2013, II AKzw 631/13, LEX No. 1391610 [accessed on 27/01/2018].

[13] S. Strycharz, *Pojęcie porządku prawnego w kodeksie karnym*, Nowe Prawo No. 6, 1970, p. 852 ff.

[14] J. Lachowski, *Przesłanka materialna warunkowego przedterminowego zwolnienia na gruncie kodeksu karnego*, Prokuratura i Prawo No. 11, 2008, Legalis/el. Also see, J. Lachowski, *Warunkowe zwolnienie…*, pp. 251–252.

[15] J. Skupiński, J. Mierzwińska-Lorencka, *Teza 5 do art. 77 k.k.*, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 3rd edition, WK 2017, Legalis/el.

[16] The Supreme Court resolution of 26 April 2017, I KZP 2/17, www.sn.pl/sites/orzecznictwo/orzeczenia3/ikzp2-17.pdf; Supreme Court ruling of 24 May 2017, V KK 82/17, LEX No. 2319706; also see, the ruling of the Appellate Court in Kraków of 20 October 1999, II AKz 441/99, LEX No. 38624; ruling of the Appellate Court in Białystok of 31 January 2013, II AKzw 43.13, LEX No. 1271803 [accessed on 22/01/2018].

In the doctrine[17] and judicature[18], attention is drawn to the need of considering all quantifiers, which of course means that each of them must be positively assessed. Complex assessment should constitute the basis of the decision on conditional release or its refusal. Ignoring any of the bases of the prognosis, as J. Lachowski[19] notes, "constitutes a violation of a provision of substantive law, i.e. Article 77 §1 CC, and justifies quashing or reversing a decision on conditional release pursuant to Article 438(1) CPC, regardless of whether it has had impact on the content of the judgement or not".

The legislator, first of all, indicates a convict's attitude. The evaluation of a convict's attitude is rather difficult, especially if ambiguity of this concept is considered.[20] The dictionary of the Polish language[21] defines it as "a man's approach to life or certain phenomena expressing his opinions; also: the way of acting and behaving in connection with certain phenomena, circumstances or in relations with people". Taking into account that the legislator does not define the objects of attitude and does not clearly characterise the relation to the object of attitudes, J. Macharski[22] believes that "the characteristic is possible based on the analysis of aims that are to be fulfilled with the use of provisions for which the issue of attitudes is especially important". Thus, it will be an attitude to social norms and rules, the attitude to other people and to the violation of the rules of social coexistence. The attitude to the act committed is also important, i.e. pleading guilty and apologising to the aggrieved. However, such conduct does not always reflect the change of attitude but it can also take place in expectation of a more lenient sentence. In the judicature,[23] "the attitude to social norms and rules and more or less visible inclination to violation of interests protected by law" is pointed out. Obviously, the persistence of the reoccurring conduct towards a specific interest or value is also important for defining "attitudes".[24]

The next criterion concerns a convict's personal features and conditions. The analysis of literature[25] makes it possible to point out that these are a convict's physical

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[17] J. Lachowski, *Przesłanka materialna…;* by this author, *Wybrane zagadnienia sporne na tle wykładni przepisów o warunkowym zwolnieniu*, [in:] J. Majewski (ed.), *Środki związane z poddaniem sprawcy próbie*, Toruń 2013, p. 11; M. Mozgawa, *Teza 6 do art. 77 k.k.*, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el 2017; S. Lelental, *Warunkowe przedterminowe zwolnienie…*, [in:] M. Melezini (ed.), *System…*, p. 1175.

[18] Ruling of the Appellate Court in Lublin of 29 August 2012, II AKzw 866/12, LEX No. 1293502; ruling of the Appellate Court in Lublin of 27 October 2010, II AKzw 846/10, LEX No. 677930 [accessed on 22/01/2018].

[19] J. Lachowski, *Teza 71 do art. 77 k.k.*, [in:] R. Zawłocki, M. Królikowski (eds.), *Kodeks karny…*

[20] J. Macharski, *Pojęcie „postawy" w polskim prawie karnym*, PiP No. 8–9, 1996, p. 129.

[21] *Słownik języka polskiego*, https://sjp.pwn.pl/szukaj/postawa.htm.

[22] J. Macharski, *Pojęcie „postawy"…*, p. 134.

[23] Ruling of the Appellate Court in Wrocław of 12 January 2005, II AKzw 116/04, OSA 2005, No. 8, item 54.

[24] See, A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Komentarz. Część ogólna*, Vol. I, Warsaw 2007, p. 833.

[25] J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny…*; S. Lelental, *Warunkowe przedterminowe zwolnienie…*, [in:] M. Melezini (ed.), *System…*, p. 1175; J. Lachowski, *Warunkowe zwolnienie…*, p. 255, A. Kwieciński, *Wykonywanie kary pozbawienia wolności w systemie terapeutycznym*, Warsaw 2017, pp. 327–328.

features, state of psychical health, character traits, age, the level of intellectual development, temperament, capacity for self-criticism, impulsiveness, calmness, rationality, being industrious, taking care of relations, consistency, ambitions, respect for other people, compassionateness, empathy, inclination to addiction, alcoholism or drug addiction. As far as personal conditions are concerned, the most frequently indicated ones are environmental conditions, family and financial status.

When evaluating a convict's attitude, his personal features and conditions, it is necessary to look at them from the evolutionary point of view.[26] This raises a question about the perspective from which the assessment should be made. There are two conceptions. One of them assumes taking into consideration the period of serving the sentence and the time preceding the conditional release because "the current attitude and not the future one influences the prospect for a criminological prognosis".[27] The supporters of the other conception believe that the period before the commission of crime is as important as the time after it.[28] Of course, the analysis of a longer period of a convict's life makes it possible to carefully evaluate a convict's attitude and changes that are essential for predicting a convict's conduct when he leaves prison. However, one must share the opinion that a convict's attitude is more important for a decision on release of prisoners sentenced for shorter periods of deprivation of liberty and less important in case of prisoners serving longer imprisonment sentences.[29] In case of longer periods, it is more difficult to establish all facts in a prisoner's life.

Personal features and conditions constitute one of the special directives for administration of penalties (Article 56 §2 CC) and have been taken into account in adjudication on punishment. When formulating a prognosis, it is important to verify changes that have taken place since this moment. It is also important to look into the future, i.e. establish the conditions in which a convict will live after the release from prison, especially his family, professional and financial situation. Obviously, indicating the Recommendation of the Council of Europe concerning conditional release, J. Lachowski[30] rightly notices that the assessment of these conditions cannot determine a criminological prognosis. It should be noticed that the assessment of a convict's situation after the release from prison will be especially important for the development of probation, i.e. taking a decision concerning the obligations and supervision as well as providing a convict with assistance, e.g. in finding a temporary domicile or employment, as the authors of the Recommendation concerning conditional release (par. 18) recommend.

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[26] T. Kalisz, *Warunkowe zwolnienie…*, p. 182. Also see, A. Kwieciński, *Wykonywanie kary…*, p. 327.

[27] J. Skupiński, J. Mierzwińska-Lorencka, *Teza 5 do art. 77 k.k.…*, [in:] R.A. Stefański (ed.), *Kodeks karny…* .

[28] P. Hofmański, L.K. Paprzycki, A. Sakowicz, *Teza do art. 3 i do art. 77 k.k.*, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, WK 2016, Legalis; J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny…* .

[29] E. Bieńkowska, [in:] G. Rejman (ed.), *Kodeks karny…*, p. 1170; S. Lelental, *Warunkowe przedterminowe zwolnienie…*, [in:] M. Melezini (ed.), *System…*, p. 1177.

[30] J. Lachowski, *Warunkowe zwolnienie…*, p. 256.

The other two prerequisites for a prognosis concern the circumstances of the crime commission and conduct after the crime commission. What they have in common is non-changeability in time. A convict does not have influence on the change of these circumstances.[31] The circumstances of the crime commission belong to the features of an offence and conduct after the crime commission belongs to special directives for penalty administration (Article 53 §2 CC), and as such they have been taken into account in a sentence. Thus, it is rightly indicated in the doctrine[32] and case law[33] that these circumstances that do not belong to statutory features and may only indicate a convict's characteristics should be taken into consideration.

The conduct after the commission of a crime concerns: striving to prevent the consequences of a crime or attempting to prevent them, repairing the loss, and meeting the social sense of justice.[34] Thus, it concerns every type of conduct that may reflect positive or negative changes of a convict's personality.

The catalogue of criteria on which a court should base its prognosis ends with a convict's conduct when serving the sentence. Right at the beginning, it should be highlighted that a convict's future conduct is assessed from the perspective of conduct in specific conditions of isolation from the community to which he is going to come back. A convict has a number of duties in prison. In accordance with Article 5 §1 PEC, he must obey orders issued by competent bodies, comply with the provisions laying down the rules and mode of serving the sentence and the order established in prison, and follow the instructions of superiors and other authorised persons (Article 116 §1 PEC). Failing to fulfil those duties results in disciplinary penalties and even the use of direct coercive measures. On the other hand, a convict is rewarded for fulfilling duties. Disciplinary penalties and prizes cannot be the only factors that affect the assessment of a convict's conduct in prison. They should only be part of the assessment. Obeying bans and fulfilling duties may result from good adaptation to prison conditions and creation of an image of a "good prisoner". On the other hand, penalties must be viewed from the perspective of reasons for a convict's conduct.

Another essential issue concerning a convict's conduct is his belonging to the prison subculture. The bans laid down in Article 116a PEC include one concerning membership of groups organised without the permission and knowledge of the

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[31] S. Lelental, *Warunkowe przedterminowe zwolnienie…*, [in:] M. Melezini (ed.), *System…*, p. 1102; J. Utrat-Milecki, *Doktrynalne i normatywne źródła kryzysu więziennictwa*, [in:] J. Utrat-Milecki (ed.), *Reforma prawa karnego. W stronę spójności i skuteczności*, Warsaw 2013, p. 67.

[32] V. Konarska-Wrzosek, *Teza 4 do art. 77 k.k.*, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz…*; J. Lachowski, *Teza 80 do art. 77 k.k.*, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny…*; J. Lachowski, *Warunkowe zwolnienie…*, p. 258; S. Lelental, *Warunkowe przedterminowe zwolnienie…*, [in:] M. Melezini (ed.), *System…*, p. 1180.

[33] Ruling of the Appellate Court in Wrocław of 21 October 2004, II AKZW 709/04, OSA 2005, No. 4, item 23; ruling of the Appellate Court in Lublin of 8 October 2008, II AKzw 743/08, LEX No. 500235; ruling of the Appellate Court in Lublin of 27 December 2007, II AKzw 1075/07, LEX No. 375121 [accessed on 4/02/2018].

[34] J. Lachowski, *Teza 87 do art. 77 k.k.*, [in:] M. Króliwski, R. Zawłocki (eds.), *Kodeks karny…*; J. Lachowski, *Przesłanka materialna…*

superior concerned. In literature[35] as well as in the judicature[36], there is an opinion that participation in the "second life" indicates a negative criminological prognosis. However, the Appellate Court in Kraków is right to present the opinion that being a member of the prison subculture "is a method of a convict's adaptation to functioning in prison, and while it has a strong impact on his conduct there (serving a penalty in a standard mode, contact only with other prison slang users), it has scarce impact on his functioning outside prison. The membership of the criminal subculture alone cannot constitute grounds for refusal to release a prisoner from serving the full penalty".

In courts' opinion,[37] in order to make a positive criminal prognosis, it is essential that a prisoner should demonstrate conduct exceeding the standard, which means passive submission to the requirements from persons serving a sentence, i.e. a convict's activity in striving to show readiness to respect the rules of coexistence in society, special involvement and activity in order to change personality and former mode of life.

The involvement and activity aimed at changing the former attitude may be reflected in serving the sentence in the remedial system. Of course, it does not consist in a convict's consent to serve the sentence in this system because consent does not always mean the readiness to verify the attitude and approach to the social environment but can be the result of sheer calculation of immediate profits.[38] What matters is activity demonstrating itself in a convict's participation in the development of an individual remedial programme, its implementation, and initiation of changes in it. A convict's activity is what the prison commission takes into account in a periodical assessment of the implementation of an individual remedial programme.

A convict's consent to establish a period of preparation for release (Article 164 PEC) and, when such a period is established, fulfilling tasks, i.e. establishing contact with a probation officer or institutions or organisations that are to assist a convict after the release from prison, should be positively assessed. A convict's conduct and activities undertaken when, in the period of preparation to the release, he obtains a permission to leave prison in order to organise living conditions after the release are not less important.

A convict's conduct when he is allowed to leave prison is especially important, i.e. during the penitentiary pass, which an inmate of half-open prison (Article 91(7) CC) or open prison (Article 92(9) CC) can get, and prizes in the form of conjugal visits outside prison to spend time with a close or trusted person (Article 138(7) PEC) or permission to leave prison without supervision (Article 138(8) PEC) as well as when he is on leave from serving a sentence. Obtaining a pass alone indicates a positive assessment

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[35] See, A. Marek, *Kodeks karny. Komentarz*, 4th edition, Warsaw 2007, p. 199; J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny…*

[36] Ruling of the Appellate Court in Kraków of 13 July 2009, II AKzw 641/09, LEX No. 53397; ruling of the Appellate Court in Kraków of 11 May 2007, AKzw 285/07, LEX No. 297275 [accessed on 6/02/2018].

[37] Ruling of the Appellate Court in Kraków of 26 August 2014, II AKzw 903/14, LEX No. 1615732; ruling of the Appellate Court in Kraków of 8 March 2012, II AKzw 113/12, LEX No. 1169414; ruling of the Appellate Court in Lublin of 25 August 2010, II AKzw 672/10, LEX No. 628249; ruling of the Appellate Court in Kraków of 19 February 2015, II AKzw 112/15, LEX No. 1767834 [accessed on 6/02/2018].

[38] T. Kaczmarek, *Resocjalizacja sprawcy jako cel wymiaru oraz wykonywania kary pozbawienia wolności*, [in:] T. Kalisz (ed.), *Prawo karne wykonawcze w systemie nauk kryminologicznych. Księga pamiątkowa ku czci Profesora Leszka Boguni*, Wrocław 2011, p. 88.

of his conduct. The issue of a permission to leave prison should be preceded by the development of a criminological prognosis when a prize or a pass is granted for the first time and also after a break longer than six months after significant changes in a convict's legal or family situation have occurred.[39] When outside prison, a convict may demonstrate self-discipline and ability to solve problems.

Courts[40] pay much attention to the use of a permission to leave prison because it makes it possible to check a convict's conduct outside prison and are conducive to his re-adaptation to the community without a risk of reoffending and, as they emphasise, conditional release could not be granted to an inmate without formerly checking his conduct outside prison.

The assessment of a convict's conduct in prison should take into account the whole period spent in prison. It should take into account all the facts and situations concerning an inmate because then one can determine whether there were changes in a convict's approach to socially desired attitudes and the obligation to comply with the law.[41]

The Penalty Execution Code indicates two other criteria that a court should take into account when making a decision on conditional release. One of them is, in accordance with Article 162 §1 CC, an agreement obtained in mediation. The other concerns inmates sentenced for the crimes laid down in Articles 197–203 CC, committed in connection with irregularities in sexual preferences. Conditional release in case of those convicts is possible after positive expert opinions are obtained.

Obliging a court to take into account a mediation agreement raises a question whether it refers to mediation in preparatory proceedings or jurisdictional proceedings, or at the stage of execution. The analysis of the opinions in the doctrine makes it possible to point out two options.[42] The supporters of the assumption that it refers to mediation in preparatory or jurisdictional proceedings justifying their opinion indicate that the provisions of execution proceedings do not envisage mediation at the stage of sentence execution.[43] The supporters of the opinion that it applies to mediation in execution proceedings in their justification refer to Article 1 §2 PEC, in accordance with which the provisions of the Penalty Execution Code may be applied in execution proceedings, respectively.[44]

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[39] See, the Regulation of the Minister of Justice of 14 August 2003 on conducting remedial programmes in prisons and remand centres (uniform text), Journal of Laws [Dz.U.] of 2012, item 1409, (§25(2)).

[40] Ruling of the Appellate Court in Kraków of 19 December 2006, II AKzw 984/06, LEX No. 252473 [accessed on 6/02/2018].

[41] Ruling of the Appellate Court in Lublin of 1 March 2006, II AKzw 124/06, LEX No. 179038 [accessed on 6/02/2018].

[42] K. Dąbkiewicz, *Mediacja w postępowaniu wykonawczym – refleksje na tle historii pewnej nowelizacji (art. 162 §1 k.k.w.)*, Probacja No. 4, 2013, p. 66.

[43] K. Postulski, *Kodeks karny wykonawczy…*, p. 669; S. Lelental, *Kodeks karny wykonawczy, Komentarz*, 6th edition, Warsaw 2017, p. 659; K. Dąbkiewicz, *Kodeks karny wykonawczy. Komentarz*, 3rd edition, WK 2015, Legalis/el. Also see, C. Kulesza, *Za i przeciw mediacji w sprawach karnych na gruncie aktualnej regulacji prawnej*, [in:] L. Mazowiecka (ed.), *Mediacja karna jako forma sprawiedliwości naprawczej*, LEX/el. 2014.

[44] T. Szymanowski, *Zmiany prawa karnego wykonawczego (o potrzebie i zbędności nowelizacji przepisów)*, PiP No. 2, 2012, p. 58; L. Osiński, [in:] J. Lachowski (ed.), *Kodeks karny. Komentarz*,

In the light of the current provisions, it is necessary to share the opinion that it applies to mediation in preparatory or jurisdictional proceedings. Pursuant to the Regulation on the detailed scope of information concerning convicts sent by a court to prison or remand centre directors,[45] a court is obliged to send information on a convict's participation in mediation with the aggrieved together with a shortened copy of the agreement.

It should be noticed that the legislator does not seem to notice that mediation, and in fact its effects, is taken into account when taking the decision on the penalty. In accordance with Article 53 §3 CC, imposing a penalty, a court takes into account the positive results of the mediation between a perpetrator and the aggrieved or the agreement between the aggrieved and a perpetrator concluded in the proceedings before a court or a prosecutor. The results of mediation may be also taken into consideration in a prognosis as conduct after the commission of a crime. It should also be considered that in mediation the will of both parties, a perpetrator and the aggrieved, is important. Thus, even a convict's readiness to mediate when the aggrieved is not interested in mediation should be noticed and taken into consideration in the assessment of a convict's conduct after the crime commission. It seems that the admission of mediation at the stage of the execution proceedings is justified. It will correspond to the aim of the penalty of deprivation of liberty, i.e. the change of attitudes from anti-social to pro-social because it can confirm the change of the attitude to the committed crime, understanding of the need to accept liability for one's act.

In case of a prisoner sentenced for the crimes laid down in Articles 197–203 CC committed in connection with sexual preference irregularities, conditional release cannot be applied without obtaining expert opinions. Requesting expert opinions is obligatory.

The analysis of the prerequisites for a criminological prognosis invokes a statement that the legislator does not define particular criteria, and the analysis of the opinions of the doctrine does not make it possible to determine them unambiguously. As a result, as the analysis of case law indicates, courts face difficulties in identifying the prerequisites and this most often results in referring to a convict's conduct in prison. As T. Kalisz[46] rightly notices, the period of a convict's stay in prison is best documented. These are specialist opinions, diagnoses and, what is especially important, regular assessment. However, a court may get acquainted with personality and psychological tests[47] conducted in prison and a criminological-

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2nd edition, Warsaw 2016, p. 607; E. Bieńkowska, *Mediacja w sprawach karnych*, Warsaw 2011, pp. 14–15.

[45] Regulation of the Minister of Justice of 11 August 2006 on the detailed scope of information concerning convicts sent by a court to prison or remand centre directors, Journal of Laws [Dz.U.] No. 181, item 1333.

[46] T. Kalisz, *Warunkowe zwolnienie…*, p. 183.

[47] Personality and psychological tests in particular consist in the analysis of: (1) a convict's personal data; (2) information concerning a convict's family life; (3) a convict's social contacts; (4) reasons for and circumstances of the crime commission by a convict; (5) a convict's record; (6) the level of a convict's susceptibility to the influence of criminal sub-culture; (7) conduct indicating the possibility of mental disorders or alcohol, drug or psychotropic substances addiction; (8) a convict's ability to adapt to prison conditions and requirements; (9) results of psychological and psychiatric tests. (§9.1. Minister of Justice announcement of 10 April 2013 on the publication

social prognosis that must be developed in prison for an inmate who has the right to apply for conditional release from serving the full sentence. The criminological-social prognosis is one of the elements of the opinion that the prison director sends to a penitentiary court together with the application for granting conditional release. In other cases, a court or a convict applying for release may request such an opinion.

The research[48] shows "that prison administration remains the real decision-maker in the application of conditional release". It should be noted that, according to the data provided by the Central Board of Prison Service (Centralny Zarząd Służby Więziennej),[49] only 519 of 24,853 motions concerning conditional release filed by prison directors in 2015 were refused; and there were 514 applications of the total of 23,258 that were refused in 2016.

In the light of the current regulations, the courts' practice of justifying the refusal of conditional release by referring to circumstances beyond the catalogue laid down in Article 77 §1 CC is inadmissible and alarming. The analysis of case law indicates that the following data are referred to: the nature of a crime,[50] the remote end of the sentence period,[51] the time of the sentence already served,[52] the type of the crime committed,[53] the crime high incidence[54] and social harmfulness[55]. The research findings also confirm this.[56]

Thus, a question arises about such an elaborated catalogue of prerequisites that a court should consider when predicting a convict's conduct after the release. The Criminal Code of 1932 (Article 65 §1 CC) obliged a court to take into account a convict's conduct when serving the sentence and his personal conditions. The Criminal Code of 1969 (Article 90 §1 CC) laid down the catalogue of criteria for a prognosis: personal

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of the uniform text of the Regulation of the Minister of Justice concerning the way of conducting remedial programmes in prisons and remand centres, Journal of Laws [Dz.U.] 2013, item 1067).

48 P. Wiktorska, *Czekając na wokandę. Warunkowe przedterminowe zwolnienie młodocianych*, Warsaw 2010, p. 277.

49 MS CZSW, Roczna informacja statystyczna, www.sw.gov.pl/strona/statystyka-roczna.

50 See, ruling of the Appellate Court in Kraków of 30 June 2009, AKzw 547/09, LEX No. 552036; ruling of the Appellate Court in Lublin of 15 April 2009, AKzw 285/09, LEX No. 508303, ruling of the Appellate Court in Lublin of 8 August 2007, AKzw 527/07, LEX No. 314627, [accessed on 23/01/2018].

51 Ruling of the Appellate Court in Lublin of 24 April 2010, II AKzw 291/10, LEX No. 593380; ruling of the Appellate Court in Kraków of 27 February 2004, AKzw 28/04, LEX No. 108554; ruling of the Appellate Court in Lublin of 20 June 2007, Akzw 434/07, LEX No. 344489, [accessed on 23/01/2018].

52 See, ruling of the Appellate Court in Lublin of 27 October 2010, II AKzw 846/10, LEX No. 677930; ruling of the Appellate Court in Lublin of 2 October 2006, AKzw 768/06, LEX No. 229387 [accessed on 23/01/2018].

53 Ruling of the Appellate Court in Lublin of 7 November 2007, AKzw 768/07, LEX No. 418185 [accessed on 23/01/2018]. Also see, the ruling of the Appellate Court in Kraków of 8 April 2003, II Akz 125/03, discussed in S. Lelental, *Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w latach 2003–2004*, Przegląd Więziennictwa Polskiego No. 49, 2005, pp. 272–273.

54 Ruling of the Appellate Court in Lublin of 27 July 2008, AKzw 154/08, LEX No. 452635 [accessed on 23/01/2018].

55 Ruling of the Appellate Court in Wrocław of 24 January 2007, AKzw 76/07, LEX No. 250067 [accessed on 23/01/2018].

56 See, P. Wiktorska, *Czekając na wokandę…*, p. 285.

features and conditions, way of living before the commission of a crime and conduct after the commission of a crime, especially in the course of serving the sentence. In the initial version of the Criminal Code of 1997, the legislator indicated a convict's attitude, personal features and conditions, the way of living before the commission of a crime, circumstances of the commission of a crime, a convict's conduct after the commission of a crime and conduct at the time of serving the sentence. The amendment to the Criminal Code of 2011[57] repealed the circumstance concerning the way of life before the commission of a crime and introduced an agreement resulting from mediation. S. Lelental[58] rightly notes that the legislator does not indicate the motives for introducing successive quantifiers of a prognosis and the extension of the catalogue does not have impact on the frequency of adjudicating on conditional release. In the period when the Criminal Code of 1969 was in force, courts granted conditional release more often than when the Criminal Code of 1997 entered into force.

This inspires consideration whether it is purposeful to take into account prerequisites that a court analysed when it issued a sentence, i.e. circumstances of the commission of a crime or conduct after its commission. J. Utrat-Milecki[59] rightly notes that the elimination of these criteria is justified "due to the *ne bis in idem* principle". It should be highlighted what the Supreme Court[60] emphasised: "a court adjudicating on conditional release from serving the full sentence cannot base its judgement on the same prerequisites that were decisive for issuing the sentence". In the above-mentioned Recommendation on conditional release (par. 18), it is recommended that the criteria which prisoners have to fulfil in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances as well as the availability of resettlement programmes. The substantive prerequisite for conditional release does not meet this recommendation.

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[57] Act of 16 September 2011 amending the Act: Penalty Execution Code and some other acts, Journal of Laws [Dz.U.] No. 240, item 1431.

[58] S. Lelental, *Warunkowe przedterminowe zwolnienie…*, [in:] M. Melezini (ed.), *System…*, p. 1174.

[59] J. Utrat-Milecki, *Doktrynalne i normatywne…*, [in:] J. Utrat-Milecki (ed.), *Reforma prawa…*, p. 65.

[60] Ruling of the Supreme Court Criminal Chamber of 24 May 2017, V KK 82/17, Legalis No. 1637183.

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SUBSTANTIVE PREREQUISITE FOR CONDITIONAL RELEASE: SOME REFLECTIONS

Summary

The subject matter of the article is the substantive prerequisite for conditional release from serving the full sentence. The analysis of literature and case law makes it possible to state that the quantifiers laid down in Article 77 §1 CC, which a court should take into account when developing a prognosis concerning a convict's conduct after the release from prison, give rise to difficulties connected with their identification. As a result, in their justification for refusal to grant conditional release courts often indicate criteria which are not laid down in Article 77 §1 CC. However, it seems purposeful to give up taking into account circumstances considered by a court when issuing the sentence because of their static nature.

Keywords: conditional release form serving the full sentence, criminal and social prognosis, penalty of deprivation of liberty

MATERIALNA PRZESŁANKA WARUNKOWEGO PRZEDTERMINOWEGO ZWOLNIENIA – KILKA REFLEKSJI

Streszczenie

Przedmiotem rozważań jest przesłanka materialna warunkowego przedterminowego zwolnienia. Analiza literatury przedmiotu i orzecznictwa pozwala na stwierdzenie, iż wskazane w art. 77 §1 k.k. kwantyfikatory, które sąd powinien uwzględnić przy formułowaniu prognozy co do zachowania skazanego po opuszczeniu zakładu karnego, rodzą trudności przy ich identyfikowaniu. W rezultacie sądy często w uzasadnieniu odmowy udzielenia warunkowego zwolnienia wskazują na przesłanki nie wymienione w art. 77 §1 k.k. Celowe więc wydaje się zrezygnowanie z uwzględniania tych okoliczności, które sąd oceniał przy wymierzaniu kary, zważywszy na ich statyczny charakter.

Słowa kluczowe: warunkowe przedterminowe zwolnienie, prognoza kryminologiczno-społeczna, kara pozbawienia wolności

Cytuj jako:

Szczygieł G.B., *Materialna przesłanka warunkowego przedterminowego zwolnienia – kilka refleksji*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 37–52. DOI: 10.26399/iusnovum.v12.2.2018.14/g.b.szczygiel

Cite as:

Szczygieł, G.B. (2018) 'Substantive prerequisite for conditional release: some reflections'. *Ius Novum* (Vol. 12) 2, 37–52. DOI: 10.26399/iusnovum.v12.2.2018.14/g.b.szczygiel

DELUSIVE SELF-DEFENCE

DOI: 10.26399/iusnovum.v12.2.2018.15/b.j.stefanska

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1. INTRODUCTION

The right of self-defence, in accordance with Article 25 §1 CC, consists in repulsing a direct, unlawful assault on whatever interest protected by law. It consists of an assault and defence. The assault must be unlawful, direct and real, and defence proportionate and contemporaneous with an assault (*argumentum ex* Article 25 §1 CC). In the event a defendant erroneously perceives one of the circumstances which justifies acting in the conditions of the right of self-defence, a problem of liability arises. Thus, a question is raised about legal evaluation of such conduct. Some types of the behaviour are assessed based on the concept of delusive self-defence.

2. DELUSIVE SELF-DEFENCE

Delusive self-defence (*inculpata tutela putativa*) consists in the fact that a defendant is in error and believes that he undertakes activities under the right of self-defence. As the elements constituting the right of self-defence exist only in his imagination and are not reflected in reality, there is an error between a defendant's imagination and reality. A defendant's conscience recognises all elements of the right of self-defence, and in reality none of them or only some of them occur (an error of delusion). In the delusive self-defence, there is inconsistency between reality and its reflection in a defendant's conscience. It is rightly pointed out in the judicature that: "An error concerning circumstances constituting the features of justification consists in erroneous belief that such a circumstance occurs, and thus concerns delusion".[1]

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[1] Judgement of the Appellate Court in Warsaw of 13 March 2009, II AKa 3/09, Prok. i Pr. No. 4 – supplement 2010, item 15; Supreme Court judgement of 21 March 2013, II KK 192/12, LEX No. 1298094. Thus also: A. Piaczyńska, *Błędne przekonanie jako postać błędu z art. 29 k.k.*, Prok.

The error must be connected with a perpetrator's belief concerning occurrence of a given factual situation, i.e. being in a situation justifying self-defence. However, the supposition that this justification that results from uncertainty and doubts takes place is not such an error. They constitute negation of the occurrence of a belief, a conviction that a particular state of things is real.[2] There is no error concerning an activity within the right of self-defence in case a perpetrator imagined the features of this justification, while their non-occurrence was objectively and subjectively predictable.[3]

Delusive self-defence does not cover a perpetrator's lack of awareness that his conduct matches the conditions of the right of self-defence; in such a situation, a perpetrator does not realise that he acts within the limits to the right of self-defence (error of unawareness). Although the existence of such an error is negated in the doctrine because it only constitutes a condition for its occurrence,[4] the opinion about two forms of the error: unawareness and delusion is convincing.[5] Negating unawareness of the right of self-defence indicates that it is inconsistency as such because justification is characterised by an attitude aimed at protecting an interest, while unawareness of the features of justification excludes the possibility of occurrence of an intent to save an endangered interest, and decomposes the features of justification.[6] It is emphasised that a perpetrator who realises that the conditions for the right of self-defence are met at the same time does not realise that his conduct preceding an assailant's attack prevents its effects; his intent is not to repulse as assault.[7] In connection with this matter, there is also a different

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i Pr. No. 11, 2016, p. 14; J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 190.

[2] A. Piaczyńska, *Błędne przekonanie…*, pp. 13–14.

[3] For more see, Sz. Tarapata, P. Zakrzewski, *O funkcjach urojenia okoliczności wyłączających bezprawność. Wybrane zagadnienia teoretycznoprawne*, [in:] J. Giezek, D. Gruszecka, T. Kalisz (ed.), *Nowa kodyfikacja prawa karnego. Księga jubileuszowa Profesora Tomasza Kaczmarka*, Vol. XLIII, Wrocław 2017, pp. 549–566.

[4] J. Giezek, *Funkcja błędu co do ustawowych znamion w nowym kodeksie karnym*, [in:] A.J. Szwarc (ed.), *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999, p. 111.

[5] W. Wolter, *Funkcja błędu w prawie karnym*, Warsaw 1965, p. 13; by this author, *Nauka o przestępstwie. Analiza prawnicza na podstawie przepisów części ogólnej kodeku karnego z 1969 r.*, Warsaw 1973, p. 220; Z. Ćwiąkalski, *Błąd co do bezprawności w polskim prawie karnym (Zagadnienia teorii i praktyki)*, Kraków 1991, p. 64; W. Mącior, *Błąd jako nieświadomość lub urojenie czy jako nieświadomość lub niewiedza*, [in:] M. Cieślak (ed.), *Zagadnienia prawa karnego i teorii prawa. Księga pamiątkowa ku czci Profesora Władysława Woltera*, Warsaw 1959, p. 112. Attention is drawn in the doctrine that the Criminal Code has still not regulated *expressis verbis* the issue of a perpetrator's error concerning being unaware of justification (A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. I, Gdańsk 2005, pp. 390–391).

[6] A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–52*, Vol. I, part I, Warsaw 2016, pp. 621–622; Z. Ćwiąkalski, *Błąd co do bezprawności…*, p. 99; K. Buchała, A. Zoll, *Polskie prawo karne*, Warsaw 1995, p. 263; J. Giezek, [in:] M. Bojarski (ed.), J. Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i szczególna*, Warsaw 2010, p. 197.

[7] G. Rejman., [in:] G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 1999, p. 804; J. Giezek, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne…*, p. 197.

standpoint.[8] Regardless of who is right in the discourse, the problem is unimportant for the discussion concerning delusive self-defence because, as it has been indicted above, this type of error is not included in its scope.

