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The Pandemic and Criminal Law – A Look at Theory and Practice in Germany

Abstract: This article provides an overview of the topic of the pandemic from the perspective of criminal law theory and practice in Germany. First of all, the major criminal offences of bodily injury and murder are discussed in the context of infecting a person with the Coronavirus and the (possible) consequences of having Covid-19, such as risk of death. The dilemmatic situation of triage, *i.e.*, allocating limited intensive care resources, is illustrated in relation to the same offences. Then, the more specific crimes that came to the fore in the course of the pandemic are addressed. Subsidy fraud due to the state aids intended to compensate for the financial damage in the marketplace because of pandemic-related measures, and issuance or use of incorrect health certificates for exemption from the obligation to wear a face mask fall within this scope. Finally, the administrative offences law of the German Infection Protection Act was discussed, primarily with regard to regulations that violate the principle of legal certainty.
Keywords: Infection Protection Act (IfSG), non-difference of the worth of life, pandemic, SARS-CoV–2, subsidy fraud, triage

Introduction

The SARS-CoV–2 virus, which first appeared in the People's Republic of China in winter 2019, and the resulting lung disease COVID-19, have had a firm grip on the entire world since the beginning of 2020 at the latest. The pandemic announced by

the WHO on 11th of March,[1] has radically changed almost all areas of life. Public and social interaction was rigorously restricted to reduce the spread of the virus and the economy was faced with the greatest challenges since the Second World War. While the natural sciences, especially virology, have played an important role in public discourse, legal sciences and practice are also confronted with numerous questions and problems. This also applies *pars pro toto* to criminal law. A remarkable amount of literature has been produced in this area in Germany;[2] a textbook on "pandemic criminal law" has even been published.[3] However the German criminal courts have so far only had to decide on a few specific types of conduct related to the pandemic. The focus of the sanctioning of such misconducts is anyway in the fine regulations of the Infection Protection Act (Infektionsschutzgesetz - IfSG) and thus within the law of administrative offences. The following article is intended to provide a brief overview of selected aspects of the pandemic in terms of criminal and administrative offence.

1. Criminal Law in the Pandemic

The article begins with the regulations of criminal law. As already mentioned, this has less to do with the constancy of their actual relevance in practice during the pandemic. However, the criminal law constellations are simply discussed most intensively in the subject literature, probably concerning the consequences for the victims and the criminal penalty as the most sensitive sanction.

1.1. The Offences of Bodily Injury and Murder (Totschlag)

The issue of viral infections and criminal law is not new. A broad debate had already taken place on the occasion of the rapid spread of HIV in Europe at the end of the 1980s and the beginning of the 1990s.[4] Back then, the central question was the

1 The media briefing of WHO General-Director, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (24.06.2021).

2 For example, well-known reference books have included special parts on the pandemic, cf. K. Gaede, Chapter 1, Teil 16, (in:) K. Ulsenheimer, K. Gaede (eds.), Arztstrafrecht in der Praxis, 6. Edition, 2021. *Cf.* exemplarily from further literature, Fahl, Das Strafrecht in den Zeiten von Corona, Juristische Ausbildung 2020, vol. 10, pp. 1058 *ff.*; E. Hoven, J. Hahn, Strafrechtliche Fragen im Zusammenhang mit der Covid-19-Pandemie, Juristische Arbeitsblätter 2020, vol. 7, pp. 481 *ff.* or I. Rau, Chapter 23: Straf- und Strafverfahrensrecht, (in:) H. Schmidt (ed.), COVID-19, Rechtsfragen zur Corona-Krise, 3. Edition, 2021. Eventually, a journal specialized in the related legal issues with the name of "COVID-19 und Recht" (Covid-19 and Law) has started to be published since the outbreak of the pandemic.

3 R. Esser, M. Tsambikakis (eds.), Pandemiestrafrecht, 2020.

4 Cf. in preference to all on the insights gained in the debate and more recent empirical developments, W. Frisch, Die strafrechtliche AIDS-Diskussion: Bilanz und neue empirische

punishability of the communication of HIV from someone who had been informed about his/her infection to his/her unsuspecting sexual partner. This earlier discussion concerned the individual-protective offences of bodily injury, and murder, which can be applied to the current pandemic.

The prevailing doctrine and the case law assume dangerous bodily injury according to Sec. 224 par. 1 no. 1 alt. 2 of the German Penal Code (StGB), if another person is demonstrably and intentionally infected with a not negligible disease or virus ("other harmful substances").[5] This applies at least if a course with symptoms develops. However, in its judicature on HIV infection, the Federal Court of Justice declared the symptom-free infection an element of the offence[6] which accords with the definition of health in the constitution of the WHO.[7] In view of the actual peculiarities of the HI-virus (lifelong carrier, infectiousness, and the preventability of outbreak of AIDS disease only by permanent medication) and the differences to SARS-CoV–2 (clearly time-limited carrier and infection can undergo without treatment, without any symptoms, without outbreak of COVID-19), the transfer of this jurisprudence about SARS-CoV–2 is not self-evident and is therefore controversial.[8] If this is chosen, a proof of the causality between the contact and the

Entwicklungen, (in:) J. Joerden (ed.), Festschrift für Szwarc, pp. 495 *ff*. Early from a comparative law perspective on Polish law: Szwarc (ed.), AIDS und Strafrecht, 1996.

5 Instead of all T. Fischer, Kommentar StGB, 68. Edition 2021, § 223 paragraph no. 13, § 224 paragraph no. 5.

6 BGH, NJW 1989, 781 (783).

7 https://www.who.int/governance/eb/who_constitution_en.pdf (6.07.2021), p. 1. Also see E. Turhan, Salgın Dönemlerinde Ortaya Çıkabilecek Ceza Sorumlulukları - Korona Tecrübesi, "Suç ve Ceza" 2020, vol.1, p. 200.

8 In favour of this A. Deutscher, Die „Corona-Krise" und das materielle Strafrecht, „Straf Rechts Report" 2020, vol. 4, p. 6; R. Eschelbach, Commentary to Sec. 223 *ff*. StGB, in: B. v. Heintschel-Heinegg (ed.), Beck´scher Online-Kommentar StGB, 50. Edition, 1.5.2020, § 229 paragraph no. 1, § 224 paragraph no. 44; Fahl, Das Strafrecht in den, *op. cit*., p. 1059; D. Neuhöfer, N. Kindhäuser, Commentary to Sec. 73 *ff*. IfSG, (in:) C. Eckart, M. Winkelmüller (eds.), Beck´scher Online-Kommentar Infektionsschutzrecht, 5. Edition, 1.5.2021, § 74 paragraph no. 37 f.; T. Pörner, Die Infektion mit Krankheitserregern in der strafrechtlichen Fallbearbeitung, „Juristische Schulung" 2020, vol. 6, p. 499; H. Schmidt (ed.), COVID-19, Rechtsfragen zur Corona-Krise, 3. Edition, München 2021, § 23 paragraph no. 46; F. Weisser, Strafrecht in Zeiten des Coronavirus – Konsequenzen des Verstoßes gegen Quarantänemaßnahmen bei Infektionskrankheiten, „Zeitschrift für Medizinstrafrecht" 2020, vol. 3, p. 156; B. Weißenberger, Die Corona-Pandemie und das Strafrecht, insbesondere in Verbindung mit dem (neuen) IfSG, „Höchstrichterliche Rechtsprechung im Strafrecht" 2020, vol. 4, p. 180; against this L. Cerny, J. Makepeace, Coronavirus, Strafrecht und objektive Zurechnung, „Kriminalpolitische Zeitschrift" 2020, vol. 3, pp. 148 *ff*.; J. Makepeace, Coronavirus: Körperverletzung ohne Symptome?, „Zeitschrift für das Juristische Studium" 2020, vol. 3, pp. 189 *ff*.; D. Hotz, Die Strafbarkeit des Verbreitens von Krankheitserregern am Beispiel der Corona-Krise, „Neue Zeitschrift für Strafrecht" 2020, vol. 6, pp. 321 f.; M. Tsambikakis, Chapter 8: Straf- und Bußgeldvorschriften, (in:) Kluckert (ed.), Das neue Infektionsschutzrecht, 2. Edition, 2021, § 17 paragraph no. 8.

infection must be established for assuming a completed offence. This would often be difficult in practice. A viral sequence comparison by which the infection can be tracked right up to the contact with a specific person is currently not possible, unlike in the case of HIV[9].[10] The exclusion of other sources of infection, taking into account *in dubio pro reo* (Sec. 261 of the Penal Procedure Code [StPO]), should be very rarely possible in the time of the widespread infection in the population, especially because of the dark number of symptomless cases which are left unreported. However, once this is the case, criminal liability may fail due to the objective attribution (objektive Zurechnung) to the result.[11] In addition, at least an attempt can be considered, depending on whether a (conditional) intent can be established. It is also conceivable that intention of killing may be accepted, particularly in the case of the approved infection of persons at risk (old age, previous illness *etc*.). On the other hand, in the case of not knowing about one's own infection, negligence (Secs. 222, 229 of StGB) may be considered, unless there are indications for the suspicion (contact with infected persons; being in a risk area; non-specific symptoms such as cough, fever *etc*. would be insufficient; the proof of causality is certainly problematic here, too).

In Germany, bodily injury and murder offences during the pandemic were of negligible practical relevance. To date, there have been no published decisions and no convictions are known. Only the District Court (AG) of Braunschweig sentenced a person for deliberately coughing on another person to pay compensation for considerable insomnia.[12]

1.2. The Decision in a Dilemmatic Situation: Triage

During the SARS-CoV–2 pandemic, a debate has erupted about the admissibility and bounds of allocating limited intensive care resources. Under the keyword triage (French: selection or sorting), the prioritization and posteriorization of patients in the event of insufficient lifesaving personnel, and material treatment resources, were discussed. Fortunately, unlike in Italy such dilemmatic situations involving fateful decisions have not come up in the clinical practice in Germany. Nevertheless, the debate on this topic has been very intensive as evidenced by the recently published

9 W. Frisch, Die strafrechtliche AIDS-Diskussion…, *op. cit*, pp. 495 *ff*. und J. Teumer, Neues zum Thema Aids und Strafrecht, „Medizinrecht" 2010, vol.1, pp. 11 f.

10 H. Lorenz, Corona und Strafrecht, „Neue Juristische Wochenschrift" 2020, vol. 12, p. 17.

11 On autonomous self-endangerment L. Cerny, J. Makepeace, Coronavirus, Strafrecht und objective…, *op. cit*., pp. 148 *ff*. and H. Lorenz, M.T. Oğlakcıoğlu, Commentary to Sec. 73 *ff*. IfSG, (in:) Kießling (ed.), Kommentar IfSG, 2. Edition, 2021, § 74 paragraph no. 6. For further explanations due to permitted risk ("erlaubtes Risiko") see E. Turhan, Salgın Dönemlerinde Ortaya Çıkabilecek…, *op. cit*., p. 201.

12 H. Lorenz, Annotation to AG Braunschweig decision of 29.10.2020–122 C 1262/20, Juristische Rundschau 2021, vol. 12, p. 659 ff.

comprehensive anthology "Triage in the Pandemic".[13] Triage is commonly addressed in two constellations.[14]

Ex-ante-triage is characterized by the need to decide which of several patients should receive an available life-saving treatment. In this process, doctors find themselves as guarantors[15] in a conflict of obligations towards their patients. There is a clear agreement up to this point. Moreover, there is a broad consensus on the abstract standards of resolving a conflict of obligations.[16] As an expression of the legal principle "*ultra posse nemo obligatur*" ("No one is obligated beyond his ability."), the guarantor must only do what is possible for him, in other words, fulfil one of the obligations. If there is a conflict of unequal-ranking obligations, this would be the higher-ranking obligation. Thus, failure to comply with the lower-ranking duty, for example killing by omission in the case of failure to care for a patient, is then justified. In contrast, in the case of a conflict of equal-ranking obligations, the guarantor has the freedom to choose. He may decide which one to fulfil.

If it is intended to apply these principles to the situation of triage, a number of questions inevitably arise. First of all, it must be decided what form of conflict of obligations is involved. If the concept of triage in the current discussion is understood narrowly – as it is here – and if it is seen as the (safe) decision on the life and death of patients, a conflict of equal-ranking obligations must be assumed.[17] Even if a patient would die faster without a ventilator, this cannot lead to the posteriorization

13 T. Hörnle, S. Huster, P. Poscher (eds.), Triage in der Pandemie, 2021. A brief selection of the published literature: S. Ast, *Quieta non movere*? Ärztliche Auswahlkriterien sowie der Behandlungsabbruch im Fall einer Pflichtenkollision aus strafrechtlicher Sicht, „Zeitschrift für Internationale Strafrechtsdogmatik" 2020, vol. 6, pp. 268 *ff*.; A. Engländer, T. Zimmermann, „Rettungstötungen" in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, „Neue Juristische Wochenschrift" 2020, vol. 20, pp. 1398 *ff*.; F.J. Lindner, Die "Triage" im Lichte der Drittwirkung der Grundrechte, „Medizinrecht" 2020, vol. 9, pp. 723 *ff*.; R. Merkel, S. Augsberg, Die Tragik der Triage – straf- und verfassungsrechtliche Grundlagen und Grenzen, „Juristenzeitung" 2020, vol.14, pp. 704 *ff*.

14 It is also argued that "precautionary triage" is conceivable if life-saving resources are withheld for patients arriving later. See only O. Gerson, Chapter 3: Pflichtenkollision beim Lebensschutz (Triage), (in:) R. Esser, M. Tsambikakis (eds.), Pandemiestrafrecht, op. cit., § 3 paragraphs no. 6, 50 *ff*. However, such a withholding should always be punishable, since the obligations are always determined by the current, actual situation.

15 The guarantor position of the doctors towards all arriving patients could already be doubted, since the actual assumption of life-saving treatment is only possible within the framework of the available capacities. However, a guarantor position regarding all patients is supported by the fact that otherwise any guarantor position prior to selecting a patient would have to be excluded, and therefore a failure to save a patient at all would have to go unpunished *sub specie* of a non-genuine crime of omission.

16 For the prevailing opinion, the following and the counter opinions, C. Roxin, L. Greco, Strafrecht Allgemeiner Teil, vol. I, 5. Edition, 2020, § 16 paragraphs no. 115 *ff*.

17 Exemplary for this prevailing opinion, A. Engländer, T. Zimmermann, „Rettungstötungen" in der Corona-Krise?..., *op. cit.,* p. 1400.

of another patient who would survive a little longer but would also surely die without the ventilator.[18] The obligations to save from the certain death do not weigh differently and are therefore ranked equal. However, this could possibly change if the specifications about the order of treatment were laid down by law. This is currently not the case in Germany.[19] Only non-binding clinical[20] or ethical[21] recommendations exist so far and various criteria are being discussed regarding a possible regulation. Although the debate is too extensive to be presented here in detail, it can be doubted whether there is any constitutional scope at all for prioritizing and posteriorizing criteria concerning definitive decision on life[22] and death.[23] This is negated by many under the keyword of the non-difference of the worth of life (Art. 2 par. 2 sent. 1 i.c.w. Art. 1 par. 1 i.c.w. Art. 3 of the German Basic Law [GG]).[24]

Doctors in Germany are currently in a conflict of equal-ranking obligations when it comes to triage. It was therefore often assumed in the subject literature that they are allowed freely to decide which of the patients to save.[25] Indeed, this is questionable. What would be obviously incorrect to accept this for doctors who work as public officials (Sec. 11 par. 1 no. 2 StGB), *e.g.*, in university hospitals. They are directly bound by fundamental rights in decision-making.[26] The only remaining option, as some have argued,[27] would be an arbitrary decision within the frame of the aforementioned constitutional scope. In addition, even doctors who are not as public officials are not allowed to make a free selection decision. It has been rightly pointed

18 See R. Merkel, S. Augsberg, Die Tragik der Triage…, *op. cit*., pp. 706 *ff*.

19 The German Federal Constitutional Court (BVerfG) had rejected an urgent application for the issuance of regulations on triage because of the currently recognizable, non-critical condition with regard to the incidence of infection and treatment capacities, cf., BVerfG, NVwZ 2020, 1353 f.

20 Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin (DIVI), Entscheidungen über die Zuteilung von Ressourcen in der Notfallund der Intensivmedizin im Kontext der COVID-19-Pandemie, Klinisch-ethische Empfehlungen, https://www.divi.de/joomlatools-files/docman-files/publikationen/covid-19-dokumente/200325-covid-19-ethik-empfehlung-v1.pdf (22.5.2021).

21 Deutscher Ethikrat, Solidarität in der Corona-Krise, S. 3 *ff*., https://www.ethikrat.org/fileadmin/Publikationen/Ad-hoc-Empfehlungen/deutsch/ad-hoc-empfehlung-corona-krise.pdf (22.05.2021).

22 It is certainly necessary that the life of a patient can be saved at all or extended in a relevant way, *i.e*., that the so-called minimum benefit threshold is exceeded.

23 The further, utilitarian considerations of E. Hoven are therefore to be rejected, Die "Triage"-Situation als Herausforderung für die Strafrechtswissenschaft, JuristenZeitung 2020, Vol.9, pp. 449 *ff*. Rightly critical therefore R. Merkel, S. Augsberg, Die Tragik der Triage…, *op. cit*., pp. 704 *ff*.

24 Exemplarily F. J. Lindner, Die "Triage" im Lichte…, *op. cit*., p. 726.

25 Exemplarily T. Rönnau, K. Wegner, Grundwissen – Strafrecht: Triage…, *op. cit*., pp. 404 *ff*.

26 A. Engländer, Die Pflichtenkollision bei der ex-ante-Triage, (in:) T. Hörnle, S. Huster, P. Poscher (eds.), Triage in der Pandemie 2021, pp. 142 *ff*.

27 T. Walter, Lasst das Los entscheiden!, Zeit online v. 02.04.2020, https://www.zeit.de/gesellschaft/2020–04/corona-krise-aerzte-krankenhaeuser-ethik-behandlungen-medizinische-versorgung (22.05.2021).

out in the literature that the third-party effect of fundamental rights must also be respected regarding the publicly financed health care system.[28]

Hence, the only remaining question is what consequences in criminal law will result from a decision made in violation of the constitutional requirements. Example: A doctor assigns a life-saving ventilator to a patient because he is a man. The female patient who was disregarded in the decision dies. In this constellation, it might be tempting to reject the doctor's justification because of his decision on the conflict of obligations which is incompatible with the constitution (Art. 3 par. 3 var. 1 GG: "No person shall be favoured or disfavoured because of sex [...]").[29] However, the fact would be overlooked in this way that in the terms of the personal injustice doctrine[30], both the disvalue of act[31] (due to knowledge of the justifying situation) and the disvalue of result[32] (due to the only possible way to rescue at least one person) are compensated.[33] Only the disvalue of the motive of the doctor's conduct remains, which is not able to sustain the conviction for murder by omission.[34] In order to figure this in criminal law, legislation about special or general prohibition of discrimination would be required.[35]

In *ex-post* triage, all available life-saving treatment resources are already in use and one or more patients arrive who are also in need of them. A decision must then be made as to whether the *status quo* should be maintained with regard to allocation or whether a reallocation of treatment resources should take place. The evaluation of this constellation is strongly dependent on the external circumstances. As far as scarce personnel resources are involved, there will often be no difference between this and *ex-ante*-triage. If a doctor decides not to continue the monitoring and treatment of a patient by further actions in order to do so with a newly arriving patient who, from his or her point of view, is preferable to be treated, the only accusation which can be made is an omission, and the conflict of obligations takes effect as a matter of justification. During the pandemic, however, the discussion focused almost exclusively on the constellation of lack of material resources, especially ventilators.[36] Aborting an already initiated treatment in order to assign the ventilator to another person is phenomenologically a positive act ("aktives Tun"). If a patient dies as a result of this reallocation, murder (Totschlag) according to Sec. 212 par. 1 StGB could be

28 F.J. Lindner, Die "Triage" im Lichte…, *op. cit*., pp. 724 *ff*.
29 In this sense likely F.J. Lindner, Die "Triage" im Lichte…, *op. cit*., p. 728.
30 Ger.: Persönliche Unrechtslehre.
31 Ger.: Handlungsunwert.
32 Ger.: Erfolgsunwert.
33 A. Engländer, Die Pflichtenkollision bei…, *op. cit*., pp. 138, 148).
34 In the result likewise S. Ast, *Quieta non movere*? Ärztliche…, *op. cit*., p. 270.
35 If applicable, the discriminating decision may also be seen as an insult according to the Sec. 185 StGB.
36 Exemplarily I. Rau, Chapter 23: Straf- und…, *op. cit*., paragraphs no. 42 *ff*.

therefore relevant. The justification due to the conflict of obligations would then not be applicable. According to the very prevailing opinion, it can only be applied to the conflict of obligations to act but not of obligations to omit. If an obligation to act and an obligation to omit collide, only the Sec. 34 StGB (necessity as justification) can be used.[37] After that, it would be necessary to reason that the life of the newly arrived patient "substantially outweighs" that of the currently ventilated patient "upon weighing the conflicting interests" (Sec. 34 par. 1 sentence 1 StGB). Such a weighing decision of life against life is actually prohibited, as already mentioned, in view of the non-difference of the worth of life.[38] Possible grounds of excuses under Sec. 35 StGB or supra-legal necessity are also excluded.[39]

This result – the criminal liability of the doctor – however, could be doubted. It is related to the classification of the accusation as commission. The comparison with *ex-ante*-triage makes this clear. If the phenomenologically active doing could be accepted as omission in the criminal law sense, impunity – as there – would be conceivable. In fact, this problem is already known from the field of passive assisted dying. For a long time, the subject literature and subsequently the case law have classified the phenomenologically active termination of life-sustaining measures by the treating doctor as "omission by commission".[40] Criminal liability for murder (Totschlag) by omission, is then, already excluded at the level (of fulfilling the statutory elements) of the offence[41] due to the limitation of the doctor's guarantor position or obligation based on the declared or presumed will. BGH departed from this line in its judgment in the Putz-case in 2010.[42] It has turned to a naturalistic view, according to which sensual perceptibility is decisive. Pressing a button to switch off a ventilator is therefore to be examined as a positive act from the perspective of commission. According to Federal Supreme Court (BGH), this conduct, which is defined with the evaluative generic term "treatment interruption", is henceforth to be regarded as justified under certain conditions.

It is not the place here to analyse this judicature in a detailed and critical way.[43] It seems convincing to make a normative determination of the form of conduct, contrary to that naturalistic approach. The decisive factor for the assessment of the

37 C. Roxin, L. Greco, Strafrecht Allgemeiner Teil, *op. cit*., § 16 paragraph no. 117.

38 H. Rosenau, Commentary to Sec. 34 StGB, (in:) H. Satzger, W. Schluckebier, G. Widmaier (eds.), Kommentar StGB, 5. Edition, 2021, paragraph no. 20.

39 T. Rönnau, K. Wegner, Grundwissen – Strafrecht: Triage, „Juristische Schulung" 2020, vol. 5, pp. 405 f.

40 C. Roxin, An der Grenze von Begehung und Unterlassung, (in:) Bockelmann (ed.), Festschrift für Engisch, 1969, pp. 395 *ff*. und BGHSt 40, 257 (265 f.).

41 Ger.: Tatbestandsebene.

42 BGHSt 55, 191 *ff*.

43 For a comprehensive study see S. Ast, Begehung und Unterlassung – Abgrenzung und Erfolgszurechnung. Begehung und Unterlassung – Abgrenzung und Erfolgszurechnung, „Zeitschrift für die gesamte Strafrechtswissenschaft" 2012, vol. 3, pp. 612 *ff*.

conduct from the perspective of omission is that the treating doctor provides his patient with a service – in the form of ventilation – that can be attributed to him.[44] If he switches off the ventilator, he omits the further service. Applied to *ex-post*-triage, this means that when a ventilator is reallocated, the omission of (further) ventilation must be justified towards the patient who has been disconnected from the ventilator. In doing so, the doctor is in a justifying conflict of obligations. According to the approach represented here, the colliding obligations to act are to be classified as equal-ranked. The fact that the treatment in favour of a patient had already been initiated (*status quo*) does not change this. The principle of "*quieta non movere*" ("Do not move settled things.") is by no means binding.[45]

1.3. Forms of Pandemic-Related Crime: Subsidy Fraud and Incorrect Health Certificates

Other offences came into focus in practice during the pandemic. It would be beyond the scope of this article to list and describe all in detail.[46] Therefore, only two of the most relevant forms of pandemic-related criminality will be discussed here by way of example. These are subsidy fraud and the offences about incorrect health certificates.

Back in March of 2020, the first aid package for the self-employed persons, small enterprises, freelancers, and farmers who are in a difficult financial situation due to the SARS-CoV–2 pandemic was announced by the Federal Ministry of Economics, and the Federal Ministry of Finance, in agreement with all federal states.[47] This provided for a non-bureaucratic process via online application, where a liquidity shortage caused by the pandemic or the control measures (*e.g.*, store closures) had to be proven by means of appropriate documentation. This system without a high level of control was abused in many cases in order to make an unfair profit. Suspicions of subsidy fraud came to the fore.[48]

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44 S. Ast, Begehung und Unterlassung – Abgrenzung…, *op. cit.,* pp. 623 *ff.*; S. Ast, *Quieta non movere*? Ärztliche…, *op. cit.*, pp. 271 *ff.*; same conclusion also R. Merkel, S. Augsberg, Die Tragik der Triage…, *op. cit*., p. 711.

45 S. Ast, *Quieta non movere*? Ärztliche…, *op. cit*., p. 274; different view by D. Sternberg-Lieben (Corona-Pandemie, Triage und Grenzen rechtfertigender Pflichtenkollision, „Medizinrecht" 2020, vol. 8, pp. 635 f.) who classifies the conduct as a positive act. Under the premise of an omission also R. Merkel and S. Augsberg (Die Tragik der Triage…, *op. cit*., pp. 711 *ff.*) reach this conclusion.

