Krzysztof Indecki, Justyna Jurewicz

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Introduction

Krzysztof Indecki

The first Polish Penal Code was adopted in 1932[1], the second one in 1969[2], and the third one in 1997[3].

The Code of 1932 was a symbol of the re-establishment of Polish independence after more than 120 years of partition[4].

After World War II the 1932 Penal Code did not ensure the protection of the newly formed State's political and economic interests. It did not correspond to the conditions of the new political, social, and economic system as well as cultural life; in particular, it did not guarantee the prosecution of the Nazi offences[5].

After World War II many laws and decrees that were aimed at prosecuting such offences were passed.

The process of creating penal law at that time can be divided into three stages:

– the first one, which covered the years between 1944 and 1954, is represented by legislative efforts to combat fascism and to punish war criminals as well as to censure those Polish citizens who had collaborated with the Nazis[6];

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[1] Rozporządzenie Prezydenta Rzeczypospolitej z 11 VII 1932 r., Dz.U., nr 60, poz. 571, ze zm. (Journal of Laws, no. 60, item 571, as amended).

[2] Ustawa z 19 IV 1969 r., Dz.U., nr 13, poz. 94 ze zm. (Journal of Laws, no. 13, item 94, as amended).

[3] Ustawa z 6 VI 1997 r., Dz.U., nr 88, poz. 553 ze zm. (Journal of Laws, no. 88, item 553, as amended).

[4] See: J. Bafia, *Penal Law*, [in:] L. Kurowski (ed.), *General Principles of Law of the Polish People's Republic of Poland*, Warsaw 1984, p. 277.

[5] See: *ibidem*.

[6] See for example: dekret z 31 VII 1944 r. o wymiarze kary dla faszystowsko-hitlerowskich zbrodniarzy winnych znęcania się nad ludnością cywilną i jeńcami oraz dla zdrajców Narodu Polskiego, Dz.U. 1946, nr 69, poz. 377, Dz.U. 1947, nr 65, poz. 390, Dz.U. 1948, nr 18, poz. 124, Dz.U. 1949, nr 32, poz. 238 (Journal of Laws of 1946, no. 69, item 377, Journal of Law of 1948, nr 48, item, 124, Journal of Laws of 1949, no. 32, item 238); art. 1st of the decree is still force in relation to the genocide (see: art. 5, sec. 1 of the law of 6 VI 1997 Przepisy wprowadzające kodeks karny, Dz.U., nr 88, poz. 554 i nr 160, poz. 1083; Dz.U. 1998, nr 113, poz. 715 – Journal of Laws, no. 88, item 554 and no. 160, item 1083, Journal of Laws of 1998, no. 113, item 715), Kodeks karny Wojska Polskiego, dekret z 23 IX 1944, Dz.U. 1957, nr 22, poz. 107, tekst jednolity (consolidated text: Journal of Laws of 1957, no. 22, item 107, dekret z 13 VI 1946 o przestępstwach szczególnie niebezpiecznych w okresie

– during the second one, which roughly covered the years 1955–1969, the laws were improved and adapted to the system that was undergoing transformation as well as to the current needs of the fight against crime, in particular economic crime[7];

– the third one started on 1 January 1970; after this date the Penal Code of 1969 and other very important laws, such as the Code of Criminal Procedure[8] and the Executive Penal Code[9], entered into force.

The Penal Code of 1969 concentrated on the so-called polarisation of responsibility and limiting the disposition of the penalty of the deprivation of liberty in favour of non-custodial penalties.

However, it is widely accepted in the literature that this idea was not implemented satisfactorily[10].

Therefore, penal law reform was undertaken at the end of the 1980s.

To this end, the Ministry of Justice appointed a special commission that was to prepare a draft of proper amendments to the penal law.

Another commission was also established under the auspices of the "Solidarity" movement.

As a result, two drafts of the Penal Code were published in 1981, i.e. the so-called governmental and the so-called public one.

Both of these drafts were based on the same principles, i.e. the liberalisation and rationalisation of penalties as well as the penal policy system and combating offence by penal measures, and were aimed to ensure better protection of individual rights (both of the wronged person and the perpetrator of an offence)[11].

The State Council introduced martial law by the decree of 1981 [12]. This decree interrupted the process of penal reform until 1987.

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odbudowy Państwa, tzw. Mały Kodeks Karny, Dz.U., nr 30, poz. 192 (Journal of Laws, no. 30, item 192). The Law contained provisions, unknown in the 1932 Penal Code: espionage, sabotage, illegal possession of firearms and others. This act was modified a number of times; was repealed on 1 I 1970.

[7] See for example: ustawa z 21 I 1958 r. o wzmożeniu ochrony mienia społecznego przed szkodami wynikającymi z przestępstwa, Dz.U., nr 4, poz. 11, ustawa z 18 VI 1959 o odpowiedzialności karnej za przestępstwa przeciw własności społecznej, Dz.U., nr 36, poz. 228 (Journal of Laws, no. 36, item 228), ustawa z 13 VII 1957 o zwalczaniu spekulacji i ochronie interesów nabywców oraz producentów rolnych w obrocie handlowym, Dz.U., nr 39, poz. 171 (Journal of Laws, no. 39, item 171); ustawa z 27 IV 1956 o warunkach dopuszczalności przerywania ciąży, Dz.U., nr 12, poz. 61; ustawa z 10 XII 1959 o zwalczaniu alkoholizmu, Dz.U., nr 69, poz. 434 (Journal of Laws of 1959, no. 12, item 61), ustawa z 22 V 1958 o zaostrzeniu odpowiedzialności karnej za chuligaństwo, Dz.U., nr 34, poz. 153 (Journal of Laws, no. 34, item 61).

[8] Ustawa z 6 VI 1969, Dz.U., nr 89, poz. 555 ze zm. (Journal of Laws of 1969, no. 89, item 555, as amended).

[9] Ustawa z 6 VI 1969, Dz.U., nr 90, poz. 557 (Journal of Laws of 1969, no. 90, item 557).

[10] See: A. Marek, *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1997, s. 18, 19, see also: Projekt Kodeksu karnego. Uzasadnienie, Warszawa 1968, p. 1.

[11] See: *ibidem*, p. 19.

[12] See: Dekret z 12 XII 1981 o stanie wojennym, Dz.U., nr 29, poz. 154 (Journal of Laws of 1981, no. 29, 154).

The commissions that had been appointed to carry out the reforms of penal law began work under new political and ideological conditions[13].

During this period certain changes were made to penal law.

The most important among them were the following:

a) repealing art. 194 of the Penal Code that penalised the abuse of freedom of conscience and confession to the detriment of the Polish People's Republic[14];

b) repealing art. 282, which penalised public incitement to disobedience to or acting against a law or regulation that was adopted by a state authority[15];

c) abolishing an additional penalty of property confiscation as well as of commitment to a social adjustment centre for recidivists[16];

d) determining the amount of a fine based on the State's economic situation and the level of inflation[17];

e) making amendments concerning the conditions under which the termination of pregnancy was permitted (arts. 149a, 156b and 157 of the Penal Code)[18];

f) repealing acts that dealt with the protection of economic turnover[19];

g) repealing a range of additional penal acts[20];

h) amending the Penal Code by the statute of 12 July 1995 (these changes were referred to as "a small amendment")[21].

After the political and legal changes the work on the new Penal Code was carried out based on the governmental draft.

The first version of the new Penal Code was published in 1991. The final version of the draft Penal Code was issued in 1994 with an explanatory statement. The bill was brought before the Sejm in 1995.

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[13] See: *ibidem*.

[14] See: ustawa z 17 V 1989 r. o stosunku państwa do Kościoła katolickiego, Dz.U., nr 29, poz. 154 (Journal of Laws, no. 29, item 154).

[15] See: ustawa z 29 V 1989 o zmianie niektórych przepisów prawa karnego, Dz.U., nr 34, poz. 180 (Journal of Laws, no. 34, item 180).

[16] See: ustawa z 23 II 1990 o zmianie kodeksu karnego i niektórych innych ustaw, Dz.U., nr 14, poz. 24 (Journal of Laws, no. 14, item 24).

[17] See: ustawa z 28 II 1992 o zmianie niektórych przepisów prawa karnego, prawa o wykroczeniach i o postępowaniu w sprawach nieletnich, Dz.U., nr 24, poz. 101 (Journal of Laws, no. 24, item 101).

[18] See: ustawa z 7 I 1993 o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, Dz.U., nr 17, poz. 78 (Journal of Laws, no. 17, item 78, as amended).

[19] See: ustawa z 12 X 1994 r. o ochronie obrotu gospodarczego i zmianie niektórych przepisów prawa karnego, Dz.U., nr 126, poz. 615 (Journal of Laws, no. 126, item 615).

[20] See for example: prawo bankowe, tekst jednolity: Dz.U. 1994, nr 72, poz. 359 z późn. zm. (Journal of Laws of 1994, no. 72, item 359, as amended), prawo o publicznym obrocie papierami wartościowymi i funduszach powierniczych, tekst jednolity: Dz.U. 1994, nr 58, poz. 239 z późn. zm. (consolidated text: Journal of Laws of 1994, no. 58, item 239, as amended).

[21] See: ustawa z 12 VII 1995 r. o zmianie przepisów Kodeksu karnego i Kodeksu karnego wykonawczego oraz o podwyższeniu dolnych i górnych granic grzywien i nawiązek w prawie karnym, Dz.U., nr 95, poz. 475 (Journal of Laws, no. 95, item 475); also: L. Gardocki, *Najnowsze zmiany w kodeksie karnym*, Państwo i Prawo 1995, 12.

The 1997 Penal Code came into force on 1 September 1998; it represents the premises on which the Republic of Poland is based.

In contrast to the former Penal Code, the new Penal Code is based on a new axiology that is adequate for democratic rule, i.e. under which penal law is a tool for protecting the fundamental human values, and not a political tool[22].

The main task of the Penal Code of 1997 is to protect the dignity of human beings, including wronged persons[23].

This objective was not questioned in the jurisprudence and it was manifested, for example, in a tendency towards liberalising the system of sanctions[24].

The code was also modified so as to meet European standards (e.g. the death penalty was abolished)[25].

The Penal Code of 1997 comprises three main parts: the general part (arts. 1–116), the special part (arts. 117–316) and the military part (arts. 317–363). Minor offences were left out from this code and regulated separately, i.e. by the Code of Minor Offences, thus continuing the trend that had begun with the Penal Code of 1969[26].

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[22] See: Uzasadnienie do Projektu Kodeksu Karnego, wkładka do Państwa i Prawa 1994, 3, p. 3.

[23] See: *ibidem*.

[24] See: A. Marek, *Prawo karne*, C.H. Beck 2011, p. 22.

[25] See: A. Grzelak, *Unia europejska a prawo karne*, Warszawa 2002, p. 99 ff.; A. Marek, *Prawo*..., p. 23. H. H. Jescheck, *Część ogólna projektu polskiego KK w świetle prawnoporównawczym*, Państwo i Prawo 1992, 12, p. 27.

[26] Compare: K. Indecki, The Main Features and Principles of the Polish Penal Law, *Teise* 2003, no. 48.

General Part

1. Principles

Penal law is based on principles which are rooted in the Constitution and which are aimed to protect civil rights. These rights must be respected also when a citizen is prosecuted for committing an offence.

Polish penal law is based on the following principles: *nullum crimen sine lege*, *nulla poena sine lege*, *nullum crimen sine culpa*, *lex retro non agit*, the principle of criminal responsibility for an act, the principle of individual and personal liability, and the principle of humanitarianism.

These principles create the so-called complex of the principles of penal responsibility[27] and define the structure of an offence and sometimes also the axiological assumptions of penal law.

In the process of formulating the 1997 Penal Code some of these principles were partly modified (cf., e.g. art. 1 of the 1969 Penal Code and art. 1 of the 1997 Penal Code). Certain new principles were also added, such as the principle of humanitarianism.

Currently, *nullum crimen sine lege* is the basic principle, which is closely connected with the guarantee function of penal law. The aim of this principle is to ensure the protection of citizens against any act committed by the organs of the State if they were to be used for the purpose of political repression by using penal law tools.

The foundation of this principle was created during the period of the Enlightenment.

The *nullum crimen sine lege* principle was clearly formulated for the first time in art. 8 of the Declaration of the Rights of Man and of the Citizen dated 1789[28]. Starting with A. Feuerbach' theory, this principle is treated as the most important

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[27] See: R. Dębski, *Uwagi o konstytucyjnym ujęciu zasady nullum crimen sine lege w polskim porządku prawnym*, [in:] *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warszawa 2007, p. 91 ff.; B. Kunicka-Michalska, *Zasada nullum crimen sine lege w projekcie kodeksu karnego w świetle norm międzynarodowych*, [in:] S. Waltoś (red.), *Problemy kodyfikacji prawa karnego. Księga ku czci M. Cieślaka*, Kraków 1993, p. 55 ff.

[28] See: http://www.historyguide.org/intellect/declaration.html. Art. 8 states: "8. The law ought only to establish penalties that are strict and obviously necessary, and no one can be punished except in virtue of a law established and promulgated prior to the offense and legally applied".

rule of the continental penal judicature and the main component of the concept of a State under the rule of law[29].

Moreover, this principle has an international dimension because it is recognised as one of the fundamental human rights (see art. 11 of the Universal Declaration of Human Rights and art. 15 of the International Covenant on Civil and Political Rights).

In the Constitution of the Republic of Poland of 1997, which refers to the March Constitution of 1921[30] and the April Constitution of 1935[31], the *nullum crimen sine lege* principle was elevated to the rank of a constitutional principle.

Art. 42.1 of the Constitution of the Republic of Poland of 1997 states that: "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible".

This provision is addressed directly **to the legislator**, and not to the State's organs that enforce the law. It contains a directive according to which the issue of criminal responsibility falls exclusively within the competence of the legislative branch[32].

The *nullum crimen sine lege* principle has also been introduced into art. 1, sec. 1. of the Penal Code. This provision is almost a literal repetition of art. 42.1 of the Constitution of the Republic of Poland.

Art. 1, sec. 1. of the Code is addressed to the State's **organs that enforce the law**, not to the legislator. Therefore, it is necessary to clearly distinguish the *nullum crimen sine lege* principle's functions that arise from the Constitution from the functions that this principle fulfils as a legal norm.

As a result of a clear distinction between the spheres of making laws from the sphere of enforcing laws, the violation of the *nullum crimen sine lege* principle by the legislator, for example, through enacting penal law with retroactive effect, is, as a rule, inadmissible and may create the basis for checking the compliance of such a law with art. 42.1 of the Constitution of the Republic of Poland[33].

The first recommendation **for the legislator** is that the classification of particular offences contrary to the *nullum crimen sine lege scripta* principle is to be prohibited.

It is clear that only written, i.e. statutory, law, that is, acts or other legal instruments that are passed by a legislative body (statutes) may be the source of norms in penal law[34].

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[29] K. Indecki, A. Liszewska, *Prawo karne materialne. Nauka o przestępstwie, karze i środkach penalnych*, Dom Wydawniczy ABC 2002, p. 32.

[30] See: *Konstytucja Rzeczypospolitej Polskiej* [marcowa], Dz.U. 1921, nr 44, poz. 267 (Journal of Laws of 1921, no. 44, item 267).

[31] See: Ustawa konstytucyjna z 23 kwietnia 1935 [kwietniowa], Dz.U., nr 30, poz. 227 (Journal of Laws, no. 30, item 227).

[32] K. Indecki, A. Liszewska, *op.cit.*

[33] See: Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997, Dz.U., nr 78, poz. 483 ze zm. (Journal of Laws, no. 78, item 483 with amended); see: K. Indecki, A. Liszewska, *op.cit.*, p. 31.

[34] See: A. Zoll, [in:] K. Buchała, A. Zoll (red.), *Kodeks karny Część ogólna. Komentarz*, Zakamycze 1998, p. 27.

A pre-war decree issued by the President of the Republic of Poland as well as post-war decrees of the State Council belong to the category of statutes.

Art. 87.1 of the Constitution of the Republic of Poland provides that among the sources of law in Poland are also ratified international treaties which have been published in the Journal of Laws, in accordance with art. 91.2 of the Constitution of the Republic of Poland: "An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such agreement cannot be reconciled with the provisions of such statutes".

Therefore, the rules of penal law can be "decoded" based on ratified international treaties[35].

The principle *nullum crimen sine lege* postulates three rules:

– prohibited acts may only be classified by statutory law (*nullum crimen sine lege scripta*);

– prohibited acts must be defined as precisely as possible (*nullum crimen sine lege certa*);

– analogy may not be used and interpretation may not be expanded to a perpetrator's disadvantage (*nullum crimen sine lege stricta*);

– kinds of prohibited acts must be precisely defined (*nullum crimen sine lege certa*).

The statutory description of a prohibited act should leave no doubt as to when citizens' conduct is considered a punishable act. If there is some doubt, then the *nullum crimen sine lege certa* principle is not fully adhered to.

This is true, for example, of the so-called evaluative features (e.g. "an insult" or pornographic content).

In such cases, it is the court that has to determine, in the process of interpretation[36], the content of such norms and, therefore, also the limits of a penalty for a given act, which contradicts the principle of a strict division of powers into the legislative and judicial branches[37].

Expanded interpretation takes place when the meaning ascribed to a given provision goes beyond the meaning that arises from linguistic interpretation[38]. For instance, the use of another person's telephone without the owner's consent can be considered a theft (art. 278, sec. 5., which prohibits the theft of energy or a bank card).

This is an example of an acceptable analogy.

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[35] Ustawa z 26 czerwca 1974 r. Kodeks pracy, Dz.U. 1974 r., nr 24, poz. 141, ze zm. (Journal of Laws 1974, item 141 as amended); orzeczenie Trybunału Konstytucyjnego z 13 VI 1994 (1/94) OTK 1994, część I, p. 271, orzeczenie Trybunału Konstytucyjnego z 1 III 1994, z 1 III 1994 (U 7/93), part I, p. 41; orzeczenie Trybunału Konstytucyjnego z 26 IV 1995, part I, p. 137; L. Kubicki, *Nowa kodyfikacja karna a konstytucja RP*, Państwo i Prawo 1998, 9–10, pp. 26–27.

[36] L. Gardocki, Typowe zakłócenia funkcji zasady *nullum crmen sine lege*, Studia Iuridica 1982, X.

[37] K. Indecki, A. Liszewska, *op.cit.*, p. 34.

[38] See: *ibidem*, p. 33.

It is inadmissible to use analogy in penal law when a person is found criminally responsible for conduct which is not exactly the same as but only similar to a particular prohibited act that is described in the Penal Code[39]. Using analogy by referring to specific provisions is known as *analogia legis*. This kind of analogy appeared in the Penal Code of 1969 which introduced the terms 'other similar activities' as well as 'in another similar manner' when defining preparation as well as aiding and abetting (see art. 14, sec. 1. and art. 18, sec. 2.). The terms expanded the scope of criminal responsibility for these acts.

Apart from *analogia legis*, there is also another kind of analogy – *analogia iuris*, which is aimed at filling the gaps not by referring to a specific provision, but to the general rules of the legal system (the so-called "spirit of the law"). Such an analogy was used in the decrees issued by the revolutionary authorities in Russia in 1917–1918 which appealed to a "revolutionary conscience". Similarly, the amendment of 1935 to the German Penal Code speaks of the "healthy sense of the nation". This kind of analogy is inadmissible in Polish penal law.

The *nullum poena sine lege* principle is defined in art. 1, sec. 1. This article states that: "Penal liability shall be incurred only by a person who commits an act prohibited under penalty, by a law in force at the time of its commission".

According to this principle, the legislator must describe the boundaries within which the court will make a decision about the kind of penalty for the perpetrator of a specific offence. Such a penalty must take into account both the character of a given act and the person who has committed this act (a relatively determined sanction). An absolutely determined sanction would reduce the court's role to only establishing a perpetrator's identity and fault. Therefore, the *nulla poena sine lege* principle would be violated if the determination of both the type and level of a penalty was left exclusively to the court's discretion (an indeterminate sanction).

The *nullum crimen sine lege* is a constitutional principle. It establishes the boundaries of criminal responsibility, thus acting as a guarantee[40].

The *nullum crimen sinle culpa* principle is relatively new. It should be remembered that fault cannot be identified with the subjective aspect of an unlawful act (intentional or unintentional).

This solution is based on the German concepts of fault and an act[41].

It is accepted in Polish legal literature that fault cannot be separated from the decision-making process because it is a basic factor in an act performed by a human

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[39] See: *ibidem*, p. 36.

[40] See: J. Śliwowski, *Prawo karne*, Warszawa 1947, p. 44 ff.; P. Wiliński, *Konstytucyjna gwarancja nullum poena sine lege a przepisy odsyłające w orzecznictwie Trybunału Konstytucyjnego*, [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Bosonoga, H. Kuczyńska (red.), *Problemy wymiaru sprawiedliwości, Księga Jubileuszowa Profesora Jana Skupińskiego*, Warszawa 2013, p. 194 ff.; J. Giezek (red.), *Kodeks karny. Część ogólna. Komentarz*, Lex 2012, p. 39.

[41] See: W. Mącior, *Zasady odpowiedzialności karnej w projekcie kodeksu karnego z 1995 r.*, Państwo i Prawo 1996, 6, p. 70.

being. Therefore, fault is connected with the internal and external freedom to choose one's conduct, which determines the decision-making process.

W. Mącior states that the topic of fault should not be discussed in isolation from the decision-making process[42].

According to the principle of fault, criminal responsibility depends on the possibility of attributing fault to the perpetrator of an act at the time of its commission (art. 1, sec. 3.)[43].

It is possible to accuse a person of committing an offence provided that several conditions are met. The existence of a particular psychological relation between a perpetrator and the act he/she commits is the most important condition. This relation describes the so-called subjective aspect of an unlawful act, irrespective of its type (an intentional or unintentional act). Objective responsibility, i.e. responsibility for an act leading to harmful consequences or endangering goods or values protected by law which was committed by a person through no fault of his/her own is not admissible in the present Polish legal system.

According to the above-mentioned art. 1, sec. 1. of the Penal Code, a perpetrator can only be held criminally responsible for an act he/she committed if this act was prohibited under penalty by a law in force at the time of its commission. In other words, penal law is not retroactive (*lex criminalis retro non agit*, *lex poenalis retro non agit*). This provision was already formulated in this way in the Penal Code of 1932.

Currently, this principle has the status of a constitutional principle (cf. art. 42.1 of the Constitution[44]). This solution has eliminated the doubt that existed when the Constitution of 1952 was in force (which did not contain an equivalent of art. 42.1), i.e. as to whether the principle may be used exclusively in reference to the Penal Code or it is possible to regulate this matter in a specific penal law[45].

Art. 42.1 of the 1997 Constitution clearly states that this principle must be recognised as having an absolutely binding (universal) character[46].

In the past this principle did not have such a character. In Polish penal law there were instances of an infringement of this principle.

After World War II two decrees that operated retroactively were passed. The decree that took effect on 22 January 1946 concerned criminal responsibility for the September 1939 defeat and the "fascisisation" of the State[47].

This decree (art. 10) stated that its provisions applied to the offences which were mentioned by the decree and which had been committed before 1 September 1939.

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[42] See: *ibidem*.

[43] Art. 1, sec. 3.: "The perpetrator of a prohibited act commits an offence if guilt can be attributed to him at the time of the commission of the act".

[44] Art. 42.1 of the Constitution: "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible (*in principio*) (...)".

[45] K. Indecki, A. Liszewska, *op.cit*., p. 41.

[46] See: A. Marek, *Prawo*..., p. 27.

[47] Dz.U., nr 5, poz. 46 (Journal of Laws, no. 5, item 46).

The decree dated 28 June 1946[48], which concerned criminal responsibility for renouncing Polish nationality during the war (1939–1945), provided (in art. 1, sec. 1.) that a person who had been a Polish citizen during the period between 1 September 1939 and 9 May 1945 and had adopted German nationality or another nationality that had been privileged by the invader would be held criminally responsible[49].

These decrees were abolished by art. 8 of the Amnesty Act (27 June 1956[50]).

Art. 61 of the 1981 decree concerning martial law as well as the offences and minor offences committed during the martial law period provided that this decree came into force on the day when it was issued (13 December 1981), but operated retroactively, i.e. as of 12 December 1981 (when it was passed).

The court and certain authors decided that art. 61 contained a clause that was an exception to the *lex penalis retro non agit* principle. There is no doubt at present that this provision was in clear contradiction to the *lex retro non agit* principle, which was expressed in art. 15 of the International Covenant on Civil and Political Rights[51] (ICCPR), ratified by Poland in 1977. Art. 15 of the ICCPR was ruled by the Supreme Court to be a self-executing international legal norm[52].

The prohibition of retroactivity was also violated in the later period.

Therefore, this principle cannot be regarded as absolute.

One can point to partial exceptions to this rule.

For example, art. 1.1 (dated 31 August 1944) of the decree concerning the level of penalty for fascist-Nazi war criminals who were guilty of murders and the abusing of civilians and captives as well as for traitors to the Polish nation (Journal of Laws of 1946, no. 69, item 377), made the penalties for the offence of murder more severe as compared to those provided for in the Penal Code of 1932.

Art. 1.1 of this decree (following the appropriate amendments) is still in force by means of art. 5, sec. 1.3. of an act introducing the Penal Code of 1997.

Art. 9, sec. 1. of the provisions introducing the Polish Penal Code also states that "the limitation period for prosecuting intentional offences against life, health, liberty or the administration of justice which are subjected to the penalty of dep-

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[48] See: Dz.U., nr 41, poz. 237 (Journal of Laws, no. 41, item 237).

[49] See: Art. 22 of the decree.

[50] See: Ustawa o amnestii, Dz.U., nr 11, poz. 57 (Journal of Laws, no. 11, item 57).

[51] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with article 49.

[52] See: orzeczenie składu 7 sędziów Sądu Najwyższego z 17 X 1991 r. II KRN 274/91, OSNKW 1992, 3-4/19. Art. 15 ICCPR: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. Available e.g.: http://www.ohchr.org./EN/ProfessionalInterest/Pages/CCPR.aspx

rivation of liberty for more than three years and which were committed by public functionaries – during the period between 1 January 1944 and 31 December 1989 – when they were performing their duties or in connection with the performance of their duties, commences on 1 January 1990".

Constitutional norms provide a support for a partial derogation from the prohibition of retroactivity, which actually aggravated a perpetrator's situation.

Art. 42, sec. 1., sentence 2. of the Constitution provides that the *nullum crimen sine lege anteriori* principle "shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law".

This norm is derived, for example, from:

a) art. 7, sec. 2. of the Convention for the Protection of Human Rights and Fundamental Freedoms;

b) art. 15, sec. 2. of the International Covenant on Civil and Political Rights (the introduction contains retroactive clauses)[53].

According to the principle of criminal responsibility for an act, human beings are held criminally responsible solely for their external conduct (actions or omissions, i.e. failure to act).

Therefore, one's psychological experiences do not constitute acts.

Criminal responsibility is always associated with acts that endanger goods or values protected by law, and not with a danger posed by a human being's characteristics or opinions.

As for a "dangerous" perpetrator, penal law provides for the possibility of using different measures if the characteristic of 'being dangerous' resulted, for example, from a mental illness, sexual preference disorder, etc. (see art. 93 of the Penal Code)[54].

These measures are known as preventive measures and they can be applied on condition that a given perpetrator has already committed a prohibited act before, which is one of the elements of the assessment of the perpetrator.

The principle of individuality and personal responsibility excluded collective responsibility and the responsibility for an act committed by another person.

Every human being bears responsibility for his/her conduct, and the penalty for an offence should be burdensome for a given perpetrator personally.

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[53] See: ustawa o zmianie ustawy z 4 IV 1991 r. o Głównej Komisji Badania Zbrodni Hitlerowskich w Polsce – Instytucie Pamięci Narodowej, Dz.U., nr 45, poz. 195 (Journal of Laws, no. 45, item 195); see also: Art. 9, sec. 1. Przepisów wprowadzających kodeks karny, ustawa z 1977, nr 88, poz. 554, ze zm. (Journal of Laws, no. 88, item 554 as amended); see: art. 4, sec. 2. "The Provisions introducing the penal code according to these norms statutes and decrees, foresee amnesty and abolition could not be applied to the perpetrators that committed the act described in art. 9, sec. 1"; see also: art. 4, sec. 2. "The Provisions introducing the penal code according to these norms statutes and decrees, foresee amnesty and abolition could not be applied to the perpetrators that committed the act described in art. 9, sec. 1".

[54] See: K. Indecki, A. Liszewska, *op.cit.*, p. 36.

A pecuniary penalty (fine) may not always be adequate because it is not only painful for the person who has committed an offence, but, for example, also for the members of his/her family[55].

The principle of humanitarianism is expressed in art. 3 of the Penal Code which states that "Penalties and other measures provided for in this Code shall be applied with a view to humanitarian principles, particularly with the respect for human dignity".

This principle also applies to preventive measures and probation measures (see art. 66 et seq., art. 69 et seq., and art. 77 et seq.), to penal law in general and to the so-called additional penal law (including the Code of Criminal Procedure) as well as to perpetrators and wronged persons.

Human dignity is the source of this principle[56].

The principle of humanitarianism is a principle of penal law – its function is to correct the penalties and other measures that are imposed on people[57].

Art. 3 is connected with art. 40 of the Polish Constitution which provides that: "No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited"[58].

Human dignity can be violated in many ways – any attack on human freedom or infringement of human rights constitutes a violation of human dignity[59]

2. Offence

A substantive definition of an offence, which was based on the concept of the social danger of an act, was presented in art. 1 of the 1969 Penal Code[60]; it has been replaced by a five-element definition of an offence (cf. art. 1 of the Penal Code).

A violation of a sanctioned norm is the first element of this definition and constitutes the basis of criminal responsibility, unless such a violation happens in circumstances excluding the unlawfulness of a particular act[61].

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[55] See: *ibidem*, pp. 36–37.

[56] See: A. Zoll (red.), *Kodeks karny. Część ogólna*..., p. 92; A. Zoll, *Zasady odpowiedzialności karnej*, [in:] *Nowa kodyfikacja karna*, Warszawa 1998, p. 58.

[57] See also: V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń 2002, p. 69.

[58] See: Compare: K. Indecki, *The Main Features and Principles*...; see also: W. Zalewski, *Zasady odpowiedzialności karnej*, [in:] M. Królikowski, R. Zabłocki (red.), *Kodeks karny. Część ogólna, t. I. Komentarz do artykułów 1–31*, Wydawnictwo C.H. Beck 2011, p. 263.