The error may concern both an assault and defence. Delusive self-defence may occur when a perpetrator is in error that:

1) there are grounds for the exercise of the right of self-defence. In the judicature, it is assumed that undertaking an act that might look like repulsing an unlawful attack in an erroneous belief that there is a state of the right of self-defence[9] or that an error concerning the circumstances constituting the features of justification is an erroneous belief that the circumstance occurs, thus it only concerns delusion, is a delusive state of the right of self-defence;[10]
2) he repulses a real assault. In the doctrine, in general, an error concerning the reality of an assault is pointed out. The right of self-defence is applicable in case of a real unlawful assault. A real assault takes place when a legal interest is infringed or endangered.[11] A real assault creates objective danger to an interest protected by law,[12] and not one that exists in a defendant's imagination.[13] An error consists in the fact that a perpetrator erroneously believes that he is attacked and he must defend himself. Subjective perception of an assault does not match the objective state of things. This error also concerns the directness of an assault or the necessity of self-defence.[14] It is pointed out that it also occurs when a defendant erroneously assumes, having objective grounds for that, that an assault was more intensive than it really was.[15] It is rightly emphasised in case law that: "The condition for the occurrence of the right of self-defence is the occurrence of a real assault, i.e. one existing in the objective reality. On the other hand, the provision of Article 29 CC concerns delusion of circumstances excluding unlawfulness, e.g. it may concern delusion that there is an assault justifying the right of self-defence. Thus, an assault is not real".[16] It does not concern a simulated assault; then the exclusion of a defendant's liability for repulsing such an assault takes place on the basis of an error concerning the circumstances constituting the features of an act (Article 29 CC);
3) an assault is unlawful, i.e. in conflict with the binding legal order;
4) an assault is direct, so he does not realise that self-defence is premature;[17]

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[8] W. Wolter, *Funkcja błędu…*, p. 136; by this author, *Nauka o przestępstwie…*, pp. 235–236; J. Majewski, *Okoliczności wyłączające bezprawność czynu a znamiona subiektywne*, Warsaw 2013, p. 103 ff.

[9] Supreme Court judgement of 6 December 1932, II K 1023/32, OSN(K) 1933, No. 2, item 27.

[10] Judgement of the Appellate Court in Warsaw of 13 March 2009, II AKa 3/09, Prok. i Pr. No. 4 – supplement 2010, item 15.

[11] A. Marek, *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warsaw 2008, p. 52.

[12] R. Góral, *Obrona konieczna w praktyce*, Warsaw 2011, p. 38.

[13] S. Śliwiński, *Polskie prawo karne materialne. Część ogólna*, Warsaw 1946, p. 157.

[14] A. Krukowski, *Obrona konieczna na tle polskiego prawa karnego*, Warsaw 1965, p. 95; S. Glaser, A. Mogilnicki, *Kodeks karny. Komentarz*, Kraków 1934, pp. 113–115.

[15] S. Śliwiński, *Polskie prawo karne…*, p. 154.

[16] Supreme Court judgement of 21 March 2013, II KK 192/12, LEX No. 1298094.

[17] Thus, according to A. Błachnio, *Krytycznie na temat tzw. defensio antecedens*, PiP No. 7, 2005, p. 78; A. Piaczyńska, *Błędne przekonanie…*, pp. 12–13.

5) an assault still lasts although, in fact, it does not exist; a situation in which an assault has ceased and defence is delayed;
6) a method of defence is proportionate to an assault.[18]

In the context of the indicated errors, a question arises about the legal assessment of exceeding the limits to the delusive self-defence in the scope of both extensive and intensive excess. It concerns a situation in which a defendant's conduct would be exceeding the limits to the right of self-defence if the right were real. In the judicature, there was an opinion that:

– "Exceeding the limits to the right of self-defence may take place only in case of real self-defence but cannot take place in case of delusive self-defence where an act is the result of an error concerning a factual circumstance";[19]
– "Subjective impression of an assault that does not match the objective state of things does not give a perpetrator's action the features of self-defence, and exceeding the limits to the right of self-defence may take place only in case of real self-defence and not in case of delusive self-defence, the one that does not exist".[20]

It is rightly assumed in literature that unreality of justification makes the discussion of the importance of exceeding its limits within the scope of liability pointless; erroneous perception depending on the scale and scope of delusion determines the limits within which it is justified. At the same time, it is believed that in case of the use of a method of defence disproportionate to the danger of an assault imagined by a perpetrator, an error concerning the justification cannot legitimise exceeding its limits. However, it is assumed that conscious exceeding the limits to delusive justification under the influence of a justified error seems to be *de lege lata* unpunished since a justified error excludes guilt, and it is proposed to solve the problem via legislation because there are no arguments for impunity in such a situation.[21] A different standpoint is right; in such a situation, a perpetrator may not take advantage of the exclusion of guilt on the basis of Article 29 CC but must be liable for excess of the really existing right of self-defence (Article 25 §2 CC).[22]

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[18] Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warsaw 2012, p. 343; by this author, [in:] L.K. (ed.), Paprzycki, *System Prawa Karnego. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, Vol. 4, Warsaw 2013, pp. 668–669.

[19] Supreme Court judgement of 16 May 1935, II K 323/35 OSN(K) 1935, No. 12, item 530; Supreme Court judgement of 7 May 1937, I K 150/37, OSN(K) 1937, No. 12, item 335.

[20] Supreme Court judgement of 9 July 1968, IV KR 117/68, OSNKW 1969, No. 2, item 16.

[21] J. Giezek, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne…*, pp. 198–199.

[22] J. Giezek, *Przekroczenie granic rzeczywistej oraz mylnie wyobrażonej obrony koniecznej*, [in:] L. Leszczyński, E. Skrętowicz, Z. Hołda (ed.), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, Lublin 2005, pp. 141–149; M. Królikowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–31*, Vol. I, Warsaw 2010, p. 566; M. Królikowski, R. Zawłocki, *Prawo karne*, Warsaw 2015, p. 309, A. Piaczyńska, *Błędne przekonanie…*, p. 12.

3. LEGAL ASSESSMENT OF DELUSIVE SELF-DEFENCE

Delusive self-defence that does not match the features of the right of self-defence cannot lead to exculpation of a perpetrator on the basis of this justification. Such defence does not result in consequences laid down in Article 25 §1 CC, i.e. it does not lift the unlawfulness of an act.[23] It is rightly stated in literature that subjective perception of an assault does not match the objective state of things and does not give an activity the features of self-defence.[24] In the judicature, it is rightly emphasised that:

– "The right of self-defence is applicable in case of real, not only existing in a perpetrator's conscience, unlawful and direct assault on interests protected by law";[25]
– "Delusive self-defence differs from real self-defence because in this case we deal with delusion that there is an assault justifying self-defence, thus this assault is not real because it does not exist in the objective reality".[26]

However, a problem arises what type of error may justify it: an error concerning a fact (*error facti*) or an error concerning the law (*error iuris*). The former concerns factual circumstances, and the latter refers to legal evaluation of an act.

The issue used to be solved in different ways based on the Criminal Codes of 1932 and 1969 (henceforth: CC). The Codes did not contain a provision regulating the issue of criminal liability for an error concerning justification. The justification for the Criminal Code Bill of 1968 directly stated: "The Bill does not attempt to decree the standpoint on the importance of acting in 'an error of justification' for criminal liability. The issue is theoretically controversial and due to that, the Bill leaves it open whether delusion of 'justification' should be *in concreto* treated in the same way as an error concerning the features of an act (Article 24 §1) or in the same way as an error concerning unawareness of unlawfulness (Article 24 §2)".[27]

The error was assumed to be concerning a circumstance constituting the feature of a prohibited act on the basis of generally unapproved theory of negative

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[23] T. Bojarski, *Polskie prawo karne. Zarys części ogólnej*, Warsaw 2002, p. 144; by this author, [in:] T. Bojarski, A. Gimbut, Cz. Gofroń, A. Wąsek, J. Wojciechowski, *Prawo karne*, Lublin 1994, p. 145.

[24] W. Świda, *Prawo karne*, Warsaw 1989, p. 183; W. Makowski, *Prawo karne. Część ogólna. Wykład porównawczy prawa karnego, austriackiego, niemieckiego i rosyjskiego obowiązującego w Polsce*, Warsaw–Lublin–Łódź–Poznań–Kraków, no date, p. 304; by this author, *Kodeks karny. Część ogólna. Komentarz*, Warsaw 1932, p. 88; M. Siewierski, *Kodeks karny i prawo o wykroczeniach. Komentarz*, Warsaw 1958, p. 52; A. Marek, *Obrona konieczna…*, pp. 52–53; Supreme Court judgement of 9 July 1968, IV KR 117/68, OSNKW 1969, No. 2, item 16; Supreme Court judgement of 31 August 1981, Rw 258/81, OSN PG 1982, No. 4, item 40.

[25] Judgement of the Appellate Court in Kraków of 28 May 1992, II AKr 62/92, KZS 1992, No. 3–9, item 43.

[26] Judgement of the Appellate Court in Gdańsk of 10 January 2017, II AKa 400/16, LEX No. 2252819.

[27] Criminal Code Bill and regulations introducing the Criminal Code (Projekt kodeksu karnego oraz przepisów wprowadzających kodeks karny), Warsaw 1968, p. 104.

features of a prohibited act,[28] i.e. treating circumstances constituting the features of justification as the negative features of a prohibited act.[29]

The Supreme Court believed that:

– "Article 24 §1 CC [at present Article 28 §1 – comment by B.J. S.] is applicable to delusive self-defence, like to other forms of error concerning justification".[30] The Court substantiated this stating that unawareness of unlawfulness is, in such a situation, a secondary phenomenon, i.e. a derivative of an erroneous evaluation of a factual situation. A perpetrator's erroneous belief that there is a special circumstance justifying his particular conduct, i.e. eliminating a general criminal law ban, determines an erroneous legal assessment of one's own act.
– "Repulsing an inexistent assault matches the concept of delusive self-defence that should be evaluated from the point of view of an error (Article 20 CC) [at present Article 28 CC, comment by B.J. S.]. Thus, undertaking an act that may look like repulsing an unlawful attack, in an erroneous belief that there is a state of the right of self-defence, may result in criminal liability only for an unintended offence, provided the error resulted from carelessness or negligence".[31]

In literature, the error was rightly assumed to be *sui generis* neither an error concerning a fact nor an error concerning the law but, due to the lack of its separate regulation, *per analogiam* the application of Article 24 §1 CC of 1969 envisaging an error concerning a circumstance constituting a feature of a prohibited act was assumed to be the solution most favourable to a perpetrator.[32] The error was closer to an error relating to statutory features because it refers to an error concerning a particular situation, and because by analogy it is a situation favourable to a perpetrator, the application of a provision on an error relating to circumstances constituting a feature of a prohibited act was admitted.[33]

The Supreme Court believed that: "Undertaking an act that might look like repulsing an unlawful attack, in an erroneous belief that there is a state of the right of self-defence (delusive state of self-defence), may result in liability only for unintended offence, provided the error resulted from carelessness or negligence".[34]

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[28] W. Wolter, *Funkcja błędu…*, p. 132; by this author, *Wokół problemu błędu w prawie karnym*, PiP No. 3, 1963, p. 92.

[29] A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny…*, p. 621.

[30] Supreme Court judgement of 31 August 1981, Rw 258/81, LEX No. 17380; Supreme Court judgement of 22 June 1979, IV KR 112/79, OSNKW 1979, No. 11–12, item 113 with glosses by S. Frankowski, PiP No. 8, 1981, p. 148 ff; W. Wolter, NP No. 9, 1980, p. 152 ff; K. Rozental, NP No. 2, 1981, p. 138 ff; S. Dałkowski, OSP No. 9, 1981, item 149; Z. Mirgos, OSP No. 2, 1981, item 29. Thus, also J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1938, p. 110.

[31] Supreme Court judgement of 12 July 1966, IV KR 89/66, OSNKW 1967, No. 1, item 2.

[32] I. Andrejew, *Unormowanie błędu we współczesnym prawie karnym*, PiP No. 5, 1979, pp. 30–50; A. Zoll, *Okoliczności wyłączające bezprawność czynu*, Warsaw 1982, p. 153; by this author, [in:] K. Buchała, Z. Ćwiąkalski, M. Szewczyk, A. Zoll, *Komentarz do kodeksu karnego. Część ogólna*, Warsaw 1994, p. 196.

[33] W. Świda, *Prawo karne…*, p. 183; K. Buchała, *Prawo karne materialne*, Warsaw 1989, p. 346; K. Buchała, A. Zoll, *Polskie prawo karne…*, p. 264; M. Filar, [in:] A. Marek (ed.), *Prawo karne. Zagadnienia teorii i praktyki*, Warsaw 1986, p. 114; T. Bojarski, [in:] T. Bojarski, A. Gimbut, Cz. Gofroń, A. Wąsek, J. Wojciechowski, *Prawo karne…*, p. 145; L. Gardocki, *Prawo karne*, Warsaw 1996, p. 130.

[34] Supreme Court judgement of 6 December 1932, II K 1023/32, OSN(K) 1933, No. 2, item 27.

The issue was approached from the standpoint that a perpetrator acts being in error as to the belief that his conduct is within the limits laid down as the right of self-defence in criminal law and, thus, does not realise that his conduct violates the statutory requirements, which justified the assumption that it was an error concerning the law.[35] The Supreme Court expressed such an opinion and stated that an error concerning circumstances constituting a feature of justification, in the same way as an error concerning evaluation assuming that a given situation is recognised in the legal system as justification, should be treated as an error concerning legal evaluation of an act.[36] However, the problem is that in case of delusive self-defence, a perpetrator's error mainly concerns a specific element of the right of self-defence that does not exist in reality, which indicates that it is an error concerning a fact.

An opinion has been presented that it may be an error concerning the law in a situation when a perpetrator errs as far as unlawfulness of an attack is concerned, because a perpetrator is not in error concerning circumstances of an act but its legal evaluation, or an error concerning a fact in case a perpetrator undertakes defensive activity despite non-existence of a real assault.[37]

In the present legal state, such a controversy does not occur because the issue is regulated in Article 29 CC, in accordance with which, whoever commits a prohibited act in a justified erroneous belief that there is a circumstance excluding unlawfulness, he does not commit a crime. It is not difficult to notice that the Criminal Code adopted the latest conception. It is a right approach because the issue, as it is rightly noticed in literature, is neither an error concerning a circumstance constituting a feature of a prohibited act nor an error concerning legal evaluation of an act.[38] It constitutes a special kind of error relating only to a circumstance excluding unlawfulness.

In the doctrine, it is called a type of an error concerning the law.[39]

It is also indicated that an error concerning justification has a double nature because it concerns a fact, which is an original error, that results in an error concerning the law to such an extent that a perpetrator believes he may undertake activities repulsing an assault. The latter error is a secondary one in relation to the error connected with the defective recognition of the factual state.[40] It is right to make an observation that, in accordance with Article 29 CC, an error is not erroneous

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[35] K. Mioduski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Vol. 1, Warsaw 1987, p. 115; A. Zębik, [in:] J. Waszczyński (ed.), *Prawo karne w zarysie. Nauka o ustawie karnej i o przestępstwie*, Łódź 1975, pp. 236–238.

[36] Supreme Court judgement of 13 March 1974, I KR 362/73, OSPiKA 1975, No. 4, item 79.

[37] A. Marek, *Obrona konieczna w prawie karnym na tle teorii i orzecznictwa Sądu Najwyższego*, Warsaw 1979, pp. 50–51. K. Buchała, *Prawo karne materialne…*, p. 346; W. Wolter, *Prawo karne. Zarys wykładu systematycznego. Część ogólna*, Kraków 1947, p. 197; M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warsaw 1994, p. 329.

[38] A. Zoll, *Okoliczności…*, p. 153; by this author, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny…*, p. 621; Z. Ćwiąkalski, *Błąd co do bezprawności…*, p. 101; T. Bojarski, *Polskie prawo karne…*, p. 144; by this author, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2006, p. 78; G. Rejman, *Zasady odpowiedzialności karnej. Art. 8–31 k.k. Komentarz*, Warsaw 2009, p. 674; M. Królikowski, R. Zawłocki, *Prawo karne…*, p. 307; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2018, p. 266.

[39] R.A. Stefański, *Prawo karne materialne. Część ogólna*, Warsaw 2008, p. 177.

[40] G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny…*, p. 804.

perception of reality in which a perpetrator of a prohibited act is, but it constitutes evaluation formulated by another person from the point of view of justification of a perpetrator's conduct or its lack.[41]

It is rightly assumed in the doctrine that a perpetrator makes an error concerning circumstances constituting the features of justification admitted in a given legal system because he inappropriately perceives a circumstance being an element of the object of legal assessment. And it is not an error concerning the assessment establishing whether a situation is treated in a given legal system as justification, because a perpetrator properly perceives the reality but errs in the legal assessment of the properly perceived reality, and thus he separates liability from real facts in favour of normative approach to provisions that determine criminal liability.[42] The solution strikes with artificiality because in case of delusive self-defence, a perpetrator refers to another person's real conduct and remains in error concerning the real situation. It seems to him that an attack is aimed at him, while in fact it does not occur, and thus an error concerns the factual aspect and not the legal one. In one case of delusive self-defence, a perpetrator errs as far as legal assessment is concerned, namely when he believes that intent against him is unlawful, while in reality it does not have such nature. It is rightly assumed in case law that: "A perpetrator's subjective belief of having the right of self-defence, even after an assailant's retreat from his flat, is not subject to protection under Article 29 CC. Imagination (called delusion) that one acts legally, i.e. acting in circumstances excluding criminal liability, requires, however, certain objective conditions justifying such imagination. Otherwise, the limits to law and unlawfulness would be developed based on strictly subjective assessment, impossible to develop common norms, uniform and equal for everyone. This would mean blurring the legal limits".[43]

It is possible to make a double error in case of an unjustified error. A perpetrator may be in error concerning the objective features of a prohibited act and, at the same time, concerning the objective conditions for circumstances excluding criminal liability. In the justification for the Criminal Code Bill of 1997, it was pointed out that: "Because in case of such an error, it is the plane of guilt that matters, one cannot exclude a possibility of double error, i.e. a person acting within delusive justification may also err as far as the circumstances constituting a feature of a prohibited act are concerned, e.g. a person acting in unjustified delusive belief in the right of self-defence unintentionally causes an assailant's death instead of a light injury. The construction of the Bill allows in such cases the application of extraordinary mitigation of statutory punishment for an unintentional offence".[44]

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[41] G. Rejman, *Zasady odpowiedzialności karnej…*, p. 676.

[42] A. Zoll, *Regulacja błędu w projekcie kodeksu karnego*, [in:] L. Tyszkiewicz (ed.), *Problemy nauk penalnych. Prace poświęcone Pani Profesor Oktawii Górniok*, Katowice 1996, p. 248; by this author, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny…*, p. 620.

[43] Judgement of the Appellate Court in Warsaw of 16 May 2014, II AKa 120/14, LEX No. 1477366.

[44] I. Fredrich-Michalska, B. Stachurska-Marcińczak (ed.), *Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warsaw 1997, pp. 133–134. Thus, also: G. Rejman, [in:] G. Rejman (ed.), *Kodeks karn*y…, pp. 802–803.

It is controversial whether a perpetrator, acting within delusive self-defence, may be attributed intent to commit a prohibited act. In the doctrine, admitting such a possibility is followed by arguments that the essence of an error concerning circumstances excluding unlawfulness of an act suggests that it does not lead to the exclusion of intent because it concerns justification. An act committed under the influence of an error remains an unlawful act, and what is decisive in attributing guilt to the perpetrator is not the recognition of his belief concerning the occurrence of circumstances excluding unlawfulness as justified or unjustified.[45] Such a possibility is rightly dismissed and it is emphasised that it results from the separation of guilt from psychical factors accompanying the perpetrator at the moment an act is committed; and, indeed, a person in such a situation first of all wants to avoid an assault and only then he commits a prohibited act.[46] Such a perpetrator acts in order to defeat an assault and not with intent to commit a prohibited act. An error cannot be treated as one concerning a circumstance constituting a feature of a prohibited act but an error concerning justification.[47] The last one is, as it has been mentioned above, a *sui generis* error.

Delusive self-defence is close to an error concerning legal assessment of an act because similarly to this error, it is connected with attributing guilt as an element of a crime.[48]

Article 29 CC concerns existing justification and is not applicable to what is called indirect error concerning unlawfulness, which occurs in a situation where a perpetrator erroneously believes that the one exists. A perpetrator does not err as far as circumstances in which he acts are concerned; he erroneously assumes that the law gives them the nature of circumstances excluding unlawfulness or erroneously extends its limits.[49] The problem is solved on the plane of an error concerning legal evaluation.[50] A different opinion, applying the scope of Article 29 CC also to a delusive circumstance excluding criminal liability that is not laid down in Polish statute, is wrong. It is substantiated by the existence of a general provision mentioning an erroneous belief that there is a circumstance excluding unlawfulness or guilt.[51]

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[45] A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny…*, p. 621.

[46] G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny…*, p. 805.

[47] K. Indecki, A. Liszewska, *Prawo karne materialne. Nauka o przestępstwie, karze i środkach penalnych*, Warsaw 2002, p. 198.

[48] A. Zoll, *Regulacja…*, p. 249; M. Szczepaniec, *Regulacja błędu co do kontratypu w polskim prawie karnym*, CzPKiNP No. 2, 2000, p. 99; A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny…*, p. 391.

[49] Z. Jędrzejewski, *Błąd co do okoliczności wyłączającej bezprawność*, WPP No. 4, 2006, p. 68.

[50] A. Wąsek, [in:] O. Górniok. S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny…*, p. 392; A., Zoll, *Regulacja…*, p. 248; M. Budyn-Kulik, [in:] M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa (ed.), *Prawo karne materialne. Część ogólna*, Kraków, 2006, p. 275; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2012, p. 394; M. Królikowski, R. Zawłocki, *Prawo karne…*, p. 308; J. Majewski, *Błąd co do kontratypu jako podstawa wyłączenia winy*, [in:] J. Majewski (ed.), *Okoliczności wyłączające winę. Materiały VI Bielańskiego Kolokwium Karnistycznego*, Toruń 2010, pp. 24–25; P. Kozłowska-Kalisz, [in:] P. Kozłowska-Kalisz, M. Budyn-Kulik, M. Kulik, M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 110.

[51] J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…*, p. 188.

4. CONSEQUENCES OF ACTING IN DELUSIVE BELIEF IN THE RIGHT OF SELF-DEFENCE

Acting in the justified delusive belief that there is a circumstance excluding unlawfulness of an act, thus also in the event of acting in compliance with the delusive right of self-defence, in accordance with Article 29 CC, results in the commission of a crime but only when an error is justified. In such a situation, a perpetrator's act is unlawful but non-culpable. This is a circumstance excluding guilt.[52] Delusive self-defence excludes criminal liability only when it results from a justified error. A justified delusive self-defence action excludes a possibility of charging a perpetrator with unlawful conduct.[53] Thus, this error does not defeat intentionality or unintentionality but the ability to charge, i.e. it excludes guilt completely, provided it is justified.[54] In the doctrine, it is assumed that what causes the problem of legal consequences of an error concerning justification is Article 29 CC, which is defectively formulated because a circumstance of this type should, in each case regardless of whether an error is justified or unjustified, exclude liability for an intentional offence. Then, there would be an issue of a perpetrator's liability for an unintentional offence to be dealt with in accordance with general rules, i.e. when criminal statute envisages a particular unintentional type and a perpetrator's error is unjustified.[55]

"An attack against an interest protected within justification, as one can read in the justification for the Criminal Code Bill of 1997, is always an assault on a legal interest, which can be justified or even desired due to the occurring collision of interests. An error concerning circumstances constituting the features of justification (delusion of such a circumstance occurrence) does not result in the automatic exclusion of intent. Intent refers to the implementation of an act having the features of a particular type and such intent, regardless of whether the discussed error occurs, takes place. The Code solves the problem of liability for this error concerning guilt. In case of a justified error, the possibility of charging a perpetrator for violation of law is excluded, which results in the exclusion of guilt. In case of an unjustified error, a circumstance that diminishes guilt occurs, which results in a possibility of extraordinary mitigation of punishment".[56] It is rightly highlighted in the doctrine that the role of that error is the same as of an error concerning the law (Article 30 CC):

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[52] A. Marek, *Prawo karne*, Warsaw 2009, p. 155; F. Ciepły, [in:] A. Grześkowiak (ed.), *Prawo karne*, Warsaw 2009, p. 135; D. Jagiełło, *Prawo karne materialne*, Skierniewice 2013, p. 68; M. Królikowski, R. Zawłocki, *Prawo karne…*, p. 308; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…*, p. 266.

[53] R. Góral, *Kodeks karny. Praktyczny komentarz*, Warsaw 2007, p. 66.

[54] A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…*, p. 267.

[55] J. Majewski, *Funkcja urojenia sytuacji kontratypowej w prawie karnym*, [in:] J. Giezek (ed.), *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, Kraków 2006, p. 448.

[56] I. Fredrich-Michalska, B. Stachurska-Marcińczak (ed.), *Nowe kodeksy karne…*, pp. 133–134.

it does not exclude intentionality because a perpetrator may be liable for the commission of an intentional offence, provided the error is unjustified."[57]

The consequence of the occurrence of a circumstance excluding guilt is expressed with the use of a phrase "does not commit a crime". With regard to that phrase, it is hard to agree with the opinion that such an act does not constitute a crime.[58] The Criminal Code uses the phrase in order to indicate that this act is socially harmful to a small extent (Article 1 §2 CC).

In literature, in order to recognise an error as justified, the following criteria are adopted:

– objective criterion based on the ability to recognise factual significance of given circumstances.[59] It concerns circumstances occurring at the time when a perpetrator is committing an act, which every ordinary citizen being in a similar situation would also undertake and make an error.[60] An example of such a model citizen (a reasonable man) might be a person characterised by "very good professional preparation, accepting a system of values underlying the binding legal system and acting in an even-tempered way".[61] It is indicated in case law that: "A justified error (Article 29 CC) is a situation which, based on the analysis of the state at the time of the given conduct, unambiguously indicates that a perpetrator had the right to erroneously recognise the actual state. Within the scope of a justified error concerning self-defence, there is a situation in which there was a certain probability of a violation of the interest protected by law but it was not high enough to let one speak about a direct assault. However, if the probability of an assault occurrence is lower (but not non-existent), an error should be recognised as unjustified, and thus providing grounds for extraordinary mitigation of punishment".[62] However, it is highlighted that those objective circumstances must concern a subjective situation, in which a perpetrator is at the time of an act, e.g. an intellectual state or an emotional sate.[63]
– objective-subjective criterion[64] based mainly on the normative criterion of a reliable (model) citizen also taking into consideration a subjective criterion that is characteristic of an error when a perpetrator had an opportunity to avoid this error.[65] It is required that, apart from the objective criterion, a perpetrator's

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[57] A. Wąsek, [in:] O. Górniok. S. Hoc, M. Kalitowski, S.M. Przyjemski Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek (ed.), *Kodeks karny…*, p. 391.

[58] A. Zoll. [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny…*, p. 623; M. Szczepaniec, *Regulacja…*, p. 108.

[59] W. Wróbel, A. Zoll, *Polskie prawo karne…*, p. 394.

[60] M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Prawo karne…*, pp. 276–277; K. Indecki, A. Liszewska, *Prawo karne…*, p. 198.

[61] K. Wytrykowski, *Błąd co do okoliczności wyłączającej winę (art. 29 k.k.)*, Iustitia No. 2, 2013, pp. 78–79.

[62] Judgement of the District Court in Tarnów of 24 January 2008, II Ka 536/07, KZS 2008, No. 3, item 56.

[63] A. Zoll, W. Wróbel, A. Zoll (ed.), *Kodeks karny…*, p. 623.

[64] J. Warylewski, *Prawo karne. Część ogólna*, Warsaw 2015, p. 350.

[65] Supreme Court ruling of 14 May 2003, II KK 331/02, OSNwSK 2003, No. 1, item 969; judgement of the Appellate Court in Katowice of 29 November 2006, II AKa 96/06, LEX No. 297315.

individual features and characteristics should be taken into consideration. It is important whether a perpetrator could avoid an error. The assessment whether a perpetrator could avoid an error must be based not only on the circumstances of a given event but also on the in-depth analysis of a perpetrator's personality, his ability to evaluate an actual situation and to anticipate events.[66] The Supreme Court rightly states that: "The condition for the advantage of Article 29 CC is the establishment that an error was justified. It concerns an erroneous opinion that in a given situation it is excusable from the point of view of social perception, and a perpetrator cannot be charged with failure to use diligence to recognise the situation properly. Thus, 'justified' means 'non-indictable', i.e. preventing charging a perpetrator with being unintentional in the meaning of Article 9 §2 CC. What decides whether justification is possible is an analysis of a particular event, especially whether a perpetrator could avoid an error using the required diligence in a given situation. 'A justified error' concerns a state of a perpetrator's awareness at the moment of an act. Thus, it is a subjective aspect of an act and it obviously constitutes an element of establishing facts with all resulting consequences".[67]

The latter criterion should be recognised as the correct one. It is rightly indicated in literature that the decisive criterion is the objective one, the use of which consists in reasonable comparison of the accused with the "model citizen", and only then, when he could not avoid an error although he used diligence, an error is justified. On the other hand, the subjective criterion plays a less important role, as it requires that an error should be recognised as justified also when a model citizen avoided it and the accused, because of his personal features, could not avoid it.[68] It is pointed out that evaluation should be made, first of all, based on the recognition that it is necessary to have adequate information, and only then through the prism of the possibility of recognising an error.[69]

An error is justified when a perpetrator cannot be accused of a blameworthy conduct.[70] This concerns a situation in which a perpetrator could not avoid an error, although he was diligent.[71] One cannot blame a perpetrator for failure to use diligence, which was the reason why he did not avoid an error.[72] In the judicature, it is pointed out that:

– "Distortion of the perception of reality resulting from the state of insobriety or being under the influence of narcotic drugs excludes the recognition of the commission of a prohibited act in a justified erroneous belief that there is a circumstance excluding unlawfulness, and as a result, it excludes a possibility of

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66 Supreme Court judgement of 13 March 1974, I KR 362/73, LEX No. 20863.

67 Supreme Court ruling of 11 October 2016, V KK 117/16, LEX No. 2135555.

68 K. Janczukowicz, *Okoliczności usprawiedliwiające nieświadomość bezprawności*, LEX/el. 2015.

69 R. Kubiak, *Pojęcie usprawiedliwionego błędu w nowym kodeksie karnym*, Palestra No. 7–8, 1998, p. 33 ff.

70 A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny…*, p. 391; G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny…*, p. 802.

71 R. Góral, *Kodeks karny…*, p. 66.

72 P. Daniluk, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 283.

referring to the construct of justification laid down in Article 29 CC providing immunity from criminal liability".[73]

– "It concerns an erroneous opinion, which in a given situation is excusable from the point of view of social perception, and a perpetrator cannot be blamed for failure to use diligence in order to properly recognise a situation".[74]

In case a perpetrator's error is unjustified, a court may apply extraordinary mitigation of punishment. In such a case, an error diminishes the degree of guilt.[75] The application of extraordinary mitigation of punishment is within the competence of a court. In literature, it is rightly assumed that the application of extraordinary mitigation of punishment may be justified by extraordinary circumstances, in which a perpetrator happened to be, i.e. the contribution of the aggrieved to that error, the level of a perpetrator's psychical development, his age or qualifications. Moreover, the closer a perpetrator's conduct is to the conduct of a model citizen, the more justifiable the use of this instrument will be.[76]

Extraordinary mitigation of punishment is not applicable, in accordance with Article 29 *in fine* CC, in a situation when a perpetrator commits a crime assuming that there is a circumstance excluding unlawfulness; the circumstance, as it is indicated in literature, may only potentially influence the type of penalty in accordance with general rules. Therefore, there is a *de lege ferenda* proposal to make it possible to apply extraordinary mitigation of punishment to a perpetrator acting in the conditions of doubts whether there is a circumstance excluding unlawfulness by the introduction of a provision stipulating that a court may apply extraordinary mitigation of punishment to a perpetrator who commits a prohibited act on the justified erroneous supposition that there is a circumstance excluding unlawfulness or guilt. The proposal does not seem to be correct because it excessively extends the consequences of erroneous recognition of justified situations.

5. CONCLUSIONS

1) Delusive self-defence consists in the commission of a prohibited act by a perpetrator who is convinced that he undertakes action within his right of self-defence, which in reality does not take place. He is conscious of all the elements of self-defence, which, or some of them, do not occur in reality. The error concerns the reality of an assault.
2) Delusive self-defence is the type of self-defence that does not match its necessary requirements and cannot result in a perpetrator's exculpation based on this justification because it does not match the objective state of things. Self-defence takes place only when it exists objectively and not only in a perpetrator's conscience.

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[73] Judgement of the Appellate Court in Wrocław of 31 May 2017, II AKa 111/17, LEX No. 2329079.

[74] Supreme Court ruling of 11 October 2016, V KK 117/16, LEX No. 2135555.

[75] Ł. Pohl, *Prawo karne…*, p. 343.

[76] J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…*, p. 191.

3) A perpetrator undertaking defensive activities in an erroneous belief that it matches all the requirements of the right of self-defence does not commit a crime, unless the error is justified (Article 29 CC). This concerns a *sui generis* error, which is neither an error concerning a circumstance constituting a feature of a prohibited act nor an error concerning the legal assessment of an act.
4) A justified action in self-defence is a circumstance constituting grounds for exclusion of guilt, i.e. a perpetrator's act is unlawful. If an error concerning self-defence is unjustified, taking into consideration special circumstances in which a perpetrator has been, a court may apply extraordinary mitigation of punishment.

