INSTYTUT WYMIARU SPRAWIEDLIWOŚCI

# PRAWO W DZIAŁANIU

38

# LAW IN ACTION

Scientific editors Elżbieta Holewińska-Łapińska, Łukasz Pohl

Wolters Kluwer

Warszawa 2019

**ISSN: 2657-4691 (wersja online)**

**ISSN 2084-1906**

Nakład 200 egz.

Wersja elektroniczna Prawa w Działaniu jest wersją pierwotną (referencyjną).

Wydawca:
Na zlecenie Instytutu Wymiaru Sprawiedliwości
Wolters Kluwer Polska Sp. z o.o.
01-208 Warszawa, ul. Przyokopowa 33


DYREKTOR DZIAŁU PUBLIKACJI PERIODYCZNYCH
Klaudia Szawłowska-Milczarek
e-mail: czasopisma@wolterskluwer.pl

Szczegółowe informacje o prenumeracie czasopisma można uzyskać:

Infolinia: 801 044 545, prenumerata@wolterskluwer.pl

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## Varia

PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3801

**Maria Stanowska***

# First Attempts at Undoing the Consequences of Violating the Rule of Law in 1944–1956**

## I. DEVELOPMENT OF LEGAL AND FACTUAL CONDITIONS ENABLING THE APPLICATION OF SEVERE REPRESSIVE PUNISHMENTS

The end, in May 1945, of World War II in Europe and the liberation of the Polish territory from the German occupation did not bring Poland full independence. The new authorities, recognizing the superior role of the Soviet Union, did their best to break any resistance on the part of the society that objected to limitation of the Polish state's sovereignty. In order to achieve the purpose, state terror was applied in 1944–1956[1].

Criminal law, enforced with the help of the system of justice and investigative bodies ensured effective fight against political opponents. Care was taken to create adequate conditions which would make it possible to apply severe repressions, among others, through the enforcement of decrees passed by the Polish Committee of National Liberation: the Criminal Code of the Polish Army[2] of 23 September 1944 and the Decree on the protection of the State[3] of 30 October 1944, with the sanction of capital punishment in every provision, as well as the Decree of Council of Ministers of 16 November 1945 on crimes particularly dangerous at the time of rebuilding the country[4], replaced with the Decree of the same name of 13 June 1946[5] (the so-called 'little criminal code'). The severity of repressions was further enhanced by the Decree of the Council of Ministers of 16 November 1945 on summary proceedings[6], allowing the imposition of capital punishment or life imprisonment

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** The manuscript was submitted by the author on 12 December 2018; the manuscript was accepted for publication by the editorial board on 6 March 2019.
1 For more details, see M. Stanowska, *Rehabilitation of People Repressed for Activity for the Independence of Poland in the Years 1944–1956 in the Practice of the Warsaw Court*, Prawo w Działaniu 32(2017), 7 et seq.
2 Polish journal of laws Dz.U. No. 6, item 27, as amended.
3 Dz.U. No. 10, item 50.
4 Dz.U. No. 53, item 300.
5 Dz.U. No. 30, item 192.
6 Dz.U. No. 53, item 301.

regardless of whether the law provided for such punishments for a given offence, with no possibility of appealing judgments issued in summary proceedings[7].

Changes made in the criminal procedure gradually phased out the independence of the investigating magistrate[8] to finally eliminate it altogether when the Code of Criminal Procedure of 1928 was amended[9]. Preparatory proceedings were entrusted to the prosecutor (or military prosecutor) and public security officers (or Polish Army Intelligence Service officers). These bodies were also authorized to apply pre-trial detention. This state of law made it easy to detain people in relation to whom proceedings had not even been formally instituted. The absence of any control over the preparatory proceedings made it possible to ruthlessly deal with real or alleged political opponents. All too often, detention was also excessively extended. The prosecutor's office became actually subordinated to special services. The trial was in turn dominated by the prosecutor who actually directed the court proceedings. Thus, it was the public security or Military Intelligence Service authorities that had the decisive voice in the court proceedings.

The communist authorities also had ensured monopoly in appointing judges. The appointment of judges, with the requirement of the procedure being repeated every year, was entrusted to the Minister of Justice. Pursuant to the Decree of 22 February 1946 on the registration and compulsory employment in the system of justice of people qualified to take the position of a judge[10], the Minister of Justice could, until the end of 1946, employ these people to work in the system of justice for a period of one year with a possibility of extension for another year. The Decree, extended by subsequent amendments, remained in force until the end of 1952. In addition, what was abandoned in the Decree of 22 January 1946 on the exceptional admission to taking the positions of judges, prosecutors and notaries as well as to being entered on the list of attorneys-at-law[11] was the previously absolute requirement of completing university studies in law and judicial training[12]. Pursuant to this instrument, the Minister of Justice could, during the 5 years from the entry in force of the Decree, appoint, among others, for the position of a judge, a person exempt from the obligation to have law studies and judicial training. The binding force of the Decree was also extended[13]. It was thus obvious that judges of this kind would offer full cooperation to the authorities. In addition, the hitherto effective ban, forbidding judges from being members of a political party, resulting from Article 121 of the Law on the Organization of General Courts ('and in particular a judge must not belong to any political faction')[14], guaranteeing judges'

[7] Summary proceedings were applied only in general courts.
[8] A. Lityński, *O prawie i sądach początków Polski Ludowej*, Białystok, 1999, 117–122.
[9] Law of 27 April 1949 on Amendments to the Provisions on the Criminal Procedure, Dz.U. No. 32, item 238.
[10] Dz.U. No. 9, item 65.
[11] Dz.U. No. 4, item 33.
[12] Interestingly, attorneys-at-law were not released from the obligation of completing law studies and passing examinations required by the law. According to I.S. Grat, the opinion of the Ministry of Justice seemed to indicate that the abandonment of this obligation could adversely affect 'the professional and ethical standards of the Bar' – I.S. Grat, *Uchwalenie dekretu z 22 stycznia 1946 r o wyjątkowym dopuszczeniu do obejmowania stanowisk sędziowskich, prokuratorskich i notarialnych oraz do wpisania na listę adwokatów*, Miscellanea Historico-Iuridica, 6/107(2008), p. 107.
[13] The last extension was made by the Law of 29 December 1951.
[14] Order of the President of the Republic of Poland of 6 February 1928 – Law on the System of General Courts, Dz.U. No. 12, item 93.

impartiality, was repealed by the Decree of the 14 March 1945 on amendments to the Law on the Organization of General Courts[15].

The communist authorities' lack of confidence in general courts resulted in a significant limitation of the competence of general courts in favour of military courts[16]. The system of military courts was organized from scratch and this provided full control over their activity. Military courts did what they were expected to do. The sentences were very severe. There were approximately 100,000, perhaps even 150,000 of political prisoners sentenced to long-term imprisonment for anti-state offences. In the years 1944–1947 alone, over 2,500 people were convicted to capital punishment for political offences[17]. J. Paśnik reports that in 1945–1953 military courts convicted over 81,000 people[18] (including 65,000 people in 1946–1953 alone) of crimes against the state and the penalties imposed were very severe. According to Z. Leszczyńska, who presented profiles of the persons convicted by the Military Court of the Garrison of Lublin and the Military Court in Lublin in 1944–1945, at the Lublin Castle alone 210 people were sentenced to capital punishment and 125 of them were executed. The sentenced were (apart from 26 deserters from the army) people who had fought for independence, predominantly Home Army soldiers[19]. More than half of those convicted in 1950–1953 were sentenced to imprisonment for over 5 years, life sentences, and capital punishments[20]. A. Lityński estimates that in 1945–1954 approximately 5,860 people were sentenced to capital punishment for offences against the state and 70% of those sentences were carried out[21].

The authorities did not stop at providing legal safeguards. What guaranteed strict performance of the new tasks was – following the Soviet model – adequate cadre. It was the tried and tested Soviet officers who were entrusted with the formation of the Military Intelligence Service. At the beginning of 1946, 90.3% of executive posts in the MIS were still occupied by Soviet officers. Although the situation gradually changed as the Polish cadre were being prepared[22], there is no doubt that Soviet officers in the Polish Army Intelligence Service formations, with Dmitry Voznesenski, head of the Main Board of the Polish Army Intelligence Service, played a significant role in the development of a repressive policy in the armed forces[23]. Soviet officers also acted as prosecutors in the Supreme Military Prosecutor's Office, judges in the Supreme Military Court, as well as advisors

[15] Dz.U. No. 9, item 46.
[16] It was only the Law of 5 April 1955 on the Transfer to General Courts of the Hitherto Jurisdiction of Military Courts in Criminal Cases Concerning Civilians, Public Security Officers, Citizen's Militia and Prison Service (Dz.U. No. 15, item 122) that restored the jurisdiction of general courts over a vast majority of these offences (with the exception of espionage).
[17] M. Turlejska, *Te pokolenia żałobami czarne… Skazani na śmierć i ich sędziowie*, Warszawa, 1990, 26, 106–107.
[18] J. Paśnik, *Prawne aspekty represji stalinowskich w Polsce*, Dziś 7/101(1991), p. 101.
[19] Z. Leszczyńska, *Ginę za to co najgłębiej człowiek ukochać może. Skazani na karę śmierci przez sądy wojskowe na Zamku Lubelskim (1944–1945)*, Lublin, 1998, 22.
[20] J. Paśnik, *Wybrane problemy orzecznictwa sądów wojskowych w sprawach o przestępstwa przeciw państwu w latach 1946–1953*, Materiały Historyczne 32/34(1991), 1.
[21] A. Lityński, *Historia prawa Polski Ludowej*, Warszawa, 2008, 51.
[22] The training was conducted in the Officers' Intelligence School, opened in September 1945, whose commander was Lt. Konstantin Lobanov, a Soviet officer.
[23] J. Poksiński, *'TUN'. Tatar-Utnik-Nowicki. Represje wobec oficerów Wojska Polskiego w latach 1949–1956*, Warszawa, 1992, 62–63.

to these bodies. It was those officers who imposed the style of work and took care of their subordinates' formation. They applied the Soviet interpretation of criminal law with high repressiveness[24]. It is worthwhile to point out that part of the Soviet officers holding responsible functions in the above bodies, were put on the list of people co-responsible for violating the rule of law in criminal proceedings[25].

The role of the military prosecutor's office consisted in issuing a decision to apply pre-trial detention not only without any evidence, but even without any contact with the detained[26]. This is confirmed in the report of the Military Prosecutor of the Garrison in Katowice dated 20 September 1945, which reveals that in every prison (out of the twenty in the territory covered by that prosecutor's office), approximately 30 to 50% detainees were kept without any sanction[27]. Sentences which the public security bodies did not approve of were immediately appealed against by prosecutors and overturned by the Supreme Military Court[28]. The authorities interfered with the work of courts. A court could not interview an investigation officer of the Public Security Office. Where the president of the adjudicating panel did not repeal the motion to interview an investigation officer, he risked the initiation of explanatory proceedings. Unsurprisingly, the security bodies demonstrated utter contempt for the military court. Where the court returned the files of the case with a request that the investigation be completed, pages from case files were often torn out and new ones with new evidence were bound in[29].

In addition, a quasi-court body was established with the power of passing prison sentences (placement in a labour camp for up to 2 years)[30]. Proceedings before the Special Commission resembled inquisition trials, because the Commission was simultaneously the body in charge of conducting preparatory proceedings and the adjudicating body[31]. Though a defence attorney could formally take part in proceedings before the Special Commission, in practice, this was not allowed. Moreover, the Commission's judgments could not be appealed against. Members of the Special Commission did not have to have legal education. Consequently, it was easy to make them act unlawfully. And thus the Commission accepted cases referred to it with a motion for passing a two-year labour camp sentence without the pre-trial detention being counted towards it. This was done upon request of the Prosecutor General's Office. The practice was commonplace, in particular where the pre-trial detention lasted more than two years and the point was to further

[24] E. Romanowska, *Karzące ramię sprawiedliwości ludowej. Prokuratury wojskowe w Polsce w latach 1944 –1955*, Warszawa, 2012, 242.
[25] *Raport tzw. Komisji Mazura (Wasilewskiego)*, published in Gazeta Wyborcza daily on 22 January 1999.
[26] J. Borowiec, *Aparat bezpieczeństwa a wojskowy wymiar sprawiedliwości. Rzeszowszczyzna 1944–1954*, Warszawa, 2004, 66.
[27] E. Romanowska, n. 24 *supra*, 328.
[28] J. Borowiec, n. 26 *supra*, 66.
[29] J. Borowiec, *Aparat bezpieczeństwa*…, 179–180 and 204–206.
[30] The body was established by the Decree of 16 November 1945 on the establishment and scope of activity of the Special Commission for Fight with Economic Abuse and Sabotage (Dz.U. No. 53, item 302), repealed by the Decree of 23 December 1954 (Dz.U. No. 57, item 282).
[31] Numerous publications are available on the Special Commission. One of them seems to be particularly valuable, the monograph by P. Fiedorczyk, *Komisja Specjalna do Walki z Nadużyciami i Szkodnictwem Gospodarczym. 1945–1954. Studium Historyczno-prawne*, Białystok, 2002. Among the latest publications, I would recommend the synthetic study by B. Sekściński, *Komisja Specjalna do Walki z Nadużyciami i Szkodnictwem Gospodarczym (1945–1955)*, Roczniki Humanistyczne, LIX/2(2011), and the extensive selection of literature to be found there.

deprive the detainee of freedom[32]. Prosecutors also referred to the Special Commission motions to place in labour camps completely innocent people (e.g. the sister of a defected sailor, simply because her brother defected abroad)[33]. The scope of the Commission's powers was practically unlimited. The Special Commission dealt with what they wanted or what they were told to deal with[34]. After the amendment to the Decree on the establishment of the Special Commission extended the substantive jurisdiction of the Commission to include the offence of 'causing panic to the detriment of the interests of working people'[35], political offences also came to be covered by its jurisdiction. In 1950–54, a vast majority of the penalties were imposed for the offence defined in Article 22 of the little criminal code[36], with almost 4,500 people placed in labour camps on this account[37]. Over 84,000 persons were sentenced to labour camps by the Special Commission, while fines were imposed on more than 200,000. Though the Special Commission could not impose such severe penalties as courts, the fact that its powers were practically unlimited and that in the inquisition-like trial they could send even completely innocent people to labour camps allows one to state that the only aim of the institution was to exert intensified terror[38].

After 1956, more than 4,500 people convicted by the Special Commission appealed to the Prosecutor General's Office that the judgments be overruled. Only of a few of those appeals were granted[39]. Attempts at having the damage done by judgments of the Special Commission repaired and compensation awarded were resumed after 1989. The First President of the Supreme Court, to whom the requests for an extraordinary revision of judgments of the Special Commission were addressed, submitted to the Supreme Court a question of law concerning the challenging of the legally binding judgments of the Commission. The difficulty resulted from the fact that pursuant to the provisions of the Code of Criminal Procedure an extraordinary appeal (as well as a motion for a resumption of proceedings) was foreseen only for legally binding judgments ending court proceedings and thus there was a legal gap in this field. In their resolution of 21 December 1994, I KZP 33/94, the Supreme Court sitting as a panel of 7 judges declared that 'a legally binding adjudication terminating proceedings before the Special Commission for Fight with Economic Abuse and Sabotage or its representative offices can be appealed against in the procedure extraordinary appeal as well as in the procedure of resumption of proceedings'[40]. In the statement of reasons for the resolution, the Court says that the solution is possible thanks to the application of *analogia iuris*,

[32] The total imprisonment happened to last even 6 years – P. Fiedorczyk, n. 31 *supra*, 231.
[33] The information quoted after A. Lityński, n. 8 *supra*, 200–201.
[34] P. Fiedorczyk, n. 31 *supra*, 164–165.
[35] Act on 20 July 1950 on the amendment to the Decree of 16 November 1945 on the establishment and scope of activity of the Special Commission for Fight with Economic Abuse and Sabotage, Dz.U. No. 38, item 350.
[36] Proliferation of false information which can cause significant damage to the interests of the Polish State or significantly lower the position of its supreme bodies.
[37] A. Zaćmiński, *Przestępstwa polityczne w orzecznictwie Komisji Specjalnej do Walki z Nadużyciami i Szkodnictwem Gospodarczym 1950–1954*, Pamięć i Sprawiedliwość 1(2008), 335, 341.
[38] P. Fiedorczyk, n. 31 *supra*, 325.
[39] J. Bednarzak, *Rewizje nadzwyczajne Prokuratora generalnego PRL* [in:] *Prokuratura PRL w latach 1950–1960*, Warszawa, 1960, 175 – quoted after P. Fiedorczyk, n. 31 *supra*, 330.
[40] 1–2 OSNKW 1995, item 2.

which is permissible because it will be applied only for the benefit of the 'accused'. This analogy is also indispensable, because it is impossible to tolerate a situation in which there would be no procedural possibilities of repealing or modifying a legally binding judgment of the Special Commission, which drastically violated the rights of a groundlessly 'punished' person. If the law creates such possibilities in relation to legally binding judgments of sovereign courts, issued – after all – in the conditions of respect for the right of the accused to defence, they must be all the more so provided and observed in relation to very similar repressive judgments issued by a non-judicial body adjudicating in the absence of the of basic procedural guarantees of the repressed persons. The same arguments apply to the possibility of appealing, by means of an extraordinary cassation, the legally binding judgments ending proceedings before the Special Commission. Hence, in subsequent commentaries to the Code of Criminal Procedure of 6 June 1997[41] the possibility of an extraordinary cassation appeal against judgments of the Special Commission was confirmed[42]. This is further confirmed by T. Grzegorczyk in the first thesis of his commentary on Article 521 of the Code of Criminal Procedure[43], though P. Fiedorczyk quotes the same author putting forward an opposite thesis[44].

Special courts were also established. The task of the special criminal courts was to judge fascist-Nazi criminals guilty of homicide and atrocities affecting civilians and prisoners of war as well as traitors to the Polish Nation[45]. In 1946, these courts were abolished and their competences were taken over by general courts.

The second special court was the Supreme National Tribunal[46] competent to judge people responsible for the nazification of state life and Poland's defeat in September 1939[47] as well as war criminals[48]. In 1946–1948, 46 Nazi criminals were judged in massive court trials (20 of them were sentenced to capital punishment)[49].

The so-called secret sections were established in general courts. In 1950–1954, they operated in the Ministry of Justice as well as in the Court of Appeal and Voivodeship Court in Warsaw and also in the Supreme Court. Though the sections formally operated within the general court system, they were in fact separated and worked undercover.

[41] Consolidated text: Dz.U. 2018, item 1914.

[42] J. Grajewski, S. Steinborn, *Komentarz aktualizowany do art. 521 Kodeksu postępowania karnego* [in:] L. Paprzycki, J. Grajewski, S, Steinborn (eds.), *Komentarz aktualizowany do Art. 425–673 ustawy z dnia 6 czerwca 1997 Kodeks postępowania karnego (Dz.U. 97.89.555)*, Lex/el. 2015.

[43] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Kraków, 2003.

[44] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Kraków, 1998 – quoted after P. Fiedorczyk, n. 31 *supra*, 330.

[45] Decree of PKWN (*Polish Committee of National Liberation)* of 12 September 1944, Dz.U. No. 4, item 21. There were six of them operating throughout the country. A special criminal court was composed of a professional judge and two lay judges. The judgments could not be appealed against. The participation of a defence lawyer was obligatory.

[46] Established with the Decree of the Council of Ministers of 22 January 1946, Dz.U. No. 5, item 45.

[47] By virtue of the Decree of the Council of Ministers of 22 January 1946 on responsibility for the September defeat and nazification of state life, Dz.U. No. 5, item 46.

[48] The establishment of the Supreme National Tribunal was linked to Poland's accession to the London Agreement of 8 August 1945 and the adoption of the Moscow Declaration of 1 November 1943 in accordance with which war criminals had to be handed over to the victim states and judged by the courts of those states. The Supreme National Tribunal adjudicated as a panel of three professional judges and four lay judges, its judgments being final. The participation of a defence attorney was obligatory.

[49] After 1948 the Supreme National Tribunal ceased to work though it was not formally abolished. More on the subject in A. Lityński, n. 8 *supra*, 169–170.

The proposal to arrange for a special procedure of examining criminal cases of great importance for the interests of the state and the Polish United Workers' Party was put forward by the Ministry of Public Security ('MPS'). The ministry claimed that this concerned mainly cases falling under the Decree of 22 January 1946 on responsibility for the September defeat and nazification of state life[50]. The establishment of the secret section was approved by Henryk Świątkowski (Minister of Justice), Wacław Barcikowski (First President of the Supreme Court), and Henryk Cieśluk (Vice-Minister of Justice)[51]. The cases were examined by fully trusted judges (Polish United Workers' Party members), while public defenders were appointed from a special list. The trials were held in absolute secrecy, mostly in the Mokotów prison[52]. In 1952, the trials were moved to a small room in the court building where the only 'public' were the investigation officers of the MPS in charge of a given case.

During the over four years of the activity of the secret section, it examined 506 cases against 626 people. The Supreme Court examined appeals in 370 cases. 585 people were convicted. The court of first instance imposed capital punishment in 34 cases, in 14 cases the sentences were upheld, nine persons were executed[53]. In addition, 20 people died in prison, while dozens of others died soon after release[54]. The latter was beyond any doubt closely linked to the unauthorized and inadmissible methods applied during the investigations.

Application of sophisticated and perverse torture was everyday practice in the proceedings conducted by security or Military Intelligence officers. The scale of the phenomenon was confirmed by testimonies of the repressed people and even by testimonies given by the persecutors themselves both in their own trials or rehabilitation trials as well as during the work of the commissions established to examine violations of the rule of law in criminal proceedings.

The problem of the interrogations conducted with the use of unauthorized and inadmissible methods returned in debates held by different groups of people. Already in 1945, it was discussed during a meeting of presidents and heads of military courts in the Supreme Military Court or during the plenary sessions of the Central Committee of the Polish United Workers' Party. Yet, it had no consequences in practice. The prosecutor did not respond to complaints about the use of torture made by the accused, even if they were eyewitnesses of the beating. Similarly, the court did not give much attention to the accused's complaints about the use of torture, treating them as devious and groundless. It was anyway 'safer' for the adjudicating courts, because they avoided the danger of initiation of potential explanatory proceedings[55].

The violations of law in criminal proceedings was not limited to merely extorting testimonies out of the accused or witnesses in cases in which accusations concerned

[50] The proposal was put forward by Gen. Roman Romkowski, Vice-Minister of Public Security, who referred to the top party leadership in the years 1949–1956, that is, Bolesław Bierut, Jakub Berman, and Hilary Minc. I quote it after A. Lityński, n. 8 *supra*, 174–175.
[51] J. Kubiak, *Sekcja tajna*, Prawo i Życie 28(1991).
[52] That is why the accused called that court the 'crapper court'.
[53] Among them were August Emil Fieldorf, Bronisław Chajęcki, Bolesław Kontrym, Zbigniew Ejme, Julian Czerwiakowski.
[54] J. Kubiak, *Sekcja tajna*, Prawo i Życie 31(1991).
[55] J. Borowiec, n. 26 *supra*, 204–206.

the actually committed crimes. Evidence was repeatedly falsified and accusations happened to be made of crimes not committed. In situations of this kind it was necessary to extort admission of guilt and orchestrate evidence.

## II. REHABILITATION MEASURES IN MID-1950S

The unauthorized and inadmissible methods applied by officers of investigation bodies came to be revealed by Józef Światło, deputy director of Department X of the MPS, who himself had made considerable use of these practices, in the Radio Free Europe broadcasts towards the end of September 1954. In response, the Central Committee of the Polish United Workers' Party set up two commissions: for matters of rehabilitated persons and for examining methods of work applied in security bodies (which be discussed further in section III).

In response to a motion of the Commission for matters of rehabilitated persons, on 10 March 1955 the Political Office of the party adopted the rules of treatment of persons released from prison and rehabilitated at that time. They related mainly to financial or welfare questions, e.g. granting a one-off allowance or compensation, or even a disability pension; the possibility of medical treatment; payment of an equivalent for losses resulting from liquidation of a flat, etc.[56] However, the most important measures were those intended to alleviate the sentence or even to fully rehabilitate the person.

In the second half of 1954, examination begun of cases of the so-called 'conspiracy in the army'. In March 1955, the first conclusions from the examinations were ready. On 3 November 1955, a special commission of the Political Office of the Polish United Workers' Party was set up to examine rehabilitation appeals submitted by the Supreme Military Prosecutor's Office and the Prosecutor General's Office. On 19 April 1956, the commission presented the results of their work to the Political Office. Once the Political Office accepted the rules of work of the commission which had looked into the results of the examination of cases of the so-called 'conspiracy in the army', the commission ordered the Supreme Military Prosecutor's Office to resume and subsequently discontinue the proceedings due to absence of evidence of guilt in the majority of the cases[57].

As a result of the rehabilitation trials (concerning not only cases of the so-called 'conspiracy in the army') a few hundred convicts were rehabilitated by the autumn of 1957. Also, measures taken in the procedure of court supervision led to sentences being reduced. Yet the largest number of people benefited from the Amnesty Act of 27 April 1956[58], as approximately 5,000 to 6,000 political prisoners were released on its basis[59]. However, that was not equivalent to full rehabilitation of the persons the proceedings against whom were discontinued by virtue of the amnesty.

Let us have a closer look at the effects of the examination of cases of the so-called 'conspiracy in the army' conducted by officers of the Supreme Military Prosecutor's

[56] J. Poksiński, n. 23 *supra*, 143–144.
[57] J. Poksiński, n. 23 *supra*, 144–145.
[58] Dz.U. No. 11, item 57.
[59] M. Turlejska, *Te pokolenia*…, 60 and 108.

Office[60]. The main case was the 'case of the central group of the conspiracy', also called as the 'trial of generals' as the defendants in the trial were generals Stanisław Tatar, Stefan Mossor, Jerzy Kirchmayer, and Franciszek Herman; colonels Marcin Jurecki, Marian Utnik, and Stanisław Nowicki and also major Władysław Roman and commander second lieutenant Szczepan Wacek.

The first arrests took place back in 1949 and after a brutal investigation all the accused, with the exception of Gen. Stefan Mossor, admitted their guilt. The public trial was to perform a propaganda task and show that the party and the communist authorities in Poland vanquished the 'diversion-espionage centres of the enemy which worked for Anglo-American imperialists'.

Invitations to attend the trial before the Supreme Military Court[61] held in the rooms of the Ministry of Justice were extended to the radio, national and international press as well as the Polish Newsreel. The officers accused in the 'trial of generals', as the only ones who had a trial among all cases involving participation in the 'conspiracy in the army', could have defence attorneys. Only one of these attorneys was given access to the court files, yet without the right to take notes.

MPS representatives were present close to the trial room and exerted all sorts of pressure on the contents and course of the hearing. No witnesses were called by the defence and the prosecutor called in 18 witnesses, all of whom had been subjected to brutal investigations. Part of them had already been convicted to death, while the remaining ones were waiting for their own trials in which some of them were also subsequently sentenced to death[62].

The sentence was pronounced on 13 August 1951. Generals S. Tatar, J. Kirchmayer, S. Mossor, and F. Herman were given life sentences[63], M. Utnik, S. Nowicki and M. Jurecki were sentenced to 15 years' imprisonment, W. Roman to 12 years' imprisonment, while Sz. Wacek received a 10-year sentence. In addition, all of them received an additional punishment in the form of loss of civil and public rights for a period of 5 years.

Towards the end of 1952, generals S. Mossor and F. Herman were again subjected to a brutal investigation aimed at extorting from them testimonies incriminating Marshal Michał Rola-Żymierski and Gen. Wacław Komar. Gen. F. Herman did not survive the investigation and died of heart attack in a cell of the detention ward of the Main Board of the Polish Army Intelligence Service[64].

As a result of the examination of the 'trial of generals', on 24 April 1956, the Supreme Military Prosecutor's Office motioned that the proceedings be resumed. On the same day, the Supreme Military Court accepted the motion, repealed the sentence and sent the case back to the prosecutor's office with a request that the investigation be completed.

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[60] Lt. Col. Franciszek Mateja, Capt. Edward Wiącek, Capt. Andrzej Kaszycki and Capt. Zbigniew Domino – quoted after J. Poksiński, n. 23 *supra*, 142.

[61] The adjudicating bench was presided over by Lt. Col. Roman Waląg from the District Military Court in Białystok. With him sat Lt. Col. Roman Bojko and Mjr Teofil Karczmarz.

[62] J. Poksiński, n. 23 *supra*, 128–129.

[63] Article 86(1) and (2) of the Criminal Code of the Polish Army, which provided grounds for the conviction and punishment, did not provide for a life imprisonment.

[64] J. Poksiński, n. 23 *supra*, 142.

The Supreme Military Prosecutor's Office, also on the same day, discontinued the proceedings due to absence of evidence of guilt. On 26 January 1990, that decision was changed as it was assumed that the grounds for the discontinuation of the case was the ascertainment that Gen. S. Tatar, Col. M. Utnik and Col. S. Nowicki did not commit the acts they were accused of[65].

What was also examined were the so-called 'sliver trials'. Investigations in these cases were conducted by boards of the Polish Army Intelligence Service, mainly by the Main Board of the Polish Army Intelligence Service, which supervised the conduct of investigations and made all the major decisions. According to the script prepared by the Military Intelligence Service, 86 officers – alleged members of a conspiracy organization working for western powers – were accused.

In 53 trials conducted behind closed doors, before the Supreme Military Court, the District Military Court and the Regional Military Court in Warsaw, as well as the Navy Military Court in Gdynia, 40 death penalties were adjudicated (20 carried out), 8 persons were sentenced for life, while 37 received long prison sentences (ranging from 8 to 15 years) on the basis of fabricated evidence and extorted testimonies. Two officers died in prison while serving their sentences, many suffered irretrievable health impairments as a result of the brutal investigations and inhuman prison conditions[66].

The examination of the 'sliver trials' led to the submission by the Supreme Military Prosecutor's Office of motions for the resumption of proceedings, overruling of sentences by the Supreme Military Court, and remand of cases in order for investigation to be completed, finally ended with discontinuation of proceedings due to absence of evidence of guilt.

The defendants in the case of the so-called new management of the military conspiracy were colonels Franciszek Skibiński, Stefan Biernacki and Adam Jaworski as well as majors Apoloniusz Zawilski and Kornel Dobrowolski. The Supreme Military Court judgment of 28 April 1952 sentenced all of them to capital punishment. The sentence was upheld on 20 May 1952 by the Assembly of Judges of the Supreme Military Court. President Bolesław Bierut did not exercise his right of pardon, but execution of the sentences was suspended at the request of the head of the Main Board of the Polish Army Intelligence Service, who wanted to use the convicts as witnesses in other cases related to the 'conspiracy in the army'.

On 21 January 1954, less than two years from the adjudication of the capital punishment, Col. Antoni Skulbaszewski concluded that it was no longer necessary to suspend the execution of the sentences. Prosecutor Gen. Stanisław Zarakowski then lodged with the Council of Ministers a motion for granting pardon to all the above-mentioned persons and on 25 January 1954 the Council of Ministers accepted the motion replacing the capital punishment with life sentences. After the resumption, on 4 April 1956, of proceedings in the cases of those convicted, the proceedings were discontinued on 6 April 1956 because of absence of evidence of guilt[67].

A similar case of execution of capital punishments being suspended also took place in the trial of officers of the General Staff of the Polish Army. Defendants in the case

[65] S. Przyjemski, *Ja po 39 latach*, Prawo i Życie 19(1990).
[66] J. Poksiński, n. 23 *supra*, 149.
[67] J. Poksiński, n. 23 *supra*, 149–153.

were lieutenant colonels Marian Orlik, Aleksander Kita and Ludwik Głowacki as well as major Władysław Skoczeń. In the judgment of 8 August 1952, the Supreme Military Court sentenced all of them to capital punishment. The sentence was upheld by the Assembly of Judges of the Supreme Military Court on 23 August 1952 with respect to M. Orlik, A. Kita and W. Skoczeń, and on 28 August 1952 with respect to L. Głowacki. President B. Bierut did not exercise his right of pardon in any of the cases. The M. Orlik and A. Kita were executed, but in the case of L. Głowacki and W. Skoczeń, the execution was suspended so that they could be used as witnesses in other 'conspiracy in the army' cases. Here again, on 21 January 1954, A. Skulbaszewski decided that the sentences could be carried out. Then Gen. S. Zarakowski motioned that L. Głowacki and W. Skoczeń be granted pardon and the Council of Ministers accepted the motion on 25 January 1954, changing the death penalty to life imprisonment. Once the proceedings were resumed on 9 April 1956, the Supreme Military Court discontinued the proceedings due to absence of evidence of guilt[68].

The execution of sentences of capital punishment was also suspended in the case of the second group of aviation officers, in which Lt. Col. Roman Rypson, Lt. Col. Zygmunt Sokołowski, Mjr. Konstanty Sabiłło, and Mjr. Roman Kurkiewicz were the defendants. With the judgment of 18 October 1952, the Supreme Military Court sentenced all of them to capital punishment. The sentence was upheld by the Assembly of Judges of the Supreme Military Court on 19 December 1952. On 15 April 1953, the Council of Ministers applied the right of pardon to K. Sabiłło, changing the capital punishment to 15 years' imprisonment, but did not exercise the right of pardon with respect to the others.

The sentence was carried out with respect to R. Rypson, while suspended with respect to Z. Sokołowski and R. Kurkiewicz, so that they could be used as witnesses in other 'conspiracy in the army' cases. However, already in August 1953, it was concluded that Z. Sokołowski would not say anything more and his sentence was carried out. R. Kurkiewicz had more luck as in response to a motion of the supreme military prosecutor the Council of Ministers granted him pardon, replacing the capital punishment with a life sentence. Once the proceedings were resumed on 24 April 1956, the Supreme Military Prosecutor's Office discontinued the proceedings for absence of evidence of guilt on 27 April 1956[69].

On 26 April 1956, proceedings were resumed only to be discontinued on the following day for absence of evidence of guilt in the cases of the colonels Bernard Adamecki, August Menczak, Józef Jungraw, lieutenants Władysław Minakowski, Szczepan Ścibior and Stanisław Michałowski (all of whom were sentenced to death and sentences carried out) and colonels: Stanisław Ziach and Aleksander Majewski, who were sentenced to life imprisonment[70]. On 21 January 1993, that decision was modified on the assumption that the proceedings were discontinued on the basis of the conclusion that colonels B. Adamecki, A. Menczak, J. Jungraw and lieutenants W. Minakowski, S. Ścibior, S. Michałowski, S. Ziach and A. Majewski had not committed the acts they had been accused of[71].

[68] J. Poksiński, n. 23 *supra*, 164–165.
[69] J. Poksiński, n. 23 *supra*, 168–169.
[70] J. Poksiński, n. 23 *supra*, 156–157. They were referred to as the conspiracy heading group in the Air Force.
[71] Quoted after J. Poksiński, *'Pisek w wojsku'. Victis honos*, Warszawa, 1994.

Similarly, on 24 April 1956, proceedings were resumed in the case of the sentenced-to-death navy captains Zbigniew Przybyszewski, Stanisław Mieszkowski, and Jerzy Staniewicz (sentences carried out) and Robert Kasperski and Marian Wojcieszka (pardoned) as well as navy captains Wacław Krzywiec and Kazimierz Kraszewski, who were sentenced to life imprisonment, only to be discontinued for absence of evidence of guilt on 26 April 1956[72].

On 7 May 1956, proceedings were resumed and discontinued on the same day for absence of evidence of guilt with respect to colonels Aleksander Rode and Feliks Michałkowski, who had been sentenced by the Supreme Military Court to capital punishment on 27 January 1953 (sentences executed)[73]. Finally, on 28 April 1956, proceedings were resumed and on 7 May 1956 discontinued for absence of evidence of guilt with respect to Mjr. Benno Zerbst, sentenced to death (sentence carried out), Lt. Col. Tomasz Kostucha, sentenced to life imprisonment, and Lt. Col. Leopold Dobrowolski, sentenced to 15 years' imprisonment[74].

In individual 'sliver' trials closely linked to the 'conspiracy in the army' case, 43 persons received sentences. In ten cases these were death sentences, of which four were executed: Col. Mieczysław Oborski, Lt. Col. Zdzisław Barbasiewicz, Mjr. Zefiryn Machalla, and Lt. Zdzisław Ficek. Capital punishment was changed to life imprisonment in six cases: Gen. Józef Kuropieska, Col. Maksymilian Chojecki, Lt. Col. Józef Bochenek, Mjr. Jerzy Lewandowski, Mjr. Henryk Godlewski, and chief petty officer Mieczysław Skibiński. In all those cases, proceedings were resumed in the first half of 1956 and finally discontinued by the prosecutor's office due to absence of evidence of guilt.

Attention should be drawn to the fact that in all those proceedings the case was returned to the prosecutor's office which made a decision to resume the investigation and then discontinue it. What was thus avoided was the public exposure of the mechanism of orchestrated trials.

It was different in the trial of Kazimierz Moczarski, who insisted on an open rehabilitation trial. He was found not guilty on 11 December 1956 by the Voivodeship Court in Warsaw in the presence of numerous people watching. His defence attorney, Aniela Steinsbergowa pointed to the fact that nowhere but in Poland was rehabilitation conducted in open trials which would allow to reveal the hidden underpinnings of political repressions[75].

In the second half of 1956, the Supreme Court overruled legally binding convictions in cases falling under the jurisdiction of general courts and found not guilty the defendants in over 45 cases, while in over 60 cases, after overruling the convictions, either remanded the cases to be re-examined or decided that the proceeding be resumed.

In 1954–1956, in cases within the jurisdiction of military courts, the Supreme Military Court overruled legally binging sentences and discontinued proceedings with respect to 540 persons[76].

The rehabilitation trial of K. Moczarski was quickly followed by a rapid growth in the number of rehabilitation petitions (by the end of December 1956, the

[72] J. Poksiński, n. 23 *supra*, 160–163. They were referred to as the heading the conspiracy in the Navy.
[73] J. Poksiński, n. 23 *supra*, 170.
[74] J. Poksiński, n. 23 *supra*, 171–173.
[75] A. Steinsbergowa, *Widziane z ławy obrończej*, Warszawa, 2016, 177–178.
[76] D. Maksymiuk, *Problem rehabilitacji w latach 1956–1957*, Miscellanea Historico-Iuridica, 8(2009), 227–229.

Ministry of Justice received almost 1,300 applications). The Rehabilitation Commission, which was established to examine the cases in June 1956, informed that by the end of May 1957 the Ministry received 1,717 rehabilitation requests. 557 of them were rejected (due to total groundlessness of the requests or purposelessness of seeking a judicial revision) and in 161 cases the minister instituted an extraordinary revision.

In 124 revisions, judgments of former district military courts and the Supreme Military Court were appealed against, while in 37 revisions – judgments of the general courts (including 14 revisions of judgments of the Voivodeship Court in Warsaw passed in its secret section).

What was requested in the first place was acquittal (63 cases), discontinuation of proceedings (52 cases), overruling of sentences and re-examination of cases (18 cases), and reduction of punishments (25 cases).

The information presented at the session of the Parliamentary Justice Commission on 9 July 1957 indicated that out of the total number of 4,400 applications for rehabilitation 2,500 were rejected (because the sentences were correct). In 900 cases, the persons were rehabilitated, while 1,000 judgments were revised as regards punishment.

In addition, within the framework of activities aimed at repairing the damage to the innocently convicted persons or persons who were given too severe penalties, an inter-ministerial commission assisting the rehabilitated persons was set up by the Council of Ministers Office. The Commission extended assistance of various kinds: financial allowances (to over 600 persons), apartments (over 200 persons), provision of healthcare or stay in convalescent homes (over 350 persons), disability pensions granted to people groundlessly convicted or their family (150 persons), help in finding a job (130 persons)[77].

Nevertheless, there is no doubt that the authorities wanted to deal with the rehabilitation campaign quickly and preferred to keep the trials secret. Ironically, rehabilitation sentences were often passed by judges who had earlier passed sentences groundlessly convicting people even to capital punishment. It was also then when at a meeting of a Ministry of Justice college the following words signaling the inevitable end of the 'thaw' period were heard: 'Instead of limiting themselves to the rehabilitation of specific people from groundless accusations courts attempted to perform socio-political rehabilitation of entire circles hostile to us'[78]. Thus, given that the rehabilitation measures of those days were only half-hearted, it is unsurprising that rehabilitation trials concerning cases from the Stalinist period had to be conducted after 1989.

## III. DETERMINATION OF THOSE GUILTY OF VIOLATING THE RULE OF LAW IN COURTS, PROSECUTOR'S OFFICE, THE MILITARY INTELLIGENCE SERVICE AND SECURITY OFFICES

In October 1954, the Political Office of the Polish United Workers' Party established a Commission for examining the methods of work in security bodies

[77] Quoted after D. Maksymiuk, n. 76 *supra*, 230–231.
[78] These were the words of the then minister Marian Rybicki – quoted after D. Maksimiuk, n. 76 *supra*, 232.

(the Commission was composed of Franciszek Jóźwiak, Franciszek Mazur, and Adam Doliński)[79]. The Commission accused, among others, Roman Romkowski, Vice-Minister of Public Security, Anatol Fejgin, Director of Department X of the Ministry of Public Security (previously deputy head of the Main Board of the Intelligence Service), and Józef Różański, Director of the Investigation Department of the Ministry of Public Security of violating the rule of law.

That resulted in an investigation instituted against J. Różański and his detention on 8 November 1954[80]. In its judgment of 23 December 1955, the Voivodeship Court in Warsaw sentenced J. Różański to 5 years' imprisonment (reduced on the basis of the Amnesty Act of 22 November 1952[81] to 3 years and 4 months).

After the extraordinary revision of the Prosecutor General to the disadvantage of the defendant had been granted, the Supreme Court overruled the judgment of the Voivodeship Court, remanding the case to this court for re-examination. The court in turn returned the case to the Prosecutor General's Office for the investigation to be complemented. The investigation against J. Różański was consequently resumed on 31 December 1956 and combined with the investigation instituted in April 1956 against A. Fejgin and R. Romkowski[82].

On 11 November 1957, the Voivodeship Court in Warsaw passed a judgment sentencing R. Romkowski and J. Różański to 15 years' imprisonment. A. Fejgin was sentenced to 12 years in prison[83]. On 2 October 1958, the Supreme Court reduced Różański's sentence to 14 years[84]. Prosecutors K. Kukawka and Antoni Ferenc, who presented the case in the trial, sent to the Prosecutor General, already on 22 November 1957, a letter requesting that Jakub Berman and Stanisław Radkiewicz, members of the Commission of the Political Office of the Central Committee

[79] The establishment of the Commission was preceded by Romkowski's dismissal from the position of the Vice-Minister of Public Security – quoted after Cz. Kozłowski, *Namiestnik Stalina*, Warszawa, 1993, 153.

[80] The investigation concerning the abuse of power was conducted by prosecutor Kazimierz Kukawka. It was initiated on the basis of the decision made by General Prosecutor Stefan Kalinowski – quoted after S. Marat, J. Snopkiewicz, *Ludzie bezpieki. Dokumentacja czasu bezprawia*, Warszawa, 1990, 31–32. In order to avoid misunderstandings, an explanation needs to be added that the same first name and surname were borne by a specialist in criminal law prof. dr hab. S. Kalinowski (1913–1996), graduate of the University of Warsaw. Prof. S. Kalinowski was vice-dean of the Faculty of Law and Administration of the University of Warsaw in 1956–1957 and 1965–1968. He was also, among others, the author of monograph: *Rewizja nadzwyczajna w polskim procesie karnym*, Warszawa, 1954; *Opinia biegłego w postępowaniu karnym*, Warszawa, 1972; *Rozprawa główna w polskim procesie karnym*, Warszawa, 1975, as well as a textbook for students: *Polski proces karny w zarysie*, Warszawa, 1979. See A. Murzynkowski, *Stefan Kalinowski (1913–1996)*, Studia Iuridica 1997, Vol. XXXIV, 223–225.

[81] Dz.U. No. 46, item 309.

[82] The substance of the Military Court's judgment and the result of the extraordinary revision are quoted after S. Marat, J. Snopkiewicz, n. 80 *supra*, 67–69. The investigation against R. Romkowski and A. Fejgin was instituted by decision of Prosecutor General Marian Rybicki. It was also conducted by prosecutor K. Kukawka – See S. Marat, J. Snopkiewicz, n. 80 *supra*, 138, 179.

[83] Conducted against A. Fejgin was also a proceeding concerning his activity in the Main Board of the Intelligence Service in the so called 'conspiracy in the army' cases, which ended with a decision of the Supreme Military Court issued in October 1958 whereby the proceedings were discontinued by virtue of the amnesty of 1956, because the punishments would not exceed 5 years' imprisonment – quoted after S. Marat, J. Snopkiewicz, n. 80 *supra*, 182–185. It should be added that R. Romkowski was degraded to the rank of a private on the basis of resolution of the Council of Ministers of 23 March 1960 – R. Kurek, *Kaci bezpieki na tle marca 1968: Roman Romkowski, Anatol Fejgin i Józef Różański w oczach SB, (1964–1968)*, 1(10) Aparat Represji w Polsce Ludowej 1944–1989, 241(2012).

[84] All of them were released from prison in October 1964 benefiting from the pardon granted by the Council of the State – quoted after S. Marat, J. Snopkiewicz, n. 80 *supra*, 374–375. See also R. Kurek, n. 83 *supra*, 237–256.

of the Polish United Workers' Party (the latter was at the same time the Minister of Public Security) be held criminally liable[85].

Investigations were also conducted with respect to investigation officers of security bodies. Following a trial which lasted several years, from 13 July 1955, the Voivodeship Court in Warsaw, passed on 23 February 1959, a legally binding judgment sentencing Józef Dusza (head of the Investigation Department of the Ministry of Public Security) to 7 years 6 months of imprisonment, Jerzy Kaskiewicz to 6 years 6 months of imprisonment, while Jan Kieres to 3 years of imprisonment. The proceedings against Jan Misiurski and Jerzy Kędziora were finally discontinued by virtue of the amnesty of 1956[86].

In the investigation conducted against J. Dusza and others, evidence was collected against other investigation officers and prison guards which confirmed that they had applied unauthorized and inadmissible methods of investigation. In spite of those findings, as soon as on 24 September 1955, a decision was made 'not to institute criminal proceedings' in relation to the people concerned, the alleged (though not true) reason being the lapse of five years since their last use of extortion.

The decision was even more surprising considering that prosecutor K. Kukawka declared, in a note made on 7 July 1956, that there were full grounds for holding criminally liable Adam Humer, Deputy Director of the Investigation Department of the Ministry of Public Security, and Ludwik Serkowski, head of division in that Department, and around ten others[87]. Those were the first signs of the authorities being reluctant to identify the actual perpetrators of violations of the rule of law and hold them criminally liable.

Concurrent with the investigations was the activity of the Commission headed by Roman Nowak (Chairman of the Central Revision Commission of the Polish United Workers' Party), established in October 1956 to examine the activities of the Commission of the Political Office of the Polish United Workers' Party for Public Security. The Commission (composed of: Ostap Dłuski, Zenon Kliszko, Marian Rybicki, and Edmund Pszczółkowski) confirmed that the application by public security officers and Military Intelligence Service officers of unauthorized and inadmissible, almost criminal, methods of investigation had been widespread. The Roman Nowak Commission submitted motions for exclusion from the party of J. Berman, S. Radkiewicz and Vice-Minister of Public Security Mieczysław Mietkowski, as well as for dismissal from the Central Committee of the party of H. Minc[88]. B. Bierut, Chairman of the Commission of the Political Office for Public Security, was then no longer alive.

Apart from the accounts of J. Światło, publicizing the methods of work of the Public Security Office in Radio Free Europe, the supreme state and party authorities received

[85] Not only were such proceedings not instituted, but in December 1983 Berman was honoured with the medal of the Polish National Council, while S. Radkiewicz, in his obituary of December 1987, was described as 'patriotic and greatly devoted in his service to Homeland' – quoted after S. Marat, J. Snopkiewicz, n. 80 *supra*, 340, 358–359.

[86] I refer the reader to my own study in which I present the course of the trials – M. Stanowska, *Próby rozliczenia z przeszłością w wymiarze sprawiedliwość* [in:] *Ius et lex. Księga jubileuszowa ku czci profesora Adama Strzembosza*, A. Dębiński, A. Grześkowiak, K. Wiak (eds.), Lublin, 2002, 306–307.

[87] In the study already referred to above, I present a list of some 20 investigation officers of security authorities and prison guards guilty of use of inadmissible methods towards the repressed in 1944–1956, in relation to whom the execution of criminal liability was abandoned. Compare: L.M. Stanowska, n. 86 *supra*, and S. Marat, J. Snopkiewicz, n. 80 *supra*, 253–257.

[88] Cz. Kozłowski, n. 79 *supra*, 192–198, 202.

other information about the violations of law in the criminal proceedings. The information came from the repressed persons and their families. The latter appealed for the examination of cases in which serious infringements of law had taken place. Rehabilitation requests were yet another source of information about violations of the rule of law.

On 10 December, following an agreement between the Minister of Justice, the Minister of National Defence, and the Prosecutor General, a commission was established to examine violations of the rule of law by former employees of the Main Board of the Intelligence Service, Supreme Military Prosecutor's Office and the Supreme Military Court. The Commission had at their disposal ample material from the analysis of the 'conspiracy in the army' case, which resulted in resumption of proceedings, overruling of judgments passed in trials conducted in glaring contravention of the law and ended with discontinuation of the proceedings due to absence of evidence of guilt. The Commission was headed by Marian Mazur, Deputy Prosecutor General. On 18 March 1957, Mazur was replaced by Jan Wasilewski (Deputy Prosecutor General) as he himself became the Prosecutor General. Hence the name – the Mazur (Wasilewski) Commission.

Members of the Commission included two representatives of the Ministry of National Defence: Col. Mieczysław Majewski and Col. Adam Uziembło, as well as President of the Voivodeship Court for the Warsaw Voivodeship, Stanisław Kotowski, and Supreme Court judge Mieczysław Szerer, who had been a judge in the secret section of the Supreme Court[89].

Judge M. Szerer stopped taking part in the works of the Commission on 13 May 1957. The official reason was excessive professional workload, but he filed in a report which constitutes a sort of dissenting opinion vis-à-vis the official report of the Commission, which was delivered on 29 June 1957[90].

Attention should be drawn to the fact that two members of the Commission were groundlessly accused. J. Wasilewski was temporarily detained for two years under a false accusation of cooperation with the German occupants[91]. A. Uziembło was accused under the 'conspiracy in the army' case and temporarily detained for 4 years and 8 months (from 1 November 1949 to 2 July 1954 he was held in the basement of the Main Board of the Polish Army Intelligence Service), but finally acquitted[92].

The report of the Mazur (Wasilewski) Commission was eventually delivered on 29 June 1957, with the four-strong Commission (J. Wasilewski, S. Kotowski, M. Majewski, and A. Uziembło) fully unanimous.

The Commission worked on the basis on materials and documents made available to them by the former bodies of the Intelligence Service, Supreme Military

[89] J. Kubiak, *Sekcja tajna*, 30 Prawo i Życie (1991).
[90] Quoted after J. Poksiński, *'My, sędziowie, nie od Boga…'. Z dziejów sądownictwa wojskowego PRL 1944 –1956. Materiały i dokumenty*, Warszawa, 1996, 239–243.
[91] From 29 November 1952 to 2 November 1954, i.e. until the investigation was discontinued – quoted after J. Poksiński, n. 90 *supra*, 240.
[92] A positive role was played by Capt. E. Wiącek, who performed prosecutor's supervision in the case of A. Uziembło from the beginning of 1954. He accepted from him the withdrawal of self-incriminatory testimony given as a result of the use of unauthorized and inadmissible investigation methods and filed with the Supreme Military Prosecutor's Office a petition for his acquittal. In spite of protests on the part of the Intelligence Service, the petition received political acceptance from the Secretary of Central Committee of the Polish United Workers' Party and the Supreme Military Court passed an acquittal judgment, the only one in the 'conspiracy in the army' cases – J. Poksiński, n. 23 *supra*, 184–185.

Prosecutor's Office and Supreme Military Court, as well as on court, investigation, control and operational files of specific cases. The Commission also held numerous talks with former and present employees of the law enforcement bodies and the administration of justice, as well as the former detainees and convicts.

The Commission focused on the 'conspiracy in the army' cases. The examinations did not cover cases from the first years of the communist regime, when fundamental criminal law provisions were commonly violated and death penalties frequently executed. The activity of regional, district or garrison military courts or military prosecutor's offices was not analysed. This led the Commission to the erroneous conclusion that the violations of the rule of law reached their peak in 1948–1954.

The Mazur (Wasilewski) Commission for the examination of the activity of military investigation and court bodies was in a relatively comfortable situation as they began their work after all the convicted in the so-called 'conspiracy in the army' cases had been rehabilitated and the rehabilitation processes declared the conspiracy accusations to have been orchestrated, the judgments having been based on doubtful evidence, on testimonies extorted with unspeakable torture. This made it easier for the Commission to formulate accusations in relation to military investigation bodies and courts. The majority of those charges applied also to criminal proceedings left outside the scope of the Commission's work.

The Commission grouped the charges in three chapters: I – against the bodies of the former Polish Army Intelligence Service, II – against the Supreme Military Prosecutor's Office, III – against the Supreme Military Court. Simultaneously, they indicated those guilty of violating the rule of law in these bodies. They also presented conclusions with proposals of various consequences for those responsible for the use of repression within criminal proceedings.

There was no doubt that the management of the Intelligence Service were responsible not only for fabricating individual accusations, but even whole cases. The 'conspiracy in the army' cases are a perfect illustrations of the thesis. The fabrication involved extortion of false self-accusations and accusations of other people according to scripts prepared well in advance through the application of criminal methods of investigation. The co-defendants were artificially divided into groups in spite of having been accused of the same offence committed at the same time, of participation in the same organization and allegedly in mutual agreement, which served to turn co-defendants into 'witnesses'. In absolute absence of any substantive evidence, false evidence was thus obtained of uncommitted crimes. The report described a variety of sophisticated and perverse tortures causing serious bodily injuries, health impairment, permanent mental disease, suicidal attempts (successful or not), mentioning even cases of deaths caused by the investigating officers (e.g. Lt. Col. Łucjan Załęski[93], Corp. Witczak[94]).

[93] This death occurred on 22 July 1948. The forensic medicine doctor was forced to hide the actual cause of death. Only a commission of specialists from the Institute of Forensic Medicine of the Medical Academy in Warsaw issued on 6 December 1957 an opinion on the causes of death on the basis of investigation files and stated that death resulted from the methods applied towards Załęski and the prison conditions. The case is described in more detail by J. Poksiński, n. 23 *supra*, 42–44.

[94] More detailed information is lacking.