[59] See: K. Indecki, A. Liszewska, *op.cit*., p. 37.

[60] D. Bogacz, *Idea ludzkiej godności jako źródło instytucji praw człowieka w świetle filozofii Hansa Wagnera*, [in:] L. Dubel (red.), *Idee jako źródło instytucji politycznych i prawnych*, Lublin 2003, p. 266 ff.; Article 1 states: "Penal liability shall be incurred only by a person who commits a socially dangerous act prohibited under threat of penalty by law in force at the time of its commission". So Article 1 introduces, to the Penal Code of 1969, the *nullum crimen sine lege periculo sociali* principle.

[61] *Ibidem*.

Unlawfulness, i.e. the second element of this structure, is determined by assessing the compatibility of an act with a legal norm[62].

A specific unlawful, prohibited act is classified based on the features that are described in the specific and the general parts of the Penal Code.

The requirement that an act be punishable is the next element of the definition of an offence and means that there can be no circumstances excluding the possibility of imposing a penalty.

The social danger of an act that is greater than insignificant is the fourth element of the structure of an offence is the fourth element of the structure of an offence [PL: *karygodność*].

Art. 1, sec. 2. of the Penal Code imposes an obligation to establish whether a prohibited act is punishable (a procedural requirement) and whether it is socially dangerous (a substantive requirement)[63].

The social danger of acts plays an important role in assessing a perpetrator's conduct – it determines the limits of a penalty (by also taking the degree of fault into consideration). The concept of the social danger of an act is defined in art. 115, sec. 2. of the Penal Code[64].

Fault is the last element of the structure of an offence; it is understood as a personal accusation against a perpetrator. It means that a person committed a prohibited act (thus violating a sanctioned norm) although he/she could behave differently.

The Penal Code of 1997 does not define the concept of an act (it only provides a definition of a prohibited act: "A prohibited act is a behaviour displaying the characteristics specified in the penal law as unlawful" – art. 115, sec. 1.).

According to art. 11, sec. 1., "The same act may constitute only one offence".

Consequently, the number of acts does not depend on the number of criminal consequences.

Also, the Penal Code does not provide a definition of fault.

If fault constitutes a personal accusation then intent/lack of intent is a feature of an act.

Such an approach to the concepts of fault and an act led to distinguishing the concept of an intentional/unintentional act and the concept of fault[65]. Thus, fault is not an element of an act.

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[62] See: Z. Jędrzejewski, *Bezprawność, jako element przestępczości czynu. Studium na temat struktury przestępstwa*, Warszawa 2009.

[63] Art. 1, sec. 2: „A prohibited act whose social consequences (danger) is insignificant shall not constitute an offence". See also: A. Bartczak-Opustil, *Sporne zagadnienia istoty winy w prawie karnym, Zarys problemu*, Czasopismo Prawa Karnego i Nauk Penalnych 2005, 2.

[64] Art. 115, sec. 2 states: "In assessing the level of social consequences of an act, the court shall take into account the type and nature of the infringed interest, the dimension of the damage caused or anticipated damage, the method and circumstances of perpetrating the act, the importance of the duties breached by the perpetrator, as well as the form of intent and motivation of the perpetrator, the type of precautionary rules breached and the degree of the transgression".

[65] See: M. Królikowski, *Zasady...*, [in:] M. Królikowski, R. Zabłocki (red.), *Kodeks karny...*, t. I, p. 384 ff.

The Penal Code of 1997 ceased to use the concepts of an intentional and unintentional fault (which had been used in the previous Penal Codes). The constructs of an intentional and unintentional act should therefore be treated as technical in nature[66].

An offence is intentional if the perpetrator acts with direct intent or oblique intent (*dolus directus* and *dolus eventualis*).

Direct intent involves a desire to commit a prohibited act (art. 9, sec. 1. of the Penal Code).

For direct intent to be apportioned to a perpetrator, one must establish that the perpetrator was aware of the circumstances surrounding the commission of a prohibited act as well as its consequences if these constituted a feature of this act.

Such awareness which is understood as an element of direct intent can take the form of an awareness of the inevitability or possibility of committing a prohibited act as a result of particular conduct if the perpetrator intends to commit such an act[67].

Oblique intent is characterised by the fact that a perpetrator foresees the possibility of committing a prohibited act as a result of particular conduct, but nonetheless accepts this possibility. In other words, the Penal Code stipulates that a perpetrator must be aware of the possibility of committing a prohibited act. There is no widely accepted definition of "accepting such a possibility" in the legal literature[68]. The dominant view seems to be that this term denotes the awareness that it is highly probable that one will commit an act having the features of a prohibited act as a result of conduct directed towards achieving the expected goal. This awareness, however, does not make the perpetrator give up a particular act (goal), nor does it limit the intensity of his/her conduct or cause him/her to use different means that would lead him/her to achieve a different goal, even though this would involve a lower probability of committing a prohibited act.

An intentional act is an act that was committed in circumstances which do not constitute grounds for assuming that the perpetrator acted in error (cf. art. 28, sec. 1. of the Penal Code).

Intent is established *ex ante*, not *ex post*[69].

The Statement of reasons for the draft of the Penal Code states that the new Penal Code introduces a new definition of an unintentional prohibited act (where-

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[66] Uzasadnienie, par. 12.; In this paper circumstances excluding the act will be passed over.

[67] See: M. Królikowski, *Zasady...*, [in:] M. Królikowski, R. Zabłocki (red.), *Kodeks karny...*, t. I, p. 388 ff.

[68] J. Waszczyński, *Prawo karne w zarysie*, Łódź 1992, p. 211; K. Buchała, *Prawo karne materialne*, Warszawa 1980, s. 341; A. Berger, *Usiłowanie cum dolo eventuali*, Głos Sądownictwa 1934, 2, p. 138; H. Jescheck, T. Weigend, *Lehrbuch, des Strafrechts, Allgemainer Teil*, Berlin 1996, p. 300 ff.; Z. Jędrzejewski, *op.cit.*, p. 50; A. Kopeć, *Próba ustalenia kryterium rozgraniczającego zamiar ewentualny od innych postaci strony podmiotowej czynu*, Wojskowy Przegląd Prawniczy 1992, 1–2, pp. 40–51.

[69] See: wyrok SM z 8 I 2004, II KK 230/03, OSNwSK 2004, 1/42.

as the definitions of direct and oblique intent are the same as those in the previous Penal Codes)[70].

Art. 9, sec. 2. is based on the principle of distinguishing between fault and the subjective elements of an act[71].

Thus, art. 9, sec. 2. reads: "A prohibited act is committed without intent when the perpetrator not having the intent[72] to commit it, nevertheless does so because he is not careful in the manner required under the circumstances, although he should or could have foreseen the possibility of committing the prohibited act".

Unintentional acts involve a violation of cautionary standards and the capability (as perceived objectively) of foreseeing the probability of damaging or destroying particular goods or values that are protected by law.

Cautionary standards are established based on legal norms that are presented in various legal instruments, for example, in the Road Traffic Act[73].

If cautionary standards are not precisely defined by statute, one should refer to the patterns that constitute criteria for assessing the objectively perceived capability of foreseeing particular consequences as well as a violation of the rules of conduct relating to particular goods or values protected by law (e.g. for a model physician, translator/interpreter, etc.)[74].

An 'intentional prohibited act' and 'unintentional prohibited act' are the terms which supersede the concepts that were formerly used with reference to unintentional acts, i.e. 'recklessness' and 'negligence' (see the Penal Code of 1969).

Polish penal law (beginning with the Code of 1932) states that: "the misdemeanour" [author's comment: 'less serious offences' is the appropriate term] may also be committed without intent, if the law so stipulates" (art. 8).

With regard to intent, all offences can be divided into the following categories: intentional-intentional (when an intentionally committed act has intended consequences), unintentional-unintentional (when an unintentionally committed act has unintended consequences), and intentional-unintentional (when an intentionally committed act has unintended consequences). These combinations result from the wording of the Penal Code, or more specifically, of art. 9, sec. 1. and art. 9, sec. 3. The latter provides that: "The perpetrator shall be liable to a more severe liability which the law makes contingent on a certain consequence of a prohibited act, if he has and could have foreseen such a consequence".

The prohibited act that is defined in art. 207 of the Penal Code, is an example

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[70] See: *Uzasadnienie do Projektu Kodeksu Karnego*..., p. 3.

[71] See: J. Giezek, *Deformacje spostrzegania jako przyczyna przestępstw nieumyślnych*, Nowe Prawo 1990, 45, p. 133 ff.

[72] R. Zawłocki, *Nieumyślność, jako podstawa odpowiedzialności karnej – w poszukiwaniu kompromisu*, Monitor Prawniczy 2008, 11, p. 569 ff.; T. Dukiet-Nagórska, *Reguły ostrożnego (standardy) postępowania w publicznych zakładach opieki zdrowotnej*, Prawo i Medycyna 2004, 3, p. 5.

[73] Dz.U., nr 98, poz. 602 ze zm. (Journal of Law, no. 98, item 602, as amended).

[74] See: M. Królikowski, *Zasady*..., [in:] M. Królikowski, R. Zabłocki (red.), *Kodeks karny*..., t. I, p. 415.

of an offence of the first kind, i.e. an intentional-intentional act. This provision penalises a perpetrator (intentionally) abusing a certain category of persons, which is indicated therein (for example, a person who is close to him/her). Article 207, sec. 3. defines the responsibility for consequences such as a wronged person's suicide. If a perpetrator intentionally abuses a given person so that the person commits a suicide, this perpetrator commits an intentional-intentional act[75].

One can also commit an unintentional offence with regard to the basic kind of offence and its consequences.

This concept was only introduced by the Penal Code that is currently in force, i.e. in art. 165, sec. 2. which penalises anyone who unintentionally "causes danger to the life or health of many persons or property of a considerable value by causing an epidemiological hazard or spread of a contagious disease or an animal or plant disease (pest)", whereas sec. 4 states the following: "If the consequence of act specified in sec. 2. is the death of a person, or grievous bodily harm to many persons, the perpetrator shall be subject to the penalty [...]".

Intentional-unintentional offences (*culpa dolo exorta*) are defined in art. 9, sec. 3. of the Penal Code.

According to this provision:

– the basic act must be committed intentionally;

– this act must have such (dynamic) consequences that entail stricter criminal liability provided that the perpetrator foresaw or could foresee these consequences[76]. This refers, for example, to the situation that is described in art. 156. In accordance with sec. 1 of this article, for example, if a perpetrator intentionally does a grievous bodily harm to another person without the intention of causing this person's death but if the perpetrator foresaw or could foresee such a consequence of his/her act, he/she will not be held liable for causing death, but under art. 156, sec. 3., according to which: "If the consequence of an act specified in sec. 1 is the death of a human being, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 2 and 12 years".

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[75] Article 207, sec. 1. Whoever mentally or physically mistreats a person close to him, or another person being in a permanent or temporary state of dependence to the perpetrator, a minor or a person who is vulnerable because or his mental or physical condition shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years; sec. 2.: If the act specified in sec. 1 is compounded with a particular cruelty, the Perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years; sec 3: If the consequence of the act specified in sec. 1. or 2. is a suicide attempt by the injured person on his or her life, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.

[76] Art. 9, sec. 3: The perpetrator shall be liable to a more severe liability which the law makes contingent on a certain consequence of a prohibited act, if he has and could have foreseen such a consequence.

3. Element excluding offence. Circumstances excluding or reducing the degree of fault

Among the circumstances that exclude fault are, most of all, insanity (limited sanity), age, making a mistake and carrying out an order[77].

The division of the elements of penal responsibility into subjective and objective ones in penal law cannot be equated with the concept of fault.

Fault can only by determined *ex ante*, i.e. after establishing if it is possible that particular conduct did not violate a sanctioned norm (which means the absence of a subjective element of fault).

Therefore, an opinion on someone's insanity should only be given after a prohibited act has been performed.

It is, however, impossible to clearly identify those disease entities which exclude someone's sanity. The court decides whether a perpetrator is insane by taking account of opinions given by three expert witnesses, i.e. two psychiatrists and a psychologist, or a sexologist in cases involving persons with sexual preference disorders.

Insanity excludes criminal responsibility based on art. 31, sec. 1. of the Penal Code, which provides that a person who was unable to recognise the significance of a particular act or control his/her conduct because of a mental disease, impairment or another mental disturbance when committing this act did not commit an offence: "Whoever, at the time of the commission of a prohibited act, was incapable of recognising its significance or controlling his conduct because of a mental disease, mental deficiency or other mental disturbance, shall not commit an offence".

The expression "because of" which is used in the provision cited above indicates that it is necessary to establish a connection between a mental disease, etc. and an act.

If someone whose sanity is limited commits a prohibited act this does not exclude his/her criminal responsibility, which means that if a perpetrator's ability to recognise the significance of a given act or to control his/her conduct was considerably limited at the time of committing an offence, the court may impose an extraordinarily mitigated penalty (art. 31, sec. 2.): "If at the time of the commission of an offence the ability to recognise the significance of the act or to control one's conduct was diminished to a significant extent, the court may apply an extraordinary mitigation of the penalty".

Particular problems are associated with establishing the principles of criminal responsibility when someone commits a prohibited act in a state of insobriety or while intoxicated. The Penal Code of 1997 refers to art. 31, sec. 1. and 2. and states that if a person got into a state of insobriety or became intoxicated, which led to a lack or impairment of the person's sanity, and if the person foresaw or could foresee this, he/she will be held criminally liable (art. 31, sec. 3.). Therefore, this provision in-

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[77] See: A. Zoll, *Wina i unormowanie art. 33 ust. 3 KK*, [in:] *IV Kolokwium bielańskie. Okoliczności wyłączające winę*, http://www.law.uj.edu.pl/karne/index.php/kolokwium-bielanskie-2009--prof-dr-hab-andrzej-zoll

troduces an exception to the necessity of determining whether someone was at fault when he/she was committing a particular act (see art. 31, sec. 1. of the Penal Code) by stating that a person's fault is determined based on the situation that had occurred before the person committed a prohibited act if he/she was in a state of insobriety (had over 0.5 per mille of alcohol in the blood or over 0.25 mg of alcohol per 1 dm^3 of exhaled air) or in a state in which the body's functions were disturbed after the person had taken intoxicating substances other than alcohol. The fault of the perpetrator who committed a prohibited act in a state of insobriety is called social fault.

It is considered that a perpetrator is able to recognise the significance of the act he/she is committing or control his/her conduct if the perpetrator got into a state of insobriety or became intoxicated voluntarily (and not, for example, under duress) and if he/she was not pathologically intoxicated and did not have alcohol poisoning.

Also, the perpetrator must know what influence alcohol or other intoxicating substances will have on his/her conduct. All of the other circumstances are insignificant as far as the attribution of responsibility to such a perpetrator is concerned.

Certain authors state that art. 31, sec. 3. introduced objective criminal responsibility by introducing criminal liability for committing a prohibited act while in a state of insobriety or intoxication in order to protect society from persons who commit acts having serious consequences while in a state of insobriety or intoxication[78].

In accordance with the provisions of the Penal Code, one should identify the following kinds of mistakes, which are understood as a discrepancy between reality and its image in a person's mind[79]:

– a mistake concerning the circumstances that constitute a feature of a prohibited act (*error facti*);

– a mistake excluding the unlawfulness of an act or fault;

– a mistake regarding the legal assessment of an act (*error iuris*).

Error facti must be related at least to one of the features of a given prohibited act. Because of this kind of mistake the perpetrator is not aware that such a feature exists, as a result of which one cannot attribute intentionality to him/her.

If there is no unintentional less serious offence that would be a "counterpart" of a particular intentional act, the perpetrator is not held criminally liable. Otherwise, he/she can be held liable for committing an unintentional offence (e.g. for causing someone's death unintentionally).

As for intentional offences, this kind of mistake excludes or limits criminal liability, whereas as for unintentional offences, it changes their nature from legally neutral conduct into unlawful conduct, thus transferring a person's conduct into the illegality and paving the way for establishing the perpetrator's fault based on art. 9, sec. 2. of the Penal Code[80].

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[78] See for example: C. Roxin, *Strafrecht, Allgemeine Teil*, Berlin 1992, p. 557 ff.

[79] See: W. Wolter, *Nauka o przestępstwie*, Warszawa 1973, p. 220.

[80] Article 7, sec. 1. of Penal Code of 1997 states: "An offense is either a serious-offence or less-serious-offences; Article 8: A serious-offense may be committed only intentional; a less-serious-offense moreover may be committed unintentional, if the law so provides".

A mistake related to the features of a particular kind of offence is relatively less serious than the kind of mistake which is referred to in art. 28, sec. 2. of the Penal Code (a mistake related to a circumstance that constitutes a feature of a mitigated kind of a prohibited act). A reference is made to this kind of mistake after the court has considered whether a given mistake was excusable.

A perpetrator is said to have had a justified false belief if a (hypothetical) model citizen would have assessed a given situation in the same way as the perpetrator. If the court decides that a particular mistake was inexcusable then the perpetrator will be held liable for committing the basic kind of offence.

It should be emphasised that a mistake relating to the features of an aggravated kind of offence is not regulated by the Penal Code.

This is why proposals concerning the solution to the problem of the responsibility of a person who acted while making such a mistake have been presented in the literature on the subject.

This topic, however, is beyond the scope of this monograph.

A mistake that excludes the unlawfulness of an act or a person's fault (art. 29 of the Penal Code) is based on a justified false belief held by the person that there is a circumstance excluding unlawfulness or fault[81].

This is a new regulation of the issue of a mistake in Polish penal law, in particular as regard the practical significance of a mistake excluding fault is relatively small – it concerns two circumstances: the state of higher necessity and a collision of duties in so far as they exclude a person's fault s circumstances excluding fault.

A mistake excluding unlawfulness is based on the assumption that such a mistake is related to circumstances other than the legal assessment of an act. Such a mistake is referred to as a mistake of law (see below).

This kind of mistake does not exclude intent, but it does exclude fault. This is because art. 29 of the Penal Code provides that if a perpetrator's mistake was excusable, fault cannot be attributed to him/her; if, however, the mistake was inexcusable, the perpetrator is considered to have committed an offence, but the court can apply an extraordinarily mitigated penalty. As a result, an offence that was committed by a person who made such a mistake will be regarded as an unlawful act.

A mistake regarding the legal assessment of an act should be treated as *error iuris* (art. 30 of the Penal Code).

Art. 30 of the Penal Code is connected with assessing the legal aspect of an act, i.e. with an erroneous assessment of a prohibited act's unlawfulness (a perpetrator mistakenly assumes that his/her conduct is allowed), and not with particular features of this prohibited act. If a perpetrator made an excusable mistake, the perpetrator is considered not to have committed an offence: "Whoever commits a prohibited act while being justifiably unaware of its unlawfulness, shall not commit

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[81] See: J. Giezek, *Przekroczenie granic rzeczywistej oraz mylnie wyobrażonej obrony koniecznej*, [in:] *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Prof. Andrzeja Wąska*, Lublin 2005, p. 141 ff.

an offence". However, "if the mistake of the perpetrator is not justifiable, the court may apply an extraordinary mitigation of the penalty" (art. 30 of the Penal Code)[82].

This kind of mistake establishes the standards of knowledge about prohibited acts. A perpetrator's mistake is excusable if the perpetrator acted following an opinion that had been given by a public authority or another specialist (an attorney), including an opinion expressed orally[83].

The appropriate age of a perpetrator is also a condition of criminal responsibility; age sets the "threshold" of this responsibility, which means that fault can be regarded as the "result" of reaching the appropriate age[84].

The issue of the principles of criminal liability as depending on age has already been discussed above.

It can be added that if a perpetrator has not reached the appropriate age he/she cannot be considered to be at fault. Fault should only be attributed to persons who are over the age of 15 after assessing the degree of their psychological and physical development. In particular, it must be proved that such a person could recognise the significance of his/her act[85].

In principle, if a person has not reached the appropriate age (i.e. of 17 at the time of committing an act), this is a circumstance excluding the person's fault; the age of those perpetrators who have not reached 15 years of age and who have committed one of the acts defined in art. 10, sec. 2. of the Penal Code constitutes a circumstance reducing the degree of their fault.

Art. 10 of the Penal Code determines the lower age limit for criminal responsibility.

This rule (which makes criminal responsibility dependent on the perpetrator's age) acts as a guarantee, i.e. it protects the dignity of human beings, which means that no one can be penalised if he/she has not reached the age that is required by the Penal Code.

As it has been stated earlier in this monograph, the minimum age for criminal responsibility is basically 17.

Therefore, the Penal Code provides that the court may apply educational or corrective measures with regard to a perpetrator who committed a less serious offence after reaching 17 and before reaching 18 years of age if the circumstances of the case as well as the degree of the perpetrator's development, his/her characteristics and personal situation so warrant[86]. The minimum age for criminal responsibility is 15 for minors who commit acts such as the premeditated homicide of another person

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[82] See: M. Królikowski, *Przedawnienie*, [in:] M. Królikowski, R. Zawłocki (red.), *Kodeks karny. Część ogólna. Vol. I, Komentarz do artykułów 1–31*, Wydawnictwo C.H. Beck, 2011, p. 931.

[83] See: wyrok SA w Katowicach z 29 II 2006, II AKa 96/06, KZS 2007, 5/53.

[84] See: J. Giezek, *Kodeks karny*..., p. 33.

[85] K. Indecki, A. Liszewska, *op.cit*., p. 203.

[86] Art. 10, sec. 4. states: "With regard to the perpetrator who commits a prohibited act after having attained 17 years of age but before having reached the age of 18 years, the court shall, instead of a penalty, adopt educational, therapeutic, or corrective measures prescribed for juveniles, if the circumstances of the case and the mental state of development of the perpetrator, his characteristics and personal situation warrant it."

(art. 148, sec. 1., 2. and 3.), causing bodily harm (art. 156, sec. 1. or 3.), or causing a road, water or air traffic catastrophe (art. 173, sec. 1. or 3.).

A minor can be held criminally responsible if he/she has committed one of the above-mentioned acts and also "if the circumstances of the case and the mental state of development of the perpetrator, his characteristics and personal situation warrant it, and especially when previously applied educational or corrective measures have proved ineffective" (art. 10, sec. 2. of the Penal Code)[87].

Relevant studies showed that the deprivation of the liberty of a juvenile may help to form his/her personality in the right way[88].

The above-mentioned solution which has been adopted in the Penal Code is also the result of growing number of offences committed by juveniles. This experience was an encouragement to propose that the minimum age of criminal responsibility be lowered to 13 years. However, this proposal has not been accepted so far.

The concept of fault constitutes a principle that must be taken into account when imposing a penalty, the degree of which should not exceed the degree of fault.

Fault does not reflect a perpetrator's character, but rather his/her personality or lifestyle[89].

Fault should not be equated with an intentional or unintentional act (see above).

The dominant view in the Polish literature is that an assessment of whether given conduct was unlawful is not only connected with conforming to a sanctioned norm, but also with stating, according to one's knowledge, that there were no circumstances that allowed the perpetrator to violate this norm.

Therefore, it is necessary to differentiate between a violation of a norm and an assessment of whether such a violation is unlawful if one wants to determine whether a given act is unlawful. Such an assessment concerns two elements: the lack of conformity to a sanctioned norm and the lack of regulations that would allow one to assume that given conduct violating this norm is lawful, which are generally known as circumstances excluding unlawfulness.

The list of rules that allow one to infringe on or sacrifice a given good or value protected by law in order to protect another person is open-ended. A perpetrator can also assess the unlawfulness of an act him-/herself (art. 30 of the Penal Code).

To conclude this part, it should be added that there is a certain group of perpetrators, i.e. soldiers (members of the Armed Forces), who act in special circumstances and to whom one cannot attribute fault.

A soldier's penal responsibility is excluded if: a soldier commits a prohibited act which constitutes the execution of an order, and a soldier acts while being mistaken about a circumstance that constitutes a feature of a given kind of an offence (i.e. a soldier did not realise that he/she was committing an offence when carrying out an order).

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[87] See also: A. Wąsek, *Kodeks karny...*, p. 32.

[88] *Ibidem*.

[89] *Ibidem*; see also: ustawa o postępowaniu w sprawach nieletnich, t.j. Dz.U. 2010, nr 33, poz. 178, ze zm. (consolidated text: Journal of Laws of 2010, no. 33, item 178, as amended).

These rules are not applicable if a soldier commits a prohibited act as a result of a coincidence while carrying out an order, if he/she commits a prohibited act when executing an order which does not constitute an offence, and if he/she commits such an act contrary to an order or if he/she carries out an order in an inappropriate way.

A soldier does not commit an offence if he/she acts because there is an ultimate need to do so (using the necessary means to enforce obedience on the part of a disobedient or resistant soldier) (cf. arts. 318 and 319 of the Penal Code.).

It should be emphasised that only the necessity excludes unlawfulness and fault. The majority of justification defences are based on the collision of goods and values protected by law. Circumstances excluding unlawfulness are referred to as justification defences (justifications – PL: *kontratyp*). Justifications belong to the category of that kind of conduct which is socially advantageous, i.e. which is not socially dangerous[90]. These circumstances cause a prohibited act to become legal in penal law[91].

Justifications can be divided into statutory ones self-defence, necessity, admissible risk connected with experiments, and acting because there is an ultimate need to do so) and non-statutory ones (among which the most important ones are: sports risk, medical activities, and the wronged person's consent)[92].

Two of them are discussed below, i.e. self-defence and the state of higher necessity, which are the most representative of this category of circumstances. A common feature of these two justifications is that they are based on the collision of goods and values protected by law.

Self-defence is regulated by the Penal Code, art. 25 of the Penal Code.

Self-defence is admissible if the following conditions, which are inferred from this provision, are met:

a) conditions related to an attack:
   – imminence
   – unlawfulness
   – verity;
b) conditions related to defence:
   – unlawfulness of the assault (attack) that is being repelled
   – necessity.

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[90] R. Zawłocki, *Pojęcie i funkcje społecznej szkodliwości w prawie karnym*, Warszawa 2007, p. 344 ff.

[91] See: Z. Jędrzejewski, *Bezprawność*..., p. 163 ff.

[92] See: W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Warszawa 2010, p. 343; A. Zoll, *„Pozaustawowe" okoliczności wyłączające odpowiedzialność karną w świetle konstytucyjnej zasady podziału władzy*, [in:] *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, Lublin 2005, p. 427; See: J. Warylewski, *Zasada ustawowej określoności przesłanek odpowiedzialności karnej a kontratypy pozaustawowe*, [in:] J. Majewski (red.), *Okoliczności wyłączające bezprawność czynu*, Kraków 1993, p. 21.

An assault is a person's (assailant's) conduct which takes the form of an action or omission (failure to act) and is aimed to pose an imminent threat to goods and values that are protected by law (someone's life, health or possessions)[93].

Such an attack must be criminally unlawful and against private or international law[94].

As for criminal unlawfulness, also conduct which is not an offence, for example, conduct on the part of a person to whom one cannot attribute fault, constitutes an attack. The unlawfulness of an act cannot be excluded on the grounds of a perpetrator enjoying immunity.

An assault must be real and imminent. The imminence of an attack is usually connected with its temporal proximity (there is a high probability that a particular good or value protected by law will be immediately attacked). When an assault is stopped, this does not exclude its imminence if the person who is repelling such an assault is convinced that it will continue.

An assault is real if it happens as part of an objectively existing situation and constitutes a real threat to goods or values protected by law (i.e. if this is not only an imagined threat)[95]. An imagined threat to such goods or values is considered in terms of a mistake related to a justification.

Self-defence is human conduct which is aimed to repel an assault. The intensity of defence is connected with the level of a threat posed by an assault. In practice this means that defence can only be effected with the minimum intensity necessary to repel an assault. If this level is exceeded then the person who is repelling an assault is committing an offence, i.e. an act in excess of self-defence in terms of its intensity. Therefore, this kind of exceeidance is characterised by conduct that is disproportionate to the threat that is posed by an assault.

An act committed in excess of self-defence in terms of its extensiveness is another kind of exceedance, which entails the lack of a clear temporal relationship between an assault and defence. Both kinds of exceedance constitute an offence. When a person acted in excess of self-defence, the court may apply an extraordinarily mitigated penalty or even refrain from imposing a penalty (art. 25, sec. 2. of the Penal Code)[96].

According to art. 25, sec. 2. of the Penal Code, "In the event that the limits of necessary defence have been exceeded, in particular when the perpetrator has used a means of defence disproportionate to the danger of the attack, the court may apply extraordinary mitigation of the penalty and even renounce its imposition".

Art. 25, sec. 3. of the Penal Code provides that whoever exceeded the limits of self-defence because of fear or emotional distress which was justified by the circumstances surrounding an assault will not be penalised.

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[93] According to A. Majewski an animal can be also the source of attack. See: A. Majewski, *Prawa człowieka a prawa zwierząt*, Gdańskie Studia Prawnicze 2005, 13, p. 58 ff.

[94] See: A. Zoll (ed.), *Kodeks karny. Część ogólna*, p. 405.

[95] See: A. Marek, *Obrona konieczna. Teoria i orzecznictwo*, Warszawa 2008, pp. 71–74.

[96] A. Marek, *Obrona konieczna*..., pp. 91, 92, 139, 148, 156.

This is not a special form of self-defence and it does not exclude liability (but it reduces this liability)[97].

In 2011[98] the legislator added a new provision to art. 25 of the Penal Code with the following wording (sec. 4.): "Whoever repels an attack on another person's goods or values protected by law, thus defending public safety or public order will enjoy the protection that is provided for public officers". This provision will not be applicable if a person repelled an assailant who was only attacking this person's honour or dignity (sec. 5.).

The legislator made several changes to the way in which the structure of the concept of the necessity was presented in the Penal Code of 1969[99]. In particular, the necessity that excludes fault was separated from the necessity that excludes unlawfulness (see above).

The necessity which is understood as a circumstance excluding unlawfulness is normatively based on art. 26, sec. 1. of the Penal Code.

According to this provision, the necessity is about averting an imminent threat to a good or value protected by law by sacrificing another good or value protected by law which is of lesser worth than the good or value that is being saved if such a threat cannot be averted in any other way (at a given moment).

This is a special situation – conflicting goods and values are protected by law. The concept of necessity is only applicable when the sacrificed good or value has been destroyed or damaged. The destruction or damaging of a good or value does not lead to criminal liability if such an action was justified, i.e. if the protected good or value was under threat regardless of the source of such a threat (also, for example, when an animal or human being was the source of such a threat)[100].