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DELUSIVE SELF-DEFENCE

Summary

The article discusses the issue of liability for acting in the delusive self-defence, which takes place when a perpetrator commits a prohibited act in an erroneous belief that he exercises the features of the right of self-defence. Due to the fact that a perpetrator is in a special situation, the Criminal Code treats this error as a circumstance excluding guilt, provided that the error is justified; and in case it is unjustified, taking into consideration special circumstances in which a perpetrator has been, a court may apply extraordinary mitigation of punishment.

Keywords: error, justification, extraordinary mitigation of punishment, right of self-defence, delusive self-defence, guilt

UROJONA OBRONA KONIECZNA

Streszczenie

Przedmiotem artykułu jest problem odpowiedzialności za działanie w tzw. urojonej obronie koniecznej, która zachodzi wówczas, gdy sprawca dopuszcza się czynu zabronionego w błędnym przekonaniu, że realizuje znamiona obrony koniecznej. Ze względu na to, że sprawca znajduje się w szczególnej sytuacji, kodeks karny błąd ten traktuje jako okoliczność wyłączającą winę pod warunkiem, że błąd ma być usprawiedliwiony, a w przypadku gdy jest nieusprawiedliwiony, sąd może zastosować nadzwyczajne złagodzenie kary, mając na uwadze szczególne okoliczności, w których znalazł się sprawca.

Słowa kluczowe: błąd, kontratyp, nadzwyczajne złagodzenie kary, obrona konieczna, urojona obrona konieczna, wina

Cytuj jako:

Stefańska B.J., *Urojona obrona konieczna*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 53–70. DOI: 10.26399/iusnovum.v12.2.2018.15/b.j.stefanska

Cite as:

Stefańska, B.J. (2018) 'Delusive self-defence'. *Ius Novum* (Vol. 12) 2, 53–70. DOI: 10.26399/iusnovum.v12.2.2018.15/b.j.stefanska

CRIMES UNDER ARTICLE 66 OF THE ACT OF 15 JANUARY 2015 ON THE PROTECTION OF ANIMALS USED FOR SCIENTIFIC OR EDUCATIONAL PURPOSES

DOI: 10.26399/iusnovum.v12.2.2018.16/m.mozgawa

MAREK MOZGAWA*

1. INTRODUCTION

Before I start discussing the topic, let me draw attention to some historical issues. The Regulation of the President of the Republic of Poland of 28 March 1928 on the protection of animals[1] (in Article 2) defined the concept of animal maltreatment, giving examples, however, the list of them was not exhaustive. The provision of Article 3 of the Regulation on the protection of animals stipulated that scientific tests on animals conducted by persons granted with special authorisation were not treated as animal maltreatment. Article 7 penalised (PLN 1,000 fine) scientific tests on animals violating Article 3 or provisions enacted based thereon. The Act of 21 August 1997 on the protection of animals[2] (hereinafter: APA) repealed the Regulation of the President of the Republic of Poland on the protection of animals. In Chapter 9 APA, testing procedures with the use of animals were laid down (Articles 28 to 32), and their violation was classified in Article 37(1) APA.[3] On 21 January 2005, the Act on experiments on animals[4] was passed, which repealed Chapter 9 APA, amended

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1 Journal of Laws [Dz.U.] of 1932, No. 42, item 417, as amended.

2 Original text, Journal of Laws [Dz.U.] No. 111, item 724.

3 Article 37(1): "Whoever violates the obligations or bans laid down in Article 9, Article 12(1) to (6), Article 13(1), Article 14, Article 15(1) to (5), Article 16, Article 17(1) to (7), Article 18, Article 19, Article 22(1), Article 24(1) to (3), Article 25, Article 27, Article 28(1) and (7) to (9), Article 29(1) to (3), Article 30 and Article 31, is subject to a penalty of detention or a fine".

4 Journal of Laws [Dz.U.] No. 33, item 289, as amended.

the scope of penalisation laid down in Article 37 and introduced new criminal provisions. They were included in Chapter 8, which classified the following offences: conducting experiments exposing laboratory animals to unnecessary pain, suffering, fear or permanent damage to their organism (Article 38), conducting experiments on animals without appropriate anaesthetic (Article 39), conducting experiments on animals in order to test cosmetics or personal hygiene products (Article 40(1)), an aggravated type of crime in relation to the one under Article 40(1), i.e. acting with extreme cruelty (Article 40(2)), and repeated use of laboratory animals in experiments resulting in strong pain, fear or suffering (Article 41).[5]

The Act of 15 January 2015 on the protection of animals used for scientific or educational purposes[6] (hereinafter: APAUSEP) entered into force on 27 May 2015 and repealed the Act of 21 January 2005 on experiments on animals. The Act lays down the rules and requirements for the protection of animals used for scientific and educational purposes, including: (1) the rules: (a) of implementing procedures and conducting experiments, (b) of the activities consisting in breeding, supplying and using animals, (c) of supervising breeders, suppliers and users; (2) conditions of keeping animals used for scientific and educational purposes and the way of treating them; (3) tasks and competences of ethical commissions for animal testing (Article 1(1) APAUSEP).[7] It should be added that in matters that are not regulated in APAUSEP, the Act on the protection of animals is applicable (Article 4 APAUSEP). Chapter 1 contains general provisions (Articles 1 to 4), Chapter 2 lays down the rules of the implementation of procedures (Articles 5 to 16), Chapter 3 determines the requirements concerning doing business involving use of animals for scientific and educational purposes (Articles 17 to 25), Chapter 4 deals with the activities of breeders, suppliers and users (Articles 26 to 31), Chapter 5 defines ethical committees for animal testing (Articles 32 to 41), Chapter 6 determines the rules of conducting experiments (Articles 42 to 53), Chapter 7 deals with supervision (Articles 54 to 63), Chapter 8 regulates cooperation with the European Commission and the European Union Member States (Articles 64 to 65), Chapter 9 contains penal provisions (Articles 66 to 68), Chapter 10 lays down administrative penalties

[5] The Act also classified misdemeanours: use of homeless animals in experiments (Article 42), use of animals representing species that are in danger of extinction or wild animals in experiments (Article 43), acquisition of homeless animals in order to breed them as laboratory animals (Article 44), breeding laboratory animals or supplying animals for testing without the required permission or without providing those animals with appropriate conditions of maintenance (Article 45), conducting experiments without the required permission for their conducting or in conflict with the approved experiment project (Article 46); on the same issue, compare, A. Habuda, W. Radecki, *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, Prok. i Pr. No. 5, 2008, pp. 31–32.

[6] Journal of Laws [Dz.U.] item 266, as amended.

[7] The Act is not applicable to: (1) veterinary services in the meaning of the Act of 18 December 2003 on animal healthcare institutions and farming, including breeding animals in compliance with the provisions on the protection of animals, not aimed at conducting procedures; (2) clinical veterinary research conducted in accordance with Articles 37ah to 37ak of the Act of 6 September 2001: Pharmaceutical law; (3) activities performed for the purpose of animals identification; (4) catching wild animals in order to conduct biometric measurements and determine their systemic classification; (5) activities that, according to medical-veterinary knowledge, do not cause pain, suffering, distress or permanent damage to an animal's body to the extent equal to or higher than a prick of a needle (Article 1(2) APAUSEP).

(Articles 69 to 72), Chapter 11 discusses changes in the provisions in force (Articles 73 to 76), and Chapter 12 contains transitional and final provisions (Articles 77 to 84). Offences are classified in Articles 66 to 67. We deal with five types of prohibited acts: (1) exposing animals to unnecessary pain, suffering, distress or permanent damage to their body resulting from the activities of using them for scientific or educational purposes (Article 66(1.1) APAUSEP); (2) using animals in experiment-related procedures without authorisation to use them in procedures connected with the use of animals for scientific or educational purposes (Article 66(1.2) APAUSEP); (3) a common aggravated type of offences laid down above (in Article 66(1.1 and 2) APAUSEP) in case of causing an animal's death (Article 66(2) APAUSEP); (4) preventing or hindering supervision based on the provisions of statute (Article 68(1) APAUSEP); (5) using information obtained during supervision proceedings for purposes different from the protection of animals used for scientific or educational purposes (Article 67(2) APAUSEP). In accordance with the assumptions made earlier, offences classified in Article 66 (i.e. the first three above-mentioned ones) will be the subject of the foregoing discussion.

2. CRIME OF EXPOSING ANIMALS TO UNNECESSARY PAIN, SUFFERING, DISTRESS OR PERMANENT DAMAGE TO THEIR BODY RESULTING FROM ACTIVITIES THAT INVOLVE USING ANIMALS FOR SCIENTIFIC OR EDUCATIONAL PURPOSES (ARTICLE 66(1.1) APAUSEP)

As W. Radecki rightly points out, "the well-being of animals that, as a result of the activities connected with the use of animals, are exposed to unnecessary pain, suffering, distress or permanent damage to their body"[8] is a protected legal interest. In other words, it concerns freeing animals from psychical and physical suffering. According to W. Kotowski and B. Kurzępa, in this case, life and health of laboratory animals are subject to protection.[9] It is a crime of exposing to danger.[10] Thus, it is material in nature, and it results in exposing an animal to unnecessary pain, suffering, distress or permanent damage to its body.[11] W. Kotowski and B. Kurzępa expressed a different opinion (in fact, based on Article 38 Act of 21 January 2005 on experiments on animals, however, treating the statutory features in the same way as Article 66(1.1) APAUSEP)

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[8] W. Radecki, *Ustawy o ochronie zdrowia zwierząt. Komentarz*, Warsaw 2015, p. 369.

[9] W. Kotowski, B. Kurzępa, *Przestępstwa pozakodeksowe. Komentarz*, Warsaw 2007, p. 196.

[10] The feature of exposure should be interpreted as exposing an animal to danger, the influence of something harmful (in this case, unnecessary pain, suffering, distress or permanent damage to an animal's body). Adopting the concept of exposure in criminal law, the legislator makes it possible to prosecute conduct that, to tell the truth, has not resulted in any measurable damage but may lead to it; thus, it is penalisation of the stage preceding a criminal effect, see W. Radecki, *Przestępstwo narażenia życia i zdrowia człowieka na niebezpieczeństwo w kodeksie karnym z 1969 r.*, Warsaw–Wrocław 1977, p. 5.

[11] M. Mozgawa, *Ustawa z 15.01.2015 r. o ochronie zwierząt wykorzystywanych do celów naukowych lub edukacyjnych*, [in:] M. Mozgawa (ed.), *Pozakodeksowe przestępstwa przeciwko zasobom przyrody i środowisku*, Warsaw 2017, p. 195.

and (wrongly) stated that it is a formal crime.[12] The provision does not require that an animal should be really exposed to unnecessary pain, suffering, distress or permanent damage to its body; for the occurrence of this crime, it is sufficient that it is highly probable that it can occur in connection with certain activities.[13] Obviously, in the event an animal really experienced pain, suffering, distress or permanent damage to its body, such a perpetrator's act matches statutory features of the offence in question,[14] and it sometimes may at the same time match statutory features of a crime of animals maltreatment laid down in Article 35(1a) Act on the protection of animals (which will imply the necessity of applying cumulative classification). According to the Dictionary of the Polish language, "pain means physical or psychical suffering".[15] According to the International Association for the Study of Pain, it is a subjective unpleasant and negative sensory and emotional experience resulting from tissue-damaging (called nociceptive) stimuli or ones that create a risk of tissue damage. On the other hand, linguistically, suffering means "great physical or psychical pain".[16] What draws attention is the fact that the legislator used a word "distress" and not "stress".[17] The concept of distress is not fully unambiguous. Distress is sometimes understood as "stress resulting from another type of stress or its strengthened form".[18] In psychology, it is stated that distress is a negative, depressing and demotivating aspect of the phenomenon of stress.[19] Sometimes, the concept of distress is used to describe the stress of deprivation or the stress of overloading causing illnesses;[20] or it is pointed out that: "distress (negative stress) means excessive overload remaining when tension is not efficiently eased".[21] Permanent damage to an animal's body is one that leads to anatomic or functional loss of an animal's organ or substantial limitation to its function.

The object of the criminal act classified in Article 66(1) APAUSEP is an animal, although a plural form is used in statute ("whoever exposes animals"). Thus, the issue that has been discussed for quite a long time arises again and a question is asked whether the legislator used the plural form to indicate at least two animals. The problem occurred in connection with Article 52(4)[22] Hunting law (in the original wording of the

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[12] W. Kotowski, B. Kurzępa, *Przestępstwa pozakodeksowe…*, p. 196.

[13] W. Radecki, *Ustawy…*, p. 369.

[14] *Ibid.*, p. 370.

[15] *Słownik języka polskiego*, see http://sjp.pl/b%C3%B3l [accessed on 15/01/2018].

[16] *Ibid.*, see http://sjp.pwn.pl/slowniki/cierpienie.html [accessed on 15/01/2018].

[17] It should be assumed that the legislator consciously did not use the concept of stress. There is a common erroneous opinion that every type of stress is harmful, which is not true. There is also stress called *eustres*, which is positive (it is constructive stress, stimulating an organism); compare, more detailed discussion by J.F. Terelak, *Psychologia stresu*, Bydgoszcz 2001, p. 367. Using the concept of distress, the legislator indicated the negative meaning of stress; also compare, comments by W. Radecki, *Ustawy…*, p. 280.

[18] *Słownik języka polskiego*, see http://sjp.pwn.pl/szukaj/dystres.html [accessed on 15/01/2018].

[19] See, http://www.psychologia.net.pl/slownik.php?level=147 [accessed on 15/01/2018].

[20] J.F. Terelak, *Psychologia stresu…*, p. 26.

[21] A. Wons, [in:] A. Trzcieniecka-Green (ed.), *Psychologia. Podręcznik dla studentów kierunków medycznych*, Kraków 2006, p. 367.

[22] Article 52(4): "Whoever breeds or keeps pedigree greyhounds or their crossbreeds without permission is subject to a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year".

provision) and resulted in the Supreme Court resolution of 21 November 2001, I KZP 26/01, stating that: "Just the use of the plural form in the text of the norm in order to refer to the object of direct protection, the object of a criminal act or a means used to commit a crime does not mean that the legislator uses it in the meaning of 'at least two', thus in order to limit the grounds for liability; therefore, the phrase 'pedigree greyhounds or their crossbreeds' used in Article 52(4) of the Act of 13 October 1995: Hunting law (Journal of Laws [Dz.U.] No. 147, item 713, as amended) covers also one pedigree dog or one crossbreed". The resolution should be obviously approved of because a grammatical interpretation should be verified with the use of other types of interpretation (mainly the purposefulness-related one) in such cases, as using it as the only one may lead to undermining the purpose of regulations laid down in legal acts. Thus, also based on the Act on the protection of animals used for scientific or educational purposes, although the legislator uses the plural form ("whoever exposes animals"), it should be recognised that exposure of one animal (to unnecessary pain, suffering, distress or permanent damage to its body) may lead to complete match of the statutory features of the crime in question (in the form of perpetration). W. Radecki rightly emphasises that "insisting that 'at least two' animals must be exposed leads to absurd in the light of the purpose of the Act. Striving to avoid the absurd justifies abandonment of purely grammatical interpretation and the use of the purposefulness-related one".[23] Undoubtedly, the argument strengthening this way of reasoning on the basis of this Act is the fact that constructing an aggravated type (in Article 66(2) APAUSEP), the legislator used the phrase: "whoever, in cases determined in (1), caused death of an animal" (and not death of animals), i.e. a singular form instead of a plural one. The opinion expressed in the doctrine is right that the use of a plural form in Article 66(1) APAUSEP is an indication of a class of cases and not a condition for a perpetrator to expose at least two animals.[24] It should be also pointed out that the Act defines animals as "living vertebrates, including larval forms that can feed independently and embryos of mammals in the last third part of their embryonic development or in the early stage of their development when, as a result of procedures carried out, after they reach the last third stage of their embryonic life, they can experience pain, suffering, distress or there is permanent damage to their body, and living cephalopods" (Article 2(1.1) APAUSEP).

According to W. Radecki's right opinion, "The essence of a crime is contained in the statement that pain, suffering, distress or permanent damage to the body are unnecessary. It is important because experiments are almost always connected with distress, usually with pain and suffering, sometimes with permanent damage to the body. The features of a crime are matched only when such a consequence is unnecessary, i.e. when it can be avoided without detriment to the sense of an experiment".[25]

Exposing animals to unnecessary pain, suffering, distress or permanent damage to their body must occur in connection with the activities that involve using animals

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[23] W. Radecki, *Ustawy…*, p. 371. Also compare, K. Nazar, *Ustawa z 13.10.1995 r. – Prawo łowieckie*, [in:] M. Mozgawa (ed.), *Pozakodeksowe przestępstwa przeciwko zasobom przyrody i środowisku*, Warsaw 2017, p. 238.

[24] W. Radecki, *Ustawy…*, p. 371.

[25] *Ibid.*, p. 370.

for scientific or educational purposes. Thus, it concerns not only procedures[26] and experiments on animals,[27] but also keeping animals to be used for scientific or educational purposes by users[28] as well as activities of their breeders[29] and suppliers[30]. Therefore, the scope of the provision application is broader than just scientific or educational activity. The legislator indicates the connections between the activities involving the use of animals for scientific or educational purposes and, as it is rightly pointed out in the doctrine, such activities consist not only in experiments (and procedures) but also in breeding and supplying them.[31] Thus, if an animal is exposed to unnecessary pain, suffering, distress or permanent damage to its body still in the course of breeding, transporting to the place of use, then the statutory features of the crime in question may be matched. A series of other types of conduct may lead to matching the features of the crime under Article 66(1.1) of the discussed Act, including:

1) implementation of the procedure in case the (scientific or educational) purposes laid down in Article 3 APAUSEP might be achieved with the use of a research method without the use of animals (breaking the principle of substitution expressed in Article 5(1.1) APAUSEP);
2) applying inappropriate research methods used in the procedure, not selected in order to limit or eliminate pain, suffering, distress or a possibility of damage to an animal's body (breaking the principle of improvement expressed in Article 5(1.3) APAUSEP);
3) implementation of the procedure causing serious damage to an animal's body and severe pain without anaesthetic and the use of medicinal products or veterinary medicinal products that act as painkillers (breaking the requirement under Article 13(1) APAUSEP);
4) using an animal in the procedure again, although its full health and well-being recovery has not been obtained and without a veterinarian's permission (breaking the requirement under Article 12(1) APAUSEP).

According to W. Radecki: "Only a natural person that is a breeder, a supplier or a user, or his representative or employee may be a perpetrator of a crime classified

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[26] The Act determines the procedure as any form of using animals for purposes laid down in Article 3, which can cause that an animal experiences pain, suffering, distress or permanent damage to its body to the extent equal to or greater than a prick of a needle as well as activities aimed at or that may cause birth or hatching of animals or the creation and maintenance of a genetically modified line of animals in the conditions of pain, suffering, distress or permanent damage to animals' body to the extent that is equal to or more intensive than a prick of a needle; depriving an animal of life only in order to use its organs or tissues for purposes laid down in Article 3 (Article 2(1.6)) is not a procedure.

[27] In accordance with Article 2(1.7), experiment is "a research programme, including a procedure or procedures with a specific scientific or educational aim".

[28] Article 2(1.11): "a user is a natural person, a legal person or an organisational unit without legal personality that uses animals in procedures."

[29] Article 2(1.9): "a breeder is a natural person, a legal person or an organisational unit without legal personality that breeds animals in order to use them in procedures or use their tissues or organs for purposes laid down in Article 3."

[30] Article 2(1.10): "a supplier is a natural person, a legal person or an organisational unit without legal personality that is not a breeder and supplies animals for the purpose of using them in procedures or using their tissues or organs for purposes laid down in Article 3."

[31] W. Radecki, *Ustawy…*, p. 370.

in Article 66(1.1)".[32] It is a right observation because exposing animals to unnecessary pain, suffering, distress or permanent damage to their body must be connected with the activity involving the use of animals for scientific or educational purposes (and this activity is mainly a user's one as well as, what has been mentioned above, a breeder's or a supplier's one).[33] He draws attention to the fact that offences under Articles 66 and 67 APAUSEP are not included in the group of offences for the commission of which a collective entity may be prosecuted (Article 16 of the Act of 28 October 2002 on collective entities' liability for prohibited acts carrying a penalty[34]).

The crime in question is intentional and may be committed with direct as well as oblique intent. Thus, a perpetrator must want to expose an animal to unnecessary pain, suffering, distress or permanent damage to its body or predicting such a possibility, he agrees to it.[35] Cases of unintentional conduct consisting in breaking the rules of careful treatment of animals in connection with the activity of using animals for scientific or educational purposes and leading to exposing animals to unnecessary pain, suffering, distress or permanent damage to their body remain outside the sphere of criminal liability.[36]

W. Radecki raises an interesting problem connected with the issue of liability for a crime under Article 66(1.1) APAUSEP. He asks a question whether an ethical commission's permission for an experiment is a circumstance excluding unlawfulness, and thus also criminal liability. As the author rightly notices, an ethical commission (taking into consideration the provisions of APAUSEP) cannot give permission for exposing an animal to unnecessary pain, suffering, distress or permanent damage to its body. Therefore, it should be assumed that the permission issued by an ethical commission for the use of animals in the procedure does not mean a permission for unnecessary pain, suffering, distress or permanent damage of their body. However, if an ethical commission issued a permission for the procedure that, according to objective scientific opinions, exposes an animal to dangers laid down in Article 66(1.1) APAUSEP, according to W. Radecki, one cannot exclude criminal liability of a person carrying out the procedure as well as of the members of an ethical commission who were for issuing of a permission for the procedure (and the concept of aiding or directing the perpetration may be applicable to their liability[37]). It should be assumed that such a possibility really exists, however, in case of an ethical commission members' liability, it would be necessary to prove intentionality on their part (their direct or oblique intent, i.e. that they wanted or at least agreed to issue a permission for the procedure in which animals were to be exposed to unnecessary pain, suffering, distress or permanent damage to their body). One cannot also exclude such cases, in which a permission has been issued in compliance with the law, however, breaking its requirements (resulting in the exposure laid down in Article 66(1.1) APAUSEP) in the course of implementation of the given procedure.

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32 *Ibid*., p. 371.
33 M. Mozgawa, *Ustawa…*, p. 200.
34 Journal of Laws [Dz.U.] of 2016, item 1541, as amended.
35 W. Radecki, *Ustawy…*, p. 371.
36 M. Mozgawa, *Ustawa…*, p. 200.
37 W. Radecki, *Ustawy…*, p. 372.

3. CRIME OF USING ANIMALS IN THE PROCEDURES DURING EXPERIMENTS WITHOUT OBTAINING A PERMISSION FOR THEIR USE IN CONNECTION WITH ACTIVITIES THAT INVOLVE USING ANIMALS FOR SCIENTIFIC OR EDUCATIONAL PURPOSES (ARTICLE 66(1.2) APAUSEP)

The National Ethical Commission for Animal Testing (Krajowa Komisja Etyczna do Spraw Doświadczeń na Zwierzętach) (in statute referred to as the Commission[38]) and local ethical commissions for animal testing (in statute referred to as local commissions) are bodies competent to issue and change permissions for experiments (Article 32(1) APAUSEP). Local commissions (11 at the most) are appointed based on the location of centres where experiments are conducted and the number of experiments conducted in a given centre (Article 32(2) APAUSEP).

A local commission's tasks include, inter alia:

1) issuing a permission for:
   a) conducting experiments, including:

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[38] Article 33: "1. The Commission's tasks include:
1) formulating and presenting:
   a) opinions and conclusions to breeders, suppliers and users concerning the protection of animals used for scientific or educational purposes;
   b) opinions to users on cooperation in the field of mutual provision of animal organs and tissues;
   c) recommendations to breeders concerning the increase in the percentage of animals that are offspring of primates bred in captivity;
2) development and provision of good practice to users, especially in the field of planning and implementing procedures, application of the principle of substitution, limitation and improvement and the use of alternative methods;
3) presenting conclusions resulting from an annual report, including the findings of proceedings of breeders', suppliers' and users' supervision to a minister for science and a minister for agriculture;
4) appointing and dismissing members of local ethical commissions;
5) cooperation with the European Commission in the field of:
   a) developing and approving research methods ensuring acquisition of the same or greater amount of information without the use of animals or with the use of a smaller number of animals, or in a method causing less pain than in case of the procedures with the use of animals (alternative methods);
   b) selecting laboratories conducting research aimed at approval of alternative methods for the needs of the EU Reference Laboratory being a European centre for validation of alternative methods;
6) providing access to information about methods alternative to animal testing and propagating them;
7) presenting opinions concerning acquisition, breeding, maintenance and use of animals in procedures and taking care of such animals to a person or persons referred to in Article 25(2), and giving access to good practices in this area;
8) exchange of information between competent bodies of other European Union Member States concerning the tasks of the Commission and the implementation of tasks laid down in Article 25(1) in the breeders', suppliers' and users' centres, and making good practices in this area available."

– reusing an animal in the procedure, as referred to in Article 12(2.2) APAUSEP,[39]
– implementing the procedure without general or local anaesthesia, as referred to in Article 13(3) APAUSEP,[40]
– administration of medicinal products or veterinary medicinal products that prevent or hamper experiencing pain, as referred to in Article 14(1.2) APAUSEP,
– using animals in the procedure referred to in Article 7[41] and Article 8(1.2 and 3) APAUSEP;[42]

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[39] Article 12(2): "An animal that has been used:
1) in a soft or moderate procedure may be used again in a procedure classified as terminal, without regaining conscience, soft or moderate;
2) once in a severe procedure may be used again, in extraordinary situations after a local ethical commission for animal testing gives consent, in a procedure classified as terminal, without regaining conscience, soft or moderate, based on the justification for the reuse submitted by the user."

[40] Article 13(3): "In the case referred to in (2), the procedure may be performed without general or local anaesthesia only when the application of this anaesthesia: 1) would cause greater pain, suffering or distress than the procedure alone or 2) cannot be reconciled with the aim of the procedure, after obtaining a local ethical commission for animal testing consent based on the justification for abandoning anaesthesia submitted by the user."

[41] Article 7: "After a local ethical commission for animal testing gives its consent, it is admissible to use the following animals in the procedures:
1) of species referred to in Article 2(1.2) – in case the aims of the procedure referred to in Article 3 cannot be obtained with the use of laboratory animals;
2) of primates referred to in Annex A to the Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ EC L 61 of 03.03.1997, p. 1, as amended; OJ EU Polish special edition, Chapter 15, Vol. 3, p. 136, as amended), hereinafter referred to as Regulation No. 338/97, which are not subject to application of Article 7(1) of the Regulation, exclusively in case of procedures aimed at research referred to in Article 3:
   a) par. 1 (b) first indent or par. 3., serving prevention, diagnosis or treating physical or psychical disability or diseases dangerous for people's life;
   b) par. 1 (c)
   – when the aim of the procedure cannot be obtained with the use of a species of animals not listed in this Annex and a species not belonging to primates;
3) of primates other than listed in par. 2 – only in case of procedures aimed at research referred to in Article 3:
   a) par. 1 (a) or (c),
   b) par. 1 (b) first indent or par. 3, serving prevention, diagnosis or treating disability or diseases dangerous for people's life – when the aim of the procedure cannot be obtained with the use of species other than primates;
4) of species in danger of extinction with the exception of primates referred to in Annex A to the Regulation No 338/97, which are not subject to the application of Article 7(1) of the Regulation – only in case of procedures aimed at research referred to in Article 3(1(b)) first indent and par. 3 – when the aim of the procedure cannot be obtained with the use of a species of animals not listed in the Annex."

[42] Article 8: "Procedures shall not be implemented with the use of:
1) apes;
2) wild animals;
3) homeless animals in the meaning of Article 4(16) of the Act of 21 August 1997 on the protection of animals, with the exception of farm animals."

b) changing an experiment, as referred to in Article 51(1) APAUSEP;[43]

2) withdrawing a permission granted for conducting an experiment[44] (Article 36(1) APAUSEP).

In accordance with the provision of Article 66(1.2) APAUSEP, the essence of the crime classified therein is the use of animals in the procedures from the category of experiments without obtaining a permission for their use in connection with the activities that involve using animals for scientific or educational purposes. Thus, it concerns a situation in which a perpetrator undertakes activities consisting in conducting experiments on animals without the permission from a competent ethical commission. Hence, these are situations, in which a perpetrator:

– did not even try to obtain the necessary permission;
– submitted an application for permission but it was refused;
– applied for permission but did not wait for it and started experiments;
– continued experiments, although the formerly issued permission was withdrawn;
– changed the experiment without obtaining permission to do this.

There is an open question of how to treat a perpetrator who has permission to use animals in experiments, however, violates the conditions for it. The grammatical interpretation results in a conclusion that we do not deal with an offence under Article 66(1.2) APAUSEP then, because the provision clearly stipulates "without obtaining permission" and not "in conflict with the conditions for the permission". However, the purposefulness-related arguments suggest that this interpretation should be verified. It should be assumed that if the violation of the conditions for the permission is significant, a perpetrator's liability for an act under Article 66(1.2) APAUSEP should be considered.

The crime in question is a formal one and only a person conducting experiments or responsible for their conducting may be its perpetrator (individual crime).[45] As far as objective side is concerned, we have to speak about intentionality in the form of both types of intent. That means that a perpetrator must want to conduct an experiment, regardless of the lack of the required permission or, predicting that the permission was not issued (or was withdrawn), agrees to that.[46]

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[43] Article 51(1): "Introduction of a change in the experiment, which may have a negative impact on the well-being of animals used, requires permission from a local ethical commission issued on the request of a user who wants to introduce it, submitted to the local commission that issued the original permission for the experiment."

[44] The local commission's tasks also include:

1) supervising an experiment against the criteria laid down in Article 53(2), which is called "a retrospective evaluation" and retention of retrospective evaluation findings;
2) provision, on a motion filed by a commune/municipal vet conducting supervision of a user concerning the experiment, information necessary for conducting supervision;
3) provision of access to non-technical summaries of experiments in Biuletyn Informacji Publicznej on the website of a minister for science (Article 36 APAUSEP).

[45] W. Radecki, *Ustawy…*, pp. 372–373.

[46] *Ibid.*, p. 373.

4. PENALTY

Offences under Article 66(1) APAUSEP carry a penalty of a fine (from 10 to 540 daily rates), a penalty of the limitation of liberty (from one month to two years) or deprivation of liberty for up to two years. The execution of the imprisonment sentence not exceeding the period of one year may be conditionally suspended. Due to the maximum limit of a penalty of deprivation of liberty laid down in Article 66(1) APAUSEP, conditional discontinuation of the proceedings is possible (in accordance with Article 66 §1 CC, of course, provided that all the conditions laid down therein are met). Renouncement of punishment is also possible (in accordance with Article 59 CC) for a crime under Article 66(1) APAUSEP, due to the fact that the penalty envisaged does not exceed three years of deprivation of liberty (provided that social harmfulness of an act is not considerable). In such a situation, a court adjudicates on a penal measure, forfeiture or compensation (provided that the aim of punishment is met this way). In case of conviction for a crime laid down in Article 66(1) APAUSEP, a court may adjudicate on such penal measures as: ban on holding a post or practicing a profession or doing business in a specified field or publicising the sentence. It is also possible to adjudicate on forfeiture of objects and financial profits obtained as a result of that crime.

5. AGGRAVATED TYPE OF OFFENCES UNDER ARTICLE 66(1.1) AND (1.2) APAUSEP: CAUSING AN ANIMAL'S DEATH IN CASES REFERRED TO IN ARTICLE 66(1) (ARTICLE 66(2) APAUSEP)

Article 66(2) APAUSEP lays down a common aggravated type of crime in case of offences laid down in 66(1.1) (exposing animals to unnecessary pain, suffering, distress or permanent damage to their body in connection with the activity that involves using animals for scientific or educational purposes) and in Article 66(1.2) (using animals in the experiment-related procedures without obtaining permission for their use). A circumstance classifying an act as aggravated is an animal's death resulting from activities referred to in Article 66(1.1) or (1.2) APAUSEP. It is a material crime (an animal's death is an effect), which is an individual one like the one referred to in Article 66(1) APAUSEP (due to the limitation of the scope of entities to persons performing activities that involve using animals for scientific or educational purposes). However, the crime is not aggravated due to a result because the legislator does not use a phrase "if an act results in", which means that a combined guilt is not the case. Thus, W. Radecki's opinion that: "A perpetrator is liable pursuant to Article 66(2) if he had predicted an animal's death or had not predicted it but could have predicted a result in the form of an animal's death" is not right.[47] On the part of a perpetrator, there must be intentionality such as direct intent (he wanted an animal to die) or oblique intent (he predicted an animal's death and agreed to

[47] *Ibid*.

it). If an animal's death is connected with lack of a perpetrator's intentionality, his liability is limited to Article 66(1) APAUSEP.

The crime under Article 66(2) APAUSEP carries a penalty of deprivation of liberty (from one month to three years). If the adjudicated penalty of deprivation of liberty does not exceed a year's time, its execution may be conditionally suspended. It is also possible to apply Article 37a CC ("If statute stipulates penalty of deprivation of liberty not exceeding eight years, a penalty of a fine or limitation of liberty can be applied instead in accordance with Article 34 §1a (1) or (4)") or the mixed penalty (Article 37b). A court may apply conditional discontinuation of criminal proceedings (provided that conditions laid down in Article 66 §1 CC are met). It is also possible to renounce punishment (in accordance with Article 59 CC) for a crime under Article 66(2) APAUSEP, due to the fact that a statutory penalty does not exceed three years' time of deprivation of liberty (provided that social harmfulness of an act is not considerable). In such a case, a court adjudicates on a penal measure, forfeiture or compensation (of course, based on the assumption that the aims of the penalty will be met this way). In case of conviction for a crime under Article 66(2) APAUSEP, a court may adjudicate on such penal measures as: ban on holding a given post or practice a given profession, ban on doing specified business or publicising the sentence. It is possible to adjudicate on the forfeiture of objects and financial benefits obtained as a result of this crime.