Other instances of violations of the rule of law included mass detentions without a prosecutor's sanction (that is, without the detention having been approved by a prosecutor); applying for a prosecutor's sanction without any substantive grounds; blackmailing the detainees with the application of repressions towards their families; concluding 'agreements' with the detainees to give false testimonies and self-incriminate in exchange for the promise of lenient sentences or relief in investigations; extending the investigations for years in spite of it being clear that there was no evidence of guilt; fabrication of the act of confrontation in such a way as to obtain signatures under extorted testimonies previously agreed on with enforcement officers; refusing the detainees the possibility to get acquainted with the collected evidence or failing to make the investigation files available to the defendants before the final court hearing; the prosecutor manipulating the defendants during the final hearing so as to keep the extortion of evidence secret and so as to not allow the defendants to withdraw the extorted testimonies; frequently hiding from the prosecutor and the court interrogation records and other evidence in favour of the detainees; manipulating the prosecutor and the court so as to not admit questions inconvenient to those in charge of the investigation to be asked; presence at secret hearings of investigation officers from a given case as the 'audience' to influence the court, the prosecutor and the defence attorney, and above all, the defendants and the witnesses.

Any withdrawal of testimonies, either before the prosecutor or at the hearing, led to the detainee being tortured. The defendants and the witnesses were beaten, even during the few-hour-long breaks in the hearings where testimonies other than those recorded in the records containing extorted testimonies were made. What was particularly drastic was the detention of those sentenced to death for years with the threat of the execution of the sentence pending so as to extort further false testimonies. However, once the role of the witness was performed, or the extorted testimonies withdrawn following the sentence, the postponed death penalties were executed[95].

Having presented the accusations against the Intelligence Service bodies, the Commission named the people guilty of violating the rule of law in those bodies. The main authors of the so-called 'conspiracy in the army' scenario, colonels Dmitry Voznesenski and Antoni Skulbaszewski escaped any consequences. They were Soviet officers and the Commission did not put forward any motions in their regard.

The Commission accused a significant group of Military Intelligence Service staff of applying inadmissible and unauthorized methods of investigation, motioning that criminal proceedings be instituted against Władysław Kochan, Mieczysław Notkowski, and Mateusz Frydman. Simultaneously, the Commission stated that the Military Prosecutor's Office had at their disposal indisputable evidence of homicide or grievous bodily harm being committed by several of them in the course of investigation[96]. The only persons sentenced by the Supreme Military Court on 28 March 1959 were Władysław Kochan (5 years' imprisonment) and Mieczysław

[95] What I discussed above were the few cases where, after suspension of the execution of death sentences, the Council of Ministers responding to the initiative of the Supreme Military Prosecutor granted pardon and the death penalty was replaced with life imprisonment.

[96] Józef Kulak, Jan Jurkiewicz, Mieczysław Wojda, and Edmund Czekała were charged with homicide, while Marian Urbaniak with grievous bodily harm. In addition, the Commission formulated a charge of criminal activity towards Eugeniusz Niedzielin in the case of the executed navy officers – Report of the Mazur (Wasilewski) Commission.

Notkowski (3 years' imprisonment)[97]. Proceedings against the others, after they were proved to have committed the crimes, were discontinued by virtue of Amnesty Acts of 1952 and 1956. The Supreme Military Court decided to adopt this course of action assuming that any penalties would not exceed 5 years' imprisonment[98].

In addition, the Commission indicated two groups of Intelligence Service officers responsible for the application of inadmissible and unauthorized investigation methods. With respect to the first group (16 officers) with a higher degree of guilt, the Commission motioned that they be degraded by two military ranks and with respect to seven of them the Commission motioned that they be discharged for disciplinary reasons[99]. As for the second group with a lower degree of guilt (24 officers), the Commission motioned that they be degraded by one military rank or that they be discharged from work due to their uselessness or transferred to other Polish Army bodies[100].

There are serious doubts whether the recommendations made by the Commission as regards officers of the Military Intelligence Service were acted upon, the more so that the leaders of the Polish United Workers' Party recommended liberalization that the severity of the prosecution of security and intelligence officers. During the National Security Service briefing in December 1957, Jan Wasilewski, Deputy Prosecutor General and Chairman of the Mazur (Wasilewski) Commission, made excuses for conducting proceedings against Security Service officers. Though, as he explained, over two thousand cases of this kind were lodged, the majority of them (1,990) were discontinued, most frequently because the limitation periods had expired. Courts received also petitions for discontinuation on the basis of amnesty and where the prosecutor was reluctant to treat the officers in an indulgent way, the Prosecutor General's Office would take over the proceedings[101].

The Commission found numerous abnormalities in the activity of the Supreme Military Prosecutor's Office. They established that part of the top officers of the Supreme Military Prosecutor's Office bore liability, among others, for: mass issuing of decisions on temporary pre-trial detention (and its extension) without consulting any materials; frequently issuing those decisions long after the actual detention; lack of supervision over the investigations conducted by the Intelligence Service and security bodies as well as uncritical acceptance of the indictments fabricated by investigation bodies in spite of stark contradictions, absence of material evidence,

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[97] Both were degraded in 1960 to the rank of a private – quoted after J. Poksiński, n. 90 *supra*, 54, 70.

[98] This was done in the case of Polish Army Intelligence Service officers taking part in the investigation in the so called 'bydgoska' and 'zamojsko-lubelska' cases, including M. Frudman, J. Kulak, J. Jurkiewicz, and M. Urbaniak as well as in the case of A. Fejgin, W. Kochan, Stefan Kuhl, Mieczysław Lis, Czesław Markiewicz, Zygmunt Lindauer – S. Marat, J. Snopkiewicz, n. 80 *supra*, 182–185. There is no information whether similar investigations were conducted with respect to E. Czekała, E. Niedzielin and M. Wojda.

[99] This group included: Lucjan Bajraszewski, Anatol Borel, Stanisław Dymek, Benedykt Knapiuk, Jerzy Kornek, S. Kuhl, Mikołaj Kulik, Władysław Kurek, Lucjan Leśniewski, M. Lis, Jan Litwinionek, Kazimierz Matela, E. Niedzielin, Henryk Olejniczak, Bernard Walczak, and Henryk Żytomierski. Those dismissed for disciplinary reasons were: S. Dymek, B. Knapiuk, J. Kornel, W. Kurek, K. Matela, H. Olejniczak, and H. Żytomierski – Report of the Mazur (Wasilewski) Commission.

[100] Those included: Józef Bartczak, Bratkowski (no name available), Tadeusz Jurczak, Zbigniew Krauze, Ignacy Krzemień, Leonard Kuźniak, Antoni Łatka, Władysław Mirosławski, Franciszek Ostrowski, Marian Popiołek, Stanisław Potemski, Stanisław Patla, Ryszard Rębak, Kazimierz Słabiak, Stefan Staszczuk, Michał Stern, Jerzy Stępniewski, Jerzy Szerszeń, Czesław Świstek, Antoni Troncik, Wiesław Trukowski, Kazimierz Turczyński, and Jerzy Wenelczyk – Report of the Mazur (Wasilewski) Commission.

[101] Wasilewski's statement is presented in a more extensive way by H. Dominiczak, *Organy bezpieczeństwa PRL 1944–1990. Rozwój i działalność w świetle dokumentów MSW*, Warszawa, 1997, 122–124.

and doubtful testimonies given by witnesses; accepting artificial divisions of one case into several separate cases so as to make the co-defendants witnesses; participation in orchestrating political trials; limiting the final hearing of the detained by the prosecutor (solely in the presence of an investigation officer) to asking whether the detained confirmed the earlier testimonies made before the investigation officer; approving the indictment without the final hearing by the prosecutor; objecting to legitimate motions of the defendant and the defence attorneys.

Moreover, the prosecutor's office failed to inspect prisons and detention wards, which was tantamount to surrendering the imprisoned persons to the total authority of investigation bodies. Neither did the prosecutor's office respond to reports of lower-rank prosecutors about unauthorized methods applied in the investigation, nor to complaints about extortion of testimonies, occasionally supported with visible evidence of beating (with prosecutors sometimes even witnessing the beating). The prosecutor's office also failed to respond to defendants' complaints about extorted testimonies voiced in court, branding them as defamation of the investigation bodies. Moreover, the Prosecutor's Office accepted the fact that repeated investigations were instituted against people already sentenced in legally binding way as well as detention of people sentenced to death, often for two years, in order to use them as witnesses in the 'conspiracy in the army' cases.

The Commission named specific people in the Supreme Military Prosecutor's Office who were guilty of violating the rule of law: four prosecutors being Soviet officers and 11 Polish prosecutors[102]. The Commission did not make any recommendations as regards the Soviet officers, but lodged motions for criminal proceedings to be initiated against prosecutors S. Zarakowski and H. Ligięza. As for the remaining nine prosecutors, the Commission recommended that their military ranks be lowered and four of them be additionally forbidden to work in the judiciary[103].

It is doubtful whether the recommendations of the Commission as regards the prosecutors were implemented. What is certain is only that even before the Commission's work was over, the Minister of National Defence expelled H. Ligięza and S. Zarakowski from the army. H. Ligięza was dishonourably discharged from the army by the order of the Minister of 29 April 1955[104], while S. Zarakowski was transferred to the reserve by the order of 19 April 1956 'in connection with the disclosed abnormalities in the work of the Military Prosecutor's Office and unacceptable lack of supervision over the investigative functions of the Military Intelligence Service bodies'[105]. According to J. Poksiński, the proceedings instituted against S. Zarakowski were discontinued due to amnesty[106].

[102] The Soviet prosecutors were: Antoni Skulbaszewski, Antoni Lachowicz, Jan Amons and Leonard Azarkiewicz. The Polish prosecutors were: Stanisław Zarakowski, Henryk Ligięza (or Ligęza), Feliks Aspis (assessed in the chapter on military justice), Józef Feldman, Maksymilian Lityński, Marian Frenkiel, Stanisław Banaszek, Mieczysław Dytry, Zenon Rychlik, Mieczysław Mett, and Helena Wolińska – Report of the Mazur (Wasilewski) Commission.

[103] The ban on work in the judiciary and the lowering of military ranks were to apply to J. Feldman, M. Lityński, M. Frenkel and S. Banaszek. In addition, the first three of the prosecutors listed were forbidden to leave the country and to occupy high public positions in the country for five years – Report of the Mazur (Wasilewski) Commission.

[104] K. Szwagrzyk, *Zbrodnie w majestacie prawa 1944–1955*, Warszawa, 2000, 115.

[105] It should be added that he was degraded to the rank of private by decision of President of the Republic of Poland, Lech Wałęsa, of 28 March 1991 – *ibid*., 186, 193.

[106] J. Poksiński, n. 23 *supra*, 249–250. The author does not provide more detailed information on the subject.

In Chapter Three, the Commission discussed the charges against the military judiciary. In fact, each of the charges made by the Commission disqualifies the judges responsible for such proceedings.

Pre-trial detention was commonly extended so as to last for years in spite of absence of any reasons. Hearings were conducted behind closed doors in the buildings of the Intelligence Service and even in prisons. The courts did not attempt to clarify obvious contradictions, did not demand presentation of substantive evidence, and not in a single case were the case files sent back for the investigation to be completed. Special benches were appointed to examine the cases, with judges submissive to the Supreme Military Court and gladly taking suggestions from the prosecutor and investigation bodies. The right of defence was entirely violated, a defence attorney – occasionally admitted – was limited in his/her ability to contact the defendant, had no freedom in access to case files, nor could he /she collect notes made from the files in order to prepare an appeal. As a rule, the motions of the defendant and the defence attorney were rejected. In the course of the hearing, procedural rules, such as directness, adversarial proceedings, and, first and foremost, oral character of statements, were violated glaringly. The last kind of violations manifested itself in the reading of testimonies extorted in the investigation, frequently being the only evidence.

The judges accepted the way of conducting the hearing and the sentence imposed by the investigation bodies. This was helped by the fact that cases were artificially divided so that the co-defendants could become 'witnesses' in the trials of others, blackmailed with the possibility of the postponed death sentence being executed or the tortures applied earlier being resumed. Judges did not react to the withdrawal of testimonies or to complaints about the extorted testimonies, even though self-incrimination or testimonies of 'witnesses' – co-defendants – were frequently the only piece of evidence. What was particularly deplorable was the adjudication of death penalties without even the grounds for finding the defendants guilty because, after all, total rehabilitation followed in all the 'conspiracy in the army' cases. In cases conducted without the participation of defence attorneys (which was in fact very common), where death and long-term prison sentences were passed, the court was not interested whether the defendants lodged appeals. In the course of appeals before the Assembly of Judges of the Supreme Military Court practically all sentences were upheld, with the complicated cases, in which death penalty was adjudicated, being often dealt with in less than a quarter of an hour. The judges adjudicating a death sentence also objected to pardon being granted and thus agreed to the execution of the sentences. Supreme Military Court judges received 'praise' for passing drastically harsh sentences in contradiction of the evidence gathered in the case and in spite of the general conditions indicating obvious fabrication of the case.

Summing up the charges made against the investigation bodies and the judiciary, the Commission found it their duty to say that the responsibility and liability for those crimes rested in the first place with the Polish Army Intelligence Service, but it was the courts that must have seen the violation of law, that must have been able to predict the possibility of the criminal effect of their actions and accepted it, therefore the courts bore the greatest responsibility. The Commission came

to the conclusion that the liability for adjudicating and administering the draconic penalties in such conditions constituted an offence of excess or abuse of power or failure to perform the duty (Article 130 of the Criminal Code of the Polish Army), prosecuted as a criminal case. The case should be investigated since the activity of some of the judges not only constituted an offence defined in Article 130 of the Criminal Code of the Polish Army, but also exhibited the features of a judicial murder. What can seem surprising in the light of these materials is the position of M. Szerer expressed in his report. In his view, none of the judges were aware of convicting innocent people and there was no evidence of the judges consciously violating the rule of law (sic!)[107]. I fully share the position of Prof. A. Kaftal that given the glaring violations of law and the way the hearings were conducted, the judges of military courts must have known why they were acting in such a way and what was expected of them[108].

In the Commission's opinion, the judges, who by virtue of their position in the Supreme Military Court not only had access to many cases, but also adjudicated in many of those cases, were able to get thoroughly and comprehensively acquainted with the alleged military conspiracy. Hence, in relation to several judges: Feliks Aspis, Juliusz Krupski, Teofil Karczmarz, and Mieczysław Widaj, who had heard many cases, the Commission made a recommendation that an investigation be carried out to determine whether they had committed judicial murder or had been, in the least, guilty of an abuse of power or failure to perform their duty.

Also the behaviour of Oskar Karliner deserved, in the Commission's view, a very negative assessment, but they did not motion for an investigation to be made as the proceedings were most likely to be discontinued because of the amnesty. Given the circumstances, the Commission proposed other consequences to be applied – a ban on work in the judiciary and degradation to a lower military rank[109].

The negative assessment of the Commission concerned two Soviet officers: Wilhelm Świątkowski (President of the Supreme Military Court) and Aleksander Tomaszewski (Vice-President of the Supreme Military Court), who were sent back to the Soviet Union. The Commission did not make any motions in their regard.

The Commission also indicated five other judges who should bear the consequences of their participation in violating the rule of law in the judiciary[110]. Three judges were given the option of transfer to a regional military court, while four were demoted in military rank[111].

Unfortunately, there are all signs that the recommendations of the Mazur (Wasilewski) Commission were not implemented. Valuable information in this respect is provided by Diana Maksimiuk, who examines archival documents concerning the liability of military judges and prosecutors for violating the rule of law

[107] M. Szerer, *Procesy przed Najwyższym Sądem Wojskowym*, Tygodnik Solidarność 36(1981).
[108] A. Kaftal, *Sędziowie mogli odejść*, Prawo i Życie 44(1988).
[109] The Commission proposed the application of the same consequences with respect to Leo Hochberg – Report of the Mazur (Wasilewski) Commission.
[110] They were: Józef Warecki, Piotr Parzeniecki, Stefan Michnik, Zygmunt Krasuski, and Kryspin Mioduski – Report of the Mazur (Wasilewski) Commission.
[111] Transfer was was suggested with regard to K. Mioduski, Z. Krasuski, and S. Michnik, degradation of military rank with regard to J. Warecki, P. Parzeniecki, Z. Krasuski, and K. Mioduski, and additional consequence in the cases of O. Karliner, L. Hochberg, and J. Warecki was a five-year ban on leaving the country or holding a high public position in the country – Report of the Mazur (Wasilewski) Commission.

before 1956[112]. According to her findings, the implementation of the Commission's recommendations began on the request of Prosecutor General Andrzej Burda of 14 November 1956. It resulted in the presentation on 10 February 1958 of a framework plan for an investigation of the liability of military judges and prosecutors for violating the rule of law in 1948–1954. The investigation was intended to cover not only the activity of judges F. Aspis, T. Karczmarz, J. Krupski, and M. Widaj (in accordance with the final motion of the Commission) but also O. Karliner and P. Parzeniecki. In addition, the investigation was to be conducted with respect to prosecutors S. Zarakowski and H. Ligięza (as recommended by the Commission) and also M. Frenkiel, M. Lityński, J. Feldman and H. Woliński. Deputy Prosecutor General, Władysław Taraszkiewicz, sent that framework investigation plan to the Prosecutor General with a request for consultation[113]. However, already in the letter of 12 May 1958, addressed to the General Prosecutor, he asked for refusal to prosecute the persons covered by the framework investigation plan of 10 February 1958, attaching draft decisions on instituting an investigation and presenting charges to H. Ligięza and F. Aspis (this time as a prosecutor). It is unknown whether the refusal to prosecute was granted nor whether the draft decisions on the institution of new investigations were implemented. The only certain thing is that until the end of the Peoples' Republic of Poland no judge or prosecutor who worked in 1944–1956 was brought before court[114]. A question arises whether they bore any consequences at all (apart from being transferred to the reserve still before the Commission started work), whether the ban on working in the judiciary was applied. Could they have been demoted? This is doubtful. It is known that T. Karczmarz, not having any legal education, having been transferred to the reserve on 5 August 1955, became a Supreme Court judge as soon as in August of the same year and remained in that position until 30 April 1957. Hochberg was delegated to the Supreme Court in May 1955 and, despite the ban on working in the judiciary, held the position of a judge until 31 March 1957. Also Z. Krasuski and K. Mioduski worked in the Military Chamber of the Supreme Court until early 1970s[115].

There was also an understood need to examine the activity of the general (as opposed to military) prosecutors' offices in terms of the observance of law by its bodies. The initiative to establish a commission of this kind was presented at an open meeting of the Basic Party Organization of the Polish United Workers' Party by the Prosecutor General's Office. Following the resolution adopted at the meeting on 29 October 1956, the Prosecutor General set up a Commission for the examination of violations of the rule of law by employees of the Prosecutor General's Office

[112] D. Maksimiuk, *Rozliczanie stalinizmu na fali 'odwilży' 1956 roku. Dokumenty archiwalne dotyczące odpowiedzialności sędziów i prokuratorów wojskowych za łamanie praworządności w latach 1948–1954*, Miscellanea Historico-Iuridica 9(2010), 109–143.

[113] Simultaneously, in the cover letter, he informed about the existence of a difference of positions among the prosecutors dealing with the case.

[114] S. Maksimiuk, n. 112 *supra*, 115–116.

[115] K. Szwagrzyk, *Prawnicy czasu bezprawia. Sędziowie i prokuratorzy wojskowi w Polsce 1944–1956*, Kraków–Wrocław 2005, 343–344 and 378–379. Only O. Karliner was degraded to the rank of a private by the order of the Minister of National Defence of 1980 – quoted after J. Poksiński, n. 90 *supra*, 57, 80–81, 156, 276 and 283.

and the Prosecutor's Office of Warsaw[116]. The Commission was initially chaired by Marian Mazur, who was replaced on 14 March 1957 by Jan Wasilkowski. Members of the Commission included prosecutors from the Prosecutor General's Office: Wojciech Gawlikowski, Antoni Hapan, M. Kulczycki, and Józef Kucharski (a voivodeship prosecutor delegated to the Prosecutor General's Office).

The Commission based their studies on the examination of case files, trial documents, complaints submitted by citizens, and statements made by employees of the Prosecutor's Office. The examinations brought much the same results as the report of the so-called Mazur (Wasilewski) Commission, which examined military investigation bodies and military courts.

The Commission established that what was the direct source of wrongdoings was the submissive attitude of the then key staff of the prosecutor's office vis-à-vis public security bodies. The Commission pointed to a definitely negative role performed in the Prosecutor General's Office by the Special Department, which tolerated numerous violations of the rule of law by the Ministry of Public Security. The Department was supervised by Henryk Podlaski, previously Deputy Supreme Military Prosecutor in charge of special cases and from September 1950 until the end of March 1955, Deputy Prosecutor General of the Peoples' Republic of Poland. Though at that time the Prosecutor General was Stefan Kalinowski (not even a lawyer), it was H. Podlaski who was actually in charge of the work of the general prosecutors' offices. It was with his active support that secret sections were established in general courts. H. Podlaski exerted various forms of pressure on judges, not only judges of the secret sections. At joint meetings of judges and prosecutors he chastised judges for being 'guilty' of passing 'mild' sentences. Prosecutors did not allow the defendants to disclose any forms of extortion used against them in the course of the investigation. Investigation procedures were initiated against judges who allowed for unauthorized and unlawful practices of security bodies in the investigation to be revealed.

The Commission concluded that those guilty of violating the rule of law included, apart from the top-ranking staff of the Prosecutor General's Office, all prosecutors working in the Special Department as well as several prosecutors from the Supreme Military Prosecutor's Office closely cooperating with the Prosecutor General's Office. Yet before the conclusion of the works of the Commission, S. Kalinowski, H. Podlaski, Władysław Dymant and Beniami Wajsblech were discharged from their positions.

The Commission presented a definitely negative assessment of three prosecutors and concluded that they should be discharged from work in the prosecutor's office[117]. As for the remaining six prosecutors, the Commission was of the opinion that it was enough to have them transferred to field prosecutor's offices[118]. The Commission presented the report to the Prosecutor General of the Peoples' Republic of Poland, Marian Mazur, motioning for a possibly fast implementation of the recommendations.

After the breakthrough of October 1956, yet another commission was set up by Zofia Wasilkowska, the then Minister of Justice. It was a Commission for

[116] Report of the Commission of 11 April 1957 was published in Zeszyty Historyczne Paris, 67(1984).
[117] They were: Maciej Majster, Paulina Kern, and H. Wolińska.
[118] They were: Kazimierz Kosztirko, Zofia Bielec, Jan Traczewski, Benedykt Jodelis, Mieczysław Dytry, and Zenon Rychlik.

examining the work of the so-called secret sections operating in 1950–1954 at the Ministry of Justice and also in the Court of Appeal and the Voivodeship Court in Warsaw. The Commission included Supreme Court judge Julian Potępa as its chairman, Prof. Stanisław Ehrlich and doc. Leon Schaff from the University of Warsaw, Prof. Józef Liwtin from the University of Łódź, doc. Sylwester Zawadzki, Vice-President of the Main Board of the Association of Polish Lawyers, Michał Kulczycki, President of the Supreme Bar Council, and Zygmunt Opuszyński, Director of the Legislative Department of the Ministry of Justice. As soon as on 9 February 1957, the Commission presented a report after making an independent analysis of 114 from among 506 cases heard in secret sections.

The irregularities found by the Commission in the examined cases were very similar to those established by the Mazur (Wasilewski) Commission. By way of an example, I will indicate the most serious of them. Temporary detentions measured in years, hearings before the court of the 1st instance held most frequently in the Mokotów prison and latter in a special room in the court building, limited right of defence (limitation of the list of defence attorneys permitted to defend, inability of the defence attorneys to take notes from case files). Judgments were issued on the basis of scarce and dubious evidence. Frequently, sentences were passed merely on the basis of self-incrimination or testimonies of 'witnesses' (actually co-defendants) in spite of testimonies being withdrawn due to extortion in the course of investigation. Judges did not respond to any complaints about the use of extortion even when signs of torture were shown at the hearing. Simultaneously, the Commission examining the cases of the so-called secret sections correctly, although as if in justification, underlined that the course of trials held in secret sections did not differ from the trials conducted outside of the secret sections at the same time. Unfortunately, the Commission did not attempt to assess the prosecutors involved in secret trials, limiting themselves to passing the information obtained to the Prosecutor General's Office.

Opinions of the Commission members differed. Some members themselves justified the system and the law of the Stalinist period. According to Prof. Ehrlich, 'a group of people can be identified who should possibly be made criminally liable'. Prof. Schaff, on the other hand, believed, though the criminal trial was his specialty, that 'adjudication in a secret section was court proceedings and thus it should not in itself discriminate the judges who took part in it'[119]. Unsurprisingly, the recommendations of the Commission that disciplinary proceedings be instituted against five most active judges were passed by a majority of votes. Those were judges: Ilia Rubinow – responsible for the secret section in the Warsaw courts; Emil Merz – responsible for the secret section in the Supreme Court; Marian Stępczyński, Kazimierz Czajkowski, and Feliks Roszkowski (information about F. Roszkowski is missing). Disciplinary procedures was initiated against the first four of them, which ended with sentences passed by the Supreme Court, acting as the Higher Disciplinary Court, on 31 December 1957[120].

Only I. Rubinow was found guilty of infringing on the dignity of the office of a judge with violation of fundamental principles of the rule of law in connection with heading the so-called secret section in the period from September 1950 to September 1955.

[119] J. Kubiak, *Sekcja tajna*, Prawo i Życie 31(1991).

[120] The first sentence ref. No. SDW 18/57 covered all four of them, the second one, with ref. No. SDW 35/57 covered only M. Stępczyński.

He received a disciplinary punishment of being transferred to the reserve without a decline in salary, while being acquitted of part of the charges[121].

The proceedings against K. Czajkowski and E. Merz were discontinued on the assumption that their professional errors referred to the period not extending beyond 1950 and thus over five years had elapsed from the initiation of the proceedings and, moreover Merz was found not guilty of having created and administered the secret section at the Supreme Court.

M. Stępczyński was acquitted from all the charges in both sentences. The court dismissed the charge of failure to reveal in the records of hearings of the complaints of B. Chajęcki, E. Grzybowski and A. Jaroszewicz about torture being applied in the course of their investigations. In the Court's view there were no grounds to accept the existence of 'ill will' on the part of the accused or to adjudicate against better knowledge. While examining the case, the Disciplinary Court completely ignored the fact that M. Stępczyński (while a bench member) pronounced a death penalty on B. Chajęcki without any grounds whatsoever (the sentence was carried out)[122]. Also the remaining charges (of contributing to passing a death penalty in contravention of regulations as well as to sentencing for 10 years' imprisonment in spite of absence of features of an offence) were dismissed. In the statement of reasons for the acquittal judgment, the Disciplinary Court stated that judge M. Stępczyński 'while examining the cases in point, exhibited high qualifications in the field of court practice and legal knowledge'. In this way, judge M. Stępczyński was given full recognition for his activity in the secret section. It should thus be reminded that it was judge M. Stępczyński who took part (as a bench member) in imposing death penalty on: Z. Ejme and J. Czerwiakowski (sentences executed) as well as K. Moczarski, E. Krak and J. Rycelski, while their rehabilitation trials revealed complete lack of grounds for their sentences[123].

In spite of the fact that, as Prof. Adam Lityński correctly observed, the Commission attempted to soften the drastic picture of the activity of courts in secret sections and relieve judges of liability for violating the law, occasionally to the point of a judicial murder[124], no effort was spared in order not to make the Commission's report known to the public.

Z. Wasilkowska, who was an adherent of making the conclusions reached by the Commission available to the public, was dismissed from her post shortly after preparing the report. The report in its full text version was not made available even to the Parliamentary Committee for the Judiciary[125].

It should be added that judges who had played a negative role in the secret sections, not only did not lose the trust of the authorities, but were even in a way rewarded for their activity. Judge M. Stępczyński, who was delegated to perform the duties of

[121] He was acquitted of secretly keeping records of cases of the secret section, exerting administrative pressure concerning the judgments made by judges and refusing to provide families with information on what happened to the accused.

[122] The Military Court judgment of the Military Law Court for the capital city of Warsaw of 16 May 1958, ended with full rehabilitation, proved that B. Chajęcki, who was tortured in the investigation, did not commit the crimes of espionage and the crimes defined in the August Decree on the punishment for fascist-Nazi criminals guilty of murder and torture of civilians and prisoners of war as well as traitors to the Polish nation.

[123] J. Rycelski, K. Moczarski and E. Krak were acquitted already in 1956 and in those trials the application of torture in investigations was revealed.

[124] A. Lityński, n. 8 *supra*, 172.

[125] D. Maksymiuk, *Jeszcze w sprawie sekcji tajnych w sadownictwie polskim w latach pięćdziesiątych XX wieku,* 11 Miscellanea Historico-Iuridica 407(2012), p. 407.

a Supreme Court judge from 16 December 1955, became a Supreme Court judge on 16 September 1958 and remained in this position until his death in 1964[126]. Also E. Merz and K. Czajkowski continued to be Supreme Court judges, the former until 1962[127] and the latter until 1972.

Although only very few of the conclusions and recommendations of the Commission were implemented, their crucial role was to recognize the immense scale of the lawlessness in the activity of bodies established specifically to ensure the observance of law. The role of the report of the Mazur (Wasilewski) Commission examining the activity of military investigation bodies and military courts should be assessed as positive. The thorough analysis made by that Commission, preceded by rehabilitation trials in the cases of the so-called 'conspiracy in the army', resulted in specific manifestations of the rule of law violation being named, in particular, the notion of a judicial murder was introduced, and allowed for an attempt to identify the people responsible for violations of law.


## Abstract

**Maria Stanowska, *First Attempts at Undoing the Consequences of Violating the Rule of Law in 1944–1956***

*The article discusses initiatives taken in the mid-1950s to examine the state of the rule of law in 1944–1956 in courts, prosecutor's offices, Polish Army Intelligence Service and public security authorities. Attention is given primarily to the Report of the Mazur (Wasilewski) Commission, which was established as a result of an agreement between the Minister of Justice, the Minister of National Defence, and the Prosecutor General. The Commission's task was to determine the extent of violations of the rule of law by the Supreme Military Court, the Supreme Military Prosecutor's Office and the Military Intelligence Service. The article discusses in detail the manifestations of violations of the rule of law disclosed by the Commission, often criminal in character, as well as the specific conclusions with proposals of a variety of consequences for the people guilty of violating the rule of law in the aforementioned authorities. The Report findings are presented against the background of the rehabilitation proceedings conducted with respect to the victims of the alleged 'conspiracy in the army'. Also discussed are the works of two other Commissions dealing with the examination of violations of the rule of law in general courts and prosecutor's offices. The Prosecutor General established a Commission for examining the state of the rule of law in the Prosecutor General's Office and in the Prosecutor's Office in Warsaw, while the Minister of Justice set up a Commission for examining the work of the so-called secret sections operating in 1950–1954 at the Ministry of Justice, in the Court of Appeal and the Voivodeship Court in Warsaw.*

*I also present the results of the first criminal trials conducted against public security and Military Intelligence Service officers guilty of the application of inadmissible and unauthorized methods in the course of investigation.*


***Keywords:*** *detention, summary proceedings, convictions, death penalty, judicial crime, judicial murder, infringing on the dignity of the judicial office, rule of law, crimes particularly dangerous at the time of rebuilding the country, military courts, Supreme Military Court, secret sections, Polish Committee of National Liberation, Ministry of Public Security, Mazur (Wasilewski) Commission, Wasilkowska's Commission*

[126] In 1963 he was honoured with the Officer's Cross of the Order of Polonia Restituta.

[127] Together with Igor Andrejew and Gustaw Auscaler he had his share in upholding the judgment sentencing to death A.E. Fieldorf, who was fully rehabilitated in 1989. The investigation into the judicial murder of Gen. Fieldorf was instituted in 1992. At present, none of those suspected of participation in that murder is alive.

## Streszczenie

**Maria Stanowska, *Pierwsze próby naprawienia skutków łamania praworządności w latach 1944–1956***

*W artykule omówiono działania podjęte w połowie lat 50. XX w. w celu zbadania stanu praworządności w latach 1944–1956 w sądach, prokuraturach oraz organach Informacji Wojska Polskiego i bezpieczeństwa publicznego. Najwięcej uwagi poświęcono Raportowi Komisji Mazura (Wasilewskiego), powstałej w wyniku porozumienia Ministra Sprawiedliwości, Ministra Obrony Narodowej i Prokuratora Generalnego, której zadaniem było ustalenie zakresu naruszania praworządności przez Najwyższy Sąd Wojskowy, Naczelną Prokuraturę Wojskową oraz organy Informacji Wojskowej. W artykule szczegółowo omówiono ustalone przez Komisję przejawy łamania praworządności będące niejednokrotnie działaniami przestępczymi, a także konkretne wnioski z propozycjami różnego rodzaju konsekwencji wobec osób winnych łamania praworządności w tych organach. Przedstawiono wyniki Raportu na tle działań rehabilitacyjnych prowadzonych wobec ofiar rzekomego „spisku w wojsku". Omówiono także działania dwóch innych komisji zajmujących się badaniem przejawów łamania praworządności w powszechnych sądach i prokuraturze. Prokurator Generalny powołał Komisję do zbadania stanu praworządności w Generalnej Prokuraturze i Prokuraturze miasta stołecznego Warszawy, zaś Minister Sprawiedliwości – Komisję do zbadania pracy tzw. sekcji tajnych działających w latach 1950–1954 w Ministerstwie Sprawiedliwości oraz w Sądach: Apelacyjnym i Wojewódzkim w Warszawie. Poznajemy też rezultaty pierwszych procesów karnych prowadzonych wobec funkcjonariuszy organów bezpieczeństwa publicznego oraz Informacji Wojskowej winnych stosowania niedozwolonych metod podczas śledztwa.*


***Słowa kluczowe:*** *areszt, tryb doraźny, wyroki skazujące, kara śmierci, zbrodnia sądowa, mord sądowy, uchybienie godności urzędu sędziowskiego, praworządność, organy Informacji Wojska Polskiego, sądy wojskowe, Najwyższy Sąd Wojskowy, Naczelna Prokuratura Wojskowa, sekcje tajne, Ministerstwo Bezpieczeństwa Publicznego, Komisja Mazura/Wasilewskiego, Komisja Wasilkowskiej, działania rehabilitacyjne*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3802

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# Criminal Mediation in the Law of the Argentine Republic**

## 1. INTRODUCTORY REMARKS

Mediation was introduced into Argentine's legal system in 1995 by virtue of Act No. 24.573 on Mediation and Conciliation Proceedings, which establishes a mandatory procedure in cases exhaustively listed in the Act. In one of the first articles, the Act also describes the types of proceedings in which mediation cannot be used, which include criminal proceedings[1]. A new law adopted in 2010 also explicitly prohibited the use of mandatory criminal mediation[2].

However, given the ineffectiveness of the repressive penal system in Argentina, some provinces have introduced mediation programmes into the criminal procedure rules applicable in their jurisdictions. Still, criminal mediation developed late, at the end of the 20th century and the beginning of the 21st century. Notably, the federal state system existing in Argentina gives provincial authorities broad jurisdictional powers, both in the institutional and procedural spheres. Thanks to this possibility, some Argentinian provinces have introduced mediation in criminal matters. However, the differences between provincial mediation models are considerable, as they involve not only different procedures, but also different substantive scopes of cases that may be subject to mediation[3]. Initially, mediation was seen primarily as a measure that could have brought improvements in juvenile justice[4].

As a procedural element, mediation must be distinguishable from traditional court proceedings. Also, the inducement of the parties to choose mediation as a method of alternative resolution of a conflict presupposes certain benefits associated with mediation. Changes to the legal basis must not only concern the Code of Criminal Procedure, but they must also result from the substantive law, which

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** The manuscript was submitted by the author on 8 November 2018; the manuscript was accepted for publication by the editorial board on 12 January 2019.

1 Article 2 of Act No. 24.573: 'El procedimiento de la mediación obligatoria no será de aplicación en los siguientes supuestos: 1. Causas penales (...)'.

2 Article 5 of Act No. 26.589: 'El procedimiento de mediación prejudicial obligatoria no será aplicable en los siguientes casos: a) Acciones penales (...)'.

3 Ministerio de Justicia y Derechos Humanos, Presidencia dela Nación, *Mediación en la Argentina, una herramienta para el acceso a la Justicia*, 83 et seq.

4 This type of procedure exists in the provinces of Mendoza, Neuquén i Santa Fe.

needs to be amended first at the federal level and then in the provinces[5]. A turning point in this context was Act No. 24.316, which, for the first time in Argentina, introduced conditional suspension of custodial sentences[6], allowing this measure, which is beneficial to the convicted person, to be taken into account in the determination of the effects of mediation at the post-trial and post-conviction stage[7].

This paper aims to present criminal mediation in Argentina, with particular emphasis on the differences in criminal mediation procedures in different provinces, as well as to evaluate criminal mediation in terms of whether it achieves its objectives, and in particular the priorities of criminal law.

## 2. CRIMINAL MEDIATION IN PROVINCIAL LEGISLATION

Criminal mediation in Argentinian provincial legislation is increasingly accepted as an alternative way of resolving conflicts in criminal proceedings. With the passing years, more and more provinces adopt laws on mediation in criminal law and introduce the relevant amendments into their codes of criminal procedure. The most characteristic legal regulations and specific features of provincial law will be discussed below. It should be added, however, that apart from the examples described below, the following provinces have since introduced criminal mediation into their legal systems: Río Negro[8], Mendoza[9], Córdoba[10], Corrientes[11], Chubut[12], Entre Ríos[13], Neuquén[14], and Santa Fe[15].

A comparative analysis of existing legislation shows that there are certain common criteria concerning the principles of criminal mediation, i.e. voluntary nature, confidentiality, speed, informality, and the requirement of the victim's explicit consent for their case to be referred to mediation. Different provinces lay down different rules on costs of mediation proceedings: in Chaco and Córdoba, an exemption from such costs requires a proof of insufficient means of subsistence (poverty). In the province of Mendoza, the mediator's fee must be paid if a party has also appointed a defence counsel.

The institutional scope of mediation and the attribution of this procedure to a particular public authority varies from province to province, as laws link the procedure with the prosecution service (the provinces of Buenos Aires, Entre Ríos, and Neuquén) or with a criminal court (Chaco, Corrientes, Río Negro, and Chubut).

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[5] N.D. Barmat, *La Mediación ante el delito. Una alternativa para resolver conflictos penales en el siglo XXI,* Córdoba, 2000, 29.

[6] Act No. 24.316 of 13 May 1994 incorporated Articles 27 bis, 76 bis, 76 ter, 76 quater into the Penal Code and amended Article 64 of the Penal Code.

[7] A. Bovino, M. Lopardo, P. Rovatti, *Suspensión del procedimiento a prueba. Teoría y práctica*, Buenos Aires, 2013.

[8] Mediation Act No. 3.487, amended by Act No. 4.270, (*Boletín Oficial* B.O.)N° 4584 of 10 January 2008.

[9] Act No. 6.730 the Code of Criminal Procedure B.O. 30 November 1999, adopted by virtue of Act No. 7.007, B.O. 16 July 2002.

[10] Mediation Act No. 8.858, B.O. of 14 July 2000.

[11] Civil and Criminal Mediation Act No. 5.931, B.O. 16 December 2009.

[12] Mediation Act No. XIII – N° 13 (formerly, Act No. 4.939/02), adopted on 27 November 2002.

[13] Act No. 9.754 the Code of Criminal Procedure B.O. 5 March 2010. The Supreme Court of Justice of the Province of Entre Ríos established the Rules of Criminal Mediation, Acuerdo General N° 38 of 17 November 2009.

[14] Act No. 2.879, B.O. 22 November 2013 established the Penal Mediation Programme for provincial jurisdiction.

[15] Act No. 12.734 the Code of Criminal Procedure of 31 August 2007.

Furthermore, certain provinces explicitly provide for the possibility of an intervention by an interdisciplinary team (Buenos Aires, Mendoza, Chubut, and Neuquén).

There are fundamental differences between provinces with regard to the classification of mediatable criminal offences: in Chubut, the law stipulates that mediation can be used in cases where defendants, if convicted, may face a term of imprisonment of up to three years, Buenos Aires and Chaco set the maximum allowed term of six years, while the province of Río Negro establishes the highest ceiling, enabling mediation in cases of offences punishable by up to fifteen years of imprisonment. The second factor to be taken into account is the substantive classification of mediatable offences: in Chaco, such offences must be considered culpable and, apart from imprisonment, may carry the penalty of a fine or deprivation of public rights; in Río Negro, Córdoba, and Corrientes, mediation can be used only in cases of privately prosecuted offences. In many provinces (e.g. Mendoza or Entre Ríos), family disputes are explicitly mentioned as ones which, in principle, should be resolved through mediation. In Córdoba, family disputes are defined more broadly to include violations of family support obligations or obligations concerning contacts between parents and children who do not live together. Moreover, in Entre Ríos, mediation is explicitly admissible in conflicts related to the nature of parental authority, those arising between neighbours or ones with a negligible impact on the society.

Another criterion for the availability of mediation is the earlier settlements to which the perpetrator agreed. In the province of Entre Ríos, persons who have engaged in mediation but refused to enter a settlement without good cause are prevented from making any future mediation attempts. The Autonomous District of Buenos Aires and the provinces of Buenos Aires and Neuquén have adopted similar policies. The province of Chaco has set a maximum limit of three mediation proceedings for the same accused person, without specifying the type of the offence or duration of a sentence, except for felony cases that can be mediated without restrictions in respect of a single person. The province of Río Negro does not allow a second mediation attempt between the same parties and in the same case.

Some provincial regulations lay down deadlines for initiating mediation procedures: for example, the provinces of Buenos Aires and Entre Ríos provide for 60 calendar days subject to granting a request for an extension (30 and 60 days respectively); Chaco sets the time frame of 60 working days, which may be extended twice with the consent of the parties; Río Negro sets a period of 40 working days.

The substantive basis for the introduction of criminal mediation in the Province of Buenos Aires is the Code of Criminal Procedure, adopted by Act No. 11.922 in 1997. Pursuant to the Code, at the sentencing or post-conviction stage the perpetrator may benefit from the taking into account of an assessment of the victim's situation, voluntary compensation for the moral loss suffered by the victim, repentance, alleviation of the conflict or a settlement between the parties[16]. According to the

[16] Article 86 of Act No. 11.922: 'Lo atinente a la situación de la víctima, y en especial la reparación voluntaria del daño, el arrepentimiento activo de quién aparezca como autor, la solución o morigeración del conflicto originario o la conciliación entre sus protagonistas, será tenido en cuenta en oportunidad de: 1. Ser ejercida la acción penal; 2. Seleccionar la coerción personal; 3. Individualizar la pena en la sentencia; 4. Modificar, en su medida o en su forma de cumplimiento, la pena en la etapa de ejecución'.

procedure, if a settlement is reached in the mediation process, the prosecutor has special powers that enable them to discontinue the proceedings[17]. While exercising such special powers, the prosecutor should take into account the need to alleviate the conflict between the parties, as well as the need for reconciliation between the parties, which enables voluntary redress of the damage caused. Mediation prevents the parties from seeking revenge and, at the same time, promotes their pro-active approach to proposing compensation within the framework of legal guarantees[18].

The 1998 Organic Act on the Prosecution Service No. 12.061 obliged prosecutors to support, promote and use all mediation and arbitral mechanisms that allow for a peaceful resolution of conflicts[19].

By indicating the possibility of using mediation as a means to achieve a specific goal (in the Code of Criminal Procedure) and identifying the authority tasked with promoting these procedures (in the Organic Act), efforts were made to introduce criminal mediation. The mediation and conciliation procedures were finally determined by Act No. 13.433 (adopted in 2006), which introduced an alternative dispute resolution system for criminal preparatory investigations (*Investigación Penal Preparatoria*) in the province of Buenos Aires[20].

The Act aims to 'alleviate the conflict, seek reconciliation between the parties, allow for voluntary compensation of the moral loss caused, avoid reprisals, promote the parties' activism within the jurisdiction and in full respect of constitutional guarantees, and to address prejudices arising from criminal proceedings'[21].

The bodies responsible for conducting mediation procedures are the Offices for Alternative Dispute Resolution (officially known as Offices for the Alternative Resolution of Departmental Disputes) which report to the Prosecution Service. Each office employs an attorney who cooperates with a team comprising a psychologist and a social worker who specialise in alternative methods of conflict resolution.

An alternative dispute resolution procedure may be initiated by a prosecutor, acting *ex officio* or at the request of a party or the victim[22]. Next, the prosecutor

[17] Article 56 of Act No. 13.943: 'El Ministerio Público Fiscal podrá archivar las actuaciones respecto de uno o varios de los hechos imputados, o de uno o más de los partícipes, en los siguientes supuestos: 1) Cuando la afectación del bien jurídico o el aporte del imputado en el hecho fuera insignificante y siempre que la pena máxima del delito imputado no supere los (6) seis años de prisión; 2) Cuando, el daño sufrido por el imputado a consecuencia del hecho torne desproporcionada, superflua o inapropiada la aplicación de una pena, excepto que mediaren razones de seguridad o interés público; y 3) Cuando la pena en expectativa carezca de relevancia en consideración a las de los otros delitos imputados'.

[18] For a legislative proposal of a law on penal mediation in juvenile justice proceedings, see M. Medan, *Justicia restaurativa y mediación penal con jóvenes: una experiencia en San Martín, Buenos Aires*, Delito y Sociedad 41(2016), 77–106.

[19] Article 38 of Act No. 12.061: 'El Ministerio Público propiciará y promoverá la utilización de todos los mecanismos de mediación y conciliación que permitan la solución pacífica de los conflictos'.

[20] Penal Mediation Act No. 13.433, passed in the province of Buenos Aires on 21 December 2005, adopted on 9 January 2006 by Decree No. 39, and published on 19 January 2006, stipulates that all criminal proceedings initiated in the province of Buenos Aires that are subject to the Prosecution Service's intervention may fall within the scope of activities taken as part of alternative resolution of criminal conflicts provided that certain conditions are complied with.

[21] Article 2 of Act No. 13.433: 'El Ministerio Público utilizará dentro de los mecanismos de resolución de conflictos, la mediación y la conciliación a los fines de pacificar el conflicto, procurar la reconciliación entre las partes, posibilitar la reparación voluntaria del daño causado, evitar la revictimación, promover la autocomposición en un marco jurisdiccional y con pleno respeto de las garantías constitucionales, neutralizando a su vez, los prejuicios derivados del proceso penal'.

[22] Article 7 of Act No. 13.433: 'El procedimiento de resolución alternativa de conflictos podrá ser requerido por el Agente Fiscal que intervenga en la Investigación Penal Preparatoria, de oficio o a solicitud de cualquiera de las partes o de la víctima ante la Unidad Funcional'.

sends an application, in which parties must be named, to an Office for Alternative Dispute Resolution. Representatives of the Office may meet with each party individually or hold a joint meeting.

Mediation in criminal proceedings may be conducted in cases concerning family law, joint residence or relations between neighbours. A definition of the negative scope of criminal mediation has been compiled in much more detail, by enumerating the cases in which mediation cannot be used. According to this definition, mediation cannot be used in proceedings in which a minor is a victim, subject to exceptions established in Acts No. 13.944 and 24.270. Moreover, mediation cannot be used to resolve disputes concerning officials charged in connection with or in the performance of their public duties. The following categories of intentional offences described in Book Two of the Penal Code are also excluded from mediation: felonies against life (Title 1, Chapter 1); offences against sexual integrity (Title 3); theft (Title 6, Chapter 2). The last category of cases not eligible for conciliatory proceedings includes felonies committed against public authorities and the constitutional order. Other procedural requirements are the maximum term of imprisonment that may be imposed under the Penal Code, which is six years, and the condition that mediation may only be conducted in misdemeanour cases (*causas correccionales*)[23].

The last type of mediation prerequisites concerns criminal proceedings previously conducted against the defendant. If the defendant has breached the terms of a settlement concluded as a result of mediation, or if less than five years have elapsed since the signing of an agreement for an alternative conflict resolution in the area of criminal law in another investigation, another case cannot be submitted to mediation. The time limit for the completion of mediation proceedings is 30 days prior to the scheduled date of the hearing. If a mediation agreement (settlement) is entered into, the prosecutor closes the case. Importantly, the settlement does not determine guilt and, in this respect, has no influence on a possible trial that may be conducted[24]. The Office's powers include the authority to control and monitor such agreements. In discharging this authority, the Office may request the cooperation of public and private institutions[25].

[23] Article 6 of Act No. 13.433: 'La Oficina de Resolución Alternativa de Conflictos departamental deberá tomar intervención en cada caso en que los Agentes Fiscales deriven una Investigación Penal Preparatoria, siempre que se trate de causas correccionales. Sin perjuicio de lo anterior, se consideran casos especialmente susceptibles de sometimiento al presente régimen: a) Causas vinculadas con hechos suscitados por motivos de familia, convivencia o vecindad; b) Causas cuyo conflicto es de contenido patrimonial. En caso de causas en las que concurran delitos, podrán tramitarse por el presente procedimiento, siempre que la pena máxima no excediese de seis años. No procederá el trámite de la mediación penal en aquellas causas que: a) La o las víctimas fueran personas menores de edad, con excepción de las seguidas en orden a las Leyes 13.944 y 24.270; b) Los imputados sean funcionarios públicos, siempre que los hechos denunciados hayan sido cometidos en ejercicio o en ocasión de la función pública; c) Causas dolosas relativas a delitos previstos en el Libro Segundo del Código Penal, Título 1 (Capítulo 1 – Delitos contra la vida); Título 3 (Delitos contra la integridad sexual); Título 6 (Capítulo 2 – Robo); d) Título 10 Delitos contra los Poderes Públicos y el orden constitucional. No se admitirá una nueva medición penal respecto de quien hubiese incumplido un acuerdo en un trámite anterior, o no haya transcurrido un mínimo de cinco años de la firma de un acuerdo de resolución alternativa de conflictos penal en otra investigación. A los fines de garantizar la igualdad ante la ley, el Ministerio Público deberá arbitrar mecanismos tendientes a unificar el criterio de aplicación del presente régimen'.

[24] If a settlement is reached, a document is drawn up stating that 'the agreement does not determine guilt as the basis for financial claims, unless expressly provided otherwise'.

[25] Article 21 of Act No. 13.433: 'Seguimiento. En los casos en los que se arribe a un acuerdo, la Oficina de Resolución Alternativa de Conflicto podrá disponer el control y seguimiento de lo pactado, pudiendo para ello solicitar colaboración a instituciones, públicas y privadas, la que no revestirá el carácter de obligatoria. (...)'.

In 2002, mediation in criminal matters was also introduced in the province of Chaco. In accordance with Act No. 4.989, mediation is a procedure designed to redress and compensate for the consequences of a prohibited act for an injured person, a defamed person or a victim[26]. The Act also introduces the concept of a 'performance for the benefit of the community', which is provided when 'the victim cannot be compensated, or the provided compensation is insufficient'[27].

Also in that province, the maximum term of imprisonment that may be imposed for the offence which mediation concerns is six years. Mediation proceedings may also be conducted in cases of offences punishable by a fine or deprivation of rights (*inhabilitación*). Mediation may also be used in cases that are not covered by the Act by virtue of a direct legislative reference, but only after a court has pronounced the perpetrator guilty or issued a judgment of conviction. A mediation settlement can only be accepted after the perpetrator has made good the damage. As a result of mediation, a judge may impose a less severe penalty, applying a penalty that would be imposed for an attempted offence or the minimum penalty for a given offence. Furthermore, a mediation agreement may be taken into account in the consideration of a motion for conditional suspension of the sentence, a request for a pardon or conversion of the penalty. Similarly to the legislation applicable in the province of Buenos Aires, the laws of Chaco place subjective restrictions on the use of criminal mediation in cases of public officials charged with a criminal offence committed in the exercise of their duties[28].

The Code of Criminal Procedure in the Autonomous District of Buenos Aires gives the prosecutor in charge of the preparatory proceedings the opportunity to suggest to the parties to a conflict, both the victim and the accused, another alternative measure to resolve the conflict. This is allowed in cases brought by private prosecution[29]. For publicly prosecuted offences, mediation is encouraged whenever it allows for finding a better way to resolve the conflict between the parties. The mediation programme is implemented through the Office for Access to Justice and Alternative Methods of Conflict Resolution (*Oficina de Acceso a la Justicia y Métodos Alternativos de Solución de Conflictos*), which is a body subordinate to the Directorate for Judicial Policy of the Judiciary Council of the Autonomous District of Buenos Aires (*Dirección de Política Judicial del Consejo de la Magistratura de la Ciudad Autónoma de Buenos Aires*)[30]. A statute stipulates that the performance of

[26] Penal Mediation Act No. 4.989, B.O. N° 4584 of 14 January 2002.

[27] Article 2 of Act No. 4.989: 'La Mediación Penal es el procedimiento que tiene por objeto la reparación y compensación de las consecuencias del hecho delictivo mediante una prestación voluntaria del autor a favor del lesionado, víctima u ofendido. Cuando esto no sea posible, no prometa ningún resultado o no sea suficiente por sí mismo, entrará a consideración la reparación frente a la comunidad. Las prestaciones de reparación no deben gravar ni al lesionado ni al autor en forma desproporcionada o inexigible'.

[28] D. Martínez Zampa, *¿De qué hablamos cuando hablamos de mediación educativa?*, 'Revista de Mediación' 3(2009), 40–41; D. Martínez Zampa, *Situación actual de la mediación en el Chaco: avances y desafíos*, La Trama. Revista interdisciplinaria de mediación y resolución de conflictos 33(2012), 1–17.

[29] Article 204 of the Code of Criminal Procedure of the Autonomous District of Buenos Aires, Act No. 2303/07: 'En cualquier momento de la investigación preparatoria el/la Fiscal podrá: 1) acordar con el/la imputado/a y su defensor/a la propuesta de avenimiento, en cuyo caso se aplicará lo establecido en el artículo 266; 2) proponer al/la imputado/a y/o al/la ofendido/a otras alternativas para la solución de conflictos en las acciones dependientes de instancia privada o en los casos de acción pública en que pueda arribarse a una mejor solución para las partes, invitándolos a recurrir a una instancia oficial de mediación o composición. En caso de acuerdo el/la Fiscal dispondrá el archivo de las actuaciones sin más trámite'.

[30] R.D. Smolianski, *El tribunal superior de justicia de la Ciudad y la mediación penal*, available in the *Prensa y Comunicación, Novedades y Artículos* section of the website of the Defensoría General de la Ciudad Autónoma de Buenos Aires, http://defensoria.jusbaires.gov.ar/(accessed on 30 November 2018).

penal activities is vested in the prosecution service, which additionally allows for the application of the principle of discretion in this matter[31].

The conciliatory procedure cannot be used in proceedings conducted in cases of intentional offences described in Book Two of the Penal Code: offences against life (Title I, Chapter I); offences against sexual integrity (Title III), as well as in cases that involve injuries resulting from domestic violence, which may occur not only in marriages, but also in any kind of informal relationships between persons[32]. There are no subjective restrictions for public officials. As regards procedural requirements, violations of previous mediation settlements preclude entering into mediation. The Autonomous District of Buenos Aires also adopted the requirement that at least two years must have passed since the signing of the last mediation agreement. A settlement reached by the parties is private and may include both requests for an apology and requests for pecuniary payments. In principle, there are no legal restrictions on the agreed obligations; such restrictions can only arise from customary law. Moreover, the District of Buenos Aires has a special criminal mediation system for juveniles aged 16–18, established by Act No. 2.451[33].

A procedure for mediation in criminal matters also exists in the province of Tierra del Fuego. In 2009, criminal mediation was introduced into the provincial legal system by Act No. 804, which indicated the conditions when it is possible to conditionally suspend trials in proceedings brought by private accusation and those involving offences committed by children and adolescents[34].