In this latter case the good or value that has been destroyed or damaged must belong to a third party. Moreover, the danger must be imminent. Another condition is that the destruction or damaging of a good or value protected by law cannot be avoided in any other way than by sacrificing some other good or value (the subsidiarity principle[101]), and the sacrificed good or value must be somewhat proportionate to the good or value that is being saved (the proportionality principle[102]).

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[97] See: A. Filar, *W obronie obrony koniecznej*, [in:] *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warszawa 2007, p. 57–59; M. Filar, *Podstawy odpowiedzialności karnej w nowym kodeksie karnym*, Palestra 1997, 11–12, p. 15.

[98] Ustawa z dnia 9 czerwca 2011 r. (Journal of Law of 2011).

[99] See: J. Lachowski, *Stan wyższej konieczności*, [in:] M. Królikowski, R. Zabłocki (red), *Kodeks karny*..., t. I, pp. 13–21.

[100] See: P. Daniluk, *Stan wyższej konieczności, jako okoliczność wyłączająca bezprawność "chirurgicznej zmiany płci"*, Państwo i Prawo 2008, 1, p. 100.

[101] See: S. Cypin, *Stan wyższej konieczności w prawie karnym*, Warszawa 1932, p. 105; A. Wąsek, *Kodeks karny*, p. 335.

[102] See: J. Lachowski, *Stan*..., [in:] M. Królikowski, R. Zawłocki (red.), *Kodeks karny*..., pp. 13–21.

The necessity which is understood as a circumstance excluding fault is based on art. 26, sec. 2. of the Penal Code (the exclusion principle[103]).

According to this provision, fault is excluded when:

a) the sacrificed good or value was of equal or greater (but not manifestly greater) worth than the good or value that was being saved;

b) the perpetrator acted in an abnormally motivated situation which occurred in relation to the activity he/she undertook in order to avert imminent danger, provided that all of the other above-mentioned conditions of the necessity were met.

As is the case with self-defence, whoever exceeds the limits of the necessity commits an offence (art. 26, sec. 3. of the Penal Code).

The limits of the necessity were exceeded if: a danger was not imminent or had ceased to exist, it was objectively possible to avoid the danger to a good or value protected by law, or the sacrificed good or value was of clearly greater worth than that of the good or value that was being saved.

If the limits of the state of higher necessity were exceeded, the court may apply an extraordinarily mitigated penalty or even refrain from imposing a penalty (art. 26, sec. 3. of the Penal Code).

Moreover, "The provision of sec. 2. (of this Code – K.I.) shall not be applied when the perpetrator sacrifices an interest which he has a special duty to protect even by exposing himself to personal danger" (art. 26, sec. 4. of the Penal Code); and: "The provisions of sec. 1 through 3 shall be applied accordingly when only one of the obligations borne by the perpetrator can be fulfilled" (art. 26, sec. 5. of the Penal Code).

4. Forms of committing an offence

In Polish penal law the term 'forms of committing an offence' encompasses:

– stages of committing an offence,

– forms of cooperation in committing an offence.

The Penal Code identifies three stages of committing an offence: preparation, an attempt, and the actual commission of an offence.

Based on art. 16, sec. 1. of the Penal Code, preparation may only take place *cum dolo directus* and it can take one of the two forms: material or personal.

The material form of preparation entails obtaining and/or adapting particular means (e.g. purchasing or repairing a firearm), collecting information or drawing up a plan of action with the aim of committing a prohibited act (art. 16, sec. 1. of the Penal Code).

These two types of the material form of preparation must be related to the features of a prohibited act, which results from the *cogitationis poenam nemo patitur* principle (i.e. "no one suffers punishment for mere intent") and art. 1 of the Penal Code, according to which an offence must constitute a prohibited act.

[103] See: A. Zoll (red.), *Kodeks karny. Część ogólna*, p. 68.

The personal form of preparation involves making an arrangement with another person or persons to commit a prohibited act.

Preparation cannot take place by omission (failure to act).

Preparation is to create the conditions for conduct that will directly lead to committing an offence (cf. art. 16, sec. 1.).

Preparation is only penalised if the law so stipulates (for example, preparation for genocide – art. 118, sec. 3. of the Penal Code).

When the legislator decides to consider certain kinds of preparation for committing a prohibited act to be an offence, the legislator is motivated by the paradigm of penal law's preventive function and, additionally, by the significance of an act, although the latter does not always cause preparation to be regarded as an offence (for example, preparation for murder is not penalised).

However, even if preparation is penalised, the Penal Code (in art. 17, sec. 1.) states the following: "Whoever voluntarily abandoned preparation, and particularly, when he destroyed the prepared means or prevented them from being utilised in the future shall not be subject to penalty. In the case of entering an arrangement with another person in order to commit a prohibited act, whoever undertook an essential endeavour aimed at preventing the commission of the prohibited act, shall not be subject to penalty." Sec. 2. of this article provides that: "The person to whom Article 17 sec. 1. applies shall not be liable to penalty for preparation"[104].

An attempt is the stage of committing an offence that is the closest to the actual commission of an offence. In accordance with art. 13 of the Penal Code, one can identify an effectual attempt (art. 13, sec. 1.) and an ineffectual attempt (art. 13, sec. 2.).

A perpetrator makes an effectual attempt if, while seeking to commit a prohibited act, he/she engages in particular conduct that leads directly to the commission of this act, which eventually does not happen: "Whoever with the intent to commit a prohibited act, directly attempts its commission through his conduct which, subsequently however does not take place, shall be held liable for an attempt" (art. 13, sec. 1.).

Therefore, an attempt to commit an offence can be made *cum dolo directo* and *cum dolo eventuali.*

A perpetrator's conduct must be direct, which means that particular attention needs to be paid to whether his/her conduct (an action or omission, i.e. failure to act) directly and objectively led to an act that had the features of a specific kind of a prohibited act. This requirement is met if there is "temporal proximity" between an attempt and the commission of an act. If there is no such temporal proximity, it is required that the perpetrator do everything possible to make a particular act happen (for example, a perpetrator planted a bomb on a plane and the bomb was to explode when the plane reached a specific height, but the plane did not take off as scheduled[105]).

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[104] See: E. Kunze, *Przygotowanie przestępstwa w ujęciu polskiego prawa karnego*, Poznań 1991, pp. 56–57.

[105] See: wyrok SN z 8.03.2006, IV KK 415/05, OSNwSK 2006, 1/510.

An attempt carries a penalty which is within the limits of a penalty provided for a given offence (art. 14, sec. 1. of the Penal Code): "The court shall impose a penalty for an attempt within the limits of the penalty provided for the given offence".

Therefore, the penalty for an attempt to commit a particular offence is equal to the penalty for committing this offence.

This is because priority was given to the subjective element of an attempt to commit an offence, i.e. intent, when the principles of imposing a penalty for an attempt were being established.

An ineffectual attempt – "occurs when the perpetrator is not himself aware of the fact that committing it is impossible because of the lack of a suitable object on which to perpetrate the prohibited act" (for example, a perpetrator fired at a person who was already dead in order to take this person's life) "or because of the use of means not suitable for perpetrating this prohibited act" (for example, a perpetrator gave salt instead of poison to the victim) (art. 13, sec. 2. of the Penal Code).

Therefore, an attempt entails a failure on the part of the perpetrator to achieve the intended result with the possibility of bringing about a different effect which would constitute a feature of a given prohibited act (for example, a failure to take a victim's life may cause grievous bodily harm to the victim). Then art. 15 of the Penal Code is not applicable (see below).

If such an attempt is ineffectual, the court may apply an extraordinarily mitigated penalty or even refrain from imposing a penalty (art. 14, sec. 2. of the Penal Code).

This solution was adopted as a result of accepting that responsibility for this kind of an attempt is based on an objective theory of this concept; therefore, conduct in the form of an ineffectual attempt is relatively less socially dangerous[106].

The court may also impose a penalty within the limits of the penalty provided for the given offence.

In practice, the court should assess the level of a threat to a good or value protected by law[107]. An ineffectual attempt is based on a perpetrator's mistake. Therefore, the penalisation of such an attempt is the result of the penal policy that has been adopted.

The actual commission of an offence is a concept that refers to all of the features of a prohibited act, including its consequence.

Nevertheless, art. 15 of the Penal Code provides that "Whoever has voluntarily abandoned the prohibited act or prevented the consequence shall not be subject to penalty for the attempt". Also, "The court may apply an extraordinary mitigation of punishment to a perpetrator who has voluntarily attempted to prevent the consequence which constituted a feature of the prohibited act".

Other forms of cooperation are based on a modified version of J. Makarewicz's concept of the so-called "accessory forms" (PL: zjawiskowe) of an offence. This concept was an original attempt to solve the problem of the responsibility of instiga-

[106] See: O. Górniok (red.), *Kodeks karny. Komentarz*, Warszawa 2006, p. 51.

[107] See: T. Bojarski (red.), *Kodeks karny. Komentarz*, Warszawa 2008, p. 56.

tors, aiders and abettors, and co-perpetrators by assuming that they are responsible for their "own" acts and that it is their "own" fault that is attributed to them. Such a subjective approach was characteristic of the 1932 Penal Code, but it proved impossible to completely abandon this approach as far as this issue is concerned.

This is also true of the Penal Code of 1997.

Nevertheless, the solutions that were adopted in the Polish Penal Code are characterised by certain specific features, among which the most important are the following:

– one provision (art. 18) defines the basis of liability for different forms of single-person perpetration as well as the causative forms of criminal cooperation (orchestrating and ordering perpetration as well as co-perpetration) and non-causative forms of cooperation in committing a prohibited act (instigation as well as aiding and abetting);

– the concept of participating in an offence committed by someone else (*Teilnahme*) was abandoned.

The wording of art. 18 makes it clear that the term 'perpetration' is used both in reference to causative and non-causative forms of criminal cooperation. This is because forms of perpetration as well as instigation and aiding and abetting constitute distinct kinds of prohibited act, which in practice means that when given conduct has the features of these kinds of prohibited act, this is the basis of criminal liability.

Significant changes were made with regard to the concept of perpetration. In fact, in Polish penal law, perpetration is primarily based on given conduct having a feature of a particular kind of prohibited act that is expressed in the form of a verb. Orchestrating or ordering the performance of a prohibited act is also regarded as perpetration. The 1969 Penal Code only provided for the orchestrating type of perpetration. This concept was understood as having different boundaries. It was used in courts in order to try those war criminals who did not commit war offences personally but who, for example, orchestrated their commission.

This concept was also used with regard to economic offences against public property which were characterised by a division of roles[108].

Single-person perpetration takes place when a perpetrator performs a prohibited act him-/herself (art. 18, sec. 1 of the Penal Code). The term 'performs' refers to a single person's conduct which has the features of a prohibited act that is defined in the provisions of the general part of the Penal Code and/or non-code penal laws.

As for establishing that single-person perpetration took place, it is important that it be determined whether the perpetrator acted for his/her own (*animus auctoris*) or someone else's benefit.

The "performance of a prohibited act" is also a constitutive feature of co-perpetration as well as of the orchestrating and the ordering types of perpetration.

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[108] According to Article 202, sec. 1. of Penal Code of 1969: "Whoever, takes advantage of the activities of the unit of the socialist economy, in agreement with other persons, usurps property to the damage of such a unit, purchasers or suppliers, shall be subject to penalty..."

The concept of the orchestrating type of perpetration, whose form is slightly different now, is similar to instigation; the differences lie in the possibilities of relating it to organised legal structures[109]. No arrangement with those who "directly" perform a prohibited act is necessary. This lack of personal contact constitutes a difference between orchestrating the performance of an unlawful act and ordering such performance[110].

Since the orchestrating type of perpetration entails orchestrating the performance of a prohibited act by another person, the scope of responsibility for perpetration is expanded to include those cases in which a prohibited act was performed (see above) through another person's conduct – the person who orchestrates perpetration does not perform an act that has the features of a prohibited act.

The orchestrating type of perpetration is characterised by orchestrating (which can also be referred to as organising the performance of a prohibited act by another person) the conduct of the "direct" perpetrator who performs an act that has the features of a prohibited act. This is the difference between this and other types of perpetration.

The perpetrator who orchestrates perpetration orchestrates the performance and not the commission of a prohibited act. There must be at least two persons, i.e. an orchestrating perpetrator and a "direct" perpetrator for the orchestrating type of perpetration to occur. An orchestrating perpetrator must have the will to cause a prohibited act to be performed by another person through action or omission (failure to act) and be aware of the fact that he/she is orchestrating the performance of an unlawful act[111]. Orchestrating must take the form of the possibility of influencing the course of events constituting such an act (for example, by effectively controlling the development of events, also by cancelling the operation), which is subject to assessment on the basis of objective considerations (circumstances).

An orchestrating perpetrator is held liable based on his/her intent or lack of intent to commit a particular act. This intent or lack of intent on the part of an orchestrating perpetrator does not influence the "direct" perpetrator's intent or lack of intent.

The ordering type of perpetration is another kind of perpetration (art. 18, sec. 1. of the Penal Code)[112].

This kind of perpetration is similar to the orchestrating type of perpetration because no definition of this kind of perpetration is available. The fact that a perpetrator is held criminally liable although the perpetrator does not perform an act which has the features of a prohibited act, i.e. it is a "direct" perpetrator who performs such an act, is a common characteristic of the orchestrating and the ordering types of perpetration.

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[109] See more: A. Zoll, [in:] K. Buchała, A. Zoll (red.), *Kodeks karny. Komentarz*, Zakamycze 1998, p. 178 ff.

[110] See: W. Cieślak, *Kierowanie wykonaniem czynu zabronionego, jako istota sprawstwa kierowniczego*, Państwo i Prawo 1992, 7, p. 66.

[111] See: P. Kardas, [in:] A. Zoll (red.), *Kodeks karny. Część ogólna*, p. 277.

[112] See: M. Szczepaniec, *Sprawstwo polecające a sprawstwo kierownicze. Problemy z rozgraniczeniem*, Palestra 2007, nr 11–12, p. 75.

For the sake of simplicity, it can be said that both of these concepts are based on giving binding instructions to a "direct" perpetrator. The similarity between these forms of perpetration has raised the question of how one can distinguish between them since both an orchestrating and an ordering perpetrator might not have any decisive influence on the way in which the "direct" perpetrator performs a given act[113].

If particular conduct is to be regarded as the ordering type of perpetration, the "direct" perpetrator must perform an act which has the features of an act defined in a specific penal provision.

Therefore, the ordering type of perpetration takes place when an ordering perpetrator orders another person to perform a prohibited act by saying how this act is to be performed (also if it is to be performed through action or omission, i.e. failure to act) and this order is binding on this person. This order must be such that it makes its recipient intend to carry out this order; also, the recipient must be capable of executing this order and able to decide how to do it, even if this would mean violating the order[114].

The Penal Code does not define the form in which such an order must be given; therefore, it can be given in any form.

Art. 18, sec. 1. of the Penal Code provides that a "direct" perpetrator must be formally or informally subordinate to the ordering perpetrator if given conduct is to be considered the ordering type of perpetration. In other words, the lack of such dependence excludes the possibility of attributing responsibility to such an ordering perpetrator.

An ordering perpetrator can be held responsible for both intentional and unintentional offences. Moreover, a "direct" perpetrator can also be held responsible for committing an intentional or unintentional offence. Whether a given ordering type of perpetration was intentional or not does not have any influence on the intentionality or lack of intentionality on the part of the "direct" perpetrator because the act performed by an ordering perpetrator does not have an impact on the attribution of responsibility to the perpetrator who was subordinate to him/her (for example, because it is impossible to attribute fault to the subordinate perpetrator).

Art. 18, sec. 1. of the Penal Code also defines co-perpetration (cooperation). According to this provision, co-perpetration involves committing a prohibited act "together and under arrangement with another person".

Therefore, at least two persons must make an (explicit or implicit) arrangement, at the time of committing a prohibited act at the latest, to perform an act which has all or some of the features of a prohibited act if given conduct is to be considered co-perpetration. In this latter case, the perpetrators' actions must be complementary.

Also, a person who engages in given conduct together with a perpetrator who is already in the process of performing a prohibited act (for example, if one person helps to carry away goods from a shop into which another person has broken) is

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[113] See: M. Czyżak, *Sprawstwo polecające w zorganizowanej grupie przestępczej*, Prokuratura i Prawo 2004, 6, p. 35.

[114] A. Zoll, [in:] K. Buchała, A. Zoll (red.), *Kodeks karny. Komentarz*..., p. 181.

a co-perpetrator. The legal situation of such a perpetrator (who is also referred to as a successive co-perpetrator in the literature) depends on what kind of criminal activity he/she joined and how the roles between particular perpetrators were divided. Based on this latter criterion, such a person can be held criminally liable as a successive co-perpetrator, for everything that the "principal" perpetrator had done before he/she joined his/her co-perpetrator.

According to jurisprudence and the Supreme Court's decisions, co-perpetration can take place when one of co-perpetrators does not perform any act having the features of a prohibited act. Such a person, i.e. a person who did not perform any act that would have the features of a prohibited act, can be regarded as a co-perpetrator if his/her role was significant at the time of committing a prohibited act; if it is proved that such a person's presence was a necessary condition for committing an offence or it made it easier to commit an offence, such a person is considered to be a perpetrator (co-perpetrator)[115].

Certain kinds of prohibited acts are considered to have been performed only if there were multiple perpetrators; this concept is referred to as 'necessary co-perpetration' and it is applicable if a given provision requires that someone act jointly with another person (see art. 197, sec. 3. of the Penal Code) or "jointly and in co-operation with other persons" (see art. 223, sec. 1. of the Penal Code), or that he/she participate in committing a given offence (see art. 158).

Co-perpetration does not only take place in connection with an intentional or unintentional act (the so-called unintentional co-perpetration), but also when one of the perpetrators acts with intent and the other one without intent.

Lastly, one should also mention art. 258 of the Penal Code which establishes responsibility for participating in an offence as a member of a criminal group. If a given offence was committed in such circumstances then the perpetrator is held criminally liable for such an offence within the limits of a penalty provided for this offence, and it is possible to apply an extraordinarily aggravated penalty.

Art. 18, sec. 2. of the Penal Code defines incitement. The structure of art. 18 is similar to that of art. 18 of the 1969 Penal Code. In fact, the concept of incitement is defined more narrowly in the present Penal Code because the 1967 Penal Code introduced the concept of the ordering type of perpetration.

According to art. 18, sec. 2. of the Penal Code, a person who intentionally (*cum dolo directo*) solicits another person to commit a prohibited act is an inciter.

The Penal Code does not define the way in which such solicitation is to take place; therefore, it can take any form (not only a verbal form). Solicitation is aimed at making a given person intend to commit a prohibited act; solicitation can only occur in the form of an action (not an omission, i.e. failure to act).

Penal law scholars discuss whether responsibility for incitement also covers acts of soliciting someone to violate cautionary standards (for example, to drive too fast). Those who are against recognising such solicitation as a form of incitement (which is

[115] See above; also: postanowienie SN z 1.03.2005 r., III KK 249/04, OSNKW 2005, 7–8/63.

sometimes referred to as improper incitement) state that solicitation involves a violation of cautionary standards and not a commission of an act that has the features of a prohibited act; consequently, such conduct cannot be regarded as incitement.

Someone can only solicit another person to commit a prohibited act before this act is committed.

An inciter's liability is basically independent of the incited person's liability. An inciter is held liable even if the instigated perpetrator is not due to the impossibility of assigning fault to him/her.

If a person who has been incited to commit a given prohibited act only attempts to commit this act then the instigator is held liable for an attempt; if the incited person does not even attempt to commit a prohibited act then the court can apply an extraordinarily mitigated penalty or even refrain from imposing a penalty on the inciter.

The act of soliciting someone to commit a prohibited act is completed when a given person stops influencing another person to commit this prohibited act (a consequence in the form of, for example, committing a prohibited act is not necessary)[116].

Art. 18, sec. 3. of the Penal Code also defines the concept of aiding and abetting.

Aiding and abetting is not a form of co-perpetration; it is based on the act of intentionally enabling another person to commit a prohibited act (*cum dolo directo* or *cum dolo eventuali*).

As is the case with instigation, aiding and abetting is a *sui generis* prohibited act.

"Facilitation" can take the form of giving advice or providing information (the so-called "mental aiding and abetting") or of providing tools or means of transport, etc. to someone ("material aiding and abetting").

Aiding and abetting can occur through action or omission (failure to act). In this latter case one should consider whether failure to act constituted a form of facilitation (if the other conditions for aiding and abetting to occur are met) by identifying a specific legal duty which should have been carried out in order to prevent the commission of a prohibited act (for example, a police person did not react when he/she noticed someone committing a robbery by using a firearm).

Aiding and abetting can also occur before or during the performance of a prohibited act.

An aider and abettor is criminally responsible irrespective of whether the perpetrator him-/herself is held responsible. An aider and abettor is held liable within the limits of the penalty that is provided for perpetration, and the court may apply an extraordinarily mitigated penalty.

The other principles of an aider and abettor's responsibility are the same as those that apply to an instigator.

Cooperating after committing a prohibited offence constitutes a separate offence–handling stolen property or criminal support.

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[116] See: T. Bojarski, *Z problematyki współdziałania przestępczego*, [in:] J. Giezek (red.), *Przestępstwo–kara–polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga Jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, Kraków 2006, p. 93.

5. Concurrence of statutory provisions and concurrence of offences

The concurrence of statutory provisions takes place when one act has the features of acts defined in two or more provisions of penal law.

Two kinds of the concurrence of provisions are identified: genuine (real) concurrence and non-genuine (negligible) concurrence.

Negligible concurrence involves two or more competing provisions; it is possible to eliminate this multiplicity of provisions by restricting it to one provision only by using one of the rules for excluding the multiplicity of legal assessments. As a result, a given act is classified based on a single provision, which was one of the concurrent provisions.

Therefore, particular concurrent provisions are eliminated based on the rules for excluding the multiplicity of assessments (interpretative directives), i.e. the subsidiarity principle, the consumption principle and the specificity principle, which make it possible to properly classify a perpetrator's act in legal terms[117].

The subsidiarity principle (*lex primaria derogat legi subsidiarae*) has its basis in the Penal Code (unlike the two other above-mentioned principles). The Penal Code, art. 231 sec. 4., provides that: "The provision of sec. 2. shall not be applied when the act has the features of the prohibited act specified in Article 228". In other words, for example, if a public official acted against public or private interest for financial gain (sec. 1. and 2.) by exceeding his/her powers or failing to fulfil his/her obligations, he/she will be held liable for passive bribery.

The specificity principle (*lex specialis derogat legi generali*) is a rule that applies to the concurrence of (general and specific) provisions which define an aggravated or mitigated kind of offence (the so-called modified kinds of offences). If this principle is to be applied, one must determine which one of the provisions is general and which is specific in character.

A specific provision describes additional, specific features which complement a particular general provision. For example, as for homicide which is defined in art. 148, sec. 1. (*lex generalis*), the features that are defined in art. 148, sec. 4. of the Penal Code represent features of this kind – acting while in strong emotional distress which is justified by the circumstances (*lex specialis*).

If the specificity principle is used a given act is legally classified based on a specific provision, i.e., in this case, art. 148, sec. 4. of the Penal Code.

The consumption principle (*lex consumens derogat legi consumptae*) is applied when the relationship between provisions is such that a given kind of prohibited act whose features are described in the "consuming" provision can only occur when it also has supplementary features that are defined by another, i.e. "consumed" provision.

For example, such a relationship exists between a burglary (art. 279 of the Penal Code) and a breach of quiet enjoyment (art. 193 of the Penal Code). If a perpetrator

[117] K. Indecki, A. Liszewska, *op.cit*., p. 264.

is stealing something from someone's home after illegal entry, he/she must be staying there without the consent of the person who is entitled to this home; thus, his/her behaviour has the features of the acts described in both of the above-mentioned provisions. Then this behaviour will be classified based on art. 279 of the Penal Code, since a breach of quiet enjoyment (art. 193 of the Penal Code) a necessary condition for a burglary to occur. The "consumption-based" relationship between provisions may not be indicated *in abstracto*, and it is usually determined based on concrete facts of a given case[118].

The genuine (real) concurrence of provisions occurs when there are two or more competing provisions that describe one act in such a way that this cannot be eliminated by applying the rules for excluding the multiplicity of provisions. In the Polish Penal Code the problem of such concurrence is solved based on the so-called cumulative concurrence of provisions (art. 11, sec. 2. and 3. of the Penal Code).

This type of concurrence is characterised by the fact that the court sentences someone for one offence based on all concurrent provisions, whereas a penalty is imposed based on the provision that provides for the most severe penalty; the court may also order that other measures that are provided for in concurrent provisions be imposed.

In other words, as part of such concurrence all concurrent provisions must be reflected in the legal classification of an act. The aim of this solution is to provide complete legal characteristics of an act, which may be important, for example, for determining recidivism.

As it is the case with the concurrence of provisions, the concurrence of offences occurs in two forms: as apparent concurrence and real concurrence.

Both types of concurrence of offences are based on a multiplicity of acts, and each of these acts is treated as a separate offence which was committed by a given perpetrator.

The apparent concurrence of offences also takes place when the provisions of penal law indicate, or if they are interpreted as indicating, that two or more acts (behaviours) should be treated as a single offence. This situation is referred to as the legal unity of an act.

Four forms of this type of concurrence can be identified: continuing offences, multiple-act offences, and multiple-form offences as well as co-penalised acts.

The concept of a continuing offence is new. It is defined in art. 12 of the Penal Code. The idea behind this solution was that two or more behaviours can be treated as constituting one offence in certain circumstances. Among such circumstances are the following: such behaviours are displayed at short intervals and with premeditated intent (*dolus directus* or *dolus eventualis*); these behaviours affect strictly personal goods or values – multiple behaviours can only be regarded as one prohibited act if they concern one wrong person.

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[118] See: K. Indecki, A. Liszewska, *op.cit.*, p. 265.

Among multiple-act offences one can identify:

a) collective offences – for example, art. 209, sec. 1. of the Penal Code (persistent non-payment of maintenance or support) prohibits a persistent evasion of the obligation to pay maintenance or support which has been imposed on the perpetrator, for example, by statute, which takes the form of failure to pay maintenance to a person who is close to the perpetrator and, therefore, of exposing such a person to a risk of not being able to satisfy his/her basic needs of life. Persistent behaviour is "prolonged behaviour that is characterised by relentlessness" [own translation].

b) two-act offences – for example, art. 230 (paid patronage) prohibits a public official from using his/her connections, e.g. in the institutions of the state (one act) and mediating in settling a particular matter in exchange for financial gain or the promise of such gain (another act).

c) complex offences – for example, the concept of the offence of robbery (art. 280 of the Penal Code) is based on theft (art. 278 of the Penal Code) and the use of violence or the threat of imminent violence (art. 190 of the Penal Code).

Multi-form offences are offences whose features refer to two or more behaviours. For example, art. 263, sec. 1 prohibits, among other things, the production of firearms without the required permit or trading in firearms.

Co-penalised acts are usually related to the so-called set of stages of committing an offence (*iter delicti*). Therefore, an attempt is an act that is penalised together with the actual commission of an offence (if it happened). Such cases are referred to as co-penalised acts preceding the main act.

Apart from the above-mentioned acts, also co-penalised acts following the main act are identified. These acts occur, for example, when the perpetrator of rape fails to help the victim of this offence.

The Penal Code in its present form defines the concept of the real concurrence of offences differently than the previous regulations.

It introduces the concept of the real concurrence of offences that leads to the imposition of an aggregate penalty and the concept of the real concurrence of offences that does not lead to the imposition of such a penalty (which applies to an offence committed in "separate" stages).

The idea of differentiating between these two kinds of real concurrence is criticised because of the lack of precise criteria that would allow one to decide which kind of real concurrence is relevant to a particular case.

The real concurrence of offences occurs when a perpetrator commits two or more offences before the first sentence for any of the offences is imposed, even if the judgment is not yet final and unappealable.

The concept of the concurrence of offences that leads to the imposition of an aggregate penalty is based on art. 85 of the Penal Code. According to this provision, a perpetrator must commit two or more offences before the first sentence is passed for any of the offences, even if the judgment is not final and unappealable.

This kind of real concurrence leads to the imposition of an aggregate penalty.

An aggregate penalty can be imposed in single proceedings which are aimed to determine responsibility for concurrent offences (then, the court imposes an aggregate penalty for a conviction) or in single proceedings which culminate in imposing an aggregate penalty as part of the so-called aggregate sentence. This is the case when, for example, separate proceedings for each of the acts are held before different courts at different times (but before the first sentence is passed).

In both cases an aggregate penalty is imposed by taking into account the separate penalties that have been imposed for particular concurrent offences.

The Penal Code specifies the rules for imposing an aggregate penalty by indicating how the lower and the upper limits of such a penalty can be determined. Thus,

a) the most severe of the penalties which was imposed for a given concurrent offence constitutes the lower limit of an aggregate penalty;

b) the sum of the penalties that were imposed for concurrent offences represents the upper limit of an aggregate penalty, but it cannot exceed the upper limit of a given kind of penalty (cf. art. 86, sec. 1 of the Penal Code), i.e.

– 15 years of deprivation of liberty;

– 18 months of restriction of liberty;

– 540 day-fine units.

The lower and the upper limits of a penalty that are defined in this way determine the limits of an aggregate penalty.

As a rule, these are penalties of the same kind that are aggregated. However, it is also possible to aggregate penalties of different kinds, for example, the restriction of liberty with the deprivation of liberty, which is when one month of restriction of liberty corresponds to 15 days of deprivation of liberty (art. 87 of the Penal Code).

The execution of an aggregate penalty may be conditionally suspended if at least one of the penalties was imposed as part of a suspended sentence. The conditions for suspending the execution of such a penalty are defined in art. 89 of the Penal Code in connection with art. 69 of the Penal Code (for example, the execution of an aggregate penalty of deprivation of liberty can only be suspended if this penalty does not exceed 2 years and if the court decides that the imposition of such a suspended penalty will be sufficient to achieve the objectives of this penalty with regard to the perpetrator, in particular, to prevent this perpetrator from recidivating).

If the penalty of deprivation of liberty for 25 years or of deprivation of liberty for life is among the penalties that have been imposed (and constitutes the most severe penalty for particular concurrent offences), such a penalty will constitute the aggregate penalty. If, however, two or more concurrent penalties of 25 years of deprivation of liberty have been imposed, this penalty will constitute the aggregate penalty. If there are two or more concurrent penalties of deprivation of liberty for 25 years, the court may decide to impose the penalty of deprivation of liberty for life as an aggregate penalty (art. 88 of the Penal Code).