6. CONCURRENCE OF PROVISIONS

Provisions of Article 66 APAUSEP may be in cumulative classification with the provisions of Article 35(1), 910a or (2) APA. Article 35(1) APA criminalises killing, causing death of or slaughtering animals with the breach of regulations of Article 6(1), Article 33 or 34(1) to (4) APA. Article 35(1a) APA lays down criminal liability for animal maltreatment, and Article 35(2) APA lays down a common aggravated type of crime for Article 35(1) and (1a) APA ("If a perpetrator of an act referred to in (1) or (1a) acts with special cruelty, he is subject to a penalty of deprivation of liberty for up to three years"). Obviously, experiments on animals are usually connected with some ailments, pain or suffering (or even depriving them of life), however, it is necessary to distinguish between what is necessary and justified in the interest of science and cases where in the course of experiments animals are abused by the application of additional suffering (maltreatment). In case of conscious exposure of laboratory animals (or those used for educational purposes) to unnecessary pain, suffering and distress or permanent damage to their body, it is undoubtedly justifiable to apply cumulative classification under Article 66(1) APAUSEP in concurrence with Article 35(1a) or (2) APA in conjunction with Article 11 §2 CC, and in case of causing an animal's death, Article 66(2) APAUSEP in concurrence Article 35(1), (1a) or (2) APA in conjunction with Article 11 §2 CC.[48]

[48] M. Mozgawa, *Ustawa…*, p. 214.

7. CONCLUSIONS

The Act of 15 January 2015 on the protection of animals used for scientific or educational purposes transposed into the Polish legal system the provisions of Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes. It seems to be a successive significant step towards the extension of humanitarian protection of animals. The construction of the above-discussed types of prohibited acts (laid down in Article 66 APAUSEP) does not raise any substantial interpretational doubts and the sanctions envisaged seem to be proportionate to the social harmfulness of the indicated conduct.

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CRIMES UNDER ARTICLE 66 OF THE ACT OF 15 JANUARY 2015 ON THE PROTECTION OF ANIMALS USED FOR SCIENTIFIC OR EDUCATIONAL PURPOSES

Summary

The article discusses prohibited acts classified in Article 66 of the Act of 15 January 2015 on the protection of animals used for scientific or educational purposes. The crime under Article 66(1.1) consists in the exposure of animals to unnecessary pain, suffering, distress or permanent damage to their body in connection with the activity that involves using animals for scientific or educational purposes and is a material one. The object of an act is an animal, although a plural form is used in the Act ("whoever exposes animals"). It is an individual crime that may only be committed intentionally (with both forms of intent). The essence of an offence under Article 66(1.2) is the use of animals in experiment-related procedures without obtaining appropriate permission in connection with the activity that involves using animals for scientific or educational purposes. It is a formal crime and only a person conducting experiments or a person responsible for their conducting can be a perpetrator (individual crime). The subjective aspect is expressed in intentionality (direct or oblique intent). A circumstance classifying the aggravated type (Article 66(2)) is an animal's death resulting from undertaking activities laid down in Article 66(1.1) or (1.2). It is a material crime (an animal's death is the effect) and an individual one. However, it is not a crime aggravated by the result because the legislator does not use a phrase "if an act results in", which means that *culpa dolo exorta* is not applicable. However, on the part of a perpetrator, there must be intentionality, such as direct intent (he wanted an animal to die) or oblique intent (predicting the possibility of an animal's death, he agreed to it). If an animal's death is not intentional on the part of a perpetrator, his liability is limited to Article 66(1) APAUSEP.

Keywords: animal, experiments, protection of animals

PRZESTĘPSTWA Z ART. 66 USTAWY Z 15 STYCZNIA 2015 R. O OCHRONIE ZWIERZĄT WYKORZYSTYWANYCH DO CELÓW NAUKOWYCH LUB EDUKACYJNYCH

Streszczenie

Przedmiotem rozważań są czyny zabronione stypizowane w art. 66 ustawy z dnia 15.01.2015 r. o ochronie zwierząt wykorzystywanych do celów naukowych lub edukacyjnych. Przestępstwo z art. 66 ust. 1 pkt 1 polega na narażeniu zwierząt na niepotrzebny ból, cierpienie, dystres lub trwałe uszkodzenie organizmu w związku z prowadzoną działalnością w zakresie wykorzystywania zwierząt do celów naukowych lub edukacyjnych i ma ono charakter materialny. Przedmiotem czynności wykonawczej jest zwierzę, choć w ustawie użyta została liczba mnoga („naraża zwierzęta"). Jest to przestępstwo indywidualne, które może być popełnione jedynie umyślnie (w obu postaciach zamiaru). Istotą występku z art. 66 ust. 1 pkt 2 jest wykorzystywanie zwierząt w procedurach objętych doświadczeniem bez uzyskania odpowiedniej zgody w związku z prowadzoną działalnością w zakresie wykorzystywania zwierząt do celów naukowych lub edukacyjnych. Ma on charakter formalny, a jego sprawcą może być tylko osoba przeprowadzająca doświadczenia lub osoba odpowiedzialna za ich przeprowadzenie (przestępstwo indywidualne). Strona podmiotowa wyraża się w umyślności (zamiar bezpośredni i ewentualny). W typie kwalifikowanym (art. 66 ust. 2) okolicznością kwalifikującą jest spowodowanie śmierci zwierzęcia w następstwie podjęcia czynności wskazanych w art. 66 ust. 1 pkt 1 lub 2. Jest to przestępstwo materialne (skutkiem jest śmierć zwierzęcia), które ma charakter indywidualny. Nie jest to jednak przestępstwo kwalifikowane przez następstwo, bowiem ustawodawca nie używa formuły „jeżeli następstwem czynu jest", co oznacza, iż nie ma zastosowania *culpa dolo exorta*. Po stronie sprawcy musi wystąpić umyślność w postaci zamiaru bezpośredniego (chciał śmierci zwierzęcia) albo ewentualnego (przewidując możliwość śmierci zwierzęcia, godził się na nią). Jeżeli śmierć zwierzęcia objęta jest przez sprawcę nieumyślnością, wówczas jego odpowiedzialność ograniczy się jedynie do art. 66 ust. 1 u.o.z.n.e.

Słowa kluczowe: zwierzę, doświadczenia, ochrona zwierząt

Cytuj jako:

Mozgawa M., *Przestępstwa z art. 66 ustawy z 15 stycznia 2015 r. o ochronie zwierząt wykorzystywanych do celów naukowych lub edukacyjnych*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 71–85. DOI: 10.26399/iusnovum.v12.2.2018.16/m.mozgawa

Cite as:

Mozgawa, M. (2018) 'Crimes under Article 66 of the Act of 15 January 2015 on the protection of animals used for scientific or educational purposes'. *Ius Novum* (Vol. 12) 2, 71–85. DOI: 10.26399/iusnovum.v12.2.2018.16/m.mozgawa

Ius Novum
2/2018

PARTICIPATION OF LAY JUDGES IN CRIMINAL PROCEEDINGS IN POLAND AND GERMANY

DOI: 10.26399/iusnovum.v12.2.2018.17/m.malolepszy/m.gluchowski

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1. INTRODUCTION

Over the recent years, the number of lay judges participating in criminal proceedings in Poland and Germany has been observed to decrease. Trials are becoming the exclusive domain of professional judges, which deserves criticism. The first threat to the quality of adjudication is connected with the fact that a professional judge in the course of everyday work develops and consolidates certain patterns of thinking and adjudicating, which he can then automatically and without change transfer onto cases that are significantly different. If someone constantly deals with the same type of cases, a risk occurs that they will be judged with the use of the same methods. Admission of lay judges to adjudication may serve getting off beaten tracks in judges' thinking; they bring in a new perspective to criminal proceedings, which can be different from the way of thinking typical of a professional judge. Obviously, the selection of the right people for lay judges to play the role of partners to professional judges and not just passive spectators is the necessary requirement for the inclusion of lay judges into the adjudicating process. Secondly, in the situation when professional judges dominate courts, there is a risk that administration of justice will depart from society's expectations, which can have a detrimental effect on the citizens' approval and trust in the court system. This threat manifests itself especially on the plane of imposing penalties. Both Polish and German criminal

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law gives judges discretion in this area. If penalties imposed by professional judges are too severe or too lenient, it will result in the society's negative opinions about the justice system. Lay judges may counterbalance this threat thanks to their participation in adjudication and influence on imposed penalties. These are just two of many arguments for lay judges' participation in criminal proceedings, which will be discussed below. However, even those arguments constitute a sufficient reason for analysing the legal grounds for lay judges' participation in criminal jurisdiction in the two states. It should be emphasised, at the same time, that the issue has not been the subject matter of a comparative analysis so far.

2. CASES HEARD WITH LAY JUDGES' PARTICIPATION

2.1. GERMANY

Lay judges adjudicate in Germany in criminal proceedings carried out before local courts (*Amtsgericht*) and state courts (*Landgericht*), i.e. the counterparts of Polish regional and district courts.

In cases tried before a local court, a bench with lay judges adjudicates, unless it is stipulated in statute that a professional judge must hear and decide in a criminal matter (§28 German Courts Constitution Act, hereinafter: GVG). The members of a lay judge bench are one professional judge who is also a presiding judge and two lay judges (§29(1) first sentence GVG). In more complex matters, the adjudicating bench can be extended, i.e. one more professional judge can be added (§29(2) GVG), which forms the "extended bench". Simply speaking, one can state that a regional court hears and decides matters as a lay-judge bench in cases in which the criminal offence carries a penalty of deprivation of liberty that exceeds two years but does not exceed four years, and in case of conviction for felonies, imprisonment does not exceed four years (two years' limit: §28 in conjunction with §25(2) GVG; four years' limit: §74(1) second sentence GVG), i.e. not in petty offences but in connection with medium-gravity offences.[1]

It should be noticed that the threshold of two years of deprivation of liberty constitutes a key limit in German criminal law because the execution of a penalty may be conditionally suspended only in case it does not exceed two years (§56(2) German Criminal Code, hereinafter: StGB). In other words, the members of the public must participate in trials concerning felonies and ones which carry a penalty of deprivation of liberty exceeding this threshold, i.e. excluding the possibility of conditional suspension of penalty execution.

It should also be taken into account that the German definition of a felony is much broader than the Polish one. In Poland, a felony is a prohibited act carrying a penalty of deprivation of liberty for at least three years or a stricter penalty (Article 7 Polish Criminal Code, hereinafter: CC). In German law, in order to recognise a prohibited act as a felony, an offence must carry a penalty of deprivation

[1] W. Beulke, *Strafprozessrecht*, Heidelberg: C.F. Müller, 2016, nb. 40.

of liberty for at least one year or a stricter penalty laid down in statute (§12(1) StGB). That is why, e.g. a robbery is not a felony in Poland because the minimum penalty is two years' imprisonment, but in Germany it is, although the minimum penalty is twice lower (Article 280 §1 CC, §249(1) StGB).

Lay judges' participation in criminal proceedings in a state court is even broader. They participate in first-instance as well as second-instance proceedings.

In the court of first instance, all proceedings are conducted before a bench with lay judges because they take place in the "grand criminal division". The grand criminal division is composed of three professional judges and two lay judges (§76(1) first sentence, *in principio* GVG). At the opening of the main proceedings, the grand criminal division rules on its composition during the main hearing (§76(2) first sentence GVG). There are three cases in which it must rule that the composition remains unchanged during the main hearing, i.e. includes tree professional judges and two lay judges:

– when a criminal division with lay judges hears and decides on one of 30 serious criminal offences enumerated in statute (§74(2) GVG), especially murder and various intentional crimes resulting in death (§76(2) third sentence, item 1 GVG);
– when the order of placement of a dangerous criminal in preventive detention, its reservation or the order of placement in a psychiatric hospital is expected (§76(2) third sentence, item 2 GVG);
– when the participation of a third judge appears necessary due to the scale or complexity of the case (§76(2) third sentence, item 3 GVG). The criterion, as a rule, is fulfilled when the main hearing is expected to last longer than ten days or the grand criminal division has jurisdiction as an economic offences division (§76(3) GVG).

If the criminal proceedings do not concern any of the three above-mentioned cases, the grand criminal division rules that it will be composed of two professional judges and two lay judges (§76(2) fourth sentence GVG).

Secondly, lay judges also adjudicate in the court of second instance, namely when a small criminal division has jurisdiction. It is composed of a presiding judge and two lay judges adjudicating in proceedings concerning appeals against a judgement of a criminal court judge or of a court with lay judges (§76(1) first sentence, second part GVG). However, appeals against a sentence of an extended bench with lay judges (§29(2) GVG) are heard by the "extended small criminal division" composed of two professional judges and two lay judges (§76(6) first sentence in conjunction with (1) first sentence, item 2 GVG).

In general, since 1924, a tendency to narrow the scope of criminal cases in which lay judges adjudicate has been observed.[2] At present, they participate in ca. 20%[3]–30%[4] of criminal proceedings.

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[2] Th. Rönnau, *Grundwissen – Strafprozessrecht: Schöffen*, Juristische Schulung No. 6, 2016, p. 501.

[3] *Ibid*.

[4] H. Satzger, *Die Schöffen im Strafprozess*, Juristische Ausbildung No. 7, 2011, p. 520.

2.2. POLAND

In Poland, lay judges' participation in criminal proceedings is even smaller. Since the 1980s, the scope of criminal proceedings with non-professional bench participants has been systematically limited,[5] and the reform of 2007[6] has almost completely eliminated them from regional courts. At present, they participate in some trials before district courts and only exceptionally in cases tried by regional courts. In addition, unlike in Germany, benches with lay judges take part in first-instance proceedings, thus only professional judges hear appeals.

As far as regional courts are concerned, as a rule, an adjudicating bench is composed of one professional judge but because of special complexity of a case or its significance, a court may decide that a bench of three judges or one judge and two lay judges should hear it (Article 28 §3 Criminal Procedure Code, hereinafter: CPC). Special complexity of a case may result from factual or legal circumstances and occurs when it is necessary to determine a complicated and multi-thread state of facts as well as when a case requires the resolution of a very complicated legal issue.[7] Special significance of a case may result from its unprecedented nature[8] or extraordinary media coverage[9].

On the other hand, the regulation concerning district courts is much more complex. Also as far as those courts are concerned, as a rule, one professional judge hears a case in first instance. However, there are three situations in which benches with lay judges adjudicate.

Firstly, a court may decide that a bench composed of three judges or one judge and two lay judges hear a case due to its special complexity or significance (Article 28 §3 CPC). Thus, it is a rule identical to that in a regional court.

Secondly, a district court in a bench composed of one judge and two lay judges adjudicates in cases concerning felonies (compare, Article 28 §2 in conjunction with Article 25 §1(1) CPC), thus in matters concerning serious offences.

Thirdly, in cases concerning offences that carry a life sentence, a bench of two judges and three lay judges adjudicates (Article 28 §4 CPC). In practice,[10] it concerns murder trials and, since 2017,[11] causing serious damage to health resulting in death.

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[5] For more on this issue, see S. Waltoś, *Ławnik – czy piąte koło u wozu?*, [in:] T. Grzegorczyk (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, Warsaw: LEX, 2011, pp. 526–527.

[6] The reform introduced by the Act of 15 March 2007 amending the Act: Code of Civil Procedure, Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] No. 112, item 766.

[7] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*, Vol. 1, Warsaw: Wydawnictwo C.H. Beck, 2011, Article 28, nb. 5; W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz*, Warsaw: LexisNexis, 2014, Article 28, comment 4; compare, A. Ważny, P. Czarnecki, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw: Wydawnictwo C.H. Beck, 2016, Article 28, nb. 9.

[8] D. Świecki, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warsaw: Wolters Kluwer, 2017, Article 28, comment 23.

[9] A. Ważny, [in:] A. Sakowicz (ed.), *Kodeks postępowania…*, 2015, Article 28, nb. 2.

[10] Other offences for which the penalty may be imposed including, e.g. initiation or conducting a war of aggression (Article 117 §1 CC), are not common in judicial practice.

[11] Amendment to Article 156 §3 CC, which entered into force on 17 July 2017 on the basis of the Act of 23 March 2017 amending the Act: Criminal Code, the Act on misdemeanour procedure concerning minors and the Act: Criminal Procedure Code, Journal of Laws [Dz.U.], item 773.

Summing up, in Poland, lay judges participate in adjudicating benches hearing cases concerning the most serious offences such as, e.g. murder (Article 148 CC), trafficking in persons (Article 198a CC), rape of a minor under the age of 15 (Article 197 §3(2) CC) and, secondly, in trials which are especially complicated or of great significance. One must admit that, this way, lay judges participate in the proceedings that evoke the strongest emotions in society and receive media coverage. In spite of that, the trials account for a small percentage of all criminal proceedings and their number seems to be unimportant in the light of proceedings concerning thefts or drink driving. It is estimated that lay judges participate in adjudication of less than 0.6% of all first-instance criminal proceedings in total.[12]

3. LAY JUDGES SELECTION

Due to the fact that regulations on the selection of lay judges in the two states demonstrate many specific differences, only some of them will be analysed.

3.1. PROCEDURE

3.1.1. GERMANY

In Germany, the municipal assembly compiles a list of the prospective lay judges, from which a committee at the local court selects the necessary number of them (details in §36 and the following GVG) for a five-year term (§ 42(1) first sentence GVG). However, the regulation is based on the assumption that might work in the smallest municipalities at the most.[13] In accordance with it, councillors know citizens well and can indicate people who can hold the posts. It is worth drawing attention to the directive the municipal assembly should follow when compiling the list of candidates. In accordance with the provision, "(…) it should adequately reflect all groups within the population in terms of sex, age, occupation and social status" (§36(2) first sentence GVG). According to the standpoint presented in the German literature, an attempt to fully implement this requirement would be a disproportionally difficult challenge, which is in practice unattainable. That is why, the directive is just a proposal for a municipal assembly, a pattern to be pursued, and only most flagrant violations of the directive result in negative legal consequences.[14] For instance, it would be inadmissible to select candidates at random, e.g. from the list

[12] For S. Waltoś' estimation based on data of 2008, see *W dziesięciolecie obowiązywania kodeksu postępowania karnego*, PiP No. 4, 2009, p. 6; by this author, *Ławnik…*, p. 528; S. Waltoś, P. Hofmański, *Proces karny. Zarys wykładu*, Warsaw: Wolters Kluwer, 2016, nb. 502.

[13] W. Degener, [in:] J. Wolter (ed.), *SK-StPO. Systematischer Kommentar zur Strafprozessordnung. Mit GVG und EMRK*, Vol. 9, Köln: Carl Heymanns Verlag, 2013, §36 GVG nb. 3; strictly, M. Jaeger, *Ganz normale Leute*, Frankfurter Allgemeine Zeitung of 26 December 2015, http://www.faz.net/aktuell/politik/inland/schoeffen-manchmal-maechtiger-als-der-richter-13975600.html [accessed on 12/01/2018].

[14] W. Degener, [in:] J. Wolter (ed.), *SK-StPO…*, §36 GVG nb. 9.

of residents.[15] Apart from that, however, the Act gives municipalities considerable discretion in compiling the list of candidates. The obligation of proportional representation of particular groups of citizens is also addressed to the committee at the local court, which takes final decisions and selects future lay judges from the list prepared by the municipal assembly (§42(2) GVG). A new committee at the local court is appointed each time[16] when new lay judges must be selected, i.e. every five years (§40(1) GVG). It is composed of nine members: one judge of the local court who is a chairman, one administrative official of self-government administration or state (*Land*) administration designated by the state government and seven upstanding individuals.

The judge who is a chairman of the committee is designated in the annual plan of tasks adopted by the local court presidium (compare, §21(1) first sentence GVG). The governments of the particular constituent states usually[17] do not select a public administration representative to be a member of the committee on their own but they use the statutory entitlement to issue statutory instruments transferring the burden of it onto the highest level authorities of constituent states, usually ministries (see, §40(2) second and third sentence GVG). The administrative official does not have to be designated by name; a particular post held in administration constitutes sufficient designation.[18]

Upstanding individuals are selected from the residents of the district of the local court jurisdiction by the representative body elected in the general election[19] and representing the administrative subdivision (*unterer Verwaltungsbezirk*). The structure of the territorial self-government varies in different constituent states so the name and the body of self-government may be different, too. Usually, it is a municipality council (*Kreistag*).[20] Upstanding individuals are elected by a two-thirds majority of the present members, however, at least, by half of the statutory number of members (§40(3) first sentence GVG).

3.1.2. POLAND

On the other hand, in Poland, the commune (*gmina*) council appoints lay judges on its own. However, the council does not select candidates but court presidents, associations, organisations, trade unions and groups of at least 50 commune residents who have the right to vote designate them (Article 162 §1 of the Law on the common courts system, hereinafter: LCCS). Before the selection, a team appointed by the

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[15] Federal Court of Justice judgement of 30 July 1991, 5 StR 250/91, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 38, beginning p. 47, p. 48.

[16] There are no contraindications to reappointment of the same people to the commission after a five-year term, see M. Goers, [in:] J.-P. Graf (ed.), *Strafprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, München: Verlag C.H. Beck, 2018, §40 GVG nb. 3 with further references.

[17] *Ibid.*, §40 GVG nb. 11.

[18] Federal Court of Justice judgement of 2 December 1958, 1 StR 375/58, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 12, beginning p. 197, p. 203.

[19] Compare, Article 28(1) second sentence German Basic Law (GG).

[20] Compare, Ch. Barthe, [in:] R. Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung mit GVG, EGGVG und EMRK*, München: Verlag C.H. Beck, 2013, §40 GVG nb. 2a; W. Degener, [in:] J. Wolter (ed.), *SK-StPO…*, §31 GVG nb. 9.

commune council assesses the candidates (Article 163 §2 LCCS) so that councillors have general knowledge about them when voting. The principle of proportional representation of the community known in Germany is not applicable in Poland. It is enough to look at the list of entities entitled to designate candidates to notice that the Polish legislator thought about the selection of activists, persons involved in the work for the local community and not about a cross-section of society. In addition, the entitlement of court presidents to designate candidates indicates that the selection of experienced, verified lay judges again does not raise objections of the legislator. Polish law does not envisage any time limits to holding the position of a lay judge; one term lasts four years (Article 165 LCCS) and the appointment for successive terms is admissible, however, this does not mean that the function should become a regular profession.[21]

3.2. CANDIDATES' CONSENT

The basic difference between the two countries concerns voluntariness to hold the function of a lay judge. In Poland, a future lay judge's consent (or initiative) is an indispensible condition for his appointment. On the other hand, in Germany, a lay judge may be appointed against his will and may have to play that role obligatorily. The instrument should be applied carefully because, regardless of the burden for a citizen concerned, compulsion to hold the post raises questions about the prospective lay judges' motivation and their positive attitude to the duties.[22] It seems to be very doubtful whether an unwilling citizen with a negative attitude will hold this post in a satisfactory way. That is why, it seems reasonable that a commune compiling the list of candidates should, first of all, take into consideration candidates who volunteer and persons designated by local organisations. One must admit that compulsion used as a last resort, when other methods fail, solves the problem of shortage of lay judges, which is present in Poland.[23] Gross remuneration for a lay judge's day's work, which is PLN 80.19 now in 2018,[24] does not encourage citizens who are professionally active to take days off to serve in court (Article 172 §1 LCCS) and lose remuneration from a company (Article 172 §2 LCCS). That is why, the picture of Polish lay judges does not match the principle of proportional representation of the population. Among all lay judges during the present term

[21] Judges answering a survey questions, J. Ruszewski, P. Sitniewski, were absolutely against this solution, *Wybór czynnika społecznego w postępowaniu sądowym na obszarze właściwości Sądu Apelacyjnego w Białymstoku – raport z badań*, Samorząd Terytorialny No. 10, 2013, p. 78.

[22] Polish professional judges taking part in a survey emphasise that they believe that the most important features of a good lay judge are motivation to work, preparation to a trial and being acquainted with files, see J. Ruszewski, P. Sitniewski, *Wybór czynnika…*, p. 78.

[23] See, e.g. A. Łukaszewicz, *Ławników mniej, niż to wynikało z zapotrzebowania*, Rzeczpospolita of 22 November 2011, http://www.rp.pl/artykul/757842-Lawnikow--mniej--niz-to-wynikalo-z-zapotrzebowania.html [accessed on 12/01/2018]; by this author, *Sędzia będzie się musiał liczyć z ławnikiem*, Rzeczpospolita of 10 July 2016, http://www.rp.pl/Sedziowie-i-sady/307109985-Sedzia-bedzie-sie-musial-liczyc-z-lawnikiem.html [accessed on 12/01/2018].

[24] The level of compensation is updated each year in accordance with Article 172 §4 in conjunction with Article 91 §1c LCCS.

(2016–2019), i.e. not only those adjudicating in criminal matters, pensioners account for 43% of them, disabled pensioners for 5%, employees for 37%, entrepreneurs and freelancers for 6%, and the unemployed for 8%.[25]

3.3. FORMAL REQUIREMENTS

3.3.1. GERMANY

Due to the fact that all social groups should be represented in the service of lay judges in Germany, the formal requirements for their appointment must be rather basic.[26] Apart from German citizenship (§31 GVG), they are as follows: a person cannot be deprived of the capacity to hold public office and there cannot be investigation proceedings pending that may result in loss of that capacity (§32 GVG), the person must have the capacity to freely dispose of his assets, be the resident of the county, be between 25 and 70 years of age, be in good health (all these conditions are laid down in §33 GVG), and there is an unwritten requirement of "special loyalty to the Constitution".[27] Moreover, relatively recently, a new requirement has been added to statute, which is worth making a few comments about because it perfectly shows how strong the pursuit of proportional representation of all social groups is in Germany. A regulation which entered into force in 2010 introduced "sufficient knowledge of German" as a requirement for lay judges (§33(5) GVG in the new wording[28]). Before this amendment, the dominating standpoint[29] in accordance with the Imperial Chamber Court,[30] the former counterpart of the Federal Court of Justice, had assumed that a citizen who did not know German could hold the office of a lay judge with the assistance of an interpreter. In the face of numerous occurrences of that,[31] the legislator introduced the requirement of knowledge of German but indicated in the justification for the amendment that ability "to communicate and read a text concerning everyday life" is sufficient, thus the knowledge of legal language is not necessary.[32] Apart from that, no other restrictions on holding the office

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[25] Data provided by the Ministry of Justice on the authors' request.

[26] Compare, J. Bader, *Die Kopftuch tragende Schöffin*, Neue Juristische Wochenschrift No. 41, 2007, p. 2966.

[27] Not regulated directly in GVG, but introduced by the Federal Constitutional Court in its ruling of 6 May 2008, 2 BvR 337/08, Neue Juristische Wochenschrift No. 35, 2008, p. 2569, nb. 19.

[28] Amended by the Act of 24 July 2010 (Federal Law Gazette [Bundesgesetzblatt] I, p. 976) entering into force on 30 July 2010.

[29] See, a good review of posts together with sources presented by W. Degener, [in:] J. Wolter (ed.), *SK-StPO…*, §31 GVG nb. 4.

[30] Imperial Chamber Court judgement of 7 January 1898, Rep. 4565/97, Entscheidungen des Reichsgerichts in Strafsachen, Vol. 30, beginning p. 399, pp. 399–400; the judgement concerns a person holding the then office of the sworn juror.

[31] D. Gittermann, [in:] E. Löwe, W. Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz*, Vol. 10, Berlin, New York: Walter De Gruyter, 2010, §33 GVG nb. 7.

[32] Bundestag paper 17/2350, p. 5.

were introduced, e.g. the minimum education level, minimum skills or knowledge,[33] which should not surprise because a different attitude would be in conflict with striving to include all social groups.

It is also worth adding that until 4 November 2017, there was a formal requirement concerning the tenure of lay judge service in Germany. In accordance with the repealed §34(1.7) GVG,[34] the selection of a given lay judge for the third term in criminal courts was inadmissible. After two successive terms, there had to be a break and only after it could a lay judge hold the office again for two terms. In the justification for the Bill amending the Act, it was pointed out that it was to "prevent selecting the same person as a lay judge in criminal courts again and again and this way guarantee the society's participation in criminal jurisdiction to a greater extent than so far".[35] Again, the pursuit of society's representation is evident in Germany, which is not so clearly indicated in Poland. Since 5 September 2017, instead of a strict ban on a lay judge's third term in criminal courts, lay judges have had the right to refuse to hold this office in criminal courts for the third successive time (§35(2)(a) GVG). It must be reminded that a lay judge may be obliged to hold the office against his will. The legislator revealed in the justification to the Bill that the reason is to make it possible for involved, wilful and experienced lay judges to continue participating in adjudication in criminal matters. At the same time, thanks to the right to refuse, those who do not want to hold the office will not be burdened with it for over ten years. Thirdly, municipalities will have less work compiling the lists of candidates because they will not have to eliminate people for whom it would be a third successive term in office.[36] It is not difficult to notice that the first reason, i.e. admission of experienced and motivated lay judges to adjudication for a long time, is similar to the solutions adopted by the legislator in Poland.

3.3.2. POLAND

In Poland, the formal requirements that lay judges must meet (Article 158 LCCS) are similar to the German ones, although it is not difficult to notice some specific differences (e.g. in Poland, there is no requirement of capacity to freely dispose of one's assets). An interesting Polish condition, which is not laid down in German statute, is, apart from an impeccable character,[37] secondary education. At first glance, the requirement may come as a surprise if one takes into account that in case of the President of the Republic of Poland or a member of parliament, there

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[33] Compare, the Imperial Chamber Court judgement of 7 January 1898, Rep. 4565/97, Entscheidungen des Reichsgerichts in Strafsachen, Vol. 30, beginning of p. 399, pp. 399–400.

[34] The reform was introduced by the second Act on strengthening the procedural rights of the accused in criminal proceedings and on the amendment of lay law of 27 August 2017, Federal Law Gazette [Bundesgesetzblatt] I, p. 3295.

[35] Justification for the government Bill, Bundestag paper 7/551, p. 99.

[36] Justification for the government Bill, Bundesrat paper 419/16, p. 28.

[37] However, non-introduction of this criterion as a formal requirement does not mean that the features of a lay judge's character are unimportant for his selection.

is no minimum education requirement.[38] It can be explained only by the fact that lay judges are expected to have a certain minimum of competence and, statistically, proper education increases probability of meeting this condition. However, it seems obvious that the connection between a lay judge's education and his ability to hold the office should not be overestimated.

Summing up, one can say that the Polish legislator does not strive to achieve the proportional representation of particular social groups but is looking for the most competent candidates.

4. STATUS

Comparing the status of lay judges in criminal proceedings in Poland and Germany, at first sight one can notice many similarities. Both legal systems guarantee lay judges' independence (Article 169 §1 LCCS, Article 97(1) German Basic Law, hereinafter: GG,[39] §45(1) first sentence in conjunction with §25 German Judiciary Act, hereinafter: DriG). Adjudicating matters, lay judges hold an office of a judge equal to professional judges and their votes have the same weight (Article 4 §2 LCCS, §30(1) GVG). As the number of lay judges exceeds the number of professional judges in some benches, it is possible that lay judges will outvote professional judges. In both situations, lay judges' participation is limited to adjudication in the course of the main hearing (Article 169 §2 LCCS, Article 28 CPC, §30(2), §76(1) first sentence GVG). Only a professional judge may be the presiding one.

However, there is an interesting difference concerning access to files. In Poland, the members of the adjudicating bench, i.e. also lay judges, have the right but also a duty to get acquainted with evidence that is in the files. The duty is laid down directly in the Polish Criminal Procedure Code (Articles 7, 92 and 410 CPC[40]) and is recognised as an obvious requirement.[41]

In Germany, the situation is more complicated. In-depth presentation of the development of case law and doctrines[42] would go beyond the framework of this

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[38] That is why, critically on this criterion: A.S. Bartnik, *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP*, Warsaw: Trio, 2009, p. 188.

[39] Lay judges are also judges in the meaning of Article 97(1) GG, see W. Meyer, [in:] I. von Münch, Ph. Kunig, *Grundgesetz. Kommentar*, Vol. 2, München: Verlag C.H. Beck, 2012, Article 97, nb. 12; Ch. Hillgruber, [in:] Th. Maunz, G. Dürig, *Grundgesetz. Kommentar*, Vol. 5, München: Verlag C.H. Beck, September 2017, Article 97, nb. 20.

[40] Supreme Court judgement of 5 November 2008, V KK 146/08, OSNKW 2009, No. 1, item 9.

[41] See, M. Domagalski, *Ławnik bierze udział w rozprawie, choć nie zna sprawy*, Rzeczpospolita of 30 November 2014, http://www.rp.pl/artykul/1144937-Lawnik-bierze-udzial-w-rozprawie--choc-nie-zna-sprawy.html [accessed on 12/01/2018].