46 A good and comprehensive overview is provided by, R. Esser, M. Tsambikakis (eds.), Pandemiestrafrecht, *op. cit., passim.*

47 The press statement of the Federal Ministry for Economic Affairs and Energy, https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/20200329-weg-fuer-gewaehrung-corona-bundes-soforthilfen-ist-frei.html (1.06.2021).

48 This problem was addressed in a minor interpellation by several MPs in the Bundestag. See BT-Drs. 19/27644 for the interpellation and BT-Drs. 19/28367 for the answer.

The most common variant of subsidy fraud is regulated in Sec. 264 par. 1 No. 1 StGB.[49] The legal definition of the act is to furnish incorrect or incomplete particulars regarding facts which are relevant for the granting of a subsidy and advantageous to the perpetrator or another person. The other variants of the offence are – generally formulated – the use of an object or a cash benefit contrary to the restriction of use (No. 2), withholding of the facts relevant to the subsidy (No. 3) and the use of a certificate of entitlement to a subsidy or about facts relevant to a subsidy which was obtained by furnishing incorrect or incomplete particulars (No. 4).[50]

A central question is whether the aid can be classified as a "subsidy" and whether the particular that was not truthfully furnished can be classified as "relevant to the subsidy". The term subsidy is legally defined in Sec. 264 par. 8 StGB. The Corona-Emergency-Aid is undoubtedly subject to this definition because it constitutes a non-repayable ("granted without market-related consideration") financial support from public funds.[51] This also accords with the recent decision of BGH.[52] Relevance to the subsidy is also defined by the legislation. According to Sec. 264 par. 9 StGB, these are the facts which are "designated as being relevant to a subsidy by law or by the subsidy giver on the basis of a law" (No. 1) or on which "the approval, granting, reclaiming, renewal, or continuation of a subsidy or of an advantage of subsidisation is dependent […] for reasons of law or under the subsidy contract" (No. 2).

A relevance to the subsidy on the basis of Sec. 264 par. 9 No. 1 Var. 1 StGB is ruled out because no formal or material law has been passed yet[53] which explicitly designates certain facts concerning the Corona-Emergency-Aids as relevant to subsidy.[54] These must therefore be determined as relevant to the subsidy by the

49 About the speciality of subsidy fraud in relation to fraud (§ 263 StGB) in the sense of the principle *lex specialis derogat legi generali* BGH decision of 23.04.2020 – 1 StR 559/19 (BeckRS 2020, 24146).

50 Within the regulation are also included especially serious cases (par. 2), commission as a member of a gang (par. 3), punishability due to the attempt at par. 1 No. 2 (par. 4), punishability due to the reckless act in the context of par. 1 nos. 1 to 3 (par. 5), active remorse (par. 6), measures and other legal consequences (par. 7).

51 LG Hamburg, NJW 2021, 707 (708); I. Rau, M. Sleiman, Subventionsbetrug im Zusammenhang mit Corona-Soforthilfen für Kleinstunternehmen und Soloselbstständige, Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 2020, vol. 10, p. 374; I. Rau, Chapter 23: Straf- und…, *op. cit*., paragraph no. 68 (with further references).

52 BGH decision of 4.5.2021 – 6 StR 137/21, paragraph no. 7 (BeckRS 2021, 10616).

53 On this discussion and rejection of the law quality of the federal regulation, see LG Hamburg, NJW 2021, 707 (708). On the opinion that the federal regulation of Corona-aid constitutes formal and substantive law, see M. Schmuck, C. Hecken, C. Tümmler, Zur Rechtswidrigkeit innerhalb der Strafandrohungen in den Verwaltungsbestimmungen zur "Bundesregelung Kleinbeihilfen 2020" – Stichwort "subventionserhebliche Tatsache"?, „Neue Juristische Online-Zeitschrift" 2020, vol. 23, p. 675.

54 The latest version of the regulation, https://www.ueberbrueckungshilfe-unternehmen.de/UBH/Redaktion/DE/Downloads/kleinbeihilferegelung-2020.pdf?__blob=publicationFile&v=3 (30.6.2021).

subsidy giver on the basis of a law (Sec. 264 par. 9 no. 1 var. 2 StGB) – in this case Sec. 2 par. 1 Subsidy Act (SubvG) – or of the subsidy contract (Sec. 264 par. 9 no. 2 var. 2). Thus, the concrete context of the application forms of the federal states is decisive, whereas they are very diverse. In some states the single facts were explicitly designated as relevant for the subsidy, other states referred extensively to whole passages or declared all facts to be relevant to the subsidy.[55] BGH did not see this as a constellation of an improper blanket or formulaic reference and therefore assumed that the designation of the relevant facts by the subsidy giver was explicit enough.[56] Even if this is not embraced, in some extreme cases (like fictitious transactions) the same result could be derived from Sec. 264 par. 9 no. 1 var. 1 StGB i.c.w. § 4 SubvG.

Offences about incorrect health certificates have also come to the fore during the pandemic. Some people untruthfully claimed that wearing masks is completely ineffective for containment and may even be harmful to individuals, especially children. Even some doctors propagated this myth publicly,[57] and in addition, issued medical attestations of convenience for exemption from the general mask obligation. They did this without examining whether the patient's personal state of health is endangered by mask-wearing which would be required for this under the containment regulations of the states.[58] Furthermore, there were cases of doctors offering already signed attestations online on which the user only had to input his name.[59] Some cases of this type have been uncovered and have come before the courts.[60] The issuance and the use of incorrect health certificates under Secs. 278, 279 StGB are thereby addressed.

The first question is whether the attestations for exemption from the obligation to wear a face mask are a health certificate in the sense of Secs. 277 to 279 StGB. In this context, a health certificate is understood to be a "certificate [...] about the current state of health of a person, about previous diseases and their traces, and consequences

55 BGH decision of 4.5.2021 – 6 StR 137/21, paragraphs no. 9 *ff.* (BeckRS 2021, 10616).

56 BGH decision of 4.5.2021 – 6 StR 137/21, paragraphs no. 9 *ff.* (BeckRS 2021, 10616). Partly different view on single points, NJW 2021, 707 (710); M. Schmuck, C. Hecken, C. Tümmler, Zur Rechtswidrigkeit innerhalb der…, *op. cit*., pp. 675 *ff.*; I. Rau, M. Sleiman, Subventionsbetrug im Zusammenhang mit…, *op. cit*., p. 375.

57 One example is the association "Doctors for Enlightenment", https://www.aerztefueraufklaerung.de/masken/index.php (4.06.2021).

58 *Eg.,* Sec. 1 par. no. 2 of the 12th BayIfSMV (Bavarian Regulation on Infection Protection Measures) and Sec. 1 par. 2 no. 3 of the 13th SARS-CoV–2-EindV of Saxony-Anhalt (SARS-CoV–2 Containment Regulation).

59 LG Frankfurt a. M. decision of 6.4.2021 – 5/26 Qs 2/21 (BeckRS 2021, 9575).

60 *Cf*. the report published by Report Mainz at 8.7.2020, https://www.swr.de/report/atteste-gegen-maskenpflicht-warum-aerzte-die-corona-gefahr-herunterspielen/-/id=233454/did=25301340/nid=233454/1t1kplc/index.html (8.06.2021). On the lack of credibility of a reason for not wearing a mask and on the necessity of concrete and comprehensible particulars, see VG Würzburg decision of 16.9.2020 - W 8 E 20.1301, ZD 2021, 287 paragraph no. 17.

or about health expectancy, whereby information of a factual nature, for example about treatments carried out or their results [...]."[61] According to this definition, at least the attestations issued in relation to a specific person and his health fall under the concept of a health certificate. An example would be an attestation incorrectly stating an asthma condition that makes wearing a mask endangering to health. Moreover it must be also asked whether blanket attestations that generally attribute a health endangering effect to masks for everyone constitute a health certificate. In this case, the attestation is not individually tailored to the user, which is why the judgments have been partly in favour[62] and partly against[63] the assumption of a health certificate. Nevertheless, a proper justification is hardly to be found in the rulings. The last issue addressed by courts is whether the document in the present case can be recognized as an "obvious fantasy document" or whether it can be mistaken by laypeople for a valid document on superficial examination. Behind this consideration lies the idea that the document quality – also a health certificate is a document – is excluded if it is by no means suitable for influencing the formation of convictions.[64] From this point of view, the District Court of (AG) Kempten assumed in one case that it was "immediately apparent to everyone that it was a fake and not a health certificate" based on "the appearance and especially due to the superimposing of an illegible 'approbation certificate'".[65] However, the Regional Court of (LG) Frankfurt has decided otherwise in a very similar case.[66] As the court correctly pointed out; if police officers previously sensitized to this problem recognize a forgery, this would not necessarily speak in favour of an "obvious fantasy document". The document in question was created by copying of the approbation document on the attestation, which is objectively unusual, but just not recognizable as unusual by everyone.

Furthermore, the incorrectness of the health certificate is required. This concerns undoubtedly the attestations of non-existent diseases that would exempt the patient

61 LG Frankfurt, BeckRS 2021, 9575, paragraph no. 9 (with further references from the literature). Cf. B. Gercke, Das Ausstellen unrichtiger Gesundheitszeugnisse nach §278 StGB, „Medizinrecht" 2008, vol.10, p. 592 and F. Zieschang, Die telefonische Feststellung der Arbeitsunfähigkeit und § 278 StGB, „Zeitschrift für Medizinstrafrecht" 2020, vol. 4, pp. 202 f.

62 According to LG Frankfurt also the certificates must be taken as health certificate, which are issued by a doctor blanketly without indicating the patient's name, signed, referring only to the inadvisability of carrying a mask for the "above-mentioned" person, and offered on a website. Decision of 6.4.2021 – 5/26 Qs 2/21, paragraph no. 10 (BeckRS 2021, 9575).

63 AG Kempten, decision of 7.10.2020–13 Cs 210 Js 12406/20, paragraphs no. 4 f. (BeckRS 2020, 31415).

64 T. Fischer, Kommentar StGB, *op. cit*., § 267 paragraph no. 14.

65 AG Kempten, decision of 7.10.2020–13 Cs 210 Js 12406/20, paragraph no. 5 (BeckRS 2020, 31415).

66 LG Frankfurt, decision of 6.4.2021 – 5/26 Qs 2/21, paragraph no. 11 (BeckRS 2021, 9575).

from the obligation to wear a mask.[67] But the incorrectness is also to be assumed in the case of blanket attestations of convenience issued without examination of the state of health. In this regard, the doctor accepts a general danger of wearing a mask for the health of the specific patient. In short: A doctor makes himself liable to prosecution according to Sec. 278 StGB if he issues an attestation of convenience without medical indication. Beyond that, the undifferentiated attestation about the danger of carrying a mask might already be considered as incorrect as a rule. Because after that, even wearing a mask for 30 seconds while buying a scoop of ice cream would be declared a health danger. It seems hard to conceive according to which disease picture this prognosis could correspond to a person moving all by himself. In spite of that the punishability of the person because of using this certificate is not equally obvious. According to § 279 StGB the person must have an intention to deceive. Someone who trusts the statement of a doctor and the attestation issued by him does not have this intention in principle as long as he has no knowledge of the incorrectness of the information about his state of health.[68]

2. The Administrative Offences Law of the Infection Protection Act (IfSG)

Lastly, the law on administrative offences in the IfSG will be presented which has gained considerable importance in the recent past.

2.1. General Remarks

With the outbreak of the pandemic, the IfSG emerged from its shadowy existence and became the central set of regulations governing the crisis. It has been reformed several times and serves as the legal basis for the measures taken by the states, municipalities, and authorities to fight the further spread of SARS-CoV–2. Sec. 73 *ff.* IfSG contain penal and administrative offences for effective enforcement of these measures. The former measures, regulated in Secs. 74, 75, 75a[69] IfSG, are of little significance in the pandemic.[70] On the other hand, the administrative offence in Sec. 73 (1a) IfSG is highly relevant in practice. Already by the early fall of 2020, the press

67 V. Erb, Commentary to Sec. 278 StGB, (in:) W. Joecks, K. Miebach (eds.), Münchener Kommentar zum StGB, Vol.5, 3. Edition, § 278 paragraph no. 4.

68 *Loc. cit*.

69 This was added, along with Sec. 74 par. 2 IfSG, on 1.6.2021 (BGBl. I, 1174 *ff.*) and is intended, among other things, to fight forgery in vaccination documentation. *Cf*. in detail H. Lorenz, "Fälschungen sind kein Kavaliersdelikt" – Kritische Überlegungen zu einer nebenstrafrechtlichen Reform anlässlich der Fälschung und des unrichtigen Ausstellens von Impfausweisen, Zeitschrift für Medizinstrafrecht 2021, vol. 4, p. 210 ff.

70 More about the reasons, H. Lorenz, M.T. Oğlakcıoğlu, Commentary to Sec. 73 *ff*..., *op. cit*., Vor §§ 73 paragraph no. 2, § 74 paragraph no. 5

reported that in the seven largest German cities (approx. 10.1 million inhabitants) alone, more than 35,000 administrative fine proceedings had been initiated for violations of the containment measures since the beginning of the pandemic. In addition, numerous court decisions in such proceedings have now been issued and published.[71] Two crucial aspects emerge repeatedly. They alone will be briefly discussed below in view of the scope of this article.[72]

2.2. Blanket Offences and Art. 103 par. 2 GG

From the perspective of constitutional law, the regulation technique of the IfSG, which enables the executive authorities to actualise the penal provisions and administrative offences of the IfSG using statutory instruments and enforceable legal orders, is particularly interesting. The extension and new formulation of the statutory elements of the offence may conflict with the principle of legal certainty (Art. 103 par. 2 German Basic Law [GG]), and of the division of power and the binding rules of law upon government powers (Art. 20 par. 3, Art. 80 par. 1 sent. 2 GG). Basically, the legislator can delegate the actualisation of a conduct norm to the executive bodies by creating a basis for authorization.[73] The constitutionality of this regulation technique was confirmed by the German Federal Constitutional Court (BVerfG) in a highly regarded decision on the Beef Labelling Act.[74] At the same time, the court outlined the requirements for such a delegation. Accordingly, it is unconstitutional if an authority, as the institution authorized issuing the legal act, is completely free to determine which violations are to be considered sanctionable. Penal or administrative offences will therefore have to be regarded as incompatible with Art. 103 par. 2 and Art. 20 par. 3 GG, and thus unconstitutional, if they are based – regarding the act – on legislation that does not specify the violation of the conduct norm precisely, or if the type and scope of the measure are not founded on clearly defined ground of authorization.[75] For this reason, those provisions of the IfSG that refer to general clauses of danger prevention such as Secs. 16, 28 par. 1 sent. 1 IfSG (cf. Sec. 74 in conjunction with Sec. 73 par. 1a no. 6, 24 IfSG) are constitutionally questionable.[76] The courts in Germany have also recognized this, but have decided the matter differently. They have voted

71 *Cf.* a – not complete – list of the decisions in the fine proceedings on Art. 103 par. 2 GG, H. Lorenz, M. T. Oğlakcıoğlu, Commentary to Sec. 73 *ff.*…, *op. cit*., Vor §§ 73 *ff*. paragraph no. 17.

72 On the other ubiquitous issues of administrative accessoriness, H. Lorenz, M.T. Oğlakcıoğlu, Commentary to Sec. 73 *ff.*…, *op. cit*., Vor §§ 73 *ff*. paragraphs no. 4 *ff.*

73 H. Kudlich, M.T. Oğlakcıoğlu Wirtschaftsstrafrecht, 3. Edition, 2020, paragraphs no. 49 *ff*.

74 BVerfGE 143, 38 = NJW 2016, 648.

75 M. Heuser, Das Strafrecht der Ausgangs- und Kontaktsperre in Zeiten der Pandemie, „Strafverteidiger" 2020, vol. 6, pp. 427 *ff*.

76 H. Lorenz, M. T. Oğlakcıoğlu, Keine Panik im Nebenstrafrecht – Zur Strafbarkeit wegen Verstößen gegen Sicherheitsmaßnahmen nach dem IfSG, „Kriminalpolitische Zeitschrift" 2020, vol. 2, p. 108.

partly in favour and partly against a violation of Art. 103 par. 2 GG.[77] In the course of the pandemic, however, the aforementioned general clauses were concretized by Sec. 28a IfSG to the extent that it now lists certain standard measures to combat the pandemic (e.g., mandatory masking, closure of retail stores, *etc*.). Thus, the legislator has probably now created sufficient constitutional basis for the delegation of norm realisation.

2.3. Uncertain Legal Terms and Art. 103 par. 2 GG

A second aspect concerns the use of vague legal terms in the legal ordinances and general orders to contain the pandemic. In this context, too, there may be a violation of the principle of certainty under Art. 103 par. 2 GG. On the one hand, this may be the case for the regulations with a general ban and standardized exceptions to it. In Saxony in the spring of 2020, for example, it was permitted to leave the home for "sports and exercise primarily in the environment of the residential area" despite the curfew. It is not very convincing when the Higher Administrative Court (OVG) of Bautzen stated that this area could be "assumed to be about 10 to 15 kilometres away from the residence, despite all the vagueness".[78] There is already the question, which value is supposed to be the decisive one. Is it already an (administrative) offence to walk 10 kilometres away from one's home or are 15 kilometres required? If the court is already unable to specify a standard and leaves some margin ("approximately"), how is the citizen, as the addressee of the norm, supposed to know what is prohibited to him? In addition, the rationale for these exact numerical values is missing. For example, a body of water must first be reached for practicing a water sport. In this case, seeking out the nearest opportunity for doing that type of sport itself can exceed 15 kilometres. Even the wording of the regulation shows that the exemption is only aimed at the greatest minimization of distance under the premise of the feasibility of the sport. The sport must be practiced only "primarily" without leaving the environment. According to the wording, longer distances remain possible.

On the other hand, the requirement or prohibition of infection control law, which is sanctioned by a fine, may already contain uncertain legal terms. An example of this was provided by the Containment Ordinance of Lower Saxony from spring 2020, according to which "physical contacts [...] were to be reduced to an absolute minimum". The Higher Regional Court (OLG) of Oldenburg rightly stated that this regulation violated the principle of certainty from Art. 103 par. 2 GG.[79] Accordingly, it is completely unclear what specific number of persons was still permissible. This

77 For an overview of the various decisions H. Lorenz, M. T. Oğlakcıoğlu, Commentary to Sec. 73 *ff*…., *op. cit*., Vor §§ 73 *ff*. paragraph no. 17.

78 COVuR 2020, 41 (43).

79 H. Lorenz, Annotation to OLG Oldenburg decision of 11.12.2020–2 Ss (OWi) 286/20, "COVID-19 und alle Rechtsfragen zur Corona-Krise" 2021, vol.2, pp. 119 *ff*.

follows from the fact alone that no purpose at all is apparent on the basis of which the "absolute necessity" of a contact can be objectively determined. If the focus is also on maintaining a social life, it should be pointed out that people are very different, and the minimum level of contact can vary significantly. Finally, such a ban on contact requires clear numerical guidelines, as was the case in other German states and later in Lower Saxony.

Conclusion

It has been shown that the pandemic has raised numerous questions in German criminal law. These reach from the core of criminal law and questions of bodily injury and murder offences as well as the grounds for justification to the administrative accessory in the supplementary criminal law of the IfSG. Notwithstanding the current significant slowdown of the situation, it is to be expected that some amount of criminal law literature and judicature will be published in the coming months. This is to be welcomed, because in view of the constantly evolving virus mutants, it is by no means foreseeable when the SARS-CoV–2 pandemic will be over. In addition, a new pathogen could also bring the topic back into focus in a few years. It remains to be hoped that some answers to the questions raised will have been found by then.

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Some Remarks on the Changes in the Polish Penal Code During the Pandemic

Abstract: The study indicates the solutions introduced by the amendment to the Penal Code during the pandemic. These are the so-called anti-crisis shields - shield 1.0, shield 3.0 and shield 4.0. The primary role of these laws was to respond to the crises related to the COVID-19 epidemic. Amendments to the Penal Code were introduced in a manner inconsistent with the Constitution of the Republic of Poland and the Regulations of the Sejm of the Republic of Poland. The mere legislative change and increasing punitiveness of the criminal law system and penal policy will not significantly reduce crime. The work is of a presentative and systematising character. The assumed hypothesis boils down to the assertion that the changes to the penal code made pursuant to the so-called anti-Covid laws are irrational and introduced without the required legislative procedure. The study mainly used the formal-dogmatic method.

Keywords: amendment, criminal law, pandemic, penal code, penal populism

Introduction

Diseases have accompanied every living organism since the beginning of its existence, as evidenced by fossils of invertebrate animals from the Carboniferous period (c. 275–220 million years ago) with traces of parasitic diseases. Importantly, with the evolution of organisms and thus the increase in diversity and size of their populations and the emergence of highly diverse species inhabiting diverse ecological

niches, new infectious diseases are emerging, with their type, severity and nature constantly varying[1].

Traces of epidemics that affected the human species in the distant past are attested to by numerous archaeological discoveries in the oldest human settlements, but also by references found in civilisation relics from ancient Egypt, Greece, or Rome[2]. One of the oldest documented human epidemics was the "Justinian Plague" between 541 and 543, which was transmitted from Egypt to the Mediterranean. A renewed plague outbreak in Europe between 1347 and 1351 killed around 40–50% of the population. Each subsequent epidemic brought with it significant depopulation and had a negative impact on the social structure and economy of the regions affected. Significantly, there have also been many epidemics in the 21st century, for example the MERS epidemic (2015), SARS (2002–2003), H1N1 influenza (2009–2010; 6), Zika fever (2015–2016), and the current SARS-CoV–2 (2019–2021)[3].

An epidemic is understood to be "(...) an outbreak of a specified disease during a specified period and in a specified area in larger than average numbers, and a pandemic as an epidemic of particularly large proportions, extending over countries or even continents"[4]. A. Zieliński defines an epidemic as "the occurrence in a specific period of time, in a specific population or area, of infections, health-related events, or behaviours that may have an impact on people's health, in a number significantly higher than what could be expected on the basis of observations from previous years"[5]. This term is defined in a similar way by J. Jaskiewicz, A. Goździalska, and H. Kaducakova. The authors point out that the concept of an epidemic is relative and dependent on the characteristics of the specific pathogen that causes it. An epidemic can affect a population ranging from a family, a village, or a town to an entire country. A pandemic, on the other hand, is a rapidly spreading infectious disease that affects entire countries, continents, or even the world[6]. Taking this into account, it can be noted that the concept of a pandemic is the same as that of an epidemic, and the condition distinguishing one phenomenon from the other is the dynamics and the area of coverage of the infectious disease.

We are currently witnessing the SARS-COV–2 pandemic (COVID-19 infectious disease pandemic) from 2019. Researchers point out that "coronaviruses" have been around forever, however, it was only the 2019 outbreak that brought the concept to

1 Z. Gliński, A. Żmuda, Epidemie i pandemie chorób zakaźnych, „Życie weterynaryjne" 2020, no. 95, p. 554.
2 J. Jaśkiewicz, A. Goździalska, H. Kaducakova, Współczesne epidemie, Cracow 2012, p. 29.
3 Z. Gliński, A. Żmuda, *op. cit.,* p. 554.
4 *Ibidem,* p. 554.
5 A. Zieliński, Co rozumiemy pod pojęciem opracowania ogniska epidemicznego, „Przegląd epidemiczny" 1999, no. 3–4, p. 257.
6 J. Jaśkiewicz, A. Goździalska, H. Kaducakova, Współczesne…, *op. cit.,* p. 28.

the attention of the international community[7]. On 30 January 2020, the World Health Organisation (WHO) declared a public health emergency of international concern as a result of the spreading COVID-19 outbreak. The first case of the infectious disease in Poland appeared on 4 March 2020, and on 5 March 2020 COVID-19 had already been reported in 84 countries[8].

1. Revision of Criminal Law During the Pandemic Period

During an epidemic, a leading role is played by regulations of a sanitary nature, in Poland contained in laws or regulations. Due to the dynamic spread of the infectious disease in Poland in the period from 14 to 20 March 2020 there was a state of epidemic emergency introduced under the Regulation of the Minister of Health of 13 March 2020 *on the declaration of a state of epidemic emergency in the territory of the Republic of Poland*[9]. On the other hand, on 15 March 2020, in order to limit the threat, under the Regulation of the Minister of Internal Affairs and Administration of 13 March 2020 *on the reintroduction of temporary border control of persons crossing the state border constituting an internal border*[10] and the Regulation of the Minister of Internal Affairs and Administration of 13 March 2020 *on the temporary suspension or restriction of border traffic at certain border crossing points, a cordon sanitaire*[11] was introduced at the borders of the Republic of Poland to limit border traffic.

From 20 March 2020 until further notice, a state of epidemic was introduced on the territory of the Republic of Poland by virtue of the Regulation of the Minister of Health of 20 March 2020 *on the declaration of a state of epidemic on the territory of the Republic of Poland*[12], as a result of which many restrictions and limitations were imposed, as well as obligatory quarantine and isolation of infected persons or those who had contact with such persons.

As mentioned above, sanitary regulations play a key role during a pandemic. In Poland, a number of changes in legislation were also made through so-called "anti-Covid" laws since the introduction – first of epidemic risk and then of epidemic status. Essentially, this legislation was about protecting the state and its citizens from

7 A. Jarynowski, M. Wójta-Kempa, V. Belik, Percepcja "koronawirusa" w polskim Internecie do czasu potwierdzenia pierwszego przypadku zakażenia SARS-CoV–2 w Polsce, „Pielęgniarstwo i Zdrowie Publiczne" 2020, no. 10, p. 90.

8 J. Duszyński, A. Afelt, A. Ochab-Marcinek, R. Owczuk, K. Pyrć, M. Rosińska, A. Rychard, T. Smiatacz, Zrozumieć COVID-19. Opracowanie Zespołu ds. COVID-19 przy Prezesie Polskiej Akademii Nauk, PAN 2020, p. 12.