This solution was adopted mainly for preventive purposes.

If the court imposes a fine as an aggregate penalty, the amount of a day-fine unit is determined again, by taking, for example, the perpetrator's income into account (arts. 86 and 33 of the Penal Code).

When the court imposes the penalty of restriction of liberty as an aggregate penalty, the court determines the amount of time that the perpetrator must devote to unpaid, supervised work of social use or the amount of deductions from the perpetrator's remuneration anew (art. 86, sec. 3. of the Penal Code).

A series of offences is a kind of the real concurrence of offences that does not lead to the imposition of an aggregate penalty.

A series of offences encompasses two or more offences that are committed before the first sentence for one of these offences is passed, even though such a judgment is not yet final and unappealable, and which are committed in a similar way and at short intervals (art. 85 and art. 91, sec. 2. of the Penal Code). As for a series of offences, the court imposes, based on the provision defining an act whose features characterise each of these offences, one penalty up to the maximum level of the penalty provided by statute and increased by half.

However, an aggregate penalty is imposed in relation to a series of offences if there were two series of offences or one such series plus another offence (art. 91, sec. 2. of the Penal Code).

If a perpetrator has been given two or more sentences for offences that formed one series, the penalty that is imposed as part of an aggregate sentence may not exceed the upper limit of the penalty provided for by statute and increased by half in a provision defining an act whose features characterise each of these offences (art. 91, sec. 3. of the Penal Code).

An important condition for treating particular offences as forming a series of offences is that these offences must be uniform, which must be reflected in their legal classification – each of these offences must be classified based on the same provision. Thus, homicide that are classified based on art. 148, sec. 1. fulfil this condition, whereas homicide that is classified based on art. 148, sec. 1. and, for example, infanticide (art. 149 of the Penal Code) do not.

6. Imposition of penalties

The term 'imposition of penalties' is primarily associated with the so-called judicial imposition of penalties, i.e. with imposing penalties and penal measures as well as probation measures on a perpetrator who has been found guilty as charged. Apart from the concept of the judicial imposition of penalties, also the term 'statutory imposition of penalties' is used. This term refers to the provisions of the Penal Code and the regulations contained in additional penal acts, based on which the court imposes a penalty.

When a judge imposes a penalty, the judge does so at his/her own discretion, i.e. by using his/her discretionary powers. This freedom to impose penalties is not

unlimited, i.e. it is not absolute. The limits of this freedom are determined by the limits of the penalty that is provided for a given sentence as well as the rules for and directives on imposing such a penalty.

The concepts of 'rules' and 'directives' should not be equated with each other.

The former is rooted in:

– the Constitution of the Republic of Poland (the principle of legality and the principle of equality before the law – art. 7 and art. 32, sec. 1. of the Constitution);

– the Penal Code (the principle of humanitarianism – art. 3 of the Code),

– the principle of individualisation of penalties and penal measures, i.e. of taking into account the circumstances that influence the level of a penalty to be imposed on a given person, only with regard to this specific person – art. 55 of the Penal Code;

– the principle of counting the real period during which a given person was deprived of liberty towards the imposed penalty and of counting the corresponding preventive measures (e.g. suspending someone's right to practise a specific profession) which were imposed based on art. 275 or 276 of the Code of Penal Procedure towards the imposed penal measures (e.g. an interdiction preventing someone from holding a specific position, practising a specific profession or conducting specific economic activities) (art. 63 of the Penal Code);

– the principle of non-custodial penalties or penal measures having priority over custodial ones;

– the principle of fault (art. 1, sec. 3. of the Penal Code); and

– the principle of imposing penal measures by taking account of both individual and general prevention with respect to adult and young perpetrators – arts. 53 and 54 of the Penal Code.

Among these directives one can identify general directives which concern: the proportionality of a sanction to the degree of fault, social danger of an act, and individual and general prevention.

Apart from general directives one can also identify specific directives, which also must be taken into consideration when imposing a penalty. Among them are the following:

– a directive limiting the level of a penalty for juvenile delinquents who commit offences (i.e., in accordance with art. 10, sec. 3. of the Penal Code, the penalty that is imposed on such perpetrators cannot exceed two-thirds of the upper limit of the penalty provided for by statute for the perpetrator of a given offence; the court may also apply an extraordinarily mitigated penalty to such perpetrators).

– a directive concerning penalties for minors or young offenders (when imposing a penalty, the court mainly aims to educate such a perpetrator; the penalty of deprivation of liberty for life is not imposed on a perpetrator who had not reached the age of 18 years when he/she was committing an offence – art. 54 of the Penal Code);

– a directive concerning the imposition of fines (when imposing this kind of penalty the court must take into consideration, for example, a perpetrator's personal and family situation as well as income – art. 33, sec. 2. of the Penal Code).

Restrictions on the imposition of penalties by the court are also related to the following circumstances:

– a perpetrator's motivation and the way in which he/she behaves;

– the fact that an offence was committed together with a minor;

– the type and degree of a violation of duties by a perpetrator;

– the type and degree of the negative consequences of an offence;

– a perpetrator's characteristics and personal situation;

– a perpetrator's lifestyle before committing an offence and his/her behaviour after committing an offence, in particular, the attempts he/she is making to redress the damage or satisfy the sense of social justice in a different way;

– the wronged person's behaviour;

– the results of the mediation between the wronged person and the perpetrator or the settlement they have reached (art. 53, sec. 2. of the Penal Code).

The level of a penalty can be modified if an extraordinarily mitigated or aggravated penalty has been applied.

An extraordinary mitigation of a penalty involves imposing a penalty below the lower limit of this penalty that is provided for in statute or imposing a penalty of a less severe kind, for example, when an act constitutes a crime and the lower statutory level is the penalty of at least 25 of deprivation of liberty and the court imposes a penalty of deprivation of liberty of not less than eight years (see art. 60, sec. 6. and 7. of the Penal Code).

An extraordinarily mitigated penalty is applied either mandatorily or optionally.

An extraordinary mitigation of a penalty is optional, for example, with regard to a young perpetrator (if this is advisable for educational reasons) as well as when this is particularly justified, i.e. when even the lowest penalty that is provided for a given offence would be disproportionately severe because of, for example, the perpetrator's attitude (art. 60, sec. 2. of the Penal Code), and in cases indicated by statute, i.e. both in the general and the special part of the Penal Code. A total of 13 such cases are described in the general part (cf., e.g. art. 14, sec. 2. of the Penal Code) and a total of 8 in the special part of this code (cf., e.g. art. 150, sec. 2. of the Penal Code).

The court applies an extraordinarily mitigated penalty mandatorily:

– to a perpetrator who cooperated with other persons if he/she discloses information about these persons and material facts relating to the commission of a given offence by multiple perpetrators to law enforcement authorities – art. 60, sec. 3. of the Penal Code;

– at the request of a prosecutor, to a perpetrator who, regardless of the explanations he/she provided in his/her case, disclosed and presented, to law enforcement authorities, material facts relating to an offence that carries a penalty of more than 5 years of deprivation of liberty which were unknown to such authorities (art. 60, sec. 4. of the Penal Code).

In these two cases, when the court imposes a penalty of deprivation of liberty for up to 5 years, the court may conditionally suspend the execution of this penalty (art. 60, sec. 5.).

If law provides for mitigation of the maximum statutory penalty, the penalty imposed for an offence carrying the penalty of deprivation of liberty for life may not exceed 25 years, and for an offence carrying the penalty of deprivation of liberty for 25 years it may not exceed 15 years (art. 38, sec. 3.).

An extraordinary aggravation of a penalty is another method of modifying the level of a statutory penalty. This involves imposing a penalty which is higher than its lower or upper statutory limit.

An extraordinarily aggravated penalty can be applied in relation to the following concepts:

– a series of offences – up to the upper statutory limit increased by half (art. 91, sec. 1. of the Penal Code);

– special, basic recidivism – up to the upper statutory limit increased by half (art. 64, sec. 1.);

– special, repeated recidivism – when the court imposes a penalty of deprivation of liberty which is provided for an offence attributed to the perpetrator and which is to be higher than the lower statutory limit, the court may impose this penalty up to the upper statutory limit increased by half, i.e. up to 810 day-fine units, 2 years of restriction of liberty, or 15 years of deprivation of liberty (cf. art. 38 of the Penal Code).

The above-mentioned cases of aggravated penalties do not concern crimes; it is considered that the penalties that are imposed for offences of this kind do not need to be additionally aggravated.

Probation measures are of vital significance as far as the imposition of a penalty is concerned. Basically, these measures are imposed on a perpetrator of an offence who has been put to the test. They are used when criminal proceedings have been conditionally discontinued and when the execution of a penalty has been conditionally suspended. These measures are based on putting a perpetrator to the test.

A perpetrator is also put to the test after he/she has been conditionally released before the expiration of his/her sentence, but such a measure is not a probation measure *sensu stricto* because it is used after a convicted person has served a part of his/her sentence.

The imposed penalty may also be cancelled or the perpetrator may be granted a pardon.

A penalty can be cancelled due to (material) immunity, expiry of a limitation period, abolition, and in cases in which the perpetrator is not subject to a penalty according to relevant provisions.

Basically, a penalty can also be cancelled after the convicted or accused person dies and then forfeiture may be ordered as a penal measure (cf. art. 100 in connection with art. 39, sec. 4.).

The idea of immunity is to make it possible for particular persons to properly perform public or official functions, in particular, to protect them from potential harassment because of the functions they carry out.

Material immunity is granted to a specific category of persons, i.e. lawyers for the defence and members of the parliament (cf. art. 8 of the Law on the Profes-

sion of Lawyers for the Defence [PL: prawo o adwokaturze[119]] and arts. 105 and 108 of the Constitution of the Republic of Poland).

The influence that immunity has on criminal liability varies; for example, according to art. 105, sec. 1. of the Constitution, a member of the parliament shall not be held liable for acts committed within the performance of the parliamentary function, neither during the term of the parliament nor following its expiry, unless he/she infringes on the rights of others. Such immunity relates to the activities outside of the Parliament (too), if those activities fall within the scope of actions while the function of a member of the Parliament is executing.

The expiry of a limitation period concerns both the prosecution of offences and execution of penalties.

The expiry of a limitation period for penalisation depends on the kind of offence.

The limitation period for prosecuting the crime of murder expires after 30 years from the time when it was committed, and after 20 years for other crimes.

As for less serious offences, limitation periods depend on the penalty that is provided for a given offence and sometimes also on the way in which it is prosecuted.

For example, if a less serious offence carries a penalty of deprivation of liberty for more than 5 years, the limitation period expires after 15 years; if a less serious offence carries a penalty of deprivation of liberty for more than 3 years, the period expires after 10 years.

The limitation period for prosecuting an offence on private charges expires after a lapse of one year (cf. art. 101, sec. 2. and 3. of the Penal Code).

A limitation period for prosecuting offences can be extended in cases indicated by the Penal Code (cf. art. 102).

The expiry of the limitation period for executing a penalty involves a ban on the execution of this penalty and depends both on the level of a penalty and penal measures that are provided for a given offence.

Thus, a penalty may not be executed if a specific time period has passed from the day on which a given judgment became final and unappealable, i.e.

– 30 years for a penalty of deprivation of liberty for more than 5 years or a more severe penalty;

– 15 years for a penalty of deprivation of liberty for less than 5 years or when a penal measure was imposed under art. 39, sec. 5. of the Penal Code;

– 10 years for a different penalty or if penal measures were imposed under art. 39, items 1–4 and 6–7 (art. 103, sec. 1. and 2. of the Penal Code).

A limitation period does not run in several cases that are specified in the Penal Code (art. 104, sec. 1.):

"The period of limitation does not run, if a provision of law does not permit the criminal proceedings to be instituted or to continue; this however, does not apply to the lack of a motion or a private charge".

[119] Dz.U., nr 16, poz. 124 z późn. zm. (Journal of Law, no. 16, item 124, as amended).

A limitation period does not run in several situations that are strictly defined in the appropriate provisions, e.g. in the case of formal immunity. Art. 44 of the Constitution of the Republic of Poland provides that: "The statute of limitation regarding actions connected with offences committed by, or by order of, public officials and which have not been prosecuted for political reasons, shall be extended for the period during which such reasons existed".

Other situations in which a limitation period does not run are defined in the Penal Code (art. 104, sec. 2.): "The period of limitation regarding the offences specified in Article 144, Article 145 sec. 2. or 3., Article 338 sec. 1. or 2. and in Article 339 shall run from the date of performing the obligation, or from the date on which the obligation ceased to be borne".

Thus, the limitation period for the above-mentioned offences starts on the day when the obligation referred to in the text of the provision is fulfilled or on the day when such an obligation ceases to exist.

The Provisions Introducing the Penal Code[120] states that the period of limitation for intentional offences against life, health, freedom or administration of justice which carry a penalty of deprivation of liberty for more than 3 years and which were committed by public officials between 1 January 1944 and 31 December 1989, during or in relation to the performance of their duties, commences on 1 January 1990.

This means that the course of limitation periods for these offences was suspended until this date.

Provisions concerning limitation periods for prosecuting offences and executing penalties do not apply to crimes against peace and humanity as well as war crimes (art. 105, sec. 1. of the Penal Code).

Such provisions do not also apply to intentional offences, i.e. homicide, grievous bodily harm, serious impairment of health or deprivation of liberty combined with using torture, which were committed by a public official in relation to the performance of his/her duties (art. 105, sec. 2. of the Penal Code).

Abolition means refraining from prosecution and a trial in cases involving offences that are listed in abolition acts (statutes). Therefore, abolition involves a legal prohibition on the commencement of proceedings or an obligation to conditionally discontinue or expunge a given sentence when the judgment was final and unappealable. The decree of 12 December 1981 on forgiving and forgetting certain offences is an example of an abolition law[121].

A penalty can be cancelled (a perpetrator can be granted a pardon) also as a result of an amnesty or refraining from the imposition of a sanction.

An amnesty means cancelling or mitigating a sanction that has already been imposed. On the one hand, an amnesty is a method of correcting the defects of

[120] Ustawa z 6 czerwca 1997 r. – Przepisy wprowadzające kodeks karny, Dz.U., nr 88, poz. 554 ze zm. (Journal of Law, no. 88, item 554 as amended).

[121] Dz.U., nr 29, poz. 158 (Journal of Laws, no. 29, item 158).

penal policy, but on the other hand, it impedes the resocialisation of persons detained in penal institutions.

The most recent amnesty in Poland was declared on 7 December 1989.

A pardon has an individual character; therefore, it is always addressed at a specific person. In fact, pardon is a means of enforcing the so-called "right to mercy". The enforcement of this right is regulated by the Constitution. Art. 139 of the Constitution states that the President of the Republic of Poland has the power to pardon, in principle, all persons who have been sentenced (except for those sentenced by the Tribunal of State).

A pardon can take different forms, e.g. the expungement of a conviction or cancellation of a penalty. It is always granted for humanitarian reasons.

The expungement of a conviction means that a given conviction is treated as if it never existed, which has certain formal effects; in particular, information on this conviction is erased from the National Criminal Register. The expungement of a conviction entails a certain legal fiction because it leads to a convicted person regaining the status of a person with no criminal record.

A number of amendments (14) have been made to the Penal Code since it came into force. Two of them deserve particular attention because they introduced the legal definitions of a person performing a public function and an offence of a terrorist nature into the code.

The introduction of the legal definition of a person performing a public function[122] into art. 115, sec. 19. of the Penal Code constitutes a significant amendment to the Code. This amendment ends the 30-year-long debate on the relationship between the terms 'a public official' and 'a person performing a public function' in the context of the offence of bribery, where the perpetrator is a person performing a public function (art. 228 of the Penal Code).

Art. 115, sec. 19 defines a person performing a public function as:

– a public official,

– member of a local government body,

– person employed at an organisational unit which has public funds at its disposal (unless he/she exclusively carries out service-related activities), and

–a person whose rights and duties in the sphere of public activity are defined in a statute or in an international agreement which is binding upon the Republic of Poland.

Among public officials (pursuant to art. 115, sec. 13. of the Penal Code) are, for example:

– the President of the Republic of Poland;

– a deputy of the Polish parliament (the Sejm and Senate), a councillor;

– a deputy of the European Parliament;

– a judge and lay judge;

– a state prosecutor;

– a notary public;

– a court enforcement officer;

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[122] Dz.U., nr 111, poz. 1061 (Journal of Laws, no. 111, item 1061).

– a probation officer appointed by the court;
– a person adjudicating in a disciplinary body pursuant to the statute;
– a person employed by the government administration or by another organ of the State or a local government body (unless he/she exclusively carries out service-related activities);
– other persons to the extent that they are entitled to make administrative decisions;
– a person employed by a state inspection authority or an inspection body of a local government (except when he/she only carries out service-related activities),
– a person holding a managerial post in another state institution;
– a person who is responsible for protecting public security or a member of the penitentiary service;
– a person who is on active duty in the military service; and
– an employee of the International Criminal Court (except when he/she only carries out service-related activities). Art. 115, sec. 19. of the Penal Code extends the group of persons who are held liable for passive bribery to include persons who are not public officials.

The provision of art. 115, sec. 2. of the Penal Code which describes a terrorist act is relatively new. It was added to the Penal Code on 16 April 2004 to provide a legal definition of an offence of a terrorist nature. This rule is the first step towards a penal response to acts of terrorism; it was also introduced with the purpose of adjusting Polish penal law to EU standards, or more precisely, to the Council of European Union framework decision of 13 June 2002 on combating terrorism[123].

Pursuant to art. 115, sec. 20. of the Penal Code, an offence of a terrorist nature is a prohibited act which is subject to the penalty of deprivation of liberty for not less than 5 years and which is committed with the aim of 1) seriously intimidating many people; 2) compelling a public authority of the Republic of Poland or another state or an organ of an international organization to perform or refrain from performing particular activities; 3) seriously destabilising the constitutional or economic system of the Republic of Poland, another state or international organization; a threat to commit such an act also constitutes an offence of a terrorist nature.

If such an offence was committed it is possible to impose penalties, or penal or probation measures that are provided for recidivists (art. 65, sec. 1. of the Penal Code).

It should be added that art. 258 of the Penal Code, which earlier only described a general form of participating in the commission of an offence, has been supplemented by a provision describing a form of participation in a group or unit that is aimed at committing offences of a terrorist nature as well as for establishing or leading such a group or unit.

[123] Official Journal of the European Communities, Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

7. Penalties, penal measures and preventive measures

The Penal Code of 1997 introduced 12 kinds of sanctions as a result of rationalising the system of sanctions[124]. For example, the limits of most penalties were lowered.

The code introduced a distinction between penalties, penal measures and preventive measures.

7.1. Penalties

The Code provides for the following penalties:
– a fine
– restriction of liberty
– deprivation of liberty (from one month to 15 years)
– deprivation of liberty for 25 years
– deprivation of liberty for life.

The increase of the range of penalties and penal measures led to the individualisation of punishment.

As a result, the sanctions were arranged in an order from the "lightest" (a fine) to the "most severe" (deprivation of liberty). In all cases the court must consider starting the imposition of sanctions from the lightest one.

Also, a positive result of mediation between the wronged person and the perpetrator or an agreement they concluded before a judge/the court or a prosecutor must be taken into consideration (see above): "In imposing the penalty, the court shall also take into consideration the positive results of the mediation between the injured person and the perpetrator, or the settlement reached by them in the proceedings before the state prosecutor or the court (art. 53, sec. 3. of the Penal Code)".

Moreover, the court takes into consideration the results of mediation between the wronged person and the perpetrator as well as the settlement they reached in conciliation proceedings, which were conducted by a judge or prosecutor, if the parties had brought a motion for it or agreed about it[125].

The Penal Code does not provide for the death penalty[126]. The legislator decided that this penalty contradicts the principle of human dignity and is inconsist-

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[124] The Penal Code of 1969 contained 21 sanctions.

[125] See: Article 53, sec. 3 of Penal Code of 1997; see also: Art. 489 Code of Criminal Procedure *in fine*.

[126] The death sentence was an exceptional penalty in the former Penal Code applicable only to the most serious offences. It always appeared an alternatively to imprisonment and it was to be applied neither to persons who were less than 18 years old at the time of the commission of act, nor to the woman who was pregnant at the time of the offence, sentencing or scheduled execution (art. 31 of the Penal Code of 1932).

ent with Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The character of a fine has been changed. Currently, the amount of a fine must be adapted, for example, to the convicted person's financial situation (also, see above); it is imposed in day-fine units of PLN 10 to 2,000.

Sometimes, if the penalty of a fine was not executed, a fine can be replaced with work of social use (see art 45 of the Executive Penal Code) or even with a substitute penalty of deprivation of liberty (art. 45 of the Executive Penal Code). The execution of the penalty of a fine can also be postponed or a fine can be paid in instalments (see art. 49 of the Executive Penal Code).

It is also possible to conditionally suspend the execution of the penalty of a fine, which is a new solution in the Penal Code.

The restriction of liberty is an alternative to the penalty of short-term deprivation of liberty and a fine. The restriction of liberty does not isolate the convicted person and it involves the imposition of special obligations on him/her (the most important among them is an obligation to work).

The penalty of restriction of liberty appeared in the 1969 Penal Code, but in a slightly different form.

A penalty of this kind is expressed in terms of months – from 1 to 12.

The obligations that are associated with this kind of penalty are specified in art. 34 of the Penal Code. According to this provision (sec. 2.), the convicted person: a) may not change his/her place of permanent residence; b) must carry out unpaid, supervised work of social use; and c) report on the progress of the activities that he/she is carrying out as a penalty.

In accordance with art. 36, sec. 2. in connection with art. 72 of the Penal Code, the court may also obligate the convicted person who has received such a penalty:

"1) to inform the court of [or] the probation officer about the progress of the probation period,

2) to apologise to the injured person,

3) to carry out a duty incumbent upon him in order to provide support for another person,

4) to perform remunerated work, to pursue an educational activity or train himself for an occupation,

5) to refrain from abusing alcohol or using narcotics,

6) to submit to medical treatment, particularly drug withdrawal or rehabilitation programmes,

7) to refrain from frequenting specified community circles or places,

[7a) to refrain from contacting the injured person or other persons in a specific way or from approaching the injured person or other persons (author's comment: this provision has been added recently)],

8) to engage in other appropriate conduct in the probation period, if it may prevent the commission of a further offence"[127].

[127] See: art. 72, sec. 1. of the Penal Code.

The same obligations are imposed on a convicted person if the execution of a penalty has been conditionally suspended.

According to the new version of art. 35, sec. 1. of the Penal Code, a total of 20 to 40 hours of unpaid, supervised work of social use is to be carried out per month.

Art. 35, sec. 2. of the Penal Code provides that, instead of an obligation to carry out such work, the court may order a 10–25% reduction from the convicted person's monthly remuneration for work of social use done for a specific social purpose, as indicated by the court; the convicted person may not terminate employment during the period of work carried out as a penalty (art. 35, sec. 2. of the Penal Code).

If the convicted person evades the penalty of restriction of liberty, this may result in the court imposing a substitute penalty of deprivation of liberty on him/her (art. 65, sec. 1 of the Executive Penal Code).

The deprivation of liberty is presented as a sanction provided for all kinds of offences in the Penal Code (like in the previous code). The Penal Code introduces 3 "types" of penalties of deprivation of liberty:

– a penalty of deprivation of liberty for a period of one month to 15 years (art. 37 of the Penal Code); and

– two "special" penalties of deprivation of liberty, i.e. of deprivation of liberty for 25 years or for life.

The penalty of deprivation of liberty for 25 years and for life is provided in the Penal Code for the most serious offences. The penalty of 25 years of deprivation of liberty is provided for in six provisions of the code together with alternative penalties of deprivation of liberty for a period of 5 to 15 years as well as in eight provisions together with alternative penalties of 10 to 15 years of deprivation of liberty.

A person who has been sentenced to 25 years of deprivation of liberty may be conditionally released before the expiration of his/her sentence after he/she has served 15 years, whereas a person sentenced to deprivation of liberty for life after serving 25 years of such a sentence.

The deprivation of liberty for life is provided for in nine provisions, whereas the deprivation of liberty for life is provided for in six provisions together with alternative penalties of deprivation of liberty for 12 to 15 years or for 25 years; the deprivation of liberty for life is provided for together with alternative penalties of deprivation of liberty for 10 to 15 years or for 25 years in one provision and together with alternative penalties of deprivation of liberty for 8 to 15 years or for 25 years in another provision.

According to the "Statement of reasons for the draft of the Penal Code", the penalty of deprivation of liberty for life should be used rarely and cautiously. This penalty is often criticised in legal literature for being contrary to the principle which says that a convicted person should have a chance to return to society. Currently, this penalty is clearly less harsh because it is possible to be conditionally released before the expiration of a sentence.

In the present Penal Code penalties are no longer divided into main and additional ones; the latter have been replaced with penal measures, which are listed in art. 39 of the Penal Code.

7.2. Penal measures

Penal measures fulfil slightly different functions than penalties and they are aimed at prevention, compensation and resocialisation[128]. As is the case with penalties, penal measures are imposed after it has been determined that a perpetrator is guilty of committing an offence[129] unless they are imposed as preventive measures, which is when they are imposed regardless of the person's guilt[130]. Utilitarian considerations lay at their political and criminal basis[131]. They are repressive in character and are based on the idea of social vengeance.

The number of penal measures that are provided for in the present Penal Code was increased to 15 (from a total of 7, which were provided for in the 1969 Penal Code): 13 of such measures are set out it art. 39 of the Penal Code (the 2 remaining ones are specified in arts. 51 and 52 of the code).

These measures' characteristics are described in the general part of the Penal Code (arts. 40–52).

The rules for imposing them are based on the directives concerning the imposition of penalties (art. 53 of the Penal Code) which are to be used in the "appropriate" way (cf. art 56 of the Penal Code).

The following penal measures are identified in the Penal Code.

Deprivation of public rights (art. 49, sec. 1. and 2.) IV°

Art. 40, sec. 1 and 2 states that the deprivation of public rights shall include the loss of the right to vote and be elected to legislative, professional or business self-governing bodies, the loss of the right to participate in the administration of justice, and an interdiction preventing someone from performing functions in state administration, local government and professional self-governing bodies, the loss of military rank and demotion to private; the deprivation of civil rights also includes the loss of decorations, distinctions and honorary titles as well as the loss of the capacity to acquire them during the period of the deprivation of such rights; the court may rule on the deprivation of civil rights in the event of sentencing someone to deprivation of liberty, for a period of not less than 3 years for an offence committed from motives deserving particular reprobation[132].

It does not seem necessary to describe the rules for imposing this measure because of the character of this book.

It is, however, necessary to explain the meaning of the term 'motives deserving particular reprobation'.

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[128] See: R. Zalewski, *Środki karne*, [in:] M. Królikowski, R. Zabłocki (red.), *Kodeks Karny. Część ogólna. Vol. II, Komentarz do artykułów 32–116*, C.H. Beck, Warszawa 2011, p. 95.

[129] Compare: K. Indecki, A. Liszewska, *op.cit.*, p. 96.

[130] See: A. L. Patenaude, M.A. Patenaude, *Diversion and Diversion Programs*, [in:] C.A. Wright, A.R. Miller (red.), *Encyclopedia of Criminology*, Vol. I, New York–London 2005.

[131] See: W. Makowski, *Kodeks karny. Komentarz*, Warszawa 1937, p. 150.

[132] See also for example: J. Szumski, [in:] M. Królikowski, R. Zawłocki (red.), *Kodeks karny*..., p. 43.

This expression means, among other things: a desire for revenge, desire to become wealthy at any cost, and desire to humiliate another person and constitutes, for example, a feature of the offence of homicide, which is specified in art. 148, sec. 2. of the Penal Code.

The expressions that are used in both these provisions, i.e. art. 40, sec. 2 and art. 148, sec. 2, should be understood as having the same meaning. Homicide someone from "motives deserving particular reprobation"[133] should lead to imposing a penal measure of deprivation of public rights[134].

An interdiction preventing someone from holding a specific post, practising a specific profession or engaging in specific economic activities (art. 39, sec. 2., and art. 41)

Even the Penal Code of 1932 provided for this measure, i.e. in art. 48.

The 1969 Penal Code extended its scope (in art. 42) to also include an interdiction preventing someone from holding specific positions or practising a specific profession.

While it is required to have certified skills to practise certain professions, this is not necessarily true of holding certain posts.

The Penal Code of 1997, art. 41, sec. 1. states that the court may issue an interdiction order preventing someone from holding a specific post or practising a specific profession if a perpetrator abused his/her position related to his/her post or profession or showed that if he/she continues to hold a particular post or practise a particular profession, this might constitute a threat to significant goods or values protected by law[135].

During the period of this code's applicability the terms 'profession' and 'post' were ultimately defined: a profession is any kind of gainful activity which is of a relatively permanent nature and which requires professional knowledge and skills; whereas a post refers to someone's professional position in an organisational or professional hierarchy as well as a dignity, function or appointment[136].

If this measure is to be imposed, such an abuse must be related to an offence, i.e. this measure cannot be used if someone abused his/her position but this was not connected with committing an offence.

The court may also issue an interdiction order preventing someone from conducting specific economic activity in the event of convicting this person of an offence that he/she committed in relation to carrying out such business activity, which, if continued, would pose a serious threat to significant goods or values protected by law (art. 41, sec. 2. of the Penal Code). It should be emphasised that this measure is optional and it can be imposed for a period of 1–10 years.

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[133] See: M. Budyn, *Motywacja zasługująca na szczególne potępienie (próba analizy)*, Prokuratura i Prawo 2000, 9.

[134] See: Decision of Polish Supreme Court (SN) (9.05.2000 r., WA 13/00), OSNKW 2000, 7–8/62.

[135] See also: M. Szewczyk, [in:] K. Buchała, A. Zoll (red.), *Kodeks karny. Komentarz...*, p. 207.

[136] See: K. Buchała, [in:] K. Buchała, A. Zoll (red.), *Kodeks karny. Komentarz...*, p. 339.

Economic activity refers to professional activity which is carried out in a continuous and organised way as well as for profit[137].

An interdiction preventing someone from carrying out activity related to the upbringing, treatment as well as education or care of people under the age of majority (art. 39, sec. 2a and art. 41a, sec. 1a and 1b)

This measure was introduced into art. 41 of the Penal Code in 2005 in the form of two new sections, i.e. 1.a and 1.b, and it is, in fact, a new penal measure.