[42] D. Gittermann presents a review of opinions, [in:] E. Löwe, W. Rosenberg, *Die Strafprozeßordnung…*, Vol. 10, §30 GVG nb. 4–10; broadly on the issue in R. Börner, *Die Ungleichheit des Schöffen. Schöffen als Garanten der Unmittelbarkeit*, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 122, No. 1, 2010, pp. 157–198; Th. Hillenkamp, *Zur Teilhabe des Laienrichters*, [in:] H.-J. Albrecht et al. (ed.), *Internationale Perspektiven in Kriminologie und Strafrecht. Festschrift für Günther Kaiser zum 70. Geburtstag*, Berlin: Duncker & Humblot, 1998, pp. 1437–1459.

article. In the former case law, it was assumed that lay judges were not authorised to have access to files and providing them with information about their contents was recognised as the violation of the principle of the proceeding directness (§249 German Criminal Procedure Code, hereinafter: StPO) and oral form of the proceedings (§261 StPO).[43] The difference in authorisation to access files between professional judges and lay judges was justified by an argument that in case of lay judges, there is a greater threat that the files will prejudice them.[44] However, already in the early 1960s,[45] the case law practice started to moderate this ban. The famous case of the admission of lay judges' access to the script of the contents of a sound recording may be an example.[46] Some authors predict that the process of changes in the Federal Court of Justice case law is heading towards granting lay judges the same rights of access to files as professional judges have in order to stick to the principle of equality of the two groups of judges in accordance with §30 GVG.[47]

5. LAY JUDGES' REMUNERATION

There are enormous differences between Polish and German lay judges as far as the system of their remuneration is concerned. In accordance with §55 GVG, German lay judges are paid compensation in accordance with the provisions of the Court Payment and Reimbursement Act (hereinafter: JVEG). Pursuant to §15(1) JVEG, lay judges are entitled to the following benefits:

1) Reimbursement of travel expenses covering real costs incurred up to the maximum value of first-class train fare (§5(1) JVEG). In case of travel by one's own car, a lay judge is reimbursed 30 cents per kilometre (§5(2) first sentence (2) in conjunction with §1(1.2) JVEG) plus the cost of car park tickets (§5(2) first sentence *in fine* JVEG).
2) Compensation for serving as a lay judge in the municipality in which he neither lives nor works. It is paid only in case a lay judge serves away from his own municipality for more than eight hours. Within this benefit, a lay judge is paid an allowance (*Tagegeld*) and reimbursed the cost of overnight accommodation (§6(1) and (2) JVEG). The allowance, in accordance with §9(4a) Income Tax Act (EStG), accounts for:

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[43] Imperial Chamber Court judgement of 8 February 1935, 4 D 787/34, Entscheidungen des Reichsgerichts in Strafsachen, Vol. 69, beginning of p. 120, p. 124; Federal Court of Justice judgement of 5 January 1954, 1 StR 476/53, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 5, beginning of p. 261, pp. 262–263; Federal Court of Justice judgement of 17 November 1958, 2 StR 188/58, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 13, beginning of p. 73, pp. 74–75.

[44] Compare, Federal Court of Justice judgement of 5 January 1954, 1 StR 476/53, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 5, beginning p. 261, p. 262.

[45] Starting from the unpublished Federal Court of Justice judgement of 23 February 1960, 1 StR 168/59; thus, W. Degener, [in:] J. Wolter (ed.), *SK-StPO…*, §30 GVG nb. 9.

[46] Federal Court of Justice judgement of 26 March 1997, 3 StR 421/96, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 43, beginning of p. 36, p. 39.

[47] W. Degener, [in:] J. Wolter (ed.), *SK-StPO…*, §30 GVG nb. 15; C. Roxin, B. Schünemann, *Strafverfahrensrecht. Ein Studienbuch*, München: Verlag C.H. Beck, 2017, §46 nb. 6.

- EUR 24 per whole day (24 hours) spent away from domicile or the place where he regularly works;
- EUR 12 per day of arrival and departure if a lay judge spent the night on the same day, the day before or the next day away from his home;
- EUR 12 for a calendar day when he spent more than eight hours but less than 24 hours away from home.

They are reimbursed the cost of overnight accommodation, provided they were really incurred and were necessary (§6(2) JVEG).

3) Reimbursement of other expenses, including e.g. the cost of organising substitution (childcare, cover for them at work), is subject to §7 JVEG.[48]
4) Compensation for the loss of time accounts for EUR 6 per hour of lay judge's service (§16 JVEG). Compensation for the loss of time is paid, regardless of compensation for the loss of remuneration (§18 first sentence JVEG) or inability to perform household chores (§17 first sentence JVEG). The time is counted in the manner favourable to a lay judge and is not limited to the time spent on lay service literally. It is necessary to quote the regulation concerning all compensations measured in hours, i.e. also benefits discussed below. Pursuant to it, the whole time of a lay judge's involvement, including the time of travelling and waiting,[49] but not exceeding 10 hours per day (§15(2) first sentence JVEG), is counted. Every started hour is counted as a whole one (second sentence) so, if a lay judge was involved in the service for five hours and ten minutes, he will be paid for six hours.
5) Compensation for inability to perform household chores accounts for EUR 14 per hour if a lay judge has his/her own multi-person family household and one of the following requirements is fulfilled:
   - a lay judge does not work to earn a living, or
   - he/she works part-time and serves as a lay judge after regular working time (§17 first sentence JVEG).

   In case a lay judge works part-time and is not able to work because of lay service, he/she is entitled to compensation for every day of lay service (not exceeding ten hours) minus daily time indicated in the employment contract (§17 third sentence JVEG). Thus, if a lay judge having a multi-person family household and working four hours a day takes a day off because he/she has to spend nine hours for lay service, he/she will be paid compensation for inability to perform household chores for five hours (EUR 70 in total) and a compensation for the loss of remuneration for the remaining four hours (see, sub-par. (6) below).

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[48] In more detail on the issue, see M. Giers, [in:] N. Schneider, J. Volpert, P. Fölsch (ed.), *Gesamtes Kostenrecht. Justiz. Anwaltschaft. Notariat*, Baden-Baden: Nomos Verlag, 2017, §7 JVEG.

[49] The Polish legislator determines a much shorter period for which a lay judge is entitled to compensation: it concerns the performance of activities in the court literally, i.e. participation in the hearing, the meeting and discussion on the judgement, participation in the development of sentence justification and participation in a lay council meeting if a lay judge is its member (Article 172 §3 LCCS). Defining the time precisely has no practical significance because the compensation is a lump sum for the whole day of service.

Lay judges are not entitled to this benefit if they are reimbursed the cost of organising the cover for them at work (§17 fourth sentence JVEG), i.e. for instance in case of hiring a person to look after the household when a lay judge serves, he/she may request a lump sum of EUR 14 per hour of his/her real service or remuneration of the real expenses incurred for hiring a substitute.

6) Compensation for the loss of remuneration covers the actual gross remuneration, including voluntary social insurance contribution paid by the employer. As a rule, the maximum compensation threshold for the loss of remuneration accounts for EUR 24 per hour (§18 first sentence JVEG). However, the maximum threshold may be raised for lay judges who are often called to lay service. And thus, the maximum compensation threshold may be raised to:
   – EUR 46 per hour if a lay judge serves 20 days within the same proceedings or loses remuneration for six days within 30 successive days (i.e. in practice, he/she is requested to serve for six or more days in the period of 30 days) – §18 second sentence JVEG.
   – EUR 61 per hour if a lay judge is requested to serve for 50 days within the same proceedings – §18 third sentence JVEG.

Undoubtedly, in the light of German solutions, finance provided for lay service in Poland is very poor. In Poland, a lay judge is paid a gross lump sum of PLN 80.19 per day.

6. ARGUMENTS FOR LAY SERVICE

Both in Polish and German doctrines, numerous arguments are raised for the participation of lay judges in justice administration.

6.1. CONSTITUTIONAL REQUIREMENTS

First of all, constitutional requirements are quoted as arguments for maintaining the office of lay judges. Participation of the citizenry in justice administration helps to avoid excessive influence of professional judges on the state and is subject to supervision exercised by the nation.[50]

However, it is necessary to distinguish between the requirements of the German and Polish Constitutions because they are quite different.

In the German doctrine of constitutional law, a question is raised whether lay judges' participation in jurisdiction finds its grounds in the Basic Law. According to some authors, the principle of democracy or the principle of the nation's sovereignty (Article 20(2) first sentence GG) absolutely requires that the citizenry should be present in jurisdiction.[51] However, the dominating standpoint, especially of the

[50] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw: Wydawnictwo C.H. Beck, 2012, Article 182, nb. 1; for a short presentation of the German standpoints, see W. Degener, [in:] J. Wolter (ed.), *SK-StPO…*, §28 GVG nb. 6–7.

[51] For brief information about this opinion, which lost its importance in the course of time in favour of reference to tradition, see W. Degener, [in:] J. Wolter (ed.), *SK-StPO…*, §28 GVG nb. 7;

Federal Constitutional Court, does not result in far-reaching consequences of those principles. The Federal Constitutional Court is of the opinion that, although the Basic Law envisages the office of a lay judge, it does not require that it should exist. From the constitutional perspective, the legislator may involve non-professionals in jurisdiction but, equally well, adjudication may be left within the exclusive competence of professional judges.[52] Most authors also point out that the office of a lay judge is deep-rooted in the tradition,[53] but not in the Basic Law.[54]

On the other hand, the Constitution of the Republic of Poland directly guarantees the participation of the citizenry in the administration of justice. Article 182 of the Constitution reads: "A statute shall specify the scope of supervision by the citizenry in the administration of justice". The Constitution leaves it for the legislator to determine in detail the participation of the citizenry (instead of lay judges, there might be a jury[55]). The legislator has also the discretion to choose the scope in which the citizenry participates in the administration of justice. The threshold is very low: the Polish Constitutional Tribunal only ruled that "it is not possible to totally exclude citizens from this function (administration of justice) nor to limit their participation so that it would become only symbolic".[56] However, if one takes into consideration the fact that lay judges participate in less than 0.6% of criminal proceedings, a question arises whether marginalisation of non-professionals from criminal proceedings is still in compliance with that modest constitutional guarantee.[57]

H.-H. Kühne, *Laienrichter im Strafprozeß?*, Zeitschrift für Rechtspolitik No. 9, 1985, pp. 237–238 with references provided therein.

[52] Federal Constitutional Court resolution of 9 May 1962, 2 BvL 13/60, Entscheidungen des Bundesverfassungsgerichts, Vol. 14, beginning p. 56, p. 73; Federal Constitutional Court ruling of 17 December 1969, 2 BvR 271, 342/68, Entscheidungen des Bundesverfassungsgerichts, Vol. 27, beginning p. 312, pp. 319–320; Federal Constitutional Court resolution of 26 May 1976, 2 BvL 13/75, Entscheidungen des Bundesverfassungsgerichts, Vol. 42, beginning p. 206, pp. 208–209; Federal Constitutional Court ruling of 30 May 1978, 2 BvR 685/77, Entscheidungen des Bundesverfassungsgerichts, Vol. 48, beginning p. 300, p. 317.

[53] A short historic outline of the institution in particular branches of German jurisdiction, e.g. in U. Kramer, *Soll der Staat sich heute noch ehrenamtliche Richter leisten?*, Deutsche Richterzeitung No. 4, 2002, pp. 151–152.

[54] Thus, e.g. P. Rieß, [in:] E. Löwe, W. Rosenberg, *Die Strafprozeßordnung…*, Vol. 1, Berlin: New York: Walter De Gruyter, 1999, Einl. Abschn. I nb. 30 with references provided therein.

[55] B. Banaszak, *Konstytucja…*, Article 182, nb. 2; W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw: LEX, 2013, p. 241. The legislator has chosen the former solution in Article 4 §1 LCCS.

[56] Constitutional Tribunal judgement of 29 November 2005, P 16/04, OTK-A 2005, No. 10, item 119, Journal of Laws [Dz.U.] No. 241 item 2037.

[57] The doctrine is careful when formulating this type of criticism; see, a very conservative and indirect opinion by S. Waltoś, *W dziesięciolecie…*, pp. 6–7; also, carefully, from the point of view of a judge M. Celej in an interview: J. Kroner, *Ławnicy – niechciani społeczni sędziowie*, Rzeczpospolita of 10 March 2008, http://www.rp.pl/artykul/104288-Lawnicy---niechciani-spoleczni-sedziowie.html [accessed on 12/01/2018]. The criticism of lay judges' marginalisation, which is not in compliance with the Constitution, can be found in the literature about civil procedure and this is due to excessive limitation of the scope of cases adjudicated on with the participation of non-professional judges, M. Orecki, *Instytucja ławnika sądowego w postępowaniu cywilnym. Uwagi de lege lata i de lege ferenda*, Przegląd Sądowy No. 7–8, 2012, pp. 171–172. Lay judges participate in judging in less than 10% of civil lawsuits, K. Knoppek, *Udział obywateli*

6.2. POSITIVE IMPACT

The second basic argument for the participation of lay judges is that it has a positive impact on the quality of judicial decisions: they offer a new attitude to matters, provide wisdom and life experience, demonstrate values and opinions typical of the public and this way counterbalance purely legal, hermetic reasoning typical of professional judges.[58] Just the presence of non-professionals has an impact on the way in which professional judges hear cases. Non-professionals can make them work more thoroughly and formulate their thoughts clearly, because professional judges must explain lay judges their solutions in such a way that they understand and recognise them as convincing. This way, lay judges constitute a supervisory mechanism over professional judges.[59] A potential discussion is especially valuable because a varied group's discourse may result in more thought devoted to decisions taking into account many points of view and mainly in-depth analyses.

Thirdly, a positive influence of lay judges in a different sphere is pointed out, i.e. a court's influence on the society. Thanks to the participation of representatives of the community, the public's legal awareness and its trust in the judicature are rising.[60] This positive impact mostly concerns lay judges for whom direct involvement in criminal proceedings makes it possible to look into the unclear world of law. The understanding of the reality of a courtroom is transferred to other people, e.g. to members of their families and acquaintances they talk to about their experiences gathered during the lay service.[61] It should be remembered that the presence of lay judges increases the whole community's trust in jurisdiction because it removes a dichotomy between "them" (judges) and "us" (ordinary people). Bringing an adjudicating bench closer to the public results in greater approval of judgements by the community.[62] This comment is valid in case of parties to the proceedings and other people personally involved in them. What decides on the approval of the judgement is not only its content (namely, whether the sentence is in conformity with the interest and belief of a given person) but also the procedure based on which a court has adopted the solution. The people involved and interested in the sentence

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w sprawowaniu wymiaru sprawiedliwości w postępowaniu cywilnym, Ius Novum special issue, 2014, p. 26.

58 Compare, T. Ereciński, J. Gudowski, J. Iwulski, [in:] J. Gudowski (ed.), *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, Warsaw: LexisNexis, 2009, Article 4, nb. 5.

59 J. Turek, *Ławnik – sędzia – przysięgły*, Monitor Prawniczy No. 24, 2009, p. 1326; H. Bietz, *Laienrichter zwischen Macht und Ohnmacht? Ehrenamtliche Richter fordern bessere Informationen*, Deutsche Richterzeitung No. 4, 1987, p. 164.

60 M. Malsch, *Democracy in the Courts. Lay Participation in European Criminal Justice Systems*, Farnham: Ashgate 2009, p. 194; T. Ereciński J. Gudowski, J. Iwulski, [in:] J. Gudowski (ed.), *Prawo o ustroju…*, Article 4, nb. 6; J. Turek, *Ławnik – sędzia…*, p. 1326; J. Bader, *Die Kopftuch…*, p. 2966; this assumption does not work in practice, according to A.S. Bartnik, *Sędzia czy kibic?…*, p. 194; also critically, U. Kramer, *Soll der Staat…*, p. 153.

61 M. Malsch, *Democracy…*, p. 2.

62 Compare, P. Rieß, *Prolegomena zu einer Gesamtreform des Strafverfahrensrechts*, [in:] H. Hassenpflug (ed.), *Festschrift für Karl Schäfer zum 80. Geburtstag am 11. Dezember 1979*, Berlin, New York: Walter De Gruyter, 1980, pp. 217–218.

are more willing to approve of an adjudication that is even unfavourable to them if they are convinced that it results from a fair trial,[63] and lay judges' counterbalance to professional judges helps to achieve that objective.

A lay judge's positive experience may also contribute to the building of active society involved for the benefit of the community without compulsion imposed by the state. Lay service reminds and teaches that that involvement in state matters does not have to be limited to casting a vote in the election but can also take place by more direct exercise of the powers vested in the nation. Direct participation in exercising authority also shows citizens that the administration of justice is not something separate from the society but created by citizens. An opportunity to get involved in a court for the common interest is an expression of the power vested in the hands of citizens as well as partial responsibility for the community, which a lay judge takes on together with the office.

7. CONCLUSIONS

The above analysis shows that the special role of lay judges has been much more strongly exposed in the German legal system. Although the reduction of lay judges' participation in criminal proceedings is also observed in Germany, their participation is still considerable. In the light of the presented analysis, a conclusion can be drawn that the Polish legislator should consider participation of lay judges in criminal proceedings, especially at the regional courts level. Current regulations have led to total marginalisation of lay judges' role in criminal proceedings, which raises considerable constitutional doubts. Moreover, one should draw attention to the fact that regional courts in Poland may adjudicate on a penalty of deprivation of liberty of up to 15 years.[64] It seems that long-term imprisonment sentences require that many people consider them because they strongly interfere into the rights and freedoms of convicts. It seems right to approve of the German regulations, which in case of a predicted penalty of deprivation of liberty exceeding two years (and thus not subject to suspension) and in case of felonies require the participation of lay judges.[65] They play a role of a specific safeguard which guarantees that long-term imprisonment will not be imposed too hastily.

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[63] M. Malsch, *Democracy…*, pp. 13–14.

[64] The German local court is not competent to impose a penalty of more than four years' deprivation of liberty (§24(2) GVG).

[65] In case of a prediction that the imposed penalty for a crime will not exceed two years' deprivation of liberty, one professional judge is competent to hear the case. However, it must be emphasised that he can adjudicate on a penalty of deprivation of liberty even for four years on his own (§24(2) GVG grants the local court this power without distinction concerning the type of adjudicating bench: one professional judge or lay bench). Therefore, if the initial prediction of penalty occurs to be too lenient and the adjudicating judge decides to impose a penalty exceeding two years' imprisonment but not more than four years' imprisonment, he can do this on his own and does not have to refer the case of a lay bench; see, Federal Court of Justice ruling of 6 October 1961, 2 StR 362/61, Entscheidungen des Bundesgerichtshofes in Strafsachen, Vol. 16, beginning p. 248, pp. 249–250; Ch. Barthe, [in:] R. Hannich (ed.), *Karlsruher Kommentar…*, §24 GVG nb. 14 with further references therein.

The potential extension of lay judges' participation in the Polish legal system should be accompanied by the development of a system of lay judges' selection that would ensure the right representation of the community. The present solution resulting in the fact that half of them are pensioners should meet criticism. Lay judges should represent all social groups above the age of 25. Overrepresentation of elderly people is absolutely groundless. The limitation of lay service to two terms should also be considered. A person taking part in criminal justice administration for a long time, in the same way as a professional judge, is exposed to a threat of falling into a routine and treating matters conventionally, which is not conducive to criminal justice administration.

A *sine qua non* condition for the extension of lay judges' participation in criminal proceedings in Poland is the change in the system of financing lay service. In this area, fundamental differences occur between the Polish and German criminal law systems. In Poland, the rules for compensation do not encourage anybody who is employed to serve as a lay judge. The remuneration is a lump sum so only people whose financial situation is worse and those for whom the "sacrifice" of one working day is not a problem can be attracted. As a result, people who work and are well paid for their job will not be interested in lay service. In Germany, a lay judge's remuneration is not a lump sum like in Poland and it compensates the real loss in remuneration for work and expenses incurred in connection with lay service. In addition, a lay judge is awarded an extra compensation for the loss of time (EUR 6 per hour). Apart from people with really high income, German lay judges benefit from the service and get paid better than at work. Thus, in Germany, lay service may be attractive not only to pensioners and the unemployed but also to people professionally active in various fields of social life. This makes it possible to engage people from various professional groups, which is an opportunity to build up a representative criminal justice administration system.

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PARTICIPATION OF LAY JUDGES IN CRIMINAL PROCEEDINGS IN POLAND AND GERMANY

Summary

The article analyses the participation of lay judges in criminal proceedings in Poland and Germany from the comparative perspective. In both countries, there has been a visible tendency over the years to reduce the participation of lay judges in criminal judicature. Whereas in Poland their role is so marginalised that it raises doubts about its constitutionality, lay judges

still play a significant role in German criminal proceedings, and there are numerous arguments in favour of their participation in trials. The rules concerning the remuneration for lay judges constitute a significant problem of the Polish system, which discourages professionally active people from holding the office. In Germany, on the other hand, the rules on the remuneration and compensation, as well as other mechanisms are designed to ensure that lay judges mirror all groups in society.

Keywords: lay judges, criminal law, jurisdiction, participation of the citizenry, criminal proceedings, adjudicating benches, access to files, remuneration

UDZIAŁ ŁAWNIKÓW W POLSKIM I NIEMIECKIM POSTĘPOWANIU KARNYM

Streszczenie

Niniejszy artykuł stanowi prawnoporównawczą analizę zagadnienia udziału ławników w postępowaniu karnym w Polsce i w Niemczech. W obu państwach na przestrzeni lat widoczne są tendencje do ograniczania tego udziału. O ile jednak w Polsce rola ławników została zmarginalizowana w stopniu budzącym wątpliwości natury konstytucyjnej, to ich udział w niemieckich postępowaniach karnych jest nadal znaczny, za czym też przemawiają liczne zalety sędziów nieprofesjonalnych. Bolączką polskiego systemu jest ukształtowanie systemu finansowania ławników, który zniechęca do pełnienia urzędu osoby aktywne zawodowo. W Niemczech natomiast, poprzez zasady wypłaty rekompensat oraz inne rozwiązania, kładzie się nacisk na to, by urząd ławnika sprawowały osoby reprezentujące pełny przekrój ludności.

Słowa kluczowe: ławnicy, prawo karne, wymiar sprawiedliwości, czynnik społeczny, postępowanie karne, składy orzekające, dostęp do akt, rekompensata

Cytuj jako:

Małolepszy M., Głuchowski M., *Udział ławników w polskim i niemieckim postępowaniu karnym*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 86–106. DOI: 10.26399/iusnovum.v12.2.2018.17/m.malolepszy/m.gluchowski

Cite as:

Małolepszy, M., Głuchowski, M. (2018) 'Participation of lay judges in criminal proceedings in Poland and Germany'. *Ius Novum* (Vol. 12) 2, 86–106. DOI: 10.26399/iusnovum.v12.2.2018.17/m.malolepszy/m.gluchowski

PROSECUTOR'S IMAGE AFTER THE AMENDMENT OF CRIMINAL PROCEDURE CODE IN 2016

DOI: 10.26399/iusnovum.v12.2.2018.18/j.skorupka

JERZY SKORUPKA*

1. INTRODUCTION

The negation of the adversarial model of a trial by the present authorities and the return to the inquisitorial model of the judicial procedure give rise to many questions about the reasons for the change of the criminal procedure introduced by the amendment to the Criminal Procedure Code of 11 March 2016.[1] Undoubtedly, the primary are the reasons that are systemic and political in nature, connected with the conception and form (method) of exercising power. It is right to say that the criminal procedure mirrors the condition of democracy in a state. Quite often, the criminal procedure is used as an element of strengthening a certain social and political system or order, or positions of political parties that are in power in the state.

However, let the above-mentioned issues be the subject matter of another paper. This article is aimed at discussing the issues concerning the perception of a prosecutor's procedural activity. The issue of the present authorities' perception of a prosecutor's work was probably the reason for departure from the adversarial model of the hearing procedure at a trial. Thus, the change of the criminal procedure made by the present authorities is a good opportunity to present a prosecutor's image.

The article presents the analysis of the regulations of exclusively criminal procedure. The volume framework and the outline nature of the article do not allow the analysis of the Act on Public Prosecution and a discussion of other issues concerning social psychology, sociology and political studies. Due to that, the presented prosecutor's image is not complete but makes it possible to realise how the present authorities perceive a prosecutor and his role in a trial.

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[1] Journal of Laws [Dz.U.] of 2016, item 437, 1 April 2016; hereinafter: CPC.

2. THE PROSECUTOR'S ROLE BEFORE THE AMENDMENT OF CPC OF 2016

Understanding the way of perceiving a prosecutor's activities in a trial requires the presentation of a prosecutor's role in criminal proceedings before the amendment of 11 March 2016. Indeed, the negation of a prosecutor's position and role in the adversarial procedure was one of the reasons for the change of the criminal procedure. Thus, it is necessary to take into account that, according to the authors of the Great Amendment to CPC of 27 September 2013, the change from the former model of a trial to a more adversarial one resulted, inter alia, from the fact that attempts to overcome the many years the old Soviet model of a trial in Eastern Europe failed, which is indicated by the following elements:

1) criminal proceedings were dominated by preparatory proceedings because a prosecutor and law enforcement bodies were obliged to explain all the circumstances of a case and conduct the full evidence-taking proceedings, and a court's role was only to verify whether the factual findings were appropriately established and make a judgement, which in most cases consisted in the confirmation of the committed crime indicated in the indictment;
2) a criminal court did not have real conditions to be impartial because it played an active role in the hearing and, instead of a prosecutor, refuted the presumption of innocence protecting the accused;
3) the principle of equality was not applicable in the hearing before a court, because a public prosecutor supported by the state apparatus had more opportunities to obtain information and present it as evidence in a trial than the accused who could not present evidence obtained for the purposes of the proceedings.[2]

The existence of such a trial model resulted in lengthiness of proceedings, including cases where the accused was remanded in custody, which was called a structural problem in the European Court of Human Rights (ECtHR) case law. Another problem of a trial was connected with the inefficient repetition of activities already performed in the preparatory proceedings.[3] The main aim of the model changes indicated was to make the proceedings more functional and, at the same time, maintain or even strengthen the rights of the parties involved. The goal was to be obtained with the use of the adversarial model of judicial proceedings and the simultaneous limitation of the preparatory proceedings.[4] It was assumed that

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[2] See, P. Hofmański, *Model kontradyktoryjny w świetle projektu zmian k.p.k. z 2012 r.*, [in:] P. Wiliński (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warsaw 2013, pp. 33–34. Also see, P. Hofmański, *Funkcja sądzenia – u progu przebudowy modelu*, [in:] T. Grzegorczyk, J. Izydorczyk, R. Olszewski, *Z problematyki funkcji procesu karnego*, Warsaw 2013, p. 523 ff; P. Hofmański, *Gwarancje prawa do obrony w świetle zmian Kodeksu postępowania karnego zawartych w ustawie z dnia 27 września 2013 r.*, [in:] *Prawo do obrony w postępowaniu penalnym*, Warsaw 2014, p. 7; J. Giezek, *Kontradyktoryjność procesu karnego – uwagi wprowadzające*, [in:] J. Giezek, A. Malicki (ed.), *Adwokatura jako uczestnik procesu legislacyjnego*, Warsaw 2012, p. 27; P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach*, Warsaw 2015.

[3] See, P. Hofmański, *Model kontradyktoryjny…*, p. 35.

[4] *Ibid.*

the change of the new model of criminal proceedings would also be connected with the need to overcome many difficulties, inter alia:

1) activating the parties, especially a prosecutor, who used to be passive in the courtroom because he believed that his role in a trial ended with filing an indictment;
2) "compelling" the accused and his counsel to be active, too, because a court was not supposed to provide paternalistic protection for the accused by taking evidence favourable to them *ex officio*;
3) concerns connected with the seeming threat to the principle of factual truth, which was associated with the limitation of a court's competence to take evidence *ex officio*.[5]

The model of preparatory proceedings was based on the assumption that evidence taking conducted at this stage is, as a rule, to create the grounds of an indictment (it is conducted for the need of a prosecutor and not a court), and only exceptionally in such a scope in which the hearing before a court was not possible, it was to be used by a court as a basis for establishing facts.[6]

Successive changes resulting from the introduction of the adversarial trial were connected with a prosecutor's obligation to specify the evidential thesis for every piece of evidence listed in the indictment, i.e. circumstances that must be proved with the use of that evidence, with the indication of the way and sequence of hearing them if necessary (Article 333 §1 CPC). In the event of filing an indictment, a prosecutor provided a court only with the materials from the preparatory proceedings connected with the liability of persons indicated in the indictment for acts subject to accusations (Article 334 §1 CPC). On a party's demand, a prosecutor also added to the indictment other required materials from the preparatory proceedings (Article 334 §2 CPC). Thus, the scope of documentation from an investigation or an inquiry passed to a court with an indictment was limited to that connected with the issue of liability of persons indicated in an indictment for acts they were charged with.[7]

In the event a prosecutor filed an indictment, a court could not return it in order to complete an investigation or inquiry, even in case there was a need to search for evidence. Should a prosecutor file a motion to a court to arrest a suspect, he was obliged to give the accused and his counsel access to the part of an indictment

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[5] *Ibid.*, pp. 36–37.

[6] In accordance with the Act of 27 September 2013, the aim of preparatory proceedings was: (1) to establish whether a prohibited act was committed and whether it constitutes a crime; (2) to detect and apprehend a perpetrator if necessary; (3) to collect data in accordance with Articles 213 and 214 CPC; (4) to determine the circumstances of a case, including the aggrieved and the size of harm; (5) to collect, protect and record evidence necessary to substantiate an indictment or another way of concluding the proceedings as well as the admission of evidence and taking of evidence before a court (Article 297 §1 CPC).

[7] The material included all decisions and judgements issued in preparatory proceedings (by prosecution bodies as well as a court), reports of evidence-taking activities and annexes to them, e.g. audio-visual recordings, shorthand records, etc. and opinions obtained in the course of an investigation or inquiry, and documents obtained by the proceeding bodies or submitted by the parties. See, J. Skorupka, *Wpływ kontradyktoryjności rozprawy głównej na przebieg postępowania przygotowawczego*, [in:] P. Wiliński (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warsaw 2013, p. 81.

containing the information about the evidence indicated in the motion. It was due to the fact that only findings based on evidence not kept secret from the accused and his counsel could be the basis for a decision to apply or prolong provisional detention (Article 249a CPC).

In the motion to apply provisional detention, a prosecutor had to specify evidence indicating high probability that the accused had committed a crime and circumstances indicating certain threats to the appropriate course of proceedings or the possibility of committing another serious crime by the accused, and circumstances indicating the existence of grounds for the application of this preventive measure and the necessity for applying it (Article 250 §2a CPC).[8]

Until the beginning of judicial proceedings at the first part of a trial, a prosecutor could withdraw an indictment without the accused party's consent. However, after the judicial proceedings started before a court of first instance, the withdrawal of an indictment was admissible only with the accused party's consent (Article 14 §2 CPC). The withdrawal of an indictment resulted in discontinuation of the proceedings by court due to the lack of a complaint filed by a competent prosecutor (Article 17 §1(9) CPC). Filing an indictment against the same person for the commission of the same act was inadmissible (Article 14 §2 CPC).

A public prosecutor's duty in judicial proceedings was to prove the accused party's guilt (Article 2 §1(1) CPC). The role of a court in the evidence-taking proceedings was subsidiary. In a trial, the burden of proof was a prosecutor's not a court's duty. It was a prosecutor not a court that was obliged to prove the fact of the crime committed by the accused. Therefore, in case a prosecutor failed to prove the crime the accused was charged with, a court could not, as a rule, do this instead. A court could undertake the evidence-taking initiative exceptionally, e.g. in order to take the evidence favourable to the accused who had no counsel for the defence.[9]

As a result of the burden of proof and the obligation to produce evidence, which is formally on a public prosecutor, doubts unresolved in the judicial proceedings were adjudicated in favour of the accused (Article 5 §2 CPC). A public prosecutor could prove the accused party's guilt with the use of any evidence admissible in accordance with the provisions of law. It was inadmissible to prove guilt with the use of evidence obtained against the bans laid down in codes and other legal acts and with the use of evidence obtained via a prohibited act referred to in Article 1 §1 CC (Article 168a CPC). In a trial, a public prosecutor could use information obtained in the course of operational-surveillance activities (Article 393 §1 CPC), including those obtained beyond the subjective and objective limits of operational control ordered by a court, provided they were authorised within the court's successive consent mode.

Because the burden of proof was on a public prosecutor, he could rely on a court's "support" only in an extraordinary situation, justified by extraordinary

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[8] *Ibid.*, p. 91.

[9] See, J. Skorupka, *W kierunku kontradyktoryjności rozprawy głównej*, [in:] J. Giezek, A. Malicki (ed.), *Adwokatura jako uczestnik procesu legislacyjnego*, Warsaw 2012, p. 45.

circumstances of a case. As a rule, in the evidence-taking proceedings, the taking of evidence was the duty of the parties, i.e. prosecutors (public, subsidiary and private ones) and the accused and their procedural representatives. A court's entitlement to take evidence *ex officio* was limited to extraordinary cases justified by extraordinary circumstances of a case and to a situation when a court acted in lieu of a party that filed an evidence motion admitted but did not attend the trial. In such a situation, a court conducted the taking of evidence within the limits of the evidence thesis specified in the motion. As a rule, a court was supposed to be passive and take active part in the evidence-taking proceedings only when, in the face of the lack of the parties' activity, the issue of an appropriate judgement came into question.[10]

A court's procedural duty was to verify evidence and not to conduct the taking of it. Collecting and providing evidence in a trial was the procedural domain of other bodies and parties to the proceedings. A court's departure from such a separation of procedural roles was possible when, e.g. a subsidiary or a private prosecutor acted without their representatives. This is how the position and the role of a court were perceived in case law. There was an opinion that "a court is obliged to conduct the taking of evidence only in such a scope that is necessary to explain all the circumstances of a case. In other words, in the scope necessary to adjudicate properly."[11] It was also assumed that "a prosecutor was to challenge the presumption of innocence in a trial and prove the accused party's guilt. Therefore, a court does not have a duty to find evidence *ex officio* in order to support the prosecution when evidence provided by a prosecutor is not sufficient to convict the accused and a prosecutor does not strive to supplement it."[12]

The new model of criminal proceedings forced a public prosecutor and the accused and his counsel to prepare to the evidence-taking proceedings in a trial. In case a public prosecutor failed to conduct the taking of evidence in a trial, he could not claim in an appeal that a court did not take some specific evidence, provided that he did not file an evidence motion and claim the taking of evidence, despite the lack of that motion or a claim of the infringement of the provisions concerning a court's activity in the taking of evidence, including the taking of evidence beyond the scope of the evidence thesis (Article 427 §5 CPC). A prosecutor could indicate new facts or evidence but only in the event they could not be provided before the court of first instance (Article 427 §3 CPC).