9 Dz.U. of 2020 Item 433.

10 Dz.U. of 2020 Item 434.

11 Dz.U. of 2020 Item 435.

12 Dz.U. of 2020 Item 491.

the crisis caused by the coronavirus pandemic, mainly in terms of supporting the Polish economy.

It should be noted that, somewhat "by the way", the Penal Code Act[13] was amended in an accelerated manner, which, in the case of separate proceedings on criminal law provisions only, would probably not have been possible in such an "express" manner. We are talking here about three laws:

1. Act of 31 March 2020 on amending the Act on special solutions related to the prevention, counteraction, and combating of COVID-19, other infectious diseases, and crisis situations caused by them and some other acts[14] - the so-called anti-crisis shield 1.0;
2. Act of 14 May 2020 on amending certain acts in respect of protective measures in connection with the spread of the SARS-CoV–2 virus[15] - the so-called anti-crisis shield 3.0;
3. Act of 19 June 2020 on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for the approval of an arrangement in connection with the occurrence of COVID-19[16] - the so-called anti-crisis shield 4.0.

2. Act – "anti-crisis shield 1.0" of 31 March 2020

The Act of 31 March 2020 on amending the Act on special solutions related to the prevention, counteraction, and combating of COVID-19, other infectious diseases, and crisis situations caused by them, and some other acts amended provisions of as many as 62 laws. The Act in Article 13 amended the existing provisions of Article 161 and Article 190a of the Penal Code. Under the Act, the limits of the threat of punishment for the offence of exposure to infection with a disease have been changed (Article 161 of the Penal Code), and the attributes of the offence of stalking and impersonation have been broadened, as well as the limits of the threat of punishment have been increased (Article 190a).

These changes are in force since 31.3.2020. Thus, after the changes, anyone who, knowing that they are infected with HIV, directly exposes another person to such infection, is punishable by imprisonment from 6 months to 8 years (before the changes from one month to three years). In turn, anyone who, knowing that they are infected with a venereal or infectious disease, a serious incurable or life-threatening disease, directly exposes another person to infection with such a disease, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5

13 Act of 6 June 1997 (Dz.U. consolidated text of 2020 Item 1444).
14 Dz.U. of 2020 Item 568.
15 Dz.U. of 2020 Item 875.
16 Dz.U. of 2020 Item 1086.

years (prior to the amendment, this was a fine, restriction of liberty or imprisonment for up to one year, giving the court a broader choice in individualising the legal penal response to a crime and treating imprisonment as the *ultima ratio*). Article 161 of the Penal Code § 3 introduces a completely new type of offence consisting in the exposure to infection with a venereal or infectious disease, a serious incurable disease or life-threatening disease of a large number of persons and provides for a penalty of imprisonment from one to ten years. This new type of offence of exposure to contagion to a number of persons is prosecuted by public prosecution, while the other two (Article 161 §1 and §2), as before, are prosecuted at the request of the victim.

At this point, it would be worth pointing out the doubt about the relation to existing Article 165 of the Penal Code, as the two provisions will now compete to assess identical facts. This is a typical example of over-regulation - the so-called statutory *superfluum*. Such procedures may cause serious problems with the qualification of the conduct in question in judicial practice and consequently discrepancies in case law. The rare formula of Article 161 of the Penal Code (in its old form) had even previously raised some doubts in the context of the content of Article 160 of the Penal Code.

In Article 190a §1 of the Penal Code the description of statutory attributes of the crime of stalking has been expanded by adding new alternative attributes of the effect - the feeling of humiliation or torment and the limits of statutory threat for this act have been made more severe. Thus, at present, anyone who by persistent harassment of another person or a person closest to that person arouses in that person, justified by circumstances, a feeling of threat, humiliation, or anguish, or significantly violates his or her privacy, is subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years (before the amendment, between one month and three years). This provision could be crucial in the fight against hate speech in the online space, which poses a huge challenge to the modern legislator. However, we should be in favour of creating a separate type of prohibited act and placing it in a relevant chapter of the special part of the Penal Code, depending on the shaping of the elements of the prohibited act. First of all, one could consider criminalising such behaviour in Chapter XXVII "Crimes against life and health", as the behaviour criminalised in the new Article 190a of the Penal Code resembles the offence under Article 216 of the Penal Code, *i.e.*, insult[17]. New elements have also been introduced into the offence of identity theft, extending protection to data by which a person is publicly identified. Thus, anyone who, by impersonating another person, uses that person's image, other personal data, or other data by means of which that person is publicly identified, with the aim of inflicting a pecuniary or personal damage, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years (before

17 M. Budyn-Kulik, Nowe znamiona nękania z art. 190a §1 Kodeksu Karnego, „Palestra" 2020, no. 9, p. 23.

the amendment between one month and three years). If the consequence of the act specified in §1 (stalking) or §2 (identity theft) is that the aggrieved person attempts suicide, the perpetrator shall be punished with imprisonment from 2 to 12 years (before the amendment from one year to ten years). No change has been made to the mode of prosecution, which means that prosecution of stalking and identity theft continues to take place at the request of the victim, while the victim's attempt on his or her own life as a consequence of these behaviours still results in a change to the mode of prosecution, with prosecution in such cases taking place ex officio.

In addition, the Act on the Code of Petty Offences[18] has been supplemented with Article 65a, under which anyone who intentionally, without complying with specific behavioural orders issued by a Police or Border Guard officer on the basis of law, prevents or significantly obstructs the performance of official duties shall be subject to a penalty of arrest, deprivation of liberty, or a fine. This change serves primarily to ensure the proper conduct of interventions undertaken by officers of the said formations. It aims to implement the right of Police and Border Guard officers to give orders, which is explicitly formulated in the provisions of Article 15(1)(10) of the Act on the Police[19] and Article 11(1)(14) of the Act on the Border Guard[20] added by the Act on amending the Act on the Police and certain other acts.

3. Act – "anti-crisis shield 3.0" of 14 May 2020

The Act of 14 May 2020, on amending certain acts in respect of protective measures in connection with the spread of the SARS-CoV–2 virus has amended dozens of laws. The Act in Article 8 amended the existing provision of Article 304 of the Penal Code. The amendment is effective from 30.5.2020. Under the Act, two new prohibited acts have been criminalised. Criminal liability has been introduced for charging a borrower or a lender, in exchange for granting a loan or credit, benefits (interest or other costs) at least twice the maximum amounts specified in the law (Article 304 § 2 and 3 of the Criminal Code). Thus, under Article 304 §2 of the Penal Code, anyone who, in return for a monetary benefit provided to a natural person under a loan agreement, credit agreement, or any other agreement the subject of which is the provision of such a benefit with the obligation to repay it, not directly connected with that person's business or professional activity, demands from that person the payment of costs other than interest in an amount at least twice as high as the maximum amount of such costs specified by the law, is subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. Pursuant to Article 304 §3 of the Penal Code, the same penalty shall be imposed on anyone who,

18 Act of 20 May 1971 Code of Petty Offences (Dz.U. of 2021 Item 281).
19 Act of 6 April 1990 on the Police (Dz.U. of 2020 Item 360).
20 Act of 12 October 1990 on the Border Guard (Dz.U. of 2020 Item 305).

in connection with the provision of a pecuniary benefit to a natural person under a loan agreement, credit agreement, or any other agreement the subject of which is the provision of a pecuniary benefit with the obligation to repay it, not directly related to that person's business or professional activity, demands from that person the payment of interest in an amount at least twice as high as the maximum interest rate or the maximum interest for a delay, as defined by the law.

The extensive explanatory memorandum to the bill indicates, *inter alia*, that the current provision of Article 304 of the Criminal Code covers a very narrow range of behaviour. It is clearly unsuited to the prosecution of typical modern usury offences, *i.e.*, payday loans, as a result of which the victims sometimes lose everything they have acquired through failure to repay a relatively small loan on time. It is most questionable to offer usury loans to elderly or infirm people whose financial situation is difficult.[21]

4. Act – "anti-crisis shield 4.0" of 19 June 2020

Act of 19 June 2020 on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for the approval of an arrangement in connection with the occurrence of COVID-19 in Article 38 it introduced a number of changes to the Penal Code - in the general and specific parts. The changes are effective from 24.6.2020.

As M. Małecki rightly points out, the amendment to the Penal Code has been hidden in the thicket of provisions on a completely different subject, as the amendment to the Penal Code is not related to interest subsidies for bank loans, as indicated by the title of the Act[22].

The specific part introduces Article 278a of the Penal Code, which criminalises a new aggravated theft offence, previously unknown to the 1997 Penal Code[23]. The Ministry of Justice website indicates that there has been an increase in theft during the epidemic. It stressed that: "Stealing from a shopkeeper who can barely survive at a time of pandemic should be treated as if someone were stealing from flood victims. And theft during a natural disaster has for years been treated in criminal law scholarship as examples of exceptional audacity that deserve particular condemnation[24]". It should be noted, however, that attempts to introduce this type

21 https://sip.lex.pl/#/act-project/102869776?unitId=justification (6.06.2021).

22 M. Małecki, Rządy prawa czy rządy ustaw (karnych)? Nielegalne prawo w czasie epidemii, https://www.dogmatykarnisty.pl/2021/05/nielegalne-prawo-w-czasie-epidemii/ (6.06.2021).

23 See widely on this subject: T. Iwanek, Kradzież szczególnie zuchwała – perspektywa historyczna i uwagi *de lege lata*, „Prokuratura i Prawo" 2021, no. 1, p. 75–97.

24 https://www.gov.pl/web/sprawiedliwosc/tarcza-sprawiedliwosci---kary-za-wlamania-na-e-lekcje-ochrona-przedsiebiorcow-mniej-spraw-w-sadach-i-procesy-on-line (7.06.2021).

of theft had already been pushed for several years (in late 2018 and early 2019), and the outbreak of the pandemic only provided a convenient excuse to implement it. According to the new provision, anyone who commits especially aggravated theft shall be punished with imprisonment from 6 months to 8 years. If exceptionally aggravated theft is committed to the prejudice of a next of kin, prosecution shall take place at the request of the victim. In Article 115 §9a of the Penal Code, the legislator has defined exceptionally aggravated theft. It has explained that exceptionally aggravated theft is:

1) theft, where the perpetrator by his/her conduct shows a disrespectful or defiant attitude towards the possessor of the property or towards other persons, or uses violence other than violence against the person with the aim of taking possession of the property;
2) theft of movable property situated either directly on the person or in the clothing worn by the person or carried or moved by the person under conditions of direct contact or contained in objects carried or moved under such conditions.

According to the intentions of the drafters, the new type of exceptionally aggravated theft is dedicated to cases of shoplifting, while the second part of the definition determines that the new offence is also intended to combat pickpocketing. The provision is an example of the return to legislation of a "communist relic" known from the previous Penal Code of 1969. It is rightly criticised in the doctrine for the "vagueness" of the criteria, which must be assessed by the court each time and may create room for very different interpretations. It suffices to point out the ambiguities surrounding the interpretation of expressions such as, for example, "disrespectful attitude", "defiant attitude". Furthermore, the penalty of up to 8 years in prison for exceptionally aggravated theft is clearly disproportionate, and inconsistent with other criminal law provisions aimed at protecting property.

It is also worth pointing out that the principle of a wobbler, *i.e.*, that a prohibited act can be punished as either a crime or a petty offence, does not apply here. Regardless of the value of the movable property which constitutes the object of the theft, aggravated theft is always a criminal offence punishable under the Penal Code and not the Code of Petty Offences, so pickpocketing of even a few zlotys *de lege lata* constitutes a criminal offence and not a petty offence. The same applies to petty shoplifting, which usually involves food items that represent little material value. It is also impossible not to notice that this setting of the limits of the statutory threat for the conduct in question also leads to a serious intensification of the penalty for the continuing act. This is unfortunately a typical manifestation of penal populism.

A comparison of the historical regulation of Article 208 of the Penal Code of 1969[25] and the currently in force Article 278a of the Penal Code shows far-reaching similarities between the classifications of exceptionally aggravated theft, but also reveals a number of significant differences. It appears that the modern regulation expands the understanding of the elements of exceptionally aggravated theft to include states that previously did not fall within its scope, which may mean that this provision will be used more frequently in practice.[26]

Final conclusions

1. Almost every anti-crisis shield designed to combat the effects of the pandemic has included provisions amending the Penal Code, and there are certainly at least a dozen such amendments made by the Ministry of Justice. Most of them are not related to the epidemic and these changes will continue to apply after the epidemic is over.

2. The Act – "anti-crisis shield 1.0" of 31 March 2020, introduced amendments to Article 161 of the Penal Code and Article 190a of the Penal Code. Exposing a person to contagion, Article 161 of the Penal Code, has been subjected to more severe penalties, and a new type of crime has been introduced, consisting of exposure to infection with a venereal or infectious disease, a serious incurable disease or a life-threatening disease of a large number of persons. This type of crime that is particularly dangerous in times of pandemics. The new type of prohibited act is prosecuted by public indictment, while the other two (Article 161 §1 and §2), as before, are prosecuted at the request of the victim. Article 190a of the Penal Code extends the elements of the offence of stalking to include a feeling of humiliation or anguish on the part of the victim. New elements have also been introduced into the offence of identity theft, extending protection to data by which a person is publicly identified. In both cases - stalking and identity theft - there are also clearly more severe limits to the statutory threat of imprisonment.

3. The Act – "anti-crisis shield 3.0" of 14 May 2020, amended Article 304 of the Penal Code. Criminal liability has been introduced for charging a borrower or a lender, in exchange for granting a loan or credit, benefits (interest or other costs) at least twice the maximum amounts specified in the law (Article 304 § 2 and 3 of the Criminal Code). Criminalisation in this area is a response to the usurious practices of providers of loans, particularly for short periods, known as payday loans. Without questioning the need to protect victims of this type of crime, it should be noted that the expansion of criminalisation in this area should be carried out through a legislative procedure conducted in a balanced manner, preceded by a series of

25 Act of 19 April 1969 Penal Code (Dz.U. of 1969 No 13, item 94 as amended).

26 T. Iwanek, *op. cit.,* p. 95.

analyses and discussions, and not somewhat in the shadow of, and on the occasion of, the "Anti-Covid Act", which in principle is intended to respond to immediate problems associated with the pandemic crisis. Payday loans, , short term loans with high interest rates, are in fact not a "pandemic-derived product", but have been present for Poles for a good few years now.

4. The Act – "anti-crisis shield 4.0" of 19 June 2020 introduced amendments to general, and specific, parts of the Penal Code. A new aggravated theft offence has been introduced, namely exceptionally aggravated theft in two varieties (Article 278a of the Penal Code). This is a return to "backward" legislation, to the construction of "exceptional audacity", which has been criticised for years, and which is a completely imprecise and extremely discretionary category that cannot be reconciled with the principles of definiteness of criminal law. For some unknown reason, the legislator decided that one of the ways to combat the coronavirus epidemic should be an amendment to the Penal Code, under which a new offence of exceptionally aggravated theft was introduced[27]. This type of theft was known in the times of the People's Republic of Poland.

5. In a democratic state governed by the rule of law, the existence of a "rational legislator" is presumed, assuming that the legislator drafts laws in accordance with the rules of legislative technique and uses the language in which the laws are written in a correct manner.[28] The will of the legislator, treated as a certain historical fact, is of great importance in the case of functional interpretation in static (historical) terms. For this purpose, for example, verbatim reports of meetings of the chambers of parliament, or parliamentary committees, which drafted the bill or explanatory memoranda to the bill are used.[29] In some of the justifications for the changes introduced, it is impossible to find broader arguments in favour of the amendments.

6. When considering the need to create criminal law regulations, especially those criminalising certain behaviour, it is necessary to cite the position of A. J. Szwarc. According to A. J. Szwarc, the law in this area should be created with respect for the supplementary role of criminal law and treating criminal liability as *ultima ratio*, as it is not infrequently sufficient to reach for instruments provided for on the grounds of other branches of law, , administrative law. Indeed, criminal law responses should only be resorted to, when necessary, when other measures fail or are insufficient, abandoning the naive belief in the omnipotence of the law, in this case criminal law. Potential orders and prohibitions criminalised under threatening conditions should be introduced with a high degree of caution, given that - when interfering with certain protected values and freedoms - they require a prior balancing with

27 J. Kluza, Kradzież szczególnie zuchwała (art. 278 a §1 kk), Nowa Kodyfikacja Prawa Karnego, Wrocław 2020, no. 4019, v. LVIII, p. 41.

28 A. Jamróz (ed.), Wstęp do prawoznawstwa, Białystok 2007, p. 129.

29 *Ibidem,* p. 132.

constitutionally protected values. The seriousness of this problem is accentuated when legal instruments of this kind sometimes subsequently become permanent and durable regulations, which continue to apply even after the threats for which they were created have been contained.[30]

7. While the introduction of a new type of exposure to infection with a serious incurable disease or a disease which poses a real threat to the lives of many people, especially in times of a pandemic, should be assessed positively (although it should be borne in mind that the toughening of the provisions of Article 161 of the Penal Code outside the state of an epidemic will include cases of exposure to influenza or other seasonal infectious diseases), the remaining amendments are not clearly and convincingly justified. The hasty manner in which they are being introduced, in particular, is by no means acceptable. Such treatment of the codes is incompatible with the constitution and the Regulations of the Sejm, which describe a special procedure for passing the codes. According to the constitution, government bills on code amendments cannot be considered under an urgent procedure (Article 121)[31]. Article 89 of the Sejm's Regulations provides for a special procedure for passing code acts[32].

8. Increasing criminal sanctions for individual crimes does not deserve approval, as it serves penal populism and makes the system of criminal reaction too harsh. Imprisonment is becoming the main instrument of response to crime, instead of being the *ultima ratio* measure. Punishment, after all, is supposed to be inevitable, not unduly harsh. Legislative change and increasing the punitiveness of the criminal law system and criminal policy alone will not have a significant impact on reducing crime.

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

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Prisoners During the Pandemic

Abstract: In connection with the COVID-19 pandemic, all countries of the world are taking actions to minimize the spread of the virus. These actions interfere with civil rights and liberties. They particularly affect convicts who serve prison sentences, as such sentences deprive them many of their rights or significantly restrict them. Recognizing the situation of prisoners at this difficult time, in March 2020, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) issued the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19)[1], while the Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment prepared Advice to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic. The purpose of this paper is to determine whether our country, while taking certain actions, takes into account the recommendations contained in both aforementioned documents.
Keywords: COVID-19 pandemic, prison, prisoner safety measures

Introduction

In December 2019, an infectious pathogen was identified in Wuhan, China. On 30 January 2020, the Director-General of the World Health Organization announced that the epidemic constituted a threat to public health on an international scale, and

1 Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic, CPT/Inf(2020)13, https://rm.coe.int/16809cfa4b Text in Polish on the website of the Commissioner for Human Rights. https://www.rpo.gov.pl/sites/default/files/Zbi%C3%B3r%20zasad%20dotycz%C4%85cych%20post%C4%99powania%20z%20osobami%20pozbawionymi%20wolno%C5%9Bci%20w%20kontek%C5%9Bcie%20pandemii%20choroby%20koronawirusowej%20%28COVID-19%29%20CoE-Statement_PL_0.pdf (20.06.2021).

on 12 March 2020, the COVID-19 epidemic was declared a pandemic. The high infection rates of the pathogen forced national governments to take steps to minimize the spread of the disease. Preventive measures that have been implemented, especially the obligation to isolate and maintain social distance, significantly interfere with various spheres of our lives, limiting contacts with other people, even with family members or relatives, depriving us of the possibility to enjoy culture, participate in various forms of social activity, change jobs, or start studies.

Appreciating the importance of preventive measures during the pandemic and recognizing that these measures interfere with civil rights and freedoms, in April 2020, the Secretary General of the Council of Europe circulated a document to all member states on respecting human rights, democracy, and the rule of law during the pandemic[2]. The document formulates the principles that should guide authorities implementing emergency measures that result in restrictions on human rights and freedoms. Implementation of such measures should be justified, necessary, limited in time, and proportionate to the threat posed by the spread of the COVID-19 virus.

Of course, the extraordinary measures that have been implemented also apply to prisoners. It is obvious that prisons are places with a high risk of rapid spread of the virus. With a large population of convicts, as is the case in many countries of the world, including Poland, it is difficult to observe the basic rules of isolation, which may result in the spread of infections, not only in prisons, but also outside them. One must not forget about Prison Service officers who have regular contact with the world outside prison walls when they return to their homes and families every day.

The safety measures implemented included a ban on visits, participation of prisoners in religious services held in the penitentiary, and employment outside the penitentiary, a limitation of contacts between convicts by closing prison cells, a ban on participation in group educational and sports activities, workshops, and vocational training, especially those that involved the participation of persons not previously employed in the specific prison, limitation of walks in the company of other convicts, and a ban on permissions to temporarily leave the penal institution[3].

2 Coronavirus: guidance to government on respecting human rights, democracy, and the rule of law, Information Documents SG/Inf(2020)11, 7 April 2020, https://www.coe.int/en/web/portal/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law (22.06.2021), Respecting democracy, rule of law, and human rights in the framework of the COVID-19 sanitary crisis https://rm.coe.int/sg-inf-2020–11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40 See also: Omówienie dokumentu Przestrzeganie praw człowieka w dobie pandemii COVID- 19. Stanowisko Rady Europy. Opracowanie tematyczne OT–684 https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/193/plik/ot_684.pdf (12.06.2021).

3 European Organization of Prison and Correctional Services (EuroPris) https://www.europris.org/wp-content/uploads/2020/06/Overview-Commission-30-March-2020.pdf (30.06.2021).

These measures affect various spheres of prisoners' lives and significantly restrict the exercise of prisoners' rights.

1. International Standards for the Prevention and Control COVID-19 in Prisons

However, when looking at the restrictions that have been implemented – which are, of course, fully justified – it should be noted that a prison is a unique place, as imprisonment results in significant restrictions of rights and freedoms. Recognizing the unique characteristics of penitentiary isolation, in March 2020, the World Health Organization's Regional Office for Europe prepared interim guidance concerning preparedness, prevention, and control of COVID-19 in prisons and other places of detention[4]. Of course, the WHO focused primarily on taking measures to prevent the spread of the virus in prisons, *i.e.*, supplying prisoners with masks and disinfectants, and preparing places for isolation. It was considered particularly important to allow prisoners to maintain adequate personal hygiene through access to hot water and soap, and the possibility to spend time outdoors for at least one hour. Attention was also drawn to the application of the standards of healthcare available to the general public in relation to prisoners. According to the WHO, "the basic guarantees of protection from ill-treatment enjoyed by persons deprived of their liberty – access to a lawyer, access to medical care, notification of detention – must be fully respected in all circumstances and at all times".

In March 2020, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) issued the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19)[5], while the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (SPT) prepared

4 Przygotowanie, zapobieganie i kontrola COVID-19 w zakładach karnych i innych miejscach pozbawienia wolności. Tymczasowe wytyczne 15 Marca 2020 r. https://www.rpo.gov.pl/sites/default/files/Przygotowanie%2C%20zapobieganie%20i%20kontrola%C2%A0C0VID-19%20w%20zak%C5%82adach%20karnych%20i%20innych%C2%A0miejscach%20pozbawienia%20wolno%C5%9Bci%20.pdf. (15.06.2021).

5 Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic, CPT/Inf(2020)13, https://rm.coe.int/16809cfa4b. Text in Polish on the website of the Commissioner for Human Rights. https://www.rpo.gov.pl/sites/default/files/Zbi%C3%B3r%20zasad%20dotycz%C4%85cych%20post%C4%99powania%20z%20osobami%20pozbawionymi%20wolno%C5%9Bci%20w%20kontek%C5%9Bcie%20pandemii%20choroby%20koronawirusowej%20%28COVID-19%29%20CoE-Statement_PL_0.pdf (15.06.2021).

Advice to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic[6].

Both documents draw attention to the obligation to take all possible measures to protect the health and safety of all prisoners. When implementing these measures, respect for human rights and human dignity was considered particularly important. In the opinion of the authors of those documents, any emergency measures introduced to prevent the spread of COVID-19 should have a legal basis, and their application should comply with the principles of necessity, proportionality to the threat, and limitation in time.

Both the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19), and Advice of the Subcommittee to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic, recommend compensating for any restrictions, especially to prisoners' contact with the world outside prison walls, by increasing alternative forms of contact such as telephone, Internet and e-mail, video communication, and other appropriate electronic means. Constant contacts of convicts with their families and relatives during the pandemic is essential as it provides emotional and psychological support to the convicts. Such support is particularly important because, as both documents point out, the response of prisoners to restrictions may be different from that of the society outside penitentiaries. This may be manifested not only in convicts' concern about their families, or families' concern about convicts, but may even lead to convicts' rebellion. In many prisons in Europe, restrictions on visits have been met by prisoners' protests, often violent[7].

It is also no less important to provide convicts, their families, and the media with detailed information about the measures implemented, and their rationale.

Both the WHO Regional Office for Europe, and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), as well as the Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (SPT) have found it useful for national preventive mechanisms to include preventive visits, of course following the necessary recommendations on how to carry them out. Monitoring by independent bodies, such as the National Preventive Mechanisms (NPMs) and the CPT, of restrictions on the exercise of prisoners' rights is an important safeguard against the violation of

6 Advice of the Subcommittee to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic, United Nations CAT/OP/10, 7 April 2020, https://undocs.org/CAT/OP/10 (15.06.2021).

7 Covid-19 pandemic: urgent steps are needed to protect the rights of prisoner in Europe – Pandemic and Human Rights – Commissioner for Human Rights (coe.int), COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe – Pandemic and Human Rights – Commissioner for Human Rights (coe.int) (15.06.2021)

prisoners' rights. The JUSTICIA European Rights Network[8] also noted the importance of enabling national human rights institutions to check whether measures are being implemented in prisons during this unique period, to ensure that the right to life and health of both prisoners and prison staff are protected.