It can be imposed: a) optionally and involve an interdiction preventing a given perpetrator from holding any or specific posts, practising any or specific professions or carrying out any or specific activities related to the upbringing, education and treatment or care of minors forever if the perpetrator has been convicted of an offence against sexual freedom or decency that was committed to the detriment of a minor (sec. 1.a); or

b) mandatorily if someone was convicted again in circumstances specified in sec. 1a (sec. 1b).

It should be emphasised that this measure is imposed "forever".

The period of time for which it is imposed is also set out in art. 43, sec. 1. of the Penal Code, which provides that the measure may be imposed for 1–15 years.

Given these two provisions, it can be stated that this measure may be imposed for a particular period of time or indefinitely (forever).

An obligation to refrain from being in specific environments or places, an interdiction preventing someone from contacting specific persons, an interdiction preventing someone from approaching specific persons or an interdiction preventing someone from leaving a specific place of residence without the court's permission (arts. 39, sec. 2.b and 41a)

This obligation was introduced in art. 41a, sec. 1–3.

The court may optionally impose an obligation on someone to refrain from being in specific environments or places; issue an interdiction order preventing someone from contacting specific persons, an interdiction order preventing someone from approaching specific persons or an interdiction order preventing someone from leaving a specific place of residence without the court's permission; or issue an injunction to order a perpetrator to leave a dwelling unit which he/she occupies together with the wronged party if the perpetrator has been convicted of an offence against sexual freedom or decency to the detriment of a minor or of another offence against freedom and if the perpetrator has been convicted of committing an intentional offence with the use of violence, especially if violence was used against a person who was close to the perpetrator; such an obligation or interdiction can also be combined with an obligation to report to the police or another organ, as indicated, at specified intervals (art. 41a, sec. 1.).

[137] See: K. Indecki, A. Liszewska, *op.cit.*, p. 118.

The court imposes an obligation on someone to refrain from being in specific environments or places or issues an interdiction order preventing someone from contacting specific persons, an interdiction order preventing someone from approaching specific persons, an interdiction order preventing someone from leaving a specific place of residence without the court's permission or an injunction to order a perpetrator to leave a dwelling unit which he/she occupies together with the wronged party if the perpetrator has received a penalty of deprivation of liberty without the possibility of conditionally suspending its execution for an offence against sexual freedom or decency to the detriment of a minor; such an obligation or interdiction can be combined with an obligation to report to the police or another organ, as indicated, at specified intervals (art. 41a, sec. 2.).

The term 'offences committed with the use of violence' refers to offences, among whose features is violence. The other features do not require detailed interpretation because their legal meaning is consistent with their common meaning. It should, however, be stressed that "the place of residence" is not equated with the place where a given person must "report to the police". According to W. Zalewski, such an interpretation of these terms makes it possible to accept changes of the place of permanent residence or changes of the place of residence that are connected with a given person's personal and proprietary business, without limiting the person in this regard[138].

The obligations and interdictions that are set out in art. 41a, sec. 1. and 2. are ordered for a period of 1–15 years.

According to these provisions, the measures can be ordered either optionally (sec. 1.) or mandatorily (sec. 2.); the indicated measures can be ordered together; their aim is to exert the appropriate influence on a perpetrator.

The measure that is set out in sec. 2. is mandatory in character. It is imposed in perpetuity on perpetrators with disturbed sexual preferences and on perpetrators who committed offences against sexual freedom or decency to the detriment of persons who are specified in the provision if such perpetrators have been sentenced to deprivation of liberty without the possibility of conditionally suspending its execution.

The court may also impose an obligation on a perpetrator to refrain from being in specific environments or a specific place (places), issue an interdiction order preventing a perpetrator from contacting specific persons or an interdiction order preventing a perpetrator from approaching specific persons, or an injunction to order him/her to leave a specific place of residence without the court's permission forever if the perpetrator was convicted again in circumstances specified above (art. 41a, sec. 3.).

When issuing an interdiction order preventing a perpetrator from approaching specific persons, the court determines the distance that the perpetrator must keep from the wronged person.

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[138] W. Zalewski, *Środki karne*, [in:] M. Królikowski, R. Zabłocki (red.), *Kodeks Karny...*, t. II, p. 127.

An interdiction preventing someone from entering a site where a mass event is being held (art. 39, sec. 2c and art. 41b)

This interdiction is sometimes referred to in legal literature as a stadium ban. Earlier, this interdiction was provided for in art. 22 of the Law on the Safety of Mass Events [PL: ustawa o bezpieczeństwie imprez masowych] of 22 August 1997 (consolidated text: Journal of Laws of 2005, no. 108, item 909, as amended).

Also, the time period for which this measure can be imposed has been changed – it used to be 3–12 months according to the above-mentioned law, and now it is 2–6 years in accordance with the Penal Code.

The measure in its current form is the result of the process of adapting Polish law to European standards.

Therefore, the court may issue an interdiction order preventing someone from entering a site where a mass event is being held if a given perpetrator committed an offence in relation to such an event and the perpetrator's participation in mass events jeopardises goods or values protected by law. The court issues an interdiction order preventing someone from entering a site where a mass event is being held in situations indicated by statute (art. 41b, sec. 1. of the Penal Code).

Such an interdiction order can only be issued in cases prescribed by law in order to provide security at mass events. Thus, it should be issues in connection with carrying and possessing a weapon at such events and also with using pyrotechnic articles in the area where sports competitions are organised at the time when a mass event is being held in a way that endangers the life or health of people who are gathered there.

The court imposes this measure if a perpetrator has been convicted of any offence which was committed in relation to this perpetrator's conduct that showed that his/her participation in a mass event poses a threat to significant goods or values protected by law.

The legal definition of a mass event has been formulated as part of judicial decisions that have been issued; according to this definition, a mass event is a mass, artistic entertainment event and also, for example, a football match, which is played, for example, at a stadium, in a sports hall or elsewhere.

Events that are organised in theatres, opera houses, schools, etc. are not considered to be mass events[139].

An interdiction preventing someone from entering a site where a mass event is being held concerns all events taking place at the territory of the Republic of Poland as well as football matches that are played by the Polish national football team or sports club outside the territory of the Republic of Poland (sec. 2.).

When issuing an interdiction order preventing someone from entering a site where such an event is being held for an offence committed in relation to a mass sports event, the court may impose an obligation on the convicted person to stay in a specific place of permanent residence for the duration of certain mass events that are covered by this interdiction; compliance with such an obligation is then checked in a way that

[139] See: *ibidem*, p. 148.

is specified in the provisions concerning the execution of the penalty of deprivation of liberty outside a penal institution with the use of electronic monitoring (sec. 3.).

It is the court that issues an interdiction order preventing someone from entering a site where a mass event is being held. The court may decide, when this is particularly justified, that after the lapse of the period covered by such an interdiction the convicted person will be obligated to appear in a particular police office or in another location that will be specified by a district, local or municipal police commander when certain mass events covered by the interdiction will be held (sec. 5.).

The total time during which a convicted person will have to comply with the obligations that are set out in sec. 3. and 5. (for example, if a given prohibited act was committed in relation to a mass event) may not exceed the period that was determined in the interdiction preventing this person from entering the site where such an event is being held (sec. 6.).

If certain facts indicate that it is impossible for a convicted person to comply with the obligation that is specified in sec. 3. or that the judgment is clearly inexpedient, the court imposes on the perpetrator, in place of this obligation, an obligation to appear in the above-mentioned location during the time period when an event that is covered by the interdiction is being held (sec. 7.).

When imposing an obligation under sec. 3., 5. or 7., the court specifies particular events during which such an obligation must be complied with, by pointing to, for example, the name of a sport and sports clubs as well as the territorial scope of this obligation in relation to the events that are covered by it (sec. 8.).

The obligations that are imposed based on sec. 3., 5. and 7. are expressed in terms of months and years. The obligation that is specified in sec. 3. can be imposed for a period of not less than 6 months and not more than 12 months (an interdiction order preventing someone from entering a site where a mass event is being held), the obligation that is referred to in sec. 7. (to appear in a given police office) is imposed for a period of 6 months to 6 years, and this period may not exceed the period which is covered by an interdiction order preventing someone from entering a site where a mass event is being held (sec. 9.).

The act of 22 July 2010 (Journal of Laws, no. 152, item 1021) introduced a new provision into the Penal Code, i.e. art. 244a, which eliminates the loophole concerning the imposition of a penalty for behaviours described in art. 41b. According to art. 244a, whoever fails to comply with the obligation to stay at a specific location (for example, the place of permanent residence or in a police office – see above), which has been imposed in relation to an interdiction order preventing him/her from entering a site where a mass event is being held, shall be subject to a fine or the penalty of restriction of liberty or deprivation of liberty for up to 2 years (art. 244a, sec. 1.).

An interdiction preventing someone from entering game centres and participating in gambling (arts. 39, sec. 2d and 41c)

An interdiction order that is issued to prevent someone from entering game centres and participating in gambling does not concern promotional lotteries (art. 41c, sec. 1.).

The court may issue an interdiction order preventing someone from entering game centres and gambling if a given person has been convicted of committing an offence in relation to organising or participating in gambling (art. 41c, sec. 2.).

This interdiction is optional. It was introduced by the Gambling Act [PL: ustawa o grach hazardowych] of 9 November 2009 (Journal of Laws no. 201, item 1540, as amended).

This measure was introduced because the legislator had noticed that there was a need to increase control over gambling.

The concepts that are used in the Penal Code are interpreted based on the relevant provisions of this act which, *nota bene*, does not include penal provisions, but specifies pecuniary penalties (so-called administrative penalties).

This measure is imposed in connection with an offence which may facilitate the organisation of gambling, i.e., for example, fraud (art. 286 of Penal Code), forgery of documents (art. 270 of Penal Code) or money laundering (art. 299 of Penal Code).

An interdiction order preventing someone from entering game centres and participating in gambling is issued for a period of 1–10 years.

An injunction ordering a perpetrator to leave a dwelling unit which he/she occupies together with the wronged person (art. 39, sec. 2e)

The meaning and function of this measure are evident from its name and, therefore, do not need to be explained.

An interdiction preventing someone from operating vehicles (arts. 39, sec. 3. and 42)

The scope of this measure is relatively broad; it covers all participants in traffic as well as aiders and abettors and instigators if they are in a vehicle[140].

This measure was already provided by the 1969 Penal Code, but its scope was slightly narrower then.

Such an interdiction order is issued optionally or mandatorily.

The court may optionally issue an interdiction order preventing a participant in traffic from operating vehicles of a specific kind if this person has been convicted of an offence against the safety of this traffic, in particular, when the circumstances of the offence show that this would endanger traffic safety if the person still operated vehicles (art. 42, sec. 1. of the Penal Code).

An interdiction order preventing someone from operating vehicles is issued mandatorily if a given person was in a state of insobriety or under the influence of an intoxicating substance at the time of committing an offence against traffic safety or fled from the scene, as set forth in art. 173 of the Penal Code (causing a road, water or air traffic catastrophe), art. 174 of the Penal Code (creating an imminent danger of

[140] See: Ł. Łucarz, *Zakaz prowadzenia pojazdów*, [in:] M. Melezini (red.), *System prawa karnego*, t. 6, p. 583 ff.; P. Kardas, *Teoretyczne podstawy odpowiedzialności karnej za przestępne współdziałanie*, Kraków 2001, p. 654.

a road, water or air traffic catastrophe) or art. 177 of the Penal Code (unintentionally causing a road, water or air traffic accident) (of any or a specific kind) (art. 42, sec. 2.).

The interdiction that is set out in art. 41, sec. 1. and 2. is ordered for a period of 1–10 years.

An interdiction order preventing someone from operating any motor vehicles (a motor vehicle is a vehicle equipped with a motor or powered by electric traction; among non-motor vehicles are bicycles, gliders, etc.) is issued in perpetuity:

– if, at the time of committing the offence that is specified in art. 173 of the Penal Code, which resulted in the death of a human being or caused grievous bodily harm to a human being, or at the time of committing the offence specified in art. 177, sec. 2. or art. 355, sec. 2. of the Penal Code, the perpetrator was in a state of insobriety or under the influence of an intoxicating substance or fled from the scene, unless it is a special case that is justified by special circumstances (art. 42, sec. 3.);

– if a person operating a motor vehicle in circumstances that are specified above was convicted for this offence again.

Therefore, this penal measure will never be implemented based on this provision unless in a special case that is mentioned above.

This interdiction order is executed after a perpetrator has served his/her sentence for the above-mentioned offences[141]. When imposing this measure, the court obligates the perpetrator to surrender the relevant document (his/her driving licence); the time period that is covered by such an interdiction starts after the perpetrator has served his sentence[142].

Forfeiture (art. 39, sec. 4.), arts. 44 and 45)

These conclusions can be drawn from art. 44, after it has been reviewed:

i) the following objects are forfeited:

– *producta sceleris* (items directly derived from an offence);

– *instrumenta sceleris* (items that were designed for or used to commit an offence);

– other items that are indicated in this provision;

ii) the following forms of forfeiture can be identified:

– forfeiture of items (art. 44, sec. 1., 2. and 6.), forfeiture of the pecuniary equivalent of items (art. 44, sec. 4.), forfeiture of a material benefit or its pecuniary equivalent (art. 45, sec. 1.)

– forfeiture of a share in co-owned items (art. 44, sec. 7.), forfeiture of the pecuniary equivalent of such a share (art. 44, sec. 7. *in fine*);

– forfeiture of a share in a material benefit (art. 45, sec. 1. *in principio* of the Penal Code);

– forfeiture of the equivalent of a share in a material benefit (art. 45, sec. 5. *in fine* of the Penal Code).

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[141] See: postanowienie SN z 19 stycznia 2002, I KZP 33/01, OSNKW 2002, 3–4/15.

[142] See: L. Paprzycki, *Zakaz działalności zawodowej w kodeksie karnym (wnioski* de lege ferenda), Nowe Prawo 1985, 3, p. 36 ff.; A. Marek, *Kodeks karny...*, p. 118.

If a perpetrator has been convicted of an offence from which he obtained, even indirectly, material benefits of significant value, it is considered that the property that the perpetrator took possession of or to which he/she obtained any legal title at the time of or after committing the offence constitutes a benefit derived from committing an offence until a judgment is passed, even if it is not yet final and unappealable, unless the perpetrator or another person presents evidence to the contrary (art. 45, sec. 2.).

If the circumstances of the case indicate a high probability that the above-mentioned perpetrator transferred to a natural or legal person or an unincorporated organisational unit beneficial or legal ownership of property which constitutes a benefit derived from committing an offence, it is considered that the items that are in the autonomous possession of such a person or unit or the property rights of such a person or unit belong to the perpetrator unless such a person or unit provides proof of obtaining them legally (art. 45, sec. 3.).

A person who is not the accused may claim the rights to forfeited items in civil proceedings (c.f. art. 412 of the Code of Penal Procedure).

Art. 45, sec. 4 makes it possible to rebut the presumption about forfeited items. Since the above-mentioned provisions apply when items were forfeited under art. 292, sec. 2. of the Code of Penal Procedure, a natural or legal person or unit whom/which the presumption introduced in sec. 3 concerns may bring an action against the State Treasury for rebutting this presumption; until the case is decided and a final and unappealable judgment is passed, enforcement proceedings are suspended[143].

An obligation to redress material damage or compensate for non-material damage (art. 39, sec. 5.) and art. 46)

Currently, an obligation to redress material damage is not a probation measure which can be imposed in connection with the conditional suspension of criminal proceedings (art. 67, sec. 2. of the Penal Code) or conditional suspension of the execution of a penalty (art. 72, sec. 2 of the Penal Code).

Also, this measure was introduced into the Penal Code in order to fulfil international obligations[144]; this shows that the importance of damages and compensation in penal law has grown.

A judge may use this measure even if no relevant application has been filed (art. 46)[145].

Such an application can be filed by a wronged person or by another person who is authorised to do this. Then the court imposes an obligation to redress the material damage that resulted from an offence in whole or in part or to compen-

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[143] W. Zalewski, *op.cit.*, p. 209.

[144] See e.g.: A/RES/40/34, 29 November 1985, 96th plenary meeting Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power http://www.un.org/documents/ga/res/40/a40r034.htm; J. Lachowski, T. Oczkowski, *Obowiązek naprawienia szkody jako środek karny,* http://www.pggov.pl/plik/2013_12/cced07995df689ddbca2a005f107c9b1.doc

[145] K. Indecki, A. Liszewska, *op.cit.*, p. 56.

sate the wronged person for the non-material damage he/she has suffered (art. 46, sec. 1.). If such an application is filed, this excludes the possibility of bringing ancillary proceedings. If, however, one has brought such proceedings, this excludes the possibility of filing such an application (see art. 65, sec. 1., item 6 and art. 49a of the Code of Penal Procedure).

If the court imposes this measure, it is not treated as a quasi-civil claim for damages[146]; the court decides how material damage is to be redressed by solely taking into account criminal policy considerations.

Instead of imposing an obligation to redress material damage that was caused by committing an offence or compensate for non-material damage, the court may order the perpetrator to make exemplary damages (**compensate for non-material damage**) for the benefit of the wronged person based on art. 46, sec. 2. and art. 415, sec. 5. of the Code of Penal Procedure; according to the latter, the court orders the perpetrator to make a supplementary payment or imposes an obligation to redress material damage or compensate the wronged person for the non-material damage in cases specified in this provision[147].

A supplementary payment (arts. 39, sec. 6.) and 47)

This measure is criticised in legal literature[148]; certain authors even propose that it be removed from the Penal Code[149]. It is generally accepted that this measure constitutes an additional burden which has a wide scope of use and which is penal in nature and similar to a fine. Since a supplementary payment is ordered optionally, the court may only issue such an order when the court decides that this measure will fulfil its objectives as a penalty.

According to the Penal Code, if someone was convicted of committing an intentional offence against the life or health of another person, an unintentional offence resulting in the death of another person, grievous bodily harm, disturbance of the functioning of a bodily organ or damage to the health of another person, or an offence under art. 173 (see above), art. 174 (see above), art 177 (see above) or art. 355 of the Penal Code (military traffic accident), and if the perpetrator was in a state of insobriety or under the influence of an intoxicating substance or fled from the scene, the court may order a supplementary payment for the benefit of the Wronged Persons and Post-Penitentiary Assistance Fund [PL: Fundusz Pomocy Pokrzywdzonym oraz Pomocy Postpenitencjarnej] (art. 47, sec. 1.).

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[146] W. Zalewski, *op.cit.*, p. 222.

[147] See: Z. Gostyński, *Obowiązek naprawienia szkody w nowym ustawodawstwie karnym*, Warszawa 1999, p. 39 ff.

[148] J. Jasiński, *O nowy kształt systemu środków karnych*, [in:] A. Strzembosz (red.), *O prawo karne oparte na zasadach sprawiedliwości, prawach człowieka i miłosierdzia. Materiały z sympozjum nt. reformy prawa karnego zorganizowanego przez sekcję nauk prawnych KUL w Kazimierzu nad Wisłą w dniach 28-30.04.1988 r.*, Lublin 1988, p. 277 ff.

[149] O. Sitarz, *Obowiązek naprawienia szkody i nawiązka jako środki karne w projekcie kodeksu karnego*, [in:] Problemy Nauk Penalnych, Prace ofiarowane Pani Profesor Oktawii Górniok, Katowice 1996, p. 160.

If someone was convicted of an offence against the environment, the court may order the perpetrator to make a supplementary payment for the benefit of the National Fund for Environmental Protection and Water Management (see art. 400 of the Environmental Protection Act [PL: prawo ochrony środowiska] dated 27 April 2001; Journal of Laws of 2008, no. 25, item 150, as amended).

A supplementary payment is ordered in the amount of PLN 1–100,000[150] (art. 47, sec. 2. of the Penal Code).

Pecuniary consideration (arts. 39, sec. 7.) and 49)

Pecuniary consideration is ordered when the court decides to refrain from imposing a penalty and also in cases that are specified by statute, i.e., e.g. in art. 72, sec. 2. of the Penal Code (apart from the conditional suspension of the execution of a penalty).

Such pecuniary consideration is ordered to be paid for the benefit of the Wronged Persons and Post-Penitentiary Assistance Fund in the amount of not more than PLN 60,000.

If a given perpetrator was convicted of an offence under art. 178a of the Penal Code (operating a motor vehicle in a state of insobriety or under the influence of an intoxicating substance), art. 179 of the Penal Code (allowing the operation of a vehicle which is not roadworthy or allowing a person who is in a state of insobriety or under the influence of an intoxicating substance or a person who does not have the required permission to operate a vehicle) or art. 180 (ensuring traffic safety), the court may order the perpetrator to pay pecuniary consideration for the benefit of the Wronged Persons and Post-Penitentiary Assistance Fund in the amount of up to PLN 60,000.

Pecuniary consideration may be ordered together with another penal measure (supplementary payment).

Making a judgment publicly known in a specific way (arts. 39, sec. 8.) and 50)[151]

The court decides how a judgment is to be made publicly known; i.e. in a way that the court deems purposeful.

This measure is imposed in order to:

– tarnish the good name of a convicted person in a particular community,

– warn those who would like to copy a convicted person's behaviour,

– give satisfaction to the wronged person[152].

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[150] A. Marek, *Kodeks karny*..., p. 133.

[151] As mentioned above – in the former Penal Code those measures were called supplementary penalties. Article 38 of the Penal Code of 1969 knew seven categories supplementary penalties: deprivation of public rights, deprivation of parental or guardianship rights, a ban on holding certain posts, an exercising certain professional occupations or certain activities, a ban on operating motor vehicles, confiscation of property, forfeiture of possessions, publication of the sentence in a specific manner for public information.

[152] K. Indecki, A. Liszewska, *op.cit.*, p. 251.

This measure can also be imposed when a wronged person petitions the court for using it (art. 215 of the Penal Code). This provision makes it mandatory to publicly announce a conviction (which is optional in the other cases)[153].

A judge decides how a judgment is to be made public at his/her own discretion by taking the circumstances of the case into account[154].

This measure is of a generally preventive character. A judgment must be published so as not to adversely affect the wronged person's interests (goods or values).

A postulate that judgments of acquittal should be made public at the accused person's request and at the State's expense seems reasonable[155].

Where a given judgment should be published should depend on the importance of a given case; for example, in a given person's workplace, in the mass media, etc.

Also, the measures that are provided for in two other provisions, i.e. arts. 51 and 52 of the Penal Code, which are not mentioned in art. 39 of the Penal Code, can be regarded as penal measures.

Notifying a family court (art. 51 of the Penal Code)

According to this provision: "The court, in deciding to deprive or restrict parental or guardianship rights in the event of an offence committed to the detriment of a minor or in co-operation with a minor, shall notify the competent family court".

This provision is regarded as redundant because it repeats certain rules of civil procedure and, therefore, it does not create a new legal basis for dealing with particular behaviour.

An obligation to return material benefits (art. 52 of the Penal Code)

In the case of a conviction for an offence which brought a material benefit to a natural or legal person or unincorporated organisational unit and was committed by a perpetrator who acted on behalf or in the interest of such a person or unit, the court obligates the entity which obtained a material benefit to return the whole or part of it to the State Treasury; this provision does not apply when a material benefit is to be returned to another entity[156].

This provision is of an "auxiliary" character – whether it will be used does not depend on the perpetrator's fault (therefore, it is an example of objective responsibility).

This measure can be imposed together with other measures. It should not be mistaken with the measure that is described in art. 45, sec. 3[157].

It is, however, relatively difficult to differentiate between them[158].

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[153] Wyrok SN z 15.02.1972 r. (V KRN 589/71), OSNKW 1972, 5/84.

[154] K. Indecki, A. Liszewska, *op.cit.*, p. 253.

[155] *Ibidem*.

[156] Art. 52 of the Penal Code.

[157] See: art. 52 of the Penal Code.

[158] M. Miąsik, *Instytucja zobowiązania do zwrotu bezprawnie uzyskanej korzyści majątkowej (art. 52) w świetle badań ankietowych*, Czasopismo Prawa Karnego i Nauk Penalnych 2007/2, p. 173 ff.

7.3. Preventive measures

These measures are used in order to prevent a perpetrator from again committing a prohibited act which is related to his/her mental disease, sexual preference disorders, mental impairment or addiction to alcohol or another intoxicating substance.

Before these measures are imposed, first at least two competent psychiatrists and an expert psychologist, and sometimes a sexologist (in cases involving persons with sexual preference disorders) are heard[159].

Preventive measures are used together with or instead of a penalty.

In the Penal Code preventive measures of a therapeutic, non-therapeutic and administrative nature are identified.

Measures of a therapeutic nature

A person on whom such a measure has been imposed is isolated in an appropriate facility.

Such isolation is aimed to eliminate those psychological traits of a perpetrator which constituted a reason for using this measure (for example, insanity or inappropriate sexual preferences).

A perpetrator is placed in the following types of closed institutions:

– a psychiatric facility (mandatorily), where he/she will be subjected to the appropriate treatment (if a perpetrator committed a prohibited act whose social danger was significant while in a state of insanity and it is highly probable that he/she will commit the same act again; art. 94, sec. 1 of the Penal Code).

The period for which a perpetrator is placed in a psychiatric facility is not determined in advance; he/she is released after it is determined that further treatment in this facility is no longer necessary. The court may decide to place a perpetrator in the appropriate psychiatric facility again if the conditions for imposing preventive measures are met and if not more than 5 years have passed from the perpetrator's release from such a facility.

– a penal institution (optionally), where special treatment or rehabilitation is used with regard to perpetrators who have received the penalty of deprivation of liberty if they committed an offence while in a state of limited sanity. Such a perpetrator may also be referred to outpatient treatment (alternatively).

A person who has been placed in such a penal institution may also be conditionally released earlier at any time if he/she has received a penalty of deprivation of liberty for not more than 3 years and if it is reasonable in the light of the effects of treatment or rehabilitation. Then such a perpetrator must be placed under probation supervision (art. 95 of the Penal Code).

– a closed institution (optionally) – if a perpetrator received the penalty of deprivation of liberty for an offence against sexual freedom he/she had committed in connection with sexual preference disorders, and after the perpetrator has

[159] N. Kłączyńska, [in:] J. Giezek (red.), *Kodeks karny...*, p. 610.

served this sentence, in order to carry out the appropriate treatment unless such treatment may endanger his/her life or health. Such a perpetrator may also be referred to outpatient treatment (alternatively) (art. 95a, sec. 1.).

– a closed institution (mandatorily) – if a perpetrator has received the penalty of deprivation of liberty for an offence of raping a minor who was under 15 years of age, an ascendant, descendant, adopted child, adoptive parent, brother or sister (see art. 197, sec. 3, item 2. or 3.). Such a perpetrator may also be referred to outpatient treatment (alternatively) (art. 95a, sec. 1a of the Penal Code);

It is determined whether or how the measure referred to in art. 95a, sec. 1. of the Penal Code or 1a is to be implemented up to 6 months before the expected conditional release or execution of a penalty; the court may also order a change in the way in which a penalty is to be executed at any time. The evasion of outpatient treatment, i.e. outside the institution, results in placing a given person in the institution (see art. 95a, sec. 2. and 3. of the Penal Code).

– closed addiction treatment facility (optionally) – when a perpetrator has received a penalty of deprivation of liberty for up to 2 years for an offence he/she committed in connection with being addicted to alcohol or another intoxicating substance and it is highly probable that he/she will commit an offence related to this addiction again.

The duration of stay in such a facility is not determined in advance; it may not be shorter than 3 months and longer than 2 years. A perpetrator is released based on the effects of the treatment (following consultations with the attending physician). The period during which a given person stays in an addiction treatment facility is counted towards the penalty (art. 96 of the Penal Code). It is also possible to conditionally release a convicted person from the obligation to serve the rest of his/her sentence at any time; then it is mandatory to place such a perpetrator under probation supervision (art. 98 of the Penal Code).

The use of this measure is relatively flexible. This is because, depending on the progress of treatment, the court may refer a convicted person to outpatient treatment or rehabilitation in a treatment and rehabilitation facility for a trial period of 6 months to 2 years. Then such a person also must be supervised by, for example, a probation officer or another trustworthy person.

If a convicted person breaches the conditions of the trial period (e.g., evades treatment) or, for example, commits an offence, he/she may be placed in a closed addiction treatment facility again.

Six months after a successful completion of a trial period, the sentence is deemed to have been served on the day of the end of this period.

Measures of a non-therapeutic nature

These measures are imposed on a perpetrator who committed an offence while in a state of limited sanity. The court may use the following penal measures as a preventive measure: an interdiction preventing the perpetrator from holding a specific post, practising a specific profession or carrying out specific economic activities; an

interdiction preventing him/her from carrying out activity related to the upbringing, treatment as well as education or care of minors; an obligation to refrain from being in specific environments or places, an interdiction preventing the perpetrator from contacting specific persons, an interdiction preventing him/her from approaching specific persons or an interdiction preventing him/her from leaving a specific place of residence without the court's permission; an interdiction preventing the perpetrator from entering a site where a mass event is being held; an interdiction preventing him/her from entering game centres and gambling; an injunction ordering the perpetrator to leave a dwelling unit which he/she occupies together with the wronged person; and an interdiction order preventing him/her from operating vehicles, if the court decides that these measures are necessary for the sake of the protection of public order.

The court may also order forfeiture as a preventive measure. The above-mentioned interdictions and obligations are cancelled when the causes of why they were ordered cease to exist (art. 99 of the Penal Code).

Measures of an administrative nature

Currently, it is forfeiture, i.e. a penal measure, that performs the function of a preventive measure of an administrative nature. The court imposes this measure optionally if the social danger of an act is insignificant, if criminal proceedings have been conditionally suspended or if it has been stated that there is a circumstance excluding the possibility of penalising the perpetrator. Among such circumstances are those that are set out in provisions containing the so-called non-punishability clauses ("shall not be subject to a penalty"); for example, art. 15 of the Panal Code, sec. 1., art. 252, sec. 4. of the Penal Code and art. 16 of the Fiscal Penal Code and many others contain this clause. The expiry of a limitation period (art. 101 of the Penal Code) as well as abolition and pardon also belong to this type of circumstances. The possibility of penalising a perpetrator can be excluded based on the Crown Witness Act [PL: ustawa o świadku koronnym] dated 25 June 1997 (consolidated text: Journal of Laws of 2007, no. 36, item 232, as amended) and because of the perpetrator's death.