A request for mediation may be made by either party, or by a prosecutor or a judge, if they consider it to be an appropriate measure to resolve a conflict and ensure reconciliation between the parties, which enables voluntary compensation for the damage caused, while fully respecting the constitutional guarantees. The promotion of parties' pro-active approach in the proceedings, which is likely to eliminate the willingness to take revenge, should also be viewed positively. The agreement reached in mediation has the effect of a judgment, therefore it does not require a subsequent approval. This rule does not apply to juvenile proceedings, where an agreement must be accepted by the *Ministerio Pupilar*.

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[31] P.C. Mazzeo, S.M.I. Margetic, C. Erlich, *La mediación penal como un programa de justicia restaurativa* [in:] *El proceso de mediación en el poder judicial de la Ciudad Autónoma de Buenos Aires*, Buenos Aires: Centro de Mediación, 2016, 65–87.

[32] The injuries referred to in Article 91 of the Penal Code should be taken into account not only with regard to family relations, but also informal relationships, as stipulated by Article 8 of the Domestic Violence Protection Act No. 24.417 (Protección Contra la Violencia Familiar): 'En los procesos por algunos de los delitos previstos en el libro segundo, títulos I, II, III, V, y VI, y título V, capítulo I del Código Penal, cometidos dentro de un grupo familiar conviviente, aunque estuviese constituido por uniones de hecho, y las circunstancias del caso hicieren presumir fundadamente que pueden repetirse, el juez podrá disponer como medida cautelar la exclusión del hogar del procesado. Si el procesado tuviere deberes de asistencia familiar y la exclusión hiciere peligrar la subsistencia de los alimentados, se dará intervención al asesor de Menores para que se promuevan las acciones que correspondan'.

[33] Act No. 2.451 of 3 October 2007, the System of Juvenile Justice Procedure (*Régimen Procesal Penal Juvenil de la Ciudad Autónoma de Buenos Aires*); M.E. Caram, *Hacia la Mediación Penal*, in: Revista La Ley Suplemento de Resolución de Conflictos, Buenos Aires, 2000, 965–972.

[34] Article 10 of the Mediation Act No. 804 of 25 November 2009: '(…) Asimismo podrán ser derivadas a los Centros de Mediación aquellas causas que tramiten en el fuero penal que correspondan a delitos de acción privada como también las que sean susceptibles de aplicación del instituto de suspensión del juicio a prueba. Del mismo modo, también podrán derivarse las causas originadas en infracciones a la ley penal atribuidas a jóvenes y adolescentes'.

## 3. CRIMINAL MEDIATION VERSUS MEDIATION IN CIVIL MATTERS AND CONSTITUTIONAL PRINCIPLES

Unlike mediation in family matters, criminal mediation relates to proceedings conducted between persons who have not previously had contact or a closer relationship with each other. Another characteristic feature of criminal cases is an imbalance of forces inherent in the victim-perpetrator relationship, which tends to disappear as the proceedings progress. Separately held preliminary meetings, during which a mediator explains the procedure to both parties, are also intended to provide the necessary assistance in preparing the parties for a joint meeting and to allow the mediator to gain the parties' trust. In civil matters, such a procedure could contravene the principle of neutrality of the person appointed to manage the entire process[35].

In criminal cases, a dispute between the parties also has a different meaning than in civil matters. Criminal proceedings are always based on the correlation between the perpetrator and the victim. One party has committed an offence and admits to it, while the other is a passive participant against whom the offence was committed. The question of innocence or guilt of the perpetrator is not subject to mediation, but the settlement must at least lead to compensation for the loss suffered by the victim. In contrast to civil mediation, where the aim is to reach a settlement between peers, a crucial element of criminal mediation is the manner in which the agreement is reached, rather than an outcome in the form of a signed agreement. In criminal mediation, special attention is paid to dialogue, but also to an empathetic approach maintained throughout the process of reaching the victim's acceptance of the financial compensation and a sincere apology expressed by the perpetrator through repentance[36].

The question of the mediator's neutrality does not extend to the assessment of facts. The mediator's impartiality is directed at the participants of the proceedings as human beings, but they always obligatorily evaluate the act committed by the perpetrator as a moral wrong legally punishable by the system. The mediator is aware of the impact of the crime on the victim and therefore seeks to obtain the perpetrator's admission of guilt, but also strives to persuade the perpetrator to accept the relevance of his behaviour and to take responsibility for it[37].

An analysis of criminal mediation laws enacted in individual provinces provides no grounds for accusing these laws of procedurally violating the Argentinian legal system. However, there is a need to take a closer look at and analyse constitutional guarantees from the substantive perspective. A section of the Argentinian legal scholarship believes that provincial criminal law contravenes the principle of citizens' equality before the law, which guarantees the same rights, privileges, and immunities to every Argentine, regardless of the province in which they reside[38].

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[35] J.I. Dávalos, *La mediación penal como método alternativo de resolución de conflictos: resultados actuales en la república Argentina*, http://www.derechoycambiosocial.com/revista022/mediacion_penal.pdf (accessed on 31 October 2018).

[36] N.V. Poblete, *Colegio Público de Abogados de la Capital Federal*, Separata Nº 20 Cuaderno de Doctrina – Temas de Mediación, Buenos Aires, 2001, 13 et seq.

[37] M.E. Caram, *supra* n. 33, at 1 et seq.

[38] Article 8 of the Constitution of the Argentinian Republic: 'Los ciudadanos de cada provincia gozan de todos los derechos, privilegios e inmunidades inherentes al título de ciudadano en las demás. La extradición de los criminales es de obligación recíproca entre todas las provincias'; Article 16: 'La Nación Argentina no

Thus, if it is assumed that in some provinces a person committing an offence may remain free or avoid imprisonment by performing certain acts, making apologies, paying compensation, etc., and another person who has committed the same offence in another province has to face imprisonment, this is not an expression of equal treatment before the law. However, it is worth recalling that the issue of unequal treatment of citizens and the different application of laws in the provinces is subject to review by federal courts. For this purpose, the mechanism of extraordinary appeal (*recurso extraordinario*) has been created[39].

Another principle which is called into question is the presumption of innocence and the right to a trial[40]. Mediation in criminal cases may be carried out at the stage of preparatory proceedings, during the trial or after a judgment has been pronounced. The last situation presents no problems, as the guilt has been decided by the court. However, how should mediation be assessed in the context of proceedings preceding the adjudication of a case? At that point, guilt has not yet been proven, and the confession of a person suspected of having committed a criminal offence may be the result of fear of a possible conviction in trial and the ensuing deprivation of liberty. A comparable situation may also occur if criminal proceedings are suspended during the trial. It is therefore important, as has always been emphasised in mediation proceedings, that the party who has committed a prohibited act should be aware that they participate in mediation on a voluntary basis and, accordingly, that they should take responsibility for the committed offence. Another guarantee of upholding the principle of presumption of innocence is the procedural prohibition of the admission of any evidence obtained by the mediator (such as documents, or statements made during meetings, talks or negotiations) in any court proceedings subsequent to mediation. Such evidence may not be included in the settlement ending the conciliatory proceedings, especially if it concerns the perpetrator's admission of the commission of the offence[41].

admite prerrogativas de sangre, ni de nacimiento: no hay en ella fueros personales ni títulos de nobleza. Todos sus habitantes son iguales ante la ley, y admisibles en los empleos sin otra condición que la idoneidad. La igualdad es la base del impuesto y de las cargas públicas'.

[39] Article 14 of Act No. 48 of 14 September 1863: (V. Recurso de inconstitucionalidad): 'Una vez radicado un juicio ante los tribunales de provincia, será sentenciado y fenecido en la jurisdicción provincial, y sólo podrá apelarse a la Corte Suprema de las sentencias definitivas pronunciadas por los tribunales superiores de la provincia en los casos siguientes: (...)'; Article 7 of Act No. 27 of 16 October 1862: 'La Corte Suprema conoce: 1° originaria y exclusivamente, de las causas concernientes a Embajadores, Ministros, Cónsules y Vicecónsules extranjeros, y en las que alguna Provincia fuese parte. 2° En el grado de apelación o nulidad, de las causas que, con arreglo al artículo 22, corresponden a los Juzgados de Sección, y de las que le vayan de los Tribunales Superiores de Provincia, con arreglo al artículo 23. 3° En grado de revisión de las causas que quedan expresadas en el inciso 1° de este artículo según las reglas que establezca una ley especial, que la misma Corte propondrá al Congreso, por conducto del Poder Ejecutivo'.

[40] Article 18 of the Constitution of the Argentinian Republic: 'Ningún habitante de la Nación puede ser penado sin juicio previo fundado en ley anterior al hecho del proceso, ni juzgado por comisiones especiales, o sacado de los jueces designados por la ley antes del hecho de la causa. Nadie puede ser obligado a declarar contra sí mismo; ni arrestado sino en virtud de orden escrita de autoridad competente. Es inviolable la defensa en juicio de la persona y de los derechos. El domicilio es inviolable, como también la correspondencia epistolar y los papeles privados; y una ley determinará en qué casos y con qué justificativos podrá procederse a su allanamiento y ocupación. Quedan abolidos para siempre la pena de muerte por causas políticas, toda especie de tormento y los azotes. Las cárceles de la Nación serán sanas y limpias, para seguridad y no para castigo de los reos detenidos en ellas, y toda medida que a pretexto de precaución conduzca a mortificarlos más allá de lo que aquélla exija, hará responsable al juez que la autorice'.

[41] A.I. Pérez Cepeda, *La víctima ante el Derecho penal; especial referencia a las vías formales e informales de reparación y conciliación*, 3 Cuadernos del Departamento de Derecho Penal y Crimonología, Nueva serie, Universidad de Córdoba, Argentina, 2000, 251.

## 4. THE PRINCIPLES OF CRIMINAL MEDIATION

Voluntary participation forms the basis for conducting mediation in criminal proceedings. None of the parties can be forced to take part in this process against their will, which is a key difference between mediation and the criminal trial. Only there does the State have at its disposal coercive measures to ensure the presence of the perpetrator, the assessment of their conduct, and the imposition of a penalty. Mediation is devoid of the character of criminal proceedings, although it is carried out with respect to actions that are normatively defined as punishable. Mediation also serves the purpose of resolving issues remaining in the realm of criminal law and attains the objectives which society has embraced as the rationale for criminal prosecution. This is why voluntary submission to mediation distinguishes criminal mediation from criminal proceedings. Parties must express their consent in writing. If a prosecutor requests mediation, they must notify the parties in writing, and the parties have a final say on the prosecutor's proposal. If a party is interested in this form of conflict resolution, they may also submit a written request to the prosecutor, who must notify the other party, also in writing, and the other party must give their consent, which is the basis for initiating the mediation process. This principle does not apply only to commencing the procedure, but remains relevant throughout the process. Also, at the stage of negotiating or determining the results of mediation and the contents of the agreement, the parties must not be coerced to engage in any activities against their will. The mediator's primary role should, therefore, be to skilfully explain any activities that are part of the mediation procedure and persuade the parties to engage in such activities.

A principle of criminal mediation, which should be respected in particular by mediation authorities, is confidentiality. No effort should be spared to uphold this principle as the parties' voluntary participation in the process is both their legal right and a personal decision based on their confidence in the justice system. This is particularly difficult in situations where there is a high level of public interest in a case, for example, because a public figure is involved. A guarantee of confidentiality means that everything that has been said during hearings and deliberations, as well as all documentation presented and prepared in the course of proceedings, will be kept within a narrow circle of recipients, i.e. between the parties and the entities appearing in the proceedings. No information from the mediation process can be used by the parties or the prosecutor as evidence in criminal proceedings that may follow[42].

A mediator must keep for themselves all knowledge acquired in the course of their activities in mediation proceedings. This rule also applies to all the actions a mediator takes, even at the stage of preliminary discussions with the parties. Single-party consultations are also subject to this principle, and knowledge acquired in this way may not be disclosed to the other party to mediation without express consent of the party involved in such consultations. As a consequence, a mediator may not be called as a witness in any criminal proceedings that may be conducted in this case.

[42] M.A. García Fernández, *La mediación penal y el nuevo modelo de justicia restaurativa*, Revista internacional de doctrina y jurisprudencia 15(2017), 13–14.

The absence of a strict procedural framework is a specific feature of mediation proceedings. In order to maintain the guarantees offered by the legal system, it is essential to resolve a conflict in a way that is satisfactory to the parties. Without assessing the substantive scope of cases that may be referred for mediation, the formal requirements will be met by the parties concerned if they give their consent to such a form of dispute resolution. Furthermore, facts need to be established and a professional accredited mediator appointed as a neutral third party. Actions taken in the course of proceedings must be appropriate to the case in question, but also to the subjective requirements and circumstances of the parties. The assessment of the actual state of affairs is the task of the mediator, who is responsible for the decisions and actions taken.

A mediator is obligated to ensure equal treatment of all parties involved in the proceedings and must inspire confidence among the parties. If any circumstances that may violate this principle of impartiality appear, the mediator is obligated to recuse themselves from the proceedings, regardless of their stage, as it is the case with the judge in a criminal case. In instances where such self-disqualification is not required by the law, a mediator who finds himself not to be competent in the case in question may step down voluntarily. The guarantee of impartiality prevents a mediator's excessive involvement in reaching a settlement, as the final resolution of the dispute should be an autonomous decision of the parties. Otherwise, the parties would not be able to obtain a mutually beneficial outcome.

The principle of direct involvement improves the confidentiality of the mediation process. In addition, personal contact between the parties and the mediator enhances confidence in the mediator and enables a better assessment of the conduct of participants in the proceedings.

With regard to the specification of the requirements pertaining to the agreement that ends mediation, it is important to emphasise the requirement of the victim's consent to the means of resolving the dispute contained in the settlement. The victim, as the injured and aggrieved party, in consideration for the determination of terms satisfactory to them, agrees to a waiver of the culprit's punishment for the act committed, mitigation of the severity of the punishment or even to the discontinuance of the proceedings brought against the culprit.

Mediation should be free of charge, which improves the availability of the procedure among members of the public. A necessity of paying a fee would prevent the economically disadvantaged from using mediation. In this way, a possible economic barrier to access to mediation is removed. The reasons for this state of affairs can be traced back to the best interests of the state, which supports peaceful resolution of conflicts.

A formal guarantee of conducting criminal mediation is its speed as compared to lengthy criminal proceedings. Most laws lay down a time limit of up to 60 days for the completion of mediation proceedings, which may be extended at the request made by the mediator in consultation with the parties involved.

It is the mediator's task to inform the parties of the nature, characteristics, and principles of the mediation procedure in which they will participate. In addition, the mediator must explain their own role in the proceedings and present the range of actions they can take in the exercise of their functions in compliance with the applicable ethical standards.

## 5. PARTICIPANTS IN MEDIATION PROCEEDINGS

The most important role in mediation is played by the parties to the proceedings: without their consent to engage in mediation the process cannot start. Each party has the right to make a request for mediation proceedings to be initiated. The parties remain active participants at all stages of mediation. It is their responsibility to look for a way to resolve the conflict. In order to do so, they need to acknowledge each other's concerns, fears, losses, and circumstances that led to the situation. All these aspects are addressed during joint meetings with the assistance of a professional actor – the mediator. Mediation is an opportunity to reflect on the conduct of the perpetrator of a prohibited act and to find a way of remedying the damage caused. Negotiations, which replace an adversarial process, are designed to create an atmosphere that allows the other party to be heard and understood. Crucially, in order to be interested in a peaceful resolution of the conflict, the parties themselves should be open to forgiveness, as they are the only ones who can put an end to the situation[43]. Notably, if there are several victims or perpetrators in a case, mediation can be conducted for all these persons jointly or any one of them separately. However, it is forbidden to extend the effects of specific procedures to other participants who have not agreed to mediation as a means of settling the dispute. In such a case, any parties 'opting out' of mediation will be subject to the ordinary criminal procedure and mediation outcomes will not even be considered in evidentiary proceedings.

The prosecutor is the first to receive parties' requests for mediation and has the opportunity to encourage the parties to make use of this form of case resolution. In order to speed up the procedure, the prosecutor may also, on their own initiative, prepare documentation and send it to a mediation centre if the prosecutor considers that a case is of a type that satisfies the legal requirements that allow mediation to take place. Such prosecutor's action is without prejudice to the guarantee of voluntary participation, as the next step is the mediator's assessment of the possibility of initiating the procedure. Next, if a case is eligible for mediation, the consent of the parties must still be obtained. Failure to meet any of these conditions will result in the case materials being returned to the prosecutor.

An important role in the mediation process is also played by the judge, whose responsibilities include reviewing the agreement signed by the parties and making sure that the agreement has not violated any constitutional guarantees. If the judge comes to the conclusion that this document does not meet the legal requirements, they will return the agreement to mediation for the purpose of remedying any defects. The judge also evaluates the impact of the settlement on the conviction already handed down and orders its mitigation in the spirit of, and in accordance with, the agreement. If the perpetrator is already serving a sentence for an infraction, a request for admitting them to the mediation process must be submitted to the judge who presided over the case and issued the judgment.

The mediator, who is not a typical participant in criminal proceedings, also plays an important role in the mediation procedure. As opposed to the judge and

[43] C.M. Cannizzaro, *Conciliación. Problemas e incongruencias del Nuevo Código Procesal Penal de la Nación*, Lecciones y Ensayos 95(2015), 230.

prosecutor, whose tasks are clearly defined by the law and whose roles stem from the judicial system established in a country, the mediator is a person from outside of the traditional framework of criminal justice. Nevertheless, the mediator is a professional actor in the mediation process. The mediator has the great responsibility of directing the actions of the parties. The mediator does not make any decisions about the conflict and does not assess the lawfulness of parties' decisions. Moreover, it is beyond the mediator's remit to establish the truth or assess guilt. What the mediator does is facilitating the parties' understanding of their needs relating to the conflict between them[44]. The mediator regulates the process of communication between the parties and is responsible for creating an appropriate atmosphere of freedom for both parties to act. Laws clearly define the requirements that a mediator must meet. In addition to specialist legal education, a mediator must have a proven track record of professional experience, must have completed training in mediation, and their name must be on the public register of mediators[45].

Act No. 26.589 introduced a new role of 'professional assistants' who are to assist mediators. They may work with a mediator intervening in a case in order to resolve the conflict which is being meditated. Assistants are subordinated to mediators, because they work under mediators' direction. Mediators are also legally responsible for the actions taken by their assistants[46]. Assistants must be registered with the National Mediation Register and meet the substantive requirements listed in statutory law. Unlike mediators, they do not have to have held a university degree in law for at least three years or take professional aptitude tests[47].

## 6. THE PROCEDURE AND DOCUMENTATION

Mediation in criminal cases starts with the prosecutor's receipt of the case file or a notification of a crime. For the types of offences eligible for mediation, the documentation must be forwarded to a Public Mediation Centre or a Justice of the Peace, who can also act as a mediator. Upon receiving the file, the Mediation Centre randomly selects a mediator, who immediately initiates an inquiry aimed at having a separate, face-to-face meeting with each party, with a view to informing

[44] E. Neuman, *Mediación y Conciliación Penal*, Buenos Aires, 1997, 20.

[45] Article 11 of the Mediation and Conciliatory Procedure Act No. 26.589 of 15 April 2009: 'Requisitos para ser mediador. Los mediadores deberán reunir los siguientes requisitos: a) Título de abogado con tres (3) años de antigüedad en la matrícula; b) Acreditar la capacitación que exija la reglamentación; c) Aprobar un examen de idoneidad; d) Contar con inscripción vigente en el Registro Nacional de Mediación; e) Cumplir con las demás exigencias que se establezcan reglamentariamente". Haber completado la capacitación exigida por el Ministerio de Justicia y Derechos Humanos de la Nación (res. 483/00): Estar inscripto en el Registro Público de Mediadores'.

[46] Article 10 of Act No. 26.589: 'Los mediadores podrán actuar, previo consentimiento de la totalidad de las partes, en colaboración con profesionales formados en disciplinas afines con el conflicto que sea materia de la mediación, y cuyas especialidades se establecerán por vía reglamentaria. Estos profesionales actuarán en calidad de asistentes, bajo la dirección y responsabilidad del mediador interviniente, y estarán sujetos a las disposiciones de la presente ley y su reglamentación'.

[47] Article 12 of Act No. 26.589: ‚Los profesionales asistentes deberán reunir los requisitos exigidos para los mediadores en el artículo 11, incisos b), d) y e)'; Article 38: 'Los profesionales asistentes deberán inscribirse en el Registro Nacional de Mediación, en el capítulo correspondiente al Registro de Profesionales Asistentes que organizará y administrará el Ministerio de Justicia, Seguridad y Derechos Humanos. El Poder Ejecutivo nacional dictará la reglamentación que determinará los requisitos necesarios para la inscripción, que deberá incluir necesariamente la capacitación básica en mediación, y la capacitación específica que exija la autoridad de aplicación'.

them about the benefits of mediation. If any of the parties rejects the procedure, the mediator returns the file to the intervening prosecutor or criminal court in order to allow them to proceed with an ordinary criminal case. If the parties agree that a dispute should be referred for mediation, the date and time of the hearing are fixed.

If the parties accept the procedure, the mediator starts to arrange individual meetings with them. If the mediator decides that a face-to-face confrontation will be unsuccessful or even harmful, they will continue with private meetings. The parties' failure to reach a settlement may also lead to the mediator's decision to extend the mediation proceedings, which must be notified to the prosecutor or judge. If, despite such an extension, the conflict cannot be resolved through mediation, the documentation is returned so that the criminal proceedings can continue.

At the end of the mediation process, after a settlement is made, an agreement is drawn up between the parties. It sets out the rules and methods of remedying the situation, as well as the deadline for the performance of the assumed obligations. This document is sent to the judge, who is required to review the agreement's compliance with constitutional guarantees. If the judge finds that the settlement violates such guarantees, they notify the mediator and the parties that the agreement needs to be amended, indicating any objections raised during the review. If the parties do not accept the need for an amendment, the dispute is deemed to be unresolved and the ordinary criminal proceedings continue. Any amendments agreed by the parties must be incorporated into the agreement, which is sent back to the judge for approval.

Another important task of the mediator is to draw up appropriate documentation once the obligated party has performed their obligations set out in the settlement. The judge is notified about their performance and then the judge has to assess the obligated party's actions and decide if these actions should result in a modification of the sentence or the non-initiation of criminal proceedings, depending on the stage of the case. However, if the perpetrator of a prohibited act has failed to comply with their obligations, the mediator's notification sent to the judge must disclose this fact. If the perpetrator's performance is incomplete, the judge's decision will be influenced by the extent to which the damage has been repaired and the party's commitment to perform the obligation.

Documents that are prepared after the oral phase of mediation have a strictly defined structure, with mandatory elements required by the law. The mediator is responsible for the preparation of these documents, including the agreement. In the introductory party, the participants and the facts of the dispute should be described. A party's identification data include the first and last name, identification number ('DNI'), and residence address. A document must also specify the date and place of preparation. This is followed by the particulars of the remaining participants: the attorneys and the mediator, accompanied by their registration numbers. A description of the facts includes a designation of the reported incident, the case file number, and the prosecutor's office. Below, sessions' start and close dates are given, together with the number of sessions held. However, the key part of any document is a description of the parties' obligations to act or to refrain from acting, which must be phrased in the most precise manner possible. The places and timeframes

of the agreement performance are also provided. Where the involvement of a third party is necessary, this party's identification data are given. The settlement may require that medical examinations, procedures or surgeries be performed, provided that it designates the healthcare institution and the attending doctor and determines the form of and the deadline for submission of medical records of such a treatment. These records are necessary for the purposes of reviewing the agreement's performance. All documents are signed by the parties and the mediator, but become effective only upon the judge's approval. The agreement is binding on the parties from the moment of its signature and constitutes a valid enforcement title.

## 7. EFFECTS OF MEDIATION AND AN ATTEMPT AT THEIR ASSESSMENT

An assessment of the effectiveness of mediation depends on the parties' subjective perception. As far as the legal system and the objectives of criminal proceedings are concerned, it is important that the agreement which ends mediation is an expression of a compromise reached between the two parties. Furthermore, the mediation procedure, which is non-adversarial, makes it more likely for the parties to reach a solution that is more satisfactory for them than a court judgment[48].

The laws governing criminal mediation do not specifically address its effects, leaving this part of the procedure to the discretion of the parties and the mediator. By way of example, it is worth noting that in the province of Buenos Aires only two articles have been devoted to this issue. One defines the formal effects on the assumption that mediation has been successful, while the other deals with cases of disagreement between the parties or failure of the participants to comply with formal requirements. They indicate the impact of mediation on the trial and describe the formal effects of the final agreement, i.e. legal review of decisions, discontinuance or continuation of preparatory proceedings by a prosecutor[49].

Mediation in criminal cases is still a new procedure, whose effectiveness can only be tested in practice. This affects the establishment of legal norms regarding mediation. In the province of Buenos Aires, draft amendments to criminal mediation laws include the introduction of clear guidelines on procedural admissibility,

[48] See arguments in favour of introducing criminal mediation into the legal system: A. Prunotto Laborde, *Mediación Penal*, Rosario, 2006, 32 et seq.

[49] Article 20 of Act No. 13.433: 'En aquellos acuerdos en que las partes hayan dado enteramente por satisfechas sus pretensiones, el Agente Fiscal mediante despacho simple, procederá al archivo de las actuaciones. Para los casos en que se pacte alguna obligación para las partes, la Investigación Penal Preparatoria se archivará sujeta a condiciones en la sede de la Oficina de Resolución Alternativa de Conflictos a fin de que constate el cumplimiento o incumplimiento de las mismas. Verificado el cumplimiento, se remitirán las actuaciones al Agente Fiscal, quien procederá de la manera enunciada en el párrafo primero. En caso de comprobarse el incumplimiento de aquellas en el plazo acordado, se dejará constancia de dicha circunstancia, procediéndose al desarchivo de la Investigación Penal Preparatoria y a la continuación de su trámite'; Article 21: 'En los casos en los que se arribe a un acuerdo, la Oficina de Resolución Alternativa de Conflicto podrá disponer el control y seguimiento de lo pactado, pudiendo para ello solicitar colaboración a instituciones, públicas y privadas, la que no revestirá el carácter de obligatoria. Asimismo, en aquellos casos en los que se haya acordado algún tipo de tratamiento, terapia, participación en algún programa de rehabilitación, etc; podrá derivar mediante oficio a las entidades públicas o privadas que presten ese servicio'.

with the aim of reducing the freedom to evaluate their specific application. They are meant to limit procedural admissibility criteria, predominantly those relating to the specific situation and the victim's position. Mediation cannot be used if the prohibited act violates, in a socially reprehensible manner, the rights of an individual on grounds of their sex (*violencia de género*). Also, mediation is inadmissible if the prohibited act results in a person's death. In those cases, a custodial penalty is intended to protect the public against the perpetrator's possible re-offending. The public interest justifies this. Moreover, if the victim has died, the case cannot be solved, as the other party is missing.

In criminal cases, mediation takes places only where the victim and the perpetrator of a prohibited act agree to this method of dispute resolution. Both parties have leading roles. They can listen to each other, ask for explanations, express their feelings as well as demand compensation and assume the responsibility that is appropriate in their opinion. They do not have these opportunities in the course of traditional criminal proceedings. It should be noted that commencing mediation does not mean that the perpetrator pleads guilty. The main objectives of this procedure are to repair the damage suffered and to rehabilitate the perpetrator[50].

There are two different views in the scholarship regarding the scope of criminal mediation. According to one of such views, mediation should be limited to some types of offences only, whereas according to the other, the procedure should be developed in a way that allows for its use in respect of any perpetrator of any prohibited act. The only restrictions should apply to officials who commit an offence related to their function, which is justified by the social harmfulness of these activities and their impact on a wide range of recipients. The importance of the public interest requires members of the public to know the truth about the events that affect public administration.

The scope of mediation procedures should include, in particular, offences committed unintentionally and prosecuted either privately or on request. Due to the substantive scope, the mediation procedure is best suited to those acts that are related to parental authority, and more broadly to the whole area of family law understood not only as the relations between spouses and children, but also between the couples remaining in non-formalized relationships[51].

In view of the high probability that the objectives of criminal proceedings will be achieved peacefully through mediation, the introduction of this option into the criminal procedure should be regarded as a positive development. However, the introduction of appropriate standards at the federal level in Argentina should be considered, as divergences, in particular those related to substantive requirements, can potentially infringe the rights of citizens based on their place of residence and thus violate constitutional norms.

[50] N.V. Lopez Faura, *Penal en Infractores: Una Utopía en Argentina*, Revista La Ley. Suplemento de Resolución Alternativa de Conflictos (18 September 1999).
[51] N.D. Barmat, n. 5 *supra*, at 203–205.

## Abstract

**Marta Osuchowska, *Criminal Mediation in the Law of the Argentine Republic***

*Mediation in criminal cases in Argentina is a mechanism governed by provincial law. Although this procedure has not been introduced in all regions, increasingly more provinces see the advantages of this procedure in resolving conflicts between the parties. Differences in provincial legislation provoke scholarly arguments concerning violations of constitutional guarantees. Despite theoretical concerns, it is appreciated in practice that criminal mediation is a time-effective measure, promoting pro-active approach of the parties to the conflict, which has a positive impact on the society as a whole.*


***Keywords:*** *mediation, criminal law, Argentina, province*


## Streszczenie

**Marta Osuchowska, *Mediacja karna w prawie Republiki Argentyńskiej***

*Mediacja w sprawach karnych jest w Argentynie instytucją podlegającą prawu prowincjalnemu. Nie została ona wprowadzona we wszystkich regionach, jednak stale zwiększa się liczba prowincji, które dostrzegają zalety tej procedury w rozwiązywaniu konfliktów między stronami. Różnice występujące w ich prawodawstwie skłaniają doktrynę do formułowania poglądów dotyczących naruszania gwarancji konstytucyjnych. Mimo wątpliwości o charakterze teoretycznym, w praktyce docenia się szybkość rozwiązań mediacyjnych oraz aktywny w nich udział stron konfliktu i pozytywny wpływ na społeczeństwo.*


***Słowa kluczowe:*** *mediacja, prawo karne, Argentyna, prowincja*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3803

**Jerzy Słyk***

# Family Justice in Poland: An Outline of the Problem Situation and the Optimum Reform Direction**

Support for families is currently listed as one of the key government policies in Poland. It should be noted that family-oriented policies are implemented primarily through social programmes addressing economic, social and demographic challenges. Changes have therefore mostly been made in the area of administrative law; they relate mainly to the social welfare system. Observation of the evolution of Polish laws on family over recent years leads to the conclusion that a fundamental aspect of these changes, namely the protection of family rights[1], necessitates a fundamental decision of a systemic nature: determining the direction of further reforms of the justice system. It must be decided whether protection of family rights will be implemented primarily on the basis of private law and will maintain its judicial character, or will instead be delegated to administrative law bodies. The author of this paper believes that the former option would be definitely more beneficial from the point of view of family protection, as it provides greater protection against arbitrary decisions and ensures a high standard of procedural guarantees of a fair resolution of a family case[2].

Generally, and formally, speaking, matters falling under the aegis of family law (understood as a branch of private law) are accorded judicial protection in the Polish legal system. However, this coincides with an expansion of the purview of administrative authorities, which have increasing influence on the situation of the family, including in the context of private law. The Act of 9 June 2011 on Support for Families and on Foster Care System (consolidated text: Polish journal of laws

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** The manuscript was submitted by the author on 10 February 2019; the manuscript was accepted for publication by the editorial board on 28 February 2019.

1 In this paper, the notion of family rights is understood to refer to the sphere of private law, i.e., the rights and obligations of spouses, parents and children as defined in family law.

2 For a discussion on the overlap of family law regulations in private and administrative law, cf. M. Andrzejewski, *Współpraca sądów rodzinnych i instytucji pomocy społecznej w umieszczaniu dzieci poza rodziną*, Państwo i Prawo 9(2003), 87 et seq. For arguments supporting the contention of judicial protection being a better option that administrative protection, see also M. Andrzejewski, *Rola sędziów rodzinnych w zreformowanym systemie opieki nad dziećmi* [in:] M. Racław-Markowska (ed.), *Pomoc dzieciom i rodzinie w środowisku lokalnym. Debata o nowym systemie*, Warszawa, 2005, 55.

Dz.U. 2018, item 998, as amended) introduced an extensive and casuistically defined system of foster care institutions managed by local authorities. The casuistic approach employed in this method has also been introduced into the Family and Guardianship Code[3] ('FGC'). There appeared a danger that the jurisdiction of family courts would be restricted, e.g. with regard to decisions concerning the placement of a child in foster care. This trend was reflected in the case law, as courts began issuing orders for the placement of a child in a foster family or a care and educational institution without naming the specific family or institution with which the child is to be placed and instead delegating this task to administrative authorities. This practice was only partially criticized (in respect of foster care placements), in a resolution of a seven-judge panel of the Supreme Court dated 14 November 2014[4]. Issued in response to a question of law presented by the Ombudsman for Children. In another judgment (of 24 November 2016)[5], the Supreme Court rejected the linguistic interpretation of the provisions of the Act on Support for Families and on Foster Care System, opting for a flexible interpretation and emphasising the primacy of the principle of protecting the child's best interests over regulations of administrative law. In this way, the Supreme Court extended the decision-making powers of guardianship courts in selecting the appropriate form of foster care for a given child[6]. These rulings of the Supreme Court should be lauded. However, it must also be noted that the very fact that such decisions needed to be made proves that administrative law had extended its influence on family law, which was mentioned above. Another example of this disquieting trend is the Domestic Violence Prevention Act of 29 July 2005 (consolidated text: Dz.U. 2015, item 1390), which, in Article 12a, authorizes a social worker to remove a child from parental custody. Empirical research on these provisions revealed substantial risks, and even cases of abusive application of the aforementioned measure. These risks involve not only procedural non-compliance, but also instances where a child was removed despite the absence of substantive and legal grounds for such a measure[7].

The aforementioned risks associated with the adoption of a specific system of family rights protection and a specific regulation method may also be observed in certain legislative measures implemented in those systems in foreign jurisdictions that allow a greater degree of administrative interference than that admissible under Polish law.

First of all, we should mention the German Youth Welfare Offices (*Jugendamts*), whose activities are attracting increasing criticism, including at European Union level. The most concerning aspect of *Jugendamt's* work is their power to place a child in foster care. The legal grounds for this interference in the rights of family

[3] The Act of 25 February 1964 – Family and Guardianship Code (consolidated text: Dz.U. 2017, item 682, as amended); an example of problems resulting from this approach is the incorrect use of the *exhaustive* list of forms of foster care in the context of Article 109(2) FGC, which contains a *non-exhaustive* list of types of guardianship court orders. Such legislative errors are a consequence of mixing legislative measures used in private and administrative law.

[4] Case No. III CZP 65/14, published in OSNC 4/2015, item 48.

[5] II CA 1/16, OSNC 7–8/2017, item 90.

[6] Cf., *in extenso*, J. Słyk [in:] K. Osajda (ed.), *Komentarze Prawa Prywatnego. Tom V. Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*, Warszawa, 2017, 1317–1318.

[7] Cf. J. Słyk, *Odbieranie dzieci rodzicom na podstawie art. 12a ustawy z 29.07.2005 r. o przeciwdziałaniu przemocy w rodzinie*, Prawo w Działaniu 24(2015), 263 et seq.

members (the request of the child, a sudden threat to the child's welfare in the absence of an objection by a guardian or lack of possibility of promptly obtaining a court ruling, the arrival of an unaccompanied child in Germany, as per § 42, Book VIII of the *Sozialgesetzbuch*) are defined so vaguely that much room is left for potential abuses[8]. Notably, a complaint against a *Jugendamt*'s decision to place a child in foster care can be lodged with the administrative court[9]. The *Jugendamt's* operations have been criticized internationally. These offices have been accused of, among other things, frequent human rights violations, acting in an uncontrollable manner, and not complying with court rulings[10].

Controversy also surrounds the activities of the Norwegian Child Welfare Services (*Barnevernet*). Concerns related to the *Barnevernet*'s work are expressed, inter alia, in a draft resolution (and the appended explanatory memorandum) presented by the Parliamentary Assembly of the Council of Europe on 6 June 2018 (doc. 14568). The resolution explicitly states, in the context of findings concerning the Norwegian social welfare system, that a child's right to be protected from all types of violence, abuse and neglect must be accompanied by their right not to be separated from their parents against their will and that any exceptions to that rule must be subject to judicial oversight.

In order to oppose the trends described above, it is necessary not only to halt the process of extending the remit of administrative authorities in the area of family law, but also, and above all, to significantly strengthen the system of judicial protection of family rights, i.e. the family justice system. Accordingly, an appropriate reform should not aim to lay down an absolute principle of family autonomy, but to ensure that any measures interfering with this autonomy, which are necessary in certain situations, are chosen in accordance with the principle of proportionality and with respect for the rights of both the child and the parents; such measures should also receive the most robust guarantees against the abuse of public authorities' power to interfere with family life. Judicial procedures seem the most appropriate for attaining the above objectives, provided that they are tailored to meet the specific needs of family rights protection, which inevitably means that the family justice system must itself be bolstered, both professionally and organizationally.

The concept of family justice was developed in the early 20th century in the United States of America. This concept was based on experiences related to the development of the juvenile justice system and stemmed from the belief that dealing with family matters requires competence in solving social problems, as a frequent cause of problems within the family[11]. A separate family justice system is also associated with the organizational advantages that result from appointing a single court to handle all family matters, which include facilitation of a judge's access to experts in the field of social sciences, prevention of jurisdictional conflicts between different courts dealing with specific aspects of family cases, and acceleration of court

[8] Cf., *in extenso* [in:] K. Kryla-Cudna, *Niemiecki Urząd do spraw Dzieci i Młodzieży (Jugendamt)*, Prawo w Działaniu 25(2016), 194 et seq.; cf. also W. Szafrańska, *Niemiecki Urząd ds. Dzieci i Młodzieży (Jugendamt)* [in:] A. Ziółkowska, A. Gronkiewicz (eds.), *Rodzina w prawie administracyjnym,* Katowice, 2015, 353 et seq.
[9] K. Kryla-Cudna, *Niemiecki Urząd*…, n. 8, 199.
[10] Cf. the Bamberg Declaration, as described in K. Kryla-Cudna, *Niemiecki Urząd*…, n. 8, 204.
[11] Cf. Ch.W. Hoffman, *Social Aspects of the Family Court*, 3(10) Journal of the American Institute of Criminal Law and Criminology, 416 (1919).

proceedings, which may be achieved thanks to centralized access to case files[12]. On the other hand, the personal qualifications and availability of a judge and the high operating costs of family courts have been identified as key risks relating to the implementation of the concept of family justice[13]. Despite the passage of time, the above-mentioned benefits and risks seem to remain fully relevant.

In Poland, the implementation of the concept of family justice began more than half a century ago, initially in the form of experiments and pilot programmes. It should be noted that the original assumption was to design a family justice system based on three pillars, namely: appointing a single judge to hear all types of matters concerning the family; upholding high professional standards for family judges; and providing support for family courts through a network of expert institutions[14]. Although this process started long ago, it has not been completed. Moreover, certain solutions were adopted that proved inconsistent with the original objectives of the family justice system. The first court division that handled only family cases was established on 1 July 1962 in the County Court in Katowice. However, it was not until 1973 that the Minister of Justice issued an executive order allowing the creation of family courts, initially as part of an experiment. Under this scheme, the first seven family courts were created in 1974[15]. In the initial, experimental stage of the implementation of the concept of family justice in Poland, family divisions exercised wider jurisdiction than their contemporary counterparts, since they also heard adult criminal cases that were related to the protection of family and children, as well as cases concerning the division of marital property. Since 1 January 1978, by the executive order of the Minister of Justice of 28 December 1977, ninety--seven Family and Juvenile Divisions (also referred to as 'family courts') have been established; their jurisdiction also covered a similarly wide range of cases[16]. In the early 1980s, criminal cases were removed from the jurisdiction of family courts[17].

Among the significant changes that have negatively affected the operation of the family justice system in Poland one should mention the amendment introduced by the Act of 13 July 1990 (Dz.U. 1990, No. 53, item 306), which transferred divorce cases to the jurisdiction of provincial (currently – regional) courts. This amendment removed a key category of family cases, which involves a nexus of family law problems, from the jurisdiction of courts specialising in family matters only to reallocate these cases to courts which deal with 'typical' civil cases and are above all guided by the principle of adversarial proceedings[18].

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[12] Cf. J. Kubiak, W. Kasprzycki, *Sądy rodzinne – idea i uregulowania prawne*, Nowe Prawo 7–8(1977), 1049.
[13] J. Kubiak, W. Kasprzycki, *Sądy rodzinne*..., 1050.
[14] M. Andrzejewski, *Rola sędziów*..., 55.
[15] *Sądy rodzinne – kompetencje, zadania, organizacja*, Palestra 4/244(1978), 59 et seq.
[16] J. Kubiak, *Sądy rodzinne: od eksperymentu do oryginalnego rozwiązania*, Zeszyty Naukowe Instytutu Badania Prawa Sądowego 7(1977), 201 et seq.
[17] For a discussion on then-proposed scope of jurisdiction of family courts, cf. F. Zedler, *Sądy rodzinne. Wybrane zagadnienia organizacyjne i procesowe*, Warszawa, 1984, 15 et seq.; F. Zedler, *Z rozważań nad kompetencją sądów w sprawach rodzinnych*, Ruch Prawniczy Ekonomiczny i Socjologiczny 3(1980), 165 et seq.; for a further discussion on the introduction of the family justice system in Poland, cf. also M. Bańkowska, *XX-lecie sądownictwa rodzinnego w Polsce*, Przegląd Sądowy 4(1999), 131–136; M. Arczewska, *Historia i organizacja sądów rodzinnych w Polsce*, Problemy Opiekuńczo–Wychowawcze 1(2007), 49–56; M. Arczewska, *Społeczne role sędziów rodzinnych*, Warszawa, 2009, 70–76.
[18] The amendment has been widely criticized in scholarly writings: cf. W. Stojanowska, *Rozwód a ochrona rodziny i dziecka – wybrane zagadnienia*, Rodzina i Prawo 7–8(2008), 6 et seq.; T. Sokołowski [in:] T. Smyczyński (ed.), *System Prawa Prywatnego. Tom 11. Prawo rodzinne i opiekuńcze*, Warszawa, 2014, 726;

The principle of the uniformity of the family justice system has also been departed from at the organizational level. The Act of 18 August 2011 Amending the Act on the System of General Courts (Dz.U. 2011, No. 203, item 1192), abolished the principle of the obligatory creation of family and juvenile divisions in district courts. The most recent reform of the courts system, implemented by the Act of 20 July 2018 (Dz.U. 2018, item 1443), introduced an even more flexible model of organization of general courts, making the creation of *all* types of divisions optional. These changes, resulting, among other things, from the need to align the organizational structure of courts with the availability of personnel, should be complemented by legislative arrangements ensuring that family matters are heard by specialized courts (judges).

Taking into account the above developments, at present, the system of family justice in Poland comprises organizationally separate family and juvenile divisions of district courts, which hear family matters in the first instance, and a network of 'auxiliary bodies' of the family court, i.e. court-appointed family support officers (*kurator sądowy*) and consultative teams of court experts[19].

The above-mentioned trends in the functioning of the family justice system in Poland, namely halting or even reversing the development of this concept, have resulted in numerous proposals being submitted over the years for legislative reforms aimed at returning to the original principles of the family justice system. These proposals have come from, in particular, the Polish community of family judges, represented by two professional organizations: the Association of Family Judges 'Pro Familia' and the Association of Family Judges in Poland[20]. The annual congresses of these associations are an opportunity for adopting resolutions that define the desired direction of legislative amendments in the field of organization and operation of the family justice system. In the last five years, the following postulates have been put forward (some repeatedly)[21]:

1. Specialized family divisions and judges should be appointed in general courts of all levels.
2. Judges should have access to professional education courses in psychiatry; doctors should be able to enrol in courses in child and adolescent forensic psychiatry.
3. Family judges should be assessed in terms of the efficiency of adjudication in family matters; such efficiency should be evaluated on the basis

a critical assessment of the changes in jurisdiction to hear divorce cases based on the results of empirical studies, cf. M. Domański, *Oddalenie powództwa o rozwód w sprawach, w których małżonkowie mieli wspólne małoletnie dzieci w świetle orzecznictwa sądów powszechnych*, Prawo w Działaniu 14(2013), 192 et seq.; M. Domański, *Orzekanie o pieczy naprzemiennej w wyrokach rozwodowych*, Prawo w Działaniu 25(2016), 146; M. Domański, *Powierzenie wykonywania władzy rodzicielskiej jednemu z rodziców w wyroku rozwodowym*, Prawo w Działaniu 21(2015), 55 et seq.

[19] Discussing aspects related to the functioning of these bodies goes far beyond the scope of this paper. However, it should be noted that these aspects are no less important for the operation of family justice as a system.

[20] The views of family judges on the functioning of the family justice system and their role in this system have already been explored by legal scholars. Cf. E. Holewińska-Łapińska, *Wyniki badań opinii sędziów o przedstawionym w „Zielonej księdze" usytuowaniu prawa rodzinnego w przyszłej kodyfikacji*, Zeszyty Prawnicze UKSW 8.1(2008), 297 et seq.; M. Arczewska, *Społeczne role sędziów rodzinnych – wyniki badań własnych*, Rodzina i Prawo 3(2007), 9 et seq.; M. Arczewska, *Społeczne role…,* n. 17, 137 et seq.

[21] The list of these proposals has been compiled on the basis of resolutions adopted at the end of annual congresses of the Association of Family Judges in Poland, on 18 September 2013, 25 September 2014, 10 September 2015, 22 September 2016, and 20 September 2017.

of the duration of proceedings, taking into account the particularities of a given case. This assessment should include the conduct of cases in enforcement proceedings.

4. New rules for horizontal promotion of distinguished family judges should be developed; these new rules should co-exist with the existing procedures for assessing the qualifications of judges for the purposes of their promotion.
5. The process of reducing the number of judicial posts in the family justice system should be stopped.
6. A robust opposition should be raised against the trends of 'administrativization' of family law, restricting the jurisdiction of family courts, and imposing restrictions on the unconstrained and independent resolution of family cases.
7. The ongoing cooperation between family courts and institutions and organizations providing assistance, support and protection for the family and the child should be extended and strengthened.
8. The responsibilities and powers of authorities and institutions cooperating with the family justice system, and in particular the responsibilities and powers of court-appointed family support officers related to the enforcement of judicial decisions should be clearly defined, and day-to-day cooperation in this area should be expanded and intensified.
9. The laws governing the creation and functioning of consultative teams of court experts as well as and selection of their staff should be amended in order to ensure that family courts have access to effective and meaningful diagnostic assistance in the proceedings pending before them.
10. A separate Section with provisions on enforcement proceedings in guardianship and custody matters should be introduced into the Code of Civil Procedure.
11. A new comprehensive juvenile justice regulation, aligned with current social realities and EU standards, should be introduced.
12. The procedural rules applying to the enforcement of parental contact orders should be amended in order to improve their effectiveness.
13. The procedures concerning maintenance payments should be simplified.
14. Provisions regarding interim relief proceedings in family matters should be amended to better address the specific nature and features of these matters and to streamline the conduct of family cases at this stage as well as to prevent protraction.
15. An effective, centralized system for the referral of juveniles to psychiatric hospitals or other appropriate medical facilities should be put in place.
16. The Sober Upbringing and Alcoholism Prevention Act should be amended with respect to family courts' authority to order mandatory addiction treatment.
17. The obligation of sobriety and the consequences of a failure to comply with that obligation by pregnant women should be regulated by statute.
18. Social assistance centres should be obliged to effectively identify candidates for guardians of persons declared legally incapacitated.

19. Separate procedural provisions for cases falling within the scope of 'medical' legislation should be introduced.
20. Mediation in family and juvenile cases should be promoted, both before and after a case is referred to a court.
21. The Family and Guardianship Code should be maintained as a standalone codification.

The above proposals also contain a diagnosis of how the family justice works in Poland. Moreover, the proposals refer to a variety of aspects of family justice: they concern structural issues, they are connected with specific jurisprudential problems that must be addressed by the legislator, and they also refer to a policy pursued by the Ministry of Justice in respect of the organization of general courts. Although all these problems ultimately affect the quality of adjudication in family matters, given the purpose of this paper, which is to define the basic principles of a reform of the family justice system, attention should be paid mainly to the structural aspects, bearing in mind, however, that even a perfectly organized family justice system may prove ineffective without appropriate procedural regulations or a proper personnel policy.

In view of the abovementioned risks to the system of judicial protection of family rights, the original principles guiding the creation of the family justice system, its evolution to date, as well as the proposals put forward by scholars and family judges, one should identify the following areas of desired structural changes.

The key objective of the reform should be to separate the family justice system in organizational terms. At present, one should acknowledge that it would be greatly difficult to create a dedicated and independent system of family courts, as is the case with military courts. This option appears impractical because of the considerable problems that would be likely to affect the organization (especially staffing) and jurisdiction of such courts: some of the cases handled by guardianship courts are closely related to civil law, both property law and personal status law. On the other hand, the most appropriate approach is to transfer exclusive jurisdiction over family matters to special family and juvenile divisions of general courts. The family and juvenile divisions should be established in courts of first and second instance, i.e. district and regional courts[22]. Such a structural arrangement is crucial for achieving the purpose of the family justice system, which is to attain an appropriate level of professionalism of judges in the areas of competence essential for hearing family cases (e.g. psychology, pedagogy, social rehabilitation). Involving family divisions in the processing of family cases in both instances would be beneficial for the purposes of judicial review, whereas the current system, in which decisions of specialized family courts are usually reviewed by 'ordinary' civil

[22] This proposal was made by, among others, the Chief Justice of the Polish Supreme Court, who, recognizing the particular professional challenges for family judges, advised that the establishment of specialized family divisions be taken into consideration, also in regional courts; cf. *Pierwszy Prezes Sądu Najwyższego, Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie*, Warszawa, 2015, 44–45, http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki-w-prawie-2015.pdf (accessed on 17 January 2019); and also *Pierwszy Prezes Sądu Najwyższego, Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie,* Warszawa, 2016, 49–50, http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki-w-prawie-2016.pdf (accesed on 17 January 2019).

courts, should be assessed as inconsistent and impractical. The creation of family divisions in both instances would also create realistic promotion opportunities for family judges sitting in district courts, who could make full use of their expertise to advance their professional careers[23].

The aforementioned reforms should be accompanied by abolition of the appellate jurisdiction of courts of appeal in family cases. Due to their position within the court system, courts of appeal are unable to adjudicate in family cases in a fully functional manner, i.e. in permanent cooperation with auxiliary bodies of the family courts (family support officers, consultative teams of court experts). The establishment of family and juvenile divisions in district and regional courts should therefore be accompanied by the submission of all family matters to the jurisdiction of district courts as courts of first instance. Transfer of divorce and separation proceedings to these courts poses a serious organizational challenge and could therefore be carried out over a longer period of time, which would be required for a readjustment of the organizational and staffing resources within the system of general courts. However, this jurisdictional rearrangement clearly has merit as no tangible benefits are associated with divorce cases being handled by regional courts. There is no evidence that regional courts ensure a more professional assessment of family law questions, demonstrated by e.g. a reduction of the number of divorces. On the contrary, the empirical studies of judicial practice mentioned earlier suggest that in deciding on family rights, civil divisions of regional courts often rely heavily on the principle of adversarial proceedings, a feature characteristic of 'typical' civil cases, which adversely affects the quality of adjudication on issues such as the parental authority of divorcing parents.

The organizational separation of the family justice system must be coupled with the creation of mechanisms ensuring an adequate level of competence of judges hearing family and juvenile matters[24]. Currently, the obligation for judges to continuously improve their professional qualifications results from Article 82a of the Act of 27 July 2001 on the System of General Courts (Dz.U. 2018, item 23, as amended – hereinafter referred to as the 'Courts Act'). This general obligation is imposed on all judges and does not require development courses to be taken on a regular basis. There is no continuing development regulation specifically designed for a given profile of judicial activities. Improving the qualifications of family judges therefore depends on their commitment and the educational offer presented to them, in particular by the National School of the Judiciary and Public Prosecution as the provider of the relevant professional and continuing education services (Article 2, Article 15a et seq. of the National School of the Judiciary and Public Prosecution Act of 23 January 2009, Dz.U. 2018, item 624, as amended). Arguably, a proposal to introduce the requirement of field-specific education (a degree in psychology or pedagogy) for family judges seems excessive. A family judge does not need to have the professional skills of an expert witness, but should have the ability to assess

[23] M. Arczewska, *Społeczne role*…, n. 20, 22.

[24] This issue has been repeatedly raised in scholarly writings over the years. Cf., e.g. F. Zedler, *Sądy rodzinne*…, n. 17, 40–45; M. Arczewska, *Społeczna role*…, n. 20, 20–21; M. Arczewska, *Społeczne role*…, n. 17, 111–117; E.Holewińska-Łapińska, *Wyniki badań*…, n. 20, 299; cf. also the argument raised by M. Andrzejewski, who puts a greater emphasis on support for, and the development of, expert institutions assisting family courts: M. Andrzejewski, *Rola sędziów*…, n. 2, 59.

evidence (which has special character in family cases) and should know how to receive such evidence and how to select appropriate measures that interfere with family rights (e.g. the hearing of a child) as well as be familiar with social welfare institutions and foster care systems, services provided by NGOs, etc. In this context, the best course of action is, arguably, to set up a system of advanced courses dedicated to family judges, the completion of which would be required from all judges sitting in family and juvenile divisions[25]. Such courses would include selected topics related to the family judge's working methodology as well as developmental and educational psychology, pedagogy, psychiatry, social rehabilitation, social welfare system, and foster care system. The organization and delivery of the courses may be entrusted to the National School of the Judiciary and Public Prosecution through an amendment to the National School of the Judiciary and Public Prosecution Act. The requirement of completing continuing education courses may be imposed on family judges by way of an amendment to the Courts Act.

The particular character of work in a family court, which means being constantly involved in solving problems affecting families, is a significant psychological burden for judges, who themselves need special support. Such support should ensure that professional standards in the work of judges are maintained, their skills are enhanced, and that judges are protected against professional burnout; this support should also enable judges to acquire self-assessment and problem identification skills and to strengthen their communication skills. All these goals can be achieved through supervision, provided on an individual or group basis. At this point one should recall the experience of the Ministry of Family, Labour and Social Policy, which implemented a programme of supervision for social workers. This supervision is envisaged in Article 121a of the Social Welfare Act of 12 March 2004 (Dz.U. 2018, item 1508, as amended) and in an executive regulation issued on the basis of Article 121a thereof. The model of supervision provided for in these normative acts, together with a definition of its objectives, may serve as an inspiration for the reform of family justice. Following the example of the supervision scheme for the social welfare system, the implementation of a similar system for family judges should start with the employment of a sufficient number of supervisors to support the judges of all family and juvenile divisions in Poland. A system of professional qualifications and training for supervisors should therefore be established. As in the case of the aforementioned legislation, the specifics of a supervision system may be laid down in an executive regulation. Creating the opportunity to undergo supervision for judges requires an amendment to the Courts Act.