In view of the increased risk of infection among persons in prisons, particularly due to overcrowding, the aforementioned documents suggest reducing the prison population as much as possible. In the opinion of the authors of the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19), and the Advice of the Subcommittee to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic, a wider use of non-custodial measures is appropriate. At the stage of imprisonment, on the other hand, it is advisable to make more frequent use of the institution of conditional release. Reducing the prison population is important for the ability to ensure social distancing and to apply other measures to protect life and health for both prisoners and officers.

Information provided by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) on the situation of prisoners in the context of the ongoing Covid-19 pandemic[9] and EuroPris[10] data show that measures have been implemented in prisons to compensate for restrictions on the rights of prisoners, particularly the right to face-to-face contact with family and relatives. As a form of compensation, convicts most often were allowed contact in the form of video calls or more frequent and longer phone calls.

In many countries, in order to reduce the prison population, conditional release was introduced earlier for certain categories of prisoners (*e.g.*, Netherlands, Ireland, and France), house arrest was used more frequently (*e.g.*, Spain, and Italy), and the commencement of prison sentences was delayed (*e.g.,* Germany, and Czech Republic)[11]. The prison population rates by mid-September were generally lower than at the beginning of the year. According to Marcelo F. Aebi and Mélanie M. Tiago's report entitled "Prisons and Prisoners in Europe in Pandemic Times: An evaluation

8 JUSTICIA European Rights Network's statement, 18 May 2020, https://www.hfhr.pl/wp content/uploads/2020/05/Justicia_stanowiska_PL-2.pdf. (15.06.2021).

9 Follow-up statement regarding the situation of persons deprived of their liberty in the context of the ongoing Covid-19 pandemic issued on 9 July 2020, CPT/Inf (2020) 21, https://rm.coe.int/16809ef566 (15.06.2021).

10 European organization of prison and correctional services (EuroPris) https://www.europris.org/wp-content/uploads/2020/06/Overview-Commission-30-March-2020.pdf. https://www.europris.org/wp-content/uploads/2020/06/Overview-Commission-30-March-2020.pdf. (15.06.2021).

11 JUSTICIA European Rights Network's statement, 18 May 2020, https://www.hfhr.pl/wp content/uploads/2020/05/Justicia_stanowiska_PL-2.pdf. (15.06.2021).

of the medium-term impact of the COVID-19 on prison populations"[12], the prison population rates on 15 April are compared to the ones on 1 January 2020, a decrease more than 4% in the number of inmates was observed in Albania, Bulgaria, Cyprus, Czech Republic, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Poland, Portugal, Serbia, Slovenia, Spain (State Administration), Spain (Catalonia), England and Wales, and Scotland (20 prison administrations). Stable (between – 4 and 4%): Azerbaijan, Belgium, Estonia, Hungary, Liechtenstein, Moldova, Monaco, Norway, Romania, Slovak Republic, Northern Ireland (11 prison administrations). Increase (more than 4%): Andorra, Denmark, Greece, and Sweden (4 prison administrations).

It should be noted that Sweden is the only country where no restrictions related to COVID-19 have been introduced.

According to another EuroPris report[13], after several months of a persistent downward trend, the number of prisoners steadily increased from September to November 2020. According to Professor Marcelo F. Aebi[14], these trends can be explained by several factors, in particular the decline in judicial activity due to the closure of courts, the increased use of conditional release of convicts as a measure to reduce the spread of Covid-19, and the decline in crime due to the restrictions, which may have reduced the opportunities to commit crimes. This explanation is supported by the opposite trend observed in Sweden and by the fact that the decline in the prison population stopped as soon as restrictions were lifted.

During the summer, the National Preventive Mechanisms and other national human rights monitoring bodies resumed visits to places of detention in many countries, while taking appropriate precautionary measures. Also, the CPT Committee resumed visits to monitor the measures implemented by countries to protect the rights of persons deprived of their liberty during the pandemic.

However, as early as in November 2020, due to the increase in the number of infected persons, many countries reinstated the suspension of visits of prisoners' families in prisons and the restrictions on the number of visitors (e.g. one adult and one child), the duration of the visit (one hour), obviously with the use of safety

12 M.F. Aebi, M.M. Tiago, Prisons and Prisoners in Europe in Pandemic Times: An evaluation of the medium-term impact of the COVID-19 on prison populations, http://www.antoniocasella.eu/nume/Aebi_Tiago_10nov20.pdf. See also: Prisons and Prisoners in Europe in the Pandemic Times, https://wp.unil.ch/space/publications/2199–2/ (15.06.2021).

13 Overview of European prison services' responses to the COVID-19 crisis Period September-November 2020 Fourth edition – 16 November 2020, https://www.europris.org/wp-content/uploads/2020/12/Overview-COVID-Commissioner-Reynders-update-November.pdf (15.06.2021).

14 Mid-term impact of Covid-19 on European prison populations: new study, https://www.coe.int/en/web/portal/-/mid-term-impact-of-covid-19-on-european-prison-populations-new-study (15.06.2021).

measures such as masks, disinfectants, screens separating convicts from visitors, and adequate ventilation of rooms. Therapeutic programmes were also resumed; however, with a limit on the number of participants. After the summer, employment in the prison workshops resumed, but due to the obligation to keep a distance, the number of working prisoners significantly decreased.

2. COVID-19 Prevention and Control in Polish Prisons

In the initial period of the pandemic in Poland, as in many other countries, a number of restrictions were implemented. Depending on the epidemiological situation, visits of prisoners' family members were temporarily suspended or restricted. In exchange, inmates were allowed, among other things, to make longer and more frequent phone calls. Access to television, radio, and newspapers was also increased. Employment of inmates outside prisons, as well as worship and religious services were suspended. Also, the granting of leave permits, and group activities, were suspended. Prisoners' walks were done under a sanitary regime. All convicts admitted to penitentiaries were placed in temporary cells for 14 days and provided with personal protective equipment. Additional therapeutic, cultural, and educational activities were introduced, individually and in small groups[15].

The basis for these restrictions is Article 247(1) of the Executive Penal Code which authorizes directors of prisons or remand prisons, in cases particularly justified by sanitary or health reasons, or a serious threat to security, to withhold or limit employment of convicts, contacts between them, visits and walks, collective activities, religious services, making purchases, receiving parcels and using payphones, as well as to order closing cells and other rooms where convicts stay or work, to forbid them to possess some objects, and to suspend the function of a prisoners' ombudsman. Restrictions may be imposed, and convicts may be deprived of certain rights for a definite period of time. If restrictions are imposed for a period of 7 days, the director of prisons notifies the penitentiary judge of the decision; an extension of the restrictions requires the penitentiary judge's consent, but lack of such consent does not stop the implementation of the director's decision. The list of restrictions and prohibitions provided for in Article 247(1) of the Executive Penal Code is closed. Thus, the director may impose only those restrictions and prohibitions that are included in the list, but he or she can change them depending on the situation[16].

Pursuant to Article 110(2a) of the Executive Penal Code, the director of prisons may place a convict in a residential cell in which the surface area per one convict is

15 Skuteczna i bezpieczna praca Służby Więziennej w warunkach epidemii, www.sw.gov.pl (15.06.2021).

16 I. Zgoliński, (in:) E. Lachowski (ed.), Kodeks karny wykonawczy, Komentarz, 2nd edition, Warsaw 2016, p. 891.

less than 3 square meters when an epidemiological emergency or a state of epidemic has been announced or an epidemic has occurred in the prison's location. Such decisions make it possible to obtain empty cells to be used for as quarantine rooms or "sick rooms"[17].

For the sake of sanitary safety in penal institutions, visits previously conducted as part of the National Mechanism for the Prevention of Torture (NMPT) were discontinued and replaced with video calls. In early May 2020, representatives of the NMPT began the first pilot video calls with inmates in remand centres in Łódź and Warsaw-Białołęka[18]. This innovative method makes it possible to obtain information not only from the Prison Service but, above all, from prisoners.

It should also be noted that penitentiary courts were enabled to hold their sessions by videoconference. Pursuant to Article 14f of the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them[19], when a prisoner takes part in a penitentiary court's session, the session may be held with the use of technical devices, which makes it possible to hold it remotely with simultaneous direct transmission of video and sound material. In the convict's location, a representative of the institution's, or remand centre's, administration takes part in the session. Since the beginning of 2021, approximately 12,500 cases have been adjudicated in this manner[20].

In the context of the protection of prisoners' rights, the activities of the Commissioner for Human Rights must not be overlooked. Since the onset of the pandemic, the Commissioner's office has received complaints from prisoners and their families. The most frequent allegations concerned the medical staff's dismissal of symptoms such as coughs and fevers, and limitation of their actions to administration of painkillers, lack of personal hygiene products (one soap bar per month) and hot water in cells, failure to observe sanitary recommendations (e.g. walks in groups of fifty), failure to disinfect places with large concentrations of convicts (door handles, hallways, handrails), and officers' failure to use masks and gloves, especially during body searches. Prisoners also complained about frequent changes of cells and transportation without observance of hygiene standards, limited contact with

17 More information can be found in: M. Niełaczna, Funkcjonowanie zakładów karnych w czasie epidemii koronawirusa, LEX/el. 2020**,** https://www.researchgate.net/publication/344287374_Nielaczna-maria-funkcjonowanie-zakladow-karnych-w (15.06.2021).

18 Krajowy Mechanizm Prewencji Tortur rozpoczął cykl wideorozmów z pozbawionymi wolności, https://www.rpo.gov.pl/pl/content/koronawirus-krajowy-mechanizm-prewencji-tortur-zaczal-cykl-wideorozmow-wiezniami (20.06.2021).

19 Act of 2 March 2020 on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them (Journal of Laws of 2020, item 1842, as amended).

20 Skuteczna i bezpieczna praca Służby Więziennej w warunkach epidemii, https://www.sw.gov.pl/aktualnosc/centralny-zarzad-sluzby-wiezien nej-skuteczna-i-bezpieczna-praca-sluzby-wiezien nej-w-warunkach-epidemii (20.06.2021).

educators and directors (*e.g.,* processing of applications and requests with a delay), lack of psychological tests and assistance, and lack of contact with a doctor, unavailability of specialists such as surgeons or psychiatrists[21]. Complaints were also made about contacts with families, particularly children[22]. Each complaint was investigated and many of them required the Commissioner's intervention. As an example, one can point to interventions concerning planned visits to prisons by immediate family or other relatives,[23] and limitation of visitors to the inmates' closest family members[24]. The Commissioner paid particular attention to contacts of convicts with children, especially those staying in orphanages[25]. On several occasions, the Commissioner asked the Minister of Justice to indicate the number of convicts, persons detained temporarily, and Prison Service officers infected with the coronavirus[26].

From the start of the pandemic through 20 April 2021, 1,660 detainees and prisoners tested positive for Covid-19. The number of officers and civilian employees of the Prison Service who tested positive was 5,968[27]. In May 2021, 0.14% of inmates were infected in Poland, 0.85% – in the Czech Republic, 0.46% – in Slovakia, and 0.42% – in Hungary. This made it possible to reintroduce prison visits in compliance with the sanitary regime[28]. With certain restrictions, an inmate may be visited by

21 Epidemia za kratami. Więźniowie w czasach koronowirusa [Epidemic behind bars. Prisoners in the times of the coronavirus epidemic], https://krytykapolityczna.pl/kraj/epidemia-za-kratkami-wiezniowie-w-czasach-koronawirusa/ (20.06.2021). See also: M. Niełaczna, COVID-19 a funkcjonowanie polskiego więziennictwa "NKPK" 2020, vol. LVII, p. 99.

22 Koronawirus a więzienia. Skargi do RPO – na brak środków ochrony, nieprzestrzeganie zaleceń sanitarnych, dostęp do badań https://www.rpo.gov.pl/pl/content/koronawirus-a-wiezienia-skargi-rpo-od-osadzonych-i-rodzin (20.06.2021).

23 Letter dated 29 July 2020 from Deputy Commissioner for Human Rights, Hanna Machińska, to the Deputy Director-General of the Prison Service, Colonel Andrzej Leńczuk, https://www.rpo.gov.pl/sites/default/files/Pismo%20do%20S%C5%82u%C5%BCby%20Wi%C4%99ziennej%20ws.%20%20wznowienia%20widze%C5%84%2C%2029.07.2020.pdf (20.06.2021).

24 Koronawirus. Wracają widzenia osadzonych – ale tyko z jednym członkiem rodziny i bez dzieci. Interwencja Rzecznika https://www.rpo.gov.pl/pl/content/wracaja-widzenia-osadzonych-z-rodzinami-ale-nie-z-dziecmi-interwencja-rpo (20.06.2021).

25 Koronawirus. Widzenia osadzonych z bliskimi wstrzymane. RPO: Mogą je zastąpić komunikatory typu Skype https://bip.brpo.gov.pl/art-z-rpo/17708 (20.06.2021); RPO ponownie pisze do Służby Więziennej w sprawie widzeń osadzonych z dziećmi, https://www.rpo.gov.pl/pl/content/rpo-do-sluzby-wieziennej-widzenia-osadzonych-z-dziecmi (20.06.2021).

26 Koronawrius. RPO pyta o zakażenia w więzieniach, aresztach, zakładach poprawczych, https://www.rpo.gov.pl/pl/content/koronawrius-rpo-pyta-o-zakazenia-wiezieniach-aresztach-zakladach-poprawczych (20.06.2021).

27 Służba Więzienna podała statystyki kowidowe osadzonych i funkcjonariuszy https://www.rpo.gov.pl/pl/content/rpo-sluzba-wiezienna-statystyki-kowidowe-oadzonych-funkcjonariuszy (15.05.2021).

28 Wznowienie widzeń w zakładach karnych i aresztach śledczych https://www.sw.gov.pl/aktualnosc/centralny-zarzad-sluzby-wieziennej-wznowienie-widzen-w-zakladach-karnych-i-aresztach-sledczych (15.05.2021).

one person, the duration of the visit cannot exceed one hour, and the visitors are required to wear masks covering their mouths and noses. From 1 July 2021, following an epidemiological analysis, the number of persons visiting an inmate, including underage persons, is to be increased.

It should be noted that measures have also been taken to reduce the population of prisoners serving custodial sentences.

The Act of 2 March 2020, on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them[29] provided for "the basis for application of a special temporary institution of a break in service of a sentence, adjudicated by penitentiary courts of competent jurisdiction for the place where the sentence is served, in relation to prisoners serving a sentence of imprisonment for so-called minor criminal acts, adjudicated for a term not exceeding 3 years"[30]. Pursuant to Article 14c(1) of that Act, the director of prisons may file a request to grant the convict a break in the service of his or her sentence. The director may do so when, in his or her opinion, granting a break to the convict may contribute to a limitation or elimination of the epidemic (Article 14c(1)). The director encloses with the request an opinion on the prisoner by the administration of the penal institution concerning the circumstances that are the basis for granting the break. The request must be approved by the Director General of the Prison Service. The introduction of a requirement for approval of the request by the central authority may contribute to a more effective control of the number of prisoners to be released, thus making it easier to control the situation regarding safety[31].

When deciding on the matter, the penitentiary court must take into account the prognosis as to the convict's behaviour after he or she leaves the prison, namely that the convict will observe the legal order, in particular will not commit a crime, and will comply with the guidelines, instructions, and decisions of the competent authorities related to prevention of SARS-COV–2 infection or treatment of COVID-19.

The court grants the break for a specified period of time. The duration of the break may be prolonged at the request of the director of the prisons for a further specified period of time. That period may not extend beyond the cessation of an epidemic

29 Act of 2 March 2020 on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them (Journal of Laws of 2020, item 374).

30 Explanatory Memorandum to the government bill on amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts, Parliamentary print no. 299 of 26 March 2020 p. 10, http://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=299.

31 P. Grzesiak, Wykonywanie kary pozbawienia wolności w czasie pandemii COVID-19 – uwagi dogmatycznoprawne i socjologicznoprawne, https://palestra.pl/pl/e-palestra/49/2020/wykonywanie-kary-pozbawienia-wolnosci-w-czasie-pandemii-covid-19-uwagi-dogmatycznoprawne-i-socjologicznoprawne (15.06.2021).

emergency, or a state of epidemic declared because of COVID-19. By law, a break ends on the day of announcement by the competent authorities of the cessation of the state of epidemic threat or the state of epidemic that constituted the basis for granting the convicted person a break in the service of the prison sentence. The convict is required to return to the penal institution within 3 days of such cessation, unless this is not possible due to the obligations imposed on him or her under the provisions on prevention and control of infections and infectious diseases in humans.

The possibility to take advantage of such a break in the service of a prison sentence is not offered to persons sentenced for an intentional crime punishable by imprisonment for more than 3 years; persons sentenced for an unintentional crime to imprisonment for more than 3 years; persons sentenced as multiple repeat offenders (Article 64(1 and 2) of the Penal Code); persons who have made crime a regular source of income; persons who committed a crime while acting as part of an organized group or association with the aim of committing a crime; and perpetrators of terrorist crimes.

In the case of prisoners to whom the court may not grant a break in the service of their prison sentences, and reduction or elimination of the risk that the prisoners infect other persons, is not possible as part of the measures implemented in the penal institution, the director of the penal institution may, pursuant to Article 14d(1), file a request to the penitentiary court for the service of the sentence in the form of placement of the prisoner in an appropriate medical facility. The approval of the Director General of the Prison Service is also required for such a request. The period of service of the sentence in the form of placement of the convict in an appropriate medical facility may not be longer than until the cessation of the state of epidemic emergency or the state of epidemic declared due to COVID-19. According to M. Niełaczna,[32] "unfortunately, this is a token measure aimed at reducing the population of penal institutions, since all the medical facilities in question are outpatient clinics with sick rooms or hospitals at remand centres or prisons. However, there is no alternative."

The Act of 31 March 2020 amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts[33] expanded the group of prisoners who can request to serve their prison sentences by way of electronic monitoring. Previously, only those sentenced to imprisonment for up to one year

32 M. Niełaczna, Funkcjonowanie zakładów karnych w czasie epidemii koronawirusa, LEX/el. 2020, https://www.researchgate.net/publication/344287374_Nielaczna-maria-funkcjonowanie-zakladow-karnych-w (20.06.2021). See also: M. Niełaczna, COVID-19 a funkcjonowanie polskiego więziennictwa, „NKPK" 2020, vol. LVII, p. 94.

33 Act of 31 March 2020 amending the Act of 2 March 2020 on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them and certain other acts (Journal of Laws of 2020, item 568).

could apply and after the law came into force, persons sentenced to imprisonment for up to one year and six months were also allowed to apply, provided they were not multiple repeat offenders (Article 64(2) of the Penal Code).

The explanatory memorandum[34] to the bill on amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts emphasized that the main goal of this amendment was to significantly reduce the current threat of COVID-19 caused by the SARS-CoV–2 virus. "The proposed amendment would make it possible to extend the possibility to serve prison sentences outside penal institutions under the electronic supervision system to an additional very large group (16,601) of convicts who currently have a valid sentence of imprisonment for up to one year and six months, and have not yet started serving their sentences in penal institutions." "Currently 3,340 convicts are serving sentences of up to one year and six months in penal institutions and remand centres".

According to information from the Central Board of the Prison Service, between January 2020 and May 2021, 7,333 persons were granted permits to serve their prison sentences under electronic monitoring.

January 2020	415	July 2020	456	January 2021	402
February 2020	433	August 2020	386	February 2021	473
March 2020	332	September 2020	474	March 2021	641
April 2020	452	October 2020	494	April 2021	576
May 2020	437	November 2020	442	May 2021	475
June 2020	506	December 2020	490		

The break in service of a prison sentence and the extension of the group of convicts who can apply for serving their prison sentences under the electronic supervision system did not have a significant impact on the prison population.

34 Government bill on amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts, dated 26 March 2020, print no. 299, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=299.

January 2020	93.2%	July 2020	86.3%	January 2021	85.2%
February 2021	93.9%	August 2021	85.8%	February 2021	86.3%
March 2020	91.6%	September 2020	85.4%	March 2021	87.3%
April 2020	88.4%	October 2020	85.5%	April 2021	87.6%
May 2021	87.2%	November 2020	84.9%	May 2021	87.6%
June 2020	86.9%	December 2020	84.2%		

One should keep in mind that in that period the number of persons who did not report at penal institutions to serve their sentences despite the expiry of the deadline to do so was in the range of 31,795 to 39,476 and the non-appearance of those convicts, to some extent, had an impact on the prison population rate.

Conclusion

From the standpoint of the recommendations of the WHO Regional Office for Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), and the Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (SPT), a number of measures have been taken in Poland that were aimed at limiting the spread of the COVID-19 virus in penal institutions while minimizing the restrictions on the rights of convicts. Particular emphasis should be put on measures that compensated for deprivation or significant limitation of the contacts of t convicts with their families. Attention should also be drawn to measures aimed at limiting the population of convicts serving custodial sentences, , the new type of break in service of a custodial sentence implemented until the state of pandemic is revoked, and the extension of the possibility of serving a sentence of deprivation of liberty under the electronic supervision system by enabling those sentenced to a custodial sentence not exceeding one year and six months, instead of not exceeding one year as was the case previously, to apply for serving their sentence under the electronic supervision system on a permanent basis. This change will be in effect after the state of pandemic is revoked, and it can be inferred that it will have a significant impact on a reduction of the prison population in the long term.

A certain incongruity in relation to these measures can be seen in the provisions of the Act on interest rate subsidies for bank loans granted to businesses affected by the effects of COVID-19 and on simplified proceedings for approval of an arrangement in connection with the[35] amendment to Article 37a of the Penal Code, which

35 Act of 19 June 2020 on interest rate subsidies for bank loans granted to businesses affected by the effects of COVID-19 and on simplified proceedings for approval of an arrangement in connection

significantly limits the substitution of a penalty of restriction of liberty or a fine for the penalty of imprisonment. Following the amendment of Article 37a of the Penal Code, courts are obliged to determine whether, if it imposed a penalty of imprisonment for a given offence, the penalty would not be more severe than one year in prison. In the case of a decision to change the penalty from a penalty of imprisonment to a non-custodial penalty, the court may, instead of the former penalty, impose a penalty of restriction of liberty for not less than 3 months or a fine of not less than 100 daily rates if it simultaneously imposes a penal measure, a compensatory measure, or a forfeiture. The possibility provided by Article 37a(1) of the Penal Code may not be taken advantage of by perpetrators who have committed a crime acting as part of an organized group or association whose aim was to commit a crime, or who have committed a terrorist crime. The amended Article 37a of the Penal Code will remain in force also after the revocation of the state of pandemic.

It is worth noting that, after the amendment, the content of Article 37a of the Penal Code is similar to the content of the Act of 13 June 2019 amending the Penal Code Act and certain other acts[36], which the President referred to the Constitutional Tribunal in order to examine its compliance with the provisions of the Constitution of the Republic of Poland. The Constitutional Court found the Act of 13 June 2019 amending the Penal Code Act and certain other acts is in its entirety incompatible with Article 7 in connection with Article 112 and with Article 119(1) of the Constitution of the Republic of Poland[37].

As M. Małecki noted[38], these amendments "have nothing to do with anti-epidemic protection, especially since they were invented a year ago.

The authors of the Global Prison Trends report[39] were right when claiming that "[t]he political backing of alternatives to imprisonment as a response to the coronavirus pandemic need to be harnessed for longer-term reform".

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37 Judgment of the Constitutional Court of 14 July 2020, file ref. no. Kp 1/19, MP 2020, item 647.

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Selected Considerations Regarding the Digitalisation of Criminal Proceedings in Light of the Standards of the Council of Europe: Analysis Taking into Account the Experience of the Current Pandemic

Abstract: The aim of the article is to prepare an analysis in order to formulate propositions regarding the digitalisation of Polish criminal proceedings as regards the administration of justice. These hypotheses would have merited consideration even pre-pandemic, but they demand even more attention as a result of the pandemic. The pandemic has served to highlight the pre-existing necessity to adapt criminal law to the latest observable technical and technological advances. In light of the above, the first issue to be analysed concerns the conditions, procedures, and possibilities surrounding the collection of evidence electronically, taking into account the most recent relevant guidelines of the Council of Europe. The second issue to be examined will be the adaptation of criminal procedures, including Polish, to the standards stipulated in the Convention of the Council of Europe on Cybercrime of 23 November 2001, in light of national norms regarding evidence gathering. The third issue that will be assessed in this study will be the benefits, risks, or potential of the application of artificial intelligence algorithms in criminal procedure. The consideration of each of the three areas will have regard to the present global pandemic. The article concludes with a concise summary containing the authors' conclusions and propositions *de lege ferenda*.
Keywords: artificial intelligence, COVID-19, cyber convention, digitalisation of criminal proceedings, electronic evidence

Introduction

The current SARS-CoV–2 virus pandemic has undoubtedly influenced perceptions of the modern world. The implementation of technological innovations regarding products and processes in many areas of human life has been greatly appreciated. A typical example would be the increasingly common use of digital medical solutions.[1] Although the pandemic is directly associated with issues related to the healthcare sector in its broadest sense, changes in the way specific activities are performed relate or pertain to other issues as well. We can cite the obvious ongoing problems regarding education, for example, where a partial solution to date has been the introduction of remote schooling. Acquiring and conveying knowledge via ICT networks has, of course, both advantages and disadvantages. Nevertheless, it is currently the only feasible method of teaching that can be applied generally. A similar example would be the judiciary where, on the one hand, the negative impact of the SARS-CoV–2 virus can be seen while, on the other, one can see also see the opportunities offered by technical and technological progress. Both positive and negative examples serve to illustrate this point. A positive example would be the growing awareness of the need to digitalise the judiciary. A negative example would concern a change of the examination mode to a remote process with potential procedural delays. This has been confirmed in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions of 2 December 2020, entitled "Digitalisation of justice in the European Union – A toolbox of Opportunities"[2] which notes,

> "The COVID-19 crisis has thus underlined the need to strengthen the resilience of the justice system across the EU. It has also stressed the further cooperation with its international partners, and promote best practices also in this policy area. This represents an important component of a society based on European values, and of a more resilient economy."[3]

This also applies to criminal proceedings, the issue under analysis, as it is one of the main features of the justice system. It is important that the European

1 See for example: D. Lupton, The digitally engaged patient: Self-monitoring and self-care in the digital health era, "Social Theory & Health" 2013, no. 11(3), p. 257; E. Elenko, L. Underwood, D. Zohar, Defining digital medicine, "Nature biotechnology" 2015, no. 33(5), pp. 456–461; A. André, The Information Technology Revolution in Health Care, (in:) A. André (ed.), Digital Medicine, Cham 2019, p. 4.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 December 2020, entitled "Digitalisation of justice in the European Union A toolbox of opportunities" (COM/2020/710 final).