Special Part

Justyna Jurewicz

Commentary to the offences in Polish Penal Code of 1997[1] should be begun from the statement that the legislator decided to penalize a lot of acts which differ from each other. Generally one may say that in the Penal Code there are following groups of offences, divided in more than one chapter:

1) offences against the person and personal interests;
2) offences against the property and the economic interests;
3) offences against the strictly public interests.

It is to remark that every offence is connected with public interest, because in other way it shouldn't be punished under the public law. On the other hand it must be noticed that there are offences which are connected with stronger protection in the Penal Code as serious offences (crimes) and the offences which are less – serious offences – that are punished less strictly (misdemeanors).

The offences against the person and the personal interests ought to be divided into following categories being written in the Penal Code

1) offences against life and health (chapter XIX);
2) offences against liberty (chapter XXIII);
3) offences against freedom of conscience and religion (chapter XXIV);
4) offences against sexual liberty and decency (chapter XXV);
5) offences against family and guardianship (chapter XXVI);
6) offences against honor and personal inviolability (chapter XXVII);
7) offences against rights of the persons who pursue the paid work (chapter XXVIII).

The offences against the property and economic interests are:

1) offences against property (chapter XXXV);
2) offences against business transactions (chapter XXXVI);

The offences against the public interests may be classified as:

1) offences against peace, humanity and war crimes (chapter XVI);
2) offences against the Republic of Poland (chapter XVII);

[1] See: part I.

3) offences against defense capability (chapter XVIII);
4) offences against public safety (chapter XX);
5) offences against safety in traffic (chapter XXI);
6) offences against environment (chapter XXII);
7) offences against functioning the state and local government institutions (chapter XXIX);
8) offences against administration of justice (chapter XXX);
9) offences against elections and referenda (chapter XXXI);
10) offences against public order (chapter XXXII);
11) offences against protection of information (chapter XXXIII);
12) offences against credibility of documents (chapter XXXIV);
13) offences against circulation of money and securities (chapter XXXVII).

Deliberations presented below are going to define the features of the most often committed offences in practice of Polish reality that is confirmed in proper criminal proceedings in Poland.

The analysis should be started from the offences against life. These are mainly cases of criminal homicide The most general of them is killing. It is described in art. 148, section 1. of the Penal Code. The killing is a serious offence which is – as every serious offence in Polish penal law, committed only with intent. It is to claim that the intent must be understood wider that causing something intentionally. It should be understood as:

a) intentional or with knowledge causing the death of an individual;
b) intending to cause serious bodily injury and committing an act clearly dangerous to human life that causes the death of an individual;
c) committing or attempting to commit an offence, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, committing or attempting to commit an act clearly dangerous to human life causing the death of an individual.

The individual is a person who is born alive by the woman. There is no difference in protection between individuals in case of killing. There is no matter in state of health, age, social status or gender. Each life is the same worth. The worth of life is the most important good which is protected by penal law[2].

The beginning of life – as it was just written – is the moment of birth. According to this, the regulation of killing does not apply to the death of an unborn child, especially if the conduct charged is:

a) conduct committed by the mother of the unborn child;
b) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of unborn child was the intended result of the procedure;
c) a lawful medical procedure performed by a physician or other licensed care provider with the requisite consent as a part of an assisted reproduction;

[2] More: S. Pikulski, [in:] J. Warylewski (red.), *System prawa karnego. Przestępstwa przeciwko dobrom indywidualnym*, Warszawa 2012, pp. 8–20.

d) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

The end of life is understood as the cerebral death. The cerebral death is the death when respiration and other reflexes are absent, consciousness is gone. It must be also claimed that the heartbeat may be not stopped during the state of cerebral death[3], because organs can be removed for transplantation before the heartbeat stops.

There is no matter who is the perpetrator. It is not needed for him to have any special feature. It can be everyone who is liable to be responsible under the penal law. The only exception is the type of killing called in common infanticide.

The offence of killing has its brands. It is to divide:

a) the general brand, which is described in art. 148 section 1.;

b) the special brands, that are included in art. 148 section 2.,3., 4., art. 149 and art. 150.

The special brands are also divided into:

a) qualified brands, which have the same features as general brand and also the additional feature or features causing the more severe responsibility under the penal law, straight from the Act;

b) preferential brands, that have the same feature as general brand and also the additional feature or features causing the more lenient responsibility under the penal law, straight from the Act.

The general brand of killing takes place when one kills an individual. The perpetrator shall be subject to the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

The qualified brands of killing are:

a) killing with particular cruelty;

b) killing in connection with hostage taking, rape or robbery;

c) killing for motives deserving particular reprobation;

d) killing with the use of explosives;

e) killing more than one person in one act;

f) killing in the situation when the perpetrator has earlier been validly and finally convicted for killing;

g) killing the public officer, committed during or in connection with discharging his official duties, connected with the protection of people or public security or public order.

The preferential brands of killing are:

a) killing a person due to the influence of an intense emotion justified by the circumstances;

b) killing an infant by the mother due to the intense emotional circumstances connected with the course of the delivery

c) killing an individual on his demand and under the influence of compassion for him.

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[3] M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz (red.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2010, p. 463.

All the qualified brands are banned under the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

The preferential brands have the various terms of sentence. Namely – the case of killing a person due to the influence of an intense emotion justified by the circumstances is forbidden under the penalty of the deprivation of liberty for a term between 1 and 10 years. Killing an infant by the mother under the conditions shown in art. 149 is punished by the penalty of the deprivation of liberty for a term of between 3 months and 5 years. And whoever kills an individual on his demand and under the influence of compassion for him shall be subject to the penalty of the deprivation of liberty for a term between 3 months and 5 years. In last case, in some extraordinary circumstances the court may apply an extraordinary mitigation of the penalty or even renounce its imposition.

The qualified brands were introduced into Polish system of penal law in the Act of 6 June 1997 of the Penal Code. Such an idea should be rather critically commented. The features of the particular qualified brands are often very similar to each other in individual cases. It causes the difficulty with the proper legal qualification. In Polish law there are no principles according to solving the problem of the coincidence of qualified brands, especially of serious offences. It is to be said that the general brand of killing seems to be enough to punish the perpetrators. The limits of the proper penalty is in its maximum sentence the same as in every qualified brand of killing. It is deprivation of liberty for life.

Underneath, there are efforts to explain the most important issues of the features of qualified and preferential brands that exist in practice.

Killing with particular cruelty should include the brutal way of acting by the perpetrator. Also it may be considered if the perpetrator inflicts to the victim some extraordinary, non-essential anguish[4]. It is said that this qualified brand of killing may be acceptable in practice. There is no approach unambiguously claiming that the other qualified brands of killing should be held.

Killing in connection with hostage taking, rape or robbery first of all is to be analyzed with construction one of shown in its name offences, namely: hostage taking, rape or robbery.

In Polish penal law hostage taking is one of the offences against liberty. It is improperly described in the chapter XXXI, entitled: "Offences against public order". Including its legal features art. 252 of the Penal Code statues that whoever takes or detains a hostage with the purpose of forcing a state or local government authority, an institution or organization, legal or natural person, or a group of persons to act in a specified manner shall be subject to the penalty of deprivation of liberty for a minimum term of 3 years. It is important to claim that whoever abandoned the intent to extort or releases the hostage shall not be subjected to the penalty for

[4] More: A. Staszak, *Przemoc, szczególne udręczenie i szczególne okrucieństwo jako znamię czynu zabronionego*, Prokuratura i Prawo 2008, 12, pp. 43–46.

this brand of hostage taking. Whoever makes preparations for this offence shall be subject to the penalty of deprivation of liberty for up to 3 years[5].

The qualified branch of hostage taking takes place if the consequence of the act specified above is the death of a person or a serious detriment to health. Then the perpetrator shall be subject to the penalty of deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years. There is also the possibility to avoid the penalty according to abandoning the intent to extort or releasing the hostage if it was voluntarily. Moreover, the court may apply the extraordinary mitigation of punishment to a perpetrator who did it not voluntarily.

Rape is one of the offences against the sexual freedom. It is described in art. 197 of the Penal Code. This is to certify that rape in Polish law has two forms:

a) connected with sexual penetration – shown in art. 197, section 1.;

b) not being the sexual penetration but connected with sexual context as submitting to other sexual act or performing such an act – presented in art. 197, section 2.

Both of rape forms are committed by using force, illegal threat or deceit[6]. The rape described in art. 197 section 1. of Polish Penal Code takes place when the perpetrator subjects another person to sexual intercourse. In such case he shall be subject to the penalty of the deprivation of liberty for a term of between 2 and 12 years.

The other form of rape takes place if the perpetrator makes another person submit to other sexual act or to perform such an act. Then he shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years.

The qualified brands of both rape forms are following:

a) committing rape in common with another person;

b) committing rape against the person under age of 15;

c) committing rape against an ascendant, descendant, brother or sister or a person being in adopted relation;

d) committing rape with particular cruelty.

Three first brands are banned with the penalty of deprivation of liberty for a minimum term of 3 years. The last one is banned with the penalty of deprivation of liberty for a minimum term of 5 years.

Robbery is an offence classified as one against property. It is described in art. 280 of the Penal Code. In general brand whoever commits theft with the use of violence against a person or through threatening the immediate use of violence or by causing a person to become unconscious or helpless shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.

The qualified brand takes place when the perpetrator of a robbery uses a firearm, knife, or any other dangerous item or paralyzing means, or acts in another manner immediately threatening life or acts in co-operation with another person

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[5] See also: T. Retyk, *Charakter przestępstwa wzięcia zakładnika (art. 252 paragraf 1 k.k.)*, Prokuratura i Prawo 2008, 4, pp. 149–151.

[6] More about the deceit: H. Myśliwiec, *Podstęp jako znamię przestępstwa zgwałcenia*, Prokuratura i Prawo 2012, 11, pp. 64–82.

using such a firearm, item or means or manner. In such case the perpetrator shall be subject to the penalty of deprivation of liberty for a minimum term of 3 years.

In the event of the act of a lesser significance of robbery, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

The main difficulties in legal qualification of perpetrator's act as describing brand is the connection between the killing and hostage taking, rape or robbery. Namely – it is not clear if such a connection should be understood narrowly or widely. If we take the narrow interpretation, it ought to be claimed that only killing coincident with the one of described acts – according to time and place – may be considered as qualified branch. Wider interpretation lets include also the post-time acts of killing which are connected with hostage taking, rape or robbery, for instance – killing the witness to avoid his testimony as a damning proof.

There is no satisfying answer to the question of wide or narrow interpretation described above. It seems that if the regulation does not constitute markedly the character of the connection between the killing and the other offence, and the interpretation is possible also widely, it should be admissible.

On the other hand, according to the principle of Polish penal proceeding law, which is included in the sentence: "*In dubio pro reo*", such wide interpretation may be for the perpetrator injurious and doubtful.

Killing for motives deserving particular reprobation is a qualified brand because of the special subjective attitude of the perpetrator. His act deserves in the valuation of most representative society particular reprobation. There is a question what is particular reprobation. In practice it is treated accidently. It may be killing because of profit desire, for example killing by the notorious contract killer or by the grandson who wants to get the grandmother's flat. It also may be killing because of revenge, but only if it is justified by circumstances. For instance – if the victim was an onerous neighbor.

Killing with the use of explosives is a qualified brand which might be a satisfying solution because of the natural danger which explosives cause. The question is in which relationship it remains with another qualified brand of killing, namely – with killing more than one person in one act. Obviously the explosives hurt and kill more than one human being, so it may become a problem of coincidence and lack of rules solving such a situation.

According to killing more than one person in one act it must be claimed that there may be difficulties with qualifying the offence of killing as such a brand that are the effect of one person killed and a lot of hurt ones – in case of direct danger of death. In such case it ought to be rather considered the general brand of killing or other qualified brand. It seems that the regulation of killing more than one person in one act makes the only possibility which is commission. Any form of an attempt seems impossible to exist[7].

[7] See also: A. Błachnio, *Zabójstwo jednym czynem więcej niż jednej osoby. Uwagi na tle art. 148 par. 3 K. K.,* Wojskowy Przegląd Prawniczy 2013, 2, pp. 3–12.

Killing in the situation when the perpetrator has earlier been validly and finally convicted for killing is a hidden form of the relapse to the offence. Generally this institution is connected with less – serious offences – not the serious ones. It may cause or causes the extraordinary enhancement of a penalty. This rule does not concern to the serious offences. The construction of describing qualified brand gives the possibility to punish the perpetrator more severe because of the fact of earlier conviction for killing. The question is what brand of earlier killing should be considered? The general or the qualified ones or also the preferential brands? It must be said that the regulation does not indicate the solution, so every interpretation is possible and admissible[8].

Killing the public officer committed during or in connection with discharging his official duties, connected with the protection of people or public security or public order is a qualified brand of killing because of the fact, that it ought to be shown that public officers are the representatives of legal power and the attacks on them during serving the society have to be punished very severe[9].

The preferential brand of killing which is killing a person due to the influence of an intense emotion justified by the circumstances, is commonly called "killing in affect". Affect is understood as the supremacy of the emotions over the intellect[10]. This supremacy must be connected with the circumstances of killing which give justification to the intense emotion leading to the killing. In practice killing in affect is considered mostly in the love – configuration between three person and is connected with lack of knowledge and agreement with such a situation by one of the involved person who is jealous. The intense emotion and committed or attempted killing usually takes place when the ripped off sees the love sequence in action and is not prepared for such a situation.

Killing an infant by the mother due to the intense emotional circumstances connected with the course of the delivery is privileged due to the special situation of mother who is the perpetrator of killing. She is justified because of the state of mind and emotions connected both with hormone shock and the difficulties included with the conditions of birth. The describing act is called in doctrine: "infanticide". The privileged qualification is possible only if the mother kills the infant during delivery and the course of it. These two conditions must come through together. Lack of one of them causes that the mother is liable to be punished for the general brand of killing or the other one – which is depended on circumstances. The time of delivery needs to be considered through the medical benchmarks. It is usually also understood as term after the real birth, it may be considered in

[8] See also: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, (red.), *Prawo karne materialne*..., p. 464.

[9] More in question of qualified brands of killing: K. Daszkiewicz, *O karaniu morderstw*, Prokuratura i Prawo 2010, 5, s. 6–10; A. Nowak, *Nowe ujęcie zabójstwa kwalifikowanego*, Prokuratura i Prawo 2012, 5, pp. 75–84; S. Pikulski, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 44–55.

[10] M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz (red.), *Prawo karne materialne*..., p. 465.

hours, days and even weeks. It is connected with retrieving the hormonal balance by woman who has just given birth. The difficult conditions of delivery, such as extraordinary, long time (many hours and even some days) or untypical place, create the course of delivery as the element of the offence[11].

Killing an individual on his demand and under the influence of compassion for him is called in Polish doctrine "mercy killing". It is a case of unlawful euthanasia. The privileging is depended on the coexistence of two elements: victim's demand and perpetrator's compassion for the killing victim[12].

It must be claimed that the victim has the initiative of his own death. It is not sufficient to certify the victim's agreement. Compassion is the special emotion which the perpetrator feels to the victim. In other words – it is impossible to consider the "mercy killing" without the emotional relationship between the perpetrator and his victim[13].

Causing death in Polish law is also forbidden if it is committed without intent. It is possible only when the perpetrator not having the intent to commit it, nevertheless does so because he is not careful in the manner required under the circumstances, although he should or could have foreseen the possibility of committing the prohibited act. This brand of causing death is established in art. 155 of Polish Penal Code, which statues that whoever unintentionally causes the death of an individual shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and years[14].

The offences against health are *inter alia* bodily injuries and impairments to health. According to legal qualification, strictness of penal reaction and the way of prosecution, there may be divided:

a) grievous bodily harm;

b) medium bodily injury or impairment to health;

c) light bodily injury or impairment to health[15].

All of the offences mentioned above have the non – intent brands.

Grievous bodily harm is described quite circumstantially in art. 156 of the Polish Penal Code. It has an eclectic form because of using various elements of stipulating the harm. These elements are basing on medicine, psychiatry, aesthetics and social context. Art. 156 statues that whoever causes grievous bodily harm in a form which:

1) deprives an individual of sight, hearing, speech or the ability to procreate, or

2) inflicts on another a serious crippling injury, an incurable or prolonged illness actually dangerous to life, a permanent mental illness, a permanent total or

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[11] More: M. Budyn-Kulik, [in:] J. Warylewski (red.), *System prawa karnego...*, pp. 88–97.

[12] More: *ibidem*, pp. 117–122.

[13] R. Krajewski, *Przestępstwo eutanazji w kodeksie karnym z 1997 r.*, Prokuratura i Prawo 2005, 2, pp. 67–71.

[14] More: M. Budyn-Kulik, [in:] J. Warylewski (red.), *System prawa* karnego..., pp. 150–153.

[15] See: M. Trybus, *Kilka uwag o wybranych skutkach w grupie przestępstw przeciwko zdrowiu*, Wojskowy Przegląd Prawniczy 2012, 3, pp. 44–50.

substantial incapacity to work in an occupation, or a permanent serious bodily disfigurement or deformation shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years. If the perpetrator acts unintentionally he shall be subject to the penalty of deprivation of liberty for up to 3 years.

Grievous bodily harm possesses the qualified branch connected with the consequence of death of an individual. In such case the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 2 and 12 years.

Medium bodily injury or an impairment to health is described generally in art. 157, section 1. of the Polish Penal Code. The interpretation of this regulation shows that this type of bodily injury and impairment to health takes place when it last 7 days or more and it is not so grievous as described in art. 156. Whoever causes such a bodily injury or an impairment to health intentionally shall be subject to the penalty of the deprivation of liberty for a term between 3 months and 5 years. If the perpetrator acts unintentionally he shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. If the injured person is the person closest to the accused, the prosecution shall occur upon the motion of the latter.

Light bodily injury or an impairment to health is placed in art. 157, section 2. of the Penal Code. It ought to be said that it lasts less than 7 days. Namely – whoever causes a bodily injury or an impairment to health lasting not longer than 7 days shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. If the perpetrator acts unintentionally he shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. The prosecution both intentional and unintentional form of this offence occurs upon a private charge[16].

One of the offences against life and health is also the brand named in doctrine "taking part in a brawl or beating". It is a kind of act which is connected – in its general brand, with causing the direct danger that may change into real harm. Described offence is regulated in art. 158 and art. 159 of the Penal Code. Actually it contains two various forms of behavior. In brawl it is impossible to identify who is attacking someone and who is defending himself or the other one. The perpetrator cumulates both of roles in his act. Beating is connected only with attacking on at least one person. Beating lets the defender act in necessary defense. There is no such possibility in case of brawl.

Brawl is understood as the configuration of at least three perpetrators. Beating takes place if at least two perpetrators direct their acts against at least one victim.

General brand of taking part in a brawl or beating is described in art. 158 section 1. of the Penal Code. According to this regulation whoever participates in a brawl or a beating in which an individual is exposed to the immediate danger of the loss of life or to a consequence of grievous bodily harm or medium bodily injury or impairment to health, shall be subject to the penalty of deprivation of liberty up to 3 years.

[16] See also: B. Michalski, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 212–249.

The offence shown above has three qualified brands:

a) if the consequence of the brawl or beating is a serious bodily injury or a serious impairment of health, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years (art. 158, section 2. of the Penal Code);

b) if the consequence of the brawl or beating is the death of an individual, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years (art. 158 section 3. of the Penal Code);

c) whoever, taking part in a brawl or beating, uses a firearm, knife or other similarly dangerous instrument shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years[17].

Amongst the offences against the safety in traffic there are to indicate:

a) causing the catastrophe in traffic;

b) causing the danger of catastrophe in traffic;

c) accident in communication.

Causing the catastrophe in traffic is described in art. 173 of the Penal Code. This offence may be committed either intentionally or unintentionally. Due to the provisions of art. 173, section 1. of the Polish Penal Code, whoever causes a catastrophe on land or water or to air traffic which imperils life or health of many persons, or property of a considerable extend shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.

It must be said that catastrophe is treated as an event which makes such danger that may cause real harms to the people or property which are estimated as serious. In analyzing the degree of danger, the attention should be paid into both a number of potential victims and the widespread, potential effects of danger. The last indicated criteria ought to be rather considered.

It is to remark that in order to art. 175 of the Penal Code, the preparation to describing offence is punishable. The perpetrator shall be subject to the penalty of deprivation of liberty for up to 3 years.

Unintentional form of catastrophe is sometimes compared with an accident in communication. The criterion of division of this offence in practice is often just the numbers of injured persons (more or less than 9, more or less than 10 etc.). However, there is no legal definition which could introduce such a criteria these affirmations made by courts or doctrine are not binding[18].

The unintentional form of this offence is included in section 2. of the Penal Code. According to this, the perpetrator of the catastrophe acting unintentionally shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

Both forms of committing the offence have their qualified brands constructed due to consequences of the act. Due to art. 173, section 3. and 4. if the con-

[17] See also: *ibidem*, pp. 273–328.

[18] See also: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz (red.), *Prawo karne materialne*..., p. 485.

sequence of the intentional act is the death of a human being or grievous bodily harm to many persons, the perpetrator shall be subject to the penalty of deprivation of liberty for a term between 2 and 12 years. If the consequence of unintentional act is the death of a human being or grievous bodily harm to many persons, the perpetrator shall be subject to the penalty of deprivation of liberty for a term between 6 months and 8 years[19].

There is also to say that grievous bodily harm should be understood due to described in previous part of commentary offence stated in art. 156 of the Penal Code.

The intentional offence involved in art. 174 of the Polish Penal Code seem to appear as a form of attempt to the intentional catastrophe but promoted to the rank of commission. If so, it turns out that in theory it is possible to attempt also this offence. Section 1. of art. 174 of Polish Penal Code states that whoever causes an immediate danger of a catastrophe on land or water or to air traffic shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years. According to section 2. of mentioned provision, if the perpetrator acts unintentionally he shall be subject to the penalty of deprivation of liberty for up to 3 years[20].

The offence of an accident in communication has its regulation in art. 177 of the Penal Code. It is the only case in the Penal Code, which has only unintentional form. In other words, there is no possibility to commit it with intent. If the perpetrator uses a car to cause any effect intentionally, it is to be qualified as another offence, for instance damaging property, killing etc.

It must be clearly certified that the responsibility for the offence of accident depends on the objective, unintentional consequences of the act. The accident is caused because of not respecting the principles of care in traffic. Breaking any of such principles may be intentional or unintentional but the offence remains as committed without intent.

Due to art. 177, section 1. of the Penal Code, in its basic form, an accident in communication takes place if anyone unintentionally causes an accident in which another person has suffered a bodily injury specified in art. 157 of the Penal Code, by violating, even unintentionally, the safety rules for land, water or air traffic. In such case the perpetrator shall be subject to the penalty of deprivation of liberty for up to 3 years.

The rules of traffic in Polish law may be codified or be led from customs. The main codified rules are involved in the Act of 20. June 1997, the Route Traffic Law [PL: Prawo o ruchu drogowym, consolideted text: Journal of Laws 2012, item 1137 as amended][21].

As it was said before, due to art. 157, mentioned bodily injury is the one which exceeds 7 days and is not a grievous one.

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[19] More: R.A. Stefański, [in:] L. Gardocki (red.), *System prawa karnego. Przestępstwa przeciwko państwu i dobrom zbiorowym*, Warszawa 2013, pp. 296–314.

[20] See: R.A. Stefański, [in:] L. Gardocki (red.), *System prawa karnego*..., pp. 317–329.

[21] See: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz (red.), *Prawo karne materialne*..., p. 487.

The prosecution of the offence above shall occur on a motion of the injured person if he is a next of kin of the perpetrator

The qualified form of this offence is described in section 2. of art. 177 of the Penal Code. According to this, if the consequence of the accident is the death or a serious bodily injury to another person, the perpetrator shall be subject to the penalty of deprivation of liberty for a term between 6 months and 8 years[22].

If the perpetrator of any of the accidents which were shown above was in state of insobriety or under the influence of a narcotic drug or has fled from the scene of the event, in order to provisions of art. 178 of the Penal Code, the court shall impose the penalty of deprivation of liberty, from the level of the down statutory limit prescribed for the offence attributed to the perpetrator, further increased by a half to the level of the upper statutory limit for such an offence – also increased by one half.

The state of insobriety has its legal definition in art. 115 section 16. of the Penal Code. It is to certify that for purpose of the Code, the state of insobriety is when:

a) the alcohol content in the blood exceeds 0. 5 per mille or leads to the concentration exceeding this level;

b) the alcohol content in 1 dm^3 of the exhaled air exceeds 0.25 mg or results in the concentration exceeding this level[23].

The influence of narcotic drugs is not defined in Penal Code. It leads to the conclusion that any amount of drug is enough to certify the circumstance involving the more severe punishment[24].

Among the offences against liberty there should be analyzed:

a) illegal deprivation of liberty;

b) human trafficking;

c) threat;

d) compelling.

Illegal deprivation of liberty is every case of intentional acting which is not connected with executing the legal measure, in order to the regulations of law. If we assume that all the conditions of legality are held, the legal deprivation of liberty concerns to executing:

a) the penalties: deprivation of liberty, deprivation of liberty for 25 years, deprivation of liberty for life;

b) detention;

c) preventive measure.

Illegal deprivation of liberty should be considered as act during which the victim is not able to change place due to his will. It may be closure in a room or tying somebody or – in extremely case – also taking away the medical equipment helping in translocation from the person who really needs it.

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[22] About the qualification from art. 177, section 2. of the Penal Code, see: R. A. Stefański, *Glosa do postanowienia SN z dnia 11 stycznia 2008 r., sygn. IV KK 429/07*, Prokuratura i Prawo 2008, 7–8, p. 222–229.

[23] Compare: part I.

[24] More: R. A. Stefański, [in:] L. Gardocki (red.), *System prawa karnego...*, pp. 376–392.

In its general brand, in description of art. 189 section 1. of the Penal Code, the offence exists when whoever deprives an individual of his liberty shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years[25].

In qualified brands:

a) the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years if the deprivation of liberty exceeded longer than seven days;

b) the perpetrator shall be subject to the penalty of the deprivation of liberty for minimum term of 3 years if the deprivation of liberty was coupled with special torment[26].

Threat is a form of compulsion which influents on mental sphere of an individual. It is an offence only if the threat causes a justified fear that it will carry through. The offence of threat is stated in art. 190 of the Penal code. According to it, whoever makes a threat to another person to commit an offence detrimental to that person or detrimental to his next of kin, and if the threat causes in the threatened person a justified fear that it will be carried out shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. The prosecution shall occur on a motion of the injured person.

The threat described as an offence is not the only one form of threat which exists in Polish penal law. There is also the construction of an illegal threat, which may be an element of proper offences, for example robbery. An illegal threat is defined in art. 115, section 12. of the Polish Penal Code. It has to be understood wider that the offence of threat. Namely – an illegal threat is both a threat mentioned in art. 190 of Penal Code, and also a threat to cause the institution of criminal proceedings, or to disseminate derogatory information concerning the person threatened or his next of kin. A declaration that the institution of criminal proceedings will be effected if made solely with the purpose of protecting the legal right violated by the offence shall not constitute a threat.

Due to art. 115, section 13. of the Penal Code, a next of kin is a spouse, an ascendant, descendant, brother or sister, relative by marriage in the same line or degree, a person being in an adopted relation, as well as his spouse, and also a person actually living in co – habitation.

The last mentioned category of next of kin is not constant. It may change during the period of life rather easily. It seems that the consideration of these relationship must allow for the elements of marriage non – existing, it means: complete and lasting collapse of coexistence [27].

Human trafficking is an offence which includes a lot of various cases. It may be connected with sexual abuse, coactive labor and illegal transplantations. Accord-

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[25] See also: T. Bojarski, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz*, Warszawa 2011, pp. 415–417.

[26] See also: M. Mozgawa, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 347–368.

[27] See also: *Ibidem*, pp. 415–426.

ing to art. 115, section 22. of the Penal Code, trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons by means of:

a) violence and unlawful threat;

b) abduction;

c) deception;

d) misleading, the exploitation of a person's mistake or his inability to properly comprehend the action being undertaken;

e) the abuse of a relation of dependence, taking advantage of a critical situation or state of helplessness;

f) giving or receiving of payments or benefits or its promise to achieve the consent of a person having control over another person, for the purpose of exploitation, even with the person's consent. Exploitation shall include, at a minimum, the exploitation of the prostitution of others, pornography, or other forms of sexual exploitation, forced labor or services, beggary, slavery or practices similar to slavery, servitude or the removal of cells, tissues, or organs against the regulations of law. Should the perpetrator's behavior concern a minor, it shall be considered "trafficking in persons" even if this does not involve any of the means described above.

Human trafficking as an offence exists in art. 189a of the Penal Code. It belongs to the category of serious offences. Due to this regulation, whoever trades in persons, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years[28].

Art. 191 of the Penal Code contains the offence of compelling. The substance of this less – serious offence is making a victim to behave as the perpetrator wants. The way of making is flawed because the victim makes up his mind under pressure. Art. 191 of the Penal Code states that whoever uses force or an illegal threat with the purpose of compelling another person to conduct himself in a specified manner, or to resist from or to submit to a certain conduct shall be subject to the penalty of deprivation of liberty for up to 3 years. If the perpetrator acts in the manner described above in order to extort a debt shall be subject to the penalty of the deprivation of liberty for a term between 3 months and 5 years. The last mentioned regulation is a qualified brand. It is not an acceptable solution. It may happen that the creditor who tried many honest ways to restore his money, threatens the victim with using force. It is not legal, but it should not be treated more strictly as in the general brand. It seems to be really misconceived regulation[29].

Amongst the offences against the sexual liberty and decency the most often committed is rape, which has been described in order to the qualified brand of killing It must be also said that in Poland there is an expectation of change in the regulation of rape that is connected with its prosecution. At first art. 205 of the Polish Penal Code stated that the prosecution of rape shall occur on a motion of the injured person. It means that the decision of prosecuting the offence of rape is

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[28] More: J. Jurewicz, *Handel ludźmi w polskim prawie karnym i prawie ponadnarodowym*, Łódź 2011, p. 33–78.

[29] More: M. Mozgawa, [in:] J. Warylewski (red.), *System prawa karnego...*, pp. 459–479.

in fact depended on victim's will[30]. The change that was introduced in Parliament is coming into the solution that the victim would be deprived of the decision due to the prosecution, the institution of proceeding would be obligated to prosecute rape in every case if it finds out of it, no matter of the source of the information. It is an acceptable solution if is connected with the rape committed on minor or mental unable person but if the victim is conscious of the situation and is able to react properly, the public reaction in a sphere of privacy seems to go too far. The victim may not wish to public the information of such a delicate case which is rape. It may cause the phenomena of the secondary victimization which is socially very harmful for the victim.