The criminal procedure reform introduced by the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts assumed the primacy of a trial over preparatory proceedings. The pre-judicial proceedings were limited, inter alia, to the collection, protection and recording of evidence in the scope necessary for taking a decision on the way of concluding this stage of the proceedings, i.e. discontinuation of the proceedings, filing an indictment

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[10] See, P. Hofmański, *Model kontradyktoryjny…*, p. 36.

[11] See, the Supreme Court judgement of 28 May 2003, WA 25/03, OSNwSK 2003, No. 1, item 1136; the Supreme Court ruling of 11 April 2006, V KK 360/05, OSNwSK 2006, No. 1, item 819.

[12] See, judgement of the Appellate Court in Katowice of 8 March 2007, II AKa 33/07, Prok. i Pr. No. 11, 2007, item 23.

or another complaint to court. The change of the model of a trial resulted in the rise in its significance. Evidence that constituted a basis for factual findings was to be established in adversarial evidence-taking proceedings, the essential feature of which is a procedural struggle of the parties, i.e. a public prosecutor and the accused, and not in inquisitorial preparatory proceedings or inquisitorial judicial proceedings.

Thus, the Great Criminal Procedure Amendment introduced a model of an active prosecutor creating the course of the evidence-taking proceedings and the scope of evidence assessment in a trial, giving a prosecutor a real possibility of influencing the course of judicial proceedings because it was him and not a court who was to conduct the taking of evidence specified in an indictment. A prosecutor stopped being a passive observer of a court's acting but was authorised to active and creative conduct in a trial. The change of a prosecutor's position and role also resulted from the belief of the former authorities that a prosecutor who as a legal body of the state not only has legal competence to conduct the taking of evidence in a trial but also real possibilities and skills to fulfil the duties. There was also a belief that the completion of master's legal studies, the required pupillage and internship should let a prosecutor play the role of a creative party to judicial proceedings and perform probably the most important duty, i.e. prove the accused party's guilt.

3. THE PROSECUTOR'S TASKS UNDER THE ACT OF 11 MARCH 2016

The present authorities, passing the Act of 11 March 2016, under the pretence of recovering the appropriate significance of the principle of material truth, changed the model of evidence-taking proceedings in a trial and reshaped a prosecutor's rights. It was assumed that only the evidence-taking proceedings and taking of evidence *ex officio* by a court guarantees the establishment of true factual findings. It should be stated straight away that the thesis results from an absurd assumption that factual findings will be in conformity with reality only if a court conducts the taking of evidence. The thesis results in a conclusion that factual findings constituting the basis for a decision to discontinue proceedings taken by a prosecutor do not have the features of conformity with the reality because they were not made by a court. This reasoning is so illogical that it can be safely called absurd. Nevertheless, it was the basis for the change of the criminal proceeding model. It demonstrates how the present authorities perceive a prosecutor's role in criminal proceedings. The image is very unfavourable to a prosecutor. The changes introduced in the provisions show that a prosecutor is not able to conduct the taking of evidence specified in an indictment, which he himself developed and potentially other evidence provided in a trial and, in this way, establish facts that are the basis for a decision on the accused party's guilt. While before the amendment to the regulations introduced by the Act of 11 March 2016 a prosecutor conducted the taking of evidence on his own and a court, as a rule, could not do this in lieu of him, after the change in the criminal procedure, a court is to conduct the taking of evidence in a trial. According to the present authorities, it is due to the lack of a prosecutor's possibilities of establishing

facts in conformity with the reality, based on which a court might adjudicate on the accused party's guilt and punishment.

It is unknown for what reasons the present authorities decided that a prosecutor is not capable of establishing facts matching the reality because they were not publicised. However, they may be as follows: (1) the lack of skills in the taking of evidence in a trial, (2) the lack of knowledge of the case in which a public prosecutor acts, (3) the lack of knowledge of evidence that should be provided, (4) the lack of knowledge of the rules of proceedings before a court of first instance. If one realises that in a trial a prosecutor presents motions to conduct the taking of evidence, which he earlier obtained in the inquisitorial preparatory proceedings, the image of a prosecutor is quite negative.

This negative image of a prosecutor is even worsened by the circumstance that in preparatory proceedings, a prosecutor, the police and other preparatory proceeding bodies may use all possible state resources, and secret or non-secret methods of obtaining information about facts that should be proved with the use of strict and flexible evidence means. While in an adversarial model of criminal proceedings a prosecutor could not provide evidence obtained in a way that was not in compliance with law, after the amendment to the model, the provision of Article 168a CPC gives a prosecutor the possibility of proving the accused party's guilt also with the use of evidence obtained with the infringement of procedural provisions or with the use of a prohibited act referred to in Article 1 §1 CC, unless evidence was obtained by a public official performing duties as a result of manslaughter, intentional damage to health or deprivation of liberty. Moreover, in the event, as a result of surveillance ordered by a competent body based on special regulations (e.g. the chief commander of the voivodeship police force), evidence against a person who was subject to surveillance is obtained concerning an offence prosecuted *ex officio* or a fiscal offence other than the offence that was subject to the surveillance ordered, or an offence prosecuted *ex officio* or a fiscal offence committed by person other than the one that was subject to surveillance, a prosecutor must decide on the use of the evidence in criminal proceedings (Article 168b CPC). A similar regulation was introduced concerning evidence obtained in the course of the tapping referred to in Chapter 26 CPC (Article 237a).

In order to introduce to a trial the evidence obtained beyond the framework of the procedural and non-procedural tapping, it is not necessary to obtain a court's successive consent. The present authorities assumed that a court's consent for the provision of this evidence is useless. Instead of a court, it is a prosecutor who is to decide whether to use that evidence in the proceedings.

The change in the criminal procedure introduced by the present authorities shows that a prosecutor has a considerable scope of legal, financial, logistic, human resources and other measures at his disposal, which enable him to base an indictment upon true factual findings. Despite this, a court may refer the case back to him to supplement evidence and thus give him the opportunity to file an indictment again.

According to the present authorities, the above-mentioned measures, although they make it possible to use a great potential of the state, information obtained in the course of secret operational-surveillance activities and evidence obtained with the

infringement of law as well as the opportunity to file an indictment in the same case many times, are insufficient to prove the accused party's guilt by a prosecutor. In order to fulfil this duty, he must be supported by a court or a court should act in lieu of him by conducting the taking of evidence unfavourable to the accused *ex officio* and, if this is not sufficient, order a prosecutor to conduct the taking of evidence in accordance with Article 396a CPC. Implementing a court's order, a prosecutor or the police may, e.g. interview witnesses, request an expert witness to prepare an opinion, perform a search or seize objects that may constitute evidence in the case, perform a procedural experiment, and conduct all these activities beyond a trial without a court's supervision. The reports of those activities are submitted to a court and are read in a trial in the way and scope determined in Article 391 §1 CPC, Article 393 §1 CPC, Article 393a CPC.

It should be taken into account that requesting a public prosecutor to conduct the taking of some evidence, a court takes responsibility for the implementation of prosecution; it undertakes activities that in criminal proceedings based on the separation of procedural roles rooted in the principle of complaint-based proceedings are a prosecutor's duties. Requesting a prosecutor to provide specific evidence, a court clearly sides with the prosecution and takes the role of "a supporter of the prosecution".[13] A court's activities in accordance with Article 396a §1 CPC result in the breach of the separation of procedural roles between a court and a public prosecutor and, consequently, procedural functions of a court and a prosecutor and lead to inappropriate distribution of responsibility for a criminal complaint, which, in accordance with the principle of complaint-based proceedings, only a public prosecutor should bear.[14] If a public prosecutor decides to indict someone, although everyone is subject to the constitutional principle of the presumption of innocence,[15] not anyone else but only he is responsible for providing evidence that can undermine that presumption. Thus, the solution introduced in Article 396a CPC results in considerable procedural imbalance between a public prosecutor and the accused.

If these activities are insufficient, on a motion filed by a prosecutor before the judgement is made, a court may refer the case back to a prosecutor to supplement an investigation or an inquiry, provided that during a trial important circumstances are revealed, and there is a need to conduct a search or other activities aimed at explaining the circumstances of a case. In other words, if there is a risk of an acquittal, a prosecutor may request referring a case back to him to be investigated in order to collect evidence for indeterminate time and to postpone the release of the

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[13] It is in conflict with the necessity of keeping distance to the case and the accused and, thus, objectivism and impartiality on the part of a court; see, J. Skorupka, *Ciężar dowodu i ciężar dowodzenia w procesie karnym*, [in:] T. Grzegorczyk (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, Warsaw 2011, pp. 133–134; J. Zagrodnik, *Model interakcji postępowania przygotowawczego oraz postępowania głównego w procesie karnym*, Warsaw 2013, pp. 418–419 and p. 439 ff.

[14] See, J. Zagrodnik, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2016, pp. 1005–1006.

[15] See, M. Safjan, L. Bosek (ed.), *Konstytucja RP*, Vol. I, Warsaw 2016, p. 1065.

accused from the charge of crime.[16] The above-mentioned regulation is not only an expression of the lack of trust in the efficiency of a prosecutor's activities in a trial but also a deep inhuman thought of the necessity of convicting a person accused by a prosecutor at all costs. The regulation in question is evidence of treating the accused in the way that is to lead to conviction, regardless of circumstances.

The Act of 11 March 2016 also changes the objectives of preparatory proceedings,[17] the objectives of the whole criminal proceedings (Article 2 §1 CPC) and the roles of a court and a prosecutor in the fulfilment thereof. While earlier it was a public prosecutor's duty to prove the accused party's guilt, after the amendment also a court has this duty and, if one takes into account the practice of law application, exclusively a court. Fulfilling this duty, a court may *ex officio* conduct the taking of evidence and, as far as this is concerned, it is not limited. Only doubts that cannot be solved can be used in favour of the accused, i.e. only when, despite all the possible evidence-taking proceedings, the doubts cannot be eliminated. If a public prosecutor does not demonstrate activity and does not file adequate evidence-related motions, a court is obliged to *ex officio* conduct the taking of evidence. According to the present authorities, a prosecutor may be inactive or even passive in a trial. It is enough that he files an indictment and a court shall do the rest. However, in case a court acquits the accused as a result of failure to conduct the talking of evidence *ex officio*, a prosecutor may raise this procedural irregularity in his appeal against a court's decision.

Filing an indictment, a prosecutor enlists persons (the accused and witnesses, possibly expert witnesses) who should be summoned to attend a trial and evidence that should be assessed in a trial. A prosecutor does not have to indicate his evidence thesis in the evidence specification at present. It turned out that requiring that a prosecutor indicate circumstances that must be proved with the use of a piece of evidence is unattainable. It is hard to understand this situation because determination of the source and evidence as well as evidence thesis are formal requirements of every evidence motion. If the accused and the aggrieved, who do not know the criminal procedure, are required to provide in their evidence motion circumstances that must be proved with the use of a piece of evidence, the fact that a prosecutor is made exempt from this obligation when he files evidence motions in an indictment must surprise.

It turns out that a prosecutor is unable to fulfil another duty. Namely, at present, a prosecutor must submit an indictment with all the preparatory proceeding files to a court (Article 344a CPC). There is an extra-standard requirement consisting in

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[16] See, Article 10 Act of 30 November 2016 amending the Act: Law on the common courts system and some other acts, Journal of Laws [Dz.U.] of 2016, item 2103, 22 December 2016.

[17] For the purpose of preparatory proceedings, it is necessary, inter alia, to collect, protect and record evidence for a court. A prosecutor does not conduct (or supervise) preparatory proceedings in the scope enabling him to take decisions concerning the way of concluding the proceedings and submit appropriate evidence motions, but in a much broader scope, because he is to collect, protect and record evidence for a court, which will make it possible to hold a perpetrator liable for a crime and free an innocent person from liability (Article 2 §1(1) CPC). He must collect evidence in an inquisitorial system and in secret preparatory proceedings. This means a return to the CPC solutions of 1950–1955, strengthened in CPC of 1969.

the request that a prosecutor selects the evidence material collected in preparatory proceedings and submits only the evidence that is significant for the adjudication on the accused party's liability for an act he is charged with in an indictment.

The procedural provisions admit basing a court's decision on the application or prolongation of preliminary remand on evidence that is of considerable importance for this decision taking, which has not been revealed to the accused and his counsel,[18] in spite of the fact that it is in conflict with Directive 2012/13/EU of the European Parliament and of the Council of 25 May 2012 on the right to information in criminal proceedings. As a result of such a regulation, the accused and his counsel are deprived of the possibility of questioning evidence provided by a prosecutor to a court in order to deprive the accused of liberty. As a result, the judicial proceedings concerning preliminary remand are deprived of arms and, thus, they are unfair. Moreover, the accused and his counsel are not informed about the secrecy of some evidence and cannot appeal against a prosecutor's decision to a court.

4. CONCLUSIONS

The present authorities introduced a criminal proceeding model in which the evidence-taking proceedings are subordinated to the aim of proving perpetration and guilt of the accused. If a prosecutor files an indictment, his action should result in success, even if this public prosecutor is incompetent. In such a situation, a court is to take the prosecution function over and show a prosecutor what evidence he should provide to make it possible to convict the accused. The present authorities assume that a prosecutor, who can use all the state resources, including secret ways of obtaining information by means of tapping and other surveillance activities, is not able to collect evidence in preparatory proceedings in order to efficiently conduct prosecution before a court and during a trial he is not able to prove the grounds for the indictment and, thus, prove the accused party's guilt. Due to that,

[18] If, in preparatory proceedings, a prosecutor files a motion to apply or prolong preliminary remand, he is obliged to provide the accused and his counsel with access to the part of case files containing evidence indicated in the motion with the exception of evidence based on testimonies of witnesses whose or whose closest relations' life, health or liberty may be in danger (Article 250 §2b CPC). The decision concerning the application or prolongation of preliminary remand must be based on findings resulting from evidence that is not secret to the accused and his counsel and secret evidence resulting from testimonies of witnesses referred to in the above-mentioned provision. In case a motion to apply or prolong preliminary remand filed in the course of preparatory proceedings, the accused and his counsel are not given access to all evidence constituting grounds for preliminary remand. The accused and his counsel are not given access to evidence resulting from testimonies of witnesses if there is a substantiated threat to witnesses' or their closest relations' life, health or liberty. In such a situation, a prosecutor must not provide the evidence in the motion to apply preliminary remand but attaches it to the motion in separate documents. A prosecutor does not inform the accused and his counsel that the motion to a court is supported with additional evidence, not just that in the motion. The accused and his counsel may learn about such additional evidence attached to the motion only when the evidence confirms circumstances that are in favour of the accused (which is not possible in practice), because then a court is obliged to admit the circumstances *ex officio* and inform a prosecutor about that.

a court must be involved in prosecution so that, in case of a prosecutor's passiveness, inability or incompetence, it will tell him what evidence should be provided to lead to conviction.

It must be added that the directive to conduct the taking of evidence *ex officio* by a court in order to establish facts that are in conformity with the reality and to fulfil the requirement of the principle of material truth cannot lead to a breach of the separation of procedural roles that are fundamental in contemporary criminal proceedings. The principle of material truth does not constitute the aim of proceedings but only a means for issuing a judgement that is materially and procedurally just. The principle ensures the achievement of the aim of criminal proceedings together with other principles, especially the principle of presumption of innocence and the adversarial model. Therefore, the principle of material truth should not be treated as more important or significant for criminal proceedings than the principle of presumption of innocence or the adversarial model. All these principles together with others constitute constitutive elements of the contemporary criminal proceedings and shape their model.[19]

In accordance with the binding regulations, the role of a prosecutor in criminal proceedings is limited to preparatory proceedings. In case of filing an indictment, a court is to take the prosecution duties over and indict in lieu of a prosecutor. This means that a prosecutor can only fulfil his procedural duties in the course of preparatory proceedings. Then he loses this "skill" during a trial.

In accordance with the regulations introduced by the present authorities, an image of a prosecutor is very unfavourable to him. It is in the interest of prosecutors to change this state of things so that they will be perceived as fully authorised, active and creative members of judicial proceedings.

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[19] See, P. Kardas, *Zasada prawdy materialnej a kontradyktoryjność postępowania. Przeciwstawne czy komplementarne zasady procesu karnego?*, [in:] J. Giezek, A. Malicki (ed.), *Adwokatura jako uczestnik procesu legislacyjnego*, Warsaw 2012, p. 52 ff; T. Gizbert-Studnicki, *Prawda sądowa w postępowaniu cywilnym*, Prok. i Pr. No. 9, 2009, pp. 9–10; P. Kardas, *Projektowany model obrony z urzędu a zasada prawdy materialnej*, Palestra No. 5–6, 2013, p. 18 ff.

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PROSECUTOR'S IMAGE AFTER THE AMENDMENT OF CRIMINAL PROCEDURE CODE IN 2016

Summary

The author shows, on the basis of an analysis of the existing rules of criminal procedure, how the present authorities perceive a prosecutor. The adversarial model of criminal proceedings, which has been rejected by the present authorities, is a counterpoint to the existing rules. The analyses show a negative image of a prosecutor as a body unable to prove the accused party's

guilt and to undermine the presumption of innocence that protects the accused. The image of a prosecutor as perceived by the present authorities is very unfavourable to him. Therefore, it is in the interest of prosecutors to change this situation.

Keywords: criminal proceedings, role of a prosecutor in a criminal trial, image of a prosecutor perceived by the authorities

WIZERUNEK PROKURATORA PO ZMIANIE KODEKSU POSTĘPOWANIA KARNEGO W 2016 R.

Streszczenie

Na podstawie analizy obowiązujących przepisów procedury karnej autor pokazuje, w jaki sposób prokurator jest postrzegany przez obecną władzę. Kontrapunktem dla obowiązujących przepisów prawa jest model kontradyktoryjnego postępowania karnego, który został odrzucony przez obecną władzę. Z przeprowadzonych analiz wynika negatywny obraz prokuratora jako niezdolnego do udowodnienia winy oskarżonemu i przełamania chroniącego go domniemania niewinności. Wizerunek prokuratora w oczach obecnej władzy jest dla niego bardzo niekorzystny. Dlatego w interesie prokuratorów jest zmiana tego stanu rzeczy.

Słowa kluczowe: postępowanie karne, rola prokuratora w procesie karnym, wizerunek prokuratora w oczach władzy

Cytuj jako:

Skorupka J., *Wizerunek prokuratora po zmianie Kodeksu postępowania karnego w 2016 r.*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 107–119. DOI: 10.26399/iusnovum.v12.2.2018.18/j.skorupka

Cite as:

Skorupka, J. (2018) 'Prosecutor's image after the amendment of Criminal Procedure Code in 2016'. *Ius Novum* (Vol. 12) 2, 107–119. DOI: 10.26399/iusnovum.v12.2.2018.18/j.skorupka

Ius Novum
2/2018

STANDARD OF THE PROTECTION OF THE RIGHT TO SILENCE APPLICABLE TO PERSONS EXAMINED AS WITNESSES IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW*

DOI: 10.26399/iusnovum.v12.2.2018.19/a.sakowicz

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1. INTRODUCTION

The issue of the protection of the right to silence provokes scientific discussions in the systems of particular states as well as in the light of international legal acts. Some acts of international law *expressis verbis* lay down the right to silence (e.g. Article 14(3g) of the International Covenant on Civil and Political Rights of 1966 and Article 8(2g) and (3) of the American Covenant on Human Rights of 1969), and in case of other acts, there is no clear reference made to this right, e.g. in the European Convention on Human Rights (hereinafter: ECHR). This did not prevent the European Court of Human Rights (ECtHR) from stating that the right to silence and against self-incrimination are international norms and constitute the essence of a fair trial. In its case law so far, the ECtHR not only determined the essence of the right to silence but also distinguished the guarantees of the right to silence, which enable an individual to efficiently oppose the state's coercion into providing incriminating information.[1] Therefore, it is necessary to have a close look at the standard of the protection of the right to silence and its

* The article was prepared under the research project entitled "Standard ochrony prawa do milczenia w procesie karnym" (Standard of the protection of the right to silence in criminal proceedings). The project was financed by the National Science Centre with a grant based on the decision no. DEC-2013/11/B/HS5/04119.

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[1] See, M. Berger, *Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence*, European Human Rights Law Review Vol. 5, 2007, p. 515.

limits determined by the ECtHR, especially as Article 6(1) ECHR in the part concerning indictment in a criminal case is interpreted by the ECtHR as covering, within its scope, not only proceedings that are criminal ones in national law but also those that are repressive in nature (e.g. disciplinary proceedings) or lead, in the meaning of national administrative regulations, to imposing financial penalties.[2]

It is worth drawing attention to the fact that in the ECtHR case law, apart from the term "the right to silence", there is also a concept of "the right not to incriminate oneself". Sometimes the two terms are used interchangeably; sometimes, it is indicated that the right to silence constitutes an element of the right against self-incrimination; and finally, there are opinions that the scopes of the two concepts overlap. On the one hand, the right to silence constitutes an element of the right against self-incrimination, which covers not only non-provision of statements that are incriminating but also non-provision of incriminating material evidence. On the other hand, the right to silence covers not only incriminating statements within its scope.[3] The essence of the right to silence is undoubtedly complex. In general, it can be said that the right constitutes a form of the right to defence, an element of the right not to incriminate oneself and a guarantee of the presumption of innocence.

The relations of the right to silence indicated above can be found in the ECtHR case law. Based on the analysis of the Strasbourg Court's decisions, a few issues connected with this right can be distinguished, especially coercion into provision of documents (things) for the proceeding bodies, obtaining testimonies or explanations with the use of prohibited methods of interrogation, drawing negative conclusions from the accused party's silence and infringement of being free from self-incrimination in the light of interrogation of persons examined as witnesses. The framework of the text does not allow a detailed analysis of all these issues so attention will be focused on the last of the indicated matters. The issue has not received much attention in literature so far, in spite of the fact that the nature of the right, its scope and exercise have been the subject of a few opinions presented in the literature concerning criminal proceedings.[4] The significance of the issue is especially great as the ECtHR, creating the European standard for the right to silence, influences the shape of the legal systems of the Member States of the Council of Europe. Thus, it is worth having a close look at what the standard of the protection of the right to silence is in relation to people testifying as witnesses in the light of the ECtHR case law. Moreover, one cannot fail to notice that the knowledge may be useful from the perspective of interpretation of the provisions of the Polish procedural act and potential amendments to them in the future.

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[2] Compare the ECtHR judgement of 3 May 2001 in the case of *J.B. v. Switzerland*, application no. 31827/96; also see, D. Vitkauskas, G. Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, Strasburg 2012, pp. 16–21.

[3] Thus, S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 342.

[4] Compare, M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur" w orzecznictwie Europejskiego Trybunału Praw Człowieka*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki, *Orzecznictwo sądowe w sprawach karnych. Aspekty europejskie i unijne*, Warsaw 2008, p. 182 and the literature cited therein; W. Jasiński, *Prawo do nieobciążania się w procesie karnym w świetle standardów strasburskich*, Prok. i Pr. No. 7–8, 2015, p. 14 ff; B. Gronowska, *Prawo oskarżonego do milczenia oraz wolność od samooskarżenia w ocenie Europejskiego Trybunału Praw Człowieka*, Prok. i Pr. No. 7–8, 2009, pp. 7–24.

2. ANALYSIS OF THE ECTHR CASE LAW CONCERNING THE RIGHT TO SILENCE (ARTICLE 6 ECHR)

2.1. CASES *SAUNDERS V. THE UNITED KINGDOM* AND *KANSAL V. THE UNITED KINGDOM*

The analysis of the ECtHR case law should be started from the case of *Saunders v. the United Kingdom*[5]. The applicant was interviewed several times as a witness by inspectors of the Department of Trade and Industry (DTI) acting based on the Companies Act of 1985 in connection with the inquiry concerning irregularities in the purchase of Guinness PLC shares. Seven interviews of the applicant took place within administrative proceedings and the next two after an accusatorial process was commenced against him. In the course of the interviews, Saunders was obliged to reveal the truth. Refusal to testify could result in the imposition of a fine or imprisonment for up to two years.[6] Evidence collected during interrogations was passed to the court conducting a trial, which convicted the applicant and other co-defendants for five years in prison. The court recognised that only the transcripts of the testimonies during the interrogations by the DTI inspectors after the criminal proceedings were started must be treated as inadmissible. The prosecutor and the court used the minutes of the earlier interviews as evidence incriminating the applicant. The applicant did not agree and complained that his conviction was based on the minutes of interviews developed by the inspectors in the conditions of procedural coercion because in the inquiry he was a witness and was obliged to give evidence.

Deliberating on the accusation, the ECtHR decided that the right not to incriminate oneself is primarily concerned with respecting the will of the accused person to remain silent. With respect to that, a prosecutor should prove guilt without coercion or pressure in order to obtain evidence in the form of statements, testimonies or explanations directly incriminating as well as other information and facts that may be used to support indictment via, e.g. confrontation with other evidence.[7] The Court decided that the right to silence does not extend to obtaining material that may be provided by the accused through the use of coercion existing independent of the will of the suspect, e.g. blood or urine sample, or tissue for the purpose of DNA testing.[8] It is so because the samples and tissues for the purpose of DNA testing

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[5] ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91; a similar factual state occurred in the judgement of 19 September 2000 in the case of *IJL, GMR and AKP v. the United Kingdom*, applications no. 29522/95, 30056/96 and 30574/96.

[6] ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §49–50.

[7] Compare, B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights and Criminal Justice*, London 2012, p. 616; J.A. Frowein, W. Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar*, Berlin 2009, p. 195; A. Lach, *Granice badań oskarżonego w celach dowodowych*, Toruń 2010, p. 62.

[8] ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §69; A.L.-T. Choo, *'Give Us What You Have' – Information, Compulsion and*

exist independent of the will of an individual.[9] The Court emphasised that, with respect to the idea of a fair trial, pursuant to Article 6 ECHR, the right not to provide evidence against oneself cannot be in any way a justification for limitation to testify by the suspect who pleads guilty or makes statements that incriminate him directly.

Deliberating on the matter of the perpetrator, the ECtHR indicated that the content of the applicant's testimonies to the DTI inspectors has been obtained under compulsion to give evidence because Saunders could not refuse to answer questions pursuant to the right not to provide self-incriminating evidence. Moreover, such refusal could have led to imposition of a fine or committal to prison. Negating the UK Government's premise[10] that the applicant's answers were not of an incriminating nature, the ECtHR stated that testimony obtained under compulsion which appears on its face to be of non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubts upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury (lay judges), the use of such testimony may be especially harmful.[11] The Court added that the establishment whether the prosecutor's use of the testimony obtained by the inspectors under compulsion meant the infringement of law required the assessment of all the circumstances. It had to be determined whether the accused had been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure. The fact that some documents exist independent of the will of the applicant does not mean that their acquisition by the proceeding bodies is excluded from the protection of the right to silence and not to self-incriminate. In such a case, it is necessary to determine whether obtaining it was connected with the influence on the will of the accused.[12]

Based on the case of *Saunders v. the United Kingdom*, it should be added that in each case of using evidence incriminating the accused in a trial, information obtained from him under legal compulsion constitutes the infringement of the ban on providing self-incriminating evidence. Thus, the statement that the law enforcement bodies and a prosecutor in a criminal case, in its autonomous meaning, should seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the suspect

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the Privilege Against Self-Incrimination as a Human Right, [in:] P. Roberts, J. Hunter (ed.), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Tradition*, Oxford–Portland 2012, pp. 243–244.

[9] See, A. Lach, *Granice badań oskarżonego…*, pp. 62–63.

[10] It should be added that the British government stated that the right to silence and the right not to self-incriminate could be limited because they were not clearly formulated in Article 6 ECHR.

[11] ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §71.

[12] B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights…*, pp. 621–622.

(the accused) is a truism.[13] Although the ECtHR shared the opinion, it did not decide whether the administrative proceedings conducted by the inspectors were subject to protection under Article 4 ECHR[14] nor did it challenge the possibility of interviewing a person under legal compulsion in non-criminal proceedings,[15] even if the information obtained this way were used in such proceedings. The ECtHR rightly noticed that the public interest could not be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.[16] The statement makes it possible to draw a conclusion that the infringement of Article 6 ECHR occurs, regardless of the fact whether the sanction for the exercise of the right to silence was imposed or there was only a threat of its application.[17] It is a pity that the ECtHR did not copy the decision of the Commission in the case of *Saunders* stating that the right to silence under Article 6 ECHR must be applicable to the accused of committing an economic crime in the same way as the crime of rape, murder or terrorist acts.[18]

Judges Meyer, Repik and Pettiti more clearly expressed their stand in their concurring opinions stating that the right to silence in order not to self-incriminate is also applicable to administrative proceedings because activities undertaken in the course of them, evidence collection, do not differ from preparatory proceedings in criminal matters. Judge Repik illustrated it distinctly comparing the powers of the DTI inspectors to the prosecution at the stage of preparatory proceedings. Moreover,

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[13] See, ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §68; also see, ECtHR judgement of 21 December 2000 in the case of *Quinn v. Ireland*, application no. 36887/97, §40; ECtHR judgement in the case of *IJL, GMR and AKP v. the United Kingdom*, applications no. 29522/95, 30056/96 and 30574/96, ECHR 2000-IX, (2001) §33; decision of 14 September 1999 in the case of *DC, HS and AD v. the United Kingdom*, application no. 39031/97; decision of 23 November 1999 in the case of *WGS and MLS v. the United Kingdom*, application no. 38172/97.

[14] Thus also, W. Jasiński, *Prawo do nieobciążania się…*, p. 14. It is not possible to share the opinion of M. O'Boyle that the ECtHR held that Article 6 ECHR does not lay down the protection of the right to silence in non-judicial proceedings; see, M. O'Boyle, *Freedom from Self-Incrimination and the Right to Silence: a Pandora's Box*, [in:] P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (ed.), *Protecting Human Rights: The European Perspective*, Berlin 2000, p. 1029.

[15] Compare, A. Ashworth, *Self-Incrimination in European Human Rights Law – A Pregnant Pragmatism?*, Cardozo Law Review Vol. 30, 2008, p. 756.

[16] The judgement in the case of *Saunders v. the United Kingdom* states that: "The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover, the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right" (§74); also see, M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, p. 183; M. Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights*, Columbia Journal of European Law Vol. 12, 2006, pp. 361–362; M. O'Boyle, *Freedom from Self-Incrimination…*, [in:] P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (ed.), *Protecting Human Rights…*, pp. 1025–1027.

[17] Compare, S.J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court Human Rights*, London 2007, p. 157.

[18] Compare, the Commission report concerning the case of *Saunders* of 10 May 1994.

from the perspective of criminal proceedings, it does not matter whether testimony was obtained by the inspectors concerned or in the course of criminal proceedings in its strict sense. Indeed, because Section 434 the Companies Act of 1985 imposes compulsion to answer inspectors' questions, testifying under compulsion means that they may be used to determine a fine in accordance with the Companies Act of 1985 and constitute evidence in the future criminal proceedings. Due to that, the right to silence and the right not to incriminate oneself should be applicable in administrative proceedings. B. Gronowska is also right to raise that in the case of *Saunders v. the United Kingdom*, the decisive factor influencing the conclusion recognising the infringement of Article 6 §2 ECHR was the change of the procedural status of the applicant, i.e. at the initial stage he was a witness in the proceedings conducted by the inspectors and then his status was changed into the accused in criminal proceedings, in which the applicant's testimony in the former proceedings was used as the main incriminating evidence.[19] Judge Morenilla also referred to this thread. In the concurring opinion, he noticed that due to the fact that Saunders was under statutory compulsion to contribute actively in the proceedings conducted by the DTI inspectors, there is no scope for examining the weight to be attached to the evidence and the use made of it at the trial.[20]

The judgement in the case of *Saunders v. the United Kingdom* also indicates that the general fair trial requirements laid down in Article 6 of the Convention are applicable to criminal proceedings, regardless of the level of a case complexity and the nature of the evidence obtained. At the same time, the ECtHR refused the admissibility of referring to the public interest as justification for departure from the ban on self-incriminating in some circumstances.[21] Despite this statement, the Court avoided giving an unambiguous answer to the question whether the right to silence and the right not to incriminate oneself are absolute in nature or may be infringed in specific circumstances, e.g. by means of reference to the public interest. The British government indicated such a possibility and added, at the same time, that the right to silence and not to self-incriminate can be limited because they were not directly formulated in Article 6 ECHR. In the successive judgements, the ECtHR assumed that the right not to incriminate oneself should not be absolute in nature.[22]

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[19] B. Gronowska, *Prawo oskarżonego…*, p. 11.