3 *Ibidem*.

institutions address this issue and provide valuable guidelines for the Member States. Similar actions are being undertaken by the Council of Europe. It would be justifiable, therefore, to examine the possibility of putting forward ideas regarding the digitalisation of Polish criminal proceedings that would strengthen the functioning of the justice system by reducing its exposure to risk of disruption by real world events. It is worth re-emphasising that the aim of the analysis in this article is to formulate specific hypotheses regarding the digitalisation of Polish criminal proceedings to strengthen the administration of justice. These ideas would seem justifiable and worthy of consideration both in pandemic-free times and, even more, during the pandemic. In this context, the first issue to be analysed will be the conditions, procedures, and possibilities in general of using electronic evidence in preparatory inquiries. The second issue that will be examined will be the adaptation of the criminal process to meet standards of evidence gathering when fighting cybercrime.[4] The third and final issue to be analysed will be the possibilities of using artificial intelligence algorithms as part of the criminal procedure.[5] The analysis in all three areas will take into consideration the situation caused by the SARS-CoV–2 pandemic and selected standards of the Council of Europe. It will also highlight a specific scientific issue. The three areas indicated above are the principal elements of the digitalisation of the judiciary as selected by the authors. The decisive criterion for the selection of these specific areas of research was the level of their importance for the issue in question and the presence of relevant standards of the Council of Europe. After analysing the entire spectrum of topics that could have been considered, it was decided to pay particular attention to issues related to electronic evidence, cybercrime, and artificial intelligence. Although there are many other possible aspects of the digitalisation of criminal proceedings that could have been included, such as the use of videoconferencing for example, the indicated analytical areas are key examples, in the Authors' opinion, related to the digitalisation of criminal proceedings.

4 See interesting study by: W. Filipkowski, L. Picarella, Criminalizing Cybercrimes: Italian and Polish Experiences, „Białostockie Studia Prawnicze" 2021, no. 26(3), pp. 171–183. Issues related to cybercrime are frequently international. The level of their complexity is similar to matters from the international criminal proceedings area, see generally: E. Karska, Karna jurysdykcja krajowa a międzynarodowa, (in:) J. Kolasa (ed.), Współczesne sądownictwo międzynarodowe, vol. II („Wybrane zagadnienia prawne"), Wrocław 2010, pp. 251–293; E. Socha, Stosunek jurysdykcji Międzynarodowego Trybunału Karnego do sądów krajowych, „Przegląd Czerwonokrzyski" 2002, no. 3–4, pp. 26-27; E. Karska, Międzynarodowe prawo karne, (in:) B. Hołyst, R. Hauser (eds.), Wielka Encyklopedia Prawa, vol. IV: J. Symonides, D. Pyć (eds.), Międzynarodowe prawo publiczne, Warsaw 2014, p. 233.

5 In respect to artificial intelligence please see interesting studies by: A. Maceratini, New Technologies between Law and Ethics: Some Reflections, „Białostockie Studia Prawnicze" 2021, no. 26(3), pp. 9–24; R. Rejmaniak, Bias in Artificial Intelligence Systems, „Białostockie Studia Prawnicze" 2021, no. 26(3), pp. 25–42.

The first of the issues to be analysed is the standardisation of the use of electronic evidence in Polish criminal proceedings. This concerns specifying both procedures and conditions related to the taking of this kind of evidence before a criminal court. This covers not only the provisions of law that decide how the parties shall submit their electronic evidence but also those provisions that specify the rules for assessing the probative value of such evidence and the conditions of their storage by the procedural authorities, which, importantly, should ensure the integrity of the digital data relevant to the subject of the proceedings. In this respect, the "Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings"[6] (hereinafter: the CoE Guidelines) adopted in 2019 by the Committee of Ministers of the Council of Europe and the related secondary document entitled "Explanatory Memorandum of Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings" (hereinafter: the memorandum)[7], provide material guidelines. Both documents were prepared as part of the activity of the European Committee on Legal Cooperation (CDCJ)[8].

After a preamble, the CoE Guidelines contain, on the one hand, a description of the purpose and scope of the regulation, and, on the other, provide definitions and general rules as well as detailed recommendations. This means that the EC Guidelines in fact provide for a number of propositions *de lege ferenda* for the national legislature. At this stage, it is not necessary to cite mechanically the content of these acts but to consider their potential practical application in criminal proceedings.[9] From the outset, as indicated in the title of the CoE Guidelines, the authors have stressed that their intention was to cover only civil and administrative proceedings within the scope of this document. Nevertheless, the content of the provisions of the guidelines

6 Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings (CM(2018)169-add1final), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680902e0c (11.10.2021).

7 Explanatory Memorandum of Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings (CM(2018)169-add2), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680902e0e (11.10.2021).

8 European Committee on Legal Cooperation, https://www.coe.int/en/web/cdcj (11.10.2021).

9 In the scope of the practical verification of the changes introduced into criminal proceedings, as noted by P. Hofmański in the context of the Act of 27 September 2013, Amending the Act – Code of Criminal Procedure (Journal of Laws, item 1282): "I am of the opinion that the changes made by the legislator in essence constitute only the beginning of the long road leading to efficient and just criminal proceedings. For most certainly practice must verify the adopted solutions and nobody is able to predict in detail how such verification will progress. Apart from foreseeable results of the amendments, what also remains is the extremely important and unpredictable human factor. It is not fully known how strong the habits of the participants in the proceedings regarding the rules thereof which have remained in force for many years will be" (see: P. Hofmański, Wielka reforma Kodeksu postępowania karnego 2013, "Forum Prawnicze" 2013, no. 18(4), p. 10).

contained in the CoE Guidelines is extremely open in nature and not focused on the specific nature of either civil or administrative proceedings. In support of this thesis, one may cite the wording of the general principles of the CoE Guidelines,

> "It is for courts to decide on the potential probative value of electronic evidence in accordance with national law. Electronic evidence should be evaluated in the same way as other types of evidence, in particular regarding its admissibility, authenticity, accuracy, and integrity. The treatment of electronic evidence should not be disadvantageous to the parties or give unfair advantage to one of them"[10],

One of the subsequent detailed recommendations states,

> "Transmission of electronic evidence by electronic means should be encouraged and facilitated in order to improve efficiency in court proceedings."[11]

This presupposes that the CoE Guidelines may also be successfully applied in criminal proceedings, since their application constitutes "good advice" that would benefit the electronic justice system. Incidentally, it may also be emphasised that such a theoretical as well as practical possibility of using the CoE Guidelines generally in any judicial proceedings in which electronic evidence is submitted.[12] This depends entirely on the will of the national legislator which may decide that the CoE Guidelines should be applied to a broader extent than that implied by the title.[13]

Taking into account the current pandemic situation caused by the SARS-CoV–2 virus, the application of the CoE Guidelines may bring real benefits to criminal proceedings. In light of the increased number of criminal proceedings in which digital evidence is used as an inevitable result of the restrictions stemming from the pandemic, it appears necessary to resort to procedures and conditions related to the taking of this kind of evidence before criminal courts. The CoE Guidelines can and should serve in this regard as valuable guidance as to how a procedural authority is to deal with electronic evidence. It seems that the biggest benefit that the CoE Guidelines can bring to criminal proceedings in the context of electronic evidence is to support the effective and accurate fact finding for a particular case.

10 Guidelines of the Committee of Ministers of the Council of Europe…

11 *Ibidem*.

12 In criminal proceedings in Poland the possibility to take evidence follows from the absence of the so-called formal theory of evidence (K. Boratyńska, M. Królikowski, Komentarz do art. 167, (in:) A. Sakowicz (ed.), Kodeks postępowania karnego. Komentarz, Warsaw 2016, p. 429). Additionally, following legal literature, it may also be stated than in Polish criminal proceedings there exists the possibility to take any evidence of material value for the resolution of the case (R. Kmiecik, Dowód ścisły w procesie karnym, Lublin 1983, p. 46).

13 It should be remembered that the CE Guidelines are a typical example of so-called soft law.

This undoubtedly leads to the realisation of the value of truth[14]in criminal procedural law as a basic goal of criminal proceedings, and thus to its fulfilment. For all of these reasons, consideration by the legislator of the application of the CoE Guidelines in the area of criminal procedure is highly recommended *de lege ferenda*. It should be noted that the impact of the CoE Guidelines in this way belongs to the field of so-called soft law.

1. The Convention on Cybercrime in Criminal Proceedings

The second point for consideration is the necessity to adapt Polish criminal proceedings to the standards set out in the Council of Europe Convention on Cybercrime signed in Budapest on 23 November 2001 (hereinafter: Budapest Convention).[15]It is an indisputable fact that the Budapest Convention, as an international treaty, is binding on the states that have ratified and acceded to it. Thus, by ratifying the Budapest Convention on 20 February 2015, Poland decided to accept an international legal obligation to adapt its normative order to the standards of this international agreement. The agreement entered into force for Poland on 1 June 2015.[16]

14 M. Wielec, Wartości – Analiza z perspektywy osobliwości postępowania karnego, Lublin 2017, pp. 149–277; S. Judycki, O klasycznym pojęciu prawdy, „Roczniki Filozoficzne" 2001, no. 49, pp. 25–26; J. Jackson, Two methods of proof in criminal procedure, „The Modern Law Review" 1988, no. 51(5), p. 554; S. Judycki, Prawda i kryterium prawdy: korespondencja, koherencja, praktyka, „Kwartalnik Filozoficzny" 1999, no. 28, pp. 23–45; J. Zajadło, Teoretyczne i filozoficzno-prawne pojęcie prawdy, (in:) K. Kremens, J. Skorupka (ed.), Pojęcie, miejsce i znaczenie prawdy w procesie karnym, Wrocław 2013, pp. 20–32; S. Waltoś, Zasada prawdy materialnej, (in:) P. Wiliński (ed.), System Prawa Karnego Procesowego, Warsaw 2014, pp. 273–281; J. Jodłowski, Zasada prawdy materialnej w postępowaniu karnym. Analiza w perspektywie funkcji prawa karnego, Warsaw 2015, pp. 54–71; J. Dębowski, O klasycznej koncepcji prawdy i jej filozoficznych podstawach. Czy w Matrixie możliwa jest prawda?, (in:) A. Kiklewicz, E.Starzyńska-Kościuszko (eds.), Oblicza prawdy w filozofii, kulturze, języku, Olsztyn 2014, pp. 12–15; M. Strogowicz, Prawda obiektywna i dowody sądowe w radzieckim procesie karnym, Warsaw 1959, p. 85; A. Murzynowski, Istota i zasady procesu karnego, Warsaw 1976, p. 131; J. Jabłońska-Bonca, O prawie, prawdzie i przekonywaniu, Koszalin 1999, p. 80; M. Klejnowska, C. Kłak, Z. Sobolewski, Proces karny. Część ogólna, Warsaw 2011, p. 45.

15 The Convention of the Council of Europe on Cybercrime signed in Budapest on 23 November 2001 (Journal of Laws of 2015, item 728; ETS No.185); See: J. Clough, A world of difference: The Budapest Convention on Cybercrime and the challenges of harmonization, "Monash University Law Review" 2014, no. 40(3), pp. 698–736; M. Gercke, The Convention on Cybercrime, "Multimedia und Recht" 2004, no. 20, p. 802.

16 The government's declaration of 2 April 2015, on the binding force of the Convention on Cybercrime of the Council of Europe signed in Budapest on 23 November 2001 (Journal of Laws, item729); Council of Europe, 'Chart of signatures and ratifications of Treaty 185: Convention on Cybercrime: Status as of 09/06/2021', https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=E7ydoPfD (11.10.2021).

Irrespective of internal constitutional regulations, this is confirmed by the commonly understood international custom, pursuant to which treaties are to be observed and performed in good faith (*pacta sunt servanda*)[17]. The intention is to adapt the legal systems of the States Parties, as the Budapest Convention is not of a self-executing nature.[18] Its individual provisions begin with the words: "Each Party shall adopt such legislative and other measures as may be necessary to ensure (…)." This is of fundamental importance in determining how to implement its standards through national law. For example, Articles 2 to 9 of the Budapest Convention make proposals regarding the classification of types of cybercrime in the form of offences relating to confidentiality, integrity, and access to IT data and systems (illegal access, illegal interception of data, data interference, system interference, and misuse of devices), computer-related offences (computer-related forgery and computer-related fraud), offences related to the nature of the possessed data (child pornography) and offences related to infringements of copyright and related rights.

In order to fulfil the international obligations arising from these provisions of the Budapest Convention, each State Party should introduce the appropriate provisions into its legal system. In Polish law, relevant legal measures to incorporate the Budapest Convention include, *inter alia*, Articles 267, 268, 268a and 269b of the Criminal Code.[19] This means that, without an act to incorporate the provisions of the Budapest Convention into the national legal order, they remain ineffective and cannot be directly invoked. Precisely the same situation occurs in the case of the procedural norms of the Budapest Convention, where the States Parties are obliged to adopt measures relating to the collection of evidence such as the expedited preservation of stored computer data (expeditious preservation of stored computer data and the preservation and partial disclosure of traffic data), and relating to orders to deliver, search, and seize stored computer data and to collect computer data in real time (real-time collection of traffic data and the interception of content data).

The indicated measures relating to evidence used in combatting cybercrime should be regarded as the appropriate standards of the Council of Europe in this respect. Their incorporation into the Polish legal system is guaranteed by the provisions

17 P. Grez, Pacta sunt servanda, "Revista Actualidad Juridica" 2008, no. 18, pp. 107–187; M. Shaw, International Law, Leicester 2008, pp. 86–89.

18 On the subject of self-executing and non-self-executing international treaties see.: J. Paust, Self-executing treaties, "The American Journal of International Law" 1988, no. 82(4), pp. 760–783; C. Bradley, Intent, Presumptions, and Non-Self-Executing Treaties, "The American Journal of International Law" 2008, no. 102(3), pp. 540–551. On the subject of practical examples of implementing international obligations into Polish criminal law see, for example, E. Socha, Zakres włączenia katalogu zbrodni objętych jurysdykcją Międzynarodowego Trybunału Karnego do polskiego prawa karnego materialnego, "Przegląd Sejmowy" 2007, vol. XV, no. 5(82), pp. 253–266.

19 Act of 6 June 1997 – The Criminal Code (consolidated text: Journal of Laws of 2020, item 1444, as amended).

of Articles 218a and 236a of the Code of Criminal Procedure,[20] which provide for the use of modern technologies in the course of the collection of evidence.[21] Nevertheless it may seem that the resulting normative content may be insufficient, which leaves certain doubts as to the full implementation of the standards of the Council of Europe in this regard into the Polish legal system. To put it more precisely, we are talking about the introduction of the appropriate measures in national law, which facilitate the possibility of applying the rules relating to evidence provided for in the Budapest Convention in the operating practice of the law enforcement authorities.

Without prejudging at this point whether or not the legal international obligations in this respect have been fulfilled by Poland, as this issue requires a separate analysis as has already been indicated above, doubts of this kind may give rise to the impossibility on the part of the competent authorities to use fully the instruments indicated above to combat cybercrime, because, as has been stressed, it is not self-executing. For this reason, it is worth postulating *de lege ferenda* that the full incorporation of the criminal and procedural standards set out in the Budapest Convention into the Code of Criminal Procedure, every standard of the CoE Guidelines will have its counterpart in national law. Only in this way is it possible to guarantee that Polish law enforcement authorities have unquestionable legal grounds to collect evidence as provided for in the Budapest Convention. Given the specificity of cybercrime, its transnational nature, it is also of key importance for international cooperation in the field of combatting cybercrime.[22] Although this hypothesis remains warranted regardless of the epidemic conditions prevailing in the country, it is reinforced by the current situation caused by the COVID-19 pandemic, giving rise to a significant increase of criminal activity on the Internet. In this era of health-driven digitalisation of everyday activities, it becomes even more necessary and important to equip the competent law enforcement authorities that protect the security of Internet users

20 Act of 6 June 1997 – The Code of Criminal Procedure (consolidated text: Journal of Laws of 2021, item 534).

21 Pursuant to Article 218a. § 1 of the Code of Criminal Procedure, government offices, institutions, and entities operating in the telecommunications sector are obliged to promptly secure, upon the demand of a court or public prosecutor contained in the order, for a specified period of time, which shall not however exceed 90 days, computer data stored in devices containing the data, on a data carrier or in the computer system. The provision of Article 218 § 2 second sentence shall apply accordingly. In turn, pursuant to Article 236a of the Code of Criminal Procedure, the provisions of chapter 25 ("Seizure of objects and searches") apply accordingly to the person who is the holder and user of a device containing computer data or computer system, with regard to computer data stored in that device or system or a carrier in that person's disposal or used thereby, including in correspondence sent by e-mail.

22 It is worth mentioning the ongoing negotiations of the second additional protocol to the Budapest Convention, in particular with regard to the draft provisions on cooperation with private partners, https://www.coe.int/en/web/cybercrime/t-cy-drafting-group (11.10.2021).

with appropriate legal instruments to combat cybersecurity.[23] It should be stressed that the hypothesis raised above falls within the scope of hard law.

2. Artificial Intelligence in Criminal Proceedings

The third issue for consideration is the possibility of using artificial intelligence algorithms in Polish criminal procedure. It should be emphasised, however, that this proposition is not intended to dehumanise the judiciary, but rather to support it through the use of the opportunities offered by the use of modern technology of this kind.[24] These possibilities are as diverse as the scope of the concept of artificial intelligence is broad. The literature emphasises that "AI refers to the

23 Regarding the correlation between criminal proceedings and modern technologies, see: S. Brenner, J. Schwerha, Introduction-Cybercrime: A Note on International Issues, "Information Systems Frontiers" 2004, no. 6(2), pp. 111–114; S. Moitra, Developing Policies for Cybercrime, "European Journal of Crime, Criminal Law and Criminal Justice" 2005, no. 13(3), pp. 435–464; M. Nuth, Taking Advantage of New Technologies: For and Against Crime Computer Law and Security Report, "Computer Law & Security Review" 2008, no. 24, pp. 437–446; N. Katyal, Criminal Law in Cyberspace, "University of Pennsylvania Law Review" 2001, no. 149(4), pp. 1003–1114; C. Coleman, Security Cyberspace – New Laws and Developing Strategies, "Computer Law and Security Report" 2003, no. 19(2), pp. 131–136; R. Winick, Searches and seizures of computers and computer data, "Harvard Journal of Law & Technology" 1994, no. 8(1), pp. 75–128; L. Lessig, P. Resnick, Zoning Speech on the Internet: A Legal and Technical Model, "Michigan Law Review" 1999, no. 98(2), pp. 395–431; L. Speer, Redefining Borders: The Challenges of Cybercrime, "Crime, Law and Social Change" 2000, no. 34, pp. 259–273; J. Reidenberg, Technology and Internet Jurisdiction, "University of Pennsylvania Law Review" 2005, no. 153(6), pp. 1951–1974; B. Boni, Creating a Global Consensus Against Cybercrime, "Network Security" 2001, no. 9, pp. 18–19; D. Resseguie, Computer Searches and Seizure, "Cleveland State Law Review" 2000, no. 48(185), pp. 185–214; N. Marion, Symbolic Policies in Clinton's Crime Control Agenda, "Buffalo Criminal Law Review" 1997, no. 1, pp. 67–108; P. Swire, Elephants and Mice Revisited: Law and Choice of Law on the Internet, "University of Pennsylvania Law Review" 2005, no. 153(6), pp. 1975–2001; A. Shapiro, The Internet, "Foreign Policy" 1999, no. 115, pp. 14–27; A. Stolz, Congress and Capital Punishment: An Exercise in Symbolic Politics, "Law and Policy Quarterly" 1983, no. 5(2), pp. 157–180.

24 As regards the possibility and justifiability of according legal personality to artificial intelligence: A. Silverman, Mind, Machine, and Metaphor. An Essay on Artificial Intelligence and Legal Reasoning. Boulder, Colorado 1993, p. 1; K. Bowrey, Ethical Boundaries and Internet Cultures, (in:) L. Bently, S. Maniatis (eds.), Intellectual Property and Ethics, London 1998, p. 36; D. Partridge, A New Guide to Artificial Intelligence, New Jersey 1991, p. 1. See also: M. Jankowska, Podmiotowość prawna sztucznej inteligencji?, (in:) A. Bielska-Brodziak (ed.), O czym mówią prawnicy mówiąc o podmiotowości, Katowice 2015, pp. 171–197; J. Byrski, Oprogramowanie zawierające elementy sztucznej inteligencji. Wybrane zagadnienia prawne, (in:) P. Kostański, P. Podrecki, T. Targosz (eds.), Experientia Docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple, Warsaw 2017, pp. 1331–1343; V. P. Talimonchik, The Prospects for the Recognition of the International Legal Personality of Artificial Intelligence, "Laws" 2021, no. 10(4)(85), pp. 1-11.

branch of computer science dedicated to the development of computer algorithms to accomplish tasks traditionally associated with human intelligence, such as the ability to learn and solve problems."[25] For this reason, it is frequently stressed that AI is a family of technologies and scientific fields that allows for greater automation, acceleration, and repeatability of human perception, decision-making, and reasoning.[26] In addition, it is important to divide AI into two models of application. We refer here to the classical model and the connectionist model.[27] In the former, AI operates on the basis of a database that has been created at the programming stage and performs strictly defined tasks, whereas in the latter case AI operates on the basis of neural networks, independently acquiring data and demonstrating self-learning features.[28]

This means that the possibilities of using AI in criminal proceedings are extremely wide.[29] Using the connectionist model of AI, it would be possible for it to perform all of the activities of a judicial authority independently, with or without human supervision. Technological progress in the 21st century makes it possible to adopt different variations of the use of AI in criminal proceedings. At this point, a regulatory approach is recommended in the law that, without hampering the development of this type of technology, will enable it to be controlled and used by state authorities. In this context, a relevant standard is the document entitled "European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment" (hereinafter: the European AI Ethical Charter) adopted by the Council of Europe on 3–4 December 2018, at the 31st plenary session of the European Commission for the Efficiency of Justice.[30] This document is based on five basic principles to be respected when using AI in judicial systems. They indicate such issues as respect for fundamental rights, respect for the principle of non-discrimination, adherence to the concept of "under user control," and the necessity to ensure quality, security, transparency, impartiality, and fairness when using of AI. These principles are valuable guidelines for the national legislator, and are sensitive to the currently perceptible process of technical, technological, or

25 A. Tang, R. Tam, A. Cadrin-Cheenevert, W. Guest, J. Chong, J. Barfett, L. Chepelev, R. Cairns, J. Ross, M. Cicero, M. Poudrette, J. Jaremko, C. Reinhold, B. Gallix, B. Gray, R. Geis, Canadian Association of Radiologists White Paper on Artificial Intelligence in Radiology, "Canadian Association of Radiologists Journal" no. 69(2), p. 122.

26 A. Renda, Artificial Intelligence. Ethics, governance and policy challenges. Report of a CEPS Task Force, Brussels 2019, pp. 7–27.

27 A. Chłopecki, Sztuczna inteligencja – szkice prawnicze i futurologiczne, Warsaw 2018, p. 5.

28 M. Jankowska, Podmiotowość…, *op. cit.*, pp. 171–197.

29 In this context, it should be mentioned that the European Commission issued a "Proposal for a Regulation laying down harmonised rules on artificial intelligence" (COM/2021/206 final).

30 European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c (11.10.2021).

civilizational progress, accompanied by an increasing use of artificial intelligence in modern technology in practical applications. In light of the above, it is proposed *de lege ferenda* that the indicated standard of the Council of Europe be taken into account in the Polish normative system. We are referring here to the use of AI algorithms in Polish criminal proceedings, which operate on the basis of a search or analytical engine. AI algorithms of this kind, as it has already been stressed, do not dehumanise the judiciary, but seek to support the work of those performing their duties in this area through automation, acceleration, and repeatability of human perception. A good example would concern programmes to analyse extensive case files, which might demonstrate numerous relationships between the factual circumstances that were, at first glance, unnoticeable. It seems that the careful implementation of the solution under analysis at this point, in line with the principles set out in the European AI Ethical Charter, could, in principle, bring considerable benefits. One of the unquestioned benefits is increasing the independence of the functioning of the judiciary from the conditions of the outside world. It is also worth pointing out that the introduction of the above solutions to the Polish normative order would facilitate the efficiency of trials, thus contributing to the reduction of the phenomenon of excessively long proceedings, and thus positively improving the shape of the legal order which, to a high degree, still embodies the principle of the rule of law

The current epidemiological situation caused by the SARS-CoV–2 virus has emphasised the necessity to ensure the continuity of the functioning of the criminal justice system. In this respect, the judiciary may be compared the state's critical infrastructure. The pandemic has shown how the medical situation can affect the state's ability to organise court proceedings, and thus the pursuit by citizens of their rights and freedoms. This is a situation that must be considered unsatisfactory. The implementation of innovative solutions into the justice system, including criminal proceedings, which would make it more resistant to the negative consequences of conditions arising beyond the scope of its activity, should be postulated. It would seem that one such solution is the use of AI algorithms that would perform data searches or analyses of the state of facts and law. It should be emphasised that this observation applies not only in times of pandemic. It may, however, be particularly beneficial during the ongoing pandemic to implement certain changes in criminal proceedings such as, for example, remote hearings or remote examinations, *i.e.*, solutions enabling the performance of procedural activities without the need for attendance in person. This would greatly facilitate and accelerate the work of the procedural authorities in complex cases, in particular cybercrime cases. This means that *de lege ferenda,* these solutions would work best in the evidence collection process in Polish criminal procedure. Finally, it should be noted that the proposition above is another example of soft law.