Often committed offences against the family and guardianship are:

a) mistreat;

b) causing minor drinking alcohol;

c) evading the duty of payment for the support.

The offence of mistreat is regulated in art. 207 of the Penal Code. According to this whoever mentally or physically mistreats a next of kin, or another individual being in a permanent or temporary state of dependence to the perpetrator, a minor or a person who is vulnerable because of his mental or physical condition shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. The mistreat has two qualified brands, created because of:

a) compounding the act with a particular cruelty – then the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years;

b) consequence which is a suicide attempt by the injured individual – then the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years[31].

There is no matter for legal qualification of perpetrator's act as a mistreat if he uses mental or physical measures to let the victim down. It must be said that the act of mistreat generally consists of many small activities which considered together create the picture of mistreat and cause the penal liability on this offence. However the Supreme Court an doctrine remarked that even the one act may state the offence of mistreat if it causes to the victim the feeling of letting down.

According to the person of the perpetrator, the mistreat may be the offence which is committed either by everyone who is able to be responsible under criminal law or by the person who has special feature causing the criminal liability.

If the act is committed against the next of kin or the individual who is in a permanent or temporary state of dependence to the perpetrator, this is a case of responsibility strictly specified features. If the offence is committed against a minor or a person who is vulnerable because of his mental or physical condition, then the perpetrator may be every individual who measures up the general conditions of penal liability.

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[30] More: J. Warylewski, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 623–666.

[31] See also: A. Staszak, *Przemoc, szczególne udręczenie i szczególne okrucieństwo jako znamię czynu zabronionego*, Prokuratura i Prawo 2008, 12, pp. 43–46.

A particular cruelty should be considered in similar way as was shown due to the qualified brand of killing.

The suicidal attempt does not have to be effective. For committing this qualified brand of mistreat it is enough to certify the acts of victim that were leading to causing his death.

Causing a minor drinking alcohol is a less – serious offence , described in art. 208 of the Penal Code. In order to this regulation, whoever induces a minor to become an inveterate drinker by supplying him with alcoholic beverages, or by facilitating or by urging him to drink such beverages shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years[32].

It must be said that this offence should cause the penal liability only if the act of the perpetrator might bring about the harm in the physical and mental progress of a minor. It ought not to be considered in a case of giving by a relative person the very little amount of alcohol just for taste. It is to allow for the cases in which a minor is given the alcohol for usual consumption. The penal liability for this offence is possible to a salesman who sells an alcohol to a minor.

Evading the duty of payment for the support is an offence described in art. 209 of the Penal Code. This less – serious offence may be committed only by an individual who is obligated to take care of the victim, giving to him economic measures for the existence. The obligation must have its legal source. Due to the regulation of art. 209 of the Penal Code, whoever persistently evades the duty imposed on him by law or by a court judgment to pay for the support of a next of kin or other person and exposes such a person to a situation where they cannot satisfy their essential needs shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. The prosecution shall occur on a motion of the injured person, social welfare authority or an appropriate institution. When the injured person has been granted support from any public fund or measures, the prosecution shall occur *ex officio*[33].

The difficulties unjust solution which may happen under this regulation, is connected with the element of persistence of not paying and prosecuting only in case when the victim cannot satisfy his essential needs. The problem mainly touches the children whose parents are divorced or just do not stay together. One of them takes care of children. The other just pays child's support. Usually the parent by whom the children stay has much more expenses due to bringing them up. The other one pays usually less. If the other parent does not pay at all or tries not to pay as much as should, the problem is passed on the parent staying with children. The question is why the legislator decided to react in penal law only if the victim cannot satisfy the basic needs? This seems to be unjust because the perpetrator may avoid paying by years, counting on feelings and manages of the other one.

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[32] More: V. Konarska-Wrzosek, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 923–931.

[33] More: M. Szewczyk, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 959–966.

The question of persistence needs to prove that the perpetrator does not pay for some time, regularly. If one pays some little quotes from time to time, it is possible that it would not be found as the persistent evading.

Offences against honor and personal inviolability, which are often committed in practice, are:

a) slander;

b) insult;

c) breaching the personal inviolability.

At first it must be said that the honor and personal inviolability seem to be the most subtle goods protected under the penal law. There is a question if they should have such a protection. Public investigation such private matter is rather not reasonable. The protection of civil law seems to be quite sufficient. The regulations of the offences against honor and personal inviolability ought to be obviated from the Polish Penal Code.

The offence of slander has its description in art. 212 of the Penal Code. According to it, whoever imputes to another person, a group of persons, an institution or organizational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type of activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. The slander has the qualified brand, namely, if the perpetrator commits it through the mass media shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years[34].

Both general brand of slander and its qualified form are prosecuted upon a private charge. The decision of prosecuting belongs then to the injured one. It shows that the public protection is soft. It should be seriously thought over if only the civil protection of slander would be saved.

Moreover, when sentencing for any of brands of slander, the court may adjudge a supplementary payment in favor of the injured person or of the Polish Red Cross, or of another social purpose designated by the injured person a supplementary payment.

By the consideration of illegality of slander, there exists an institution of admissible censure. It may lead to the legality of the act first qualified as the offence of slander. The admissible censure which let find the act as legal is described in art. 213 of the Penal Code. According to this regulation, the offence of slander in its general brand is not committed, if the allegation not made in public is true. Making the act in public means that it is possible to be known by not identified amount of individuals. It may be connected with place or the way of giving out the information. It must be also mentioned, that due to further part of art. 213 of the Penal Code states that whoever raises or publicizes a true allegation in defense of a justifiable public interest shall be deemed to have not committed the offence

[34] See also: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz (red.), *Prawo karne materialne*..., pp. 525–526; W. Kulesza, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 1039–1080.

of slander, both in general and qualified brand if the allegation regards private or family life the evidence of truth shall only be carried out when it serves to prevent a danger to someone's life or to prevent demoralization of a minor[35].

The justified public interest is a good reason to avoid the penal liability by the individuals professing politics.

If the court finds that the perpetrator acted due to the conditions described in art. 213 of the Penal Code, it does not mean that his penal liability for considering act is excluded. Namely – it may be an insult, by the reason of the manner of announcing or publishing the allegation.

The court may order the judgment of conviction to be published on the motion of the injured person.

The offence of insult is stated in art. 216 of the Penal Code. Its entity relies on disturbing the victim's honor not by using force but by making him feel mentally offended. The slander is connected with public sphere of individual's living. The insult should be combine with strictly private sphere of life.

The insult has both general and qualified brand. In its basic form it is described in art. 216, section 1. of the Penal Code. Due to this, whoever insults another person in his presence, or though in his absence but in public, or with the intention that the insult shall reach such a person shall be subject to a fine or the penalty of restriction of liberty. The qualified brand is shown in section 2. of this article. In order to this, whoever insults another person using the mass media shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

The insult may be committed in various ways: by word, gesture or in written form. It is important for the penal liability to be addressed into an injured person. As it comes out the lecture of regulations, it may be done with the intention to reach the victim. It is not needed for victim to be aware of the insult. For instance – the minor or the disabled person may not understand the context[36].

In Polish law there are two institutions connected with mitigation of penal reaction that are considered according to the offence of insult (the same concerns to the offence of breaching the personal inviolability). These are provocation and reply. Art. 216, section 4. of the Penal Code states that if the insult was caused by the provocative conduct of the insulted person, or if the insulted person responded with a breach of the personal inviolability or with a reciprocal insult, the court may waive the imposition of a penalty. If the court convicts the perpetrator for committing the qualified brand of the insult, it may decide to impose a compensatory payment to the benefit of the injured person, the Polish Red Cross or towards another social cause indicated by the injured person[37].

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[35] More: M. Skwarzyński, *Charakter prawny art. 213 kodeksu karnego*, Prokuratura i Prawo 2008, 7–8, pp. 200–208.

[36] More: W. Kulesza, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 1086–1087.

[37] See also: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne*..., pp. 529; W. Kulesza, [in:] J. Warylewski (red.), *System prawa karnego*..., p. 1088.

Regarding to the regulation mentioned above, there is a question if it is possible to exclude the illegality of the perpetrator's commission due to the institution of necessary defense. It lets – without any legal consequence – repeal a direct illegal attack on any interest protected by law. In such a case the individual shall not be deemed to have committed an offence. Art. 216, section 4. of the Penal Code seems to exclude the ability of using the necessary defense against the offence of insult.

Prosecution of both brands of the insult shall be by private accusation.

Art. 217 of the Penal Code states the offence of breaching the personal inviolability. This offence is directed against the individual's honor through the delicate physical attack which is not lead into the bodily injury or impairment to health. Due to the regulation, whoever strikes an individual or in another manner breaches his personal inviolability shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. If the act was caused by the provocative conduct of the injured person or if the injured person responded with an act of the same kind, the court may waive the imposition of a penalty. Regarding to this, there are the same difficulties as in the case of the offence of insult[38].

The breaching of personal inviolability may be committed by striking or in another manner, including spitting on a victim or leaking on an injured person.

Prosecuting of this offence shall be by private accusation.

Special category of offences is stated in chapter XXI of the Penal Code, titled 'Offences against safety in traffic'. This special character is connected with type of danger which is lead by the perpetrator – in many cases without intent to commit the offence. For instance – in the offence of an accident in communication there is only possibility to be penal liable acting without intent. The objective elements have the main influence on the final range of penal liability.

Considering the offences against the functioning of the state and local government institutions, it must be said that there may be divided the acts connected with attacks coming from inside and outside the public structure. In first case the structure is attacked by a person who does not have to be committed with its functioning. In the other case, the perpetrator is a part of the victimized structure.

Among the offences that are the attacks from outside of the public institution, there may be remarked:

a) violating the personal inviolability of a public official;
b) active assault on a public official;
c) insult of a public official;
d) pretending a public official;
e) offering a bribe

There are following offences which are the usual attacks from inside of the public institution:

a) accepting a bribe;
b) exceeding the authority.

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[38] More: W. Kulesza, [in:] J. Warylewski (red.), *System prawa karnego*..., pp. 1090–1094.

The offence of violating the personal inviolability of a public official is described in art. 222 of the Penal Code. It states that whoever breaches the personal inviolability of a public official, or a person called upon to assist him, or in connection with the performance of official duties shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 3 years[39].

It must be said that the essence of this offence is the same as in just analyzed case of offence from art. 217 of the Penal Code. However, the offence of violating the personal inviolability finite in art. 222 of the Penal Code is prosecuted by public accusation. The reason is that the persons who are injured in the effect of committing this offence are the part of functioning the public structure, they serve the society, represent the public authority. In fact, the attack is directed on the functioning the proper institution which is embodied by a public official or the person called upon to assist him[40].

The Penal Code contains the legal definition of "public official" in art. 115 section 13. It states that public official is:

a) the President of the Republic of Poland;

b) a deputy, a senator, a councilman;

c) a judge, a lay-judge, a state prosecutor, a court executive officer, a professional court probation officer, a person adjudicating in cases of contraventions or in disciplinary authorities operating in pursuance of a law;

d) a person who is an employee in a state administration, other state authority or local government, except when he performs only service-type work, and also other persons to the extend in which they are authorized to render administrative decisions;

e) a person who is an employee of a state auditing and inspection authority or of a local government auditing and inspection authority, except when he performs only service-type work;

f) a person who occupies a managerial post in another state institution;

g) an official of an authority responsible for the protection of public security or an official of the State Prison Service;

h) a person performing active military service.

There were difficulties in practice to define the term "a person called to assist the public officer". The possibilities are:

a) this is a person who was officially allocated or asked by the public official to help him;

b) also the person who wants to help by himself, without asking by the public official.

The question is about the scale of protection which is given to the representatives of functioning public authority. In the last case the answer should be following: if the public official did not refuse the cooperation with the person, just let

[39] See: J. Potulski, [in:] L. Gardocki (red.), *System prawa karnego...*, pp. 527–530.

[40] See also: O. Górniok, [in:] R. Góral, O. Górniok, *Przestępstwa przeciwko instytucjom państwowym i wymiaru sprawiedliwości*, Warszawa 2000, p. 26–30.

him act due to official duties, such a person should be protected under art. 222 of the Penal Code.

As it is regulated in case of breaching the personal inviolability, if the act has been in response to the inappropriate conduct of a public official or a person called upon to assist him, the court may apply an extraordinary mitigation of the penalty or even renounce its imposition.

The offence stated in art. 223 of the Penal Code is more serious attack on the public official or the person called to assist him than breaching the personal inviolability. Mentioned offence is called in common "an active assault".[41] Besides the general brand it has also the qualified one. Section 1. of art. 223 of the Penal Code includes the description of the general brand. According to it, whoever, acting jointly and in cooperation with other person, or using a firearm, knife or other similarly dangerous item or forceful means, commits an active assault on a public official or a person called upon to assist him, during or in connection with the performance of official duties shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

In fact, the general brand has two divided forms:

a) the one committed by at least two persons who are dangerous because of the amount of perpetrators acting jointly and in cooperation;

b) the one committed by an individual, who is dangerous due to using the specific item or manner.

Acting jointly means that the perpetrators committed the offence together. It must be said, that each of the perpetrators commits his own prohibited act. For the existence of the penal liability under art. 223 of the Penal Code is that every perpetrator filled the features of the offence described in it.

Cooperation should be understood as giving the agreement on taking part in the offence. It may be expressed clearly or by showing that the perpetrator does not show the objection and accedes to committing the offence.

The special item or manner is defined in similar way as by the described yet participating in a brawl or a beating.

The qualified brand takes place if the act of active assault caused a grievous bodily harm on a public official or the person called upon to assist him The perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 2 and 12 years[42].

In art 226 of the Penal Code there is a legal description of the offence of insult of a public official. The regulation of it is analogical as in case of art. 222 – in connection with art. 216 of the Penal Code. Whoever insults a public official or a person called upon to assist him, in the course of and in connection with the performance of official duties shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty.

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[41] See: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne*..., p. 537.

[42] See also: J. Potulski, [in:] L. Gardocki (red.), *System prawa karnego*..., pp. 527–532.

If the insult has been in response to the inappropriate conduct of a public official or a person called upon to assist him, the court may apply an extraordinary mitigation of the penalty or even renounce its imposition.

By the offence of insult connected with the attack on functioning of the public institutions, there exists a special form which is directed against the constitutional organ of public authorities. In section 3. of art. 226 of the Penal Code, there is a regulation due to which whoever in public insults or humiliates a constitutional authority of the Republic of Poland shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years[43].

The offence stated in art. 227 of the Penal Code is commonly called "pretending a public official". It may be committed by everybody who is liable under the penal law. If so, it may be a person who is not connected with the institution at all or the public official but not secured to fulfill the official duty[44].

In order to art. 227 of the Penal Code whoever, by purporting to be a public official or by taking advantage of an erroneous belief of another person concerning this, performs an act connected with a relevant official capacity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year[45].

There are two forms of victimizing the person and directing to the attack the public authorities:

a) active – when the perpetrator claims to be the public official secured to fulfill the act;

b) passive – when the perpetrator uses the fact that the victim is not aware of the fact that he is not secured to fulfill the act.

Art. 228 of the Penal Code states the offence of accepting a bribe, so called "passive bribery". It must be claimed that there is no possibility to commit such the offence without the existence of its active form which is the offence described in art. 229 of the Penal Code ("active bribery").

In such case, it is very difficult to prosecute both of these offences, as none of the perpetrators (both the active one and the passive one) are not interested to reveal them in order to threat of penal liability.

Regarding to this, the Polish legislator decided to break the solidarity of perpetrators by introducing the regulation of art. 229, section 5, which is beneficial only for the perpetrator of "active bribery". In order to this, the perpetrator who reveals to the agency responsible for prosecution, essential circumstances, not previously known to the agency, if the benefit or its promise was accepted shall not be liable for the penalty.

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[43] More: *Ibidem*, pp. 553–561.

[44] See also: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne*..., p. 539.

[45] More: O. Górniok, [in:] R. Góral, O. Górniok (red.), *Przestępstwa przeciwko instytucjom państwowym*..., pp. 64–66.

The proposed solution seems to be unjust because the potential perpetrator of passive form of bribery has no chance to avoid the penal liability. In cases of illegal provocation made by the "active briber" the indicated by him passive one may have a lot of procedural difficulties to prove his own innocence.

In its general brand, the perpetrator who, in connection with the performance of a public function accepts a material or personal benefit or a promise thereof, or demand such a benefit shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

Accepting a bribe has both qualified brands and the preferential one. These are generally counterparts of the same offences by "active briber's" side. Only one of qualified brand of accepting a bride is independent on offering a bride, namely the one, in which the feature aggravating the penal liability is committing the offence demanding or conditioning making the official duties on the benefit. In such a case the perpetrator shall be subject to the penalty of deprivation of liberty for a term between 1 and 10 years[46].

The other, common for the both form of bribery, qualified brands, are the ones, which aggravate the penal liability because of:

a) accepting or offering the benefit or its promise in connection with violation of law – then the perpetrators shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years;

b) accepting or offering a material benefit of considerable value or a promise thereof – in such case the perpetrators shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years[47].

The violation of law means breaking the regulation of law, which may be strictly indicated.

The considerable value is defined in art. 115 section 4. of the Penal Code. It is a value which at the time of the commission of a prohibited act exceeds of 200 000 Zlotys.

It must be also said that Poland, respecting the international law, introduced to the Polish Penal Code the analogical rules of penal liability for the bribers employed in international institutions.

The preferential brands of both forms of bribery is so called event of the act of a lesser significance. In such a case, the perpetrators shall be subject to a fine the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

The act of lesser significance by the bribery should be understood by the sphere of the social consequences (harm). According to art. 115, section 2. of the Penal Code, in assessing the level of social consequences of an act, the court shall take into account the type and nature of the infringed interest, the dimension of the damage caused or anticipated damage, the method and circumstances of perpetrating the act, the importance of the duties breached by the perpetrator, as well as the form

[46] More: *Ibidem*, pp. 78–80.

[47] See: J. Potulski, [in:] L. Gardocki (red.), *System prawa karnego...*, pp. 564–587.

of intent and motivation of the perpetrator, the type of precautionary rules breached and the degree of the transgression.

Adding to this the circumstances of bribery, it may be noticed that less significance may be estimated according to low material worth of benefit, less-important position of the public official or even due to the social greed for the good which is an object of bribery.

At the offences of bribery there is considered the construction excluding the penal liability under the custom. It is possible not to be penal liable under art. 228 and 229 of the Penal Code if the benefit was given as a thankful gift and its value is just symbolic and the potential perpetrator of "passive bribery" has just made his duty and did not expect any profit because of that fact. The gifts that may be given and accepted without any legal consequences are for instance: flowers, chocolate-bonbons, self – made picture. It is discussed if it may be a bottle of alcohol.

The penal liability for the offence described in art. 231 of the Penal Code is a consequence of accepting that the public official represents the public authority that is why he ought to be demanded much more than the person not having such a position or status. This is a case of widening the penal liability because of disappointment of public trust.

In its general brand, the offence of exceeding the authority is performed art. 231, section 1. According to this, a public official who, exceeding his authority, or not performing his duty, acts to the detriment of a public or individual interest shall be subject to the penalty of deprivation of liberty for up to 3 years.

The offence described above has the unintentional form which is connected with the penal liability only if the perpetrator causes an essential damage. In such case the perpetrator shall be subject to a fine, the penalty of restriction of liberty or deprivation of liberty for up to 2 years.

The qualified brand is situated in art. 231, section 2. of the Penal Code. The regulation of it is involved with the only in Polish law case of so called: "legal subsidiarity"[48]. It shows very clearly the mentioned widening the penal liability because of disappointing the public trust. Namely – if the perpetrator commits the act of exceeding his authority, or not performing his duty in conditions of general brand but in addition with the purpose of obtaining a material or personal benefit, he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years. However, this provision shall not be applied when the act has the features of accepting a bribe[49].

Among the offences against the administration of justice, there should be mentioned the acts indicated below:

a) giving a false testimony;

b) aiding a perpetrator to evade penal liability.

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[48] See also Part I.

[49] More: J. Potulski, [in:] L. Gardocki (red.), *System prawa karnego*..., pp. 598–606; O. Górniok, [in:] R. Góral, O. Górniok (red.), *Przestępstwa przeciwko instytucjom państwowym*..., pp. 106–111.

Giving a false testimony is an offence placed in art. 233 of the Penal Code. Due to its section 1, whoever, in giving testimony which is to serve as evidence in court proceedings or other proceedings conducted on the basis of a law, gives false testimony or conceals the truth shall be subject to the penalty of deprivation of liberty for up to 3 years.

As it may be seen, the offence equals the situation of lying and not telling the truth. The purpose of protection is good of effective functioning of administration of justice. The perpetrator is an individual who is capable to be a witness due to the proceeding conducted on the basis of a law. In order to Polish criminal proceeding, any person summoned as a witness is obligated to appear and testify.

It must be said that the following persons may not be examined in the capacity of witnesses:

a) defense counsel on facts communicated to him while he was giving legal advice or conducting the case;

b) priest on facts communicated to him in confession.

Moreover, person obligated to preserve the state secret may be examined as to the circumstances to which this obligation extends only if released from the obligation to preserve such secret by an authorized superior agency. The mentioned release may be refused only if the giving of evidence might result in serious damage to the state's interests.

In case of less important secrets to the public, person obligated to preserve an official secret or secrets connected with their profession or office may refuse to testify as to the facts to which this obligation extends, unless they have been released by the court or the state prosecutor from the obligation to preserve such a secret. Persons obligated to preserve secrets such as lawyers, physicians or journalists, may be examined as to the facts covered by these secrets, only when it is necessary for the benefit of the administration of justice, and the facts cannot be established on the basis of other evidence.

The person who has right to refuse testifying is the next of kin of the accused. If such a person does not know about his right and is examined, then he should not be penal liable for the offence from art. 233, section 1. It must be also said that the right to refuse to testify shall not expire, even though the marital or adoptive relationship has been dissolved. Similar situation takes place if a witness may decline to answer a question if such an answer might expose the witness himself or his next of kin to liability for an offence or a contravention. Moreover, a witness may demand to be examined at the trial in closed session, if the contents of his testimony may expose him or his next of kin to disgrace and if there is a justified concern for safety of life, health, freedom or loss of property of considerable dimension regarding the witness or his next of kin, the court, and in the preparatory proceedings – the state prosecutor, may issue an order classifying as secret the personal data of such a witness. A person having a particularly close relationship to the accused may be exempted from the obligation to give testimony, if such a person applies for such an exemption[50].

[50] See also: A. Wojtaszczyk, W. Wróbel, W. Zontek, [in:] L. Gardocki (red.), *System prawa karnego*..., pp. 623–632.

According to art 233, section 2. of the Penal Code, the prerequisite to the liability is that the person testifying of testimony, acting within his competence, shall have warned the person testifying of the penal liability for false testimony or obtained a relevant pledge from the latter[51].

Due to art. 187 and 188 of the Code of Criminal Procedure of 1997, the pledge of the witness may be given only to the court or to the designated judge. The pledge shall be given by the witness before he commences to testify. In addiction it must be remarked, that the obligation to have a pledge given by the witness may be waived, if the parties present do not object. The witness shall give his pledge by repeating after the judge the following words: "Being fully aware of the significance of my words and of my responsibility before the law I solemnly promise to state the truth and not to conceal anything known to me". Dumb and deaf persons shall give their pledge by signing text. A witness who has already given his pledge in the case, shall be reminded of his prior pledge upon any new examination by the court, unless the court finds it necessary to receive a second pledge.

In order to art. 189 of the Polish Code of Criminal Procedure, a pledge shall not be accepted in following situations:

a) from persons under the age of 17;

b) if there is good reason to suspect that the witness, by reason of mental disorder, does not understand the true significance of the pledge;

c) if the witness is suspected of the offence constituting the object of the proceedings or closely connected with act which is the object of proceedings, or if he has been duly sentenced for this offence;

d) if the witness has been validly sentenced for giving false testimony or making false accusation.

In accordance with art. 190 of the Polish Code of Criminal Procedure, before commencing the examination the court shall inform the witness of the penal liability for giving a false testimony. In the course of proceedings the witness shall sign a statement to the effect that he has been informed of this penal liability.

Due to the regulation of criminal proceeding which are performed above, whoever, being unaware of the right to refuse testimony or answer to questions, gives false testimony because of fear of penal liability threatening himself or his next of kin, shall not liable to the penalty.

The similar regulation as to the witness is considered to the experts. Due to art. 233, section 4. of the Polish Penal Code, whoever, acting as an expert, expert witness or translator, provides a false opinion or translation to be used as in proceedings conducted on the basis of a law shall be subject to the penalty of deprivation of liberty for up to 3 years.

It must be noticed that art. 193 of the Polish Code of Criminal Procedure states that if the determination of material facts having an essential bearing upon then

[51] More: Z. Kukuła, *Przestępstwo składania fałszywych zeznań w orzecznictwie sądowym*, Wojskowy Przegląd Prawniczy 2012, 1–2, p. 148.

resolution of the case requires some special knowledge, the court shall consult an expert or experts.

Due to art. 200 of the Polish Code of Criminal Procedure, depending on the instruction from the agency conducting the trial, the expert shall state his opinion orally or in writing. Such an opinion ought to include the following elements:

a) the expert's name and surname, scientific degree, specialty and post held in the profession;

b) the names and surnames and he remaining data of persons who have participated in preparing it, with an indication of the actions carried out by each of the persons;

c) in the case of opinions from institutions – the full name and place of the institution;

d) the dates of the studies and the date of issuance of the opinion;

e) the report of actions carried out, and findings and conclusions drawn there from;

f) the signatures of all the experts who have participated in its preparation.

Having regard on the good of administration of justice, there are circumstances which let the perpetrator be treated in privileged way just under the act. Namely – art. 233, section 5. of the Penal Code states that the court may apply an extraordinary mitigation of the penalty, or even waive its imposition if:

a) he false testimony, opinion or translation concerns circumstances which cannot affect the outcome of the case;

b) the perpetrator voluntarily corrects the false testimony, opinion or translation before even a decision which is not final and valid has been rendered in the case.

It must be also noticed that he provisions of the Penal Code (not the ones of the Code of Criminal Procedure) connected with a witness, shall be applied accordingly to a person who provides a false statement if a provision of law provides for the possibility of obtaining a statement under the threat of penal liability.

In Penal Code there are offences which states forms of specific help in avoiding the penal liability which are committed after the concerned ones. These are:

– Described in art. 291–292 of the Penal Code, so called "handling stolen goods";

– Given in art. 239 of the Penal Code, aiding a perpetrator to evade penal liability.

Considering the functioning the administration of justice, the more important for this is the last one. It must be generally said that both of the mentioned offences cannot be classified as facilitation as a form of commission as there is no coincidence between the act of perpetrator who is helped and the one who helps. That is why "handling stolen goods" and aiding a perpetrator to evade penal liability are derived offences.

Due to art. 239 of the Penal Code, whoever obstructs or frustrates a penal proceeding by aiding a perpetrator to evade penal liability, and especially whoev-

er hides the perpetrator, or obliterates physical evidence of the offence or undergoes a penalty for a sentenced person shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years[52].

The legislator took his attention into the possibilities of existing the close relationship between the perpetrators which may justify the act committed by the helping one. The perpetrator who hides a person, who is his next of kin, shall not be subject to a penalty. The court may apply an extraordinary mitigation of the penalty and even waive its imposition if the perpetrator has rendered assistance to a person who is his next of kin, or acted on account of fear of a penal liability threatening himself or his next of kin[53].

The next category of the offences which should be written due to the frequency of their existence in practice is the group of offences against public order. However at first it is to be declared that every offence in its substance is committed against the public order. The public interest and the public order is the essence of penal protection at all. Most of the offences are classified and divided into groups connected with directly broken or threatened goods (for instance: life and health, administration of justice etc.). Some of them did not find such a placement and the legislator decided to leave them in the chapter named "Offences against public order". It may be discussed if such a chapter is needed. The acts described in it might be allocated to the appropriate categories, for example taking hostage to the offences against liberty.

Amongst the offences mentioned in above named chapter, the most important seem to be the following ones:

a) taking or detaining a hostage;

b) promoting a totalitarian system of state;

c) participating in an organized crime.

Taking or detaining a hostage was just characterized as the feature influencing on the qualified brand of the offence of killing.

Promoting a totalitarian system of state is described in art. 256 of the Penal Code. Due to it, whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years[54].

Promoting any of the systems mentioned in the art. 256 of the Penal Code is not synonymous to applauding it. Promoting is connected with an active attitude of the perpetrator who has intent to widen the understanding to the forbidden idea onto the other individuals.

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[52] More: R. Góral, [in:] R. Góral, O. Górniok (red.), *Przestępstwa przeciwko instytucjom państwowym*..., pp. 171–174.

[53] See also: A. Wojtaszczyk, W. Wróbel, W. Zontek, [in:] L. Gardocki (red.), *System prawa karnego*..., pp. 642–650.

[54] See also: M. Bojarski, [in:] L. Gardocki (red.), *System prawa karnego*..., p. 771.

Totalitarian systems ought to be put as the ones in which the basic feature of public authority is terror. These are for instance: Nazism, fascism, communism.

In Polish conditions there may be seen a specific situation due to promoting communistic system. The sale of T-shirts with Che – Guevara is not forbidden, nobody prosecutes the salesman offering the blouses with red star or hammer and sickle. But for sure the prosecution would be lead if they sold any T-shirt with Hitler or fylfot.

The offence which essence is being a part of a phenomenon of the organized crime is the one described in art. 258 of the Penal Code. The general brand is stated in its section 1. According to it, whoever participates in an organized group or association having for its purpose the commission of offences, including the fiscal offences shall be subject to the penalty of deprivation of liberty for a term between 3 months and 5 years.

The regulation mentions of two forms of criminal activity, namely: organized group and association.

Due to the principle of strict – bordering the penal liability in each case must be proved exactly in which form the perpetrator committed the act.

It is to remark that organized group remains in lower degree of organizing than the criminal association. There are no legal definitions of such forms of criminal activities. Having regard on the number criteria, it must be said that organized group consists of at least 3 individuals[55]. In doctrine it may be found the opinion that for the existence of organized group 2 individuals is enough but they must be connected with qualified form of accord, containing the acts in organization. There also should be divided an organizational hierarchy, at least one of the perpetrators must be actually a leader whose instructions are respectable for the other perpetrators.