[20] See, concurring opinion of Judge Morenilla, see, ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91.

[21] See, ECtHR judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §74; S. Trechsel, *Human rights…*, pp. 344–345; M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, p. 183; M. O'Boyle, *Freedom from Self-Incrimination…*, [in:] P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (ed.), *Protecting Human Rights…*, pp. 1027–1028. On the other hand, Judges Valtico and Gölcüklü did not recognise the violation of the provision of Article 6 §1 ECHR indicating that the Companies Act 1985 makes it possible to maintain "proper sense of proportion" between the right to silence as well as the right not to self-incriminate and the possibility of prosecuting fraud.

[22] See, e.g. ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97; see, A. Lach, *Granice badań oskarżonego…*, pp. 66–67.

In the case of *Kansal v. the United Kingdom*,[23] the ECtHR expressed a standpoint similar to the one in the case of *Saunders v. the United Kingdom*. The factual state in this case was as follows. The applicant's testimony in insolvency proceedings (Insolvency Act of 1986) in which he was under legal compulsion to answer questions was used as evidence against him. In accordance with the provision of Article 291(6) Insolvency Act of 1986, Y. Pal Kansal was obliged, under compulsion and exposure to sanctions of a fine or imprisonment, to answer questions asked by an official conducting the insolvency proceedings. On the other hand, the provision of Article 433 of the Act stipulated that a statement made for whatever purpose in insolvency proceedings might be used as evidence against the person who made it or took part in making it. Thus, the Act laid down legal compulsion towards the applicant because it excluded the admissibility of exercising the right to silence.[24] So stating, the ECtHR also noticed that British law did not contain a provision ensuring efficient protection of the applicant against self-incrimination.

2.2. CASES *HEANEY AND MCGUINNESS V. IRELAND* AND *SHANNON V. THE UNITED KINGDOM*

The ECtHR judgements in the cases of *Saunders v. the United Kingdom* and *Kansal v. the United Kingdom*, indicating that information obtained in the course of compulsory interview answers will not be used in criminal proceedings were also confirmed in judgements in the cases of *Heaney and McGuinness v. Ireland*[25] and *Shannon v. the United Kingdom*[26].

In the former case, the applicants were arrested in connection with a bomb attack at the British Army checkpoint. Heaney and McGuinness were informed that they have the right to silence and both refused to answer questions concerning participation in the bomb attack and the reasons for being in the house near the scene of explosion. Then the police officers informed them about the content of Article 52 of the Offences against the State Act 1939. Pursuant to this provision, a person questioned is obliged to give full account of his movements and actions over the period of 24 hours before the time of an incident that is subject to the investigation conducted. Non-compliance with the obligation exposed the applicants

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[23] ECtHR judgement of 27 April 2004 in the case of *Kansal v. the United Kingdom*, application no. 21413/02.

[24] Compare, A. Krawczyk, who states that the exclusion concerned only "the insolvent's right not to self-incriminate", see, *Prawo do nieobciążania się a postępowania restrukturyzacyjne*, Prok. i Pr. No. 2, 2017, pp. 109–110; M. Berger, *Europeanizing Self-Incrimination…*, pp. 361–362.

[25] ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97; also compare, the case of *Quinn v. Ireland*, application no. 36887/97, judged in a similar way; in the judgement of 21 December 2000, §56, the ECtHR clearly indicated that the degree of compulsion imposed on the applicant by the application of the provision of Article 52 of the Offences against the State Act 1939 destroyed the very essence of the ban on coercion to self-incriminate and the right to silence. Also see, S.J. Summers, *Fair Trials…*, pp. 156–157; B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights…*, pp. 620–621.

[26] ECtHR judgement of 4 October 2005 in the case of *Shannon v. the United Kingdom*, application no. 6563/03, §34–41.

to a penalty of six months' imprisonment which they were later sentenced to. It was the only penalty imposed on the applicants because they were acquitted of the charge of membership of an unlawful organisation. Before the ECtHR heard the case, the applicants had appealed against their conviction and sentence to the High Court challenging the conformity of Article 52 of the Offences against the State Act 1939 with the Constitution of Ireland.[27] The High Court rejected their claim of unconstitutionality of the provision in question stating that interference into the right to silence laid down in Article 52 of the Offences against the State Act 1939 meets the requirement of proportionality because it aims to protect the security of the state. British authorities also argued before the ECtHR that undertaking steps pursuant to the legal norm expressed in Article 52 of the Offences against the State Act 1939 was the right response to the threat of terrorism, and was justified by the need to ensure the appropriate functioning of the administration of justice and maintaining peace and public order. However, the ECtHR expressed a different opinion. Although at the beginning of its considerations the ECtHR indicated that the right to silence is not absolute in nature, it recognised the infringement of the right to silence and the presumption of innocence in the case of *Heaney and McGuinness v. Ireland*.[28] The factors supporting the judgement are as follows.

Firstly, there is a lack of a provision excluding the admissibility of using the interrogation minutes in criminal proceedings against the applicants in the Offences against the State Act 1939. At the same time, the ECtHR adds that it is not its role in the case to assess the influence of potential direct or indirect use of the accused party's statements in the successive criminal proceedings. What is more, there is no ban on using the interrogation minutes in the criminal proceedings in the light of the provisions of the Act referred to. Secondly, the "degree of compulsion" imposed on the applicants by Article 52 of the Offences against the State Act 1939 reduced their procedural guarantees, especially the right to silence, because they were sentenced for that "silence".[29] The ECtHR rightly noticed that general fairness requirements laid down in Article 6 ECHR are applicable to all types of offences, those simplest as well as those most complex ones. That is why, it is inadmissible to refer to the public interest to justify the use of testimony obtained under compulsion in a police investigation, which is then to support charges against the accused during a trial.

It is worth mentioning that in the course of the proceedings before the ECtHR, the government party indicated the possibility of limiting the right to silence based on the clause of the public interest. The opinion, like in the case of *Saunders*

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[27] ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97, §14; also see, R. Goss, *Criminal Fair Trial Rights. Article 6 of the European Convention on Human Rights*, Oxford, Portland, Oregon 2016, pp. 191–193.

[28] ECtHR drew attention to the relation between the right to silence and the right not to self-incriminate in the judgement of 17 December 1996 in the case of *Saunders v. the United Kingdom*, application no. 19187/91, §68 stating that both rights constitute "basic principles of a fair procedure inherent in Article 6(1)", also see, R. Goss, *Criminal Fair Trial Rights*…, p. 103.

[29] ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97, §57; W. Jasiński, *Prawo do nieobciążania się*…, p. 21; M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"*…, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe*…, pp. 188–189; S. Summers, *Fair Trials*…, p. 156.

v. the United Kingdom, was dismissed. In the case analysed, the ECtHR also added that the guarantees laid down in Article 6 ECHR should be applied to all criminal proceedings in the same way (in the autonomous meaning of the Convention). At the same time, the weight of an act or the level of the case complexity is not important. It was also emphasised in the justification for the judgement that public order concerns cannot justify extinguishing the applicants' rights to silence and against self-incrimination.[30]

A similar adjudication policy is adopted in the case of *Shannon v. the United Kingdom*. The facts were as follows: the applicant failed to attend an interview with a financial investigator conducting proceedings under the Proceeds of Crime (Northern Ireland) Order 1996 at the time when criminal proceedings were already conducted against him in connection with false accounting in his club and conspiracy to defraud. The applicant sought a guarantee that no information obtained during the interview with the financial investigator would be used in the criminal proceedings against him. As a result of the lack of such a guarantee, the applicant referred to the right not to self-incriminate and refused to answer questions, thus he exercised the right to silence. As a consequence, he was convicted and fined the sum of GBP 200. In the course of the appeal, the case was heard before the Court of Appeal in Northern Ireland, which gave a judgement that Article 6 §1 ECHR was not applicable to extra-judicial proceedings like those conducted by financial investigators so a person could not refuse to comply with the requirement to attend an interview and answer questions, even in a situation when the information provided might be "potentially incriminating".[31] The opinion and stand of the government that the applicant cannot refer to the right to silence because the criminal proceedings against him, in which the incriminating information might be used, were struck out was dismissed by the ECtHR.

The Court clearly stated that the applicant did not have influence on which information might be used in the criminal proceedings and he had to provide it under legal compulsion expressed in the form of a fine or deprivation of liberty. There

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[30] Compare, ECtHR judgement of 21 December 2000 in the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97, §§57–59. It was pointed out in §59 that "the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 §1 of the Convention". For more see, A. Ashworth, *Self-Incrimination…*, p. 761 ff; M. Berger, *Self-Incrimination…*, pp. 517–518; J. Jackson, *Reconceptualising the Right of Silence as an Effective Fair Trial Standard*, International and Comparative Law Quarterly Vol. 58, No. 4, 2009, p. 837; S. Summers, *Fair Trials…*, p. 156; M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, pp. 188–189.

[31] Compare, Lord Justice Carswell in the judgement of 11 December 2002 stated that: "Article 6 §1 of the Convention is directed towards the fairness of the trial itself and is not concerned with extra-judicial inquiries with the consequence that a person to whom those inquiries are directed does not have a reasonable excuse for failing or refusing to comply with a financial investigator's requirements merely because the information sought may be potentially incriminating", compare, ECtHR judgement of 4 October 2005 in the case of *Shannon v. the United Kingdom*, application no. 6563/03, §21. The case is analysed in the Polish literature in M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, pp. 189–190; W. Jasiński, *Prawo do nieobciążania się…*, p. 17.

was a probability that the information might be used in the criminal proceedings against the applicant. At the same time, the Court highlighted that there were no systemic guarantees in the law of Northern Ireland that could protect against the use of information passed to the financial investigator in the criminal proceedings against the applicant. Moreover, Strasbourg judges stated that reference to the right to silence and not to self-incriminate did not depend on whether a testimony obtained under compulsion in administrative proceedings might be used in criminal proceedings. In other words, statements made by the accused under compulsion in other proceedings or his silence do not have to be used in criminal proceedings in order to recognise the infringement of the right not to self-incriminate.[32] However, the fact is that in the case of *Shannon v. the United Kingdom*, the Court went further and recognised that the applicant had the right to silence even before criminal proceedings were initiated and the information provided under compulsion could be used.[33] The condition for the exercise of the right to silence that could occur only in the event of criminal proceedings conducted simultaneously would create a state of uncertainty for the applicant. A person in such a situation would not know in what way the information obtained from him/her under compulsion might be used by the state authorities. In the case of *Shannon v. the United Kingdom*, there were no guarantees that the content of the applicant's statements made during the financial investigator's inquiry would not be used against him in other proceedings. In the light of this, M. Berger suggests that a state should regulate the right to silence during the first interview and create its protection.[34]

2.3. CASES *SERVES V. FRANCE*, *MACKO AND KOZUBAL V. SLOVAKIA* AND *VAN VONDEL V. THE NETHERLANDS*

The presented ECtHR standpoints are not the only ones in the field of the protection of the right to silence as far as the interrogation of witnesses is concerned. In the abundant Strasbourg case law, one can also find judgements that underrate the scope of the Convention standard and state that the use of legal compulsion in order to obtain testimony does not constitute the infringement of Article 6 ECHR. To recognise it as the infringement of this provision, they also require that the information obtained this way should be used in criminal proceedings against the person who

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[32] As far as this is concerned, the ECtHR refers to the judgements in the cases of *Heaney and McGuinness v. Ireland*, §§43–46 and *Funke v. France*, §§39–40, see ECtHR judgement of 4 October 2005 in the case of *Shannon v. the United Kingdom*, application no. 6563/03, §34. See, M. Berger, *Self-Incrimination…*, pp. 522–523.

[33] W. Jasiński rightly indicates that, in the case of *Shannon v. the United Kingdom*, the ECtHR did not analyse whether the provision of Article 6 ECHR is applicable to proceedings concerning the recovery of objects obtained as a result of crime. Thus, the basis for the judgement was the potential opportunity to use the statements made in the course of the proceedings aimed at the recovery of objects obtained as a result of crime within the criminal proceedings conducted against the applicant; compare, W. Jasiński, *Prawo do nieobciążania się…*, p. 17.

[34] See, M. Berger, *Self-Incrimination…*, p. 525.

provided it. The judgement in the case of *Serves v. France*[35] may be an example of that. The circumstances of the case indicate that the applicant, together with a few other soldiers, was charged with murder of a poacher in the course of a military mission in Africa. After a few months the criminal proceedings were declared void because it had been commenced without the opinion of the Minister of Defence, which did not meet the requirements for prosecution. In the next proceedings commenced after the elimination of formal obstacles, Serves was summoned to appear as a witness before the investigative judge but he refused to take the oath obliging him to tell the truth. It happened three times. Each time, the applicant attended but refused to take the oath and give evidence. As a result, Serves was ordered to pay fines. He appealed against those fine orders to the First Indictment Division of the Paris Court of Appeal. His pleading was that in the light of the evidence collected and circumstances of the case known in connection with the former indictment, he should be charged again and interrogating him as a witness violated Articles 6 ECHR and 105 French CPC, which excludes a possibility of interviewing a person as a witness if there is grave and coherent evidence of his guilt. The First Indictment Division of the Paris Court of Appeal upheld the orders stating that, on the one hand, the material collected in the first proceedings could not be used against the applicant and that, on the other hand, the applicant did not give any reasons for his refusal to take the oath, which did not let the judges assess whether circumstances under Article 105 French CPC occurred.[36]

Before the ECtHR started assessing whether the French authorities infringed the right to silence, it had to decide whether the applicant was entitled to the guarantees under Article 6 ECHR because he was not formally accused. Referring to the autonomous meaning of the concept of "indictment in a criminal case", the ECtHR decided that it is not only official charges but also each factual situation in a trial which substantially influences the situation of a given entity.[37] Although the ECtHR admitted that the penalty of a fine for refusal to take the oath was a type of compulsion, it stated that it was not aimed at obtaining testimony but only a guarantee that the interviewee would tell "the whole truth and nothing but the truth".[38] The Court stated that the applicant could not refuse to answer

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[35] See, M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, pp. 184–185; B. Gronowska, *Przegląd orzecznictwa ETPC, sprawa Serves przeciw Francji – wyrok z 20 października 1997 r. – zarzut naruszenia prawa do słusznej rozprawy sądowej*, PPE No. 1, 1998, p. 87; W. Jasiński, *Prawo do nieobciążania się…*, p. 16; P. Hofmański, A. Wróbel, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz*, Warsaw 2010, p. 278.

[36] Compare, ECtHR judgement of 20 October 1997 in the case of *Serves v. France*, application no. 20225/92, §26; also see, M. Berger, *Self-Incrimination…*, p. 522; M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, p. 185.

[37] ECtHR judgement of 20 October 1997 in the case of *Serves v. France*, application no. 20225/92, § 26; ECtHR judgement of 27 February 1980 in the case of *Deweer v. Belgium*, Series A no. 35, p. 22, §42, 46; ECtHR judgement of 15 July 1982 in the case of *Eckle v. Germany* Series A no. 51, p. 33, §73; also see, M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, p. 185.

[38] M. Berger approves of this opinion, see M. Berger, *Self-Incrimination…*, p. 522.

questions that, in his opinion, might violate his right not to self-incriminate. He did not give an investigating judge a chance to ask questions because he did not attend an interview. As a result, in the ECtHR opinion, imposition of a financial penalty cannot be recognised as compulsion to self-incriminate because such a risk did not occur at all. The aim of the penalty imposition was to execute the obligation ensuring truthfulness of evidence given.[39] The judgement was held by six votes to three. According to the joint dissenting opinion, as the applicant was actually a suspect at the same time, he should have the right to refuse to give evidence. Judges Pekkanen, Wildhaber and Makarczyk expressed the opinion that the obligation to take the oath served to ensure that his statements made to the investing judge would be truthful. The judges added that by inciting on the applicant's obligation to take the oath without giving him an opportunity to explain the reasons for his refusal, the investigating judge put him in a position violating the right not to self-incriminate. That is why, they believed, rightly, that the applicant could feel that after the oath he would be forced to give evidence, including that incriminating him. It was not important what the applicant's role was: the accused or a witness. In each situation, the coercion would constitute the infringement of Article 6 §1 ECHR.

The judgement in the case of *Serves v. France* is not the only example where the ECtHR limited the scope of protection under the right to silence. It happened, e.g. in the case of *Macko and Kozubal v. Slovakia*[40]. The facts were as follows. The applicants were the representatives of the company, one of the co-owners of which was accused of unauthorised trading. The applicants were summoned to an interview as witnesses, however, they refused to answer questions referring to the provision of Article 100 §2 Slovak CPC regulating the right to silence and the right not to self-incriminate. They were fined for refusal to give evidence and then they were charged with economic crimes based on other circumstances than in case of the co-owner of the company. However, for the prosecution, this was not an obstacle to conducting one investigation against all the accused.[41] It is worth mentioning that taking the decision on imposing fines on the applicants, the investigators stated that a person who wants to refer to the right to silence should give reasons for his refusal to give evidence. The right is not subject to the witness's will but is the competence of the proceeding body. It may accept a witness's opinion but also dismiss the

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[39] ECtHR clearly indicated that "the fines imposed on Mr Serves did not constitute a measure such as to compel him to incriminate himself as they were imposed before such a risk ever arose", compare, ECtHR judgement of 20 October 1997 in the case of *Serves v. France*, application no. 20225/92, §47; also see, the comments on this judgement by W. Jasiński, *Prawo do nieobciążania się…*, p. 25. In Polish literature, the ECtHR is approved of by, e.g. A. Lach, who indicates that "the obligation to take the oath by a witness does not constitute the violation of the right to silence, which should be distinguished from the compulsion to give evidence", compare, A. Lach, *Współczesne tendencje w zakresie ograniczenia prawa do milczenia w procesie karnym*, [in:] A. Marek (ed.), *Współczesne problemy procesu karnego i jego efektywności. Księga Pamiątkowa Profesora Andrzeja Blusiewicza*, Toruń 2004, p. 236 ff.

[40] ECtHR judgement of 19 June 2007 in the case of *Macko and Kozubal v. Slovakia*, applications no. 64054/00 and 64071/00.

[41] M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, p. 186.

motives and order him to testify.[42] Regardless of the applicants' doubts concerning the circumstances of interrogations and leaving the decision on the right to silence within the competence of the proceeding bodies, the ECtHR did not recognise the infringement of Article 6 ECHR. According to the Court, the applicants were summoned to interviews as witnesses in connection with other events than those that later became subject to charges against them. This let the Court recognise that the applicants' refusal to give evidence did not meet with the proceeding bodies' response violating the right to silence.[43]

Also in the case of *Van Vondel v. the Netherlands*, the Court did not recognise the violation of Article 6 §1 ECHR, regardless of the fact that applicant's right to silence had been limited. The facts were as follows. Van Vondel was a police officer heard by the parliamentary commission of inquiry under legal compulsion and a threat of criminal liability for refusal to give evidence. In accordance with Section 3 §2 Parliamentary Enquiries Act (Wet op de Parlementaire Enquête), every person summoned by the commission of inquiry is obliged to appear and give evidence, except for persons who are subject to professional privilege and the protection of classified information. Apart from these exceptions, the Dutch law does not envisage an opportunity to refuse to give evidence or exercise the right to silence. A person summoned to give evidence is obliged to testify even in a situation when the evidence is self-incriminating, which without doubt means the abolition of the right to silence in proceedings before the commission of inquiry. However, in accordance with Section 24 Parliamentary Enquiries Act, evidence given to a commission of inquiry cannot be used as evidence in judicial proceedings against the interviewee, except for proceedings concerning perjury. Despite this guarantee, the applicant was accused of perjury and convicted.

Analysing the situation, the ECtHR held that the right not to incriminate oneself mainly focuses on the accused party's will to respect his silence. These rights of an individual cannot constitute grounds for excluding penalisation of every activity motivated by the desire to escape criminal liability. The judgement in the case of *Van Vondel v. the Netherlands* indicates that the circumstance that the evidence revealed by the commission could not be evidence against the interviewee was a sufficient protection of the applicant's procedural interests. Moreover, according to the justification to the judgement, the circumstance constituted a significant argument for the recognition that the right to silence was not violated.[44]

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[42] ECtHR judgement of 19 June 2007 in the case of *Macko and Kozubal v. Slovakia*, applications no. 64054/00 and 64071/00, §40.

[43] Compare, ECtHR judgement of 19 June 2007 in the case of *Macko and Kozubal v. Slovakia*, applications no. 64054/00 and 64071/00, §§52–55; M. Wąsek-Wiaderek, *„Nemo se ipsum accusare tenetur"…*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Orzecznictwo sądowe…*, p. 186.

[44] The ECtHR decision of 2 March 2006, in the case of *Van Vondel v. the Netherlands*, application no. 38258/03; it was stated in the decision that: "It may be that the applicant lied in order to prevent revealing conduct which, in his perception, might possibly be criminal and lead to prosecution. However, the right to silence and not to incriminate oneself cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation. Thus, the Court does not find that the facts of this case disclose any infringement of the right to silence or privilege against self-incriminations or that there has been any unfairness contrary to Article 6 §1

4. CONCLUSIONS

Summing up, it can be stated that the presented comments based on the ECtHR case law make it possible to draw a few conclusions. Firstly, there is no doubt that national authorities' activities obliging the accused to provide self-incriminating evidence in criminal proceedings are in conflict with the Strasbourg standard. Secondly, an individual may refer to the right to silence and the right not to incriminate oneself also when he is obliged to give incriminating evidence in proceedings different from criminal ones and the information was or may be used in criminal proceedings already initiated or likely to be initiated. Sometimes, it is even assumed that criminal proceedings do not have to be initiated to recognise the violation of Article 6 ECHR. It must be noted that, although this opinion was strongly emphasised in the judgement in the case of *Saunders v. the United Kingdom*, there are judgements (e.g. *Serves v. France*), in which the Court limited its standpoint only to the situation when the information obtained under legal compulsion was used in criminal proceedings against the interviewee providing it. Despite the discrepancies, it can be assumed that in the ECtHR opinion, it is inadmissible to use incriminating information provided to administrative bodies as evidence in criminal proceedings. This concerns statements unambiguously confirming circumstances unfavourable to the prospective accused as well as the circumstances that may be used to the accused party's disadvantage (e.g. the fact of exercising the right to silence).

As far as this is concerned, it is not the content of the specific evidence that is significant but the way in which it is used by the prosecution. Further conclusions should be carefully drawn because, due to the ECtHR imprecise assessment whether the right to silence has been infringed or not, it is not possible to unambiguously state what the consequences of the proceeding bodies' erroneous action might be. This state of things does not surprise because the ECtHR is far from expressing categorical opinions and precise reasoning; it prefers to treat every case individually, which limits predictability of the judgements and makes it impossible to present the standard of the Convention.

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STANDARD OF THE PROTECTION OF THE RIGHT TO SILENCE APPLICABLE TO PERSONS EXAMINED AS WITNESSES IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

Summary

The article discusses the issue of the application of the right to silence to persons giving evidence as witnesses in the light of the European Court of Human Rights case law. The author analyses the circumstances in which an individual may refer to the protection guaranteed by this right as well as how the provision of self-incriminating information should be understood. He focuses on the key ECtHR judgements concerning the protection against coercion to self-incrimination of a person on whom legal compulsion was imposed in non-criminal proceedings in order to obtain information relevant to criminal proceedings. The article presents the ECtHR judgements indicating that the protection is applicable also when

the incriminating information is not used in the future criminal proceedings. It also emphasises the lack of coherence in the ECtHR case law, which considerably limits predictability of the Court's judgements and makes it difficult to develop a uniform standard.

Keywords: criminal proceedings, right to silence, right not to incriminate oneself, European Court of Human Rights, human rights

STANDARD OCHRONY PRAWA DO MILCZENIA W KONTEKŚCIE OSÓB ZEZNAJĄCYCH W CHARAKTERZE ŚWIADKA NA TLE ORZECZNICTWA EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA

Streszczenie

W artykule omówiono problematykę prawa do milczenia w kontekście osób zeznających w charakterze świadka w orzecznictwie Europejskiego Trybunału Praw Człowieka. Autor analizuje, w jakich okolicznościach jednostka może powołać się na ochronę gwarantowaną przez to prawo, a także, co należy rozumieć pod pojęciem dostarczania dowodów na swoją niekorzyść. Zwraca uwagę na kluczowe orzeczenia ETPCz dotyczące ochrony przed przymuszeniem do samooskarżenia osoby, wobec której użyto przymusu prawnego poza ramami postępowania karnego w celu uzyskania informacji relewantnych z uwagi na postępowanie karne. Przedstawiono orzeczenia ETPCz wskazujące, że ochrona ta przysługuje także wtedy, gdy nie wykorzystano obciążających informacji w późniejszym postępowaniu karnym. Zaakcentowano również brak spójności w orzecznictwie Trybunału, co istotnie ogranicza przewidywalność wydawanych przez Trybunał rozstrzygnięć oraz stanowi trudność w stworzeniu jednolitego standardu.

Słowa kluczowe: postępowanie karne, prawo do milczenia, prawo do nieobciążania się, Europejski Trybunał Praw Człowieka, prawa człowieka

Cytuj jako:

Sakowicz A., *Standard ochrony prawa do milczenia w kontekście osób zeznających w charakterze świadka na tle orzecznictwa Europejskiego Trybunału Praw Człowieka*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 120–136. DOI: 10.26399/iusnovum.v12.2.2018.19/a.sakowicz

Cite as:

Sakowicz, A. (2018) 'Standard of the protection of the right to silence applicable to persons examined as witnesses in the light of the European Court of Human Rights case law'. *Ius Novum* (Vol. 12) 2, 120–136. DOI: 10.26399/iusnovum.v12.2.2018.19/a.sakowicz

PRINCIPLES OF BANKING LAW: COMMENTS IN THE LIGHT OF AMENDMENTS TO THE EU AND NATIONAL LAW

DOI: 10.26399/iusnovum.v12.2.2018.20/a.zalcewicz

ANNA ZALCEWICZ*

1. INTRODUCTION

The need to ensure coherence of law and implementation of certain values recognised by the legislator as essential invariably inspires to enact regulations, to which in particular an ability to influence the construction of the system of law and a special role in interpretation and application of law are attributed. In jurisprudence, these are called principles of law.[1] And, although the concept of "principles of law" is not unambiguous, which motivates to undertake research into its meaning and to create various concepts of principles of law,[2] it is unquestionable that some norms are more significant in the legal system in comparison to others. Their relation to other norms of the system, "the ability to organise all norms of a given legal branch in a systemic unity"[3] and their basic meaning in the legal system or part of it[4] constitute their classification as primary ones. At the same time, quite often, the principles are not formulated clearly in one provision. They often result from "the entirety of provisions of the system of law or its part".[5]

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1 General principles of law as proposals of the system of law are also distinguished in jurisprudence, for more see, e.g. M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012, pp.14, 20–21 and literature referred to therein.

2 Works by R. Alexy, H. Ávil, R. Dworkin, S. Wronkowska, J. Wróblewski, M. Zieliński and Z. Ziembiński are recognised as the most important in this field.

3 M. Kordela, *Zasady prawa…*, p. 271.

4 J. Wróblewski, *Rozumienie prawa i jego wykładnia*, Wrocław–Warsaw–Kraków–Gdańsk–Łódź 1990, pp. 81–83.

5 J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego*, Warsaw 1959, p. 259.

The above-mentioned features of the principles, their role and the way in which they are laid down in the provisions, not always directly, result in the necessity of giving scientific consideration to identification and classification of the principles of law in its every branch. It is not different in case of banking law. The principles of banking law were analysed in jurisprudence several times; they were also presented and classified. Authors like J. Gliniecka, J. Harasimowicz, C. Kosikowski and T. Narożny, in particular, have discussed these issues in their works and tried to determine, describe and classify them.[6]

It is worth pointing out that analyses concerning norms which are especially significant for banking law, formulating an obligation to meet the basic values assumed by the legislator, were conducted mainly at the time when the new Act: Banking law entered into force.[7] This was connected with the necessity of formulating them and systematising in the different reality of market economy. On the other hand, Poland's accession to the European Union provoked identification of the EU banking law principles that entered the national legal system.[8]

Based on the output of the banking law doctrine, it seems possible, especially in the face of the latest amendments to regulations, to undertake further legal discourse on changes in banking law and to update the findings of the representatives of jurisprudence, which is the aim of the author of the present article.[9]

First of all, it is necessary to make a reservation that the considerations will strictly focus on banking law because it must be remembered that it is possible to discuss them from a very broad perspective of business law or a little narrower financial markets law.[10] It would be purposeful to indicate, e.g. the principle of freedom to start and do

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[6] J. Gliniecka, *Tajemnica finansowa. Aspekty aksjologiczne, normatywne i funkcjonalne*, Gdańsk 2007, pp. 50–51; by this author, *System bankowy w regulacjach polskich i unijnych*, Gdańsk 2004, p. 74; J. Gliniecka, J. Harasimowicz, *Zasady polskiego prawa bankowego*, Warsaw 1998, *passim*; by these authors, *Zasady polskiego prawa bankowego i dewizowego*, Bydgoszcz 2000, *passim*; C. Kosikowski, *Publiczne prawo bankowe*, Warsaw 1999, pp. 101–102; T. Narożny, *Prawo bankowe*, Poznań 1998, pp. 28–34.

[7] Act of 29 August 1997: Banking law, uniform text, Journal of Laws [Dz.U.] of 2016, item 1988, as amended, hereinafter referred to as BL.

[8] See, E. Fojcik-Mastalska, *Prawo bankowe Unii Europejskiej*, Wrocław 1996, p. 43; L. Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego we Francji i w Polsce*, Warsaw 2011, pp. 38–39; A. Jurkowska-Zeidler, *Prawo bankowe Unii Europejskiej. Licencjonowanie działalności bankowej*, Bydgoszcz–Gdańsk 2003, *passim*; A. Michór, *Swoboda przedsiębiorczości na rynku finansowym Unii Europejskiej*, [in:] W. Miemiec, K. Sawicka, *Instytucje prawnofinansowe w warunkach kryzysu gospodarczego*, Warsaw 2014, p. 656; T. Nieborak, *Aspekty prawne funkcjonowania rynku finansowego Unii Europejskiej*, Warsaw 2008, pp. 98 and 99, and p. 152 ff.

[9] It must be at least signalled that the influence of failure to comply with the principles laid down in banking law on the functioning of the state, although it is a separate matter, in fact, in the context of the discussed area, is an extremely important issue. At present, not only the influence on the economic system or the financial market but also the fact of multi-plane reaction resulting from withdrawal from the adopted rules, including e.g. "the erosion of the rule of law" as a consequence of irregularities in financial policy, are becoming a sphere of growing interest to jurisprudence (for more see, e.g. a paper for an NBP scientific seminar presented on 18 January 2017, Ch.A. Hartwell, *The "Hierarchy of Institutions" Reconsidered: Monetary Policy and its Effect on the Rule of Law in Interwar Poland*, https://www.nbp.pl/badania/seminaria/18i2017.pdf [accessed on 01/06/2018]).

[10] For more see, inter alia, M. Fedorowicz, *Prawne ujęcie nadzoru makroostrożnościowego w świetle krajowych projektów ustaw o nadzorze makroostrożnościowym nad systemem finansowym*

business, which is considered to be one of the fundamental principles of the integrated financial market.[11] Following this thread, it is necessary to state that a banking system is at present more differentiated not only in terms of entities providing banking services (performing banking activities). Evolving, its perception has been extended and it covers, in the meaning *sensu largo*, not only all the banks operating in a given territory at a given time,[12] but also bodies and specialist entities working for banks and their clients.[13] Looking at the banking system and analysing the provisions in force, one can formulate a principle of separation of a legal regime for entities performing banking activities in order to satisfy the community demand for banking services and entities operating in order to ensure appropriate functioning of the banking sector or financial sector[14] (e.g. the leading role of central banking in macro-prudential supervision[15]). However, the issues are also excluded from the analysis because, as it has already been indicated, the research area is strictly limited to the principles of operations of banks as entities performing banking activities.

Thus, going onto the ground of public banking law,[16] and at the same time perceiving "principles as a result of legislator's choice of values",[17] one should start with values that are subject to protection on the banking services market. There is no doubt at present that these are security of operations on the banking market and stability of the banking system,[18] and more broadly speaking, the financial system, which both constitute the content of social interest[19] treated as a direct value in the doctrine of law and case law. The protection of these values is the basic reason for the legislator's interference into the sphere of behaviour on the banking market and enacting norms to implement them as well as other "secondary values" derived from them. Thus, these two values may be found in all norms of public banking law because the whole system must demonstrate axiological conformity. In consequence, a meta-principle may be drawn from the entirety of norms of public banking law:

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w ramach przedsejmowego etapu legislacyjnego, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warsaw 2016, p. 117; T. Nieborak, *Unia bankowa – w stronę bezpieczeństwa i stabilności rynku finansowego Unii Europejskiej?*, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego…*, p. 95.

[11] See, S. Biernat, A. Wasilewski, *Wolność gospodarcza w Europie*, Kraków 2000, p. 197 ff; M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warsaw 2013, p. 191; L. Góral, *Zintegrowany model…*, pp. 37–39; T. Nieborak, *Unia bankowa…*, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego…*, p. 95; P. Zapadka, S. Niemierka, *Charakterystyka europejskiego systemu bankowego – zagadnienia instytucjonalno-prawne. System prawny oraz organizacja rynku finansowego w Unii Europejskiej*, BiK No. 10, 2003, p. 20 ff.