Conclusions

In summarising the presented selected propositions regarding the digitalisation of criminal proceedings in light of the standards of the Council of Europe and the present pandemic situation, it should be noted that putting them forward for consideration would also have been warranted in non-pandemic times. The pandemic has only accentuated the need for their implementation into Polish criminal proceedings. In other words, these times have shown what the consequences may be of failing to adapt formal criminal law to the realities of technical, technological, or civilizational progress that are apparent today. Based on the arguments presented here, outlining specific scientific problems, it is highly recommended *de lege ferenda* that the Polish legislator undertakes three steps. The first is to consider the possibility of applying the CoE Guidelines within the framework of the Polish criminal procedure. This will support the effective and factual determination of the reality of a given case, in order to establish the truth, and thus to fulfil the purpose of the criminal procedure. The second is the incorporation of criminal and procedural standards set out in the Budapest Convention into the Code of Criminal Procedure, where each CoE standard will have its equivalent in national law. This will guarantee that Polish law enforcement authorities have an unquestionable legal basis to conduct the collection of evidence as provided for in the Budapest Convention, which also has a direct impact on international cooperation in combatting cybercrime. The third is the use of AI algorithms in Polish criminal proceedings, taking into account the provisions of the European AI Ethical Charter. Firstly, it is recommended to use AI solutions in search or analytical engines. Through automation, acceleration, and repeatability of human perception, this will considerably facilitate and expedite the work of the procedural authorities in complex cases, in particular cases concerning cybercrime. In this respect the decision to reactivate in 2021 the Working Group for Artificial Intelligence, operating at the Office of the President of the Council of Ministers, is an interesting initiative. Finally, it should be emphasised that all of the propositions presented regarding the digitalisation of Polish criminal proceedings in light of the standards of the Council of Europe were also valid and justified prior to the pandemic caused by the SARS-CoV–2 virus. In its turn, the pandemic has shown how much the introduction of these concepts into the normative system is required when facing extraordinary circumstances. It is, however, necessary to verify their usefulness in practice.

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The Impact of the Pandemic on Economic Crime

Abstract: This paper aims to outline possible directions of criminal activity that are part of both state and global economic crime. It is not a novelty that periods of economic crises carry particular criminogenic potential, affecting the scale and dynamics of specific crime categories. The ongoing pandemic makes precise data collection or statistical calculations, in the context of the problems described in this paper, difficult. Nevertheless, at this stage, it is possible to indicate certain areas which, from the perspective of criminal law, should be of interest for criminal law specialists, but also criminologists aiming to develop tools to combat the most serious pathologies in business trading.
Keywords: COVID, criminal law, criminology, economic crime, pandemic

Introduction

Economic crime is one of the key crime categories that significantly correlate with the economic situation on the country and global levels. The financial crisis in the early 2000s, including the collapse of Lehman Brothers, one of the key US banks, significantly affected the functioning of the global economic system[1]. History teaches, therefore, that every economic crisis significantly influences the course of criminal activity and the statement that "economic crimes are the mirror image of

1 For further details see: M. Pronobis, Kryzys w strefie euro – ryzyko niewypłacalności Grecji i pozostałych krajów peryferyjnych, (in:) M. Kalinowski, M. Pronobis (eds.), Gospodarka. Nowe perspektywy po kryzysie, Warsaw 2010, p. 75 et seq.

a particular state economic order"[2] remains valid. Criminology has long emphasised the role of economic and institutional factors determining criminal activity, which resulted in the emergence of such concept as "economic crime"[3]. Therefore, without a shadow of a doubt, a hypothesis can be made about the significant impact of the COVID pandemic on the formation of new trends in the area of economic crime. Given, however, that the role of criminological research is, *inter alia*, to find a general explanation for the causes of certain events or behaviours[4], the main objective of this paper was to make an attempt to identify the possible new forms of threats to business trading that may be observed in the public perception in connection with the current COVID pandemic, and which are not yet reflected in statistics or legislative output. As emphasized in the subject literature, there is no single way to conduct research in social science. In various research orientations, one can distinguish, for example, nomothetic explanation which consists in seeking an explanation for a certain class of social events in an "economic" way, using only one or several explanatory factors[5]. In the present paper, the occurrence of the pandemic was treated as one such factor. For this purpose, the research methods adopted and accepted in the science of criminology were applied. In the course of research, a secondary analysis of data was carried out, consisting in a structured analysis of official data published by European institutions and leading international consulting companies providing legal services, focused on counteracting the negative effects of the pandemic. Firstly, the desk research method was used, which made it possible to collect data on the status of knowledge concerning new forms of threats in the area of economic crime, which significantly evolves during the COVID-19 pandemic. The analysis of reports, analyses, papers, or publications enabled the obtaining of data necessary to investigate the phenomenon is question. Then, in order to juxtapose the assumption made in the research hypothesis, the doctrinal output in the form of available studies and scientific commentaries on the investigated matter was analysed. Conclusions from the above procedures allowed noticing certain forms of exploitation that appear in social life.

2 E.J. Lampe, Ogólne problemy prawa karnego gospodarczego, „Ruch Prawniczy Ekonomiczny i Społeczny", Warsaw-Poznań 1988, no. 3, p. 115.

3 G. Becker, Crime and Punishment, An economic Approach, http://www.nber.org/chapters/c3625 (12.08.2020); P. Bieniek, S. Cichocki, M. Szczepaniec, Czynniki ekonomiczne a poziom przestępczości- badania ekonometryczne, „Zaszyty Prawnicze" 2012, no. 12(1), pp. 147–172. H. Kołecki, Podstawowe zagadnienia badawcze z zakresu kryminalistycznej problematyki współczesnej zorganizowanej przestępczości ekonomiczno-finansowej w Polsce, (in:) E. Gruza, T. Tomaszewski (eds.), Problemy współczesnej kryminalistyki, Warsaw 2004, pp. 16–18.

4 E. Glińska, Metody badań w kryminologii, (in:) E.W. Pływaczewski et. al. (ed.), Kryminologia. Stan i perspektywy rozwoju, Warsaw 2019, pp. 199-200.

5 E. Babbie, Badania społeczne w praktyce, Warsaw 2005, pp. 45–50.

The term "economic crime" covers many different types of crime, and in the literature several terminological approaches can be distinguished[6]. In the present paper, the term economic crime is considered from a criminal law perspective. Nevertheless, the common denominator can be regarded to be the main generic object of protection, defined as orderly business trading, "it is, therefore, a question of numerous and varied types of criminal regulations which primarily protect the economy"[7]. The criminal law protection of business trading in the Republic of Poland is regulated in the Act of 6 June 1997 – the Criminal Code, and in other acts in the area of business trading. The vast majority of criminal regulations defining economic crimes are found outside the Criminal Code, yet – due to the nature of the issues addressed in this paper – the discussed crimes are included in the Criminal Code.

There is no doubt that in the period of lockdowns introduced by governments of individual countries, which significantly changed the functioning of economic entities, even leading to their bankruptcy, entrepreneurs were often forced to make decisions on the verge of economic risk. Consequently, attempts to 'save' assets and, on the other hand, to 'look for opportunities to make money' have become practices of various business sectors. Given the short period of time since the outbreak of the pandemic, in terms of analysing the structure and dynamics of crime, it is difficult to find much data and research on this subject. Nevertheless, the aim of this paper is to give an idea of possible developments in economic crime.

1. Fraud as a Form of Abuse

At a time of economic crisis, which the ongoing COVID-19 pandemic can certainly be viewed as, the activity of entrepreneurs has been extremely limited, resulting in financial destabilisation and even, on many occasions, inevitable insolvency. This, in turn, forces those who are struggling to survive in the marketplace or inspires those who are taking advantage of a difficult situation, to multiply their profits. While in the case of the first group the activities of entrepreneurs are aimed at taking advantage of the solutions offered by the State, in the case of the second group an increase in the risk of fraud can be observed, particularly in the context of State offered anti-crisis shields. Observation of society leads to the conclusion that it is not only those in an extreme financial situation who apply for financial support, but also those who, in times of pandemic, are able to maintain business at least at an adequate

6 Confer: M. Kuć, Leksykon kryminologii, Warsaw 2015, p. 148; R., Zawłocki, Podstawy odpowiedzialności karnej za przestępstwa gospodarcze, Warsaw 2004, pp. 59-62,

7 R. Zawłocki, Prawo karne gospodarcze. System Prawa Handlowego, Warsaw 2018, vol. 10, Legalis (20.06.2021).

level[8]. Thus, the question arises as to whether such practices may be considered a criminal offence.

Pursuant to Article 297 of the Criminal Code, the Polish legislator has provided for criminal liability for financial, subsidy, and subvention fraud, sometimes referred to as capital or economic fraud. The term covers various types of fraud, *i.e.*, defrauding of capital, extortion of a credit, bank loan, credit guarantee, grant or subsidy, or a public contract from the State, a foundation, a bank, *etc.*, generally by means of presentation of false documents or statements and failure to inform the lender (grantor) of circumstances likely to have an impact on the withholding or reduction of the credit, bank loan, credit guarantee, grant or subsidy, or a public contract[9]. The common use of the term subsidy fraud is treated in the same way as financial fraud, as both refer to the provision of Article 297.1 of the Criminal Code, but due to the types of financial support currently offered under anti-crisis shields, the former term has become more common.

The perpetrator of the fraud identified in Article 297.1 of the Criminal Code acts with the intention (*dolus coloratus*) to obtain financial support and for this purpose submits to the bank, or the organisational unit conducting similar business activity pursuant to the act, or to the authority disposing of public funds – which applies to applicants under the anti-crisis shield, a document (within the meaning of Article 115.14 of the Criminal Code) which is forged, counterfeited, or which evidences untruth or is unreliable, or an unreliable written statement, and which concerns circumstances of material significance.

The offender's criminal conduct can therefore manifest itself in three forms: a) the submission of false documents, b) the submission of documents that claim untruth, c) the submission of unreliable written statements. The term 'submission' includes any action consisting in submitting documents or written statements, handing them over for inspection or evaluation, or appearing before an authority or an authorised person, such as a bank employee[10]. The offences under Article 297 are formal in nature. This means that if, for example, a benefit covered by the anti-crisis

8 Raport Policji: Zarzuty dla przedsiębiorców z za wyłudzenie dotacji z tarczy antyktyzysowej, https://www.policja.pl/pol/aktualnosci/209313,Zarzuty-dla-przedsiebiorcow-z-katowic-za-wyludzenie-dotacji-z-Tarczy-Antykryzyso.html (13.09.2021); Raport Policji: Czlonkowie grupy są podejrzeni m.in. o wyłudzenie świadczeń z tarcz antykryzysowych, https://www.policja.pl/pol/aktualnosci/196298,Czlonkowie-grupy-sa-podejrzani-min-o-wyludzanie-srodkow-finansowych-z-tzw-tarczy.html?search=66998609 (20.08.2020); ZUS wyczulony na wyłudzenia świadczeń z tarcz antykryzysowych – Artykuły dla Szukających pracy (szukampracy.pl) (12.08.2021); N. Szagdaj, Wyłudzili pieniądze z tarczy antykryzysowej, ale oszustwo wyszło na jaw, Gazeta wrocławska 2021, https://gazetawroclawska.pl/wyludzili-pieniadze-z-tarczy-antykryzysowej-ale-oszustwo-wyszlo-na-jaw/ar/c1-15681477 (09.10.2021).

9 I. Zgoliński, Komentarz do art. 297, (in:) V. Konarska-Wrzosed (ed.), Kodeks karny. Komentarz, third edition, Warsaw 2020, p. 1364.

10 Supreme Court judgement of 2.12.2003, IV KK 37/03, LEX no. 108050.

shield is paid out, Article 286 of the Criminal Code (fraud) will apply, while the mere submission of a statement containing unreliable information, on the basis of which institutions will be able to grant the requested assistance, will be subject to a charge of violation of Article 297 of the Criminal Code. The occurrence of actual damage is not a condition for criminal liability[11]. At this point a question may arise as to the differences between economic fraud – Article 297 of the Criminal Code and classic fraud under Article 286 of the Criminal Code. Semantic interpretation could suggest that the provision of Article 297.1 is a special provision in relation to Article 286 of the Criminal Code[12]. However, it is most often assumed in this case that there is an actual (and not negligible) concurrence of these two provisions[13]. In the event of fraud under Art. 286 of the Penal Code there must be an adverse effect of disposing of the property. On the other hand, financial fraud (297 kk.) belongs to ineffective crimes[14], this means that it does not matter for its existence whether it has obtained support, a financial instrument or an order and unfavourable disposal of property or the occurrence of damage is not a necessary element to talk about committing a prohibited act. However, if such a situation does occur, then the Court will consider the cumulative qualification, *i.e.*, it will recognize that the perpetrator has completed the elements of the offense under Arts. 286 and 297. Cumulative qualification will also be in the event of obtaining a loan, cash loan, surety, guarantee, letter of credit, subsidy, subsidy, confirmation by the bank of the obligation arising from the surety or guarantee, or a similar cash benefit for a specific economic purpose. If the perpetrator leads to the disposition of property in a different way than described in art. 297 of the Penal Code, then the qualification will be based only on the basis of Art. 286 of the Penal Code

Thus, anyone who submits falsified documents, or unreliable statements in order to obtain financial support from public funds may be subject to criminal liability. Any act of disclosure of a document or a statement with its annexes shall be criminalised. According to information posted on the official Government website, applicants for financial assistance under the anti-crisis shield are not obliged to submit specific documents, but only statements showing that the entity in question has suffered a loss

11 P. Kardas, Komentarz do art. 297, (in:) A. Zoll (ed.), Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278-363 k.k., wyd. IV Warsaw 2016, pp. 649-651; Judgement of the Court of Appeal in Wrocław of 27.09.2017, II AKa 242/17, LEX no. 2381446; J. Giezek, Komentarz do art. 297, (in:) D. Gruszecka, N. Kłączyńska, G. Łabuda, A. Muszyńska, T. Razowski, J. Giezek (eds.), Kodeks karny. Część szczególna. Komentarz, Warsaw 2014, p. 1203.

12 Confer: A. Ratajczak, Ochrona obrotu gospodarczego: Komentarz do ustawy z dnia 12 października 1994 r., Warsaw 1994, p. 40.

13 M. Bojarski, Komentarz do art. 297, (in:) M. Filar (ed.), Kodeks karny. Komentarz Warsaw 2016, p. 1589; R. Zawłocki, in: R. Zawłocki (ed.), System Prawa Karnego, vol. 9, Warsaw 2011, p. 543.

14 M. Kulik, Komentarz do art. 297, (in:) M. Mozgawa (ed.), Kodeks karny. Komentarz, LEX/el. 2021.

due to a decline in revenue[15]. Further dangers may appear in this respect, namely an attempt to 'control' the amount of income in order to obtain subsidy support, despite the fact that in reality the entity is able to survive on the market without this support. The income referred to in the anti-crisis shield is understood in accordance with the regulations on income tax. In this context, the problem of so-called creative accounting, which has already been described in the subject literature and has been noticed and described as a result of financial scandals in the United States, may arise[16]. Each application for aid on the basis of the anti-crisis shield requires the submission of a statement of income, which should be carried out reliably, taking into account the actual income. Otherwise, it is possible to accuse the applicant of giving false testimony, which in turn is criminalised under Article 233.6 of the Criminal Code (liability for false testimony).

Additionally, a question may arise in this area as to the legal assessment of forgery or alteration of a document by the perpetrator, which is subsequently submitted in the proceedings for granting a given economic instrument. On the one hand, an actual coincidence of Article 297.1 and Article 270 of the Criminal Code is accepted[17], while on the other, a negligible coincidence in the form of a co-criminal act is indicated (forgery of documents is only a means to an end, therefore it is co-criminalised together with the conduct described in Article 297.1 of the Criminal Code)[18].

Given the fact that the COVID pandemic has driven most of the services provided to date to the Internet, it can be assumed that this will have an impact on the growth in fraud cases in general, which shows a connection with business trading. However, such an assumption is not made in isolation from reality, since criminal tendencies in the context of fraud have been repeatedly drawn attention to, both in the public perception[19], and in the work of specific institutions. As an example, reference may be made to documents prepared by the European Commission, which alerted consumers to the increasing prevalence of unfair practices[20]. Pursuant to Article 286 of the Criminal Code, a criminal offence is committed by anyone who, in order to

15 Portal Gov.pl, Tarcza antykryzysowa, https://www.gov.pl/web/tarczaantykryzysowa (12.08.2021),

16 K. Wróbel, Kreatywna księgowość na tle najczęściej popełnianych przestępstw gospodarczych, „Edukacja prawnicza" 2014, no. 1, p. 10.

17 R. Zawłocki, Komentarz do art. 297, (in:) R. Zawłocki (ed.), System Prawa Karnego, vol. 9, Warsaw 2011, p. 543.

18 H. Pracki, Nowe rodzaje przestępstw gospodarczych, „Prokuratura i Prawo" 1995, no. 1, pp. 50-51.

19 The impact of COVID-19 on the fraud risks faced by organisations Information available on the official Delloite website, https://www2.deloitte.com/pl/pl/pages/Forensics/articles/ryzyko-naduzyc-w-dobie-covid19.html (20.08.2021).

20 Information available on the official European Commission website:https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/scams-related-covid-19_pl (20.03.2021);

gain a material profit, leads another person to a disadvantageous disposal of their own or another person's property by means of deception, exploitation of a mistake, or incapacity to comprehend the action undertaken. Reports on the security of networks and information systems in Poland and worldwide show that the problem of cybercrime is growing, and criminal proceedings are also initiated on the basis of the Criminal Code, in particular under Article 286.1 of the Criminal Code – fraud[21]. Particularly in the initial phases of the pandemic, the public, frightened by the effects of the virus, easily succumbed to offers to buy protective measures, tests that were shown to fall short of the relevant standards, rendering the product useless. What is more, the frauds also often involved the non-fulfilment of an order which, in fact, was never dispatched to the buyer, despite payment having been made[22]. Another example of fraud in the COVID era is the conduct of fictitious collections for health care purposes (for financial support of hospitals, purchase of ventilators, or support for the sick and their families)[23].

The sharp decline in sales in regular shops with the simultaneous increase in e-commerce can become a predictor of phishing scams, *i.e.*, attacks based on e-mail or SMS messages. One example is the communication from the Chief Sanitary Inspector, which suggests that we should be particularly wary of fraudsters who use text messages requesting that we call them about a positive COVID-19 test result. Cybercriminals, pretending to be courier companies, offices, or medical institutions, try to obtain login data *e.g.*, to bank accounts, social media accounts, or business systems. Moreover, it is worth pointing out that the literature even uses the term 'cyberpandemic', which "describes the similarities between cyberattacks and pandemics, not limited to COVID-19, the devastating human and economic consequences of their global, instantaneous spread. The massive and sudden shift from the infected real space to cyberspace has spread awareness of the opportunities associated with digital transformation – especially in healthcare."[24] In view of the

21 Krajobraz bezpieczeństwa polskiego Internetu. Raport roczny z działalności CERT Polska 2019, https://www.cert.pl/wp-content/uploads/2020/07/Raport CP 2019.pdf (20.03.2021);

Internet Organised Crime Threat Assessment (IOCTA) 2020, Europol, https://www.europol.europa.eu/activities-services/main-reports/internet-organised-crime-threat-assessment-iocta-2020 (20.03.2021),

Pandemic profiteering: how criminals exploit the COVID-19 crisis, Europol 2020, https://www.europol.europa.eu/publications-documents/pandemic-profiteering-how-criminals-exploit-covid-19-crisis (20.03.202.), for further details see: D. Taberski, Postępowania w sprawach o oszustwa popełnione za pośrednictwem Internetu, "Prokuratura I Prawo" 2018, no. 6, p. 63.

22 Pandemic profiteering: how criminals exploit the COVID-19 crisis, Europol 2020, https://www.europol.europa.eu/publications-documents/pandemic-profiteering-how-criminals-exploit-covid-19-crisis (20.03.2021).

23 A. Gryszczyńska, G. Szpor (ed.), "Internet. Cyberpandemia. Cyberpandemic", Warsaw 2020, Legalis.

24 *Ibidem*.

above, both in Poland and worldwide, work has been undertaken to counteract cybercrime. Work is also continuing on a directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings[25].

2. The Activity of Organized Crime Groups

What is more, criminal groups pose a great threat to the proper functioning of business trading, as economic crime is very often the focus of organised crime groups. One of the greatest threats in the context of state economic security is organised crime of an economic nature, which significantly correlates with the internationalisation of economic processes[26]. Therefore, at a time of global crisis, the activity of these groups may intensify. This hypothesis is supported, among other things, by Interpol's conclusions which show that the outbreak of a pandemic represents an opportunity to make money quickly, which inspires criminal groups to take advantage of the high demand for hygiene and personal protection products[27]. Operation Pangaea, conducted in 90 countries from 3rd until 10th March 2020, to combat the online trade in counterfeit medical products, resulted in the arrest of 121 people and the seizure of potentially dangerous products worth USD 14 million, including counterfeit protective masks, low-quality antibacterial gels and medicines designed to counter coronavirus such as chloroquine, according to a statement from the Interpol secretary general. The problem is that criminal groups may seek to steal such products, which means that they may be improperly stored, rendering the medicines ineffective. According to Interpol, some fake medicines have been found to contain mercury, arsenic, rat poison, or cement[28]. What is more, medicines may be falsified or deliberately mislabelled. Interpol has sent a warning to the law enforcement agencies of 194 Member States, noting that the activity of criminal groups, including those having international reach, will focus on COVID-19 vaccines. Interpol secretary general, Jürgen Stock, stated "As governments are preparing to roll out vaccines, criminal organizations are planning to infiltrate or disrupt supply chains."[29] It is common knowledge that vaccines of legal origin are not for sale. Each country is

25 *Ibidem.*

26 E.W Pływaczewski, Bezpieczeństwo obywateli – prawa człowieka – zrównoważony rozwój, Białystok 2017, p. 459.

27 Information available at: https://www.lexpress.fr/actualite/monde/la-criminalite-organisee-tire-profit-du-coronavirus-selon-interpol_2121420.html (28.05.2021).

28 Information available on the official Interpol website: https://www.interpol.int/en/Crimes/Illicit-goods/Shop-safely/Fake-medicines (27.05.2021).

29 Own translation, based on the official Interpol website: https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-warns-of-organized-crime-threat-to-COVID-19-vaccines (27.05.2021).

responsible for introducing rules for their marketing. In view of the dynamic nature of the pandemic and its global extent, controlling trade in medicinal products, including vaccines, which have become the most sought-after product in the world, has become an absolute priority for the authorities responsible for investigating economic crime. The struggle against time to produce effective vaccines, combined with the public's expectations of rapid and effective success on the part of scientists, undoubtedly influenced the ingenuity of organised crime groups, who turned their interests precisely in this direction. From a criminological point of view, the attractiveness of the pharmaceutical market, in the context of COVID vaccines may change prevailing trends for a long time. While it is nothing new that organised crime has long been oriented towards the multiplication of profits from pharmaceutical crime, it is now all the more dangerous because we are dealing with a virus which, as yet, has completely unpredictable health consequences, and this means that any interference with products of unknown origin can only exacerbate an already dramatic medical situation. It is therefore important to monitor offers, particularly those involving the sale of vaccines online, as Interpol warns[30]. From the perspective of criminal liability, the provisions regulating pharmaceutical crime, *i.e.*, production/manufacture, marketing or, broadly understood, trade in medicinal products contrary to statutory provisions, are the provisions of Article 124b of the Pharmaceutical Law and Article 165.1(2) of the Criminal Code[31]. In addition, another threat from criminal groups should not be overlooked. It seems likely that groups will seek to use 'illegally earned' cash in trading, through a desire to invest in industries that have been materially affected by the COVID pandemic. For example, organised crime groups may find it attractive to buy out companies, restaurants, and hotels whose owners are at risk of bankruptcy. The need to monitor activities in the area of organised crime groups, for example, was highlighted by the European Economic and Social Committee during its conference on "The economic impact of organised crime and money laundering – How does the COVID-19 crisis exacerbate the problems?"[32]

3. Pandemic and Bankruptcy

For entrepreneurs reporting financial problems due to the ongoing COVID pandemic, the State offers not only the possibility to benefit from anti-crisis shields,

30 *Ibidem*.

31 For further details see: I. Kalinowska-Maksim, Fałszowanie produktów leczniczych. Zagadnienia prawne i kryminologiczne, Warsaw 2020.

32 Information available at the following address: https://www.eesc.europa.eu/fr/news-media/press-releases/contre-la-criminalite-organisee-leurope-doit-lutter-comme-si-elle-ne-formait-quun-seul-et-meme-pays (20.06.2021).

but also the liberalisation of the rules on bankruptcy or restructuring procedures[33]. So far, in a situation of threatened insolvency or actual insolvency of an entrepreneur, the legislator has provided for the use of court procedures: restructuring and bankruptcy. It appears that the economic crisis caused by the SARS-CoV-2 virus will also affect creditors' ability to recover, while creating space for new abuses by debtors. It is indisputable that bankruptcy is part of the economic risk borne by every market participant and does not in itself constitute a criminal offence. However, in many cases, debtors take advantage of existing bankruptcy and restructuring laws to create a situation in which they can avoid paying their creditors. From a criminological point of view, economic criminal law can also be a criminogenic factor in the context of economic crime[34] and, in the case of the current liberalisation due to the pandemic, this problem may become even more topical.