A criminal association is a higher form of organization than a group. Sometimes a group evolves into an association. The association is the lasting creature, with the constant structure, aiming the overtaking the power in region, state etc. It is to declare that in Poland there is no criminal association, there are only organized groups.

The qualified brands of describing act are included in sections 2. and 3. of art. 258 in the Penal Code.

Due to these ones, if the criminal group or association has the characteristic of an armed organization, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. Besides, whoever sets up such a group or association or leads it shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

There is not clearly understood what is the feature of armed organization. This difficulty has been not solved so far. The ideas which may appear according to this are:

– At least one of the members of the organization must use the dangerous arm like a fire one or a knife;

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[55] See: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz (red.), *Prawo karne materialne*..., Warszawa 2010, p. 563.

– Each member of the organization should at least have an arm;

– The leader should use the arm.

None of these conceptions is in preponderance in doctrine.

Art. 259 of the Polish Penal Code states the possibility to avoid the penal liability for participating in criminal organization. Whoever voluntarily abandoned the participation in the group or association and disclosed to an authority responsible for prosecuting offences all the essential circumstances of the committed act or has voluntarily averted the impending danger shall not be subject to the penalty for the mentioned offence[56]. As it was shown before, the act of will does not have to be taken under the perpetrator's contrition. It is enough to be taken without the intervention of other subjects.

The most committed offences amongst the ones against the credibility of documents are counterfeits. In the Polish Penal Code there are two forms of document forgery:

a) so-called 'material forgery', described in art. 270;

b) so-called 'intellectual forgery', stated in art. 271.

The first mentioned act is committed on the physical document substance. It is faked in object. The provision constitutes that whoever, with the purpose of using it as authentic, forges, or counterfeits or alters a document or uses such a document as authentic shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of between months to 5 years.

The legal definition of document includes art. 115, section 14. of the Penal Code. Due to this, a document is any object or record on a computer data carrier to which is attached a specified right, or which in connection with the subject of its content, constitutes evidence of a right, a legal relationship or a circumstance which may have legal significance.

The mentioned offence may be committed by imitating the whole document or by illegal changing the content of authentic one. Such acts must be undertaken with the special intent which is the purpose of using the faked document as authentic[57]. The other form of the offence written in section 1. of art. 270 of the Polish Penal Code is using earlier forged document as an authentic one. In the last case there is no need to prove the purpose of such an use. It is enough to prove the intent of use, without analysing the symptomatic aim.

The special attention should be paid into the fact of penal liability for preparations to the forgery from art. 270 section 1. of the Penal Code. In Polish law – due to art. 16, section 2. of the Polish Penal Code – preparation is subject to a penalty only when the law so provides. The provision of art. 270, section 3 introduces such a construction. Having regard to the general provisions of the preparation, contained in art. 16, section 1. of the Penal Code, it must be said that preparation

[56] More: M. Bojarski, [in:] L. Gardocki (red.), *System prawa karnego*..., pp. 773–781.

[57] M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz (red.), *Prawo karne materialne*..., p. 575.

only occurs when the perpetrator, in order to commit a prohibited act, undertakes activities aimed at creating the conditions for effecting an act leading directly to commission of the prohibited act, particularly when, for this purpose, he enters into an arrangement with another person, acquires or makes ready the means, gathers information or concludes a plan of action.

The preparation – if it is forbidden under the act – is always subject to less penalty than commission. In case of forgery, the perpetrator penal liable for the preparation shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

The "material forgery" has a preferential brand, stated as the act of lesser significance. It seems to be a good solution because in practice there are a lot of cases which are forgery but even the most lenient penalty would be too severe. For instance, often existing case is a forgery of school card which is made by imitation the valid seal – if the pupil forgot to confirm it in the appropriate institution and he is entitled to benefit from it. The act of lesser significance by this form of forgery is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years[58].

"Intellectual forgery" has its regulation in art. 271 of the Penal Code. It is an offence which may be committed only by strictly indicated perpetrator, namely either a public official or other person authorized to issue the document. In this case the document is authentic in its substance but it contains the content not corresponding to the truth[59].

It is to accent that the penal liability occurs only when the affirmed by the perpetrator circumstance is important in law. In other case, there may be considered the penalty for exceeding the authority – if the perpetrator is a public official.

Due to art. 271, section 1. of the Penal Code, a public official or other person authorized to issue a document, who certifies an untruth therein, with regard to a circumstance having a legal significance shall be subject to the penalty of deprivation of liberty for a term of between months and 5 years. "Intellectual forgery" may be committed as the act of a lesser significance. According to section 2. of art. 271 of the Penal Code, the perpetrator of such an act shall be subject to a fine or the penalty of restriction of liberty[60].

The qualified brand of describing offence is contained in section 3. of art. 271 of the Penal Code. The severity of penal liability is justified because of acting with a special purpose, namely in order to gain material or personal benefit. The explanation of benefit was given by the description of bribery. Then the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

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[58] More: J. Piórkowska-Flieger, [in:] L. Gardocki (red.), *System prawa karnego*..., pp. 1005–1011.

[59] More: *Ibidem*, pp. 1027–1049.

[60] See also: A. Orłowska, *Fałsz intelektualny a faktura VAT*, Prokuratura i Prawo 2004, 9, pp. 63–65.

Among the offences against property the attention should be paid onto:

a) theft;

b) burglary;

c) robbery;

d) extortion racket;

e) appropriation;

f) fraud;

g) handling stolen goods.

At first the deduction requires making some general remarks. First of all, most of the offences against the property has qualified brands which description is contained in the separate provisions of art. 294 of the Penal Code. Besides, there is also a special construction that let apply the extraordinary mitigation of the penalty and even renounce its imposition in cases indicated in art. 295 of the Penal Code.

The qualified brands from art. 294 of the Penal Code concern to following offences:

a) theft;

b) appropriation;

c) computer fraud;

d) fraud;

e) theft of phone impulses;

f) destroying or damaging the property;

g) intentional handling the stolen goods.

In each case the circumstances causing the more severe penal liability are:

a) committing an offence with regard to property of considerable value;

b) committing the offence with regard to a property of significant cultural value.

In these cases the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

As it was indicated before, the considerable value is defined in art. 115, section 5. of the Penal Code. Due to it, property of considerable value means the property whose value at the time of the commission of a prohibited act, exceeds of 200 000 zlotys.

Art. 295 states the mentioned mitigation of the penalty or renouncing its imposition if the perpetrator of some offences indicated in this provision compensates the damage.

If the perpetrator has voluntarily compensated in full for any damage caused, or returned undamaged the vehicle or the property of significant cultural value, the court may apply an extraordinary mitigation of the penalty and even renounce its imposition.

If the perpetrator voluntarily repaired a significant part of the damage, the court may apply an extraordinary mitigation of the penalty.

The offences which are referred in art. 295 are:

a) theft;

b) appropriation;

c) computer fraud;
d) fraud;
e) theft of phone impulses;
f) destroying or damaging the property;
g) intentional handling the stolen goods;
h) unintentional handling the stolen goods;
i) qualified brands indicated in described yet art. 294 of the Penal Code.

Amongst the offences against property there are some committed with using violence or threating the life or health of a person. These are inter alia robbery and extortion racket. Together with burglary they have acts of lesser significance described in different common provision of art. 283 of the Polish Penal Code, which is subject to a penalty of deprivation of liberty for a term between 3 months and 5 years[61].

It may be reflecting if it is possible to consider the act of lesser significance into the offences committed with using violence or threating life. The practice shows that this regulation is needed. Such a solution may be necessary for following cases:

1) three men were drinking together alcohol outside. They knew each other well and drank together very often. When they ran out of money, began to wonder how to get money for more alcohol. One of them declared that he had 10 zlotys but it is destined for food for his child. The other fellows tried to provoke him to show the note. They said: "if you have the note, just show it". The guy wanted to be credible and showed them a 10 – zlotys – note laying it on his hand. The perpetrators caught him strongly at the hand and took money away. The event was seen by the police patrol which decided to apply the detention;

2) a few businessmen were celebrating a lucrative contract. They rented a restaurant. They decided that each of them paid for himself. The victim changed his mind. That fact caused the others took his wallet away by force.

Theft is an offence which in its general brand was characterized in art. 278, section 1. of the Penal Code. According to it, whoever, with the purpose of appropriating, willfully takes someone else's movable property shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

Taking someone else's movable property is committed if the perpetrator in fact captured it. If the movable property is not captured yet and the perpetrator was for instance caught on the abortive attempt of theft, he would be penal liable for the attempt.

The penal liability for theft requires from the perpetrator the special intent which is committing the act with purpose of appropriating. The perpetrator must then identify the property as not belonging to him.

Movable property is to be understood in agreement with definitions stated in private law. In doctrine of civil law it is said that movable property is a material

[61] See also: M. Szwarczyk, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz...*, pp. 695–696.

thing which may be moved without disturbing its substance. The term of movable property stays in opposition to immovable property which is put as a piece of land or the other thing which is permanently connected with it[62].

It must be also said that due to art. 115 section 9. of the Penal Code, a movable property or chattel is also Polish or foreign currency or other means of payment and a document which entitles one to a sum of money or includes the obligation to pay principal, or interest, share in the profits or a declaration of participation in a company or partnership.

The purpose of appropriation must be understood as the will of acting with the thing as with the own property.

As it was noticed before, theft has qualified brands described in art. 294 of the Penal Code. Besides it has the preferential brand as the act of lesser significance. It must be clearly said that in most cases the most important thing in qualifying the offence as such an act would be the value of stolen property. It cannot be forgotten that in Polish law theft belongs to so called "half – divided acts". This term means the acts, which has the same features of illegality, described in appropriate provisions but due to the value of object of the act, it is either an offence or petty offence. In Polish law these are two separate categories of liability. Offences cause the penal liability and the petty offences effects the administrative liability, which is similar to the penal one, but states another, divided regime.

In other words, the perpetrator of an offence would be penal liable and the perpetrator of a petty offence would be administrative – penal liable.

Theft which is committed to a property which is worth more than 400 zlotys effects the penal liability and theft of property worth of 400 zlotys or less is connected with administrative – penal liability.

Such solution which conditions the form of liability forms the material value and not from the act seem to be not justified. A thief may not know how much worth is the thing. If he wants to avoid the penal liability, he may explain that he only wanted to steal few money and accidentally received much more.

The best solution of performed situation would be merging both forms of theft into an offence.

It must be also said that due to art. 278 section 4. of the Penal Code, if the theft has been committed to the detriment of a next of kin, the prosecution shall occur upon a motion of an injured person. This seems to be a reasonable solution because of the fact that sometimes teenage persons may steal some money or items from parent's wallets or houses. It would not be social acceptable if a parent would be obligated to bear the penal liability of his child in case if he does not want to blame him.

The discussing construction is added to art. 278 of the Penal Code its section 2. In this provision it is stated that the same punishment as in case of general brand of theft shall be imposed on anyone, who without the permission of the

[62] More about theft: A. Marek, T. Oczkowski, [in:] R. Zawłocki (red.), *System prawa karnego. Przestępstwa przeciwko mieniu i przestępstwa gospodarcze*, Warszawa 2011, pp. 60–68.

authorized person, acquires someone else's computer software, with the purpose of gaining material benefit. This punishment contains the penalty of deprivation of liberty for a term of between 3 months and 5 years.

It seems that the provisions of theft should not be connected with the provisions of computer intellectual rights. The intellectual property has traditionally separated regulations. It is difficult to explain why the legislator decided to place it just in described context.

The same rules of penal liability as in case of theft are referred into stealing energy or a card enabling the collection of money from a bank automatic cash dispenser[63]. In practice, so called "theft of energy" may be committed either with fighting the assurance of the thing or without it. The provisions, which are described in section 5. of the Penal Code, let art. 278 of the Penal Code uses only to such cases. If there is situation similar to burglary, there is no legal authorization to use art. 279 of the Penal Code, which refers to the burglary. In other words – in every case it has to be used art. 278 of the Penal Code. It is important because of the difference in penal reaction. Burglary, which description is contained in art. 279 of the Penal Code, is connected with being subject to the penalty of deprivation of liberty for a term between 1 and 10 years.

Mentioned above burglary is traditionally treated as a qualified brand of theft. It is to agree as the perpetrator must fill all the features of theft and the more severe punishment is connected with the element of breaking into. The perpetrator who wants to commit the theft must at first break the special protection which guards the access to the thing[64]. It does not matter the quality of the access – it is important to be active during the commission of the offence.

As it was described above, burglary has the preferential brand which is the act of lesser significance.

Similarly to the general brand of theft, if the burglary has been committed to the detriment of a next of kin, the prosecution shall occur on a motion of the injured person.

The offence of robbery has been just characterized by the way of features of qualified brands of killing. It must be mentioned that it is stated in art. 280 of the Penal Code. It is one of the offences against the property which is committed with using violence or threatening of the immediate use of violence to the person[65].

Extortion racket is an offence described in art. 282 of the Penal Code. It is to mention that it has a preferential brand included in art. 283 of the Penal Code as an act of lesser significance. Due to the provision of art. 282 of the Penal Code, whoever, with the purpose of gaining a material benefit, by using violence or threatening a violent attack against property, causes another person to dispose his own property

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[63] More about the 'theft of energy': B. Kurzępa, *Glosa do wyroku Sądu Najwyższego z dnia 26 lutego 2004 r., sygn. IV KK 302/03*, Prokuratura i Prawo 2005, 3, pp. 117–119.

[64] See also: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne*..., pp. 581–582.

[65] *Ibidem*, p. 582.

or property of other persons, or causes another person to dispose his own property or property of other persons, or causes a person to cease operating their business shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

The main difference between the robbery and the extortion racket is the moment of using violence or threat. In case of robbery these forms of coercion are used at the same time as theft. In case of extortion racket the forms of coercion are used before making the injured person dispose the property[66]. Besides, the form of coercion which may create the feature of extortion racket is violent attack against property. Such feature does not exist in other offences against the property.

The offence of appropriation is regulated in art. 284 of the Penal Code. According to this provision, whoever appropriates someone else's movable property or property rights shall be subject to the penalty of deprivation of liberty for up to 3 years.

Appropriation is an offence which is committed by omission. Its essence moves into not giving back the thing or property right in case if the perpetrator got the thing or property right legally. The offence takes place in the moment the perpetrator makes up his mind not to give the mentioned elements back to legal owner or possessor. In other words, the main difference between theft and appropriation is that in first case the perpetrator is to capture the thing, and in the other case this element does not exist as the thing is just in the perpetrator's possession. Apart from that, the appropriation may be committed due to property right and the regulation of theft does not include it.

The offence of appropriation has its qualified brands. Two of them are described in just analyzed art. 294 of the Penal Code. Another one is contained in section 2. of art. 284 of the Polish Penal Code which states that whoever appropriates a movable property entrusted to him shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. Such severity is justified of letting down the trust that the injured person had to the perpetrator, allocating the thing or property rights in his hands.

The appropriation has also preferential brands. One of them is defined as an act of a lesser significance. The other one is created due to appropriation of an item found. In mentioned cases the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

The offence of appropriation of an item found is committed only if it is possible for the perpetrator to pinpoint the owner of the lost thing. If such pinpointing is not possible, there is no penal liability for appropriation.

If the appropriation has been committed to the detriment of a next of kin, the prosecution shall occur on a motion of the injured person[67].

Art. 286 of Penal Code states the offence of fraud. In order to its provisions, besides the general brand, there may be divided also a qualified and a preferential

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[66] See: *Ibidem*, p. 584.

[67] More: A. Marek, T. Oczkowski, [in:] R. Zawłocki (red.), *System prawa karnego...*, Warszawa 2011, pp. 102–111; M. Szwarczyk, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz*, p. 697–699.

brand. In general brand, whoever, with the purpose of gaining a material benefit, causes another person to disadvantageously dispose of his own or someone else's property by misleading him, or by taking advantage of a mistake or inability to adequately understand the action undertaken shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

In regards of the features of fraud, there may be indicated two forms of it, namely – so called active fraud and passive one. The active fraud means that the perpetrator misleads the injured persons to get the material benefit. The passive fraud takes place if the perpetrator aiming the material benefit takes advantage of a mistake or inability to adequately understand the action undertaken[68].

It does not affect on the qualification the offence as a fraud if the injured person would dispose his own or somebody else's property. Each time such act is regarded as a fraud.

The qualified brand of fraud is described in art. 294 of the Penal Code. The preferential one is stated as an act of lesser significance. In this case the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years.

In art. 286 section 2. of the Penal Code, there is a provision similar to fraud. In doctrine it is sometimes called "after – theft – fraud". The essence of it is demanding a material benefit in return for an unlawfully acquired item. In such case the perpetrator shall be subject to the penalty of deprivation of liberty for a term between 6 months and 8 years[69].

If any of the acts specified in art. 286 of the Penal Code has been committed to the detriment of a next of kin, the prosecution shall occur on a motion of the injured person.

It must be also said that the fraud committed on the property which is worth of 400 zlotys or less is connected with the administrative – penal liability.

The act, which is committed very often, either as an offence or as a petty offence, is destroying, damaging or rendering unfit for use an item belonging to someone else in form of offence it is described in art. 288 of the Polish Penal Code. For the penal liability for this offence there is no matter to which degree the item is damaged. As it is included in legal description, it may be fully destroyed or in softer form as impossible to use. In order to indicated so far construction of "half – divided acts", the offence takes place if the item is worth more than 400 zlotys, the petty offence – if the value is lower. In general brand of this offence, whoever destroys, damages or renders unfit for use an item belonging to someone else shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years[70].

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[68] See also: Z. Niezgoda, *Niektóre aspekty prawnokarnej ochrony ubezpieczycieli (instytucji ubezpieczeniowych) na gruncie unormowań art. 286 i 298 k.k.*, Prokuratura i Prawo 2006, 4, p. 132.

[69] More: A. Marek, T. Oczkowski, [in:] R. Zawłocki (red.), *System prawa karnego*..., p. 123–139; M. Szwarczyk, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz*, pp. 702–705.

[70] See: J. Piskorski, [in:] R. Zawłocki (red.), *System prawa karnego*..., pp. 350–361; M. Szwarczyk, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz*, pp. 708–709.

It is to remember that this offence has a preferential brand in form of an act of lesser significance. Considering the value of an item it must be said that this preferential offence would be connected rather with value coming around 400 zlotys. In other words – the act of lesser significance must be particularly sought between the general brand of the offence and the petty offence. If the perpetrator committed an act of lesser significance, he shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year[71].

Due to Polish international obligations, the legislator introduced to art. 288, section 3 of the Penal Code. The offence is symbolic. Namely – whoever cuts or damages an undersea cable, or infringes the regulations binding on the laying or repair of such a cable shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

It must be also said that the prosecution of the offence committed not against the undersea item shall occur on a motion of injured person.

Handling stolen goods has in Penal Code two forms – intentional and unintentional. It must be noticed that this offence against property is the only one which has an unintentional form. The intentional brand of handling goods is described in art. 291 of the Penal Code. In order to it, whoever acquires a property obtained by means of a prohibited act, or assists in its disposition, or receives such property or assists in concealment thereof shall be subject to the penalty of deprivation of liberty for a term of between 3 moths and 5 years[72].

The intentional handling stolen goods has a preferential brand which is considered as an act of lesser significance. In such case, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

It must be said that the offence described above has an equivalent in a petty offence, due to the rules which were performed so far.

Intentional form of handling goods has its qualified brand in art. 294 of the Penal Code.

Unintentional handling stolen goods is included in art. 292 of the Penal Code. Due to its provisions, whoever acquires or assists in the disposition of property which he should or could assume, on the basis of the attendant circumstances, to be obtained by means of a prohibited act, or receives such property or assists in concealment thereof shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years[73].

At the end of considering the offence of handling stolen goods it is to be mentioned that in Polish Penal Code there is also a computer offence which is similar to traditional handling stolen goods. It is contained in art. 293 of the Penal Code.

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[71] Compare: M. Bojarski, *Przestępstwa przeciwko życiu i zdrowiu*, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne*..., p. 587.

[72] See also: E. Guzik-Makaruk, E. Pływaczewski, [in:] R. Zawłocki (red.), *System prawa karnego*..., pp. 253–268.

[73] More: *Ibidem*, pp. 273–278.

Apart from this, the similar regulations of the offences connected with help after the other offence are described also in the other acts of Polish law, for instance in art. 118 of Copyright Law Act [PL: ustawa o prawie autorskim i prawach pokrewnych] of z 4 February 1994 (consolidated text: Journal of Laws 2006, no. 90, item 631 as amended).

The important part of criminal provisions states chapter XXXVI of the Penal Code which describes offences against business transactions.

Before defining the chosen offences of this category, some remarks are to be done:

– the offences against business transaction are rather connected with valuable material harms;

– these offences are described by the features which must be defined due to provisions of private or financial law.

As these offence may cause valuable material damage, the solutions which are included in art. 308 and 309 of the Penal Code seem to be justified. First of them let spread the responsibility on person or organization, which are to be treated as a debtor or creditor in case of an offence against business transaction.

Due to art. 308 of the Penal Code, responsibility for such an offence lies with anyone who pursuant to legal provision, decision or competent authority, contract or actual performance who manages the assets of another natural or legal person, a group of persons or entities, which do not have a status of legal person.

The mentioned above provisions (art. 308 of the Penal Code), are very closely connected with regulations and principles of civil law. The damage must be fixing up and the injured being should not worry who is to do it. That seems to be a reason of the presented solution. It must be added that usually such beings which are indicated in art. 308 of the Penal Code may be more capable to pay off than the perpetrator.

Besides, the legislator decided for make fixing up the damage possible to give the solution which let not to punish the perpetrators of some offences or use the extra ordinary mitigation of penalty in case if they voluntarily fix the damage. This solution is written in provisions of art. 307 of the Penal Code. According to this, with regard to the perpetrator of the offence specified in art. 296 or 299–305 of the Penal Code, who voluntarily compensates in full for the damage caused, the court may apply an extraordinary mitigation of the penalty or even renounce its imposition. With regard to the perpetrator of the offence indicated above, who voluntarily repaired a significant part of the damage, the court may apply an extraordinary mitigation o f penalty.

Art. 309 of the Penal Code let increase the fines in cases of existing the offences included in its provisions. These are:

– qualified brand of exceeding power from art. 296 section 3. of the Penal Code – the circumstance which justifies that is causing the significant material damage of great extent;

– credit fraud which is described in art. 297 of the Penal Code;

– money laundering from art. 299 of the Penal Code.

In such cases indicated above, the fine may be imposed along with the penalty of deprivation of liberty imposed up to a maximum 2000 times the daily fine.

Among often committed offences against business transactions are:

– so called exceeding powers;

– credit fraud;

– assurance fraud.

The first of indicated offences has its description in art. 296 of the Penal Code. In its general brand, whoever, while under an obligation resulting from provisions of law, a decision of a competent authority or a contract to manage the property or business of a natural or legal person, or an organisational unit which is not a legal person, by exceeding power granted to him or by failing to perform his duties, causes it to suffer considerable material damage shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years[74].

This offence may be committed either as commission (exceeding power) or omission (failing to perform the duty). Exceeding power is not synonymous to overdrawing the competence. Exceeding power may not be connected with breaking law. It is contained in gesture of the perpetrator but may be for instance immoral or unjustified. Overdrawing the competence means breaking law.

This offence has two qualified brands. They exist if:

a) the perpetrator acts in order to gain a material benefit – then he shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years;

b) the perpetrator causes significant material damage of great extent. Then he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

Described offence has also the unintentional form, naturally not including the qualified brand connected with aiming to material benefit. The core of it states just the intent. If the perpetrator acts unintentionally he shall be subject to the penalty of deprivation of liberty for up to 3 years.

The legislator decided to give to the perpetrator the possibility to avoid the penalty, if he, voluntarily compensates full the damage which he caused. In such case the perpetrator obligatorily shall not be liable to punishment[75].

The offence so called 'credit fraud' is described in art. 297 of the Penal Code. It states one of the cases of acts which make punish the commission because of the danger of further negative effects. The penal reaction is taken before causing the real damages. As it is indicated in section 1. of art. 297 of the Penal Code, whoever, in order to obtain a loan, bank loan, loan guarantee, grant, subsidy, or public procurement order for himself or for another person, submits false documents or documents attesting untruth, or dishonest statements regarding their circumstances that are of significance for the obtaining of such a loan, bank loan,

[74] More: A. Michalska-Warias, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz*, pp. 725–730.

[75] More: J. Skorupka, *Przestępstwo nadużycia zaufania – wybrane zagadnienia*, Prokuratura i Prawo 2004, 1, pp. 127–140.

loan guarantee, grant, subsidy or a public procurement order shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years[76].

As it may be seen, the danger is connected with submitting the documents. For penal liability it does not matter if the loan or other measure of financial support would be given. The moment of commission is submitting the document in a appropriate institution.

The provisions of art. 297, section 1. of the Penal Code mention about the measures of financial supports as the aims of the perpetrator's act. Each time considered, they ought to be explained due to the current provisions of financial acts which may involve the legal definitions of such measures.

Art. 297, section 2. of the Penal Code let the penal liability for the persons who should guarantee the security of financial system in the institution which gives indicated above measures of financial support. In order to it, anyone who, despite of his obligation, does not notify a competent authority or institution of the occurrence of circumstances, which can have an effect on withholding or limiting the amount of a loan, the bank loan, loan guarantee, grant, subsidy or a public procurement order shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

As it was just claimed, the reparation of damage is extremely important due to the measure of responsibility for the offences against business transactions. The testimony gives also art. 297 section 3. of the Penal Code which states that whoever voluntarily prevented, prior to the instituting of criminal proceedings, using a loan, bank loan, bank guarantee, grant, subsidy or a public procurement order obtained in a manner specified in section 1. or 2., or compensated the claim of the injured, shall not be liable for the punishment[77].

Art. 298 of the Penal Code brings the penal liability for the assurance fraud. In order to its provisions, whoever in order to obtain the compensation under the insurance contract, causes an event which provides grounds for a compensation payment shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years[78].

The analyzed offence is also an example of an act which is connected with the existence of danger of damage. The danger is involved in causing the event which may lead to the damage understood as compensation payment.

Also in this case the legislator gives the privilege to the perpetrator who prevented the damage. Due to provisions of art. 298, section 2. of the Penal Code, who had voluntarily prevented the payment of compensation, prior to instituting criminal proceedings, shall not be liable to the punishment[79].

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[76] More: A. Michalska-Warias, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz*, pp. 739–743.

[77] More: J. Skorupka, *Przestępstwo oszustwa finansowego z art. 297 k.k. po noweli z marca 2004*, Prokuratura i Prawo 2005, 7–8, pp. 135–150.

[78] More: A. Michalska-Warias, [in:] T. Bojarski (red.), *Kodeks karny. Komentarz*, pp. 744–746.

[79] More: Z. Niezgoda, *Niektóre aspekty prawnokarnej ochrony ubezpieczycieli (instytucji ubezpieczeniowych) na gruncie unormowań art. 286 i 298 k.k.*, Prokuratura i Prawo 2006, 4, pp. 134–138.

The money and valuable paper counterfeiting is the most important offence in practice in order to the offences against the circulation of money and securities. It has its description in art. 310 section 1. of Penal Code. This offence belongs to the serious crimes which is arguable because the significance of social consequences of cases of acts having features of counterfeiting may be very different. The same legal qualification would be use to the case of massive counterfeiting money and to counterfeiting one note by using home – made technology. Due to art. 310, section 1. of the Penal Code, whoever counterfeits or alters Polish or foreign money[80], other legal tender, or a document which entitles one to obtain a sum of money or contains an obligation to pay capital, interest, share of profits, or verifies a share in a company, or whoever removes a sign of cancellation from money, other legal tender or from such document shall be subject to the penalty of deprivation of liberty for a minimum term of 5 years or a penalty of deprivation of liberty for 25 years.

It must be also remarked that the circulation of public valuable papers is nowadays virtual – made. Thanks to that the described offence decreases in order to valuable papers.

Probably according to ease the consequences of using the art. 310, section 1. of the Penal Code, the legislator introduced the act of lesser significance in section 3. of art. 310. However it is to say that it is the only case of act of lesser significance which is connected with extraordinary mitigation of the penalty, and not with legal described sanction which is different from the general brand.

The presented text of part II gives the picture of mainly considered in doctrine and existing in practice offences. The general purpose was to describe their features and show the way of leading analysis in Polish penal law. Hope you might understand the system of Polish penal law in its special part. It is also important to certify that the offences which are involved in the Penal Code are not the only ones that exist in Polish penal law. In almost each act there are situated the provisions according to the penal liability. However, every principle of penal law included in the Penal Code involves also these offences. What is important is to remember that they may be found not only in the Polish Penal Code.

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[80] Due to money, see: J. Skorupka, *Pojęcie pieniądza w przestępstwie z art. 310 k.k.*, Prokuratura i Prawo 2007, 7–8, pp. 51–57.

Conclusions

Due to the specific nature of the issues involved it was decided not to include such legal acts as the Fiscal Penal Statute, the Code on Minor Offences and the penal provisions contained in those statutes with regards to specialised fields, such as mining, marine and water law in the Penal Code. Simultaneously, however, the treatment of issues in the Penal Code (as has already been mentioned) has decisively influenced other penal acts belonging to the penal law in a broad sense.

The Penal Code of 1997 is a code is the code which serves as a "mirror" reflecting recent times. So, it has implemented the primary principle of humanism, reflected as a fundamental principle in our penal law that no one will be penalised for an act not prohibited by the law when committed (the so-called principle of *nullum crimen, nulla poena sine lege poenali anteriori* – art. 1 of the Penal Code) and international human standards.

Humanism is also reflected in the Penal Code provisions concerning sentencing. These provisions require sentencing courts to take into account the personal traits and circumstances of the offender, his mode of living prior to committing the act and his behaviour after the offence. At the same time, the court is obliged to take into account the purpose of punishment, both with regards to its social impact and its preventive and re-educational aims in respect of the convict (art. 53 of the Penal Code).

Based upon the principle of humanism the Code gives ground to the system of justice to less severe treatment of the offender who is responsible for an accidental offence, the negligence offence or when it is reasonable expecting that the offender, treated less severely, will not commit a new offence in the nearest future. The legal instruments for less severe treatment of an accidental offender include for example conditional discontinuance of proceedings concerning the offence – first of all – it should not be socially damaging (arts. 66–68 of the Penal Code).

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