As has already been mentioned, a reform of the family justice system should be accompanied by the Ministry of Justice's organizational efforts in the area of staffing policy or a workload assessment system. These efforts should take into account the unique factors specific to the work of a family judge (e.g. enforcement proceedings in guardianship and custody cases), which are absent in other areas of general courts' judicial activity[26].

[25] M. Arczewska formulated this proposal in a similar way in M. Arczewska, *Społeczne role*…, n. 17, 21.

[26] It is worth pointing out that during the period when the family justice system was introduced in Poland, the time-consuming nature of a family judge's work was recognized as a significant burden, cf. M. Arczewska, *Społeczne role*…, n. 20, 75–76.

Another crucial factor is good organization of the work of auxiliary bodies of the family court, i.e. court-appointed family support officers and consultative teams of court experts[27]. Optimum working conditions for these bodies must be ensured to allow them to focus on fulfilling their assigned tasks rather than on bureaucracy. It should be strongly emphasized that without efficient and competent auxiliary bodies, the family court is unable to perform its functions.

The foregoing directions for a reform of the system of general courts pose a major legislative and organizational challenge. In particular, it could be difficult to make all such changes in one step. As already mentioned, in the 20th century, when laws establishing the system of family justice in Poland were introduced, the method of gradual implementation of this concept was used, sometimes on an experimental basis. Nowadays, the constitutional principles of the rule of law arguably prevent the implementation of any experimental reforms in the family justice system. However, it is possible to establish appropriate transitional periods to allow for a gradual introduction of changes. On the other hand, any such difficulties should stand in the way of a reform, which is presently necessary to protect family rights and oppose the trends outlined above.


## Abstract

**Jerzy Słyk, *Family Justice in Poland: An Outline of the Problem Situation and the Optimum Reform Direction***

*The paper discusses the development and functioning of the family justice system in Poland and the necessary legislative amendments in this area. At the outset, the author describes the most efficient mechanisms for the protection of family rights, pointing to judicial protection as the most appropriate option as compared to administrative law measures. Next, the discussion moves on to the origins and evolution of legislative measures that created the family justice system. At this point, legal changes that undermine the original structural concept of family justice are noted. An outline of proposals for family justice reform, made by the community of family judges, is also presented. The findings presented in the paper serve as a basis both for the identification of the key areas in need of legislative amendments and for the definition of a framework for reform proposals.*


***Keywords:*** *Family justice system, family courts, family law, protection of the family*


## Streszczenie

**Jerzy Słyk, *Sądownictwo rodzinne w Polsce – zarys sytuacji problemowej i optymalny kierunek reformy***

*W artykule omówiono problematykę tworzenia i funkcjonowania sądownictwa rodzinnego w Polsce oraz niezbędnych zmian legislacyjnych w tym zakresie. W pierwszej kolejności zostało omówione zagadnienie optymalnych mechanizmów ochrony praw rodzinnych. Jako najwłaściwszą wskazano ochronę sądową, przeciwstawiając ją instrumentom administracyjnoprawnym. Następnie została omówiona geneza i ewolucja rozwiązań prawnych tworzących system sądownictwa rodzinnego. Wskazano również zmiany prawne przeciwstawiające się tej koncepcji ustrojowej. Przedstawiony został też zarys postulatów de lege*


[27] For a diagnosis of the current problems with regard to consultative teams of court experts, see J. Włodarczyk-Madejska, *Efektywność opiniodawczych zespołów sądowych specjalistów*, Prawo w Działaniu 33(2018), 242 et seq.

*ferenda, zgłaszanych przez środowisko sędziów rodzinnych w omawianym zakresie. Dokonane ustalenia prowadzą do wskazania głównych obszarów niezbędnych zmian legislacyjnych i określenia ramowych propozycji reformy.*

***Słowa kluczowe:*** *sądownictwo rodzinne, sądy rodzinne, prawo rodzinne, ochrona rodziny*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3804

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# Legal Aspects of e-Health and the Reality of the Polish Society[1]**

## 1. PRELIMINARY REMARKS

Current technical, technological and civilization progress is starting to determine legal solutions and social behavior. In recent times, one can observe the dynamic development of new technologies in many areas of modern life. Therefore, it can be said that the current technological progress in a lasting way changes the majority of traditional solutions to modern alternatives, which are supposed to simplify people's lives. The above clearly shows, that there are no things, which can be attributed to the durability or innovation. When defining something as new or old, always, consciously or not, we refer to certain permanent foundations. In this case, the key point of reference is usually time. These remarks refer to majority of social relations occurring in contemporary countries and being an inseparable element of today's life. Medicine could be used as an example. In its traditional form it was a measure of civilizational progress, while, today we witness the implementation of its avant-garde telemedicine/e-health form. Another example are legal contracts. Their traditional forms and ways of concluding begin to cooperate with pioneer possibilities in the form of smart contracts, which, at the level of ideas, are legal relations that can independently function in the digital space without reference to the real world[2]. The last proof of this state of affairs is the general and increasingly common application of artificial intelligence in various areas of

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** The manuscript was submitted by the author on 13 February 2019; the manuscript was accepted for publication by the editorial board on 28 February 2019.

1 One of purposes of this paper is to substantive update of some data contained: B. Oręziak, *Telemedycyna a konstytucyjne prawo do opieki zdrowotnej w kontekście wykluczenia cyfrowego*, Zeszyty Prawnicze 1(20180, 117–141 (in particular: 6. The demand for e-health in Poland and 7. Digital exclusion in Poland).

2 P. Venegas, *Guide to smart contracts. Blockchain examples*, Cambridge, 2017, 5–7; N. Atzei, M. Bartoletti, T. Cimoli, *A Survey of Attacks on Ethereum Smart Contracts* [in:] J. Garcia-Alfaro, G. Navarro-Arribas, H. Hartenstein, J. Hierrera-Joancomarti (eds.), *Data Privacy Management, Cryptocurrensies and Blockchain Technology*, Oslo, 2017, 164–186; C. Schultz, M. Bhatt, *A Numerical Optimisation Based Characterisation of Spatial Reasoning* [in:] J. Alferes, L. Bertossi, G. Governatori, P. Fodor, D. Roman (eds.), *Rule Technologies. Research, Tools and Applications*, New York, 2016, 199–208; B. Kelly, *The bitcoin big bang. How alternative currencies are about to change the world*, New Jersey, 2015, 149–163; Ch. Dennen, *Introducing ethereum and solidity*, New York, 2017, 89–111; I. Bashir, *Mastering Blockchain. Distributed ledgers, decentralization and smart contracts explained*, Birmingham, 2017, 21–23 and 43–44.

human life, in particular under different legal systems. This last statement refers to the discussion on granting legal personality to it[3], and thus making artificial intelligence a legal entity[4].

## 2. CONCEPT OF E-HEALTH

It should be noted that concepts such as 'digital medicine'[5], 'e-Health'[6], 'm-Health'[7], 'telecare'[8] although they accentuate another aspect of the technologies used in health care systems, basically they have a similar meaning as concept of 'telemedicine'[9]. They are all synonymous with the implementation of modern technologies for practical use in medicine. Therefore, all the above concepts will be treated as synonyms in this paper. It's important to note that no act of Polish or international law provides for the legal definition of e-health. For this reason, we must look for the meaning of this concept elsewhere.

The literature indicates that e-health is 'Telemedicine is one way of practicing medicine which may provide opportunities and increase possibilities to effectively use available human and material resources'[10]. Another definition says, that telemedicine is 'the transfer of medical information from one remote place to another, that uses electronic communication to prevent disease, maintain health, ensure and monitor patient health care, educate patients and health care providers, and support healthcare workers from other disciplines. This is a remote medical diagnosis, consultation and treatment that can be used synchronously (in real time) or asynchronously'[11]. Other representatives of the doctrine believe that telemedicine is simply medicine at a distance[12] or medicine at a distance with the use of information and communication technologies data[13]. In this way, the literature understands and describes the concept under examination. It is worth noting that

[3] A. Silverman, *Mind, Machine, and Metaphor. An Essay on Artificial Intelligence and Legal Reasoning. Boulder*, Colorado, 1993, 1; K. Bowrey, *Ethical Boundaries and Internet Cultures* [in:] L. Bently, S. Maniatis (eds.), *Intellectual Property and Ethics*, London, 1998, 36; D. Partridge, *A New Guide to Artificial Intelligence*, New Jersey, 1991, 1.

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[13] M. Maheu, P. Whitten, A. Allen, *E-Health, Telehealth, and Telemedicine: A Guide to Startup and Success*, San Francisco, 2001, 2–4.

the attention of international and non-governmental organizations also focuses on this concept. Therefore, the American Telemedicine Association suggests that 'Telemedicine is the remote delivery of health care services and clinical information using telecommunications technology. This includes a wide array of clinical services using internet, wireless, satellite and telephone media'[14]. While, World Health Organization states that 'Telemedicine is the practice of medical care using interactive audiovisual and data communications. This includes the delivery of medical care, diagnosis, consultation, and treatment, as well as health education and transfer of medical data'[15]. These definitions do not differ far from those suggested by the literature of medical law.

The citation of the above definitions was necessary to show that due to the lack of legal definition of telemedicine, there are various definitions and differences in them taking place. However, the purpose was also to show what always remains in common. That common denominator is the transfer of medical data using information and communication technologies to improve the patient's health. This is the point of telemedicine as well. Thus, at least three basic construction elements of the concept of telemedicine are visible: the transfer of medical data, the use of Information and Communication Technology networks and the improvement of the patient's health. Without any of them one cannot talk about telemedicine in its proper meaning. However, it is not true that each of these elements is equally important. The above specification shows the necessary condition for participation in telemedicine services. The condition is access to Information and Communication Technology networks and this element has a primary character in relation to the others. In addition, the legislature should be required to create a clear, unconditional and precise definition of telemedicine, which would take into account the semantic proposals presented above. This can be both an international and a national legislature.

## 3. THE POTENTIAL OF E-HEALTH

It seems unavoidable to use new technologies as a part of the state health care system. This is confirmed by the European Commission document 'GREEN PAPER on mobile health', which states, 'that the healthcare systems in Europe are facing new challenges such as the ageing of the population and increased budgetary pressure. In this context, e-health could be one of the tools to tackle these challenges by contributing to a more patient-focused healthcare and supporting the shift towards prevention while at the same time improving the efficiency of the system'[16]. On one hand, this shows the enormous potential of an innovative approach to health protection, on the other, the need to consider it in the light of current demographic changes of contemporary societies. Additionally, in accordance with the referenced document: 'E-health solutions can help detect the development of chronic conditions at an early

[14] www.americantelemed.org/main/about/about-telemedicine/telemedicine-faqs (accessed on 4 February 2019).
[15] K. Lops, *Cross-border telemedicine. Opportunities and barriers from an economical and legal perspective*, Rotterdam, 2008, 7.
[16] GREEN PAPER on mobile Health ('mHealth'), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52014DC0219 (accessed on 4 February 2019).

stage through self-assessment tools and remote diagnosis while sharing data with care providers would facilitate timely intervention […] E-health could contribute to a more efficient way of delivering care through better planning, reducing unnecessary consultations and better prepared professionals receiving guidance on treatment and medication […] E-health solutions support the changing role of patients from a rather passive, to a more participative role while enhancing their responsibility over their own health through sensors that detect and report vital signs, and mobile apps that encourage them to adhere to diet and medication. It can also raise citizens' awareness of health issues through easy-to-understand information about their health condition and how to live with it, thus helping them take more informed decisions on their health'[17]. This clearly shows that e-health ideas affect not only the legal solutions, but also human behavior and feelings. Thus, e-health is a challenge for both lawyers and sociologists. In addition, The American Telemedicine Association indicates the main benefits of using modern technologies in medicine:

a. creates value for payers, patients and providers,
b. increased patient access,
c. enhanced reach of healthcare services,
d. reduced cost structure,
e. 24/7 coverage,
f. higher customer satisfaction,
g. reduced cost structure[18].

## 4. BARRIERS TO DEPLOYMENT OF E-HEALTH

Nevertheless, when implementing modern technologies, some problems may arise for practical applications, which seems to be a natural result of changing the existing solutions. The following problems to deployment of e-health are indicated[19]:

a. lack of awareness of and confidence in e-health solutions among patients, citizens and healthcare professionals,
b. lack of interoperability between e-health solutions,
c. limited large-scale evidence of the cost-effectiveness of e-health tools and services,
d. lack of legal clarity for health and wellbeing mobile applications and the lack of transparency regarding the utilization of data collected by such applications,
e. inadequate or fragmented legal frameworks including the lack of reimbursement schemes for e-health services,
f. high start-up costs involved in setting up the e-health systems,
g. regional differences in accessing information and communication technologies services, limited access in deprived areas.

[17] GREEN PAPER…
[18] http://www.americantelemed.org/about/about-telemedicine (accessed on 4 February 2019).
[19] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions eHealth Action Plan 2012–2020 – Innovative healthcare for the 21st century, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0736&from=PL (accessed on 4 February 2019).

This paper will be about the last barrier and its occurrence in Polish society in the context of the right to health. It seems to be a key legal problem, arising at the beginning of the debate on the possibility of deployment of telemedicine into the national order.

## 5. RIGHT TO HEALTH IN POLAND

The basic social conviction regarding the state health care system is universal access to a doctor – a living person[20]. Therefore, it should be emphasized that telemedicine does not aim to dehumanize the health care system, but to support the work of doctors by improving its performance, quality and speed. After all, one of the purposes of telemedicine is to increase the accessibility of health care services. The right to health care protects one of the basic goods of every human being, which is why every person has a very subjective approach to health problems. This subjective approach consists of own ideas about the state called 'health', expectations about the possibility of using health services, own ideas about health protection. However, these numerous ideas and expectations collide with realities and functioning of health care systems. For this reason, discussions on the scope of future changes in this field are extremely important.

The right to health is widely recognized. It includes personal right, that is the right to health protection[21]. On the other hand, the right to healthcare services is a noticeable right, which is a social right. This difference is important because everybody is a beneficiary of a personal law, regardless of any concretization. Whereas the beneficiary of social law is already a person with individualized characteristics (e.g. a citizen of a given country). When it comes to personal right, it should be understood as right that protects the most important goods of every human being, which are immanently connected with human nature and which deserve protection only on the basis of the fact of being human (e.g. the right to life or the right to privacy)[22]. While, social rights are understood as those which indicate what actions should be taken by public authorities for the benefit of the individual, in order to provide material basis for existence in the light of the economic situation of a specific state[23].

The most important legal norm regarding the right to health care is Article 68 of the Constitution of the Republic of Poland. According to the latter provision: '1. Everyone shall have the right to have his health protected. 2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute'[24]. The first of

[20] W. Piątkowski, L. Nowakowska, *System medyczny w Polsce wobec wyzwań XXI w. Perspektywa krytycznej socjologii zdrowia i choroby*, Przegląd Socjologiczny 2(2012), 23.
[21] T. Jasudowicz, *Prawo do zdrowia* [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski (eds.), *Prawa człowieka i ich ochrona*, Toruń, 2010, 491.
[22] P. Sarnecki, *Komentarz do wolności i praw osobistych* [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2002, 1.
[23] B. Banaszak, *Ogólne wiadomości o prawach człowieka* [in:] B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa, 2002, 27; B. Zawadzka, *Prawa ekonomiczne, socjalne i kulturalne*, Warszawa, 1996, 9.
[24] The Constitution of the Republic of Poland of 2 April 1997 (Polish journal of laws Dz.U. No. 78, item 483, as amended; Dz.U. 2001, No. 28, item 319; Dz.U. 2006, No. 200, item 1471; Dz.U. 2009, No. 114, item 946).

them includes the right of everyone to protect their health, and the second the right of citizens to health care services financed from public funds. Thus, the provision of Article 68(1) is a personal right[25] and the provision of Article 68(2) is a social right[26]. Paragraph 2 of Article 68 contains a reference to an ordinary legislation, which determines the scope and conditions of the right to health care. For this reason, the right to health care, as a social right, cannot constitute a direct basis for citizens' claims while the right to health protection guaranteed in paragraph 1 of Article 68, as a personal right, may constitute such a basis[27]. In addition, the right to health alone, without ensuring equality in access to health services, will prove to be an empty intention. Although it seems that difficulties in access to treatment by residents of smaller towns are natural, in particular when it comes to specialized medical care, this inequality should be gradually eliminated. In this case, the Polish Constitutional Court recognized, that 'this is not only formal accessibility, declared by the legal provisions of a program nature, but about the actual availability, constituting the implementation of the right to health protection defined in paragraph 1 art. 68 of the Constitution'[28]. Thus, equalizing opportunities in accessing health services is a particularly important responsibility of public authorities. The use of modern technologies in medicine will result in the equalization of such access. Telemedicine gives you the chance to overcome natural barriers (e.g. lack of staff in healthcare).

This is a purely domestic look, because on the other hand, Poland is obliged to respect the binding upon international law – according to Article 9 of the Constitution of the Republic of Poland. The most important international agreements in this field are: 1) International Covenant on Economic Social and Cultural Rights; 2) Universal Declaration of Human Rights; 3) Charter of Fundamental Rights of the European Union; 4) European Social Charter.

Interestingly, Article 38 of the Charter of Fundamental Rights provides everyone the right of access to preventive health care and to benefit from medical treatment under the conditions established by national laws and practices. Therefore, the European Union guarantees a high level of protection for human health. This provision not only states that the European Union recognizes and respects the right to health care and treatment, but directly guarantees the right to access such services[29]. However, its content introduces a significant limitation by referring to the conditions established in national legislations and practices. So, the European Union "as an addressee of the norm is only obliged to ensure the implementation of claims arising in accordance with the national orders of states, not to define their type and scope"[30]. It is for this reason that the constitutional right to health

[25] K. Ryś, *Konstytucyjne prawo do ochrony zdrowia i prawo do szczególnej opieki zdrowotnej*, https://repozytorium.amu.edu.pl/bitstream/10593/19342/1/Rys_artykul_ZNPK.pdf (accessed on 15 October 2018).
[26] M. Piechota, *Równość a konstytucyjne prawo do ochrony zdrowia. Uwagi dotyczące obywateli Unii Europejskiej* [in:] M. Zubik, A. Paprocka, R. Puchta (eds.), *Konstytucja w dobie europejskich wyzwań*, Warszawa, 2010, 137–142.
[27] M. Piechota, *Konstytucyjne prawo do ochrony zdrowia jako prawo socjalne i prawo podstawowe*, Roczniki Administracji i Prawa 12(2012), 93–104.
[28] Polish Constitutional Court's judgment of 7 January 2004, K 14/03, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20040050037/T/D20040037TK.pdf (accessed on 5 February 2019).
[29] A. Nußberger, *Artikel 35 GRCh Gesundheitsschutz* [in:] P.J. Tettinger, K. Stern (eds.), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, München, 2006, 586–594.
[30] *Ibid*.

**Table**
The basic legal norms of health care in Poland

| | **Health care legal norm** |
|---|---|
| The Constitution of the Republic of Poland | Article 68:<br>1. Everyone shall have the right to have his health protected.<br>2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute.<br>3. Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age.<br>4. Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.<br>5. Public authorities shall support the development of physical culture, particularly amongst children and young persons. |
| Universal Declaration of Human Rights[1] | Article 25:<br>1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<br>2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. |
| International Covenant on Economic, Social and Cultural Rights[2] | Article 12:<br>1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,<br>2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:<br>a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;<br>b) The improvement of all aspects of environmental and industrial hygiene;<br>c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;<br>d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness. |
| Charter of Fundamental Rights of the European Union[3] | Article 35:<br>Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities. |
| European Social Charter[4] | Article 12:<br>With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:<br>1. to remove as far as possible the causes of ill-health;<br>2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;<br>3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents. |

[1] Universal Declaration of Human Rights, http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (accessed on 5 February 2019).
[2] International Covenant on Economic, Social and Cultural Rights (Dz.U. 1977, No. 38, item 169).
[3] Charter of Fundamental Rights of the European Union (OJ C 326, 26 October 2012, p. 391–407).
[4] European Social Charter (Dz.U. 1999, No. 8, item 67).

Source: Author's own study.

care provided for in Article 68 of the Constitution of the Republic of Poland is extremely important, because, generally, international law is not a direct condition for its realization – it is an indirect basis for citizens' claims, because it must be implemented into national law[31].

## 6. THE DEMAND FOR E-HEALTH IN POLAND

It should be remembered that, as a rule, the largest group of people who benefit from health services are citizens over the age of 65 and they must be regarded as the most interested in the technological novelties proposed in e-health. For this reason, presenting the demographic forecast of Polish society will allow to effectively determine the demand for health services or, in the future, telemedicine services. The most important will be to characterize the aging process of Polish society, which will definitively determine the planned demand for the services in question.

The aging of the population is a global and irreversible process, strongly diversified regionally[32]. Among European countries, at this moment, Poland is a demographically 'young' country, but the aging process of the Polish population has been observed for years. In 2013, the median age of Poles was 37.4 years for men and 40.9 for women, while in 1990 it was lower by 6.5 years for men and 7.2 years for women[33]. The situation is expected to change drastically in 2050[34]:

a) Population projection for Poland: around 34 million;
b) Projected changes in polish population size 2013–2050: -10%;
c) Median age of Polish population: 49,5;
d) Polish population aged 65 and more: 30,2%;
e) Polish population aged 80 and more: 9,6%.

This means that in Poland in 2050 there will be 2 people in the age lower than 65 years for one person in the age of 65 years or older. While today, proportion is 6:1[35]. Such dramatic forecasts clearly show that the traditional healthcare system is likely to become inefficient. In particular, if it is noticed that today there are 134 865 active doctors in Poland[36] – there are 2,29 doctors per 1000 people[37]. Therefore, an increasing burden for doctors should be expected – currently from 1,000 people only 140 are over the age of 65, while in 2050 from 1,000 people as many as 333 will be over the age of 65. However, the most dramatic data was created by the United Nations in the context of 2100[38]:

[31] M. Shaw, *Prawo międzynarodowe*, Warszawa, 2011, 107–143.
[32] A. Abramowska-Kmon, *O nowych miarach zaawansowania procesu starzenia się ludności*, Studia Demograficzne 1(2011), 3–22.
[33] GUS: Population Projection (http://stat.gov.pl/obszary-tematyczne/ludnosc/prognoza-ludnosci/prognoza-ludnosci-na-lata-2014–2050-opracowana-2014-r-,1,5.html – accessed on 12 February 2019).
[34] Eurostat EUROPOP 2013 demographic projections (http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database – accessed on 12 February 2019).
[35] GUS: Population Projection (http://stat.gov.pl/obszary-tematyczne/ludnosc/prognoza-ludnosci/prognoza-ludnosci-na-lata-2014–2050-opracowana-2014-r-,1,5.html – accessed on 12 February 2019).
[36] NIL: Zestawienie liczbowe lekarzy i lekarzy dentystów wg przynależności do okręgowej izby lekarskiej i tytułu zawodowego z uwzględnieniem podziału na lekarzy wykonujących i nie wykonujących zawodu (https://www.nil.org.pl/__data/assets/pdf_file/0007/128527/Zestawieni e-nr-01.pdf – accessed on 12 February 2019).
[37] WHO: Density of physicians (total number per 1000 population, latest available year) (http://www.who.int/gho/health_workforce/physicians_density/en/– accessed on 12 February 2019).
[38] UN: World Population Prospects 2017. https://esa.un.org/unpd/wpp/Graphs/Demo graphic Profiles/– accessed on 12 February 2019).

a) Population projection for Poland: around 22 million;
b) Projected changes in polish population size 2017–2100: -42,1%;
c) Median age of Polish population: around 60;
d) Polish population aged 65 and more: 31,8%;
e) Polish population aged 70 and more: 27,3%.

While data created by the Statistical Office of the European Union[39] in the context of 2050 may leave some field of interpretation that can be used by proponents of traditional solutions, the data of the United Nations[40] clearly determine that the traditional health care system will not endure the test of the coming times. If modern countries – including Poland – do not introduce new solutions in the field of state health care system, then a disaster awaits us. One thing is for sure, deployment of telemedicine solutions, as a cheaper, faster, more common and safe method of providing medical services[41], will be necessary as traditional solutions will cease to function properly[42].

## 7. DIGITAL EXCLUSION IN POLAND

As has already been noticed, some barriers occur in e-health deployment – see: 4. Barriers to deployment of e-health. This study approximates a specific problem regarding the relationship between telemedicine and the right to health care in the context of the phenomenon of the so-called digital exclusion. For this reason, its further part will be devoted exclusively to the information barrier, i.e. the lack of public access to information and communication technologies networks.

Digital exclusion, sometimes also called a digital divide, consists in determining the difference between those people or societies that have access to information and communication technologies – ICT, and those that do not have such access[43]. Thus, digitally excluded people are all who can be said to be beyond the reach of ICT[44]. This phenomenon is relevant from the point of view of telemedicine solutions, which one of the main purposes is to equalize opportunities in access to health care services[45] (EFTA 2010). In 2017 Poland had Internet access in households (in% of total households) amounted to 81.9%, with 77.6% being broadband Internet

[39] Eurostat EUROPOP 2013 demographic projections (http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database – accessed on 12 February 2019).
[40] UN: World Population Prospects 2017 (https://esa.un.org/unpd/wpp/Graphs/Demo graphic Profiles/– accessed on 12 February 2019).
[41] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on telemedicine for the benefit of patients, healthcare systems and society (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0689&from=PL – accessed on 12 February 2019).
[42] E. Kwiatkowska, *Internet rzeczy. Czy będą nas leczyć komputery?*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 5(2016), 19–32.
[43] K. Wilson, J. Wallin, Ch. Reiser, *Social Stratification and the Digital Divide*, Social Science Computer Review 21(2003), 133–143.
[44] L. Porębski, *Wykluczenie cyfrowe i co dalej? Nowe technologie jako katalizator podziałów społecznych i bodziec dla cywilizacyjnego rozwoju*, Acta Universitatis Lodziensis Folia Sociologica 50(2014), 89–106.
[45] EFTA: EFTA Surveillance Authority Decision No 34/10/COL of 3 February 2010 amending, for the 79th time, the procedural and substantive rules in the field of State aid by introducing a new Chapter on the application of State aid rules in relation to rapid deployment of broadband networks (https://publications.europa.eu/pl/publication-detail/-/publication/5e284cfd-e061–45c9-b695–174bb1d3a6fe/lang uage-en – accessed on 12 February 2019).

access[46]. This is promising, given the growth in Internet access by 5.1% compared to 2015 and by more than 10% compared to 2013[47]. However, the main reason for the lack of access to ICT in households in Poland in 2017 was the lack of the need to use the Internet – 67,6%, which in relation to 2016 decreased by 3%. Other reasons were: lack of skills – 54,2%, too high hardware costs – 26,9%, too high access costs – 18,7%, unwillingness to the Internet – 10,9%, or privacy and security considerations – 3,6%[48].

After analyzing the scale and reasons for the occurrence of the so-called digital exclusion, one should answer the question, what is the main criterion for the appearance of this phenomenon. In other words, what determines the lack of access to the Internet by a specific member of Polish society. The report 'Digital exclusion in Poland' directly shows that such a basic criterion is the age of the person[49] (KS 2015). This situation should not come as a surprise, because the problems of older people regarding assimilation with new technologies seem to be natural and difficult to overcome. It turns out that if we look at Polish society through the prism of age, it can be seen that as many as 97% of people aged 18 to 24 have access to the Internet, while between 55 and 64 years it is only 39%. However, dramatic data concerns people aged 65 and above, because only 15% of them have access to ICT networks, which means that it is this social group that is most affected by the phenomenon of the so-called digital exclusion. This fact is very worrying.

## 8. FINAL REMARKS

Summing up, it is worth recalling the four issues discussed in this study. Firstly, according to its sense and essence, telemedicine means the transfer of information and communication technologies data in order to improve the patient's health. This indicates that information and communication technologies are a necessary condition for the proper functioning of telemedicine. Secondly, it can be expected that public authorities will be able to ensure effective, universal and equal access to treatment regardless of the financial situation of public health care users. Thirdly, forecast for the demand for health services in Poland carried out on the basis of relevant documents. It clearly indicates that the increasing group of Poles that are 65 years old or older is the most interested in access to the medical services in question. With such a large scale of changes that await Polish society, it is possible, with all responsibility, to speak about the demand for telemedicine services in Poland. Fourthly, the fact that there are some problems with access to information and communication technology network in Poland, in other words, this refers to the phenomenon of so-called digital divide. The conducted analysis shows that the general access to the Internet in Poland

[46] GUS: Społeczeństwo informacyjne w Polsce w 2017 roku (https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5497/2/7/1/spoleczenstwo_informacyjne_w_polsce_w_2017.pdf – accessed on 12 February 2019).

[47] GUS: Społeczeństwo informacyjne w Polsce w 2016 roku (https://stat.gov.pl/files/gfx/por talinformacyjny/pl/defaultaktualnosci/5497/2/6/1/si__sygnalna_2016.pdf – accessed on 12 February 2019).

[48] GUS: Społeczeństwo informacyjne w Polsce w 2017 roku (https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5497/2/7/1/spoleczenstwo_informacyjne_w_polsce_w_2017.pdf – accessed on 12 February 2019).

[49] KS: Wykluczenie cyfrowe w Polsce (https://www.senat.gov.pl/gfx/senat/pl/senatoprac owania/133/plik/ot-637_internet.pdf – accessed on 12 February 2019).

is at a satisfactory level, which cannot be said about specific social groups. It turns out that access to information and communication technology networks decreases inversely in relation to age, which unfortunately seems to be a natural effect of the difficulties for older people in adaptation to modern solutions. In particular, it should be remembered that those most interested in accessing health services are at the same time most affected by the phenomenon of the so-called digital divide.

All these four issues should be considered when deployment telemedicine solutions in Poland happens. Nevertheless, during this process, a troublesome problem arises because: 1) Telemedicine, by definition, requires access to information and communication technology networks; 2) The right to health care requires equality in access to health services; 3) People over the age of 65 are the most interested in accessing medical care; 4) People over the age of 65 are most affected by the phenomenon of the so-called digital exclusion. For all these reasons, it seems legitimate to ask how to regulate telemedicine in Poland in the light of the existing phenomenon of the so-called digital exclusion without violating the right to health care and how to create an optimal legal model of telemedicine in Poland.

Taking all arguments into consideration, one can come to the right conclusion that telemedicine is no longer just an option, it has become a necessity. Because the words of Victor Hugo will always remain valid: 'All armies of the world gathered together cannot stop the progress that has just come'[50].


## Summary

**Bartłomiej Oręziak, *Legal Aspects of e-Health and the Reality of the Polish Society***

*This paper discusses issues relating to the possibility of implementing telemedicine solutions within the framework of the Polish healthcare system financed from public funds. Firstly, as part of introductory remarks, an outline of technical, technological and civilizational progress, as well as its correlation with the law and social behaviours is made. Secondly, due to the lack of a legal definition of e-health, the definitions proposed in literature and created by selected international and non-governmental organizations are recalled. In this way the essence of this concept is revealed. Thirdly, based on relevant international documents, the overall potential of e-health is presented. This shows the various benefits that the use of avant-garde solutions within the healthcare system can bring. Fourthly, a catalogue of the possible barriers to the deployment of e-health solutions is presented. From the presentation, it becomes clear that such processes will not run seamlessly. Fifthly, an outline of the right to healthcare is provided on the basis of instruments of national and international law, indicating the most important elements of the right. Sixthly, a forecast of the demand for telemedicine services in Poland is presented. Seventhly, the sociological concept of the so-called digital exclusion is introduced and the occurrence of this phenomenon in the Polish society is discussed. The paper ends with a brief summary, in which the author considers all the arguments presented and offers his own position and de lege ferenda proposals for the Polish legislator.*


***Keywords:*** *e-health, m-health, telemedicine, law of new technologies, Polish society, digital exclusion*

[50] M. Rath, *Dlaczego zwierzęta nie dostają zawałów serca tylko my ludzie*, Almelo, 2005, 2.

## Streszczenie

**Bartłomiej Oręziak, *Prawne aspekty e-zdrowia a realia polskiego społeczeństwa***

*Niniejszy artykuł omawia kwestie związane z możliwością wdrożenia rozwiązań telemedycznych w ramach polskiego systemu opieki zdrowotnej finansowanego ze środków publicznych. Po pierwsze, w ramach uwag wprowadzających dokonano zarysu postępu technicznego, technologicznego i cywilizacyjnego oraz jego korelacji z prawem oraz zachowaniami społecznymi. Po drugie, z uwagi na brak definicji legalnej e-zdrowia zostały przywołane definicje proponowane przez literaturę oraz stworzone przez wybrane organizacje międzynarodowe oraz pozarządowe. Zobrazowało to istotę tego pojęcia. Po trzecie, bazując na odpowiednich dokumentach międzynarodowych, został przedstawiony ogólny potencjał e-zdrowia. Pokazało to spektrum korzyści, jakie mogą płynąć z zastosowania awangardowych rozwiązań w ramach systemu ochrony zdrowia. Po czwarte, został przedstawiony katalog barier mogących wystąpić podczas wdrażania rozwiązań z zakresu e-zdrowia. Powyższe uzmysłowiło, że tego rodzaju procesy nie będą przebiegać bezproblemowo. Po piąte, dokonano zarysu prawa do opieki zdrowotnej za pomocą aktów prawa krajowego i międzynarodowego, wskazując na najważniejsze jego elementy. Po szóste, zaprezentowano prognozę zapotrzebowania na świadczenie telemedyczne w Polsce. Po siódme zaś, przybliżono socjologiczne pojęcie tzw. wykluczenia cyfrowego oraz występowanie tego zjawiska w polskim społeczeństwie. Artykuł kończy się zwięzłym podsumowaniem, w ramach którego autor bierze pod uwagę wszystkie zaprezentowane argumenty i wysuwa swoje stanowisko oraz postulaty de lege ferenda dla polskiego ustawodawcy.*


***Słowa kluczowe:*** *e-zdrowie, m-zdrowie, telemedycyna, prawo nowych technologii, polskie społeczeństwo, wykluczenie cyfrowe*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3805

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# Recidivism of Juvenile Offenders**

In recent years, the phenomenon of youth crime has attracted increasing attention among criminologists, psychologists, and educators. This is a difficult social problem, described in criminology as a 'social pathology'[1]. The increasingly young age of perpetrators and the gravity of their crimes are becoming noticeable factors. In addition, over the last few years there has been a significant increase in crimes committed by juvenile inmates of educational and reformatory institutions[2]. According to the laws in force, non-adults are only subject to legal measures if they commit a 'punishable act' or show signs of antisocial and delinquent behaviour. The purpose of this paper is twofold. On the one hand, it aims to outline certain issues related to youth crime. On the other hand, the authors present the findings of a recent study concerning the history of juvenile delinquency among a group who subsequently acquired the status of state witness. Until recently, no such studies had been carried out, and the conclusions from the study may prove useful for policies formulated to tackle crime.

Pursuant to the Juvenile Justice Act[3], a juvenile is defined as a person who:

1. is under the age of 18 (this age limit is used for the purposes of prevention and addressing antisocial and delinquent behaviour);
2. attained the age of 13 but is under 17 (the limit used for procedural purposes in cases brought against juvenile offenders, or 'perpetrators of punishable acts');
3. is under the age of 21 (this age limit is used for the purposes of the execution of reformatory or corrective measures)[4].

The status of a juvenile appearing before a criminal justice authority is, to an extent, similar to that of a suspect in pre-trial criminal proceedings ('preliminary

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** The manuscript was submitted by the authors on 2 January 2019; the manuscript was accepted for publication by the editorial board on 7 March 2019.

1 K. Tsirigotis, E. Lewik-Tsirigotis, B. Baster, *Przestępczość nieletnich – główne teorie wyjaśniające zjawisko*, Pedagogika Rodziny 2–3(2012), 83–84, www.profnet.org.pl (accessed on 12 February 2019).

2 R. Mysior, *Przestępczość nieletnich jako problem społeczny – cz. II,* Remedium 8(2013).

3 Juvenile Justice Act of 26 October 1982 (consolidated text: Polish journal of laws Dz.U. 2018, item 969, 'JJA').

4 Art. 1(1) JJA.

proceedings'), or that of a defendant in proceedings before a criminal court ('judicial proceedings')[5]. There is no doubt, however, that the juvenile's liability is much more limited when compared to the liability imposed in criminal proceedings. Under the Polish criminal law, criminal liability may be imputed to perpetrators who had attained the age of 17 at the time they committed a prohibited act[6]. A perpetrator who has not reached that age is a juvenile offender[7]. Such a perpetrator may be held criminally liable only exceptionally, if a competent court so decides[8]. The above rule is subject to an explicit legislative proviso according to which criminal liability may be imputed to a juvenile only if the juvenile has attained 15 years of age and only in cases of the offences enumerated in Article 10(2) CC, namely:

1. an attempt on the life of the President of Poland (Article 134 CC);
2. manslaughter (Article 148(1)–(3) CC);
3. grievous bodily harm (Article 156(1) or (3) CC);
4. causing a dangerous mass event (Article 163(1)–(3) CC);
5. piracy (Article 166 CC);
6. offences against traffic safety (Article 173(1) or (3) CC);
7. rape (Article 197(3) or (4) CC);
8. physical assault (Article 223(2) CC);
9. hostage taking (Article 252(1) or (2) CC);
10. robbery (Article 280 CC)[9].

It should be noted at this point that there is controversy related to divergent interpretations of whether or not the rules of the Criminal Code provide sufficient grounds for holding a juvenile criminally responsible for instigating, aiding and abetting in, directing or instructing the commission of the offence defined in Article 148(1) CC. Ł. Pohl notes this problem and has attempted to analyse it in a structured way, proposing the introduction of legal measures that would eliminate these discrepancies[10].

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[5] P. Czarnecki, *Status nieletniego w postępowaniu w sprawach nieletnich*, Przegląd Sądowy 51–52(2016).

[6] Art. 10(1) of the Criminal Code of 6 June 1997 (consolidated text Dz.U. 2018, item 1600, as amended, 'CC').

[7] M. Budyn-Kulig [in:] M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa (eds.), *Kodeks karny. Komentarz aktualizowany*, LEX/el. 2018.

[8] M. Budyn-Kulig [in:] *Kodeks karny*…

[9] Art. 10(1) CC.

[10] Ł. Pohl, *Zakres odpowiedzialności karnej nieletniego w Kodeksie karnym z 1997 r. (O konieczności pilnej zmiany art. 10 § 2 k.k. – problem form popełnienia czynu zabronionego)*, Prawo w Działaniu 30(2017), 7–18. In the above article, Pohl proposes two options for amending Art. 1(2) CC.
Option one: 'A juvenile who, after reaching 15 years of age, commits a prohibited act contrary to Article 134 CC, Article 148(1)-(3) CC, Article 156(1) or (3) CC, Article 163(1) or (3) CC, Article 166 CC, Article 173(1) or (3) CC, Article 197(3) or (4) CC, Article 223(2) CC, Article 252(1) or (2) CC or Article 280 CC or a prohibited act that contributes to the perpetration of a prohibited act in question, may be held responsible pursuant to the rules laid down in the Criminal Code, if the circumstances of the case and the level of the offender's developmental maturity, their features and personal conditions warrant holding the juvenile criminally responsible, and in particular where the reformatory and/or corrective measures previously taken have proven ineffective'.
Option two: 'A juvenile who, after reaching 15 years of age, commits a prohibited act contrary to Article to Article 134 CC, Article 148(1)-(3) CC, Article 156(1) or (3) CC, Article 163(1) or (3) CC, Article 166 CC, Article 173(1) or (3) CC, Article 197(3) or (4) CC, Article 223(2) CC, Article 252(1) or (2) CC or Article 280 CC or a prohibited act that contributes to the perpetration of a prohibited act defined in the above provisions, may be held responsible pursuant to the rules laid down in the Criminal Code, if the circumstances of the case and the level of the offender's developmental maturity, their features and personal conditions warrant holding the juvenile criminally responsible, and in particular where the reformatory and/or corrective measures previously taken have proven ineffective'.
R. Stefański, among others, presents a different position on the subject of juveniles' liability for non-direct forms of perpetration, see R. Stefański, *Obrona obligatoryjna w polskim procesie karnym*, Warszawa, 2012.

Furthermore, as far as crime management policies are concerned, it is important to determine whether the level of an offender's developmental maturity, their features and personal conditions can be reconciled with the imposition of a custodial sentence provided for these offences. The juvenile's previous behaviour is also an important factor, especially if any reformatory or corrective measures applied to the juvenile have proved to be insufficient (ineffective). However, some scholars, including M. Budyn-Kulig, argue that this is not a necessary condition[11]. Where measures of this kind have been applied and have not produced the expected results, more severe measures (i.e. an appropriate penalty) should be taken against the juvenile. Yet, the ineffectiveness of the measures taken should not automatically lead to the imposition of criminal liability[12]. Notably, B. Stańdo-Kawecka draws attention to the 'blended sentencing' doctrine applied in the adjudication of juvenile cases by courts in the United States. Under this doctrine, courts may impose both delinquency (juvenile) sentences and adult criminal sentences on juvenile offenders. However, the 'blended sentencing' system has been criticised for 'the absence of a consistent philosophical approach to juvenile justice proceedings'[13].

The reasons for juvenile recidivism should be seen primarily in inadequate social environments and poor family relations. A key factor is the environment in which a young person lives after leaving a young offenders' institution or another juvenile facility. The main causes of re-offending include contact with a peer group that replicates negative patterns and the desire to catch up with others and gain recognition within the group[14]. The rules and relationships within the family home have an additional impact. Disrupted relationships among the closest family members and poor life prospects may contribute to the belief that only illegal activities can bring any benefit[15]. Against the background of such a family setting, school becomes a place to let out negative emotions, and compulsory education carries no value. As A. Chudzyńska rightly asserts, it is the family that is the primary educational environment for the child and it is the family that plays a 'decisive role in shaping the personality of a young person, their world of values and mental resilience to failures'[16]. At the same time, it is the school's duty to cooperate with the juvenile's family and to foster a sense of security in order to prevent a difficult situation and halt the process of the juvenile's descent into social deviance.

According to A. Biskupska, that process may appear in three stages[17]. The first one can be associated with frustration, a feeling of rejection, and a propensity to respond inadequately to events. This stage also manifests itself in an inability to focus and impatience. The second stage involves aggressive responses towards parents and persons outside the family, e.g. teachers. Already at this stage juveniles become inclined to meet their needs outside the family environment, staying in the

[11] M. Budyn-Kulig, n. 7 *supra*.
[12] J. Lachowski [in:] V. Konarska-Wrzosek, A. Lach, T. Oczkowski, I. Zgoliński, A. Ziółkowska (eds.), *Kodeks karny. Komentarz*, LEX/el. 2018.
[13] B. Stańdo-Kawecka, *Prawo karne nieletnich. Od opieki do odpowiedzialności*, Warszawa, 2007, 350.
[14] R. Mysior, n. 2 *supra*.
[15] R. Mysior, n. 2 *supra*.
[16] A. Chudzyńska, *Sytuacja szkolna dziecka osoby skazanej, odbywającej karę pozbawienia wolności* [in:] Z.B. Gaś (ed.), *Profesjonalna profilaktyka w szkole: nowe wyzwania,* Lublin, 2011, 111.
[17] A. Biskupska, *Przestępczość nieletnich. Przyczyny przestępczego wykolejenia i rodzaje czynów przestępczych,* http://www.wszia.edu.pl/images/old/inne/zeszyty_nr3/61–65.pdf (accessed on 4 November 2018).

wrong company, committing petty crimes. The third stage entails participation in leisure activities or a criminal gang. At that point, juveniles commit burglary, theft and violent crimes against health and life[18].

However, their involvement in criminal activities is not always a consequence of the absence of parental acceptance and affection. Evidence in support of this conclusion is provided, for instance, by G. Ocieczek, who describes a case based on the findings of a criminal investigation[19]. In this case, a crime was committed against the backdrop of a regular, functional family in which both parents were working and expressed interest in their children. Despite this, the older of two brothers, aged 16, caused the death of his 13-year-old sibling, inflicting 30 stab wounds throughout the victim's body. According to the parents, there had never been any serious conflicts between the brothers. The 13-year-old did not have any behavioural issues, unlike the older brother, who ran into conflicts with the law. Eventually, a psychiatric assessment determined that the 16-year-old had had full mental capacity at the time of committing the act. The court sentenced the juvenile to an unconditional prison term of 12 years. G. Ocieczek proposes involving the convicted juvenile in the following rehabilitation activities: an aggression and violence prevention programme and the social skills training including interpersonal communication and self-presentation[20].

The case mentioned above is an example of the fact that juveniles' choice of engaging in crime is not always determined by family dysfunctions. Another relevant study, performed by M. Kolejwa, shows that children of re-offending parents (including those with addictions) are more likely to commit punishable acts than children brought up in families where parents break the law less frequently[21].

B. Hołyst names the following most frequent causes of juvenile delinquency:
- a desire to impress others,
- a desire to gain money,
- a desire to fulfil oneself in one's own environment,
- a sense of impunity for past criminal activities,
- replication of environmental patterns, mainly those originating from one's family home[22].

According to published court statistics, since 2010 there has been a noticeable decrease in the percentage of final judgments against juvenile perpetrators of punishable acts (from 58.5% in 2010 to 42.8% in 2016). A reverse trend can be observed in statistics concerning antisocial and delinquent behaviour, which in 2010 accounted for 41.5% of decisions; there has been an upward trend in this category of cases in the following years. In absolute numbers, there were 15,189 (57.2%) final judgments made against juveniles in antisocial and delinquent behaviour cases. The above figures show that in the period between 2010 and 2016 the total percentage

[18] A. Biskupska, *Przestępczość nieletnich…*
[19] G. Ocieczek, *Przestępczość młodzieży w perspektywie penitencjarnej*, Humanistyczne Zeszyty Naukowe – Prawa Człowieka 1(20)/(2017), 190–191.
[20] G. Ocieczek, *Przestępczość młodzieży…*, 191.
[21] M. Kolejwa, *Rodzinne uwarunkowania zachowań przestępczych*, Warszawa, 1988.
[22] B. Hołyst, *Kryminologia*, Warszawa, 2001, 450.

of juvenile sentences decreased significantly from around 17% to 11.4%. The largest number of juvenile delinquents came from the Silesia and Mazovia regions[23].

Table 1 presents statistics from the National Police Headquarters concerning prohibited acts committed by juveniles in 2011–2013. These data indicate that during this period, the offences most frequently perpetrated by juveniles were: extortion, robbery, and theft (in particular, theft with burglary). In 2011–2012, an increase in the number of these offences was observed. Another class of juvenile offences consisted of inflicting serious injury or taking part in a beating or a brawl. Manslaughter and rape were the offences least frequently committed by juveniles.

**Table 1.**
Prohibited acts committed by juveniles

| Year | 2011 | 2012 | 2013 |
|---|---|---|---|
| Manslaughter | 6 | 4 | 4 |
| Inflicting bodily harm | 5,496 | 3,289 | 2,617 |
| Taking part in a brawl or beating | 3,580 | 3,289 | 2,219 |
| Rape | 126 | 181 | 106 |
| Theft with violence, robbery or extortion | 12,438 | 12,237 | 8,845 |
| Theft with burglary | 9,329 | 7,796 | 6,205 |

Source: National Police Headquarters statistics.

The figures from the Statistics Poland shown in Table 2 highlight the high level of juvenile involvement in drug-related crime. At the same time, there was a significant decrease in juvenile delinquency in the remaining categories of prohibited acts – the most noticeable is the drop in the number of robberies, which decreased by more than 50% between 2010 (1,116) and 2016 (389). The number of thefts with burglaries, thefts of property, and thefts with violence committed by juveniles also decreased.

The above statistics show the relatively high (though decreasing) crime rates among young people. The very phenomenon of deviation is strongly rooted in interpersonal relations, often in the economic situation, and personality disorders. Failure to take appropriate rehabilitation measures in respect of juvenile offenders facilitates their return to a criminogenic environment in which they feel accepted by their peer group. In the case of recidivism, it is much more difficult to use the criterion of biological conditions. This is because the phenomenon of re-offending is evaluated from the perspective of the efficiency of therapeutic programmes, social rehabilitation, and the work of specialists in this area[24]. To a large extent, recidivism appears in former inmates of young offenders' institutions, who tend to perpetrate more violent crimes as they put to use their new 'skills' acquired during their time spent in the facility[25].

[23] Court statistics from the Ministry of Justice, Statistical Management Information Unit in the Department of Strategic Policy and European Funds, *Sprawy nieletnich. Prawomocne orzeczenia w latach 2010–2016* (2nd ed. Warszawa, ISWS, 2017), https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/download, 2779,15.html (accessed on 16 August 2018).

[24] K. Drapała, R. Kulma, *Powrotność do przestępstwa nieletnich opuszczających zakłady poprawcze (raport z badań)*, Prawo w Działaniu 9(2014), 205.

[25] K. Drapała, R. Kulma, *Powrotność do przestępstwa*…, 227.

**Table 2.**
Juvenile delinquency broken down into categories of offences

| Offence | 2010 | 2015 | 2016 |
|---|---|---|---|
| Manslaughter – Article 148 CC | 7 | 3 | 11 |
| Inflicting bodily harm – Articles 156 and 157 CC | 1,534 | 831 | 831 |
| Taking part in a brawl or beating – Articles 158 and 159 CC | 2,345 | 845 | 795 |
| Offences under the Drug Abuse Prevention Act | 1,086 | 1,325 | 1,194 |
| Rape – Article 197 CC | 56 | 45 | 49 |
| Having sexual intercourse with a minor under 15 years of age – Article 200(1) CC | 138 | 140 | 153 |
| Theft of property – Article 278 CC | 2,792 | 1,024 | 866 |
| Theft with burglary – Article 279 CC | 1,776 | 744 | 610 |
| Robbery – Article 280 CC | 1,116 | 427 | 389 |
| Theft with violence – Article 281 CC | 47 | 31 | 28 |
| Criminal extortion – Article 282 CC | 520 | 198 | 172 |

Source: The Statistical Yearbook of the Republic of Poland (Rocznik statystyczny RP) 2017.

According to the 2013 statistics from the National Police Headquarters presented in Table 3 below, juveniles perpetrated 6.6% of all confirmed crimes, much less than in previous years. According to Statistics Poland's figures, in 2016 the Police and the Prosecution Service completed preliminary proceedings in cases involving a total of 757,374 confirmed crimes; the figure for 2015 was 809,929[26]. It should be noted that since 2015 the statistics on confirmed crimes have not included punishable acts committed by juveniles. According to the current methodology, punishable acts committed by juveniles are recorded in court proceedings after the Police transfer the files of a juvenile case to the family court. The numbers of cases concerning punishable acts committed by juveniles in 2015 and 2016 were 12,368 and 12,360, respectively, while as many as 18,362 such cases were recorded in 2017, as shown in Table 4. It is also noteworthy that juvenile violence is slowly but steadily expanding to the circle of closest family members: according to the 2017 statistics from the National Police Headquarters, 293 juveniles were named suspects in cases of domestic violence; 27 of these suspects acted under the influence of alcohol.

**Table 3.**
Rates of juvenile delinquency in 2011–2013

| Year | 2011 | 2012 | 2013 |
|---|---|---|---|
| Confirmed crimes | 1,159,554 | 1,119,802 | 1,061,239 |
| of which, punishable acts committed by minors | 101,026 | 94,186 | 70,452 |
| Percentage of juvenile crimes | 8.7 | 8.4 | 6.6 |
| Suspects, total | 504,403 | 500,539 | 438,524 |
| of which, juvenile suspects | 49,654 | 43,847 | 25,167 |
| Percentage of juvenile suspects | 9.8 | 8.8 | 5.7 |

Source: statistics from the National Police Headquarters.

[26] Source: Statistics Poland (GUS).

**Table 4.**
Punishable act committed by juveniles in 2015–2017

| Confirmed crimes | 2015 | 2016 | 2017 |
|---|---|---|---|
| Total | 822,297 | 769,734 | 782,892 |
| of which punishable acts committed by juveniles | 12,368 | 12,360 | 18,362 |

Source: The Small Statistical Yearbook of the Republic of Poland (*Mały Rocznik Statystyczny RP*) 2017, 2018.

Adolescents' propensity to commit criminal acts depends on biological and environmental factors, and family ties. It happens, however, that callous acts are committed in two-parent families without any substance dependency problems. This means that where a juvenile commits any of the serious and major offences listed in Article 10(2) CC, it is highly likely that he or she acts with considerable premeditation and cruelty. In these circumstances, the sentence imposed by the court may be much more severe, and the phenomenon of repeat offending will not appear because at the time of their release from prison the juvenile offender will most likely already be a young adult. Legally speaking, the commission of any new crime by the then-juvenile will not be considered re-offending and the perpetrator will be held liable as an adult. For the above reasons, it is important to carry out the psychiatric, psychological, and personality evaluation of a juvenile, which should at least determine the extent of their depravity, as well as their intelligence. An appropriate assessment report, offering a judge an overview of the juvenile offender's attitude, may be the primary tool useful in this regard. Pursuant to the Code of Criminal Procedure, an expert's opinion is all the more desirable if it is to be used to determine circumstances which are of great importance for the adjudication of the case[27].

The Court of Appeal in Wrocław emphasized that it is the court's duty to make findings of fact, while the assessment of the opinions of experts issued in the case cannot be limited to just quoting such opinions[28]. A similar conclusion was made by the Court of Appeal in Krakow in its decision of 5 November 2008: 'The application of Article 10(2) CC requires an evaluation of the personal characteristics of the perpetrator, hence determining the causes and degree of the perpetrator's depravity.... In order to determine the degree of the perpetrator's depravity, rather than merely referring to the circumstances of the case, one should make a general assessment of the juvenile perpetrator's conduct. The above factors relevant to sentencing purposes should be determined based on, among other things, a psychological assessment report that should not avoid the aforementioned aspects of the evaluation'[29]. In addition, a note should also be made of the judgment of the Court of Appeal in Katowice of 27 September 2006, according to which the 'distinctive traits of a juvenile, in particular those expressed by the level of their mental development, high intelligence quotient, considerable degree of depravity as well as personal circumstances, as confirmed by psychological and personal evaluations, should be considered as grounds for the application of the responsibility regime envisaged in Article 10(2) of the Criminal Code'[30].

[27] Art. 193(1) of the Code of Criminal Procedure (consolidated text Dz.U. 2018, item 1914).
[28] Judgment of the Court of Appeal in Wrocław of 21 October 2015, II AKa 262/15, LEX No. 1927499.
[29] Judgment of the Court of Appeal in Krakow of 5 November 2008, II AKa 87/07, LEX No. 493917.
[30] Judgment of the Court of Appeal in Katowice of 27 September 2006, II AKa 224/06, LEX No. 217115.

A survey conducted by the Institute of Justice on 257 juvenile cases show that 70 of these cases (27%) were transferred to criminal courts pursuant to Article 10(2) CC, while the remaining 187 (73%) were heard by family courts[31]. A review of these cases carried out to determine the impact of assessment reports led to the conclusion that such reports provide highly relevant information. In as many as 66% of the cases, the courts decided to subject juveniles to the same influence measures as those suggested in the report. The most comprehensive social rehabilitation assessment reports were prepared by family diagnostic and consulting centres and diagnostic teams at youth detention centres. Reports compiled by these facilities contained the highest number of detailed characteristics of the assessed juveniles. Based on the above findings, it may reasonably be argued that an assessment report that fully captures the individualized picture of the juvenile and contains specific proposals on how to proceed with the juvenile in question may contribute to proper socialization of the juvenile and thus prevent their relapse into crime.