According to a report by Euler Hermes, prepared on the basis of official sources such as *Monitor Sądowy i Gospodarczy*, Polish companies set an insolvency record in 2020. In 2020, 1293 insolvencies of companies operating in Poland were announced, 32% more than in 2019. In contrast, Euler Hermes forecasts that in 2021 there will be another significant increase in the number of insolvencies in Poland, by 17%, but also in export markets (+25%)[35]. Naturally, such figures do not immediately prove their criminogenic nature, but it is worth bearing in mind that, just as with the anti-crisis shields, there will be abuse of the new insolvency law.

On 24 March 2020, an amendment to the Insolvency Law [36] came into force, which is already affecting the increase in the number of declared bankruptcies. As a result of the amendments, Article 491[4] of the Insolvency Law was repealed, in which the legislator indicated the prerequisites for the court to dismiss a bankruptcy petition (if the debtor led to their insolvency intentionally or due to gross negligence). As a result of the amendment, bankruptcy can also be declared by those who have brought themselves into debt intentionally. According to the new regulations, the cause of insolvency will be examined only after the declaration of bankruptcy, at the stage of establishing the repayment plan. In addition, the new regulations make it possible to apply the same procedure to debtors running a sole proprietorship as the one for consumers. In addition, the Act of 16 April 2020, on specific support instruments in connection with the spread of the SARS-CoV-2 virus, regulates, *inter alia*, the issue of the impact of an epidemic emergency, or an epidemic state, declared

33 For further details see: R. Adamus, Uproszczone postępowanie restrukturyzacyjne. Art. 15–25 Tarczy 4.0. Komentarz, Warsaw 2020.

34 For further details see: R. Zawłocki, Zarys prawa, Prawo karne gospodarcze, Warsaw 2007, p. 40.

35 Euler Hermes report available at Raport EH website: Niewypłacalności. Rekordowa skala niewypłacalności firm w Polsce, https://www.eulerhermes.com/pl_PL/o-nas/dzial-prasowy/wiadomosci/2021-01-26-raport-eh-rekordowa-skala-niewyplacalnosci-firm-w-polsce.html (20.08.2021).

36 Ustawa z dnia 30 sierpnia 2019 r. (Dz.U. z 2019 r. poz. 1802).

due to COVID-19 on the running of the 30-day period for filing a bankruptcy petition, specified in Article 21 of the Act of 28 February 2003, the Insolvency Law. The emergence of a state of insolvency gives rise to an obligation to file a bankruptcy petition within 30 days thereof. Failure to comply with this obligation carries a risk of civil as well as criminal liability. Pursuant to Article 586 of the Code of Commercial Companies, a person who, being a member of the company's management board or its liquidator, fails to submit a petition for the company's bankruptcy despite the fact that the conditions justifying the company's bankruptcy have arisen, according to the provisions of law, shall be subject to a fine, the penalty of restriction or deprivation of liberty for up to one year.

Euler Hermes reports that the Covid-19 pandemic, through significant changes in various business sectors, such as hospitality, air and road transport, are exposed to the so-called domino effect of insolvency, which means "a chain reaction that starts when an insolvent company is unable to meet its obligations towards its trading partners. In its simplest form, it is when a company is unable to settle accounts with customers and suppliers, leaving them with unpaid invoices." [37] This could lead to a 25% year-on-year increase in global insolvencies in 2021, according to the latest report "How to inoculate the economy" [38]. Provisions of a criminal nature, in the context of debtors' liability, are scattered in various legal acts. They are found in the Bankruptcy Law, *i.e.*, in Articles 522 (provision of false data) and 523 (failure to disclose accounts), as well as in the Criminal Code, in Article 300 (preventing or depleting satisfaction of a creditor), Article 301 (transfer of assets, leading to one's insolvency or bankruptcy), Article 302 (favouring creditors).

Conclusion

One can venture to say that the COVID pandemic is a criminogenic factor shaping contemporary manifestations of economic crime. The economic situation of the State, including the legislation in force, is embedded in the aetiology of this type of crime. Undoubtedly, the world's economic slowdown, the bankruptcy of many companies, and the new policies of governments around the world are 'channelling' criminal trends. It seems that criminal trends are updated depending on whether we consider them on the basis of their national or transnational impact. Undoubtedly, at the national level, a real threat, which is difficult to identify, is the application for subsidies on the basis of anti-crisis shields by entities which *de iure* show the prerequisites for entitlement, but which *de facto* do not report real financial

37 Insolvency risk: understanding the domino effect of Covid-19, https://www.eulerhermes.com/en_GL/news-insights/business-tips-and-trade-advice/insolvency-risk-and-covid-19-domino-effect-ebook.html (21.05.2021).

38 *Ibidem.*

problems. On the other hand, internationally, the development of organised pharmaceutical crime, in particular, at the expense of human health and life, through illegal distribution chains of vaccines and anti-COVID medicines, can be considered a significant effect of the pandemic.

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The Dark Number of Insurance Crimes

Abstract: Insurance crime makes is difficult to interpret and measure the scale of undisclosed crime. In the insurance industry, the perpetrator can easily craft a false claim by simulating, for example a traffic accident, injury, or property damage. This causes difficulties in the evidential process and measuring the scale of the phenomenon. The aim of the article is to analyse the phenomenon of the dark number of insurance crimes. This paper includes the analysis of the definition of the term 'dark number' and other factors, such the degree of market development, the effectiveness of detection, the level of insurance awareness, and the dimension of social consent in Poland and selected European countries. Defeating the problem of insurance crime and estimating the dark number of insurance crimes requires taking into account the specificity of individual markets and types of insurance. We prove that effective measurement and reduction of a dark number of insurance crime is not possible without the constant updating of knowledge about the phenomenon of insurance crime and the use of advanced IT tools.
Keywords: dark number of crime, insurance crimes, insurance fraud, undisclosed crime

Introduction

Undisclosed crime is a generally a complex phenomenon, and in the field of economic crimes[1], especially insurance crime, difficulties grow. Varying levels of the dark number of crimes are due to several factors:

1 O. Górniok, Przestępczość gospodarcza i jej zwalczanie, Warsaw1994, pp. 67–68.

- weight of the act committed (the more serious a crime, the more often it is reported and detected, *vide* – a low dark number in homicides);
- willingness to report a crime by the interested – victims who calculate the "profitability" of reporting a crime to law enforcement agencies, the reasons for not reporting are different- shame, costs, not only the financial, but also lost time and emotional commitment, trust in law enforcement agencies that they will do their job,
- law enforcement activities that focus on a selected group of crimes (*i.e.*, homicide...), results in a decrease in the dark number of crime.

In the field of insurance crime, one can observe an increase in the factors preventing crime reporting. Insurance crimes are seen as not very serious. In Poland, only state and local government institutions, which in connection with their activities learned about the committing of a crime prosecuted *ex officio*, are obliged to immediately notify the prosecutor or the Police and take necessary actions until the body appointed to prosecute the offenses or until the appropriate order is issued by that body, in order not to obliterate traces and evidence of the offense (Article 304 § 2 of Code of Criminal Procedure). The remaining entities have only the social obligation to notify about the crime.

It should be added that insurance companies are not interested in reporting crimes for business reasons. In addition, they minimize crime costs by transferring them to clients in the form of increasing the amount of insurance premiums. Insurance entrepreneurs understand the need to combat frauds, but they do not see the need to report them to the appropriate authorities, preferring to settle matters in a different way[2], especially in civil law. The prosecution of this type of crime is difficult in providing evidence and requires a lot of legal knowledge, but also economic and financial knowledge. As a result, an important group of cases is not considered, is not adjudicated, and the perpetrators are not responsible, which lowers civic sense of justice, does not shape legal awareness in the right way, and does not contribute to shaping pro-legal attitudes.

Knowing the dark number of crime is therefore important not only for criminological cognitive purposes, but above all, for economic (*i.e.*, assessment of cost calculation and, as a result, of the premium) and legal reasons, and in the wider perspective also for criminal prevention. Tolerating this crime is particularly dangerous. In Poland, in 2020, there were attempts to improper claims of compensation and benefits insurance in the amount of PLN 401 billion[3]. The difficulties in determining the overall amount of the loss in a relationship are rightly

2 See R. Połeć, Przestępczość ubezpieczeniowa w praktyce zakładów ubezpieczeń, Sopot 2021, p. 51.

3 https://piu.org.pl (1.06.2021).

pointed out[4]. It must be remembered, however, that official statistics do not include undisclosed crimes. The so-called dark number of crime in relation to the group of types of deeds in question seems particularly high[5].

The basic thesis of the paper is: insurance crime is a criminal area with one of the largest percentages of undisclosed crime; in order to fight it effectively you need to know its real image.

In this text, we have reviewed the literature and analysed it, and collected and analysed statistical data. Before we go on to discuss the current research results on the estimation of insurance crime in Poland, it is advisable to make some general comments.

1. The Dispute about the Definition

Undisclosed crime in Poland is often defined as a "collection of crimes occurring in social reality, about which information did not reach, or has reached law enforcement agencies, but was not registered by them".[6] In criminological literature, undisclosed crime also functions under the term "the dark number of crimes", that is, crimes committed but not formally controlled.[7]

The term "dark number" is used in a narrower way to determine the extent of undisclosed crime,[8] as H. Schwind says "the sum of these crimes, which are not known to law enforcement agencies (police and judiciary) and therefore do not appear in criminal statistics (...)".[9] In the second, broader sense, the "dark number" is treated as the ratio of the number of crimes actually committed to the number of crimes in which cases have been terminated by a valid conviction.[10]

The first approach seems more accurate.

Brunon Hołyst, representing the second and, therefore, broader approach, distinguishes several areas of the "dark number" of crimes. The first are crimes that have not come to the attention of law enforcement. The second covers cases of

4 See M. Płonka, B. Oręziak, M. Wielec, Rynek Ubezpieczeniowy. Zapobieganie przyczynom przestępczości, Warsaw 2021, p. 13.

5 J. Błachut, Problemy związane z statystycznym opisem przestępczości w oparciu o dane statystyk policyjnych, „Archiwum Kryminologii" 2001, t. XXV, pp.123–140.

6 J. Błachut, Definicje przestępstwa – przestępczości, (in:) A. Marek (ed.), Zagadnienia ogólne, System Prawa Karnego, Tom 1, 2010, p. 150.

7 J. Błachut, Czy „ciemna liczba przestępstw" istnieje?, (in:) A. Kossowska et al. (eds.), Archiwum Kryminologii Tom XXIX – XXX, 2007 – 2008, Tom jubileuszowy dedykowany Paniom Profesor Helenie Kołakowskiej – Przełomiec, Zofii Ostrihanskiej, Dobrochnie Wójcik, Warsaw 2009, pp. 78–79.

8 J. Błachut, A. Gaberle, K. Krajewski, Kryminologia, Warsaw 2007, p. 227.

9 H-D. Schwind, Kriminologie: Eine praxisorientierte Einführung mit Beispielen. Heidelberg 2008, p. 34.

10 B. Hołyst, Kryminologia, Warsaw 2016, p. 111.

revealed crimes which perpetrators have not been detected. The third area is filled with offenses, the perpetrators of which were detected, but due to negative procedural reasons no indictment was made or no conviction was given. The fourth area are offenses for which the perpetrators have been convicted by a valid court judgment, although not all acts were known to the prosecution authorities and were included in the indictment. The view of B. Hołyst somewhat obscures the picture, as areas 2–4 are "areas" of revealed, most frequently reported crimes, known to law enforcement agencies, thus "bright", not "dark". Specific procedural decisions in the form of, for example, discontinuation of proceedings in the absence of the perpetrator are the result of specific actions or omissions of the judicial authorities against revealed events, which were likely to commit a crime, if the proceedings were initiated.

For example, in German science, the term dark field (*das Dunkelfeld*) as the opposite of the clear field of crime (*das Hellfeld*) is taken to denote the phenomenon in question[11]. Of course, it can be argued that as part of the "dark field", there is a "dark number", however, this does not go on for the discussion.

In criminology, researchers point to methodological problems occurring in both the clear[12] and dark[13] fields (the dark figure of crime, Dunkelziffer, le chiffre noir, il ciffro nero). In addition, there is a distinction between relative (relativen) and absolute (absolute Dunkelfeld) dark field.[14] The relative dark field refers to parts of unregistered crimes that can be detected using various research methods. However, some of the actions remaining in the dark field cannot be detected in the research, for various reasons, for example, the parties do not perceive the behaviour as criminal or do not remember it, *etc*.

Criminologists have long studied this important and interesting phenomenon, already identified by A. Quetelet, who laid the foundations and shaped the criminal statistics.[15] Currently, it is believed that Quetelet's fundamental thesis that the mutual relationship of dark and clear crime number is constant, is now considered

11 S. Eifler, D. Pollich (eds.), Empirische Forschung über Kriminalität, Wiesbaden 2014.

12 S. Kersting, J. Erdmann, Analyse von Hellfelddaten – Darstellung von Problemen, Besonderheiten und Fallstricken anhand ausgewählter Praxisbeispiele, (in:) Empirische Forschung über Kriminalität, Wiesbaden 2014, p. 9.

13 S. Prätor, Ziele und Methoden der Dunkelfeldforschung. Ein Überblick mit Schwerpunkt auf Dunkelfeldbefragungen im Bereich der Jugenddelinquenz, (in:) Empirische Forschung über Kriminalität, Wiesbaden 2014, p. 31.

14 S. Prätor, Ziele und Methoden der Dunkelfeldforschung, Bundeskriminalamt 2010, p. 8. H. J. Scheider, (in:) H.J. Scheider (ed.), Internationales Handbuch der Kriminologie. Band 1. Grundlagen der Kriminologie, Walter de Gruyter, Berlin 2008, p. 309.

15 A. Quetelet, Układ społeczny i jego prawa, Warsaw1874. Nowadays, for example J. Błachut, Problemy związane z statystycznym opisem przestępczości w oparciu o dane statystyk policyjnych, „Archiwum Kryminologii" 2001, t. XXV, pp.123–140.

to be wrong. These relationships are variable in time and space.[16] The dark number is estimated differently. One of the greatest criminologists of the twentieth century, Sir Leon Radzinowicz estimated that the number of crimes that were registered and punished, and therefore fully brought into the open, does not usually exceed fifteen percent of all committed.[17] This means that according to the British criminology co-founder, born in Łódź,[18] as many as 85% of crimes are not punished. Crimes are either not reported or not registered, and where crimes are registered, prosecutors either refuse to initiate proceedings against these crimes or proceedings are discontinued, and perpetrators are acquitted. Nowadays, the reasons for not reporting crimes are carefully classified. It is emphasized that some crimes are reported more frequently than others. Crimes against health and life (*i.e.*, homicide, severe damage to health) are more often reported, crimes against property (*i.e.*, theft, burglary) are reported much less frequently, especially minor ones. The subjective factor is also important, and therefore who is reporting whose crime. Crimes committed by strangers are more frequently reported, more often crimes are reported by middle-class victims, better educated, etc. On the other hand, crimes committed by the closest: spouses or relatives, crimes less serious in financial as well as corporeal consequences, are reported much less often.[19]

Despite the sexual revolution of the 1960s, the sphere of human sexuality is still a shameful, taboo sphere for many people. This crime is not mentioned, it is hidden, kept silent, and often blamed on the victim. Being raped still results in social stigma, victims prefer not to talk about it[20]. The estimated dark number of crimes, and therefore undisclosed crime, is exceptionally high here. It is estimated that up to 65%, and in some studies even up to 95%, of sexual offenses remain undisclosed[21]. In Poland, similar data has been pointed out for a long time. For example, Andrzej Siemaszko has indicated a long time ago that the dark number of crimes is the ratio of actual crime to recorded crime. The indicated author claimed that every year three quarters of crimes are not registered[22].

16 S. Eifler, D. Pollich (eds.), Empirische Forschung über Kriminalität – methodologische und methodische Grundlagen, Wiesbaden 2014, pp. 16, 35.

17 L. Radzinowicz, Ideology and Crime. A Study of Crime in its Social and Historical Context, London 1966, pp. 63–64.

18 W. Zalewski, Sir Leon Radzinowicz – refleksje w setną rocznicę urodzin wybitnego kryminologa, „Gdańskie Studia Prawnicze" 2006, t. 15, pp. 185–195.

19 J. Schwartz, A. Vega, Sources of Crime Data, (in:) B. Teasdale, M.S. Bradley (eds.), Preventing Crime and Violence, Advances in Prevention Science, Springer International Publishing Switzerland 2017, p. 155.

20 K.M. Helm, Hooking Up: The Psychology of Sex and Dating, Greenwood, 2015, p. 92.

21 K.M. Hess, Ch.H. Orthmann, H.L. Cho, Criminal Investigation, Boston 2015, p. 352.

22 See A. Siemaszko, Przestępczość nieujawniona. Porównanie polskich rezultatów ICVS`96 i `92 (badania międzynarodowe), Archiwum Kryminologii 1997–1998, t. 23–24.

Crime measurement has long been a problem, not only within a dark number. A clear number is also objectionable. Criminal statistics are not complete in all countries, and data is not always collected consistently and systematically.[23] Exemplary, though far from perfect, are crime data collection systems in the US. The two most important sources of data on the one hand come from the Unified Crime Reports (UCR), and on the other from National Crime Victimization Survey (NCVS). Data in the UCR has been collected almost from the beginning of the FBI, and thus over eight decades. Meanwhile, NCVS, and so victimization reports, are younger, because they have been systematically accumulated only since 1973.[24] UCR reports provide data with a clear number, while NCVS reports on a dark field. For almost fifty years, scientists have been trying to obtain a comprehensive picture of the actual number of crimes on the basis of both groups of data.[25]The conclusions are unfortunately pessimistic. It was not possible, as illustrated by van Dijk, to find the "Holy Grail" of criminologists, and therefore the full and real number of crimes. What is worse, the studies, especially of Lynch and others, seem to prove that this goal is almost impossible to achieve.[26]

The sources of failure in data collection vary widely. In the "bright field", it is not uncommon for data to be falsified for political, economic, or opportunistic reasons. An excellent illustration is the proven example of statistical distortions committed by US middle and senior police officers in entering data into "the Compstat" criminal statistics system[27]. The problems started when promotions and bonuses were made conditional on lower criminal rates, and when political pressure began to be exerted to reduce crime, for example in New York. Police officers began to report less than the actual number of crimes, especially against property, lowering *e.g.*, the assessment of the value of stolen goods, not accepting reports, *etc*.

Also in Europe, the so-called statistical "institutional inertia, where the system responds to changes in crime with a delay, means that official statistics do not

23 M.F. Aebi, K. Aromaa, B. Aubusson de Cavarlay, G. Barclay, B. Gruszczynska, H. von Hofer, V. Hysi, J.-M. Jehle, M. Killias, P. Smit, C. Tavares, European Sourcebook of Crime and Criminal Justice Statistics 2006. Den Haag: Home Office, Swiss Federal Statistical Office, Cesdip, Boom Juridischeuitgevers, WetenschappelijkOnderzoek-enDocumentatiecentrum, http://www.europeansourcebook.org (15.06.2021).

24 J. van Dijk, Revisiting the 'dark number of crime', (in:) M. Herzog-Evans (dd.), Transnational Criminology Manual Nijmegen: Wolf Legal Publishers (WLP) 2010.

25 J. Pepper, C. Petrie, S. Sullivan, Measurement Error in Criminal Justice Data, (in:) A.R. Piquero, D. Weisburd (eds.), Handbook of Quantitative Criminology, Descriptive Approaches for Research and Policy: Innovative Descriptive Methods for Crime and Justice Problems, New York Dordrecht Heidelberg London, 2010 pp. 353–374.

26 J.P. Lynch, L.A. Addington (eds.), Understanding Crime Statistics; Revisiting the Divergence of the NCVS and UCR, Cambridge 2007.

27 R. Kall, NYPD Cops Fudged Crime Stats in Compstat Model Program Now Used in 100s of US Cities, https://www.huffingtonpost.com (15.06.2021).

correspond to reality. Van Dijk points out that in each of the European countries studied by him, the justice systems have specific capacity, beyond which there is an overload and pressure is put on strict control of the impact of cases. Such a situation, well documented, took place, for example, in the Netherlands in the 1970s, where prosecutors and police officers refused to initiate cases in small cases against property, as a result of which the number of thefts decreased statistically[28].

Statistical distortions are related to the level of trust in the justice system in a given country. Officially, crime statistics in post-communist countries tend to show lower crime rates than in the West, where it exceeds on average 4,300 crimes per 100,000 inhabitants. This does not mean, however, that it is the actual case. It is indicated that the dark crime rate in the East was much higher than in the West, which was linked to a distrust of law enforcement in the former Soviet bloc. Recently, the political and bureaucratic influence on crime statistics seems to be greater. Penal populists winning votes through anti-crime slogans are not interested in demonstrating crime reduction[29].

Also, the first research on the victims, and so the dark field research, was motivated more politically than cognitively or scientifically. It is indicated that in many respects these studies were aimed at learning unknown victimization and questioning public opinion about the stereotypical victim of crime and demonstrating the low risk of criminal victimization. The British Crime Survey, which was first conducted in 1982, was just calming down the mood. It is suggested that the Home Office believed that distorted and exaggerated ideas about the level of crime were widespread among the public. The study has been partly planned to at least achieve what can be called "normalization" of crime – to create a less alarming and more balanced climate of opinion on law and order, to demonstrate the "irrationality" of fear of becoming a victim of crime.[30]

Investigations of the dark number from the essence are even more difficult, although it seems that Franz Exner, who believed that these tests are the crux of criminal statistics, was right.[31] Nowadays, a number of problems are pointed out, the most important of which concern methodology. The experiment as to whether the participant observation has obviously very limited application, although it was also used for it. An example is Blankenburg's 1973 experiment with shoplifting. This research raises moral objections, but goes to criminal acts that the researcher provokes, tolerates, or participates in without informing the authorities.[32]

28 J. van Dijk, Revisiting the 'dark number of crime', *ibidem*.
29 J. van Dijk, Revisiting the 'dark number of crime', *ibidem*
30 T. Kearon, B.S. Godfrey, Setting the scene: a question of history, (in:) S. Walklate (ed.), Handbook of Victims and Victimology, London, New York, 2011, p. 45
31 F. Exner, Kriminologie, Springer 1949, p. 11.
32 S. Prätor, Ziele und Methoden … *op. cit*., p. 31.

Surveys still remain the best tool. Despite the fact that this type of research is often methodologically questionable because the respondents may not immediately "capture reality", they can only present it in a way "chosen" by their memory. First, it is necessary to decide who is to be tested and select the appropriate sample. In this context, perpetrators or victims can be investigated. In the case of examining the perpetrators, we encounter limitations in their readiness to admit. Respondents tend to provide socially desirable responses that are oriented to the expectations of others, especially in the case of serious and socially harmful crimes, and therefore conceal socially undesirable behaviour or experiences. In addition, it is particularly important to ensure the anonymity, and thus confidentiality, of data in the context of the interrogation of perpetrators, which is now standard in any form of dark field research. In addition to the tendency not to report appropriate behaviour ("false negative" information), there is the problem of "false positive" responses, especially in adolescence. In this case, for example, the surveyed teenager confirmed the information about the criminal behaviour, although in reality it did not take place, for example, to gain recognition by a peer group. There are also difficulties in formulating questions. Precise questions may not be understood, while using colloquial expressions, one has to take into account the erroneous "subsumption" of the incriminating behaviour by the interlocutors. All attempts to 'extrapolate' sample results to larger populations are limited in scope. Sometimes it is possible to defuse this problem by retrying the test and asking the same sample several times at the same time intervals and asking questions with clear reference to the same time intervals[33].

The impact on the attitude to the term "dark number" has even a specific criminological paradigm. According to Błachut, criminologists of juridical orientation do not use either the concept of real or undisclosed crime, or the notion of a "dark number of crimes". The latter, on the basis of accepted assumptions that crimes in social reality do not exist, because in reality only human units exist and their behaviours, which become crimes due to giving them such meaning by competent bodies (initially law enforcement agencies, and finally the court) – loses the reason for being. Crimes are in fact behaviours that were revealed in social reality and then classified as a leap in the legal process of interpretation. Undisclosed behaviours could not be subjected to this process.[34]

J. Błachut says in this context that "the use of the term" dark number "to determine the extent of undisclosed crime does not seem justified. This number was dark, *i.e.*, unknown, because the method of determining it was unknown. However, when the methodology of empirical research developed, new possibilities of obtaining data on social phenomena appeared (self-report methods) or victimization, and thus the

33 See M. Bock, Kriminologie, Für Studium und Praxis, München 2013, pp. 300

34 J. Błachut, System…, *op. cit.*, pp. 151–152.

measurement of undisclosed crime became possible – the number of undisclosed crimes is no longer dark and unknown, but established and determined".[35]

An important element of the strategy to fight against economic crime is establishing close cooperation between the judiciary and the private sector, in particular with insurance companies. It has been pointed out for years that allies should be recruited in the fight against economic crime.[36] An example of such cooperation is the establishment, in the United Kingdom, of a special unit; the Insurance Fraud Enforcement Department. In 2011, the insurance industry agreed to participate in the unit's maintenance costs. The Strategic Council, consisting of representatives of the insurance industry, specifies the individual's priorities and analyses trends in insurance crime.[37]Also established, was the so-called Action Fraud[38], a national fraud information centre, designed for individuals and representatives of small and medium business. The transmission of information about fraud is done via the Internet or by telephone. Collecting data under AF contributes to reducing the "dark number" of insurance crimes. This is particularly important in relation to economic crimes, the number of which is traditionally considered to be too high.