[12] See, A. Mikos-Sitek, P. Zapadka, *Polskie prawo bankowe: wybrane zagadnienia*, Warsaw 2011, pp. 20–21 and opinions referred to therein by: W. Baka, C. Kosikowski and Z. Ofiarski.

[13] E. Fojcik-Mastalska, *System bankowy*, [in:] E. Fojcik-Mastalska (ed.), *Prawo bankowe w zarysie*, Wrocław 2006, p. 24.

[14] A. Zalcewicz, *Bank lokalny. Studium prawne*, Warsaw 2013, pp. 191–192.

[15] M. Fedorowicz, *Prawne ujęcie nadzoru makroostrożnościowego…*, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego…*, p. 117.

[16] The author intends to discuss only the principles of public banking law and leave the issue of the content of the principles of private banking law for discussion in a separate article.

[17] M. Kordela, *Zasady prawa…*, p. 251 ff.

[18] A. Zalcewicz, *Bank lokalny…*, p. 190; T. Nieborak, *Tworzenie i stosowanie prawa rynku finansowego a proces ekonomizacji prawa*, Poznań 2016, p. 116 ff.

[19] L. Góral, *Ustawa o nadzorze nad rynkiem finansowym. Komentarz*, Warsaw 2013, p. 30.

the principle of ensuring security of operations on the banking market and stability of the banking system.[20] This influences the development of all legal instruments regulated by banking law.

In the author's opinion, a detailed analysis of the provisions of law made it possible to distinguish seven fundamental principles of public banking law concerning entities performing banking activities, namely the principles of: licensing access to banking activities, monopoly on performing banking activities, public supervision, risk minimisation, special protection of confided means, special protection for a party concluding a contract with a bank and prevention of the use of a banking system for the purpose of criminal activities.[21]

New phenomena on the financial market and the consequent need to review the former opinions on the scope of necessary legislative interference in order to ensure not only security but also trust cause that at present the citizen's economic interests are more and more strongly emphasised as the values, the protection of which leads to meeting the interests of the community. It is reflected in the latest provisions introduced at the EU level and in Member States. Analysing them, one can point out a newly formed principle of accessibility to basic banking services. And although it must be connected with the implementation of human rights, it influences the activities of entities performing banking activities and can be recognised as the latest principle of banking law incorporated in a catalogue distinguished based on the adopted criterion.

2. FUNDAMENTAL PRINCIPLES OF PUBLIC BANKING LAW CONCERNING ENTITIES PERFORMING BANKING ACTIVITIES

2.1. PRINCIPLE OF LICENSING ACCESS TO THE ACTIVITY FOR ENTITIES PERFORMING BANKING ACTIVITIES

In the European Union Member States, taking up and pursuit of the business in banking services provision (in Poland referred to as performance of banking activities) is possible after obtaining access to this business,[22] and the issue of a single licence by a competent supervisory institution is recognised throughout the EU. The

[20] A. Zalcewicz, *Bank lokalny…*, p. 190. It must be noticed that in the contemporary doctrine, trust is increasingly strongly emphasised as a fundamental value of the financial market, and stability and security in the financial sector as protected interests. As T. Nieborak points out, the legislator acts in public interest, "the content of which is filled with the major value of trust that will be achieved thanks to the protection of particular interests", T. Nieborak, *Tworzenie i stosowanie…*, pp. 111–116. It is also possible to describe the principles of banking law in a different way. There are proposals in the doctrine to distinguish, e.g. the principles of: measuring out prudence and risk or professionalism (thus, W. Góralczyk, Konferencja „Wyzwania bankowości. Prawo–Wartości–Finanse", Warsaw 15 November 2017).

[21] The presented catalogue together with the output of the doctrine and existing proposals of terminology and systemisation of the principles taken into account were developed in the monograph by A. Zalcewicz, *Bank lokalny…*, p. 190.

[22] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC

principle of "licencing" banking activity is, therefore, a principle binding in all EU Member States and is laid down in Article 8 Directive 2013/36/EU.[23]

In Poland, the requirements for carrying out business as banking activities, as defined in Article 5(1) BL, after obtaining authorisation are laid down in the provisions of BL and the Act on the freedom of business activity (hereinafter: AFBA). The legislator determines material requirements (capital, personal and organisational ones) that an entrepreneur must fulfil in order to obtain access to the banking activity. The statutory requirements meet a constitutional requirement to limit the freedom of business activities for the protection of particular interests, i.e. because of important public interest, which includes such values as stability and security of the financial market. Recognition that there are no obstacles to establishing a legal person that will carry out banking activity constitutes grounds for the issue of authorisation by a public body, i.e. the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego – KNF), and this way, legitimisation of taking up and pursuit of business by a bank.

Although all banks are obliged to meet formal and material requirements, the conditions imposed on entities having a different organisational and legal form vary. It concerns both legal conditions that are subject to assessment by a supervisory body and the necessity of obtaining particular types of authorisation.[24] The rule has not been changed over the last years.

2.2. PRINCIPLE OF BANKS' MONOPOLY ON PERFORMING BANKING ACTIVITIES

Based on law, one can speak about two aspects of the principle of monopoly on performing banking activities: positive and negative ones. The former must be associated with the exclusiveness of banking activities granted by the legislator, and the latter with the ban on performing other activities than banking services by banks.

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and 2006/49/EC (OJ L 176 of 27.6.2013, p. 338); in the Polish language version the term *zezwolenie* is used for the English term *authorisation*.

[23] In the light of the topic of the present article, it is necessary to emphasise that, although the rule is not changed, at present, a new attitude of competent authorities in the EU to the division of their tasks and functions can be noticed and the Central European Bank is taking over, in fact to a still limited territorial extent, the supervisory competence in the fields of micro-prudential supervision, including the disposal of a single licence, which has been the exclusive national supervisory bodies' task so far. For more on this topic, see M. Fedorowicz, *Nowe zadania i funkcje Europejskiego Banku Centralnego w zapewnianiu stabilności finansowej w świetle regulacji Europejskiej Unii Bankowej*, Warsaw 2016, p. 67; also compare, A. Drwiłło, A. Jurkowska-Zeidler (ed.), *System prawnofinansowy Unii Europejskiej*, Warsaw 2017, pp. 225–227.

[24] See, Article 14 BL, Article 30a BL and Article 36 BL. It is also worth emphasising the functions of administrative authorisations, especially the supervisory one, beside the regulatory one, and that of organising the course of business processes. Licensing in the form of authorisation undoubtedly serves the implementation of the state's supervisory function (D. Kijowski, *Funkcje zezwoleń administracyjnych*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo administracyjne materialne*, Vol. 7, Warsaw 2012, pp. 397–398) resulting in the penetration of this principle together with the principle of public supervision in this area.

The positive aspect of the principle of banks' monopoly on banking activities should be drawn from Article 5(4) BL. The provision literally stipulates that business in the field of banking activities *sensu stricto* may only be conducted by banks,[25] and illegal performance of banking activities carries civil and criminal liability (Articles 170 and 171 BL).[26]

In general, the scope of activities reserved for banks is broader in Polish regulations than in the EU law. The EU provisions only lay down a ban on non-credit institutions' activities consisting in taking deposits from the members of the public or other means that are subject to repayment.[27] Thus, the monopoly applies only to deposit-related activities. In Polish literature, there are also opinions that banks' monopoly should be recognised only in relation to deposits because the deposit-related activity is the one that distinguishes banks from other business entities.[28] Agreeing with the statement that taking means with whatever repayable obligation constitutes a feature distinguishing banks (credit institutions), one cannot assume that, based on Polish law, the monopoly is limited to deposit-related activity. At present, one can even indicate banks that do not perform banking activities consisting in taking demand deposits or time deposits and do not keep such accounts, however, within the banks' monopoly, credits constitute one of their major activities belonging to the category of banking activities in the strict sense (mortgage banks[29]). Therefore, analysing the issue of exclusiveness of banking activities performed by banks, it is necessary to emphasise that the Polish legislator differentiates the scope of their performance by particular types of banks (co-operative banks or specialist banks such as mortgage banks), which does not influence the general principle of banks' monopoly on performing banking activities.

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[25] However, the Act (BL) provides also "organisational units other than banks" with an opportunity to perform them. As a result, some representatives of the doctrine define this monopoly as relative; A. Kawulski, *Prawo bankowe. Komentarz*, Warsaw 2013, p. 59.

[26] For more, see e.g. P. Ochman, *Ochrona działalności bankowej w prawie karnym gospodarczym*, Warsaw 2011, p. 218; B. Smykla, *Prawo bankowe. Komentarz*, Warsaw 2005, p. 523. One cannot fail to show that although the legislator, as it has been indicated, introduces civil sanctions for "the performance of banking activities without authorisation" and penal ones for doing business consisting in "the collection of financial means of other natural persons, legal persons or organisational units without legal personality in order to provide credits or loans, or the imposition of risk on those means in another way", in practice the banks' monopoly was often infringed. Among others, some notifications submitted by the KNF concerning the suspicion that crime was committed under Article 171(1) to (3) BL did not result in the initiation of criminal proceedings, in spite of the violation of law (compare, P. Bachmat, *Prokuratorska praktyka ścigania przestępstw z art. 171 ust. 1 i 3 prawa bankowego. Przypadki umorzeń oraz odmów wszczęcia postępowania*, Pr. w Dział. No. 18, 2014, pp. 133–182).

[27] Article 9 Directive 2013/36/EU. It must also be highlighted that the doctrine indicates the problems that arose in connection with the fact that payment agencies were authorised to take means from customers in the context of credit institutions' monopoly on deposit-related activity (see, M. Burzyńska, *Ochrona depozytów w świetle ustawy o usługach płatniczych*, [in:] W. Góralczyk (ed.), *Problemy współczesnej bankowości. Zagadnienia prawne*, Warsaw 2014, pp. 120–137).

[28] A. Janiak, *Przywileje bankowe w prawie polskim*, Kraków 2003, p. 69.

[29] Mortgage banks can only perform activities laid down in Articles 12 and 15 of the Act on mortgage banks and mortgage bonds, which, since 9 October 2016, has not contained activities consisting in taking time deposits or keeping bank accounts.

On the other hand, banks may only perform banking activities and provide strictly defined financial services. Therefore, undoubtedly, it can be pointed out that the principle discussed may be analysed with regard to its negative aspect and the scope of permitted banking services (banking activities and other financial services) is strictly determined in the provisions of law.

2.3. PRINCIPLE OF PUBLIC SUPERVISION

Banks have become subject to a regulatory body's supervision. Its activities connected with the implementation of economic administration tasks focus on ensuring the protection of significant social values on the financial market. Both BL and AFMS[30] stipulate supervision of banking activities within the supervision of financial market and determine supervisory aims and tasks. The most important supervisory requirements are, in this case, ensuring the protection of account holders' means and undisturbed functioning of the banking market[31] by an administrative body's authoritative influence on banks within the framework of awarded competences and by supervisory measures of different legal nature so that the activity of every bank complies with the provisions of law concerning the KNF's supervision.[32] The discussed principle is common in nature. All entities having the status of a bank are subject to public supervision.[33]

In order to efficiently perform tasks concerning business administration, the KNF, like other regulatory bodies, undertakes much more far-reaching activity in exercising public interest than other public administration bodies. The regulatory aims determine the KNF's activities and constitute justification for the "regulatory arbitrariness", which in the doctrine is connected with "the body's discretion to assess the factual state from the perspective of regulatory aims", and the body has "a choice between various legal grounds and arbitrariness in the use of chosen measures".[34]

Discussing the principle of public supervision, it is necessary to notice that at present one can observe a continuous tendency to extend supervision over the new areas of banking activities and redefine supervisory aims under the influence of

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[30] Act of 21 July 2006 on financial market supervision, uniform text, Journal of Laws [Dz.U.] of 2017, item 196, hereinafter: AFMS.

[31] It concerns, inter alia, ensuring the security of transfer of means on the domestic and the EU financial markets.

[32] A series of other requirements typical of supervision over the banking market are pointed out in the doctrine; in particular, see L. Góral, *Nadzór bankowy*, Warsaw 1998, p. 23; M. Fedorowicz, *Nadzór nad rynkiem finansowym…*, p. 49. It can be pointed out that "public supervision of banking, analysed as an instrument of substantive law, is connected with the supervisor's obligation to take care of banks' activity in compliance with law, imposed by the legislator", A. Zalcewicz, *Bank lokalny…*, p. 196.

[33] The principle may also be analysed in the context of the EU rules of functioning of the financial market. One of them is the principle of supervision over all credit institutions in the EU Member States.

[34] K. Jaroszyńki, M. Wierzbowski, *Organy regulacyjne*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo administracyjne materialne*, Vol. 7, Warsaw 2012, pp. 317–318.

the EU law. At present, it is more and more strongly emphasised that regulatory bodies perform European administration tasks.[35] In this case, the EU dimension of supervisory activities is confirmed by, e.g. the supervisory body's obligation to take into account a possible influence of its decisions not only on the domestic market but also "on the stability of financial systems in all other Member States concerned".[36] On the other hand, changes introduced at the EU level in the development of the EU supervisory bodies' competences resulting from the successive modification of the European structure of supervision over the financial market reflect new tendencies to transfer the performance of supervisory tasks, as it has been mentioned above, onto the EU level.[37]

2.4. PRINCIPLE OF RISK MINIMISATION

One of the basic principles of banking law is the requirement of undertaking steps in bank management that serve the limitation or most complete elimination of possible threats that can or might directly disturb the proper functioning of a bank and cause inappropriate fulfilment of a bank's obligations to depositors and other creditors. This results from the provisions of both the EU and national law.

Speaking about the risk occurring in banking activities, one must point out that it is more and more precisely recognised in various areas of this activity by supervisory bodies[38] as well as the representatives of the doctrine[39]. The abundant literature on this subject and supervisory practice, and the aim of this article inspire to abandon a complex presentation of the issue of risk and to signal only that the economic risk is the easiest identifiable risk associated with banking activities. As a result, the legislator introduces a series of detailed rules constituting the principle of risk minimisation such as, e.g. a bank's capital adequacy ratio, keeping

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[35] *Ibid*., p. 310.

[36] Article 7 Directive 2013/36/EU.

[37] For more, see e.g. M. Fedorowicz, *Nadzór nad rynkiem finansowym…*; by this author, *Normatywne aspekty regulacji europejskiego nadzoru finansowego ze szczególnym uwzględnieniem europejskiego nadzoru w prawie bankowym*, [in:] A. Dobaczewska, E. Juchniewicz, T. Sowiński (ed.), *System finansów publicznych. Prawo finansowe wobec wyzwań XXI wieku*, Warsaw 2010; by this author, *Rola i zadania teorii prawa rynku finansowego UE*, Bezpieczny Bank No. 1, 2016, pp. 114–134; P. Iglesias-Rodriguez, *The Accountability of Financial Regulators. A European and International Perspective*, Wolters Kluwer International BV 2014; M. Olszak, *Zmiany dotychczasowych rozwiązań prawnych w zakresie nadzoru nad rynkiem finansowym Unii Europejskiej – wybrane problemy*, [in:] C. Kosikowski (ed.), *Przyszłość Unii Europejskiej w świetle jej ustroju walutowego i finansowego*, Białystok 2013, p. 267 ff.

[38] One can point out here, e.g. numerous KNF's recommendations identifying risk: one connected with the portfolio of credit exposure with mortgage security, financial liquidity, retail credit exposure, one connected with offering insurance products, risk of offering products that are not adjusted to individual needs and possibilities of clients, etc.

[39] See, e.g.: J. Krasodomska, *Zarządzanie rykiem operacyjnym w bankach*, Warsaw 2008; W Żółtkowski, *Zarządzanie ryzykiem w małym banku – w kontekście zmieniających się regulacji nadzorczych*, Warsaw 2017; G. Birindelli, P. Ferretti, *Operational Risk Management in Banks: Regulatory, Organizational and Strategic Issues*, London 2017; J. Bessis, *Risk Management in Banking*, 4th edition, Wiley 2015.

accounting liquidity adjusted to the size and type of activity and keeping within the concentration risk limits. In fact, the content of those rules is constantly evolving, which results, inter alia, from the introduction of more and more precisely, not to say in a meticulous way, formulated requirements at the EU level concerning in particular a bank's capital.[40] However, regardless of the wording and scope of the regulation, the value that is economic risk minimisation is subject to protection.

Looking at the discussed principle in a broader way, one can speak about the necessity of limiting the occurrence of other threats (or their negative consequences) that always accompany entrepreneurs, e.g. the need to protect against operational risk. In case of big banks, there are their typical categories or irregularities endangering the functioning of the financial market in a special way, which result from the nature of banking activities, such as money laundering or those connected with progress in technological developments in banking services. Especially the last one will force legal changes in the future. The introduction of automated consulting will require decisions concerning liability in the event of defective automation (the need to find solutions limiting the risk of losing reputation connected with the allocation of liabilities, etc.[41]).

2.5. PRINCIPLE OF SPECIAL PROTECTION OF CONFIDED MEANS

The principle of special protection of confided means is discussed in the doctrine in a narrow as well as broad context. In the former, it results from the obligation of special care imposed on a bank with respect to ensuring the security of deposited means (Article 50(2) BL) connected with the economic sphere (payment of all financial means to a bank's client) as well as with a depositor's personal sphere (banking secrecy),[42] and provisions regulating the norms of protecting deposits by covering the depositor's means[43] with a deposit guarantee scheme up to a statutorily defined limit in the event of a bank's insolvency and within its mandatory restructuring[44]. However, no modification of the legislator's approach to depositors' liabilities can be observed after the introduction of the Bank Recovery and Resolution Directive (hereinafter: BRRD).[45] In accordance with Article 66(4) of the Act

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[40] See, inter alia, Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ 2013 L 176 of 27.6.2013, p. 1.

[41] See, https://www.eba.europa.eu/documents/10180/1299866/JC+2015+080+Discussion+Paper+on+automation+in+financial+advice.pdf.

[42] D. Rogoń, [in:] F. Zoll (ed.), *Prawo bankowe. Komentarz*, Kraków 2005, p. 418.

[43] It only concerns depositors in the meaning of the Act of 10 June 2016 on the Bank Guarantee Fund, a system of guaranteeing deposits and mandatory restructuring, Journal of Laws [Dz.U.] of 2016, item 996, as amended.

[44] It is worth mentioning that the protection of depositors is one of the aims of mandatory restructuring (Article 66(4) ABGF).

[45] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and

on the Bank Guarantee Fund (hereinafter: ABGF), in the event of restructuring, the protection of depositors, as it has been indicated above, remains the aim but it does not mean a guarantee to recover the whole sum of the means confided to the bank. However, the introduction of the bail-in instrument as one of the restructuring and resolution instruments to the national legal system provides a greater opportunity to regain confided means. To tell the truth, the remission of bank's liabilities is admissible without creditors' consent, inter alia, in order to raise the capital of an entity being restructured (Article 201(1.1) ABGF) and a depositor is only certain, as far as the protected means are concerned (compare, Article 206(1) ABGF), yet the use of this instrument is in compliance with the "no creditor worse off" rule because in case of efficient performance of mandatory restructuring, they will be able to regain their means exceeding the guaranteed amount. It is also extremely important that the BFG (Bank Guarantee Fund) may exclude some or part of liabilities from remission or conversion, especially those resulting from natural persons' as well as small and medium-sized entrepreneurs' deposits. It takes place in case it might endanger financial stability, and seriously disturb the functioning of the economy and the financial market or sector (Article 206(3) ABGF).[46]

Looking at the principle of special protection of confided means from a broader perspective, one cannot fail to notice that what serves this protection is not only the obligation of special care in ensuring the security of deposited means but also the principle of licensing access to banking activities, risk minimisation and public supervision (inter alia implemented in order to ensure the security of means kept on banking accounts).[47] Care for maintaining a bank clients' trust in a bank's obligation to return a settled amount of means resulting from liabilities towards the creditor is also the reason for enacting regulations other than those concerning the possibility of suspending the activity, banks associations, their mergers and divisions. It is worth mentioning that it translates into the introduction of specified norms in other fields of law, such as insolvency law, where the principle of special care for bank depositors' interests applies.[48]

The discussed principle, introduced for the purpose of maintaining trust in the financial market, is especially important also as an element of security and stability of the financial market,[49] which should be perceived as particular ideas, valuable

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Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173 of 12.6.2014, p. 190.

[46] For more on this issue, see: M. Fedorowicz, *Bankowy Fundusz Gwarancyjny jako organ przymusowej restrukturyzacji*, [in:] J. Gliniecka (ed.), A. Drywa, E. Juchniewicz, T. Sowiński, *Praktyczne i teoretyczne problemy prawa finansowego wobec wyzwań XXI wieku*, Warsaw 2017, pp. 405–416; M. Kozińska, *Przymusowa restrukturyzacja banków w Unii Europejskiej*, Warsaw 2018, p. 104 ff.

[47] See, the discussion of the principle in the narrow and broad context in A. Zalcewicz, *Bank lokalny…*, pp. 203–207.

[48] J. Sawiłow, *Przekształcenie wierzytelności konsumentów na skutek ogłoszenia upadłości – pozycja prawna konsumenta w polskim prawie upadłościowym i naprawczym. Zagadnienia wybrane. Proceduralne aspekty ochrony konsumenta*, [in:] B. Gnela (ed.), *Ochrona konsumenta usług finansowych. Wybrane zagadnienia prawne*, Warsaw 2007.

[49] Also see, E. Fojcik-Mastalska, R. Mastalski, *Cel i zakres nadzoru bankowego*, [in:] L. Etel, M. Tyniewicki (ed.), *Finanse publiczne i prawo finansowe – realia i perspektywy zmian*, Białystok 2012, p. 567.

for the community, and a certain feature of the market, i.e. a value, on the one hand independent from one's own feelings, and on the other hand, a conditioned value being a projection of particular emotions giving grounds for trust in financial institutions, including banks.[50]

2.6. SPECIAL PROTECTION OF A PARTY TO A CONTRACT WITH A BANK FOR PROVISION OF BANKING SERVICES

The principle should be analysed, inter alia, as a specific manifestation of the constitutionally guaranteed protection of consumers (Article 76 Constitution)[51]. As it is described in the doctrine, "constitutionalisation" of the protection of weaker parties to legal transactions[52] is of critical importance for the shape of private law,[53] because it results in "the right to interfere into civil relations".[54] In case of banking services (performance of banking activities), it is, first of all, connected with the limitation of the freedom concerning the content of agreements concluded because the provisions precisely determine the requirements in this area.[55] On the other hand, as it is indicated in the doctrine and case law, constitutional protection also covers the right to obtain information about the object and conditions of a transaction[56] (the principle of protection via information) so that a consumer could "freely and in conformity with one's own interest satisfy, with the use of particular transactions, one's conscious needs based on knowledge and information provided",[57] which is especially evident in the financial market legal regulation.

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[50] Z. Duniewska indicates trust as a value connected with the transfer of some emotions (Z. Duniewska, *Pojęcie, typologia i egzemplifikacja wartości dóbr*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo administracyjne materialne*, Vol. 7, Warsaw 2012, p. 128.

[51] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.] No. 78, item 483.

[52] E. Łętowska, *Konstytucyjne i wspólnotowe uwarunkowania rozwoju prawa konsumenckiego*, [in:] C. Mik (ed.), *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej*, Toruń 1999, p. 373.

[53] A. Zieliński, *Wpływ praw człowieka na kodeks cywilny*, [in:] M. Sawczuk (ed.), *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, Kraków 2006, p. 42.

[54] Judgement of the Constitutional Tribunal of 10 October 2000, P 8/99, OTK ZU No. 6, 2000, item 190. One can follow C. Banasiński and say that at present there is an extremely "strong relation of regulations guaranteeing the fulfilment of legally protected consumer's interest in the sphere of private law and regulations of public law"; C. Banasiński, *Miejsce prawa ochrony konsumentów w systemie prawa*, [in:] H. Gronkiewicz-Waltz, M. Wierzbowski (ed.), *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, Warsaw 2015, p. 403.

[55] E. Rutkowska-Tomaszewska, *Nieuczciwe praktyki na rynku bankowych usług konsumenckich*, Warsaw 2011, p. 126.

[56] The Ombudsman's opinion in the case K 33/03, OTK-A, see, judgement of the Constitutional Tribunal of 21 April 2004, K 33/03, OTK-A 2004, No. 4A, item 31.

[57] Judgement of the Constitutional Tribunal of 21 April 2004, K 33/03, OTK-A 2004, No. 4A, item 31. There is, e.g. a proposal to place information about the essence of a contract to be concluded beside its detailed provisions; I. Lipowicz, *Nowe wyzwania w zakresie ochrony praw obywateli i przedsiębiorców na rynku finansowym*, [in:] A. Tarwacka (ed.), *Iura et negotia. Księga*

Looking at the matter from a different perspective, it is necessary to point out that, at the same time, such a need to build trust in the financial market translating into stability and security of that market forces the introduction of provisions not only aimed at ensuring the economic security of a bank but the protection through the development of an appropriate relation between a bank and its client, also a potential one (before an agreement conclusion) in the sphere of civil-law relations. The obligations and bans existing in the provisions, including not only those aimed at guaranteeing clients reliable, readable information in compliance with cognitive capabilities of a party to a contract with a bank but also still before its conclusion (inter alia, recognition of a bank from among other enterprises), result in considerable interference, incomparable to other market sectors. Thus, the special nature of this protection is expressed in its extraordinarily broad scope.

2.7. PRINCIPLE OF PREVENTING USE OF A BANKING SYSTEM FOR THE PURPOSE OF CRIMINAL ACTIVITIES

The protection of a financial system against its use for the purpose of criminal activities, including money laundering and financing terrorism, requires the establishment of provisions supporting activities aimed at preventing the use of a banking system for these purposes. At the same time, it is an element influencing the stability of credit institutions, the financial market and trust in the whole financial system.[58] One can identify in banking law a group of strictly connected legal norms established in order to protect the banking system against criminal activities. In particular, the legislator introduces provisions that are to limit a possibility of carrying out activities by a bank based on means obtained from crime (the principle of proof of funds earmarked for share capital) and the use of a bank for the purpose of a criminal activity (inter alia, Article 106 BL, Article 106a BL, Article 54 (4) ABGF).

What constitutes a new element preventing the use of a banking system for criminal purposes is the introduction of the instrument of refusal to keep a banking payment account because of the suspected commission of crime of financing terrorist activities and money laundering as well as in the event a bank has plausible information about a consumer's participation in crime committed with the use of a payment account or that the means retained on the account originate from crime (Article 59ic(6) of the Act on payment services).[59]

Jubileuszowa z okazji 15-lecia Wydziału Prawa i Administracji Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie, Warsaw 2015, p. 158.

[58] Compare, motives 1 and 2 of the Preamble to the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of financial systems for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141 of 5.6.2015, p. 73.

[59] Act of 19 August 2011 on payment services, uniform text, Journal of Laws [Dz.U.] of 2016, item 1572, as amended, hereinafter: APS.

2.8. PRINCIPLE OF ENSURING ACCESS TO BASIC PAYMENT SERVICES

What constitutes a new direction of legislative activities is deeper than before inclusion of banking activities in the sphere of social activity. The social aspect of economy results from the EU law and Article 20 of the Polish Constitution, providing grounds for respect for specified social values and creating bases of the implementation of the adopted economic model in the provisions of law. The values include the creation of mechanisms of social development, the important element of which at present is access to basic banking services. At present, indeed, not only shortage of financial means but financial exclusion to a considerable extent influence an individual's potential marginalisation in social life. With that in mind, the Polish legislator followed the EU one and introduced a principle of ensuring that customers have access to basic payment services within banking activities.[60] In Poland, it mainly results from the Act on payment services (Articles 59ia-59ih APS). Their interpretation allows recognising that at present we have a group of axiologically coherent norms obliging banks to provide free banking services (performing banking activities) for the needs of some members of the public. More precisely, it is a bank's absolute readiness to conclude a basic payment account contract on a customer's request and settle some payments via a bank (with the use of a debit card or a similar payment instrument, performance of an order to pay or a remittance order) without charge within the scope of a minimum statutory transaction limit, because the legislator enumerates the reasons that may constitute grounds for refusal to conclude a contract (Article 59ic(6) and (7) APS) and its termination (Article 59ig APS).

In a broader context, the principle also results from the provisions of BL regulating family accounts (Articles 49(4), 52a, 54 BL). Although the basic reason for the introduction of the above-mentioned provisions was the need to distinguish means that are exempt from enforcement[61] from the rest of a given natural person's means in order to ensure that they will not be seized from the bank account within the judicial or administrative enforcement, in conjunction with a ban on imposing charges for keeping an account, the issue of a debit card and keeping this instrument, and withdrawals made with its use from cash machines of the bank keeping the family account, one may assume that they constitute a complementary solution that influences the exercise of the right of access to basic payment accounts.

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[60] The principle results from Article 16 Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the compatibility of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257 of 28.8.2014, p. 214.

[61] It concerns "allowances, benefits and other amounts exempt from enforcement referred to in Article 833 §§6 and 7 of the Act of 17 November 1964: Code of Civil Procedure (uniform text, Journal of Laws [Dz.U.] of 2014, item 101, as amended), with the exception of alimony" in accordance with Article 49(4) BL.

3. CONCLUSIONS

Polish banking law continually evolves and in recent years it has been influenced by the European Union law, which requires the introduction of specified solutions to the national legal systems in order to create the common market and values that are significant for it. In spite of considerable transformation and development, the axiology of the system of norms of banking law in general remains unchanged. The protection of transactions security on the banking market and the banking system stability seem to be most important for ensuring trust in the financial market, which has impact on the final shape of the principles of banking law concerning banks' activities. Nevertheless, one can see changes in their content resulting from amendments to the provisions of law.

One can also notice that the financial crisis has translated into greater activity in searching for earlier unknown solutions and a new approach to the issue of supervision as well as the perception of consumers' protection on the banking market (manifesting, inter alia, in deep interference of public law into the sphere of civil law) and a citizen's legitimate economic interests, which is reflected in the content of the principles of public banking law. The provisions adopted in the EU over the last five years under the influence of new ideas have had an impact on considerable development of supervisory regulations or the change in the scope of particular supervisory bodies' competences, and the modification of the principle of special protection of confided means. In this last case, there was a considerable change in attitudes to the repayment of confided means in connection with the introduction of the bail-in principle (i.e. the possibility of remission or conversion of liabilities, inter alia, of a bank's creditors in order to provide capital for the entity under restructuring). It is worth emphasising here that the new solutions in the protection of means also influenced the evolution of specialist banks. These banks do not perform banking activities consisting in taking deposits payable on demand or time deposits, which manifests the principle of the monopoly on banking activities.

One can also indicate the development of a new principle of ensuring access to basic payment services, which may also be perceived from the point of view of maintaining social values; and "organising mechanisms of social development"[62] undoubtedly is one of them.

Noticeable evolution of the content of principles under the influence of the EU law with parallel ever broader interference of public law into the sphere of civil law are at present two most important legislative tendencies.

[62] For more on the issue of "organising mechanisms of social development", see Z. Duniewska, *Pojęcie…*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo…*, p. 128.

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PRINCIPLES OF BANKING LAW: COMMENTS IN THE LIGHT OF AMENDMENTS TO THE EU AND NATIONAL LAW

Summary

The subject matter analysed in the paper is a voice in the discussion about the catalogue and content of baking law principles, which combines a theoretical analysis of the law, reference to the existing achievements of scholars in the field, and current changes in the law of the financial markets. It is an attempt at systematizing existing principles, both old and new, concerning the activity of banks. In this context, it also presents the evolution of the Polish legal system under the influence of the EU law, an increasingly strong tendency for public law to encroach upon the sphere of private law, and a visible attempt to take a new, social, aspect into account in baking activity (a citizen's legitimate economic interests). The analyses particularly take account of the impact on the content of the latest legislation concerning, for instance, orderly restructuring of banks and prevention of financial exclusion.

Keywords: financial market, banking law, law principles

ZASADY PRAWA BANKOWEGO – UWAGI W ŚWIETLE ZMIAN W PRAWIE UNIJNYM I KRAJOWYM

Streszczenie

Podjęta w opracowaniu tematyka stanowi głos w dyskusji nad katalogiem i treścią zasad prawa bankowego, łączący w sobie analizę teoretycznoprawną, odniesienie do dotychczasowego dorobku doktryny w tej kwestii oraz aktualnych zmian przepisów prawa rynku finansowego. Jest próbą usystematyzowania istniejących, uznanych i nowych, zasad dotyczących działalności banków. W tym kontekście ukazane zostały również przeobrażania polskiego porządku prawnego pod wpływem prawodawstwa unijnego, coraz silniejsze tendencje wkraczania prawa publicznego w sferę prawa prywatnego oraz widoczne dążenie uwzględniania nowego, społecznego, aspektu w działalności bankowej (słusznych interesów ekonomicznych obywatela). Dokonując analiz, w szczególności uwzględniono wpływ na treść zasad najnowszych przepisów dotyczących między innymi uporządkowanej restrukturyzacji banków czy zapobiegania wykluczeniu finansowemu.

Słowa kluczowe: rynek finansowy, prawo bankowe, zasady prawa

Cytuj jako:

Zalcewicz A., *Zasady prawa bankowego – uwagi w świetle zmian w prawie unijnym i krajowym*, „Ius Novum" 2018 (Vol. 12) nr 2, s. 137–155. DOI: 10.26399/iusnovum.v12.2.2018.20/a.zalcewicz

Cite as:

Zalcewicz, A. (2018) 'Principles of banking law: Comments in the light of amendments to the EU and national law'. *Ius Novum* (Vol. 12) 2, 137–155. DOI: 10.26399/iusnovum.v12.2.2018.20/a.zalcewicz

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