There is another consequence of an expert's evaluation expressed in this form: it allows for it to be shown that a juvenile offender does not deserve a more lenient punishment for committing a prohibited act. A negative criminological prognosis for a juvenile is therefore conducive to the conclusion that the juvenile may be held criminally responsible as a repeat offender. When imposing a punishment on the juvenile, the court should take into account their age and the reformatory purpose of the sentence. For this reason, a juvenile may not receive the penalty of life imprisonment if they have not attained 18 years of age at the time of committing a crime (Article 54(2) CC). It is obvious that in such a case the juvenile needs to commit another offence from the list contained in Article 10(2) CC or a similar offence, because Article 10(2) CC is the only provision that allows a juvenile offender to be held liable under criminal law. Re-offending juveniles, on the one hand, may be eligible for extraordinary mitigation of a penalty due to their age. However, on the other hand, recidivism may be invoked as an aggravating circumstance. It is crucial to determine whether any measures have already been applied in respect of the re-offending juvenile and whether they have manifested any problems with abiding by the law. An escalation of delinquent behaviour may lead to more severe punishment. The first-time re-offending that satisfies the criteria of what is defined in Polish criminal law as 'regular special recidivism' does not entail the obligatory imposition of a more severe penalty[32]: it is for the court to decide whether or not the adolescent defendant should receive a harsher sanction.

The Court of Appeal in Katowice correctly ruled that a young age cannot automatically justify the imposition of a more lenient sanction for a given offence, not least because sentencing directives provide no basis for the more lenient treatment of juvenile (or young adult) offenders[33]. Therefore, if a juvenile perpetrator

[31] P. Ostaszewski, *Opinie diagnostyczne w sprawach nieletnich*, Instytut Wymiaru Sprawiedliwości, 2010, https://www.iws.org.pl/pliki/files/IWS_Ostaszewski%20P._145_Nieletni%20opinie%20diagnostyczne.pdf (accessed on 17 August 2018).
[32] M. Budyn-Kulik, n. 7 *supra*.
[33] Judgment of the Court of Appeal in Katowice of 20 October 2014, II AKa 313/14.

re-offends, they should be held criminally liable as an adult. This was the conclusion of a decision of the Regional Court in Piotrków Trybunalski, which noted that the obligation resulting from Article 54(1) CC should not be interpreted as an absolute directive for the liberal treatment of young adult offenders of serious crimes based exclusively on the fact that they have not reached an age specified by the Criminal Code[34].

At this point, it is appropriate to present the most recent results of a study conducted in 2017 on a representative group of 52 state witnesses, which constituted 60% of the then-current population of state witnesses in Poland. The vast majority of the state witnesses participating in the study were aged between 31 and 50, and the full age range of state witnesses was from 26 to 60. Two-thirds of the state witnesses had completed education at the basic or vocational level. All the state witnesses surveyed were male. At the time of the study, the total number of state witnesses was 88. A decisive majority of the surveyed (43 persons) had lived in the state witness protection programme for a period longer than 5 years.

The purpose of this study was to determine whether state witnesses had a history of juvenile delinquency and had therefore been punished by Juvenile Courts. In addition, an attempt was made to determine the family situation of state witnesses, i.e. to establish if they had grown up in a two-parent family and if their closest family members had broken the law previously and had been convicted by a final court judgment.

A total of 35 survey questions were asked to the state witnesses participating in the study. Given the purpose of this paper, we will focus on several of these questions only, namely those concerning the respondents' history of juvenile delinquency. The interviewers – officers of the State Witness Protection Directorate of the Central Bureau of Investigations of the Police – received pre-survey instructions, according to which each interview was to include the following elements:

1. Greeting the respondent;
2. Informing the respondent that there was no time limit for completing the survey;
3. Informing the respondents that the survey was anonymous;
4. Instructing the respondents that, due to the anonymous nature of the study, personal data should not be entered, except for age, gender and education;
5. Informing the respondents that their participation in the survey was fully voluntary;
6. Informing the respondents that their participation in the survey and the conduct and outcomes of the survey had no impact whatsoever on their participation in the State Witness Protection Programme, and that it did not affect their current status as a state witness;
7. Informing the respondents that the test and survey had been developed exclusively for research purposes.

[34] Judgment of the Regional Court in Piotrków Trybunalski of 14 October 2014, IV Ka 546/14.

Despite receiving this information from witness protection officers, some respondents reportedly approached the study with extreme distrust, which was evidenced by, among other things, the absence of answers to certain questions asked in the survey. The state witnesses completed a paper-and-pencil questionnaire in the presence of witness protection officers in Warsaw.

Tables 5–8 below show the answers given to the questions asked to the surveyed state witnesses in the questionnaire.

**Table 5.**
Have you been sentenced by a Juvenile Court?

| | |
|---|---|
| **Yes** | 15 |
| **No** | 34 |

Source: own study.

**Table 6.**
Have you been detained in a young offenders' institution or a reformatory facility?

| | |
|---|---|
| **Yes** | 10 |
| **No** | 39 |

Source: own study.

**Table 7.**
Have your closest family members (father, mother, siblings) ever come into conflict with the law (been finally convicted for a criminal offence)?

| | |
|---|---|
| **Yes** | 10 |
| **No** | 37 |

Source: own study.

**Table 8.**
Were you raised in a two-parent family?

| | |
|---|---|
| **Yes** | 34 |
| **No** | 15 |

Source: own study.

Based on the results of the above study, one may reasonably conclude that as many as 30% of the respondent state witnesses had a history of juvenile delinquency. Among this group, 20% had been detained in a young offenders' institution or reformatory facility. Moreover, 30% of the group in question grew up in an incomplete family, which may have been a cause of their subsequent dysfunctional behaviour and inability to abide by universally accepted social rules, especially given the fact that in 20% of the cases state witnesses' parents and other family members also had a criminal record.

Certainly, as is shown by previous studies, state witnesses belong to the category of offenders who have committed the most serious crimes. In addition, a significant number of state witnesses received sentences from juvenile and/or criminal courts in the past.

The phenomenology of recidivism among juveniles and young adults is a controversial issue. The available statistics provide little basis for defining any clear and precise causes of juvenile recidivism. There is also a scarcity of research into the effectiveness of efforts made to combat social maladjustment and deviation. For juveniles, affiliation with a specific criminal group becomes an attractive prospect, a way of entering adulthood and impressing others[35]. For persons under 18 years of age, there is the additional advantage of being subject to a less stringent regime of liability. In light of the above, the court plays an important role by selecting appropriate corrective mechanisms for a juvenile offender. In making such a decision, the court should rely on evidence and reports that provide such information as: the mental and physical health of the juvenile, the level of their intellectual development, personality characteristics or factors such as the norms and values they adhere to. Pronouncement of a punishment capable of reforming a juvenile in an appropriate way requires an accurate diagnosis and assessment of the offender's degree of social deviancy, as well as cooperation between the court and the relevant institutions. For juvenile perpetrators of acts punishable under the Criminal Code, especially if they re-offend, their young age should not be considered a mitigating factor for sentencing purposes. Notably, juveniles may be held criminally liable if previous measures used to correct their delinquent behaviour have proved ineffective. This means that a given juvenile offender is especially prone to depravity and manifests reluctance to comply with the rules. By re-offending, the juvenile leaves the legal system no choice but to impose harsher measures.

Unsurprisingly, some juvenile justice scholars propose extending the option of applying the regime of 'adult' criminal liability to juveniles in respect of all types of criminal or petty offences[36]. 'An excessively lenient penalty, one which does not cause any real and direct discomfort to the accused and has been imposed on an accused who has already been engaged in antisocial and delinquent behaviour, fails to achieve its reformatory purposes and does not teach the accused to respect the legal order'[37].

As the Court of Appeal in Wrocław rightly noted, such a penalty, subjectively viewed by the accused as no penalty at all, reinforces their feeling of impunity and the conviction that the legal system does not work. Such a penalty not only fails to prevent the juvenile offender from committing crimes, but even encourages them to commit new crimes. Therefore, an excessively lenient sentence does not bring the expected benefits to the convicted person, but contributes to negative changes in their personality by creating a false system of values. It is certainly necessary to take an individualised approach to the criminal responsibility of juvenile offenders, but this should be combined with a more in-depth assessment of the personal development of the offender, which, in adolescence, is usually extremely turbulent. It is true that a juvenile's choice of a life in crime or their return

[35] M. Kowalczyk-Ludzia, *Demoralizacja sprawców przestępstw w świetle prawnokarnej oceny czynu zabronionego* [in:] T. Grzegorczyk, R. Olszewski (eds.), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej,* LEX/el. 2017.

[36] A. Herzog, *Prokurator a odpowiedzialność karna nieletnich,* Prokuratura i Prawo 9(2017), 145.

[37] Judgment of the Court of Appeal in Wrocław of 23 February 2006, II AKa 17/06, LEX No. 176531.

to crime is usually not an accidental decision, as shown, for example, by the state witnesses study. This is why it is vital, from a criminological perspective, to take action aimed at the general prevention of juvenile delinquency, which will certainly contribute to reducing the level of youth crime principles rules of criminal law. It is the environment in which a young person is raised and lives that plays an essential role in defining their further life choices. If this environment does not meet the juvenile's needs because of certain deficits or because there is too much pressure on the juvenile, they may present what is known as socially unacceptable or even criminal behaviour. It seems that whenever visible parenting deficits occur, it is the school community that should take over the role of the juvenile's 'parent-like educator' and take appropriate remedial measures with regard to the parents or guardians of the minor.


## Abstract

**Grzegorz Ocieczek, Paula Sambor, *Recidivism of Juvenile Offenders***

*This paper aims to address a number of aspects related to juvenile delinquency, in particular the causes of criminal behaviour among minors, as well as the phenomenon of juvenile re-offending. In addition, it presents the latest scientific findings concerning the history of juvenile delinquency among the population of state witnesses.*


***Keywords:*** *juvenile, criminality, state witness, re-offending (recidivism)*


## Streszczenie

**Grzegorz Ocieczek, Paula Sambor, *Powrót do przestępstwa wśród młodzieży***

*Niniejszy artykuł ma na celu przybliżenie kwestii związanych z przestępczością wśród młodzieży, a w szczególności zarówno przyczyn ich przestępczego zachowania, jak i powrotu do przestępczej aktywności. Dodatkowo w publikacji zostały zaprezentowane najnowsze wyniki badań dotyczące popełnienia przez świadków koronnych czynów karalnych jako osoby nieletnie.*


***Słowa kluczowe:*** *nieletni, przestępczość, świadek koronny, recydywa*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3806

**Konrad Burdziak***

# Does the Prohibition of Incest Excessively Restrict Human Sexual Freedom?**

## 1. PURPOSE OF THE STUDY

This paper aims at answering a question if the criminal law prohibition of incest excessively restricts human sexual freedom.

Considerations of this research will refer to the Polish legislation and, in more precise terms, to Article 201 of the Polish Penal Code[1], pursuant to which: 'Whoever commits the act of sexual intercourse with ascendants, descendants, adopted persons, adopters, brothers or sisters, shall be subject to a penalty of imprisonment of 3 months up to 5 years' (and views presented in the Polish doctrine of criminal law and decisions taken by Polish courts, which are examined in light of this provision). As stipulated in the said regulation, the prohibition of incest will be analysed with reference to requirements set forth in Article 31(3) of the Constitution of the Republic of Poland[2], in which a rational action of public authorities is stipulated[3].

It is clear that the analysis of Article 201 of PC (concerning the prohibition of incest) carried out with reference to Article 31(3) of the Constitution of RP will not make it possible to unambiguously determine whether the criminalisation of incest is a fully rational solution or not. After all, it should be underlined that the principle of proportionality (*sensu largo*) stipulated in Article 31 of the

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** The manuscript was submitted by the author on 14 December 2018; the manuscript was accepted for publication by the editorial board on 13 February 2019.

1 The Act of 6 June 1997 – the Penal Code (consolidated text Polish journal of laws Dz.U. 2018, item 1600, as amended, 'PC').

2 The Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483, as amended, 'Constitution of RP').

3 Obviously, this kind of an operation should not be performed *in abstracto*, but with respect to a given factual situation, or rather to a certain kind of factual situations, to which the norm of Article 201 PC applies (see K. Wojtyczek, *Zasada proporcjonalności jako granica prawa karania*, Czasopismo Prawa Karnego i Nauk Penalnych 2(1999), 42). However, the author of this study has taken an attempt to carry out the set task. It should be noted though that considered will be only an issue of punishability of voluntary incestuous relationships between adults. There are two reasons why this type of a limitation seems to be justified. Firstly, it is only in this scope that Article 201 of PC is not a repetition of other provisions (see K. Banasik, *Karalność kazirodztwa jako naruszenie wolności seksualnej* [in:] *Konteksty prawa i praw człowieka*, Z.M. Dymińska (ed.), Kraków, 2012, 42; J. Warylewski, *Zakaz kazirodztwa w kodeksie karnym oraz w ujęciu prawnoporównawczym*, Przegląd Sądowy 5(2001), 96). Secondly, it is the criminalisation of these exact types of behaviour that arouses most controversy in the subject literature.

Constitution of RP allows one to question those legal regulations which trespass a certain degree of non-rationality (which excessively constrain human rights and freedoms)[4]. The mentioned analysis will hence form an essential argument in the discussion on the need (or its lack) for the forthcoming decriminalisation of the unlawful act concerned.

## 2. INTRODUCTION

Let it be reminded that pursuant to Article 201 of PC those shall be punished who commit the act of sexual intercourse with ascendants, descendants, adopted persons, adopters, brothers or sisters.

Already a superficial analysis of the said provision allows one to state that the legislator used it to restrict a possibility to freely choose a sexual partner and, what follows, has interfered with human sexual freedom. It is clear that this freedom forms one of the elements of the individual's private life and is not protected as such (in Poland it unequivocally results from Article 47 of the Constitution of RP[5]). Notwithstanding the above, it does not mean it is of an absolute character[6]. Quite contrary, exercising this freedom may be restricted, but two conditions have to be met in this regard in Poland, which are set forth in Article 31(1) of the Constitution of RP.

## 3. FORMAL PREMISE

Pursuant to Article 31(3) of the Constitution of RP, a basic requirement for introducing restrictions on people with regard to exercising rights and freedoms they are entitled to is to establish their statutory force in a legal act (a formal premise)[7]. This gives rise to two obligations: first, to construct a restriction in a statutory law; secondly, to introduce the restriction in such a way as to meet a demand for completeness of a statutory provision[8]. The prohibition of incest stipulated in Article

[4] See K. Wojtyczek, *ibid*., 45.

[5] Article 47 of the Constitution of RP provides that every person is entitled to the protection of a private life, family life, honour and a good name as well as to decide about their personal life. This provision hence acknowledges the human right to privacy. It is extremely difficult to define 'privacy'. It is almost impossible to list all its elements separately and precisely. Therefore, the definitions created so far focus on indicating those areas that should be protected by establishing the right to privacy or actions which infringe on this right (see M. Safjan, *Prawo do ochrony życia prywatnego* [in:] *Podstawowe prawa jednostki i ich ochrona sądowa*, L. Wiśniewski (ed.), Warszawa, 1997, 127–128; D. Ostrowska, *Prawo do prywatności* [in:] J. Hołda, Z. Hołda, D. Ostrowska, J.A. Rybczyńska, *Prawa człowieka. Zarys wykładu*, Kraków, 2004, 136). 'The right to privacy is a right to living in a manner consistent with one's wish. It is connected with the freedom to act and direct one's conduct in a manner an individual deems to be right with regard to own capabilities. Such wide presentation of privacy leaves space for us taking decisions concerning ourselves, without engagement of any third parties. Privacy understood in this way encompasses: the freedom of speech and religion; intimacy of a personal life; making choices regarding own life and health; information concerning an individual; freedoms which, in order to be exercised, require free decision making' (A. Breczko, *Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznego*, Białystok, 2011, 172).

[6] See L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności* (*na tle orzecznictwa Trybunału Konstytucyjnego*), Państwo i Prawo 10(2001), 6–8.

[7] It seems that the meaning of this requirement is obvious. It suffices to demonstrate that it guarantees the parliament is engaged in the shaping of an individual's legal situation and, what follows, ensures that the decision-making process is open, no hasty and unwise decisions are made, and, what is more, makes it possible to control the government in terms of its law-shaping activity. L. Garlicki, *ibid*., 10).

[8] See J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa, 2008, 118.

201 of PC undoubtedly fulfils both these obligations; indeed, the Penal Code is a statutory law (and of major importance to the Polish criminal law) and one can explain by interpreting Article 201 of PC all key elements of the prohibition of incest (a party to the unlawful act, objective side of the unlawful act, subjective side of the unlawful act, subject of protection). There can, therefore, be a smooth shift now to the analysis of the prohibition in question when considering subsequent premises resulting from Article 31 of the Constitution of RP.

## 4. THE SUBJECT OF PROTECTION

The Constitution of RP allows the restriction of human rights and freedoms only when it is necessary for the state security, public order, environmental conservation, public health and morality, or rights and freedom of other persons. In other words, interference with an individual's rights and freedoms is only possible when it is based on a paramount public interest. It is hence essential to identify objectives which the legislator considered upon establishing the prohibition of incest between members of immediate family.

The foundations of a draft Penal Code of 1997 do not mention any *ratio legis* of Article 201 of PC[9]; whereas the doctrine has seen the bipolarisation of stances in this matter. On the one hand, some authors point that Article 201 of PC does not protect anything in reality, and even if it were to safeguard anything, then nothing else than morals understood as the compatibility of human behaviour with socially accepted moral values[10]. On the other hand, there are those who find arguments for the criminalisation of incest in other aspects, in particular, related to its eugenic character or the protection of families.

Adopting the first mentioned stance, i.e. in line with which Article 201 of PC safeguards morals at most, which is understood as the compatibility of human behaviour with socially accepted values, it could be stated that the prohibition of incest in the criminal law interferes with human freedom too intensively. To exemplify, K. Banasik indicates that: 'Sexual freedom is closer to humans than morals, even more than morals being a set of norms which an individual identifies with. It seems justifiable to conclude that sexual freedom as a legal good which is more individualised and personalised comes first before abstract morality. The above analysis corroborates (...) a thesis that the punishability of incest is a sign of unfair infringement on human freedom by public authorities'[11]. Therefore, M. Budyn-Kulik is right in pinpointing that this sort of view would be justified only in a society in which moral principles are clearly set and reprehensibility of incest does not raise any doubt. Only then would it be guaranteed that the criminal law would not have to safeguard against breaking

[9] See *Kodeks karny, kodeks postępowania karnego, kodeks karny wykonawczy. Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warszawa, 1997, 196–197.

[10] See K. Banasik, *Karalność kazirodztwa*…, 40–41; K. Banasik, *W kwestii penalizacji kazirodztwa*, Prokuratura i Prawo 4(2011), 68; M. Filar, *Przestępstwa seksualne w nowym kodeksie karnym* [in:] *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, Warszawa, 1997, No. 2, 45; L. Gardocki, *Prawo karne*, Warszawa, 2013, 276–277; O. Górniok, *Sporne problemy przestępstwa gwałtu zbiorowego*, Nowe Prawo 10(1972), 181; M. Surkont, *Prawo karne. Podręcznik dla studentów administracji*, Sopot, 1998, 173; J. Warylewski, *Zakaz kazirodztwa*…, 80.

[11] K. Banasik, *Karalność kazirodztwa*…, 41–42.

such a moral norm[12]. 'However, (these days – KB's note) we witness a situation when private morality is stratifying more and more (norms and values considered by an individual as important and thus observed) against common morality ("officially" accepted values and norms). (…) Due to this reason, the criminal law is starting to aim at "ordering". The legislator clearly and explicitly informs that a given type of behaviour should be condemned and punished. That is why one cannot agree with a viewpoint that "we can surely discard 'morals' from the criminal law"'[13].

Notwithstanding the above, it is worth considering whether there are other reasons than those founded on morals for introducing Article 201 to the Penal Code.

Potential grounds for the criminalisation of incest should obviously encompass an increased risk of health abnormalities in offspring born out of incestuous relationships[14]. While it is true that a number of authors undermine this concept, citing – to substantiate their thesis – results of relevant studies[15], as much research, also contemporary genetic engineers, make this concept probable to a significant degree[16]. Therefore, as I think, a statement of J. Giza still holds true that at a current phase of research it should be deemed premature to refuse a view that the protection of a good in a form of freedom against eugenic threats is one of the reasons for prohibiting incest[17].

Antagonists of the eugenic argument try also to depreciate it by contending that should the legislator want to safeguard the society against any health irregularities, it would also forbid other relationships which could lead to offspring of a higher risk of disability, for instance, relationships of mentally disabled people or those affected by genetic defects. This argument cannot be considered valid whatsoever. Irrespective of the legislator's will, it would be certainly inadmissible to introduce the mentioned prohibition. And a reason for this is the fact that we would then speak about the said persons being completely deprived of their sexual freedom and not only about a narrow restriction of this freedom as it happens in the case of the prohibition of incest. Undoubtedly, this kind of a solution would be unconstitutional (since it would be too far-reaching)[18].

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[12] See M. Budyn-Kulik, *Prawnokarna problematyka kazirodztwa w ujęciu paternalistycznym*, Wojskowy Przegląd Prawniczy 1–2(2012), 70.

[13] *Ibid*.

[14] See P. Daniluk, C. Nowak, *Kazirodztwo jako problem karnoprawny (dwugłos)*, Archiwum Kryminologii 2007–2008, Vol. XXIX–XXX, 478; J. Giza, *Zagadnienie kazirodztwa w nowym kodeksie karnym*, Problemy Rodziny 4(1970), 45; J. Leszczyński, *O projektach reformy przepisów dotyczących przestępstw seksualnych*, Państwo i Prawo 2(1992), 83–84.

[15] In literature most often cited is the research of B. Ślusarczyk, who examined 310 cases of incest which were the subject of criminal proceedings between 1970–1975 (see B. Ślusarczyk, *Z problematyki kazirodztwa (charakterystyka rodzin, w których ujawniono fakty współżycia kazirodczego*, Studia Kryminologiczne, Kryminalistyczne i Penitencjarne 1977, Vol. 6, 136 et seq.). It should be hence emphasised that many authors questioning the concept saying that freedom from eugenic threats forms the subject of protection under Article 201 PC limits itself solely to a statement that the 'thesis about deficient offspring born out of incestuous relationships has not been corroborated' (see K. Banasik, *Karalność kazirodztwa*…, 40; L. Gardocki, *Prawo*…, 264; N. Kłączyńska, *Komentarz do art. 201 Kodeksu karnego* [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2014, 550–551; A. Marek, *Komentarz do art. 201 Kodeksu karnego* [in:] A. Marek, *Kodeks karny. Komentarz*, Warszawa, 2005, 460; M. Rodzynkiewicz [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, Kraków, 2006, 659; A. Sakowicz, *Prawnokarne gwarancje prywatności*, Kraków, 2006, 207).

[16] See P. Daniluk, C. Nowak, *Kazirodztwo jako problem*…, 477–478; J. Baranowski, *Ratio legis prawnokarnego zakazu kazirodztwa*, Przegląd Prawa Karnego 3(1990), 64–65. See also E. Raczek, *Kazirodztwo – ujęcie sądowo-genetyczne*, Archiwum Medycyny Sądowej i Kryminologii 1(2012), Vol. LXII, 57).

[17] See J. Giza, *Zagadnienie kazirodztwa*…, 45.

[18] See P. Daniluk, C. Nowak, *Kazirodztwo jako problem*…, 478–479.

The argument in question will not cease to be pertinent even if a circumstance is considered that the norm warranted under Article 201 of PC does not only prohibit heterosexual relationships between persons related by biological kinship, but also, for example, homosexual relationships between adopted persons and adopters. This circumstance becomes hence completely irrelevant if one takes account of a potential subsequent reason for the criminalisation of incest, which is intended to safeguard the family as a fundamental unit of society[19].

Obviously, the argument that the family forms the subject of protection under Article 201 of PC is virtually disregarded in literature with a statement that it is not sexual intercourse between members of an immediate family that results in problems, but rather difficulties that already exist in the family lead to incest[20]. Nonetheless, it should be noted that, although one must agree with this kind of thesis, it is beyond any doubt that the phenomenon of incest only deepens the breakdown of the family that has already begun, leading to weakening or even cutting fundamental family bonds and should be opposed as such[21].

Another view is also expressed against the argument being discussed that (Article 201 of PC – KB's note) does not safeguard (...) the correct, whatever is meant by that, functioning of families as it does not forbid sexual drive in family arrangements to be stimulated or satisfied, let it suffice that partners refrain from sexual intercourses."[22] At first glance, this objection seems to be valid. After all, Article 201 of PC prohibits ordinary heterosexual copulation (sexual intercourse), as well as an oral and anal intercourse (hetero- and homosexual), yet it does not forbid 'other sexual acts'[23]. However, this circumstance could be justified – which was duly noted by V. Konarska-Wrzosek – by the legislator's attempting to classify solely the most harmful part of incestuous behaviours as the offence specified in Article 201 of PC[24].

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[19] A question can be asked: what family is it about? Is it about a family understood as a specific functional unit whose functioning has been disturbed by the phenomenon of incest? Or is it about a family treated as an abstract symbol and value (family-based structure of society)? Or perhaps what is meant here is connected with the concept of family elements of moral doctrines which form part of various ideologies? (see J. Baranowski, *Ratio legis*…, 67). Well, one can risk a statement that each above interpretation is appropriate. Not only does Article 201 of PC safeguard (or attempt to safeguard) a specific social sub-system against incest occurring within its framework, it also sanctions the approved structure of society.

[20] See K. Banasik, *Karalność kazirodztwa*…, 42; J. Warylewski, *Zakaz kazirodztwa*…, 82.

[21] See P. Daniluk, C. Nowak, *Kazirodztwo jako problem*…, 479. It is worth quoting J. Baranowski's view which, in my opinion, is correct here: 'According to a new thesis, which gathers more and more supporters, incest is not a cause but consequence of other factors that disturb a family life. However, this statement seems to be (...) not fully compelling as it is based on empirical research of families in which incest was prosecuted under criminal law. It means that the choice of population under examination was determined by selective mechanisms of the system of justice. As found in the latest research, incestuous relationships not only take place in pathological families of a lower social status, but also in middle-class families which function normally only on the surface. In his new study on this subject, M. Hirsh, for instance, defines incest as an act of which essence does not lie only in satisfying sexual drive, but far more as a perpetrator's attempt to seek compensation for cold and frustrating relationships in the family they come from. The above doubt does not aim at undermining the thesis about the destructive influence incest has on a given family. Nonetheless, constructing simple models of causes and consequences seems to be unjustified' (J. Baranowski, *Ratio legis*…, 67–68).

[22] J. Warylewski, *Zakaz kazirodztwa*…, 80.

[23] See A. Marek, *Komentarz*… [in:] *Kodeks karny*…, 460.

[24] As V. Konarska-Wrzosek points: 'Every incestuous act breaches moral norms which a modern society observes. Despite the foregoing, not all sexual acts taken in incestuous arrangements are equally immoral and harmful to intra-family relationships and when taking account of possibilities of a family continuing to function in a way allowing the performance of its primary functions. From this point of view, not of any importance is a fact in what personal arrangement between closest members of family and at what age relationships of sexual character occur. That is why not all sexual acts but only their most harmful part has fallen within the

Apart from the above points, there are other arguments raised in literature, which could justify the criminalisation of incest. Among other things, they refer to: (1) the need to develop relationships from outside families, to eradicate families' tendencies to isolate themselves, to broaden families' socialising opportunities, to strengthen parental authority through counteracting the establishment of links of sexual character[25]; (2) the protection of the society against types of behaviour viewed by its vast majority as unwanted[26]; (3) the protection of underage siblings and offspring of partners living in an incestuous relationship against possible registration of such relationships, which could negatively affect the shaping of models of inter-human relationships[27]; and (4) the prevention of offspring being born to partners living in incestuous relationships due to a fact that such children are stigmatised from the beginning of their life, they do not live in normal family environments, they are often socially isolated, which may result in socially and psychologically abnormal development, lack of a normal and happy life and difficulties in forming own successful relationships and families[28].

It is beyond any doubt that all the aforementioned goods (freedom from eugenic threats, correct functioning of the family, morals, etc.) are included in a set of values listed in Article 31(3) of the Constitution of RP. And so, the freedom from eugenic threats could be classified under the category of the protection of public health, the protection of family under the protection of public order, and morals, obviously and first of all, under public morality. After all and as K. Wojtyczek reasonably argues 'A very general and vague way of defining these premises (in Article 31(3) of the Constitution of RP – KB's note) does not constrain (...) in any significant way the legislator's freedom to act and, in practice, allows the protection of almost all constitutional values in the criminal law'[29]. Therefore, a further analysis of incest can be now taken, based on Article 31(3) of the Constitution of RP. It should be emphasised though that establishing a link between the restriction of human freedom (or right) and the protection of one of values specified in the Constitution of RP is a crucial condition for recognising such a restriction as

scope of criminalisation as a type of the offence of incest' (V. Konarska-Wrzosek, *Przedmiot ochrony przy typie przestępstwa kazirodztwa* [in:] Ł. Pohl (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009, 291).

[25] See M. Demczuk, *Kazirodztwo – zarys problematyki* [in:] G. Iniewicz, M. Mijas (eds.), *Seksualność człowieka. Wybrane zagadnienia*, Kraków, 2011, 146; J. Giza, *Zagadnienie kazirodztwa*…, 47; A. Podgórecki, *Patologia życia społecznego*, Warszawa, 1969, 253–254.

[26] See N. Kłączyńska, *Komentarz*… [in:] *Kodeks karny*…, 551.

[27] N. Kłączyńska, *ibid.*

[28] See V. Konarska-Wrzosek, *Przedmiot ochrony*…, 290; M. Rodzynkiewicz [in:] *Kodeks karny*…, 659. In addition, the protection of minors could form *ratio legis* of the criminalisation of incest. Such a belief follows from the fact that, in my opinion, Article 201 of PC could play, insofar as it does not already play a considerable role in detecting and eradicating sexual abuse in family structures (see P. Nalewajko, *Konstytucyjność prawnokarnego zakazu kazirodztwa – uwagi na gruncie postanowienia niemieckiego Trybunału Konstytucyjnego z dnia 26 lutego 2008 r.* [in:] N. Buchowska (*et al.*), *Prawo wobec wyzwań współczesności. T. 6. Materiały sesji naukowej (Poznań, 15.06.2009 r.)*, Poznań, 2010, 52). See also P. Kozłowska-Kalisz, *Racjonalizacja penalizacji kazirodztwa* [in:] *Kazirodztwo* [online], Warszawa, 2018–11–20, https://sip.lex.pl/#/monograph/369392048/311775 (accessed on 11 December 2018); M. Płatek, *Kodeksowe ujęcie kazirodztwa – pozorny zakaz i pozorna ochrona* [in:] *Kazirodztwo* [online], Warszawa, 2018–11–201, https://sip.lex.pl/#/monograph/369392048/311779 (accessed on 11 December 2018); J. Sobczak, *Bioetyka a kazirodztwo. W kwestii dobra chronionego w odniesieniu do przestępstwa kazirodztwa* [in:] *Kazirodztwo* [online], Warszawa, 2018–11–20, https://sip.lex.pl/#/monograph/369392048/311802 (accessed on 11 December 2018).

[29] See K. Wojtyczek, *Zasada proporcjonalności*…, 41.

admissible, but not the only one. This restriction has to also compensate for the principle of proportionality (Article 31(3) sentence 1 of the Constitution of RP) and, what is more, it cannot infringe on the core of individual rights or freedoms (Article 31(3) sentence 1 of the Constitution of RP)[30].

## 5. PRINCIPLE OF USEFULNESS AND PRINCIPLE OF NECESSITY

The principle of proportionality boils down to – in a simplified way, obviously –a statement that the legislator is forbidden from excessive interference with an individual's freedoms and rights. To establish whether in a given case such excessive interference does not take place, it is essential to answer three questions: (1) can the implemented regulation bring about the results it was designed to produce (the principle of usefulness); (2) is the regulation necessary to safeguard public interest which it is connected with (the principle of necessity); (3) are effects of the implemented regulation proportional to the burden it imposes on citizens (the principle of proportionality *sensu stricto*)[31]. A requisite for examining whether the content of Article 201 of PC is consistent with the aforementioned principles is to consider the whole content of norms expressed within the framework of this provision. It is hence necessary to analyse the correctness of introducing punishability, the accuracy of formulating the description of this kind of an unlawful act and the severity of a penal sanction that has been provided for[32].

Considerations should be started from reminding that the protection of legal goods has to consist in, on the one hand, deterring potential offenders from infringing on these goods (general prevention) as well as strengthening a feeling in the society that social norms which do not permit these goods to be violated are binding (general prevention) and, on the other, securing the society against a given offender re-violating a given good (individual prevention)[33]. So, when it comes to general prevention, then in the case of incest, criminalisation seems to be the only useful and effective at the same time solution. A reason behind this conclusion is that literature has not demonstrated any other methods yet which could, in a comparable way, secure the goods specified in Article 201 of PC against violation and confirm that social norms forbidding such violation are binding. The latter aspect becomes of considerable importance now since, as it has been already mentioned, there is no contemporary message as to the moral assessment of behaviour such as incest.

As far as individual prevention is concerned, it seems not to be completely proven that criminalisation is justifiable. There are valid arguments put forward that support given to perpetrators by psychologists or sex therapists can be of equal

[30] L. Garlicki, *Przesłanki ograniczania*…, 18.

[31] See the judgment of the Constitutional Tribunal of 26 April 1995, K 11/94, LEX No. 25538. Let's add that in Article 3(3) of the Constitution of RP the issue of 'necessity to restrict' is referred to the concept of 'democratic state'. What follows, if a question is raised whether a given restriction is necessary, useful and proportional, then a requisite for answering it is to take account of legal consequences of standards of democracy (see J. Zakolska, *Zasada proporcjonalności*…, 125; L. Garlicki, *Przesłanki ograniczenia*…, 21).

[32] See M. Królikowski, *Dwa paradygmaty zasady proporcjonalności w prawie karnym* [in:] T. Dukiet-Nagórska (ed.), *Zasada proporcjonalności w prawie karnym*, Warszawa, 2010, 41.

[33] See Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa, 2012, 472–474. See also K. Wojtyczek, *Zasada proporcjonalności*…, 35.

effectiveness. It is conceivable that this type of counselling could contribute even more to the perpetrator's understanding of family relationships in an appropriate way[34]. A problem is that the case of incest in the family has to be detected in the first place and it seems that in this scope Article 201 of PC plays a significant role.

As has been already stated, the assessment of the way the unlawful act is described when taking account of the declared subject of protection is also of vital importance. 'A situation may occur though when the very "intent" (purpose) of the legislator was legitimate constitutionally but certain solutions fell outside the scope of such legitimacy'[35]. It seems that with regard to Article 201 of PC we do not deal with this sort of a situation as this provision defines a punishable behaviour so as to allow the effective realisation of set objectives and in the most narrow manner at the same time[36]. Another thing is that due to its synthetic nature, Article 201 of PC loses a considerable portion of its precision, which is reflected in the earlier doubts whether it is the legislator's intent to protect the family and freedom against eugenic threats or not.

What raises serious doubts though is answering the question if the penalty set out in Article 201 of PC is not too harsh. In other words, there is uncertainty if less severe penalties would not lead to achieving the same (or even better) results[37]. A remark should be made that sexual intercourse with members of the family is subject to a penalty which is, *in abstracto*, the most severe out of all types of punishment provided for in the Penal Code, i.e. imprisonment of which period can be as long as from 3 months to up to 5 years. And so what we deal here with is the same punitive sanction as for the unintentional cause of human death.

Therefore, in the author's opinion, what needs to be thought over is the lowering of the upper threshold of the statutory penalty to a period of 3 years' imprisonment (which was once proposed by J. Warylewski). Most importantly, Article 201 of PC does not significantly strengthen the protection of the society against rape offenders or those guilty of sexual intercourse with a minor under 15 years of age; there are other provisions that adequately safeguard against this type of offences, that is Article 197 of PC[38] and Article 200 § 1 of PC[39]. When it comes to voluntary

[34] See K. Banasik, *W kwestii*…, 69.

[35] The judgment of the Constitutional Tribunal of 30 October 2006, P 10/06, LEX No. 210825.

[36] After all, the norm sanctioned in Article 201 of PC prohibits its addressees exclusively from sexual intercourse with certain persons; it does not encompass other sexual acts. In addition, it should be noted that possible sexual partners of an individual have been limited in this provision to merely a few explicitly specified persons.

[37] It should be stressed here that: 'The assessment of how severe a penalty is cannot be narrowed down to its types and borders but it should also take account of principles of the infliction and execution of the penalty. When considering possibilities of setting less strict penalties, not only consequences of deliberated statutory solutions for the prevention of a given harm should be taken into account, but also further repercussions of a criminal law regulation, the stabilisation of a given social norm in particular' (K. Wojtyczek, *Zasada proporcjonalności*…, 38).

[38] Pursuant to Article 197 of PC: '§ 1 Whoever induces another person to sexual intercourse by violence, unlawful threat or deceit shall be subject to a penalty of imprisonment of 2 to 12 years. § 2 If the perpetrator, in a manner specified in § 1, induces another person to submit to another sexual act or perform the same, they shall be subject to a penalty of imprisonment of 6 months to 8 years. § 3 If the perpetrator commits the offence of rape: (1) with another person; (2) on a minor of under 15 years of age; (3) on an ascendant, a descendant, an adopted person, an adopter, a brother or sister, they shall be subject to a penalty of imprisonment for a period of at least 3 years. § 4 If the perpetrator of the act specified in § 1–3 acts with extreme cruelty, they shall be subject to a penalty of imprisonment for a period of at least 5 years'.

[39] Pursuant to Article 200 § 1 of PC: 'Whoever engages in sexual intercourse with a minor of under 15 years of age or commits another sexual act on the said person or induces the said person to submit to the said acts or to perform the same, they shall be subject to a penalty of imprisonment of 2 to 12 years'.

intercourse between adult partners, this penalty would be sufficient in terms of criminal and political aspects (which could not be said about a fine and penalty of restricting one's liberty; stipulating that incest offenders would be subject to the specified penalties would not secure adequately, as it seems, protected goods, nor would it ensure the stabilisation of the social norm in question)[40].

It is worth stressing here that due to a fact that the punishment has this and not the other shape Article 201 of PC may provide for: (1) ruling – instead of imprisonment as stipulated in this provision – fine or restriction of liberty (Article 37a of PC); (2) ruling – instead of imprisonment as stipulated in this provision – simultaneous imprisonment for not longer than 3 months and restriction of liberty for up to 2 years fine (Article 37b of PC); (3) conditional discontinuation of proceedings (Article 66 of PC); and 4) conditional suspension of the execution of the adjudicated penalty (Article 69 of PC). Ultimately, one may risk stating (in the context of the last option) that in the case of voluntary sexual intercourse of adults the penalties inflicted will not exceed, and if they do, then not too often, one year of imprisonment[41].

It can be argued of course that 'Punishing sexual partners under Article 201 of PC (by imprisonment, in particular – KB's note) will not only fail to a defend the family unit, but it will cause its ultimate breakdown. Such partners need expert advice'[42]. A problem is that the main purpose of criminal law is not to punish perpetrators but counteracting the violation of certain goods (in the case of offence referred to in Article 201 of PC, it is, inter alia, preventing the infringement of the family well-being) and in this context the criminalisation of incest appears to be essential. In addition, where it is truly possible to 'defend the family unit', the court will be able to – as has been already mentioned – exercise the competences conferred in the Penal Code under Articles 37a, 37b, 66 or 69.

Having regard to the above, it should be stated that Article 201 of PC does not contradict the principle of usefulness and principle of necessity. Nevertheless, it should be examined if the restriction of human liberty specified under this provision does not breach the principle of proportionality *sensu stricto*.

## 6. THE PRINCIPLE OF PROPORTIONALITY *SENSU STRICTO*

Behind the principle of proportionality *sensu stricto* is the observance of a proportion between all goods which a given interference refers to and those which it safeguards.

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[40] See J. Warylewski, *Kazirodztwo (art. 201 KK)* [in:] J. Warylewski (ed.), *System prawa karnego. Vol. 10. Przestępstwa przeciwko dobrom indywidualnym*, Warszawa, 2012, 806.

[41] M. Rodzynkiewicz is right is indicating that: 'When imposing punishment for the offence of incest, the court should assess, in particular, criminological distinctiveness and degree of culpability which occurs between various cases of assigning liability for this crime – for instance, voluntary sexual intercourse between adult siblings and sexual intercourse between a father and teenage daughter. The correct adoption of directives of imposing punishment under Article 53 of PC (…) should lead here to significant diversification of penalties' (M. Rodzynkiewicz [in:] *Kodeks karny*…, 663).

[42] See K. Banasik, *W kwestii*…, 69. J. Baranowski contends that: 'interference (of the system of justice – KB's note) does not keep the family affected by incest safe but it destroys it. According to G. Strantenwerth, it entails adverse economic repercussions, the poisoning of personal relationships by family members testifying against one another, separation or divorce as well as discrimination of the environment' (J. Baranowski, *Ratio legis*…, 68). Unfortunately, such scenario cannot be excluded.

As regards the goods which the criminalisation of incest affects, they can surely include sexual freedom of an individual and its personal freedom due to the stipulated sanction of imprisonment. Whereas the protected ones are first and foremost freedom from eugenic threat, correct functioning of the family and morals. As K. Wojtyczek points: 'The adoption of the principle of proportionality in the strict sense requires at all times "weighing goods" (…). Generally speaking, two elements should be reflected upon – the weight of colliding values and the degree of their realisation. The more important the value which the interference effects and the higher the degree of violation, the more precious the value which this interference is to safeguard must be and the higher the degree at which the second one is achieved. A fact that a given value is placed higher in an abstract hierarchy of values than the other one means that in some situations it cannot be sacrificed – to a certain degree – to realise a value which is ranked lower in the hierarchy'[43].

Undoubtedly, sexual freedom belongs to a catalogue of fundamental rights and freedoms. In Poland, it is safeguarded by the so-called non-derogable rights, i.e. which must not be restricted even at times of martial law and emergency (Article 233(1) of the Constitution of RP)[44]. Of major importance is also, quite obviously, personal freedom referred to in Article 41 of the Constitution of RP. What follows, interference with freedoms at issue should be always duly justified and not too intensive. As regards the prohibition of incest, the above premises have been fulfilled, as it seems though. Admittedly, interference with the human sexual freedom provided for in Article 201 of PC is not very intensive; the list of possible sexual partners of the individual has been limited by a mere few persons specified in the said provision. We can talk only about gross interference in the case of individual personal freedom since the sanction stipulated in Article 201 of PC is imprisonment of 3 months to 5 years. Nevertheless, it should be emphasised that a direct reason for this interference is a fact of committing the offence and sentencing. After all, it seems that when it comes to the voluntary sexual intercourse of adults, penalties inflicted by depriving liberty will not considerably reach the upper threshold of statutory punishment, and they will be sometimes conditionally suspended or replaced with a fine or penalty restricting liberty.

Furthermore, of utmost importance are goods for whose protection it was decided to introduce the prohibition of incest. As it seems, the weight of the good being the freedom from eugenic threat does not necessitate more substantial justification. And when it comes to the good in the form of the family functioning correctly, in the context of the Polish system of law attention should be drawn to Article 18 of the Constitution of RP, pursuant to which: 'Marriage as the relationship between a woman and a man, family, maternity and parenthood shall be protected and safeguarded by the Republic of Poland'. The inclusion of this provision in Chapter 1 of the Constitution of RP (entitled 'The Republic') seems to demonstrate that the protection of family is treated as 'one of the fundamental

[43] K. Wojtyczek, *Zasada proporcjonalności*…, 42.
[44] See the judgment of the Constitutional Tribunal of 30 October 2006, P 10/06.

principles constructing the state system by defining it as one of the central pillars on which the structure of the state law and system, as well as state apparatus, has been built'[45].

It is also the good being morals that matter crucially. Particularly at times when – as has already been shown – we face the deepening stratification of private morality, that is norms and values considered by the individual as important and observed by it, from common morality understood as officially accepted norms and values. There is no clear message as to the moral evaluation of such behaviours, for instance, incest, which may turn out exceptionally dangerous to individuals with an undeveloped hierarchy of values (though not only for them)[46]. By all means, the author of this study agrees that it is inadmissible to 'force morality', meaning the interference of law with the field of perfectionistic moral principles or morally controversial cases. However, it can be presumed that imposing legal sanctions for failure to observe the prohibition of sexual intercourse with immediate family members does not constitute such 'forcing of morality'. It seems that this prohibition belongs to norms of fundamental nature and does not result only from emotions and prejudice, but also from potential negative consequences which incest may bring to the society (family in particular) and given individuals[47].

Even though we refuse the concept behind which the prohibition of incest falls within the so-called ethical minimum and assume that incest is a morally controversial case, then the legal prohibition of such behaviour will be still admissible. The reason behind this is that Poles seemingly have not formed a society yet whose members show a high degree of moral development and feeling of moral responsibility for own acts, and still to relatively wide extent expect the law to serve also an educational function[48]. There are, therefore, 'substantiated doubts concerning results (...) (of adopting in the practice of the Polish law – KB's note) the concept of moral neutrality of law, which is reflected in specific statutory acts liberalising ethically and legally controversial cases'[49].

## 7. CONCLUSIONS

Having regard to the above, one can risk stating that by introducing the prohibition of incest the legislator has realised all colliding values in the highest possibly degree. On the one hand, the adequate protection of human rights and freedoms has been provided and, on the other hand, common goods of the society have been sufficiently safeguarded. In other words, there is the right proportion between the effect exerted by Article 201 of PC and burden imposed on the individual, which means the said provision is in line with the principle of proportionality *sensu*

[45] See the judgment of the Constitutional Tribunal of 30 October 2006, P 10/06. It is also Article 47 of the Constitution of RP that safeguards the family life and, as has been already indicated, the goods referred to in this provision are protected by non-derogable rights. Furthermore, it should be noted that pursuant to Article 71 of the Constitution of RP the state has to take account of the family well-being when constructing its social and economic policies.

[46] See M. Budyn-Kulik, *Prawnokarna problematyka*..., p. 70.

[47] See D. Bunikowski, *Porządek prawny a neutralność moralna prawa*, http://usfiles.us.szc.pl/pliki/plik_1160575750.doc (accessed on 1 September 2014), 28.

[48] See D. Bunikowski, *ibid*., 35.

[49] *Ibid*.

*stricto*, and what follows, it fulfils all requirements stipulated in Article 31.3 of the Constitution of RP. In addition, the prohibition under Article 201 of PC does not breach the essence of rights and freedoms which it interferes with.

It can be argued as well that there is no absolute certainty as to the social harm of incest, the effectiveness of the prohibition specified in Article 201 of PC and the positive final balance. This argument will be probably accompanied by a demand to act in accordance with the principle of *in dubio pro libertate*, which says that 'the burden of proof in respect of criminalisation falls on the legislator, and in case of any doubt, criminalisation should be abandoned'[50]. It appears though that there are no reasons why the criminalisation of incest should be excluded only because not all doubts connected with Article 201 of PC can be resolved unambiguously. After all, the criminalisation of a given behaviour does not require its culpability but only (or perhaps as much as) demonstrating its probability, and such probability, in the author's opinion, is what we deal with in the offence of incest[51].

Nonetheless, we emphasise that the above conclusion does not imply yet that Article 201 of PC needs to be maintained in its present form.


## Abstract

**Konrad Burdziak, *Does the Prohibition of Incest Excessively Restrict Human Sexual Freedom?***

*Pursuant to Article 201 of the Polish Penal Code ('PC') those shall be punished who commit the act of sexual intercourse with ascendants, descendants, adopted persons, adopters, brothers or sisters. As a result, by introducing the said provision, the Polish legislator has restrained individual sexual freedom, which is safeguarded in Article 47 of the Constitution of the Republic of Poland. Under the Polish Constitution, every human freedom can be obviously subject to restrictions; however, if this is the case, conditions laid down in Article 31(3) of the Constitution of RP have to be always observed. These requirements include: (1) the inclusion of a restriction in a statutory act; (2) possibility of establishing a constraint only if it is necessary for state security, public order, environmental conservation, public health and morality or rights and freedoms of other persons; (3) forbidding excessive interference with the individual freedom being limited (principle of proportionality); (4) prohibition of infringing the essence of this freedom.*

*The in-depth analysis of the prohibition of incest carried out by the author of this study has shown that it was (and still is) public interest that is the premise for introducing Article 201 of the Penal Code. What is more, the said provision can bring about results which the legislator aimed at (principle of usefulness) and is essential to safeguard public interest it is connected with (principle of necessity). By introducing the prohibition of incest, the legislator also maintained the right proportion between the effect exerted by Article 201 of PC and burden imposed on the individual, which means the said provision is in line with the principle of proportionality sensu stricto, and what follows, it fulfils all requirements stipulated in Article 31(3) of the Constitution of RP. Furthermore, the prohibition under Article 201 of PC does not breach the essence of rights and freedoms which it interferes with. It can be argued as well that there is no absolute certainty as to the social harm of incest, effectiveness of the prohibition referred to in Article 201 of PC and positive final balance.*


[50] L. Gardocki, *Subsydiarność prawa karnego oraz in dubio pro libertate jako zasady kryminalizacji*, Państwo i Prawo 12(1989), 65.

[51] See L. Gardocki, *ibid*., 69.

*This argument will probably entail a demand to act in accordance with the principle of in dubio pro libertate, i.e. to relinquish criminalisation. It appears though that there are no reasons why the criminalisation of incest should be excluded only because not all doubts connected with Article 201 of PC can be resolved unambiguously.*

***Keywords:*** *incest, sexual freedom, Article 201 of the Polish Penal Code, Article 31(3) of the Constitution of the Republic of Poland*

## Streszczenie

**Konrad Burdziak, *Czy zakaz kazirodztwa w sposób nadmierny ogranicza wolność seksualną człowieka?***

*Zgodnie z art. 201 polskiego Kodeksu karnego (k.k.), podlega karze ten, kto dopuszcza się obcowania płciowego w stosunku do wstępnego, zstępnego, przysposobionego, przysposabiającego, brata lub siostry. Za pośrednictwem rzeczonego przepisu ustawodawca polski ograniczył zatem wolność seksualną jednostki chronioną przez art. 47 Konstytucji RP. Oczywiście w myśl polskiej konstytucji każda wolność człowieka może podlegać ograniczeniom; w takim przypadku zawsze jednak muszą zostać spełnione warunki określone w art. 31 ust. 3 Konstytucji RP. Do warunków tych zaliczamy: 1) wymóg ustanowienia ograniczenia w akcie prawnym rangi ustawowej; 2) możliwość ustanowienia ograniczenia tylko wówczas, gdy jest to konieczne dla bezpieczeństwa państwa, porządku publicznego, ochrony środowiska, zdrowia i moralności publicznej, albo wolności i praw innych osób; 3) zakaz nadmiernej ingerencji w ograniczaną wolność jednostki (zasada proporcjonalności); 4) zakaz naruszenia istoty tejże wolności.*

*Przeprowadzona przez autora niniejszej publikacji dogłębna analiza zakazu kazirodztwa wykazała przy tym, że za wprowadzeniem art. 201 do Kodeksu karnego przemawiał (i wciąż przemawia) istotny interes publiczny. Co więcej, przywołany przepis jest w stanie doprowadzić do zamierzonych przez ustawodawcę skutków (zasada przydatności) oraz jest niezbędny dla ochrony interesu publicznego, z którym jest powiązany (zasada konieczności). Wprowadzając zakaz kazirodztwa, ustawodawca zachował także odpowiednią proporcję pomiędzy efektem regulacji art. 201 k.k. a ciężarem nałożonym na jednostkę, co oznacza że dyskutowany przepis jest zgodny z zasadą proporcjonalności sensu stricto, a w konsekwencji – iż spełnia wszystkie wymogi przewidziane w art. 31 ust. 3 Konstytucji RP. Zakaz z art. 201 k.k. nie narusza bowiem również istoty wolności i praw, w które ingeruje. Może się oczywiście pojawić zarzut, że brak jest stuprocentowej pewności co do społecznej szkodliwości kazirodztwa, skuteczności zakazu określonego w art. 201 k.k. oraz pozytywnego bilansu zysków i strat. Z zarzutem tym zaś pojawi się zapewne postulat postąpienia zgodnie z regułą in dubio pro libertate, tzn. postulat odstąpienia od kryminalizacji. Wydaje się jednak, że nie ma powodów, by wykluczać kryminalizację kazirodztwa tylko dlatego, iż nie wszystkie wątpliwości związane z art. 201 k.k. można rozstrzygnąć w sposób jednoznaczny.*

***Słowa kluczowe:*** *kazirodztwo, wolność seksualna, art. 201 Kodeksu karnego, art. 31 ust. 3 Konstytucji RP*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3807

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# On Public Attribution of Responsibility (Co-Responsibility) for Nazi Crimes Perpetrated by the German Third Reich to the Polish Nation or the Polish State. The Actual Normative Content of Now Repealed Article 55a of the Institute of National Remembrance Act**

To begin with, let us recall that the provision in question, Article 55a of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation ('IPN Act'), became part of the law on account of Article 1(6) of the Act of 26 January 2018, amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the War Cemetery and Grave Act, the Museum Act, and the Act on Collective Responsibility for Acts Prohibited on Pain of Punishment[1]. By virtue of this provision, Article 55a was introduced into the IPN Act of 18 December 1998[2]. still in force, and worded as follows:

> Article 55a. 1. Any person who publicly and contrary to facts attributes to the Polish Nation or the Polish State responsibility and/or co-responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the Charter of the International Military Tribunal annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis,

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** The manuscript was submitted by the author on 1 February 2019; the manuscript was accepted for publication by the editorial board on 20 February 2019.
[1] See Polish journal of laws Dz.U. 2018, item 369.
[2] See Dz.U. 2016, item 1575 and Dz.U. 2018, item 5.

signed at London, on 8 August 1945 (Dz.U. 1947, item 367) and/or for other offences constituting crimes against peace, humanity or war crimes or in some other way flagrantly diminishes the responsibility of the actual perpetrators of such crimes shall be punished by a fine and/or imprisonment of up to 3 years. The judgment shall be made public.
2. If the perpetrator of the act defined in paragraph 1 above acts unintentionally, he/she shall be punished by a fine or restriction of liberty (community service).
3. No offence is committed by the perpetrator of the prohibited act as defined in paragraphs 1 and 2 above if he/she has perpetrated it as part of artistic or scholarly activity.

The limitations of this article make the presentation of a comprehensive interpretation of the above provision obviously impossible. The plurality of issues related thereto – at times very complex – is so great that it would take a sizeable monograph to discuss responsibly all on their merits. This is why the text below concentrates on those that have featured prominently in the heated media debate, which at times has been very critical of the provision in point. Coincidentally, some time ago, the present author already had an opportunity to consider the relevant issues, writing a legal opinion on the crucial problems of interpretation of the entire Article 55a of the IPN Act. Opinion was sought on answers to the following five fundamental questions:

1. Does the use by the legislator of the phrases 'contrary to facts' and 'Polish Nation', while specifying the *actus reus* of the offence, preclude the application of the provision to people relating real crimes committed by groups of Polish citizens or even crimes on which historians have different opinions?
2. Does Article 55a(1) and (2) of the IPN Act prevent historical research and the publication of its results?
3. Does the IPN Act, in Article 55a(1) and (2), prevent public debate on Nazi or other crimes, as defined in Article 55a(1), including the question of the participation of people of Polish nationality in these crimes?
4. Does the IPN Act, in Article 55a(1) and (2), prevent making public the cases of the participation of people of Polish nationality and Polish citizens in Nazi crimes? In particular, is criminal responsibility provided for so-called testimonies of truth, describing the reprehensible behaviour of people of Polish nationality and Polish citizens?
5. Does the expression 'attributes responsibility' cover the behaviour consisting in mentioning Polish camps?[3].

Let us tackle the problems touched upon in the above questions.

To begin with, it must be observed that Article 55a(1) of the IPN Act, crucially important for this discussion, was a so-called plural provision, because it comprised

[3] The questions, thus, narrowed down the opinion solely to problems of interpretation. Consequently, it has not touched upon in the least the questions of legitimacy/illegitimacy of the regulation laid down in the IPN Act, Article 55a(1), (2) and (3). This article will not touch upon these questions either.

many legal norms[4]. In addition, the plurality of the provision was diversified, because it encoded both many sanctioned norms and many sanctioning norms related to the former. On account of the fact that most of the questions posed, including the first one, directly concerned the content of the norms of the first kind, let us name the norms of this kind that are reconstructible from the article in question. It yielded the following (let us say: preliminary)[5] sanctioned norms:

1. Prohibiting public attribution to the Polish Nation, contrary to facts, of responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 ('IMT Charter');
2. Prohibiting public attribution to the Polish State, contrary to facts, of responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the IMT Charter;
3. Prohibiting public attribution to the Polish Nation, contrary to facts, of co-responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the IMT Charter;
4. Prohibiting public attribution to the Polish State, contrary to facts, of co--responsibility for Nazi crimes perpetrated by the German Third Reich as defined in Article 6 of the IMT Charter;
5. Prohibiting public attribution to the Polish Nation, contrary to facts, of responsibility for offences other than those named above, constituting crimes against peace or humanity or war crimes;
6. Prohibiting public attribution to the Polish State, contrary to facts, of responsibility for offences other than those named above, constituting crimes against peace or humanity or war crimes;
7. Prohibiting public attribution to the Polish Nation, contrary to facts, of co-responsibility for offences named in point 5 above;
8. Prohibiting public attribution to the Polish State, contrary to facts, of co--responsibility for offences named in point 5 above;
9. Prohibiting public flagrant diminishing of responsibility of the actual perpetrators of crimes against peace, which is contrary to facts and other than the types of behaviour named in points 1–8 above;
10. Prohibiting public flagrant diminishing of responsibility of the actual perpetrators of crimes against humanity, which is contrary to facts and other than the types of behaviour named in points 1–8 above;
11. Prohibiting public flagrant diminishing of responsibility of the actual perpetrators of war crimes, which is contrary to facts and other than the types of behaviour named in points 1–8 above.

[4] On the plurality of a legal provision, see M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010, 134 et seq.

[5] With a particularized approach, these norms could – and actually should – be broken up further into smaller ones, e.g. by relating each norm to a single, precisely defined, crime of a given type, for instance, to a single specific Nazi crime, a single specific crime against peace, a single specific crime against humanity or a single specific war crime.

**I.** An answer to the first question must relate – quite obviously – to those of the above-named norms that concern the attribution to the Polish Nation or the Polish State of responsibility (co-responsibility) for specific crimes.

For a start, a breach of these norms had to consist in the attribution of responsibility (co-responsibility) for crimes named in Article 55a(1) of the IPN Act, including Nazi crimes as defined in Article 6 of the IMT Charter[6], to the Polish Nation or the Polish State. On account of the incontrovertible circumstance that the perpetrator of the crimes named in Article 55a(1) of the IPN Act, may be only a man[7], the attribution of responsibility (co-responsibility), referred to in the article, was a construction founded on the idea that responsibility (co-responsibility) for the crime named therein and committed by an individual is borne by the community as well[8].

In the case at hand, the community was the Polish Nation[9] and the Polish State. The idea – as everybody knows – is also very well known to jurisprudence[10], which

[6] To remind: under Article 6 of the said Charter: 'The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) *Crimes against peace:* namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) *War crimes:* namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'.

[7] Fully instructive and still relevant today, the argument by Czesław Znamierowski reads as follows: '… when we say that a community shares some conviction, that it judges something or that it does something, we mean something else than when we relate these predicates to an individual. A community has no head with which to think, no heart with which to feel emotions or no hands with which to do something. That a community thinks something, feels some emotion or does something means in short that it is the way all or very numerous of its members think, feel or do, or that this is the behaviour of few individuals who are given a special position by the structure of a given community', Cz. Znamierowski, *Rozważania wstępne do nauki o moralności i prawie*, Warszawa, 1964, 97.

[8] In a simplified version and not accurate enough, the idea could be expressed by the formula that a crime committed by an individual is actually a crime of the community the individual is a member of.

[9] To remind: the term 'Polish Nation' means – according to the Preamble to the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483, as amended) now in force – all the citizens of the Republic.

[10] Besides, it also exists in the Polish legal system. Its extreme variety is provided for in the Act of 28 October 2002 (Dz.U. 2002, No. 197, item 1661, as amended) on the Responsibility of Collective Entities for Prohibited Punishable Acts. The Act provides for the punitive responsibility of a collective entity for a prohibited act committed by a natural person. Elementary information on the principles governing this type of responsibility is given in almost every textbook covering the general part of criminal law – for instance, W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, 176–177. At this juncture, it is worthwhile to remind the reader – for this might prove helpful in the search for right answers to the questions posed – that under Article 3 of the cited Act:
'A collective entity shall bear responsibility for a prohibited act which is behaviour by a natural person:
1) acting in the name or interest of the collective entity under a power or duty to represent it, to make decisions on its behalf, to perform an internal audit or in excess of this power or failing in this duty;
2) permitted to act as a result of the person mentioned in subparagraph 1 acting in excess of his/her powers or failing in his/her duty;
3) acting in the name or interest of the collective entity with the consent and/or knowledge of the person mentioned in subparagraph 1;

emphasises, in addition, that for it to be considered legitimate in a specific case, the behaviour of an individual must show strong ties to the community. In Article 55a(1) of the IPN Act the ties – quite obviously – could not consist only in the membership in a community on an ethnic basis. By no means can it be assumed that for every crime committed by an individual of Polish nationality, responsibility (co-responsibility) is borne by the Polish Nation.

For analogous reasons, the ties cannot consist only in the possession of a specific citizenship, because – by the same token – not for every crime committed by a Polish citizen, is responsibility (co-responsibility) borne by the Polish State. In a word, a different criterion must have been meant here. It is safe to assume therefore that in the case of Article 55a(1) of the IPN Act (and, consequently, in the case of paragraph 2 of this Article) the ties consisted in the social (as far as the Polish Nation is concerned) or legal[11] (as far as the Polish State is concerned) authorization of an individual by a community to commit a crime mentioned in the Article.

Considering the above, it must be assumed that a public statement in which a person truthfully indicated that a Polish citizen had committed a crime defined in Article 55a(1) of the IPN Act is behaviour that by no means could be held to be a breach of the norms named in points 1–8 above, if

(1) the statement did not mention the responsibility (co-responsibility) of the Polish Nation or the Polish State for that crime;
(2) in the event the statement did mention the responsibility (co-responsibility) of the Polish Nation or the Polish State for that crime – providing the statement was underpinned by a (authentic, actually having occurred) fact, of which the person making the statement was aware, proving the existence of an authorization from the Polish Nation or the Polish State for a Polish citizen to commit that crime.

Therefore it shall be argued that in order to commit the *actus reus* contrary to Article 55a(1) or (2) of the IPN Act, two interdependent acts as it were, need to have been expressed in a given public statement. First, where the person making it truthfully indicated that a Polish citizen had committed a crime defined in Article 55a(1) of the IPN Act, and second, at the same time wrongfully attributed to the Polish Nation or the Polish State responsibility (co-responsibility) for the said

3a) being an entrepreneur who directly cooperates with the collective entity, working towards a lawful goal;
4) (abrogated)
– provided that the behaviour gave or could give advantage to the collective entity, even a non-financial one'.
Thus, in this case too – as a matter of fact in compliance with the rule mentioned earlier – we are dealing with the attribution of responsibility (legal and punitive in this case) to a collective entity (community) for (specific) behaviour connected with it exhibited by an individual and prohibited and penalized. On the impossibility of the commission of a prohibited act by a community see also W. Wróbel, A. Zoll, *Polskie prawo...*, 177, who rightly assert that – in agreement with Cz. Znamierowski's view cited above – 'Despite many similarities between the responsibility of a collective entity and criminal responsibility, it must be held that an offence, in the Polish legal system too, may be committed only by a natural person. The responsibility of a collective entity depends on the commission of a prohibited act by a natural person and is thus dependent in this respect. A collective entity bears punitive responsibility for a prohibited act committed by a natural person in the name of the collective entity and in conditions that may give advantage to the collective entity, even a non-financial one'.

[11] Moreover, both individual and general norms (including authorizations) may come into play here. On such norms see in particular Z. Ziembiński, *Logika praktyczna*, Warszawa, 1963, 105.

crime (due to the lack of any fact proving the existence of an authorization from the Polish Nation or the Polish State for a Polish citizen to commit that crime)[12].

With respect to that part of the question which concerns crimes where historians have different opinions, it must be said that such differences on whether there was an authorization for a Polish citizen from the Polish Nation or Polish State to commit a crime named in Article 55a(1) of the IPN Act, would rule out the possibility of committing a prohibited act defined in that provision and in Article 55a(2).

The above findings – understandably – find application to crimes defined in Article 55a(1) of the IPN Act, committed by groups of Polish citizens.

**II.** In answer to the second question, it must be said first that under Article 55a(3) of the IPN Act, artistic and scholarly activities were accorded the status of circumstances precluding unlawfulness. At the same time, the provision unequivocally opted for such an interpretation of these circumstances that did not deprive the behaviour displayed under them, being the commission of the *actus reus* defined in Article 55a(1) or (2) of the IPN Act, of the feature of penalization. In a word, the cited provision clearly opted for such a view of the types of activity named in it that is tantamount to the rejection of a legal excuse as a circumstance being the negative *actus reus* of a prohibited act[13]. This followed – and quite indisputably so – from the IPN Act, Article 55a(3), that after all said directly, using the phrase '[n]o offence is committed by the perpetrator of the prohibited act', that under the conditions described therein a prohibited act is perpetrated[14]. In sum, the provision acknowledged that artistic and scholarly activities were circumstances in which the sanctioned norm, encoded in Article 55a(1) and (2) of the IPN Act, was legally breached.

Taking this into account, it must be found that the norms expressed by the IPN Act in Article 55a(1) and (2), prohibited the behaviour described therein also when

[12] The *actus reus* defined in the IPN Act, Article 55a(2), would be committed when the person making the statement – failing to exercise sufficient care – was wrongly convinced that the fact he/she invoked, supposedly bearing out the said authorization, was actually the fact bearing out such authorization.

[13] The literature on the substantive-law function of a legal excuse is vast. Among the Polish criminal law studies, *see* especially the works by: Władysław Wolter (*Funkcja błędu w prawie karnym*, Warszawa, 1965; *Z problematyki struktury przepisów karnych*, Państwo i Prawo 11(1978); *Wokół problemu błędu w prawie karnym*, Państwo i Prawo 3(1983)); Andrzej Zoll (*Stosunek kontratypów do ustawowej określoności czynu*, Państwo i Prawo 4(1975); *Okoliczności wyłączające bezprawność czynu (Zagadnienia ogólne)*, Warszawa, 1982; *Jeszcze raz o problemie błędu w prawie karnym*, Państwo i Prawo 8(1983); *Kontratypy a okoliczności wyłączające bezprawność czynu* [in:] J. Majewski (ed.), *Okoliczności wyłączające bezprawność czynu*, Toruń, 2008; *W sprawie kontratypów*, Państwo i Prawo 4(2009)); Łukasz Pohl (*Struktura normy sankcjonowanej w prawie karnym. Zagadnienia ogólne*, Poznań, 2007); Tomasz Kaczmarek (*O tzw. okolicznościach „wyłączających" bezprawność czynu*, Państwo i Prawo 10(2008); *O kontratypach raz jeszcze*, Państwo i Prawo 7(2009)); Zbigniew Jędrzejewski (*Bezprawność jako element przestępności czynu. Studium na temat struktury przestępstwa*, Warszawa, 2009)); Jacek Giezek (*„Zezwolenie" na naruszenie dobra prawnego – negatywne znamię typu czy okoliczność kontratypowa* [in:] Ł. Pohl (ed.), *Aktualne problemy prawa karnego*, Poznań, 2009) and Jarosław Majewski (*Okoliczności wyłączające bezprawność czynu a znamiona subiektywne*, Warszawa, 2013).

[14] I believe, though – to which I shall return – that this approach could have given rise to serious doubts, especially with respect to artistic activity. For one can hardly share the view that, for instance, a statement in a feature film, in which an actor, as part of his/her role, utters words about the responsibility (co-responsibility) of the Polish Nation or the Polish State for crimes named in Article 55a(1) the IPN Act, was a prohibited act contrary to paragraph 1 or 2 of this Article. After all, the behaviour by an actor is originally lawful; this is so because in this case we are not faced with a real assault on a legally protected interest and, consequently, with an infringement of such an interest. Meanwhile – as everybody knows – in the case of a circumstance being a legal excuse, an attack (excused of course by the situation and constitutive for the excuse) on a legally protected interest is by all means a real assault on this interest and, consequently, an absolutely real interference with the said interest.

it was part of artistic or scholarly activity. However, the fact that paragraph 3 of this Article was in force, precluded the responsibility of the perpetrator in such situations because this provision accorded to the named types of activity the status of circumstances precluding the unlawfulness of the perpetrator's behaviour. All in all, the perpetrator's behaviour, on account of the substantive-law consequence defined therein of the legal excuses named therein was ultimately lawful (secondarily lawful)[15].

Speaking of historical research, it is undeniably a kind of scholarly activity and, it must be emphasised, irrespective of whether the person conducting it has formal, i.e. historical education in this field. Arguably, the scholarly character of a given activity is decided exclusively on its merits seen in its skilful pursuit and not on the formal aspect that does not – as everybody knows – fully guarantee such skills. Wherefore, it must be concluded that as part of historical research – on account of Article 55a(3) of the IPN Act – a prohibited act defined in Article 55a(1) and (2) of the IPN Act could not be unlawfully committed[16].

**III.** The third question has already been answered together with the first question. To reiterate: Article 55a(1) and (2) of the IPN Act by no means restricted public debate on the participation of people of Polish nationality in the crimes enumerated in these provisions.

**IV.** The fourth question has already been answered, too, together with the first question. To reiterate: Article 55a(1) and (2) of the IPN Act by no means prevented making public – which is ethically necessary – the cases of the participation of people of Polish nationality and Polish citizens in Nazi crimes. It must be strongly stressed therefore that the norms laid down in these provisions by no means proscribed so-called testimonies of truth, exposing the criminal behaviour of people of Polish nationality and Polish citizens. What the norms did proscribe was – and it should be repeated emphatically – only wrongful claims making the Polish Nation or the Polish State responsible (co-responsible) for such criminal behaviour.

**V.** The final question asked whether the expression 'attributes responsibility' covered the use of words about Polish camps. The right stance to be taken in this

[15] For Article 55a(3) of the IPN Act, actually provided for a right to commit a prohibited act contrary to Article 55a(1) and (2) of the IPN Act. The right – viewing the matter from the perspective of deontic logic – is founded on a normative (deontic) operator known as strong permission. On this question see Ł. Pohl, *Struktura normy*..., 193 et seq., and further literature on the subject quoted and analysed there, in particular the works by J. Woleński (*Logiczne problemy wykładni prawa*, Kraków, 1972) and Z. Ziemba (*Analityczna teoria obowiązku. Studium z logiki deontycznej*, Warszawa, 1983).

[16] It is another matter if the solution was justified in an entirely convincing manner. This author believes that this is very doubtful. The issue shall be discussed further, but let us note already now that it appears that with the relevant law being as it was at that time more was demanded of a non-professional entity than of a person conducting historical research; the latter, unlike the non-professional entity, was allowed to commit lawfully the *actus rei* of prohibited acts defined in Article 55a(1) and (2) the IPN Act; e.g. he/she was allowed in the course of research to attribute wrongly to the Polish Nation or the Polish State responsibility (co-responsibility) for crimes named in Article 55a(1) of the IPN Act. Thus, by this approach, the principle of 'levelling up the standards' was ignored, one that is by all means desirable in criminal law. How important the principle is for it can be seen not only in determining the degree of guilt of a person who by his/her behaviour carried out the *actus rei* of a prohibited act, but also in determining the scope of criminalization and legal excuses.

case was that the said expression, being a feature of the *actus reus* of prohibited acts defined in Article 55a(1) and (2) of the IPN Act, covered the said behaviour only when a person used the words in question ('Polish camps', 'Polish concentration camps', etc.) to denote the responsibility of the Polish Nation or the Polish State for crimes mentioned in Article 55a(1) of the IPN Act. Consequently, it had to be assumed that if a person used the words only to denote the location of these camps, his/her statement would not be the *actus reus* in point. In a word, an answer to the fifth question depends on the meaning assigned to these words by their speaker. Hence, every instance of using these words would have to be considered individually, according to the law as it stood then. To sum up, speaking about Polish concentration camps is a behaviour that – quite obviously – does not have to entail the attribution to the Polish Nation or the Polish State of responsibility (co-responsibility) mentioned in Article 55a(1) and (2) the IPN Act.

**VI.** Having, thus, obtained – in the light of the above findings – a fairly clear picture of the scope of criminalization set by the wording of Article 55a(1) the IPN Act, we can move to the critical reflection, announced earlier, on paragraph 3 of this Article and, consequently, to more general conclusions. To remind yet another time, under this paragraph: 'No offence is committed by the perpetrator of the prohibited act as defined in paragraphs 1 and 2 above if he/she has perpetrated it as part of artistic or scholarly activity'.

As already mentioned, it is not a matter of controversy that the circumstances mentioned therein, precluding the criminality of an act, were accorded the status of circumstances precluding the unlawfulness of a prohibited act. Specifically, they were given the character of circumstances secondarily legalizing a prohibited act, because they depended on the condition of committing such an act. Thus, they were not formulated in accordance with the principle considering a legal excuse as the negative *actus reus* of a prohibited act; after all, it should be stressed yet again that – pursuant to Article 55a(3) of the IPN Act – as part of artistic or scholarly activity, a prohibited act could be committed as defined in Article 55a(1) or (2) of the IPN Act.

As matters stand, the question springs to mind whether the solution adopted in Article 55a(3) of the IPN Act was right; specifically if it was legitimate from a theoretical point of view. As already mentioned, there are doubts on this particular question.

The most serious doubts concern artistic activity, which – in the opinion of this author – cannot, in the nature of things, really threaten an interest protected then by Article 55a(1) of the IPN Act, and thus cannot really destroy the said interest. For the interest protected by the provision in question is – to use Władysław Wolter's nomenclature – a social value related to an ideal object (good name of the Polish Nation, good name of the Polish State)[17]. Hence, it is an interest that by no means can be threatened by artistic behaviour. This is so because an attack on such

[17] See W. Wolter, *Nauka o przestępstwie. Analiza prawnicza na podstawie przepisów części ogólnej kodeksu karnego z 1969*, Warszawa, 1973, 42–43.

interests carried out as part of artistic activity is only a feigned attack, a type of behaviour being only a pretence of an attack. This, in turn, is a consequence of an unwritten social contract[18], having an obvious and absolutely sufficient axiological justification, whereby the domain of artistic activity is exempted from the norms proscribing the infringement of social values related to an ideal object. Arguably, the above is a parallel world of a kind where the scope of criminal law regulation is narrower.

In a word, with respect to ideal objects, this domain is one where only socially acceptable human behaviour is found and which, therefore, lies outside the scope of criminal-law sanctioned norms[19]. It can be said, in the light of the above, that the lawfulness of such behaviour is original, since in its case – for the reasons given above – the norms are not breached (because they cannot be breached). From the point of view of deontic logic, which uses weak and strong permissions, these types of behaviour would be classified as weakly permitted. Wherefore, the solution adopted in Article 55a(3) of the IPN Act, in as much as it applies to artistic activity, must be considered wrong as it made an artist the subject of a prohibited act without any substance.

Now let us consider scholarly activity. In its case, too, it has already been said that considering it a legal excuse with respect to behaviour defined in Article 55a(1) and (2) of the IPN Act may raise doubts. Before this behaviour is described in greater detail, though, it has to be observed that unlike in the case of artistic activity, in scholarly activity – one geared at learning the truth – an attack on the interest protected by the then Article 55a(1) of the IPN Act, is no longer feigned, but real. In the theoretical framework adopted here, for the breach of a norm sanctioned by criminal law to occur it is necessary that the behaviour infringing a legal interest infringe, in addition, rules of dealing with such an interest[20], including rules of careful treatment of the interest concerned. In this context, these will concentrate around the rule of honest conduct of research.

In a word, as long as the researcher's behaviour complies with the said rule, he/she cannot be attributed either intentional or unintentional commission of the prohibited act defined in Article 55a of the IPN Act. Moreover, the compliance with the rule in question by no means depends on the correspondence between the researcher's findings and facts. Specifically, the researcher may be wrong (he /she has the right to a justified error) and against the facts, for instance, attribute to the Polish Nation or the Polish State responsibility for crimes defined in Article 55a(1) of the IPN Act, provided that, to emphasize yet again, his/her research meets the condition of honesty imposed by the rule in question. The question of honesty will be decided by the criterion of legitimacy of the researcher's scholarly findings.

[18] The constitutional guarantee of artistic creation and scientific research stems from it – see the Constitution of the Republic of Poland, Article 73.

[19] Obligatory in the process of interpreting any legislative text, the presumption that the norm maker rationally encodes norms makes us assume each time that only socially unacceptable behaviour is prohibited. Otherwise, we will be left with a result impossible to be classified as the product of a rationally acting entity. For it cannot be maintained that a rational norm maker prohibits socially acceptable behaviour. More on this issue see for instance in Ł. Pohl, *Struktura normy*..., 99 et seq., and for norms of caution in general see the exceptionally competent discussion by M. Byczyk, *Normy ostrożności w prawie karnym*, Poznań 2016, 470.

[20] See Ł. Pohl, *Struktura normy*..., 99 et seq.

If, therefore, scholarly activity is limited solely to behaviour complying with the rule of honesty in research, the solution adopted in Article 55a(3) of the IPN Act was wrong, because such behaviour – in agreement with the said rule – remained clearly outside the scope of the prohibitive norms encoded in Article 55a(1) and (2) of the IPN Act.

However, the fact of the matter is that what is also considered scholarly activity is certain manifestations of such activity that clearly fail to meet the aforementioned standard. It is with respect to these that serious doubts arise whether they should be accorded the status of secondarily legalized behaviour. While there is no need to discuss their incompliance with the sanctioned norm (after all, this incompliance was noticed by the legislator, who laid down the condition of committing a prohibited act in Article 55a(3) of the IPN Act), the condition of social advantageousness of the behaviour breaching the said norm, constitutive of every legal excuse, may be seriously questioned.

If, however, the freedom of research and dissemination of its results is absolutized and considered a value in itself, one that would *per se* satisfy the condition, then those would be right who maintain that the difference between the original lawfulness of human behaviour and its secondary lawfulness is too serious a matter to be hidden in the formula of a uniform lawfulness of an act. The difference – to finally attempt some general conclusions – is seen in the fact that in the case of originally lawful behaviour, the very behaviour of a person is socially acceptable, because this is the way the person behaves, whereas in the case of secondarily legalized behaviour it is not so. This is so because the legalizing effect always depends on the assessment of some additional context, such as a situation, i.e. a context that makes the offender's behaviour justified despite the infringement of the rules of dealing with a legally protected interest (concerning the way it is treated). The justification is strong enough to allow us to pronounce the behaviour – at the end of the day – socially advantageous in spite of the breach of a norm sanctioned in criminal law.

Summing up, there are grounds to uphold this distinction, because of the qualitative – in my view – difference between the situation where a norm is not breached and the situation where a breach is considered justified. It is another matter, naturally, if the justification is right and convincing. In the studied example, there are serious doubts, as already mentioned. Perhaps, it is these doubts that lend support to the idea of secondary lawfulness. After all, with originally lawful behaviour, no such doubts arise, do they? If this conjecture were to be considered right, it would be thus necessary to assume that the behaviour constituting a legal excuse may attract varied assessments. The condition of a legal interest infringement and its social advantage appears not to be based on a binary formula, but rather one that requires partial assessments based on hierarchy.

A few words in place of conclusions. The above findings reveal that the discussion of the regulation in question, often very critical, was superficial, that is – at the end of the day – insufficiently substantive. The fact that the desired scholarly insight was deficient reinforces the thesis of those who claim that legislative measures, including the swift derogation of the article in question, are not always – and it is regrettable that this is the case – in accord with the conclusions of a critically oriented – in the proper sense of the term – scholarly reflection.

## Summary

**Łukasz Pohl, *On Public Attribution of Responsibility (Co-Responsibility) for Nazi Crimes Perpetrated by the German Third Reich to the Polish Nation or the Polish State. The Actual Normative Content of Now Repealed Article 55a of the Institute of National Remembrance Act***

*As is well known, the provision in question has aroused considerable controversy among many commentators. One may venture a statement that it was the controversy that made the Polish legislator remove the provision from the legal system relatively quickly. A thorough interpretation of the provision suggests, however, the controversy was partially due to a highly superficial analysis. The comments below shall attempt to prove this superficiality.*


***Keywords:*** *Nazi crimes of the German Third Reich, co-responsibility for international crimes, Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (IPN)*


## Streszczenie

**Łukasz Pohl, *O publicznym przypisywaniu Narodowi Polskiemu lub Państwu Polskiemu odpowiedzialności (współodpowiedzialności) za zbrodnie nazistowskie popełnione przez III Rzeszę Niemiecką – uwagi o rzeczywistej zawartości normatywnej nieobowiązującego już art. 55a ustawy o Instytucie Pamięci Narodowej***

*Jak wiadomo, tytułowy przepis uchodził w ocenie wielu jego komentatorów za przepis rodzący rozliczne kontrowersje. Można zaryzykować stwierdzenie, że to właśnie ta jego właściwość legła u przyczyn powzięcia przez polskiego ustawodawcę decyzji o stosunkowo rychłym usunięciu go z systemu prawnego. Pogłębiona wykładnia tego przepisu skłania jednak do wniosku, że podnoszone kontrowersje były niejednokrotnie wynikiem analizy dalece powierzchownej. Poniższe uwagi poświęcone są wykazaniu jej powierzchowności.*


***Słowa kluczowe:*** *zbrodnie nazistowskie III Rzeszy Niemieckiej, współodpowiedzialność za zbrodnie międzynarodowe, Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3808

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# Attitudes to Punishment. The Results of Three Surveys**

## 1. INTRODUCTION

In public debate the subject of criminal policy often returns on the extent of sentences for particular crimes and offences. Questions are raised such as whether Polish criminal law is effective, just and\or severe. Discussion centres on the need for making the present provisions more rigorous, especially for the most serious crimes. The general question of punishing those responsible for crimes is regularly undertaken in the media, especially with every subsequent 'publicised' criminal case. One such occasions the unchanging question is raised again on the need for possible changes in criminal law.

So as to provide an answer to such questions it would be necessary first of all to consider whether such changes are necessary for resolving the problem that is the subject of debate. If the answer is in the affirmative then subsequently it is necessary to consider what changes would be appropriate and proportional for the stature and scale of the problem in question. This would therefore amount to drafting legislation for relevant changes that would in fact prove useful and necessary. Penal policy however, has become a permanent element of public debate and it is no longer possible to separate objective research on the effectiveness of criminal law and particular forms of sentences (i.e. in preventing crime) from the voice of public opinion on the same subject. Such a policy on the part of the state is observed and assessed by society. The specific decisions of state organs in respect to the introduction and practice of law, including criminal law, have an influence on social mood and sensibilities. On the other hand though, public opinion can also influence penal policy, specifically social expectations and sensibilities can have an impact on the change of relevant provisions in the law. In this respect Professor Mirosława Melezini in 2003 wrote:

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** The manuscript was submitted by the authors on 2 January 2019; the manuscript was accepted for publication by the editorial board on 7 March 2019.

> At the centre of debate an issue (today) of supreme importance for penal policy has arisen that concerns the means of reacting to the phenomenon of crime. With ever increasing intensity there have arisen – by no means new ones – the following questions: whether increasing the severity of sentences can lead to a lowering of the crime rate and therefore the answer to an increase in crime ought to be the increase in punitive repression. Or indeed whether in the light of an increase in crime it is appropriate to increase the repressive nature of criminal law or to maintain the rationalism of sentences promoted by the new penal code?[1].

Today we are witness to crime drop and improvement of safety in Poland[2], nonetheless questions to do with penal policy remain the same. It is worth checking therefore how present opinions on the part of polls on this very issue are shaping. This research is aimed at checking what Poles think of the criminal law functioning at present and what the attitude is to increasing the severity of punitive provisions. For this purpose, in July and August 2018, on the commission of the Institute of Justice, three independent surveys of public opinion concerning penal policy were conducted. The following were chosen for this purpose: Kantar, CBOS and Ipsos. Every survey was conducted by means of the Omnibus Method, which guarantees the completion of research on a nationwide representative sample of Polish residents.

Thanks to the completion of surveys by three independent research centres a unique comparative set of data has been gained in respect to Polish society's attitude to penal policy. In the case of the majority of questions the opinions of respondents in the respective surveys were very similar, as confirmed by their level of reliability and accuracy. In several instances there were observed however, significant differences in answers that this issue demands a thorough methodological analysis, one that goes beyond the context of this study.

This report entails the above introduction, research methodology, research results, conclusion and appendix.

## 2. RESEARCH METHODOLOGY

As already mentioned, each of the three projects discussed in this study was conducted via the Omnibus Method – cyclical multi-aspectual public opinion research conducted on a nationwide representative sample of Polish residents. The survey was conducted using direct interview techniques (in respondents' homes), using CAPI – Computer Assisted Personal Interview. Thus, the questions appearing on the laptop screen were read out and then answers given by the respondent were marked (closed question) or the respondent's answer was written down (open question).

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[1] M. Melezini, *Punitywność wymiaru sprawiedliwości karnej w Polsce w XX wieku*, Białystok, 2003, 9.

[2] Cf. for example, *Mniej przestępstw, wysokie poczucie bezpieczeństwa Polaków – podsumowanie I półrocza 2018 roku*, „Statystyka" Policji, http://statystyka.policja.pl/st/informacje/161093,Mniej-przestepstw-wysokie-poczucie-bezpieczenstwa-Polakow-podsumowanie-I-polrocz.html (accessed on 23 November 2018); *Raport o stanie bezpieczeństwa w Polsce w 2016 roku*, www.bip.mswia.gov.pl/download/4/31673/RaportostaniebezpieczenstwawPolscew2016roku.pdf (accessed on 23 November 2018).

The research was conducted as follows:
- Kantar: 27 July – 1 August 2018
- Ipsos: 9 – 14 August 2018
- CBOS: 23 – 28 August 2018

The data entailed answers to a block of 10 questions devoted to various aspects of public opinion on forms and means of sentences, and answers to questions that characterised the social-demographic traits of those surveyed (so-called metrical questions).

The research conducted by Kantar was quote-random sample in nature and drawn from the Statistics Poland database. In all, 1061 individuals took part in the survey, aged 15 to 90 (46 average), including 51.6% women and 48.4% men; 18.1% of whom had elementary education, 28.7% vocational education, 38.4% secondary education and 14.9% higher education.

The Ipsos survey chose respondents by quota sample for gender and age in 168 target points (communes) at random for proportional likelihood to population. After the survey the sample was weighted for gender, age, education and location type (town/village), which insured its representative nature for the population of Polish residents surveyed, aged 15 and over. As a result, the sample covered 1000 individuals aged 15 to 88 (46 average), out of which there were 52.2% women and 47.8% men; among whom 18.8% had elementary education, 24.2% vocational education, 33.7% secondary education and 23.3% higher education. In sum, 1,002 interviews were conducted.

The CBOS survey was also weighted in respect to the raw data (*rim weighting*), taking into account social-demographic traits such as gender, age, size of town, province and education. Altogether, 1000 individuals above the age of 18 took part in the survey, out of whom there were 52.7% women and 47.3% men; 17.9% had elementary/middle school education, 24.1% basic vocational education, 31% secondary education and 27% higher education.

On the basis of the above data is possible to state that the respective population groups surveyed in the three above-mentioned surveys are comparable in respect to demography[3].

## 3. DISCUSSION OF RESEARCH RESULTS

The first of the questions set in the survey concerned the general social attitudes to the possibility of limiting crime thanks to a more rigorous criminal law and its provisions. The relevant questions and proposed choices by way of answers were the same in the three surveys[4]. Irrespective of survey, the majority of respondents were in favour of limiting crime and improving the safety of citizens as well as

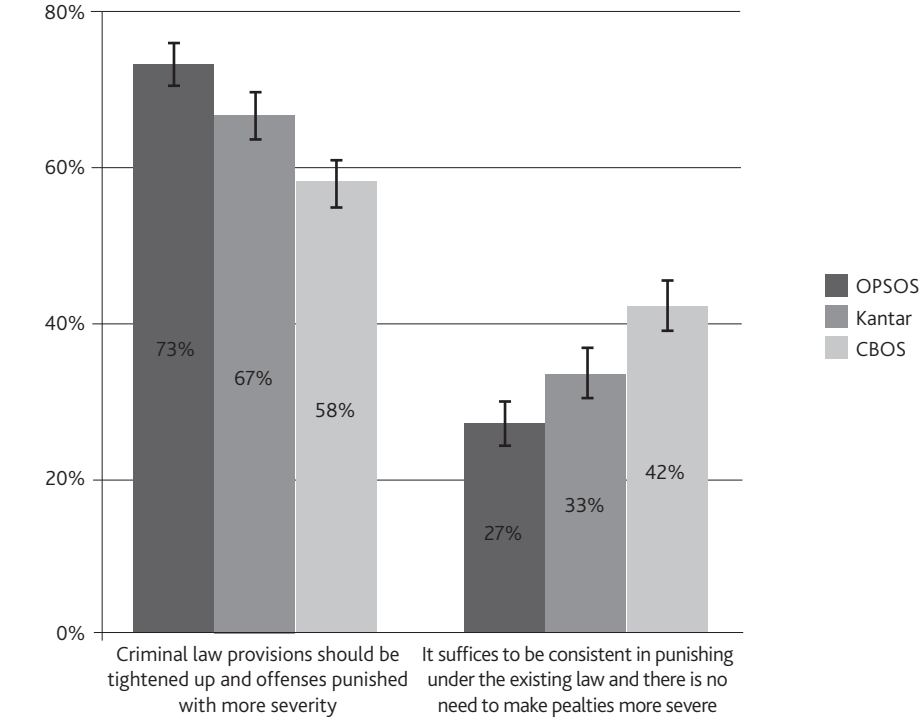
[3] It is possible to note however, the cohort in the Kantar survey had the lowest percentage of those with higher education – 14.9%, while for Ipsos this was 23.3% and CBOS 31% respectively.

[4] The only modification was the wording in the Kantar survey. It read as follows: *Which of the following opinions is closest to your views?* And possible answers: *So as to limit crime it is necessary to make more stringent the provisions of criminal law*/*So as to limit crime it is sufficient to meet out a sentence according to the present law*/*Difficult to say*. In the survey conducted by Ipsos, in the answer of the second category the word 'consistent' was also absent.

meting out more severe forms of sentences for crime. As can be seen in Chart 1, the most decided on this issue were those surveyed by Ipsos – as much as 73% expressed support for a more severe penal policy. On the other hand, 42% of those surveyed by CBOS stated that it is enough to consistently execute the law as it stands and it is not necessary to make sentences more severe. The columns (error margin) presented on the chart represent the range of trust (95%) for particular answers.

These show that contrary to expectations and methodological assumptions, the differences in respondents' answers – surveyed by three different research centres – are statistically significant. This particular question requires no doubt a more precise form of methodological analysis, one beyond the confines of this brief report. It is worth however, to note that results very close to the 'average' from these surveys were gained for a comparable question set by CBOS in 1996. After adjusting to the same format (without the answer 'Difficult to say') that survey showed 64% were of the opinion that so as to limit crime the provisions of the law need to be more stringent and respectively 36% that it is enough to firmly and consistently execute the law according to its existing provisions[5].

**Chart 1.**
So as to limit crime and improve the safety of citizens…



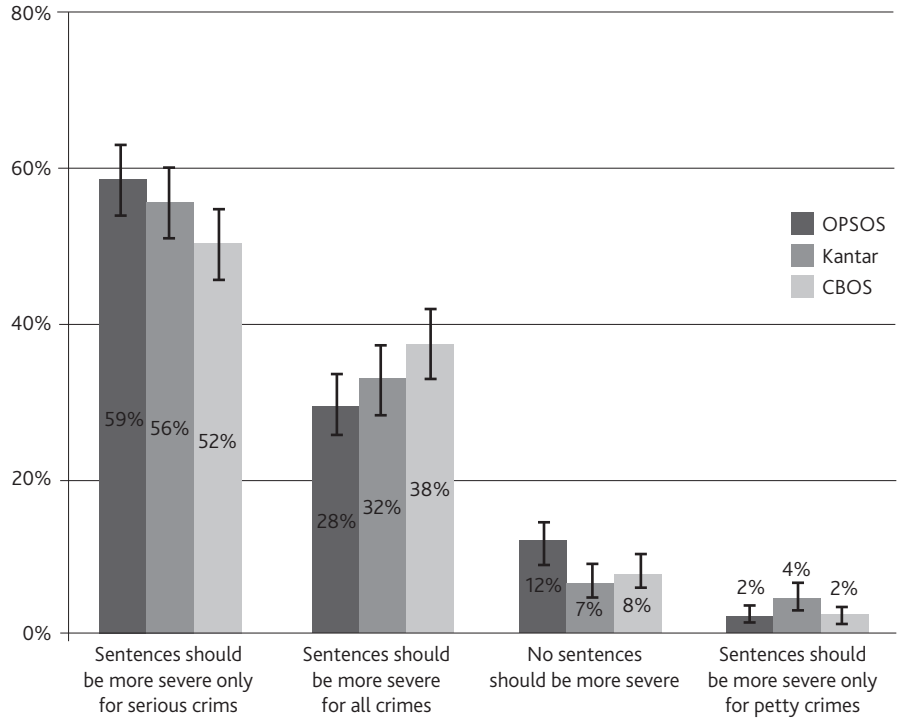

Source: Author's own study.

[5] Cf. *Sposoby walki z przestępczością*, Komunikat z badań, Warszawa, maj 1996 roku, https://www.cbos.pl/SPISKOM.POL/1996/K_074_96.PDF (accessed on 23 November 2018).

The second concerned the issue whether there should be particular sentences for crimes and if so then generally speaking, what particular sentences in the opinion of respondents should be more severe[6].

It is possible to note in Chart 2 that the hierarchy of answers given was the same in each of the surveys. The most in this respect – over half of respondents in each survey – represented those in favour of more severe sentences only for serious crimes. The remainder of those surveyed (about 30% in each research) spoke in favour of increasing sentences for all crimes. Respondents, choosing between the last two answers, stated that there is no need to make sentences more severe (average 9%), while relatively few took the position that sentences should only be more severe for petty crimes. Moreover, it is worth noting that inasmuch there are visible differences between the surveys in the answers speaking for increasing sentences, in respect to the position that sentences should not be made more severe, the respective answers and their percentages in particular surveys are very similar. Those with a punitive point of view could therefore choose between the categories: 'sentences should be more severe for all crimes' (more stringent position) and 'sentences should be more severe only for serious crimes' (less stringent position).

**Chart 2.**
Should sentences be more severe for crimes and if so, which ones?




Source: Author's own study.

[6] In the Kantar survey the question read: '*And take into account the following opinions, which is the closest to yours?*'. In the second answer, instead of the word 'serious' there appeared the words 'most grievous'.

In the next question respondents were asked to take a position on the matter of sentences for serious crimes against life, health and personal freedom – are more severe sentences an expression of justice and do they increase the sense of safety on the part of citizens, or rather denote an excessive interference on the part of the state in personal freedom, lowering the sense of safety of citizens.

In the surveys conducted by Kantar and CBOS the question was set in the same form. In both the results are similar – a decided majority of respondents view a more severe form of sentences for given crimes as an expression of justice and a means of increasing the sense of safety on the part of citizens (over 80%).

In the research conducted by Ipsos, however, this issue was broken into two separate questions – respectively for crimes against life and health as well as those against personal freedom. The respondents answered in very similar fashion in both cases. Thus a decided majority considered a more severe form of sentences for crimes against life and health (83.5%) as well as for crimes against personal freedom (81.1%), as an expression of justice and a means of increasing the sense of safety.

**Table 1.**
Making sentences for serious crimes more severe against life, health and personal freedom in your opinion:

| | Kantar | | CBOS | |
|---|---|---|---|---|
| | **N** | **%** | **N** | **%** |
| is an expression of justice and increases the sense of safety on the part of citizens | 761 | 81.2 | 782 | 86.9 |
| is an excessive form of interference on the part of the state in respect to personal freedom, lowering the sense of safety on the part of citizens | 176 | 18.8 | 118 | 13.1 |
| **Total** | **937** | **100.0** | **899** | **100.0** |
| *Difficult to say* | 124 | 11.7 | 101 | 10.1 |

Source: Author's own study.

The next question was also presented in more detail in the Ipsos survey and the remaining two others; therefore Tables 2 and 3 present the results only from the former. The task of respondents was to evaluate in two respects three types of crime: economic fraud, cyber fraud and dishonest loans. In the first, respondents had to state whether a more severe form of sentences for these crimes is essential for the effective function of the economy, or indeed is an unjustified limitation of the freedom to conduct a business. In the second, respondents were asked to choose whether more severe sentences for these crimes leads to an increase in the sense of safety on the part of citizens and firms in the workings of the economy or is an excessive form of interference on the part of the state in freedom and civic liberties.

Respondents in the survey conducted by Ipsos to a similar extent related to crimes in the form of economic and cyber fraud. The decided majority (approx. 87%) considered more severe forms of sentences for these crimes as necessary for the effective function of the economy, one that would lead to an increase in the sense of safety of citizens and firms in the workings of the economy.

The greatest support for a more severe form of sentences however, was expressed by respondents in respect to crimes relating to dishonest loans. Almost all those

surveyed (90%) considered that more stringent sentences in this respect are necessary for the effective functioning of the economy, leading to an increase in the sense of safety on the part of citizens and firms in the economy itself.

In the survey conducted by CBOS respondents were asked only in respect to the first aspect, while in the research conducted by Kantar, the second. In both cases there was one question without a breakdown into types of crime[7]. It transpired however, despite the methodological difference, respondent's answers were very similar to those in the Ipsos research. CBOS survey respondents therefore stated (83.7%) that more severe forms of sentences for economic and cyber fraud as well as dishonest loans leads to an increase in the sense of safety on the part of citizens and firms in the economy and those surveyed by Kantar stated that the above is necessary for the effective functioning of the economy because it leads to an increase in the sense of safety in its workings (79%).

**Table 2.**
Ipsos – More severe sentences for crimes:

| | Economic fraud | | Cyber fraud | | Dishonest loans | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| are essential for the efficient function of the economy | 778 | 86.6 | 762 | 87.5 | 800 | 90.4 |
| are an unjustified limitation of the freedom to conduct a business | 120 | 13.4 | 109 | 12.5 | 85 | 9.6 |
| **Total** | **898** | **100.0** | **870** | **100.0** | **885** | **100.0** |
| *Difficult to say* | 102 | 10.2 | 130 | 13.0 | 115 | 11.5 |

Source: Author's own study.

**Table 3.**
Ipsos – Does more severe sentences for crimes:

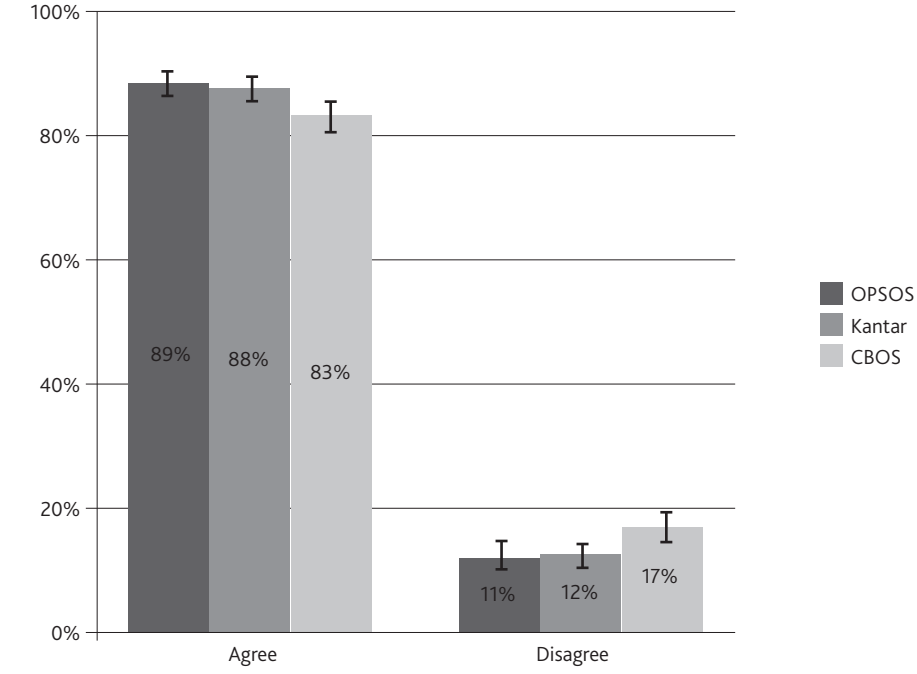
| | Economic fraud | | Cyber fraud | | Dishonest loans | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| lead to a greater sense of safety on the part of citizens and firms in the workings of the economy | 766 | 86.1 | 771 | 87.8 | 818 | 91.0 |
| mean an excessive interference on the part of the state in respect to freedom and civic liberties | 124 | 13.9 | 107 | 12.2 | 81 | 9.0 |
| **Total** | **890** | **100.0** | **878** | **100.0** | **899** | **100.0** |
| *Difficult to say* | 110 | 11.0 | 122 | 12.2 | 101 | 10.1 |

Source: Author's own study.

[7] The wording read: '*In your opinion, are more severe sentences for crimes such as economic fraud, cyber fraud, dishonest loans…*'. Answers in the Kantar survey: *are essential for the efficient function of the economy so as to increase the sense of safety in the workings of the economy/an unjustified limitation of the freedom to conduct the business*. Answers in the case of CBOS: *cause an increase in the sense of safety on the part of citizens and firms in the workings of the economy/are an unjustified limitation of the freedom to conduct a business*.

In the next question respondents were to state whether in the case of aggravated homicide – circumstances were given – those responsible should be liable only to life imprisonment. Regardless of survey (see Chart 3), the decided majority were in favour of narrowing the sentences to the highest form (life imprisonment) in the case of aggravated homicide. Table 3 in the appendix of this report contains the details of respondents' answers.

**Chart 3.**
Do you agree or not agree that in the case of aggravated homicide the only sentence should be life imprisonment?[8]




Source: Author's own study.

The respondents were then asked to state whether for the seven crimes chosen, sentences should remain as at present, be more lenient or be more severe than at present. In the questions set by Kantar an additional aspect of sentences was given, one foreseen for each of the crimes mentioned in the Penal Code in force at present.

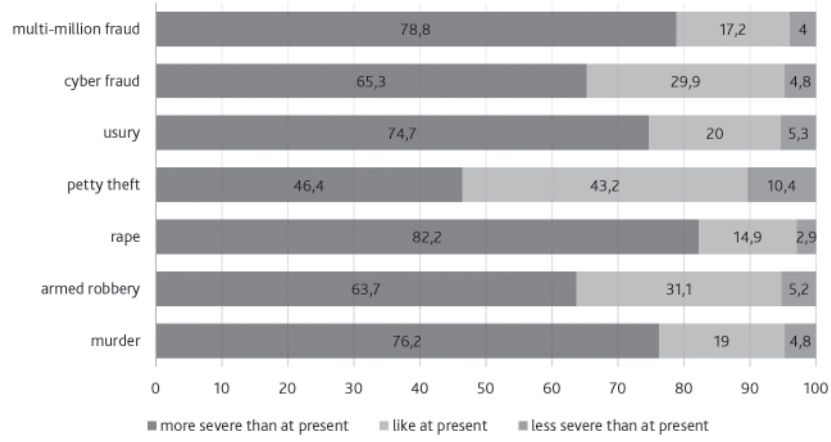
The answers in particular surveys were similar for the majority of crime categories – almost always the majority of those surveyed believed that it is necessary for sentences to be very severe. Regardless of research, the greatest support for a more severe form of criminal responsibility was expressed in relation to crimes of rape. In this context also the lowest percentage of answers was noted for retaining the

[8] The precise wording of the question was: *at present for aggravated homicide or taking someone hostage, rape or armed robbery or as a result of murder for motives deserving particular condemnation or killing more than one person in one act the sentence be not less than 12 years imprisonment, up to 25 years imprisonment or life imprisonment. Do you agree or not agree that in the case of this crime the only sentence should be one of life imprisonment?*

possibility of punishing criminals without change or marginally in favour of more lenient sentences than is the case at present.

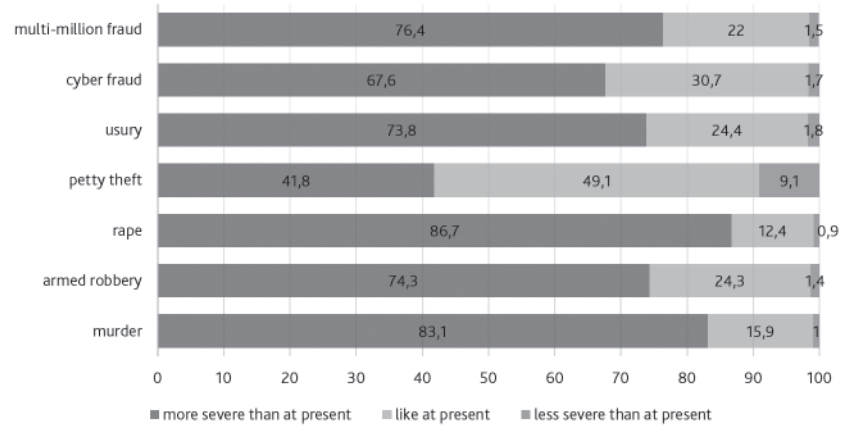
Respondents on the issue of sentences for petty theft though, gave as an exception, different answers. In the two surveys conducted (Ipsos and CBOS) the majority of surveyed took the position that such sentences should remain as at present. This was the only crime for which a minority of respondents opted for a more severe form of sentence and at the same time, the most in favour of a more lenient form of sentence than presently.

**Chart 4.**
Kantar – attitude to the extent of sentences for particular crimes



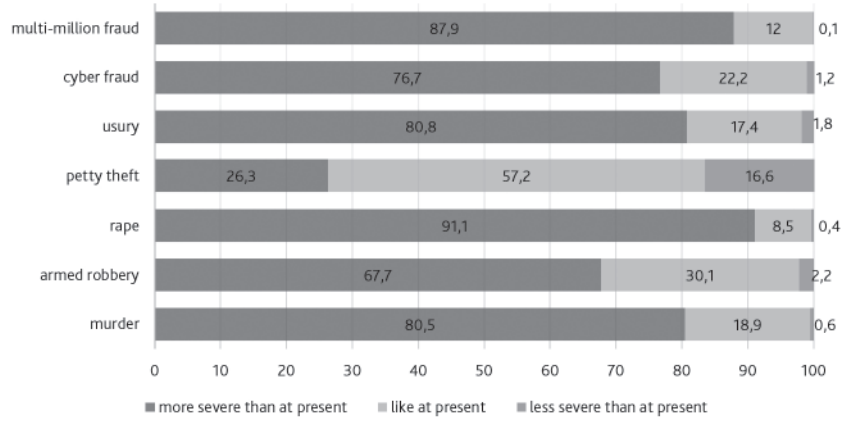

Source: Author's own study.

**Chart 5.**
Ipsos – attitude to the extent of sentences for particular crimes




Source: Author's own study.

**Chart 6.**
CBOS – attitude to the extent of sentences for particular crimes




Source: Author's own study.

Another issue subject to analysis in the surveys was that of a possible change of age from which juvenile criminals of the most serious crimes (murder, assault leading to death) can receive the same sentence as adults.

It was only in the research conducted by Kantar that two questions were set on this subject. The first, where the present age of criminal responsibility for juveniles was given (from 15) and the next that asked whether this should be changed or not. The majority of respondents (78.9%) where of the opinion that the age of criminal responsibility for juveniles should not be changed.

In the second question – this was also set in the remaining two surveys – respondents were asked to state from which age juvenile criminals for the most serious crimes should be responsible the same as adults (with information that 15 is the age in force for juvenile criminal responsibility). The wording of this question was the same in each of the three surveys analysed. Table 4 contains the answers from all three surveys[9].

In this context the majority of surveyed were in favour of the age of criminal responsibility of juveniles to remain at the present age of 15, with those most decided in this particular issue being the respondents surveyed by Kantar (79%) and the least – those surveyed by CBOS, where 46% were of this opinion.

The remaining respondents were most often in favour of raising the age in this respect to 16 or 17. It should also be noted that several respondents were in favour of raising this age even above the general age limit of criminal responsibility (to 18).

In the next question respondents were presented with the following situation: a 21 year old man, with no prior convictions, takes part in an assault and with the use of a knife is responsible for grievous bodily harm to another person[10]. Then

[9] In the category 'other', in the possible answers indicated by IPOS, there were: 'from 20 years of age' and 'from birth'. Another such in the case of CBOS there were, however: 'sentencing from 20 years of age', 'from the age at which [the perpetrator] committed the crime' as well as making that age dependent on the degree of a given child's development.

[10] In the question set by Kantar: *Please imagine a situation, where a 21-year-old man, with no prior convictions, takes part in a fight and with the use of a knife causes grievous bodily harm to another person. What sentence in your opinion should he receive?*

the surveyed were asked to state what sentence this man should receive. Chart 7 illustrates the answers of respondents.

**Table 4.**
From what age, in your opinion, juveniles responsible for the most serious crimes (murder, assault leading to death), should be subject to the same sentence as adults (imprisonment)? Please give the relevant age

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | N | % | N | % | N | % |
| Less than 13 | 1 | 0.1 | - | - | 7 | 0.7 |
| From 13 | 26 | 2.5 | 81 | 9.2 | 98 | 10.3 |
| From 14 | 37 | 3.6 | 63 | 7.2 | 68 | 7.1 |
| From 15 (Like at present) | 809 | 78.9 | 478 | 54.8 | 442 | 46.3 |
| From 16 | 58 | 5.7 | 103 | 11.8 | 197 | 20.7 |
| From 17 | 80 | 7.8 | 143 | 16.4 | 128 | 13.5 |
| From 18 | 14 | 1.4 | 4 | 0.4 | 11 | 1.1 |
| Other | - | - | 2 | 0.2 | 3 | 0.3 |
| **Total** | **1025** | **100.0** | **874** | **100.0** | **954** | **100.0** |
| *Difficult to say* | 36 | 3.4 | 127 | 12.7 | 46 | 4.6 |

Source: Author's own study.

The majority of those surveyed were in favour of a custodial sentence. Subsequent sentences chosen (in the case of Ipsos and CBOS almost equal) were: suspended sentence and community service/unpaid community work. The answers in the survey conducted by Kantar differ from the other surveys – as much as 25% surveyed chose a sentence of community service, then (16%) a suspended imprisonment. This survey found the largest percentage of those in favour of a fine.

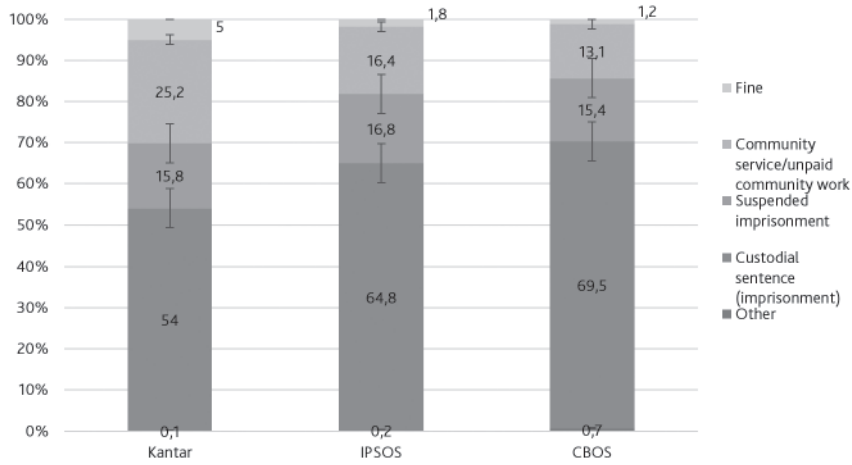
The limited range of sentences proved insufficient for some respondents, who opined that in a given situation it is necessary to apply other means of punishment – among others, being sentenced to hard labour, having a hand cut off as well as the death penalty. In addition, apart from the above mentioned questions, respondents indicated the following forms of punishment:

- Kantar: 3 times – reparation for victims, 2 times – sentencing to hard labour ('stone quarry' – as well as imprisonment), 1 time – forced labour in jail (as well as custodial sentence)
- Ipsos: life imprisonment and prison work programmes in a penal Institute
- CBOS: 'imprisonment together with a work programme, thanks to which the prisoner and prison staff are paid for', 'imprisonment and community work, compensation\reparation for the victim', 'life imprisonment'.

Respondents that indicated in the previous question imprisonment as an appropriate sentence were asked to comment further and say how long this should be. Regardless of the survey conducted, respondents most often indicated that the criminal concerned should be imprisoned from 6 to 10 years[11].

[11] Detailed answers of respondents can be found in Table 12 of the appendix to the report.

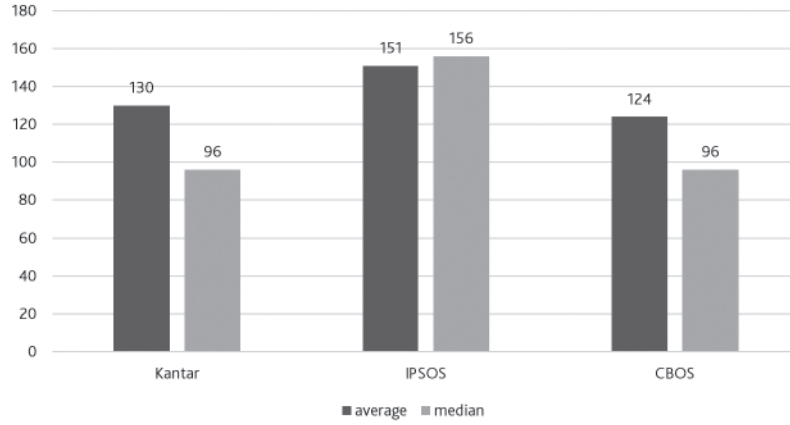
**Chart 7.**
People have different views as to how severely punish criminals. For example, a 21 year old man, with no prior convictions, takes part in an assault and causes serious body injury to another person with a knife. What sentence, in your opinion, should he receive?




Source: Author's own study.

The respective categories of answers were subsequently converted into numerical values, establishing for each a value equivalent to the number of months and for the respective periods, the number of months constituting the average of this period. Sentences of 'More than 25 years' and 'Life imprisonment' were transformed into 300 months (25 years). After this conversion it was possible to calculate the average length of a sentence of imprisonment, as defined by respondents for the relevant crime and its perpetrator. The results gained were represented in Chart 8.

**Chart 8.**
How long should the prison term be? (months)



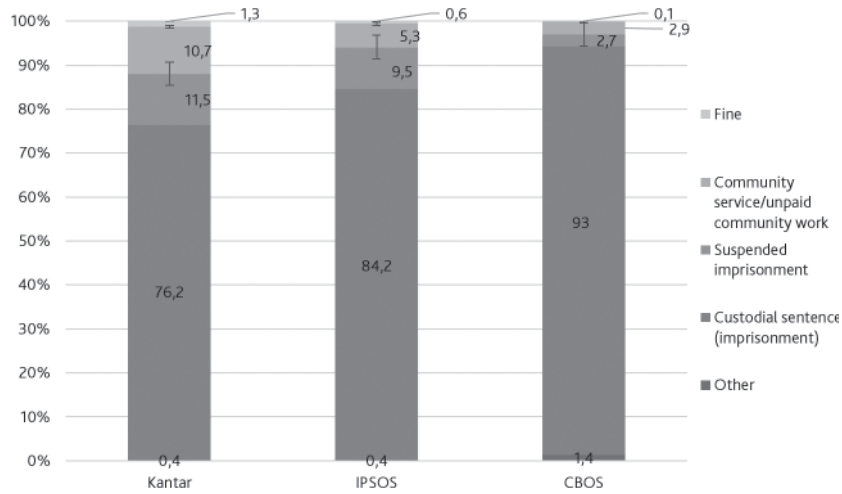

Source: Author's own study.

The most severe sentence of imprisonment was meted out by respondents from the Ipsos survey – where the arithmetical average amounted to 151 months (over 12 years), with a median of 156 months (13 years). In the remaining two surveys the results were similar: in Kantar the arithmetical average sentence amounted to 130 months (almost 11 years), with a median of 96 months (8 years), while in CBOS the arithmetical average amounted to 124 months (over 10 years), with a median of 96 months (8 years).

Respondents were then asked what sentence in their opinion, should the same man receive had he already been previously sentenced for a similar crime? On this occasion respondents more often than previously chose a sentence of imprisonment, which clearly dominated the remaining answers.

In respect of the category 'other', each survey had at least one response favouring the death penalty. In addition, apart from the above-mentioned sentences, respondents indicated: life imprisonment, forced labour (as well as imprisonment), austere conditions in jail (as well as imprisonment), hard labour (as well as community service) or life-term work for the benefit of the victim.

**Chart 9.**
What sentence, in your opinion, should the same man receive had he already been previously sentenced for a similar crime?




Source: Author's own study.

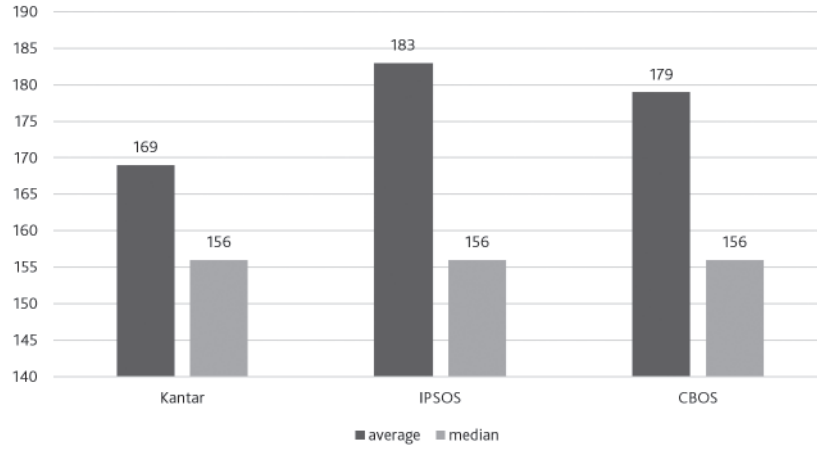
As in the previous case, respondents who were in favour of sentencing the man – this time previously sentenced – to custodial sentence, were asked to indicate how long he should spend in prison. In respect to recidivists, respondents decidedly more often were in favour of a more severe sentence. The majority of those surveyed chose a sentence of more than 10 years imprisonment[12]. Moreover, the percentage of those opting for 'meting out' a sentence of life imprisonment (approximately 50% in every survey, while for perpetrators with no prior convictions the respective percentage amounted to 7% on average).

[12] In the case of Kantar this amounted to 56% of answers, Ipsos – 63%, and CBOS – 61%.

Using the same methodology as before, the respective categories of answers were converted into numerical values, establishing for every such value a corresponding number of months. Of particular note in respect to length of sentence for recidivists, respondents in the respective surveys had a far closer point of view. In the surveys conducted by Ipsos and CBOS the average arithmetical 'sentence' for recidivists amounted to approximately 15 years and in the Kantar survey – 14. In each of the surveys the median amounted to 156 months (13 years).

It can be said therefore that in respect to 'sentencing' a recidivist, respondents were more in accord regarding the length of imprisonment than was the case in regard to the sentence for a perpetrator with no prior convictions.

**Chart 10.**
How long should the prison term be? (months)




Source: Author's own study.

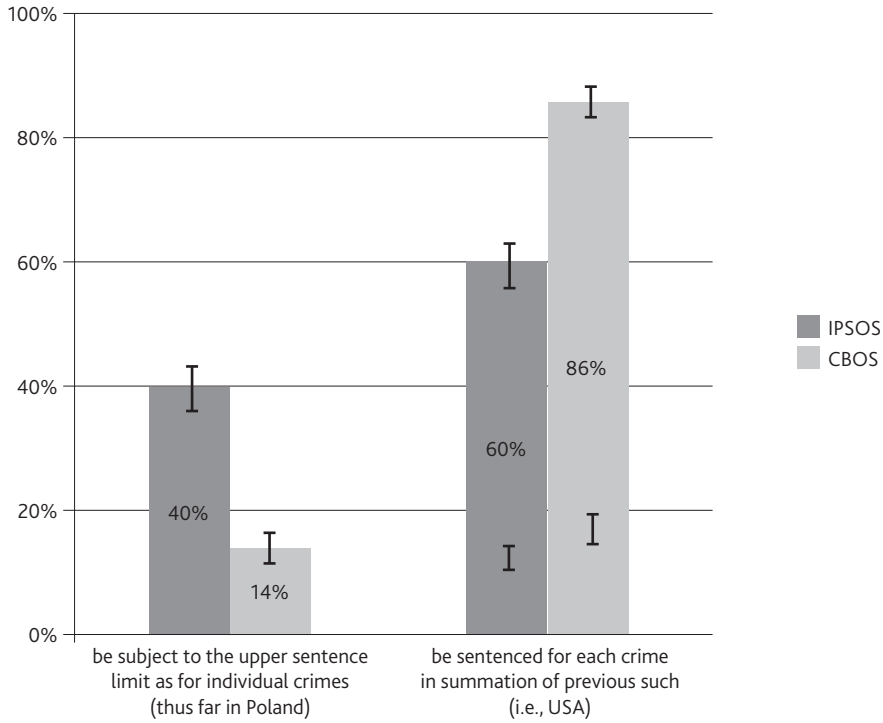
In two surveys – Ipsos and CBOS – the questionnaire contained additional question which was shaped in a somewhat different way. Respondents in the latter were asked to express their opinion as to whether a criminal previously sentenced a number of times for a similar crime (armed robbery or rape) should be subject to the same upper sentence limit as in the case of individual crimes (as is the case now in Poland), or indeed whether every crime should be summed for previous crimes (as is the case in the USA)[13].

The majority of respondents in both surveys were in favour of introducing a summation sentence. It should be noted however, answers to this particular question differed greatly depending upon the survey concerned. Respondents in the case of CBOS in the decided majority opted for introducing a summation sentence for every crime. Those against represented only every seventh respondent. In the case of Ipsos, despite the fact that the majority of respondents were in favour of a summation sentence, 40% of respondents stated that on this issue there should be no change in Poland. Such large

[13] This question was changed in the Ipsos survey: 'a criminal who has committed more than one crime of a similar nature (for example, armed robbery or rape): 1) should be subject to an upper limit sentence as for an individual crime (as at present in Poland), 2) sentences for every crime should be some (as for example in the USA), 3) Difficult to say'.

differences in answers may be associated with different means of formulating questions in both surveys concerned, but is also possible to argue that the very wording the question itself could have been somewhat unclear and incomprehensible for respondents. It is therefore the case most probably that it is not possible to treat the answers gained in both surveys as fully comparable. Public opinion therefore is in favour of a change of Penal Code provisions introducing sentence summation, though it is worthwhile in addition to subject the scale of these attitudes to a more detailed analysis.

**Chart 11.**
Should criminals previously sentenced many times for a similar crime (i.e. armed robbery or rape):




Source: Author's own study.

## 4. CONCLUSION

In all the surveys discussed in this study the decided majority of respondents were of the opinion that in order to limit crime and improve the safety of citizens it is necessary to make the provisions of the Penal Code more stringent with more severe sentences for crimes. This was the case for most respondents; for over half of respondents in every survey took the position that sentences should be made more severe only in the case of serious crimes. The remainder (approximately 30% in every survey) answered that is necessary to make sentences more severe for all crimes per se.

Poles agreed with the thesis that making sentences more severe for serious crimes against life, health and personal liberty is an expression of justice and increases the sense of safety on the part of citizens. In practically every instance, the majority of

those surveyed considered that sentences should be more severe than at present in the Penal Code in force. The exception being, petty theft, which in the opinion of Poles does not deserve a more severe sentence.

The decided majority of those surveyed were in favour of narrowing the threat of committing aggravated homicide simply to a sentence of life imprisonment.

In the light of a predilection on the part of the majority for making criminal law tougher, of particular interest was the attitude on the part of Poles in respect to the age from which juveniles just as adults, are seen to be responsible under the law. The majority of respondents were of the opinion that the age of criminal responsibility for juveniles should not be changed (15 years), while those who thought otherwise, most often proposed increasing this limit.

Undoubtedly, the great differences in the results of the three nationwide surveys justify the need to continue research on this particular question. Among others, on account of this at the Institute of Justice there are plans to conduct in 2019 a nation-wide survey – based on a decidedly greater cohort of respondents – that offers a significantly greater precision of measuring instruments. This research therefore shall facilitate the establishment among others, of the scale of victimisation in society, levels of fear of crime, punitive views and social opinions on the functioning of law-enforcement authorities as well as the system of justice itself.

## Appendix

**Table 1.**
Do you believe that in order to limit crime and improve the safety of citizens it is necessary to:

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| make the provisions of the penal code tougher with more severe sentences for crimes | 613 | 66.6 | 681 | 73.2 | 534 | 58.0 |
| consistently execute the present law without making sentences more severe | 307 | 33.4 | 250 | 26.8 | 387 | 42.0 |
| **Total** | **920** | **100.0** | **931** | **100.0** | **921** | **100.0** |
| *Difficult to say* | 141 | 13.3 | 69 | 6.9 | 79 | 7.9 |

Source: Author's own study.

**Table 2.**
Which among the following opinions is the closest to yours?

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| Sentences should be made more severe for all crimes | 315 | 32.4 | 355 | 37.9 | 266 | 28.0 |
| Sentences should be made more severe only for serious crimes | 545 | 56.0 | 486 | 51.8 | 558 | 58.8 |
| Sentences should be made more severe only for petty crimes | 42 | 4.3 | 22 | 2.3 | 15 | 1.6 |
| Sentences should not be made more severe | 69 | 7.1 | 75 | 8.0 | 110 | 11.6 |
| **Total** | **971** | **100.0** | **937** | **100.0** | **949** | **100.0** |
| *Difficult to say* | 90 | 8.5 | 63 | 6.3 | 51 | 5.1 |

Source: Author's own study.

**Table 3.**
At present, for aggravated homicide or taking someone hostage, rape, armed robbery or as a result of murder for motives deserving particular condemnation or killing more than one person in one act, the sentence is not less than 12 years imprisonment, up to 25 years imprisonment or life imprisonment. Do you agree or not agree that in the case of this crime the only sentence should be one of life imprisonment?

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | N | % | N | % | N | % |
| Definitely agree | 415 | 42.2 | 440 | 47.8 | 539 | 57.0 |
| Rather agree | 449 | 45.7 | 374 | 40.7 | 245 | 25.9 |
| Rather do not agree | 92 | 9.4 | 86 | 9.4 | 102 | 10.8 |
| Definitively do not agree | 27 | 2.7 | 19 | 2.1 | 59 | 6.3 |
| **Total** | **983** | **100.0** | **919** | **100.0** | **945** | **100.0** |
| *Difficult to say* | 78 | 7.4 | 81 | 8.1 | 55 | 5.5 |

Source: Author's own study.

**Table 4.**
In your opinion, those responsible for murder should receive a sentence (underlinings by the authors):

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | N | % | N | % | N | % |
| more severe than at present | 768 | 76.2 | 804 | 83.1 | 745 | 80.5 |
| like at present | 192 | 19.0 | 154 | 15.9 | 175 | 18.9 |
| less severe than at present | 48 | 4.8 | 10 | 1.0 | 6 | 0.6 |
| **Total** | **1008** | **100.0** | **968** | **100.0** | **925** | **100.0** |
| *Difficult to say* | 53 | 5.0 | 32 | 3.2 | 75 | 7.5 |

Source: Author's own study.

**Table 5.**
In your opinion, those responsible for armed robbery should receive a sentence:

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | N | % | N | % | N | % |
| more severe than at present | 634 | 63.7 | 715 | 74.3 | 603 | 67.7 |
| like at present | 309 | 31.1 | 234 | 24.3 | 268 | 30.1 |
| less severe than at present | 52 | 5.2 | 14 | 1.4 | 19 | 2.2 |
| **Total** | **995** | **100.0** | **963** | **100.0** | **891** | **100.0** |
| *Difficult to say* | 66 | 6.2 | 37 | 3.7 | 109 | 10.9 |

Source: Author's own study.

**Table 6.**
In your opinion, those responsible for rape should receive a sentence:

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | N | % | N | % | N | % |
| more severe than at present | 829 | 82.2 | 844 | 86.7 | 864 | 91.1 |
| like at present | 150 | 14.9 | 120 | 12.4 | 81 | 8.5 |
| less severe than at present | 29 | 2.9 | 9 | 0.9 | 4 | 0.4 |
| **Total** | **1008** | **100.0** | **972** | **100.0** | **949** | **100.0** |
| *Difficult to say* | 53 | 5.0 | 28 | 2.8 | 51 | 5.1 |

Source: Author's own study.

**Table 7.**
In your opinion, those responsible for petty theft should receive a sentence:

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| more severe than at present | 459 | 46.4 | 399 | 41.8 | 229 | 26.3 |
| like at present | 427 | 43.2 | 469 | 49.1 | 499 | 57.1 |
| less severe than at present | 103 | 10.4 | 87 | 9.1 | 145 | 16.6 |
| **Total** | **989** | **100.0** | **955** | **100.0** | **872** | **100.0** |
| *Difficult to say* | 72 | 6.8 | 45 | 4.5 | 128 | 12.8 |

Source: Author's own study.

**Table 8.**
In your opinion, those responsible for usury (companies that lend money, bypassing the law) should receive a sentence:

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| more severe than at present | 736 | 74.7 | 710 | 73.8 | 738 | 80.8 |
| like at present | 197 | 20.0 | 234 | 24.4 | 159 | 17.4 |
| less severe than at present | 52 | 5.3 | 18 | 1.8 | 16 | 1.8 |
| **Total** | **985** | **100.0** | **961** | **100.0** | **912** | **100.0** |
| *Difficult to say* | 76 | 7.2 | 39 | 3.9 | 88 | 8.8 |

Source: Author's own study.

**Table 9.**
In your opinion, those responsible for cyber fraud should receive a sentence:

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| more severe than at present | 639 | 65.3 | 634 | 67.6 | 668 | 76.6 |
| like at present | 293 | 29.9 | 288 | 30.7 | 193 | 22.2 |
| less severe than at present | 47 | 4.8 | 16 | 1.7 | 10 | 1.2 |
| **Total** | **979** | **100.0** | **938** | **100.0** | **871** | **100.0** |
| *Difficult to say* | 82 | 7.7 | 62 | 6.2 | 129 | 12.9 |

Source: Author's own study.

**Table 10.**
In your opinion, those responsible for multi-million fraud should receive a sentence:

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| more severe than at present | 786 | 78.8 | 733 | 76.5 | 809 | 87.9 |
| like at present | 171 | 17.2 | 211 | 22.0 | 110 | 12.0 |
| less severe than at present | 40 | 4.0 | 15 | 1.5 | 1 | 0.1 |
| **Total** | **997** | **100.0** | **959** | **100.0** | **920** | **100.0** |
| *Difficult to say* | 64 | 6.0 | 41 | 4.1 | 80 | 8.0 |

Source: Author's own study.

**Table 11.**
There are various views on how severe a sentence should be for criminals. For example, a 21 year old man, with no prior convictions, takes part in an assault and with the use of a knife is responsible for grievous bodily harm to another person. What sentence in your opinion should he receive?

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| Fine | 48 | 5.0 | 18 | 1.8 | 12 | 1.2 |
| Community service/unpaid community work | 243 | 25.2 | 163 | 16.4 | 123 | 13.1 |
| Suspended sentence | 152 | 15.8 | 167 | 16.8 | 145 | 15.4 |
| Custodial sentence (imprisonment) | 521 | 53.9 | 644 | 64.8 | 650 | 69.6 |
| Other | 1 | 0.1 | 2 | 0.2 | 7 | 0.7 |
| **Total** | **965** | **100.0** | **1000** | **100.0** | **936** | **100** |
| *Difficult to say* | 96 | 9.0 | 6 | 0.6 | 64 | 6.4 |

Source: Author's own study.

**Table 12.**
In your opinion, what should the prison sentence be (in the case of no prior convictions)?

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| One month or less | - | - | - | - | - | - |
| Two to six months | 2 | 0.5 | 1 | 0.2 | 2 | 0.4 |
| Seven to eleven months | 2 | 0.5 | 5 | 0.9 | 5 | 0.9 |
| One year | 19 | 4.4 | 20 | 3.9 | 25 | 4.6 |
| Two years | 17 | 4.0 | 30 | 5.9 | 31 | 5.7 |
| Three years | 24 | 5.6 | 14 | 2.8 | 46 | 8.5 |
| Four years | 15 | 3.5 | 23 | 4.5 | 22 | 4 |
| Five years | 72 | 16.8 | 66 | 12.8 | 88 | 16.1 |
| Six to ten years | 122 | 28.3 | 95 | 18.6 | 122 | 22.3 |
| 11–15 years | 44 | 10.3 | 76 | 14.8 | 70 | 12.9 |
| 16–20 years | 27 | 6.3 | 46 | 9.0 | 37 | 6.8 |
| 21–25 years | 27 | 6.3 | 55 | 10.8 | 49 | 9 |
| More than 25 years | 21 | 4.9 | 43 | 8.4 | 19 | 3.6 |
| Life imprisonment | 37 | 8.6 | 38 | 7.4 | 28 | 5.2 |
| **Total** | **429** | **100.0** | **512** | **100.0** | **543** | **100.0** |
| *Difficult to say* | 188 | | 132 | | 103 | |
| Not relevant (other sentences indicated) | 444 | | 356 | | 354 | |

Source: Author's own study.

**Table 13.**
What sentence in your opinion, should the same man receive, had he already been previously sentenced for a similar crime?

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| Fine | 13 | 1.3 | 6 | 0.6 | 1 | 0.1 |
| Community service/unpaid community work | 106 | 10.7 | 53 | 5.3 | 28 | 2.9 |
| A suspended sentence | 114 | 11.5 | 95 | 9.5 | 26 | 2.7 |
| Custodial sentence (imprisonment) | 757 | 76.1 | 840 | 84.2 | 903 | 92.9 |
| Other | 4 | 0.4 | 4 | 0.4 | 14 | 1.4 |
| **Total** | **994** | **100.0** | **1000** | **100.0** | **972** | **100.0** |
| *Difficult to say* | 67 | 6.3 | 2 | 0.2 | 28 | 2.8 |

Source: Author's own study.

**Table 14.**
How long in your opinion, should a prison sentence be (for those previously sentenced)?

| | Kantar | | Ipsos | | CBOS | |
|---|---|---|---|---|---|---|
| | **N** | **%** | **N** | **%** | **N** | **%** |
| One month or less | | | | | 0 | 0 |
| Two to six months | 0 | 0.0 | 2 | 0.3 | 3 | 0.3 |
| Seven to eleven months | 4 | 0.6 | 1 | 0.1 | 5 | 0.7 |
| One year | 10 | 1.6 | 9 | 1.3 | 8 | 1.0 |
| Two years | 28 | 4.3 | 19 | 2.8 | 26 | 3.3 |
| Three years | 32 | 5.0 | 36 | 5.2 | 24 | 3.1 |
| Four years | 14 | 2.2 | 23 | 3.3 | 9 | 1.2 |
| Five years | 64 | 9.9 | 60 | 8.7 | 74 | 9.3 |
| Six to ten years | 131 | 20.4 | 107 | 15.3 | 155 | 19.6 |
| 11–15 years | 86 | 13.3 | 99 | 14.3 | 118 | 15.0 |
| 16–20 years | 59 | 9.1 | 61 | 8.8 | 69 | 8.7 |
| 21–25 years | 65 | 10.1 | 75 | 10.8 | 114 | 14.4 |
| More than 25 years | 55 | 8.5 | 85 | 12.2 | 60 | 7.6 |
| Life imprisonment | 97 | 15.0 | 118 | 17.0 | 124 | 15.8 |
| **Total** | **645** | **100.0** | **696** | **100.0** | **790** | **100.0** |
| *Difficult to say* | 179 | | 144 | | 113 | |
| Not relevant (other sentences indicated) | 237 | | 160 | | 97 | |

Source: Author's own study.

**Table 15.**
Those sentenced previously a number of times for a similar crime (ie. armed robbery or rape):

| | Ipsos | | CBOS | |
|---|---|---|---|---|
| | **N** | **%** | **N** | **%** |
| should be subject to the same upper limit as for individual crimes (as is the case at present in Poland) | 353 | 40.5 | 124 | 13.7 |
| The sentence for each crime should be summed (as in the USA) | 519 | 59.5 | 776 | 86.3 |
| **Total** | **872** | **100.0** | **900** | **100.0** |
| *Difficult to say* | 128 | 12.8 | 100 | 10.0 |

Source: Author's own study.


## Abstract

**Andrzej Siemaszko, Paweł Ostaszewski, Joanna Klimczak,**
***Attitudes to Punishment. The Results of Three Surveys***

*In public debate the subject of penal policy often returns on the extent of sentences for particular crimes and petty offences. Questions are raised such as whether the Polish criminal law is effective, just and\or severe. The discussion focuses on the need to make the existing provisions stricter, especially those concerning the most frequent crimes. The general question of punishing perpetrators of offences is regularly undertaken in the media, especially with every subsequent criminal case that receives extensive coverage. One such occasions the same question is raised again: does the criminal law need amendments?*

*Today we are witness to a crime drop and improvement of safety in Poland, nonetheless questions to do with penal policy remain the same. It is therefore worth checking what opinions Poles currently express about this very issue. This research is aimed at checking what Poles think of the criminal law currently in force and what the attitude is to increasing the severity of punitive provisions. For this purpose, in July and August 2018, on the commission of the Institute of Justice, three independent opinion surveys concerning penal policy were conducted. The following were chosen for this purpose: Kantar, CBOS and Ipsos. Every survey was conducted by means of the Omnibus Method, which guarantees the completion of research on a nationwide representative sample of Polish residents.*

*In all the surveys discussed in this study, a clear majority of respondents were of the opinion that in order to limit crime and improve the safety of citizens it is necessary to make the provisions of the Penal Code stricter, with harsher punishments for offences. Over half of respondents in every survey took the position that punishments should be made more severe only in cases of serious offences. The remainder (approximately 30% in every survey) answered that was necessary to introduce more severe punishments for all crimes.*

*In the light of a preference for tougher penal laws, of particular interest was Poles' stance on the age from which juveniles might be held criminally liable just as adults. The majority of respondents were of the opinion that the age of criminal responsibility for juveniles (15 years) should not be changed, while those who thought otherwise most often suggested increasing this threshold.*


***Keywords:*** *penal policy, crime, punitivity*

## Streszczenie

**Andrzej Siemaszko, Paweł Ostaszewski, Joanna Klimczak,**
***Postawy wobec kary.***
***Wyniki trzech sondaży opinii publicznej***

*W debacie publicznej często powraca temat polityki kryminalnej i wymiarów kar za poszczególne przestępstwa i wykroczenia. Padają m.in. pytania o to, czy polskie prawo karne jest efektywne, sprawiedliwe czy/i surowe. Dyskutowana jest np. potrzeba zaostrzenia obecnych przepisów, szczególnie tych za najcięższe przestępstwa. Problematyka karania sprawców przestępstw podejmowana jest regularnie w mediach właściwie przy każdej kolejnej „głośnej" sprawie przestępstwa. Odnawia się przy tej okazji niezmiennie pytanie o potrzebę ewentualnych zmian w prawie karnym.*

*Dzisiaj jesteśmy świadkami spadku przestępczości i poprawy bezpieczeństwa w Polsce, jednakże pytania o politykę kryminalną pozostają te same. Dlatego warto sprawdzić, jak kształtują się aktualnie opinie Polaków w tej kwestii. Niniejsze badanie miało na celu sprawdzenie co na temat obecnie funkcjonującego prawa karnego sądzą Polacy i jaki jest ich stosunek do zaostrzenia przepisów karnych. Dla realizacji tego celu, w lipcu i sierpniu 2018 r. na zlecenie Instytutu Wymiaru Sprawiedliwości zostały przeprowadzone trzy niezależne sondaże opinii publicznej dotyczące polityki karnej.*

*We wszystkich omawianych w niniejszym opracowaniu sondażach zdecydowana większość respondentów opowiedziała się za tym, że aby ograniczyć przestępczość i poprawić bezpieczeństwo obywateli należy zaostrzyć przepisy prawa karnego i surowiej karać za przestępstwa. Najwięcej, bo ponad połowa respondentów w każdym badaniu, zajęła stanowisko, że należy zaostrzyć kary jedynie za poważne przestępstwa. Pozostali ankietowani (ok. 30% w każdym badaniu) odpowiedzieli, że należy zaostrzyć kary za wszystkie przestępstwa.*

*Przy przeważającej skłonności do zaostrzania prawa karnego interesujące było stanowisko Polaków wobec wieku, od którego nieletni odpowiadają karnie tak jak dorośli. Większość respondentów było zdania, że wiek odpowiedzialności karnej nieletnich nie powinien się zmieniać (15 lat), a ci którzy byli innego zdania, najczęściej proponowali podwyższenie tej granicy.*


***Słowa kluczowe:*** *polityka kryminalna, przestępczość, punitywność*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3809

**Andrzej Siemaszko, Paweł Ostaszewski, Joanna Klimczak, Justyna Włodarczyk-Madejska***

# Sense of Security among the Residents of Warsaw. Survey Results**

## 1. INTRODUCTION

In conclusion of their project 'Sense of security among inhabitants of large cities', Janina Czapska and Krzysztof Krajewski referred to a very suggestive quotation from the 1987 work of Georges Kellens and Andre Lamaitre:

> 'Never before have people been so well guarded as they are today. Never have they lived so long. Never have they also, in all likelihood, enjoyed such great freedom. Neither have inhabitants of small and large industrialized countries had, in theory, fewer reasons to be afraid of anything. Simultaneously, however, never before have such enormous, persistent and overwhelming sense of lack of security been present. In the past, people would know fear but not so widespread, arousing an internal feeling of lack of security suffocating all of us even when everything is in order'[1].

Over thirty years have passed since the fragment quoted was written and almost twenty years since the performance of the study on 'Sense of security among inhabitants of large cities. Cracow and other European towns'. The present situation seems to be entirely different, both in Poland and in other countries. The high level of 'safeguarding' people in many aspects of life persists while, simultaneously, the

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** The manuscript was submitted by the authors on 2 January 2019; the manuscript was accepted for publication by the editorial board on 7 March 2019.

[1] G. Kelles, A. Lemaitre, *Research on the 'Fear of Crime'*, Eurocriminology 1987, vol. 1,31 quoted after: J. Czapska, K. Krajewski, *Podsumowanie* [in:] K. Krajewski (ed.) *Poczucie bezpieczeństwa mieszkańców wielkich miast. Kraków na tle innych miast europejskich,* Kraków, 2008, 201.

crime rate declines and the feeling of security is rising[2]. In this situation, Andrzej Siemaszko asks 'are criminologists going to face unemployment ?'[3] and should we abandon studying crime and fear of crime as well as security and criminal policy? Paradoxically, it seems that it is these 'secure' conditions that should induce us to have a better (or in other words a much closer and more targeted) look at these issues so as to not miss possible new sources and types of threat.

Stereotypically, it is the large cities that are believed to be foci concentrating various sources of social threats such as crime, social disorganization, poverty, weakened social control, waning of traditional values and interpersonal links, frequent contacts with strangers and people coming from other environments, noise or environmental pollution[4]. However, the sense of security is obviously a global as well as very local problem concerning both whole societies and individual people in specific situations. Consequently, analyses of security-related issues should be as comprehensive and multidimensional as possible.

The study findings analysed below constitute, to some extent, continuation and expansion of a series of projects implemented by the Institute of Justice and devoted to unregistered crime, fear of crime and punitivity of the Polish society in light of survey findings[5]. The study focuses on attitudes, experiences and fears of the residents of the largest Polish town, Warsaw. The thus established scope of the object of the analysis made it possible to attempt essential comparisons as well as attempt to diagnose both the 'old' (analysed and discussed already before) and the 'new' sources of threat and fears of reaction to them.

The whole article consists of the introduction, five main parts and summary. The first part describes the methodology of research and principal characteristics of the study sample. The second part deals with the general sense of security among inhabitants of Warsaw, the third part – about fear of crime and specific threats, the fourth – about victimization as well as assessment of police work while the fifth – about the attitude to adjudicating severe penalties to perpetrators of crimes, in other words – to punitivity.

## 2. METHODOLOGY AND DESCRIPTION OF THE STUDY SAMPLE

The discussed study was conducted in the period from 27 September 2018 to 12 October 2018 on a 2000-strong sample of adult Warsaw inhabitants, by means

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[2] Comp. e.g. *Mniej przestępstw, wysokie poczucie bezpieczeństwa Polaków – podsumowanie I półrocza 2018 roku,* http://statystyka.policja.pl/st/infomacje/161093.Mniej przestępstw-wysokie-poczucie-bezpieczeństwa-Polaków-podumowanie-I-polrocz. html (accessed on 23 November 2018); *Raport o stanie bezpieczeństwa w Polsce w 2016 roku* (accessed on 23 November 2018), *www.bip.mswia.gov.pl/download/4/31673/RaportostaniebezpieczenstwawPolscew2016roku.pdf* (assesed on 23 November 2018).

[3] A. Siemaszko, *Zamiast podsumowania. Czy kryminologom grozi bezrobocie?* [in:] A. Siemaszko, B. Gruszczyńska, M. Marczewski, *Atlas Przestępczości 5*, Warszawa, 2015, 225–232.

[4] Comp. e.g. P. Ostaszewski, *Lęk przed przestępczością. Aspekty teoretyczne, metodologiczne i empiryczne,* Warszawa, 2014, 161–167 and K. Sessar, *Podstawowe założenia projektu Insecurities in European Cities z punktu widzenia kryminologii oraz socjologii miasta* [in:] K. Krajewski (ed.) *Poczucie bezpieczeństwa*…, 13–23.

[5] For more information on the subject compare, among others, A. Siemaszko (ed.), *Geografia występku i strachu. Polskie Badanie Przestępczości '07*, Warszawa, 2008; A. Siemaszko, B. Gruszczyńska, M. Marczewski, *Atlas przestępczości w Polsce 4*, Warszawa, 2009; P. Ostaszewski, *Lęk przed przestępczością*…; A. Siemaszko, P. Ostaszewski, J. Klimczak, *Badanie poparcia dla zaostrzenia polityki karnej. Wyniki trzech badań sondażowych*, Institute of Justice Report, Warsaw, 2018, https://iws.goc.pl/wp-content/uploads/2018/12/IWS-Siemaszko-A.-Ostaszewski-P.-Klimczak-J.-Badanie-poparcie-dla-zaostrzenia-polityki-karnej.pdf (accessed on 20 November 2018).

of computer-assisted telephone interviewing (CATI). It used a measurement tool in the form of a questionnaire consisting of 29 questions, divided into six parts, including: 1) general sense of security; 2) personal experience; 3) possibility of improvement; 4) punitivity; 5) other problems; 6) respondent's particulars (demographics). The questions were directed to users of both landline and mobile telephones (1:4, proportionately)[6].

45.1% of respondents taking part in the study were men and 54.9% women. The age of the respondents ranged from 18 to 98 years (average age – 49 years). The majority of the respondents (59.2%) had university education. The remainder had secondary school education (35.7%) vocational education (3.8%) and basic education (1.3%). In general, the majority of the respondents were professionally active (61%). As for the social-professional group of the sample population studied, people working full-time prevailed (45%), followed by old age and disability pensioners – 30%.

Two-person households (42.2%) and one-person households (30.9%) were most common. Three-person households (15.4%) and four-person households (8.7%) were less common while five or more-person households constituted a marginal fraction (2.8%) of the Warsaw inhabitants studied.

As regards the financial situation of the respondents, most of them assessed it as good. The majority of the respondents (50.3%) were of the opinion that they were bearably or moderately well-off while 37% thought they were rather well-off and 4% – very well-off. 6.7% of the respondents assessed their financial situation as rather bad while some 2% said they were poor-off and in a bad financial situation.

The survey included each of the eighteen districts of Warsaw. The respondents were most frequently inhabitants of Mokotów (13%) and Praga-Południe (11%) while most rarely of Wilanów (1.3%) and Rembertów (1.5%).

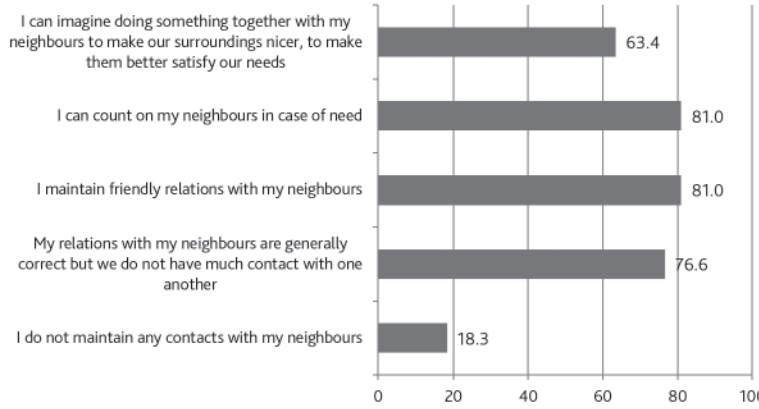
Most frequently, the respondents were born in Warsaw (58%). Among the remaining respondents, a vast majority (85%) were inhabitants of Warsaw for over 15 years.

The majority of the respondents (94.5%) were satisfied with living in Warsaw. Most of them maintained friendly contacts with neighbours (81%) and agreed with the statement that they can count on their neighbours in case of need (also 81%). Over 60% declared that they could imagine themselves doing something together with their neighbours to make their surroundings nicer so that they would better satisfy their needs. Simultaneously, however, 3/4 of them admitted that they did not have much contact with their neighbours in spite of describing their relations as generally good. In the sample population only 18.3% of the inhabitants were found to not maintain any contacts with their neighbours. As revealed by comparison with the 2002 In Sec study covering three districts of Cracow, relations of Warsaw inhabitants with their neighbours are similar to those of inhabitants of other large towns[7].

[6] The percentage of refusals amounted – to 40%.

[7] K. Krajewski (ed.), *Poczucie bezpieczeństwa*…, 164. The Warsaw study revealed a slightly higher percentage of the answer 'I can imagine that together with neighbours we are doing something to make our surroundings better satisfy our needs' (63.4 vs. 49.1 and 39.9) as well as 'I maintain friendly relations with neighbours'.

**Figure 1.**
Relations with neighbours[8]




The percentages do not total 100 – multiple choice possible.

Source: Author's own study.

2/3 of the respondents have acquaintances close to their place of living with whom they meet regularly. 34% do not have such acquaintances. In this respect, the results do not differ in any significant way from the results of studies concerning other large towns. In the In Sec study referred to above, the percentages were 72.1% (for the Nowy Bieżanów district), 52.3% (for Kazimierz) and 56.9% (for Grzegórzki)[9].

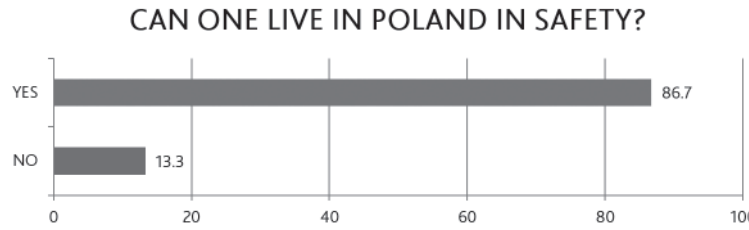
## 3. GENERAL SENSE OF SECURITY

Approximately 87% of Warsaw inhabitants believe that Poland is a safe country which should be considered as a very high, though not at all unexpected, result. It is actually as high as the result revealed in the study carried out by the Centre for Public Opinion Studies (hereinafter referred to as CBOS) in April 2018 in which 88.7% of respondents assessed Poland as a safe country[10].

In spite of the commonly expressed view with respect to the security situation in the country as much as one fourth of Warsaw respondents is of the opinion that the crime rate in Poland keeps increasing and almost a half that it remains unchanged. Only 1/3 of the respondents, according to clear hard data[11], believe that it is decreasing. This distribution of results is certainly surprising and can be evidence of the fact that endorsement bodies (including, in particular, Police) are doing too little to make public opinion aware of the optimistic facts concerning criminality in our country.

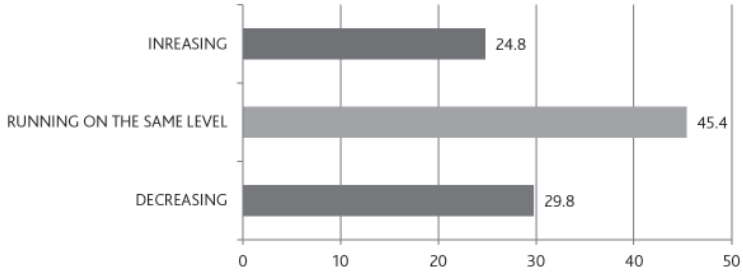
[8] The question was: '*Please, say whether the statement which I will read describe correctly your relations with your neighbours?*'. It was a multiple choice question. The responder could give a '*Yes*' or '*No*' answer in response to each answer give in Figure 1. That is why the percentage given in Figure 1 does not total 100.
[9] K. Krajewski (ed.), *Poczucie bezpieczeństwa*…, 166.
[10] Comp. *Poczucie bezpieczeństwa i zagrożenia przestępczością,* Communique from the study, May 2018, https://www.cbos.pl/SPISKOM.POL/2018/K_061_18.PDF (accessed on 20 November 2018).
[11] Comp.: e.g. *Mniej przestępstw*…; *Raport o stanie bezpieczeństwa w Polsce w 2016 roku*.

**Figure 2.**
Sense of security in the country[12]




Source: Author's own study.

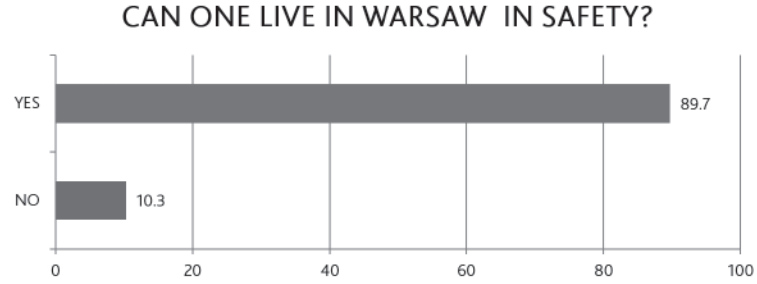
**Figure 3.**
Assessment of criminality in Poland in the past years[13]




Source: Author's own study.

The assessment by the respondents of security in Warsaw itself, as compared with the country as a whole, is even better – 90% declared that living in Warsaw is safe. The differences are slight and statistically insignificant though a little co-unterintuitive as the level of security in Warsaw could have been expected to be perceived as worse than in Poland as a whole.

**Figure 4.**

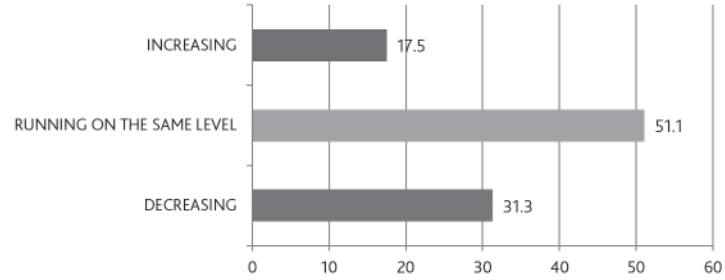



Source: Author's own study.

[12] The question was: '*Is Poland, in your opinion, a country in which one can live safely*?'. The respondent could choose one of the three answers: '*Yes*', '*No*', '*Hard to say*'. Like all the other figures further on this material, Figure 2 does not include the last of them. Consequently, the percentages given refer to the total of factual answers, in this case '*Yes*' and '*No*'.
[13] The question was: '*Has, in your opinion, the crime rate in Poland been increasing, running on the same level or decreasing?*'. The respondent had a choice of four answers: '*increasing*', '*running on the same level*', '*decreasing*', '*hard to say*'.
[14] The question was: '*Is Warsaw, in your opinion, a town in which one can live in safety?*'. The respondent had a choice of one of the three answers: '*Yes*', '*No*', '*Hard to say*'.

As regards the assessment of the crime rate in Warsaw and in the country as a whole, significant differences were observed. Over 7 percentage points fewer respondents believe that criminality in the capital is increasing while more or less the same percentage believe that it is decreasing or running on an unchanged level. In other words, Warsaw respondents are a little more optimistic in their assessment of criminality in their town than in the country as a whole which can be considered as a certain surprise.

**Figure 5.**
Assessment of criminality in Warsaw over the past years[15]




Source: Author's own study.

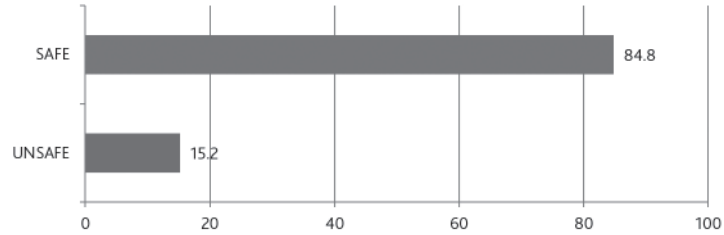
The sense of security during a lonely evening walk has long been considered a good indicator of fear of crime[16]. The distribution of results presented in Figure 5 is absolutely clear and leaves no doubts: an overwhelming majority (almost 85%) of the inhabitants of the capital feel safe in the situation referred to. What should also be mentioned in this context is the fact that this is a historically high result in fear of crime studies among Warsaw inhabitants. It is worth noting that inhabitants of Warsaw, as shown by a comparison with the results of the Polish Crime Survey carried out at the beginning of 2017, feel slightly more secure during a lonely evening walk after dark than inhabitants of Poland as a whole (a difference of 3.8 p.p.)[17].

## 4. FEAR OF SPECIFIC THREATS

In spite of the commonly declared general sense of security, and to some extent against declarations, a fairly large part of the respondents (over 1/3) fear that they can fall victim to crime. This percentage should be considered to be very high and to some extent arousing doubt as to indicative value of the previously analysed variables, in particular those of very general and abstract nature. It is also consistent with the results of studies conducted by CBOS in April 2018, in which 38.8% of the respondents declared feeling fear of becoming a crime victim[18].

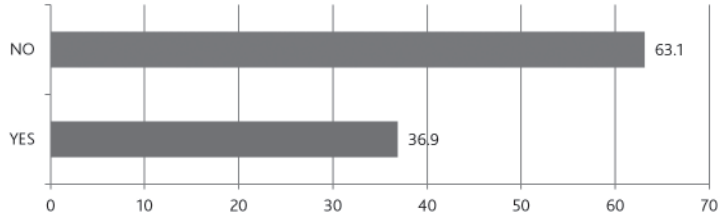
[15] The question was: '*Has, in your opinion, criminality in Warsaw been increasing, running on the same level or decreasing?*'. The respondent had a choice between three questions: '*increasing*', '*running on the same level*', '*decreasing*', '*hard to say*'.
[16] Comp.: e.g. P. Ostaszewski, *Lęk przed przestępczością…*
[17] The Polish Crime Rate Study was conducted by Police on a sample of 17 000 people. 81% of the respondents declared that they felt safe during a walk after dark, http://bip.kgp.policja.gov.pl/download/18/85912/OcenaPolicjipoczuciebezpieczenstwaPBP2007–2017.pdf (accessed on 20 November 2018).
[18] Comp.: *Poczucie bezpieczeństwa i zagrożenia przestępczością,* Communique from studies, May 2018.

**Figure 6.**
Sense of security during a lonely walk after dark[19]




Source: Author's own study.

**Figure 7.**
Fear of becoming a victim of crime[20]




Source: Author's own study.

What is very interesting and can give much ground for thought (especially to Police) is the distribution of answers to the question about individual dimensions of the feeling of threat in the area of residence. The respondents are definitely most afraid (43% indications, as much as 13 p.p. more than the next factor) of reckless drivers which is evidence of the severity of the problem (or low significance of the remaining threats). In addition, the problem seems to remain unsolved as testified by similar results obtained in the study conducted a decade ago[21].

Approximately one fourth of the indicators concerned: being accosted by groups of aggressive youths, damage of public property by vandals, being accosted by drunk people and burglaries. The remaining problems, including such serious acts as robberies, fights and battery, were pointed to much more rarely (by 7% of the respondents each). Only a little over 3% of the indications referred to a terrorist attack, even fewer (merely 1.5%) to extortions and ransoms. In turn, only some 11% of the declarations express absence of any fears in the vicinity of the place of residence.

It is worthwhile to compare these results with the results of the Polish Crime Survey of 2017 conducted on a sample of 17 000 respondents. They allow to see fairly interesting differences between the inhabitants of Warsaw and the inhabitants

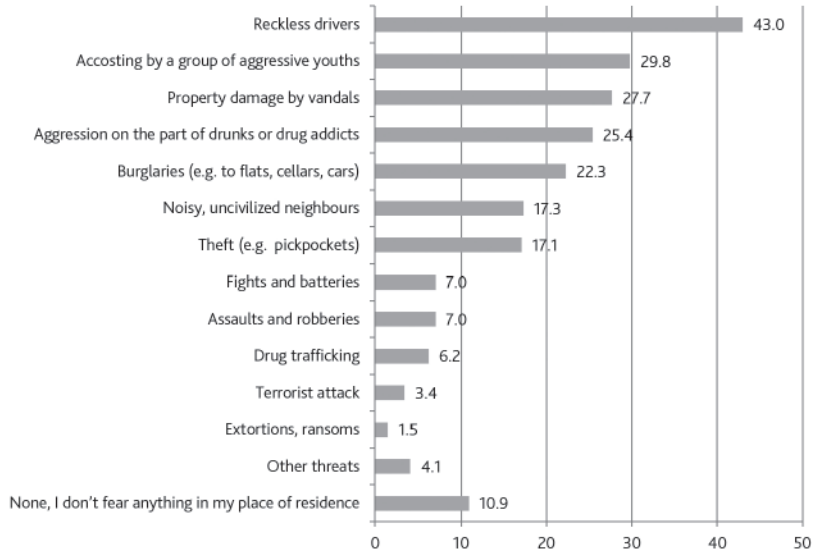
[19] The question was: '*Do you feel safe walking alone in your area after dark?*'. The list of possible answers to this question consists of: '*very safe*', '*rather safe*', '*rather unsafe*', '*very unsafe*', '*hard to say*'. The data given in the figure referring to the '*safe*' variable are a total of the '*very safe*' and '*rather safe*' answers. Similar data referring to the '*unsafe*' variable are a total of the answers '*very unsafe*' or '*rather unsafe*'.

[20] The question was: '*Sometimes people wonder whether they will not become a crime victim in future or will not become seriously victimized or injured in another way. Do you, generally speaking, fear that you can become a crime victim?*'. The respondents had a choice between three answers: '*Yes*', '*No*', '*Hard to say*'.

[21] Comp.: A. Siemaszko (ed.), *Geografia występku*…, 113 et seq.

of Poland. What the inhabitants of Poland fear most are burglaries (34.5%), reckless drivers (29.5%), assaults and robberies (23.7%). By comparison, what the inhabitants of Warsaw fear most are reckless drivers (43%, i.e. 13.5 p.p. more). Their fears of burglary as well as assaults and robberies are definitely lower, a difference of 17.2 p.p. and 16.7 p.p., respectively. Visible differences can also be seen with respect to the fear of being accosted by aggressively behaving groups of youths. These behaviours are feared by 17.5% of the inhabitants of Poland and 29.8% of the inhabitants of Warsaw[22].

**Figure 8.**
Fear of threats in the vicinity of the place of residence[23]




The percentages do not total 100 – multiple choice possible.

Source: Author's own study.

For the sake of comparing the sources and the specific object of fear, the respondents were also requested to express their opinion on selected 'non-criminal' threats related to everyday living, i.e. access to electric energy and potable water. Only every fifth respondent worries about possible breaks in electric energy supply while every third about possible lack of access to potable water. In both cases, these fears are much lower than the fear of becoming a crime victim (15.6 and 8.3 p.p., respectively).

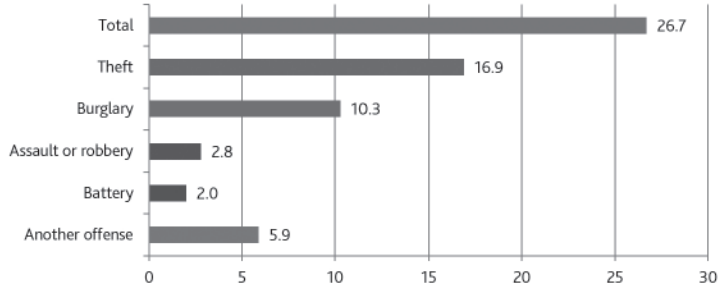
## 5. VICTIMIZATION AND ASSESSMENT OF POLICE WORK

Over 1/4 of the respondents, and thus a fairly large part of them, were victims of one of the array of crimes listed in the answer at least once over the five years preceding the study. Most frequently, they were thefts (almost 17%) and burglaries (10%).

[22] Comp.: *Polskie Badanie Przestępczości – 2017 ROK*, 4–5.
[23] The question was: '*What, what threats do you fear most in the vicinity of your place of residence? Please, indicate no more than 3 most important answers*'. Given the possibility of more than one answer being chosen, the percentages found in the figure do not total 100.

Approximately 3% of the respondents fell victim to robbery while 2% – battery. Some 6% of the respondents were victims of another crime (e.g. Internet crime). It is also worthwhile to compare the results of this study with the results of the Poland-wide study conducted in April 2018 by CBOS. What follows from the CBOS study is that 15% of Polish residents were victims of theft, 7% of burglary, 3% of battery or deliberate injury, 3% of assault or robbery, 4% of another crime[24].

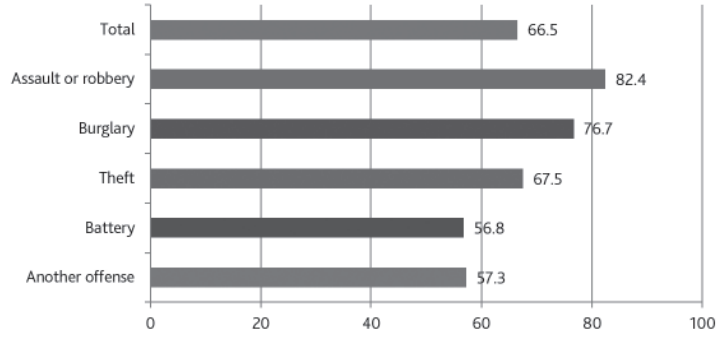
**Figure 9.**
Victimization of the respondents over the past 5 years[25]




The percentages do not total 100 – multiple choice possible.

Source: Author's own study.

**Figure 10.**
Notification of falling victim to a crime over the past 5 years




The percentages do not total 100 – multiple choice possible.

Source: Author's own study.

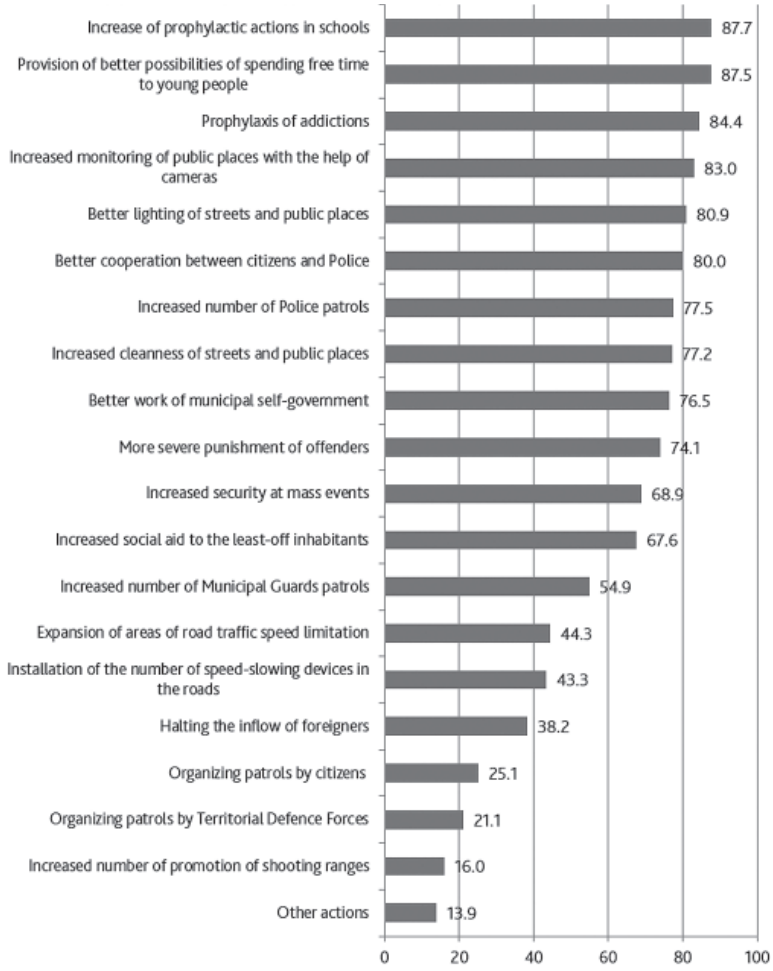
The respondents were also asked to propose actions which could improve security in Warsaw. Over 80% of the suggestions referred to such Warsaw security--improving actions as: providing young people with better possibilities of spending their free time, expanding the monitoring of public places with the help of cameras or better cooperation between citizens and Police.

[24] Comp.: *Poczucie bezpieczeństwa i zagrożenia przestępczością,* Communique from studies, May 2018.
[25] The question was: '*Have you experienced any of the situations specified below over the past five years?*'. The respondents could give a '*No*' or '*Yes*' answer next to each of the situations. They were also asked to indicate '*how many times*' the event had place as well as '*how many of the events were reported to Police*'. The crime notification rate can be seen in the figure which follows.

Although the suggestion that punishment for crime perpetrators be made more severe (close to 3/4 of choices and thus seemingly very many) received 70 to 80% of the indications, the rank and significance these declarations seems to be weakened by the fact that a few more percentage points were gained by indications concerning making the city more clean, followed by the need to increase social aid for the least well-off inhabitants.

What should also be signalled is yet another result: in Warsaw, believed to be liberal, approximately 40% indications concerned the view that limitation of the inflow of foreigners could also contribute to improvement of security.

**Figure 11.**
Possibility of improving security in Warsaw[26]



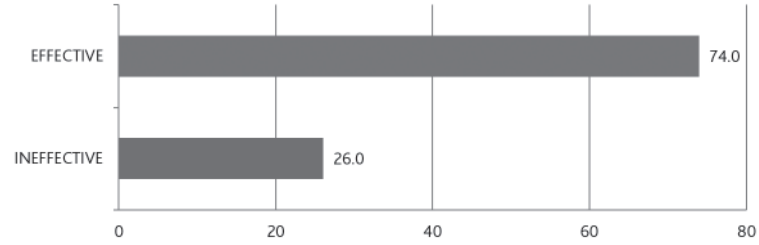

The percentages do not total 100 – multiple choice possible.

Source: Author's own study.

[26] The question was: '*What should be done to improve security in Warsaw?*'. Answering this question the respondents had a possibility to refer to each of the 20 elements of the proposed answers by choosing the answer: '*Yes*', '*No*', '*Hard to say*'.

Moving on to the question of the assessment of the work of the formation the main aim of which is to prevent threats, it should be pointed out that as many as 3/4 of the respondents were of the opinion that Police are effective in combating crime. This high percentage of positive assessments of this formation can, however, derive from the overall decline in crime which needs not be a consequence of the Police work being more effective. It is also slightly lower (by 4 p.p.) than the percentage for the Polish national sample[27].

**Figure 12.**
Assessment of the effectiveness of Police work[28]

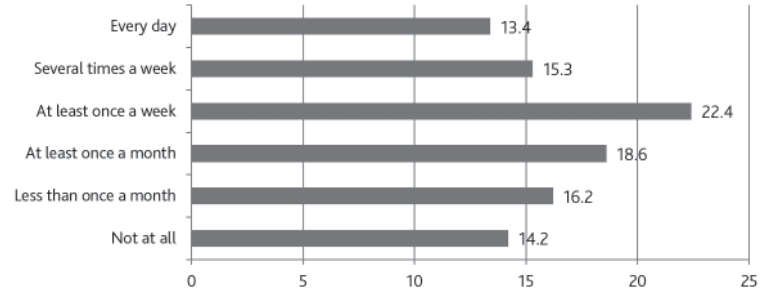



Source: Author's own study.

The 'bucolic' picture of the work of Police emerging from the previous figure changes drastically when the distribution of answers to the question concerning the 'visibility' of Police patrols near the place of residence of the respondents is analysed. Surprisingly, almost one third of them declared not seeing Police patrols or seeing them less than once a month which should be deemed an unexpectedly low result.

In turn, barely a little over 13% of the respondents, which should rather be a standard in a capital, see Police every day while another 15% – several times a week.

**Figure 13.**
Seeing Police close to the place of residence[29]




Source: Author's own study.

[27] Comp.: *Polskie Badanie Przestępczości – 2017 ROK*, 1.
[28] The question was: '*Taking everything into account, is Police in your area very effective, fairly effective, rather ineffective or very ineffective in combating crime?*'. The respondents had a possibility to choose one of the five answers: '*very effective*', '*fairly effective*', '*rather ineffective*', '*very ineffective*'. The percentage referring to the 'effective' variable given in the figure is the total of the 'very and fairly effective' answers. A similar procedure was applied with reference to the 'ineffective' variable – the calculated percentage covers the 'very or rather ineffective' answers.
[29] The question was: '*How often do you see pedestrian or motorized Police patrols close to the place of your residence?*'. The array of possible answers included those listed in the Figure. The respondent could choose one of them.

## 6. PUNITIVITY

The punitivity, in other words, the tendency (greater or smaller) to severely punish the perpetrators of offenses happens to vary significantly from country to country though Polish society is generally considered to belong to those in which punitivity is fairly high.

The said differences in approach to punishing offense perpetrators (in a mild or severe way) can however refer also to a specific country, in particular as large as Poland (differences existing, for instance, between urban and rural areas or even regions). What should also be kept in mind is that punitivity is by no means a fixed value, its severity tending to vary over time.

One of the more crucial aims of the study described in this article was thus, first, to determine the level of punitivity of Warsaw residents and secondly, to compare the obtained results with the results of other studies. To this end, three blocks of questions were used.

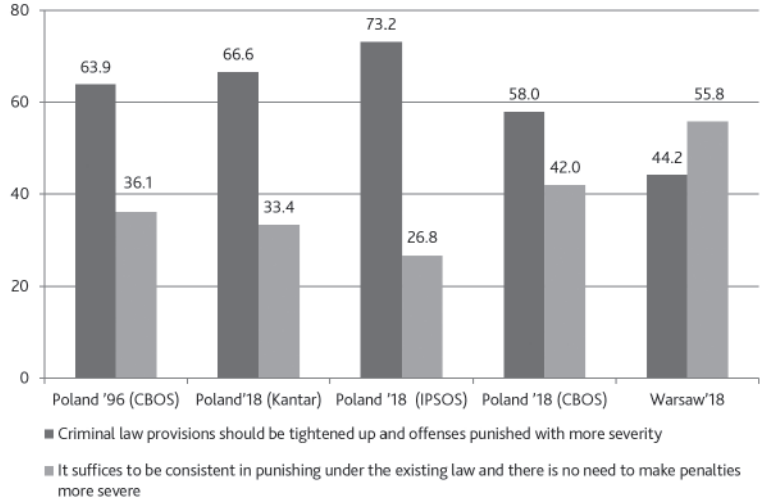
Over a half of the Warsaw respondents are of the opinion that consistent application of the already existing regulations will suffice to reduce criminality and the severity of penalties need not be raised. An opposite view ('the provisions of criminal law should be tightened up and crimes should be punished more severely') is expressed by 44% of the respondents (and thus fewer – a difference of barely 12 p.p.). The opinion of a relatively liberal attitude of Warsaw residents to the punishment policy (as the said percentage concerning more severe punishment must be nevertheless considered insignificant) finds its confirmation, in particular in the comparative context, i.e. when viewed against other studies on the punitivity-related issues (comp. Figure 13). The first study in which an identical measure was applied, was conducted by CBOS in 1996 on a nation-wide sample. The percentage of the proponents of severe punitivity (64%) was then markedly higher than the share of those opposing this view (36%).

It thus seems, to some extent against the thesis of the fluctuation in the level of punitivity over time, that the attitude to punitivity in Poland tends to be exceptionally stable. It turns out that the averaged results for the three studies conducted over twenty years later (in 2018) generated almost the same results[30].

The second measure of the level of punitivity of Warsaw residents was the question about the penalty suggested for the commission of a specific offense. Among the proposed penalties for a youthful knifer without a criminal record, over a half of the respondents were for imprisonment, 1/4 for the community service. Interestingly, very few proponents (barely every tenth) are for conditionally suspended penalties (an approach common in court practice). The penalty in the form of a fine received practically no support (2%).

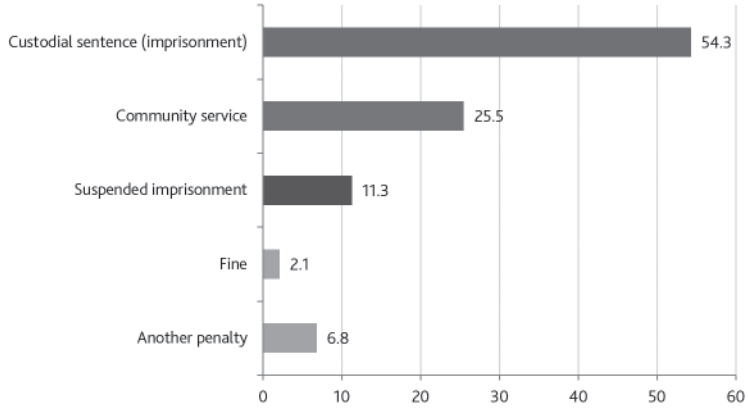
[30] In 2018, the Institute of Justice commissioned that three firms, Kantar, CBOS and Ipsos, conduct independent public opinion polls concerning criminal policy. Each poll was conducted with the use of the Omnibus method, that is a cyclical, multi-subject public opinion poll conducted on a nation-wide representative sample of residents of Poland. The studies were carried out with the use of the computer-assisted direct interviewing technique (CAPI). See: A. Siemaszko, P. Ostaszewski, J. Klimczak, *Badanie poparcia…*

**Figure 14.**
Assessment of the proposal of actions aimed at reducing criminality and improving the security of citizens[31]




Source: Author's own study.

**Figure 15.**
Proposal of penalties for a 'knifer' without a criminal record[32]



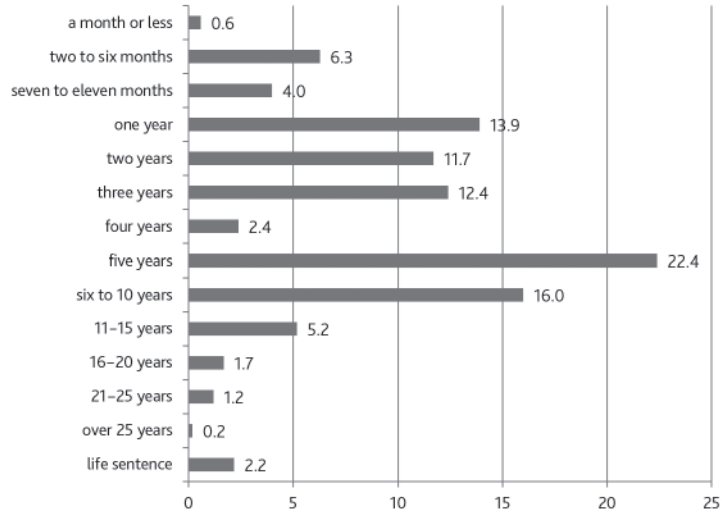

Source: Author's own study.

As signalled above, over a half of the respondents demanded that the knifer given in the example be sentenced to a penalty of imprisonment. As regards its length, two brackets prevailed: five years (over 22%) and from six to ten years (16%). However, after all the proposals for shorter penalties (from a month to three years) are summed up, it turns out that all their proponents make up a total of almost

[31] The question was: *'Do you believe that in order to reduce criminality and to improve the security of citizens (...)?'*. The respondents had a possibility to choose one of the two answers given in the figure.
[32] The question was: '*People have different views as to how severely punish criminals. For instance, a 21-year old man, with no prior convictions, takes part in a assault and causes serious body injury to another person with a knife. What penalty should he receive, in your opinion? Choose on answer*'. The answers available are listed in the figure.

a half of the respondents. In general, the mean length of the proposed imprisonment amounted to almost 62 months while the median to 48 months.

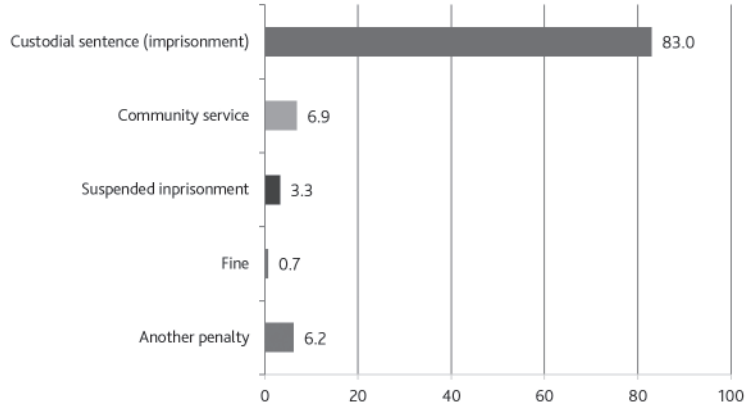
**Figure 16.**
Proposals for the duration of the imprisonment for a 'knifer' without a criminal record[33]




Source: Author's own study.

As it could be expected, much more severe penalties were demanded for an exemplary knifer who committed the offense as a repeat offense – over 80% of the respondents opted for the penalty of an imprisonment (against 54% in an analogous case of a knifer without a criminal record).

**Figure 17.**
Proposals of penalties for a 'knifer' being a recidivist[34]

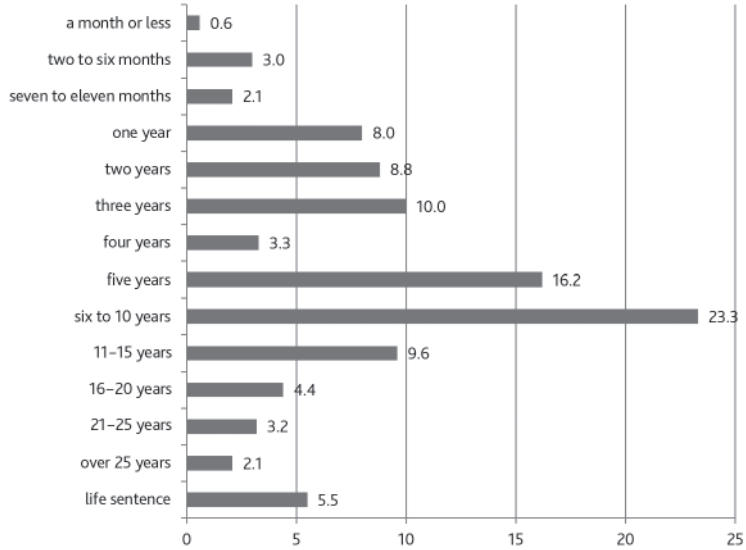



Source: Author's own study.

[33] The question was: '*How long should the perpetrator remain in prison, in your opinion?*'. It was a single-choice question.
[34] The question was: '*And what penalty should the same man receive, in your opinion, in case he had already been punished for a similar offense? Please choose one answer*'. The proposed answers are given in the figure.

The distribution of the proposed duration of penalties was also different: nearly 40% of the respondents opted for a penalty ranging from five to ten years of imprisonment while every tenth for a penalty ranging from 11 to 15 years. Proponents of yet longer penalties amounted to as much as 15%, including 5.5% being for a life sentence. The average penalty amounted to 96 months, the median being 60 months. The penalties were thus much higher than in the case of the knifer without a criminal record.

**Figure 18.**
Proposals of a penalty of the imprisonment for a 'knifer' being a recidivist[35]



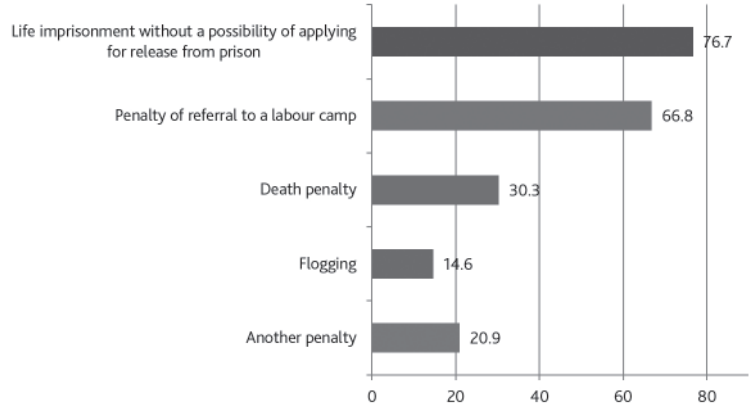

The final block of questions concerning penalties and punishment were those about support for sanctions not provided for in the criminal code or international law in force. Among the four proposed sanctions the Warsaw respondents most frequently expressed support for the penalty of life imprisonment without a possibility of conditional release from prison (as many as 3/4% of them). An only slightly smaller number of respondents were for sending the perpetrator to a labour camp. Every third respondent would welcome restoration of the capital punishment while 14% were for the penalty of flogging. Other proposals included most frequently compulsory referral to work. Sporadically (in 8 cases), a proposal appeared to make the image of the perpetrator known to the public.

## 7. SUMMARY

The article constitutes a report on a large-scale study devoted to security issues affecting the residents of Warsaw. It was carried out at the turn of September and October 2018 on a fairly large (2.000) random sample of respondents.

[35] The question was: '*How long should the offender remain in prison, in your opinion?*'. It was a single-choice question.

**Figure 19.**
Support for penalties not stipulated by the criminal code[36]




The percentages given do not total 100 – multiple choice possible.

Source: Author's own study.

The studied group of Warsaw residents is characterized by an exceptionally high sense of security: an overwhelming majority of the respondents (90%) believe that the capital is a secure place to live in while 85% do not experience fear during a lonely evening walk and nearly 2/3 express no fear of becoming a crime victim.

Despite such a high level of security, only one third of the respondents think that criminality in Warsaw is decreasing. The remainder are of the opinion that, contrary to obvious facts, it is running on the same level or is even increasing.

The overall level of victimization (that is of becoming a victim of any of the acts specified in the questionnaire) should be found quite considerable: 1/4 of the respondents confirmed that they had become crime victims over the 5 years preceding the study. Theft was the offense reported most commonly.

The crime notification rate was very high (overall 66.5% but, for instance for robbery – 82.4%, for burglary – 76.7%) which can be evidence of high trust placed in Police. The fact that it must actually be so is confirmed by the highly positive grades given to this formation: 3/4 of the respondents find Police effective in combating crime.

What seems to be the greatest problem for residents of Warsaw in their place of living are reckless drivers. This problem was indicated by over 40% of the respondents, i.e. by a significantly higher number of percentage points than the second listed – accosting by aggressively behaving youths groups. Only every fifth respondent fears a break in electric energy supply and every third possible lack of access to potable water.

Though the percentage of proponents of severe punishment among the Warsaw respondents is relatively high, they are much less numerous than in the country

[36] The question was: '*If it were possible, would you be for the introduction to the Polish criminal code* [of the penalties listed in the figure]'. The respondent had a possibility to mark each of the penalties with '*Yes*', '*No*', '*Hard to say*'.

as a whole, which actually comes as no surprise. The number of the opponents of the tightening up of penal policy is 10 p.p. higher (44 and 56%, respectively) than of its proponents. This is a result totally different from the results obtained in the national, Poland-wide, studies, carried out at approximately the same time and with the use of the same indicators, where proponents of making the criminal code stricter clearly dominated.

What the respondents most frequently opted for when indicating the penalty to be given to the sample 'knifer' was a penalty of the deprivation of liberty of an average length of 62 months (i.e. over 5 years). It should also be emphasized that the conditionally suspended penalties, still frequently used in practice, met with approval on the part of barely every tenth respondent while the penalty of a fine was supported by barely 2%.

The penalty of the absolute deprivation of liberty, of an average duration of 96 months, i.e. 8 years, dominated even more clearly in the distribution of proposals of penalties for the sample perpetrator of an analogous act with a criminal record of a similar offense. Proposals of penalties for the sample recidivist were thus much more severe than for a perpetrator without a criminal record which should after all not be surprising.

The Warsaw respondents were also asked about sanctions which are not provided for by the criminal code in force. The penalty of a life imprisonment without a possibility of conditional earlier release from prison and referral to a compulsory labour camp gained the largest number of proponents, 3/4 and 2/3 of the respondents, respectively. Every third respondent was for the restoration of the death penalty, every seventh for the introduction of the penalty flogging which, bearing in mind the alleged ultra-liberalism of the residents of the capital, should be considered a surprisingly high result.

To sum up, it should be said that residents of Warsaw are characterized by:

- very high sense of security, accompanied by high assessment of Police work;
- rather high level of victimization as well as an unexpectedly high rate of the notification of crimes;
- punitivity lower than in the country as a whole.

The obtained results should be considered of great significance and interest. They also induce to continuation of analyses of related topics. What seems worthwhile to be given more attention to and demand further study is, among others, the question which revealed most surprising data in this project, namely, victimization. This is one of the reasons why the Institute of Justice has planned a national, Poland-wide, survey to be carried out in 2019 on a much larger sample of respondents, ensuring greater precision of results. This survey will allow to determine, among others, the scale of the victimization as regards individual types of crimes in the society, the level of fear of crime, the punitivity rate and social opinions about the functioning of the endorsement bodies, the system of justice as well as the scale of other social problems.

## Abstract

**Andrzej Siemaszko, Paweł Ostaszewski, Joanna Klimczak, Justyna Włodarczyk-Madejska, *Sense of Security among the Residents of Warsaw. Survey Results***

*In the second decade of the 21st century, Poland manifests a high level of 'safeguarding' of people in numerous aspects of their life, while, simultaneously, the crime rate is decreasing and the sense of security is increasing. Paradoxically, it is these 'safe' conditions that should induce us to have a closer (or rather more thorough and more focused) look at these issues so as to not miss the possible new sources and types of threats.*
*The article analyses the results of a survey concerning the attitudes, experiences, and fears exhibited by the inhabitants of Poland's largest city, Warsaw. The scope of the analysis determined in this way allowed the authors to make important comparisons as well as to attempt to diagnose both the 'old' (previously analysed and described) and new sources of threats and forms of responding to them.*


***Keywords:*** *fear of crime, sense of security, crime rate, punitivity, Warsaw*


## Streszczenie

**Andrzej Siemaszko, Paweł Ostaszewski, Joanna Klimczak, Justyna Włodarczyk-Madejska, *Poczucie bezpieczeństwa mieszkańców Warszawy. Wyniki badania sondażowego***

*W drugiej dekadzie XXI w. utrzymuje się w Polsce wysoki poziom „zabezpieczenia" ludzi w wielu wymiarach życia, zaś jednocześnie spada przestępczość i rośnie poczucie bezpieczeństwa. Paradoksalnie, to właśnie te „bezpieczne" warunki powinny skłonić nas do dokładniejszego (czy inaczej drobiazgowego lub bardzo ukierunkowanego) przyjrzenia tym zagadnieniom, tak by nie przeoczyć ewentualnych nowych źródeł i rodzajów zagrożeń.*
*Artykuł analizuje wyniki badania sondażowego dotyczącego postaw, doświadczeń i obaw mieszkańców największego polskiego miasta, czyli Warszawy. Takie zakreślenie przedmiotu analizy umożliwiło prowadzenie istotnych porównań, a także podjęcie próby zdiagnozowania zarówno „starych" (analizowanych i opisywanych już uprzednio), jak i nowych źródeł zagrożeń oraz form reakcji na nie.*


***Słowa kluczowe:*** *lęk przed przestępczością, poczucie bezpieczeństwa, przestępczość, punitywność, Warszawa*

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PRAWO W DZIAŁANIU
LAW IN ACTION
38/2019
DOI: 10.32041/pwd.3810

**Bartłomiej Oręziak, Joanna Repeć, Dorota Sobczak***

# Academic conference 'Law, economy and technology for preventing the causes of crime'. Report**

On 7 December 2018, an international academic conference 'Law, economy and technology for preventing the causes of crime' was organized by the Institute of Justice. The event was held under the auspices of Minister of Justice Zbigniew Ziobro, who officially opened the conference. The conference was devoted to both the problems encountered during the implementation of the research project and its hitherto results.

The event was attended by professors from the most important research centres in the world, including Paul M. Healey from the Harvard Business School, Roland Stephen from the Stanford Research Institute, Michael Siegel from the Massachusetts Institute of Technology, Mike Rosenberg and Mireia Las Heras from IESE Business School. The participants included persons holding the most important functions in their organizations, representatives of international institutions, high-level managers of state-owned companies as well as representatives of government administration and law enforcement agencies.

The main topic of the event was modern technologies as well as legal and organizational solutions used by administrations of highly developed countries and the largest corporations in the context of preventing the causes of crime.

The discussion covered four thematic areas, that is, finance, energy, insurance, and human resources management in the organization. Issues such as strategic management, crime analysis, application of new technologies in operation management, global availability of solutions to crime-related problems, creation of strategic scenarios for the future, and innovative strategies for economic development as well as implementation of the developed solutions into the Polish legal system were discussed.

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** The manuscript was submitted by the authors on 30 January 2019; the manuscript was accepted for publication by the editorial board on 15 February 2019.

**Dr Marcin Romanowski, Director of the Institute of Justice,** was the first to speak. On behalf of the Institute, he welcomed the attending representatives of government administration, the speakers, and all representatives of the academia, public administration, and legal protection authorities. Then, Dr Marcin Romanowski asked the Minister of Justice/Prosecutor General Zbigniew Ziobro to take the floor.

**Zbigniew Ziobro, Minister of Justice and Prosecutor General** welcomed all the guests and remarked that it was a great honour for him to appear in front of such outstanding academics, practitioners, and representatives of various sectors of Polish administration and business.

He emphasized that the event was extremely important, because it crowned an exceptionally important research project related to the sphere of law, economy, and modern technology. The head of the Ministry of Justice noted that these three planes naturally permeated and formed an inseparable relationship that required us to take a global approach to all these issues. What is needed is an approach more general than only from the perspective of one field which a given specialization concerns.

Minister Z. Ziobro argued that a good legal system meant such laws that could follow the modern economy and technology. He noted that it would of course be perfect if we could create this kind of law-making system, when the lawmakers, legislators, scientists, eminent professors, practitioners, would be able to anticipate the development of technology, anticipate the challenge of the economy. However, with the hindsight of his rich experience in the field of public action, he said that being the the Minister of Justice for the second time and participating in the legislative process in both the Polish parliament and the European Parliament, he felt it was the perfect state which we should strive to achieve, but rather an unattainable one. He argued that the most outstanding mind was unable to pre-empt the challenges that practice and reality bring. These meanders related to the challenges that arise for instance from the development of modern technology cannot be imagined even by the most outstanding lawyer or theoretician of law.

For these reasons he noted that a meeting of scientists, a meeting of lawyers, a meeting of people who are specialists in the field of modern technology development, a meeting of economic practitioners was important in order to make it possible for the law to keep up with the development of technology and the needs of the economy.

The Minister also observed that our legislative activities concerning not only the sphere related to those areas which were the subject of the conference and research project, but generally the legislative issues that we undertook were usually reactive. He emphasized that we usually responded to a certain diagnosis of reality that was ahead of legislation, ahead of the strongest legal minds, and required a response. At the same, whenever possible, we should attempt predict the effects of the future and anticipate them whenever possible, but with the knowledge it would often be impossible.

The Minister of Justice and Prosecutor General said that he greatly appreciated the project undertaken by the Institute of Justice and considered it extremely valuable. He stressed that he was convinced that combining these three disciplines, reflecting on modern technologies, showing the emerging challenges, as well as

revealing the related risks, created opportunities for practitioners, for the theory of law, and for legislation, because it would enable developing solutions which would help make the economy more efficient and to simplify the system with the result that the economy would be based on clear and stable laws. On the other hand, this would also enable prevention of crime and pathologies.

The head of the Ministry of Justice reflected on the fact that the world's history was inhabited by people with different motivations: both noble and ready to think in terms of the common good, but also those who were ready to take advantage of opportunities, use others to achieve their particular goals (often contrary to the common good, which the legislator qualifies as criminal activity).

For this reason, the Minister noted that it was extremely important for the state that its structures and laws to be able keep the pace with the developments in the world of technology and react when needed. Adequate measures should be taken in terms of preparing a system of legal norms that would allow us to effectively protect the interests of the economy, those of enterprises, and those of ordinary citizens. All that in order for the free market to be really free, including freedom from pathology. He stressed that for us and for him as the Minister of Justice /Prosecutor General this was the basic point of view.

He emphasized that in this way the state tried to react, including by preparing legislation in various fields, responding to new forms of crime which use modern technologies, such as VAT carousels that government had been very successful in combating. The work of the Ministry of Justice played a key role here as well as in other areas associated with modern technologies, one of the examples being a bill that left the Ministry of Justice a few days prior, aimed to improve the principles of criminal liability of collective entities. In this context, he noted that many offences were related to cybercrime, that is, the sphere of activity of enterprises and the field of modern technologies, to which the state should respond effectively, protecting the interests of honest entrepreneurs and honest citizens.

The Minister of Justice and Prosecutor General stressed that computerization and modern technologies were present everywhere, in every sphere of the law of the present day. To prove the above, he used the example of how a few days before, in the National Prosecutor's Office, he had a meeting with the management and one of topics was the use of modern analytical methods. A decision had then been made to purchase modern analytical technology for such specialized departments in the prosecutor's office whose tasks included criminal analysis. Expanding access to those databases would enable them to respond more effectively to pathologies, eliminate possible crime detrimental to the public interest, the interests of the state, and the interests of individual citizens, including participants of business transactions.

The Minister emphasized that the subject of reflection of the conference and research project, thus also the subject of the related work, was also of great interest for the state administration in general, but also for the Ministry of Justice and the Prosecutor's Office.

Finally, Zbigniew Ziobro once again thanked for that work and commitment. He thanked eminent representatives of US academic centres, the universities which have established cooperation here, but also European ones. The Minister of Justice

underlined that this was a very prestigious event for the Institute of Justice. He also expressed the hope that it was the beginning of a certain path: the project where Director Marcin Romanowski had played an important role. Finally, the Minister wished us that we could continue these studies to yield useful reflections and conclusions, including specific conclusions for legislative amendments necessary in the legal order of the Republic of Poland. The Minister of Justice/Prosecutor General Zbigniew Ziobro concluded his speech by thanking the audience and wishing them fruitful work.

**Professor Michael Rosenberg from IESE BUSINESS SCHOOL** was the next speaker at the international academic conference 'Law, economy and technology for preventing the causes of crime'.

Prof. M. Rosenberg presented the assumptions and challenges of the research project 'Law, economy and technology for preventing the causes of crime'. He noted that the project included four workshops held in 2018: the first in September (Assessing Foundations), the second in October (Improving Performance), the third in November (Transforming People & Organizations) and the fourth in December (Heading into the Future). He pointed out that each workshop comprised four different thematic groups with participants from various sectors of the Polish economy: Financial Sector, Insurance Sector, Energy Sector, and Managing Human Resources.

Then, Prof. M. Rosenberg explained what the methodology of the workshops was. The Assessing Foundations module consisted in identifying the problem of crime in Poland in the light of selected sectors of the Polish economy. The Improving Performance module was about finding solutions to these problems. The Transforming People & Organizations module involved presenting how these solutions could change organizations and human behaviour. The Heading into the Future module was spent debating about the future and future changes, e.g. in technology.

Then Prof. M. Rosenberg presented the profiles of the lecturers of all workshops and their affiliations. He also gave an overview of the main solutions developed: 1) Identification of sources of crimes in selected areas of economy; 2) Methods of crime prevention; 3) Implementation of methods and instruments for crime prevention; 4) Challenges for crime prevention in the future.

**Professor Paul M. Healey – Dean of the HARVARD BUSINESS SCHOOL** was another speaker at the international academic conference 'Law, economy and technology for preventing the causes of crime'.

During his lecture, Prof. P.M. Healey considered it appropriate to adopt the perspective of a person who does not regulate, but studies management and business. He indicated that during the speech he would focus on two types of risk and organization, i.e. the risk of non-compliance and operational risk, both of which may remain in a certain correlation, and thus be similar to and complementary with each other.

Prof. P.M. Healey began his address by discussing the issue of compliance, focusing also on the issues of regulations, which should be included in norms, in order to counteract corruption. He stressed that currently there are many challenges for enterprises: corruption, money laundering, fraud, and problems related to internal trade, which occur both in Poland and in the United States. In addition, he noted that there were some operational problems in the enterprises themselves, which

concern product quality control, product safety, as well as employee safety. In addition, they can also affect the management of the company's processing in the operational process related to the structure and organization of the company, which can easily get out of control. He pointed out that the challenge in the company was also systematic and that it was inevitable for every large company to encounter compliance and operational failures.

The Dean of the Harvard Business School devoted part of his lecture to discussing a well-known example of Siemens management, which faced the problem of corruption. He showed that corrupt companies posed problems, Siemens not being the only example in this respect. Therefore, if the challenges and problems that appeared in Siemens were implemented for another example, it turned out that those were not only German problems, but they also appeared in other countries. He described the events that took place in this company. Siemens was initially charged in Germany and then in the United States. Depending on the estimates, the amounts allocated for corruption ranged from USD 800 million to USD 1.8 billion within 7 years. Those dealings covered multiple countries, including the United States. One of the manifestations of corruption in Siemens was employing and paying business partners, not a rare practice at all. In 1999, Siemens ignored many warning signals. It was still able to pay bribes outside of Germany, which resulted in a reaction on the New York Stock Exchange, which meant that Siemens was subject to both American and German law. Another aspect that Prof. P.M. Healey noted was the fact that there was no state where corruption would be lawful. Continuing, the main problems that Siemens did not notice, were present in a number of cases of corruption, as exemplified by the corruption cases in Italy. Corruption also happened in other countries such as Nigeria, Switzerland, and Liechtenstein. There were many situations in which Siemens could have spotted the problem and reacted appropriately, but it decided to ignore the problem.

Prof. Paul M. Healey noted that people who were involved in corruption were those involved in Italian affairs – including managers who subsequently retired. One of those accused of approving bribes by the CFO got $ 1.8 million in settlement and then left the company. He explained that it also involved costs for Siemens in the form of $ 2.2 billion penalties and the dismissal of over 500 employees, with many experienced and older contractors resigning from work.

As part of the lecture, a question was asked about the genesis of this type of cases and about the types of activities undertaken by companies in order to reduce the risk of their occurrence. In addition, it was noticed that the costs incurred by Siemens were relatively small, both for the company and for individual employees.

Prof. P.M. Healey noted that in order to create a crime environment, several factors had to be combined. The first of these was the pressure exerted on individuals to perform tasks. Obviously, every reputed organization exerts such pressure on people. Another issue is the organization's way of giving people the opportunity for corruption and allowing them to rationalize their activities.

An important aspect emphasized by Prof. Healey, as far as the pressure exerted by Siemens was concerned, was that the area in the company where crime was the most widespread was the least competitive area in relation to the clearly occurring pressure. In this case, the company gave a clear signal to employees, received from

the top management, that profit was the most important thing, regardless of the adopted methods. Employees in this case were under pressure.

Prof. P.M. Healey stressed that an important problem in the case of Siemens was the fact that it operate in 190 countries around the world. Within this conglomerate there are geographical regions, where the fight against corruption is the most difficult. The system adopted by Siemens worked for and also included government clients. He noted that corruption usually continued until audits proved something, and those in Siemens were practically non-existent. There were 75,000 full-time employees in Siemens working in different countries, which created many possibilities.

Prof. P.M. Healey asked how to reduce system problems, when most people help make them worse and control them. He stressed that control and leadership were needed, no matter how critical we were. As for the role of leadership, he pointed to personal honesty because one of the things that he heard consistently in every company he visited and from people he talked to were 'we do not tolerate corruption', 'we do not tolerate scams', 'we have honesty in the company', 'people who work with us can quickly see how hard the work is'. He pointed out that this was why the problem in many companies he saw was the fact that people were becoming cynical, because they wanted to believe in the company's high standards of integrity and value, while they saw those standards regularly violated by individuals, and the standard of honesty did not seem to be widespread throughout the company.

He pointed out that when he talks about integrity in the leader group, he means conversation. He said the next thing the leaders can do is send a message to people that the crime does not end in benefits for the company or the employees. He cited facts that confirm that crime is not a profitable business practice. The argument to support this thesis was the conversation with the managing director and the director general of Siemens. During these talks, both pointed out that in the case of problematic transactions in the company, where both fraud and corruption occurred, the company does not earn much. Prof. P.M. Healey explained that the reason for this is that when a bribe begins to pay, less money is left for the company and automatically the profits are reduced. He emphasized that during his research the starting point was a broader perspective of the activity of as many as 180 international corporations located all over the world. In 2006, they were assessed in terms of transparency on the basis of declared actions to counteract corruption. He continued that after analysing the questions, it can be concluded that these companies indicate more activities than they actually do. He explained that looking at 2007–2010, it can be stated that countries rated as low-corruption countries grew faster than countries with high levels of corruption, which may suggest that paying bribes is not good for business.

He emphasized companies paid bribes because of their desire to gain an advantage, as a result of which the company does more, but also has higher costs and in general there are no clear differences. He explained that after the analysis, it turned out that the increase in sales in companies where corruption was rife did not generate higher profits. Prof. Healey observed that such companies could gain more for business, but less profitable business, resulting in a larger gap.

Prof. Paul M. Healey pointed out that the research also drew attention to the perspective of shareholders who received a better assessment as regards the issue of bribes. This was so because at the end of the day shareholders, like top companies, take care of profits rather than sales. He stressed that he had analysed the behavior of companies with low ratings after they were transferred to international assessment. His studies showed that such a transfer of the companied with higher frequencies of media allegations of corruption worked against them, because they were more likely to appear in the press in connection with problematic transactions related to corruption. In addition, he explained that bribery was something to be avoided, because although one of the two people who gave bribes may have been promoted or received bonuses, for the shareholders such activities did not carry any benefit.

Prof. P.M. Healey stressed that the problem was interestingly addressed in a study which he conducted with people who had business education, and thus observed what was happening to people who worked for companies involved in criminal scandals. Researchers have found over 2,000 executive movements. They noticed that managers and companies that were involved in criminal scandals had 4% lower annual profits than their counterparts after moving to other organizations. These are employees who work for Volkswagen or Siemens. The speaker pointed out that 4% a year was a significant amount as a penalty for loss of reputation. In contrast, the effects were not felt only by people who were involved in the criminal dealings, but also by uninvolved workers who took on jobs with Volkswagen or Siemens, and actually had nothing to do with giving bribes. He explained that the impact of lost reputation was greater when it came to employees of a higher rank, because there the penalty was 6.5% lower pay or lower pay in the following years. In the case of women, the loss of pay equalled 7%. He pointed out that corruption was harmful not only to business owners, but it also appeared detrimental to employees, at least those not directly involved in the crime.

The speaker pointed out that there were many studies that discussed building a culture of responsibility. Their results indicated the need to provide people with mental safety so that they could report questions where they were uncomfortable. Giving tasks and not listening to questions does not create an atmosphere of a culture of mental safety. Good managers allow people to ask questions. He notes that Siemens had also found a problem that had to be solved to encourage new people to change this culture because the problems were inside the company: they needed new blood and people who thought differently about these problems.

As an example, Prof. Paul M. Healey mentioned a Norwegian waste management company that had internal problems. Thus, the new director-general stated that the identified problems went beyond the company and brought people together to change that. The speaker explained that the research indicated that to try to encourage people to behave well, one should not make important decisions individually, individuals being more prone to make mistakes. People working in teams and groups have a tendency to motivate each other. These problems are not unique only for one of the entities, but are common to the entire industry and concern the case of Siemens, as well as the case of the whole region or a waste management company in Norway.

The Dean of the Harvard Business School noted that when we looked at what the company needed to do in terms of compliance, it was not just about internal control mechanisms, but also about the technical and organizational activities of the leader. Consequently, one did not need to look at what happened in the past, but what would happen in the future, and think about the types of incentives and organization to join in the next five years and about whether something would happen or whether we had prepared ourselves for it.

Prof. P.M. Healey also spoke about companies that had done through the financial crisis in the United States in 2008. He pointed out that those were mortgage companies that had extended loans to people that did not meet the specific criteria of such a mortgage. The above was a new financial type, operating as a subprime company. In this mechanism, Adidas sells a mortgage to an investment bank, and then the investment bank puts it in one bag depending on its security level. The third step is to keep some loans to their maturity. He stressed that when buying high-risk loans, we also had to deal with the risks associated with people. He indicated that if a loan was sold to an investment bank, the investment bank had the right to return it if there were any errors in the documentation and also had the right to return if there was evidence of fraud. Thus, before the end of the process, it was not possible to completely eliminate this risk. He emphasized how risky it was to ignore important warning signals. Over time, people start to take more risks and buy more and more risky loans. He pointed out that loans for 100% of the real estate value were high-risk loans. He noted that warning signals appeared indicating that the company's problems were being ignored. He also pointed out that another warning flag was the drop in the premium that was received from the sale of loans.

The speaker pointed out that the finances of the new century had responded to these challenges by keeping a higher mortgage to maturity. He explained that these had been mistakes in the way the reserve for loans for focus related to the loan had been measured. However, earnings from results dropped by 56%, as a result of which banks were for the first time asked to borrow money to fulfil some of their agreements.

Prof. Paul M. Healey asked a question about the cause driving this kind of systemic operational failures. He pointed primarily to rapid growth, being a priority, and two challenges in company management. The first challenge he identified was the difficulty in increasing the number of types of systems and processes of these organizations that needed to be controlled through in terms of risk, which is difficult with growth reaching 66% per annum. Problems arise with recruiting people with good skills to manage the company and ensure risk management, which is important for the company's behaviour.

The other challenge described by the Dean of the Harvard Business School was that for the majority of executives and managers, pressure was not about risk management, so they could easily focus on growth management and strive for faster growth, postponing the decisions concerning the risk they took by engaging in this business.

Prof. P.M. Healey stated that it was important to be aware that whenever there were certain measures in the organization measuring performance, they were

immutable and incomplete. These measures do not take into account important things that determine the company's success in the future, which is difficult to measure. He explained that maybe it would be possible in relation to today's profit or today's sales, but it was very difficult to say how a company contributed to customer satisfaction, what in fact would drive future sales and profits or how it should look after its staff who would be able to create value for the future. He also pointed out that it was very easy to recognize the prize and focus on the measures that drove productivity at the given moment, while ignoring the fundamental risks for the organization. He believes that companies at the beginning of the century were not concerned with risk, because they were really focused on measuring, monitoring, and assessing the risks they took, taking into account new transactions in these new loans.

Prof. P.M. Healey claimed that this was a challenge for those who faced this type of behaviour, with their own human mistakes. He pointed out that there had been many studies which showed that all people were overly confident and believed that their successes would last. He also emphasized that managers in top companies tried to identify with the company very closely and it was difficult for them to think that a company could do anything bad. He expressed the belief that there was a certain level that was a problem and that Facebook was struggling with. Mark Zuckerberg founded the company, so he sees it in a special way through the prism of what the company hopes to achieve, and intends to ignore and downplay the company's problems and costs associated with Facebook's activities. The speaker pointed out that the challenge for managers of top companies stemmed from perceiving their role and organization differently from outsiders.

Prof. P.M. Healey asked how to reduce the number of operational failures and how to measure key performance indicators for a company. He pointed out that at present companies had to measure key performance indicators related to operational risk, which should be monitored. He explained that it was necessary to respond quickly, although it was often easy to be reactive, and to introduce a new system when it became obvious that the company was heading for failure. He emphasized that it was important how systems could be introduced in new companies, stressing the importance of risk plans for overtime work, because new and mature systems in companies has to be added in a predictable way in which these new systems could be added to companies as an essential start-up. He explained he believed it important to understand that people were motivated not only by external rewards. Companies focus on recruiting people based on simple performance measures. He asked what really motivated employees and pointed to research that identified the factor people were guided by in choosing a job: the desire to win prizes, which could be achieved by a motivational reward system and a company culture thanks to which employees felt connected with people in the organization. Prof. Healey explained that it was worth understanding and dealing with in business, designing jobs that help people understand that they are contributing. He noticed that people had a tendency to defend themselves against external threats and that tendency could also be addressed, but in a fair and transparent way, rather than proving that people are guided solely by financial rewards. He emphasized that research showed people would give up 36%

of their remuneration to have a manager who trusts them or 21% of their salary to have a more satisfying job. He explained that when you thought about how to inspire loyalty in the organization and how to reward people, there were different ways of doing so than through financial rewards.

Prof. Paul M. Healey said he believed that companies needed to create ways to empower people. He explained that in most organizations there was a board overseeing the management, somewhat dependent on the company. As part of supervision over a company, there are also external and internal auditors, whose work is less dependent on the company and is therefore more objective. He stressed that one should trust and rely on these people to pass on messages, and not avoid generating negative news. He pointed out that this was a review of what systems were needed for management, such systems addressing both operational and compliance risk. Each organization must have internal control to protect its information, to manage property risk. He suggested, however, that this was not enough and those other systems were needed. The first of them, prof. Healey called the belief system. He said he was always amazed when he attended faculty meetings at the business school. The dean would come and start the meeting, saying why the participants were there – not at that meeting, but in business school – and what was the purpose. The second time round, he thought he had heard it before and the situation was repeated at every meeting. Prof. Healey asked why the dean did it. He explained that this was to make sure that everyone knew what the purpose was and understood that they were doing the last thing in this organization to build a commitment to cooperate, to get inspiration from what they were trying to achieve. The dean believed that every good organization needed a mission, but not just as a piece of paper to put on the wall.

The current Dean of the Harvard Business School noted that the second thing a good organization needed was limits and limitations, defining things that would result in failure. He pointed out that there was a lack of transparency in Siemens, that there were no clear boundaries for people, and during the problems they found themselves beyond such limits. He emphasized that although KPIs should be measured for the organization, this was not all and that the most important thing to achieve was the ability to measure many things that would inevitably contribute to the organization's success in the future. He explained that they would be imperfect, but nevertheless financial and non-financial indicators helped understand how the company managed to achieve the intended goal.

Finally, Prof. Paul M. Healey stressed that companies had to be aware of the developments in their competitive environment as quickly as in case of financial crises. He noticed that some people had not realized what was happening in their competitive environments and had not done their work by measuring KPIs. On that note, the Dean of Harvard Business School concluded his very interesting address.

**Professor Mireia Las Heras from IESE BUSINESS SCHOOL** was the next speaker at the international academic conference 'Law, economy and technology for preventing the causes of crime'.

During the speech, Prof. M. Las Heras told the conference participants about compliance culture, presenting its origin and evolution over the years. The aim of

compliance is to prevent the causes of crime and compliance culture is the main element in the company. Other elements include:

- 'compliance officer', whose aim is, put simply, to systematize, monitor, and control risks in the company;
- 'risk map' – which helps to identify, rank, and determine the risks in the company.

One of the employer's challenges is to provide its employees with well-being. This concept is defined as motivation to work, which is closely related to the well-being felt by all employees. One should, therefore, strive to maintain a balance between work and private life. Conscious modelling of these two planes is necessary.

The goal of every company should also be to create an atmosphere of trust between employees and the employer. The employer should allow employees to care for their relatives and family (and therefore, not discriminate both mothers and fathers in the professional environment). An environment should also be created in which all employees are treated equally. No one may be discriminated against on the basis of sex.

**Professor Michael Siegel from the MASSACHUSETTS INSTITUTE OF TECHNOLOGY** was yet another international speaker at the international academic conference 'Law, economy and technology for preventing the causes of crime'.

During his address he talked about cyber risk and cyber risk management. In his opinion, cyber risk today is one of the biggest risks that organizations and companies have to face. Some people think that cyber risk is the only risk that can completely destroy the entire company and organization. Moreover, cyber risk has also been one of the main problems in the area of financial services for over three years. Since 2016, it has been ranked first in the rankings (i.e. also in 2017 and 2018).

Cyber risk is a combination of several elements, namely:

- Uncertainty and,
- Exposure.

In conclusion, according to Prof. M. Siegel, risk management, risk, risk mitigation, transfer and acceptance are among the most significant and key issues that may occur in the future.

**Professor Roland Stephen from STANDFORD RESEARCH INSTITUTE** was the next to speak at the international academic conference 'Law, economy and technology for preventing the causes of crime'.

He observed that in the twenty-first century many devices had been created with the aim of collecting, saving and using any information obtained about their users. It allows us to improve the standard of living of every person, but it involves many dangers (for example, the information can be used to commit a crime). There are various methods of obtaining information, such as:

- 'Amazon echo' – a device with a built-in ALEXA voice assistant. All information that is passed to ALEXA is remembered by her and saved in the internal memory of the device. One of the consequences of this approach is the ads displayed when using the Amazon web browser, matching the individual needs of the user.

- 'Driver monitoring system for Toyota' – it is the use of state-of-the-art technology in the form of special sensors and cameras; the technology informs the driver and passengers about any threats and dangers, and takes actions to avoid an accident. The presented system also stores all information in its memory.

In the next part of the lecture, Prof. R. Stephen told the conference participants about robots. The presented films showed the transformation of robots over the years. In the 21st century, robots are so smart that they can run, jump and avoid obstacles. There are also robots that replace human work (for example in mass production). For this reason, the development of new technology is both exciting and frightening.

**The climax** of the international academic conference 'Law, economy and technology for preventing the causes of crime' was the discussion panel. The discussions were moderated by Prof. Michael Rosenberg and covered four different thematic areas: finance, energy, insurance, and human resources management in the organization. The panellists were: Prof. Mireia Las Heras, Prof. Paul Healey, and Prof. Roland Stephen. The panel began with a question asked by Prof. Michael Rosenberg, recalling a lecture by Prof. Michael Siegel and an example of 'falling coconuts' (in the context of cyber risk). Using this example, the panellists gave their own views on this subject. The participants of the conference could then ask questions they prepared. While answering the questions, the panellists expressed the following views:

- Prof. Mireia Las Heras described where in the compliance culture ethics is (how it ranks) and where we can look for this value (for example in legal regulations). Therefore, the term 'compliance' should comprise not only acting in accordance with legal regulations, but we should also act better and better: according to ethical standards.
- Prof. Roland Stephen talked about how in the present day all the information and data shared via the Internet (such as e-mails) could be used. He also reminded that criminals nowadays had much more time to prepare for commission of a crime, because they could steal from another person without leaving their home.
- In the future, work and work environment will be completely different, flexible. We will be able to have jobs of different character and in different categories. It will not matter where and when we will perform our professional duties. It is important that when we perform it, we will develop thanks to it (Prof. Mireia Las Heras). Prof. R. Stephen expressed his conviction that over time work that was worse or different would be done with the help of machines and robots (this being an optimistic vision of the future).

**At the end** of the international academic conference 'Law, economy and technology for preventing the causes of crime', Dr Marcin Romanowski – Director of the Institute of Justice thanked all conference participants for their participation in the meeting and in discussions. He also expressed the hope that such meetings would result in an efficient state and a quickly growing economy, thanks to modern management methods and the latest technological solutions. He stated that the most important thing, however, was to ensure that the dignity and freedom of individuals were not jeopardized.