The literature indicates that the following factors influence the high level of the dark number of economic crimes:

- it is conducted in a way that is not noticeable (detection of this type of crime would require professional and often meticulous control);
- there are visible problems in identifying the damage;
- the perpetrators are characterized by high qualifications (this is due to their excellent knowledge of their profession, and the frequent use of modern technical means that help to erase traces causing problems in their detection);
- perpetrators of economic crimes due to their high material and social status also have broad (and often unlimited) possibilities of defense;
- these acts are committed to a large extent by people who have enormous social confidence;
- the mechanism of committing economic crimes, due to its complexity, is incomprehensible to the average citizen;
- there is a belief in impunity in relation to economic crimes (colloquially referred to as the "golden number of crimes").[39]

35 *Ibidem.*

36 O. Górniok, Przestępczość gospodarcza…, *op. cit*., pp. 199–200.

37 G. Krysztofiuk, Zwalczanie przestępczości gospodarczej w Polsce na tle doświadczeń brytyjskich – wybrane zagadnienia, „Justitia" 2013, no. 3, p. 139.

38 The service is run by the City of London Police working alongside the National Fraud Intelligence Bureau (NFIB), https://www.actionfraud.police.uk/what-is-action-fraud (20.06.2021).

39 D. Jagiełło, Wybrane aspekty odpowiedzialności karnej w prawie gospodarczym, (in:) M. Bidziński, D. Jagiełło (eds.), Prawo gospodarcze – zagadnienia wybrane, C.H. Beck 2016.

This crime also takes the form of the so-called professional crime, which is rightly assessed as the main threat to socio-economic relations. This is particularly visible in the statistical picture, as these acts account for approx. 10% of all crimes (found in preparatory proceedings).[40]

2. The Scale of the Phenomenon

Insurance crime is a serious problem affecting all insurance markets in Europe and in the world. Insurance crime is one of the most complicated areas of economic crime. To commit them a certain level of knowledge about the functioning of the insurance industry is required.

International research and the experiences of business practitioners indicate insurance fraud as one of the main threats to the development of insurance markets.[41][42][43]

The scale of the phenomenon is very serious, and amounts from several to a dozen percent of the value of compensations paid, depending on the conditions related to market development, product characteristics, and the socio-economic environment.

There are many definitions of insurance crime that are used in practice.[44] Not all of them refer directly to the fraudulent obtaining of compensation and often include all acts directed against the insurance company. For this reason, a coherent definition of insurance crime has been developed for the needs of the insurance industry. According to Insurance Europe, insurance crime is a claim for unjustified compensation or compensation for it through fraud.[45] This procedure creates many unfavourable consequences for insurers in the form of direct financial losses, increased costs, and time of loss adjustment processes, as well as loss of clients' trust. Direct financial losses, estimated on a European scale, are several percent of contributions.

40 Miesięcznik Biuletynu Statystycznego (styczeń grudzień 2009/2010), przygotowany przez Wydział Analizy Kryminalnej Komendy Głównej Policji (WK-IV–1152/2010), pp. 3, 22–24; D. Jagiełło, Wybrane aspekty…, *op. cit.*

41 Deloitte Report, The Future of Financial Services, How disruptive innovations are reshaping the way financial services are structured, World Economic Forum, Prepared in collaboration with Deloitte Final Report, Deloitte 2015, p. 80

42 PwC Report, Insurance Banana Skins 2015, The CSFI survey of the risks facing insurers, PwC 2015, p.18

43 EIOPA report, Fifth Consumer Trends Report, EIOPA 2016, p. 35

44 R. Derring, Insurance Fraud, "The Journal of Risk and Insurance" 2002, vol. 69, no. 3, pp. 271–287.

45 Report, The impact of insurance fraud, Insurance Europe, http://www.insuranceeurope.eu/uploads/Modules/Publications/fraud-booklet.pdf (13.10.2019).

Before discussing in detail the results of research on the scale of insurance crime, the scope of particular variants of the definition should be clarified. According to the commonly known division, insurance crime is:[46]

Real insurance crime – all offenses consisting in gaining a financial advantage at the expense of an insurance company (in particular undue compensation or insurance benefit) and at the same time combining with the use of insurance relationships that were committed at a given time and in a given area. The number or structure of these crimes is unknown.

Insurance crime disclosed – all acts for which information was obtained by law enforcement authorities and therefore initiated preparatory proceedings regarding the suspicion of an insurance offense. The disclosed crime is also called apparent crime, because not all acts that have been classified as crimes at the time of the pre-trial investigation are actually crimes.

Insurance crime confirmed – all acts that as a result of the pre-trial investigation were confirmed as insurance offenses.

Insurance crime judged – all acts which character as insurance offenses was confirmed as a result of court proceedings and in which there was a conviction.

The problem of the dark number in insurance crime is the ratio of the real crime value (which we can only estimate) to the disclosed (which value is presented in Tables 2 to 5). Another difficulty in measuring this multithreaded phenomenon is the fact that for many reasons, not every facet of revealing the fraud is reported by the insurers to law enforcement agencies. The length and cost of proceedings, the massive use of so-called "Poles" (natural persons used by criminals while making economic frauds) cause that insurance companies which are primarily driven by an economic calculation, deviate from the legal path and focus on the refusal of claims and elimination of dishonest entities from among their clients.

The actual magnitude of the sentence consisting mainly of deprivation of liberty is not a sufficient motive for the financial industry to take legal steps against the perpetrators. The business approach seeks to take away the spray of economic benefit from the crime, which, especially in the case of scattered criminal groups, may be a daunting task.

In addition, many cases are already thwarted at the stage of the claim, and they do not occur at all thanks to the quick response of the insurer. The scale of crime revealed in the research is the best indicator showing the state of development of this phenomenon on the marke. In view of the facts cited above, criminal prosecution amounts to only a few dozen convictions per year and does not reflect the value of the acts committed. For this reason, the use of statistics from the judiciary is not

46 J. Talarek, Przestępczość ubezpieczeniowa w ubezpieczeniach komunikacyjnych w Polsce na tle wybranych krajów, (in:) VII Międzynarodowa Konferencja Przestępczość Ubezpieczeniowa – materiały konferencyjne, SZCZECIN-EXPO, Szczecin 2004, p. 6.

authoritative. Official evidence of crime events concerning insurance criminality is placed in Table 1.

Table 1. The number of offenses established in art. 298 of Code of Criminal Procedure

Year	The number of offenses
2012	93
2013	113
2014	161
2015	104
2016	126
2017	57
2018	75
2019	270
2020	111

Source: Own research based on www.policja.pl.

It should be remembered that the "dark number" is not only a theoretical indicator. One of the most important applications in the area of economic crime is the estimation of the actual scale of losses suffered by a given market sector as a result of criminal activities. In the insurance area, this is extremely important for determining the future level of costs of undue claims and benefits. Research conducted in Poland and Europe shows that, depending on the type of insurance, and the level of market maturity, the insurance industry loses 10–12% of the cost of criminals to payments to customers.[47]

Due to the above-mentioned limitations, the "dark number" value can only be estimated with low accuracy, and its value changes over time and is different for individual markets and product groups.

3. The Results of Research Concerning the Disclosed and Estimated Scale of Insurance Offenses

The data contained in Tables 2 to 5 come from periodic surveys conducted by the Polish Chamber of Insurance – an insurance self-governing body appointed by way of an act, which is compulsory for all insurance companies operating in the Polish market. The annual survey covers all insurance companies operating on the Polish market. They fill out questionnaires by reporting fraud in terms of quantity and

47 Report, The impact of insurance fraud, *op. cit.*

value, and broken down by types of insurance, both in Section I and in Section II.[48] The quoted numbers include both cases classified as attempts and actual fraud, both detected in internal proceedings and reported to law enforcement agencies. Care was also taken to divide the recorded acts into: acts identified in the area of payment of benefits (insurance crime *sensu stricto*), as well as those occurring in the processes of insurance sales and service.

Over the years, a strong tendency to increase the value of disclosed cases in both Sections is noticeable. Tables 2 to 5 below show the scale of the phenomenon over the years.[49]

Table 2. Insurance crime in Poland – payout area (PLN million)

Year	Life Insurance	Non-life insurance
2014	10.3	151.7
2015	11.3	179.9
2016	13.7	211.9
2017	17.9	195.4
2018	18.1	214.6
2019	42.8	351.0

Source: Analiza danych dotyczących przestępstw ujawnionych w 2019 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw 2020, https://piu.org.pl/analiza-przestepstw-ubezpieczeniowych-w-2019-r/ (1.12.2020).

Approximately 85% of the values cited in Table 2 above constitute attempts to commit scams effectively frustrated by insurance companies in the claims handling process.

Table 3. Participation of insurance crime in Poland in payment of benefits

Life insurance	Non-life insurance
0.23 %	1.57 %

Source: Analiza danych dotyczących przestępstw ujawnionych w 2019 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw 2020, https://piu.org.pl/analiza-przestepstw-ubezpieczeniowych-w-2019-r/ (1.12.2020).

48 Section I – Life insurance, Section II – Non Life insurance

49 P. Majewski, Analiza danych dotyczących przestępstw ujawnionych w 2019 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw2020, https://piu.org.pl/analiza-przestepstw-ubezpieczeniowych-w-2019-r/ (1.12.2020).

The percentages of the non-life insurance area cited in Table 3 above indicate clearly how much the value of detected offenses differs from the previously quoted estimated scale of the phenomenon, amounting to more than 10%. Therefore, in the case of non-life insurance, the undiscovered nominal scale of funds lost to criminals is almost 8–10 times higher than the disclosed value. In the case of life insurance, discrepancies may be even greater, however, due to the less advanced detection efficiency of this type, the comparison could lead to wrong conclusions.

As it is shown in Table 4, in the Polish market, for many years the most popular and most acute crime in terms of value is the illegal obtaining of the death benefit of the insured person. This trend has been practiced since the beginning of the research. This is caused by problems of citizen evidence in database systems held by country authorities. [50]

Table 4. Insurance crime by type of insured event (Life insurance in 2019)

Type of irregularity	Number	Value (PLN)
Death of the insured	656	25 776 602
Death of the insured in the event of an emergency	8	6 430 000
Serious illness	167	5 170 413
Permanent disability or damage due to an emergency	253	882 596
Inability to work	39	511 570
Hospital treatment or operations	1216	3 610 445
Birth of a child / birth of a dead child	30	43 065
Death of a parent / parent-in-law/ spouse / child	18	63 240
Other*	42	355 754
Total	2 429	42 843 684

Source: own study based on data Analiza danych dotyczących przestępstw ujawnionych w 2019 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw 2020, https://piu.org.pl/analiza-przestepstw-ubezpieczeniowych-w-2019-r/ (1.12.2020).

Malfunctions of medical treatment evidence systems enable the high popularity of the method of fraud involving the submission of false circumstances of occurrence of injuries, or concealment of existing disease, prior to the conclusion of the insurance

50 P. Majewski, Analiza danych dotyczących przestępstw ujawnionych w 2019 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw 2020, https://piu.org.pl/analiza-przestepstw-ubezpieczeniowych-w-2019-r/ (1.12.2020).

contract. These offenses are mainly related to group insurance and numerous additional contracts.

Detection of insurance fraud in property insurance are enabled by the database systems of the Insurance Guarantee Fund.[51] Until the year 2020, they only consist of data concerning motor insurance. This can explain why motor insurance is the most serious threat to insurers, as shown in Table 5. Criminal events in other types of insurance are far more difficult to detect because of the lack of a central claim database.

Table 5. Insurance crime by type of fraud (Non life insurance in 2019)

Type of irregularity	Number	Value (PLN)
Third Party Motor insurance (property)	6082	79 088 884
Third Party Motor insurance (personal)	3161	96 607 891
Car insurance	2494	96 081 682
Farmers' insurance	201	7 825 932
Burglary theft insurance (business)	35	5 132 442
Insurance against fire and other elements (business)	78	5 309 869
Insurance of apartments and houses	931	7 319 952
Travel Insurance and Assistance	28	310 250
Insurance of consequences of accidents	426	4 467 655
Other third-party insurance	851	19 493 492
Loan, Financial, D&O insurance	15	1 150 016
Insurance guarantee	2	1 975 676
Other (mainly cargo and corpo)*	376	26 244 591
Total	14 680	351 008 331

Source: own study based on data Analiza danych dotyczących przestępstw ujawnionych w 2019 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw 2020, https://piu.org.pl/analiza-przestepstw-ubezpieczeniowych-w-2019-r/ (1.12.2020).

Analysis of the average value of fraud in particular product groups proves a high level of risk associated with business and financial insurance. In the case of business entities, you can create and modify your identity without any restrictions, which

51 Insurance Guarantee Fund, Raport Roczny UFG 2018, https://www.ufg.pl/UCMServlet3/ucmservlet3?dDocName=UCM_UFG_449545 (1.12.2020).

significantly hampers investigative and preventive actions.[52] Particularly noteworthy is the category "other" containing damage to companies and cargo. Results of an unpublished pilot research for the Polish market in 2020 show that the amount and value of insurance crimes cases will increase.[53]

4. Insurance Crime in Selected EU Countries

The scale of insurance crime detected in Poland is significantly different from the values disclosed in other EU countries. Apart from the obvious nominal differences resulting from the size of particular markets, interesting conclusions are provided by the analysis of relative values characterizing the share of revealed frauds in the general volume of compensations paid. Fraud scale data from selected European countries are cited in the following part of the paper.[54], [55], [56]

Great Britain has been recognized as a leader in the fight against insurance crime in Europe for years. The country has a rich tradition and a number of organizational solutions that translate into high efficiency in combating and detecting insurance crimes. Research in Great Britain is conducted by the Association of British Insurers (ABI) – the equivalent of Polish Chamber of Insurance on that market.

The ABI report[57] also includes a reference to the results of research included in international literature. The estimates of the scale of the threat of insurance fraud in selected countries were cited. Sample estimates of the total value of frauds in proportion to the total amount of compensation paid out are 10–15% in non-life insurance and 10–20% in motor insurance. The data comes from the following countries: USA, Australia, Canada, Germany, and Spain.

In 2008, the value of detected frauds, and thus the total savings due to unpaid criminal claims amounted to approximately GBP 730 million, which is approx. 4.2% of claims paid out at that time. This value in 2004 was approximately GBP 250 million (1,8%). The amount is increased by 20–25% year to year.

52 P. Majewski, Insurance crime in Poland. Characterization and evolution of the phenomenon, "Insurance Review" 2014, vol. 4/2013, pp. 121–132, https://piu.org.pl/public/upload/ibrowser/WU/WU4_2013/majewski.pdf, p. 127 (1.08.2021).

53 This conclusion is the result of research held by Commission of Insurance Fraud Prevention in Polish Chamber of Insurance.

54 P. Majewski, Analiza danych dotyczących przestępstw ujawnionych w 2016 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw2017, https://piu.org.pl/raport-o-przestepczosci-ubezpieczeniowej-2016/ (1.12.2020).

55 https://www.gdv.de/de/medien/aktuell/sorge-der-versicherer--corona-gibt-betruegern-auftrieb-61842 (1.08.2021).

56 https://www.abi.org.uk/news/news-articles/2020/09/detected-insurance-fraud/ (1.08.2021).

57 Cited in: P. Majewski, Analiza danych dotyczących przestępstw ujawnionych w 2014 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw 2015, https://piu.org.pl/raport-o-przestepczosci-ubezpieczeniowej-2015/ (1.12.2020).

ABI test results include an estimate of the total value of undetected frauds. This is the equivalent of the so-called dark number of insurance crimes reported in Polish literature. To obtain this result, the researchers conducted research at British insurance companies, carried out consumer research, interviewed experts and analysed international literature on the subject. The basis for estimating the value of undetected fraud was the calculation of the so-called "undetected fraud risk multiplier". The value of this parameter is about 3, which corresponds approximately to the ratio of 25%:75% between cases detected and undetected. The value quoted for the British conditions, which may serve as a reflection of a specifically defined dark number, differs significantly from the previously mentioned value characterizing the Polish market. This discrepancy is mainly due to differences in the effectiveness of detection between Poland – a country with a relatively underdeveloped market, and Great Britain, considered to be the undisputed leader.

Experts from ABI have pointed out a number of reasons that in the following years British insurers are able to detect more and more frauds, and the refusal rate has increased from 2 to 4% of the value of claims. Considering that, for Poland this value is about 1,5%. These reasons include:[58]

- establishment of special fraud teams in insurance companies,
- introduction of advanced IT systems to handle reporting of damages and specifying suspicious claims,
- the use of special methods of conducting conversations based on psychological and cognitive techniques in the call-centre dealing with the receipt of claims,
- education and building awareness of the risk of frauds among all employees of the insurer, including sales departments,
- building insurance awareness, fighting with social consent, and introducing the possibility of anonymous information about the fraud,
- better use of publicly available databases providing customer information and reported damage.

In the opinion of experts,[59] the above actions requiring involvement and investment on the part of insurers are justified, they turn and result in an increasing number of detected frauds and, therefore, measurable savings. The ABI report also cites the results of consumer surveys, which show that between 7 and 11% of citizens admit to reporting a false claim.

58 P. Majewski, Analiza danych dotyczących przestępstw ujawnionych w 2020 roku w związku z działalnością zakładów ubezpieczeń – członków Polskiej Izby Ubezpieczeń, PIU, Warsaw 2021, https://piu.org.pl/analiza-przestepczosc-ubezpieczeniowa-w-2020-r/ (1.08.2021).

59 *Ibidem.*

Analogous research is also conducted in Germany – another country that is considered to be a leader in combating insurance crime in Europe.

German experts estimate that about 10% of the value of property damages is fraudulent This indicator is very different in individual product groups, and the greatest threat is seen in the insurance of portable electronic equipment, *e.g.*, smartphones, where every second claim is described as suspicious. German specialists attach great importance to conducting educational campaigns aimed at making the public aware of the many harmful effects that insurance crime incurs. The side effect of this campaign is to make potential offenders aware of the fact that the problem of frauds is well recognized and that insurers are efficient in capturing cases of fraud. This is a kind of preventive effect, especially in the case of the most common minor frauds related to household insurance.[60]

Particular attention is paid to the fact that there is a high level of social acceptance for committing the scams that characterize German society. 23% of respondents in the research agree with the statement: "Almost everyone cheats the insurer". 12% of households admitted having an incentive to commit insurance fraud, the incentive usually came from a circle of friends.[61]

Apart from countries with exceptionally rich traditions in combating frauds, such as Germany or the United Kingdom, it is worth quoting the results of research carried out in the Czech Republic. This country stands out against other post-communist countries in the area of counteracting insurance crime.

Attention is drawn to the large number of cases detected in all types of insurance. Despite three times smaller market capacity in life insurance, it is 7,660 cases, in property 8383. It is about 10 times more for the life market than in Poland. The value for the property market is comparable. The effectiveness of detection also surprises in terms of value. The share of frauds in the premium is 0.46% for life insurance, 1.36% for property. Similar indicators for the Polish market (in the time of comparison) for the life and property sector are: 0.058% and 0.66% respectively. Therefore, in Section II, Czech insurers are twice as effective, and in Section I it is 8 times as much. (Czech research is based on the participation of frauds in the volume of collected premiums, and not as previously reported in paid damages.)

Particularly noteworthy is the high effectiveness of anti-fraud operations in the life part of the market. This is an excellent proof that fraudsters do not bypass life insurance. In total, the value of these irregularities exceeds the volume of revealed frauds in communication twice.

60 Gesamtverband der Deutschen Versicherungswirtschaft GDV, https://www.gdv.de/de/themen/positionen-magazin/versicherungsbetrug-62938, https://www.gdv.de/de/themen/news/fast-jede-zehnte-schadenmeldung-mit-ungereimtheiten-11376, (1.08.2021).

61 Gesamtverband der Deutschen Versicherungswirtschaft GDV, J. Karsten, Versicherungsbetrug: aktuelle Entwicklungen, Muster und ihre Abwehr, GfK Finanzmarktforschung. GDV 2011.

5. The Role of Education in Revealing, Combating, and Preventing Insurance Crime and Social Consent for Insurance Crimes

In Poland, the level of social acceptance for crimes against the common good is relatively high.[62]

Table 6. Acceptance of crime insurance

Determination of indifference to insurance crimes	2011	2013	2015
I DO NOT AT ALL That someone is fraudulently obtaining insurance compensation	19.8 %	19.2 %	18.6 %
I DO NOT CARE MUCH That someone is fraudulently obtaining insurance compensation	23.8 %	23.5 %	23.6 %

Source: Based on: J. Czapiński, T. Panek, Diagnoza Społeczna 2015, Report, www.diagnoza.com (1.12.2020).

In the study shown in Table 6, the indicators of sensitivity to the common good have slightly improved over the last few years. It should be remembered that in Poland the society is characterized by a strong distrust towards the insurance industry. Only 1/3 of the population trusts insurance companies. The basic reason for this is the extremely low level of insurance awareness resulting in a lack of understanding of the mechanisms of insurance products. It is also worth mentioning the examples of unethical insurers' actions reflecting the wide social echo, concerning, among others, irregularities in the liquidation of motor claims or life insurance problems with the insurance capital fund.

The level of social acceptance for committing insurance offenses depends on individual personal characteristics. Committing effective crimes in the financial industry requires an adequate intellectual level. Therefore, the picture of a typical embezzler is usually that of a mature person with a social and professional position, high professional skills, and good relations with the environment. People of this type are unfortunately a role model for others. [6364]

As has been shown above, the high level of social acceptance for insurance offenses also applies to countries with rich insurance traditions and proves the need to conduct research and education campaigns in this area.

62 J. Czapiński, T. Panek, Diagnoza Społeczna 2015, Raport, www.diagnoza.com (1.12.2020).

63 KMPG Report, Global profiles of the fraudster White-collar crime – present and future, KPMG 2013, p. 10

64 KMPG Report, Who is the typical fraudster – KPMG analysis of global patterns of fraud, Executive summary, KPMG 2011, p. 7

It is necessary to emphasize the importance of continuous research and popularization of knowledge about frauds not only among employees of the insurance industry, but also people cooperating (law enforcement agencies, experts, workshops) and the clients of insurance companies themselves.

The latter group plays an especially important role in passively participating in the process of so-called social consent for insurance crimes, which still enjoy a high degree of social acceptance.

Conclusions

To sum up, the dark number of insurance crimes is the ratio of the actual crime to the disclosed scale of frauds. Its value can be determined only by way of approximation. The value of the "dark number" depends mainly on the effectiveness of crime detection, which in turn results both from the technology used and the readiness of the public to inform about known crimes. The smaller the value of the dark number, the more accurately the actual losses incurred by the industry can be estimated.

The authors formulated a few general assumptions about the value of a dark number in insurance crimes:

- The value of the dark number of insurance crime is inversely proportional to the effectiveness of fraud detection.
- The value of the dark number of insurance crime is higher for markets with high levels of social acceptance and low level of insurance awareness.
- The effective reduction of the dark number of insurance crime is not possible without the use of advanced IT tools based on a comprehensive database.

The analysis of the above data and experience from European countries allows us to attempt to estimate the value of the dark number of insurance crime for the property insurance market in Poland. The current detection efficiency is about 1% of the value of paid claims and benefits, and it is about 3 to 4 times lower than for the British market, which is the most advanced in combating crime, where similar values were recorded about 10–15 years ago. Progress in Poland in the development of central data bases suggests that within 5 years it is likely to achieve the level of detection in property insurance in excess of 2%. Pan-European estimates of the scale of real crime in property and especially in property insurance amount to approximately 10–12% of the volume of payments. A simple comparison of these values allows a rough estimate of the dark number of insurance crimes in Poland at around 10 in non-life insurance. This translates into more than PLN 2 billion in losses per year for the property insurance industry. In the case of life insurance, data deficiencies and the lack of database tools cause that the estimates would have too

high error margin. However, it should be assumed that its value many times exceeds the result for property insurance.

It should be remembered that even a perfect estimate of the value of the dark number of insurance crime only applies to a given moment in time, because the dynamically developing insurance market awakens the perpetrators to search for new methods of insurance fraud. This results in the necessity of continuing further research in relation to new areas of the market, such as changes in the insurance distribution model, electronisation of customer contact or the shopping habits of new generations of customers.

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The Unclear Picture of Child Sexual Abuse Material (CSAM) Online Volumes During the COVID-19 Pandemic

Abstract: The COVID-19 global pandemic altered the social lives of people around the globe and centred our activities around the internet and new technologies even more than before. As countries around the world responded with lockdowns and social restrictions in order to prevent spreading the virus, concerns about the effects of those measures on child sexual abuse materials (CSAM) volumes on the internet and CSAM related offending online arose. While it is impossible to measure the entire volume of CSAM available online and CSAM related offending, there are some indicators that can be used to assess the scale of online CSAM and whether there was an upward or downward trend in CSAM related activity online and reporting over the pandemic time. Such indicators include the number of reports to hotlines combating CSAM, the number of criminal investigations and cases, and the measurements of the offenders' online activity monitored by law enforcement and other entities. The aim of this paper is to analyse the data available in these areas and see how they picture the CSAM online problem during the COVID-19 pandemic.
Keywords: child exploitation material, child online victimization, child pornography, cybercrime, online sexual offences

Introduction

When The World Health Organization (WHO) declared the COVID-19 outbreak a global pandemic on March 11, 2020[1], and countries around the world

1 WHO, WHO Director-General's opening remarks at the media briefing on COVID-19–11 March 2020, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (10.07.2021).

responded with lockdowns and social restrictions in order to prevent spreading the virus, concerns about the effects of those measures on child sexual abuse (CSA) online, including child sexual abuse material (CSAM) related criminal activities, arose[2].

For many people, including children, confinement measures introduced due to COVID-19 pandemic resulted in increased time spent on the internet, and as the global health crisis was developing, the data and reports on how the child sexual abuse material related online activity and reporting changes were being released. For example, in the report released in June 2020, Europol warned about a surge in online distribution of child sexual abuse material (CSAM) as a result of the COVID-19 pandemic indicated by their intelligence[3]. In March and April 2020, the National Center for Missing & Exploited Children (NCMEC), a non-profit clearinghouse and comprehensive reporting centre for all issues related to the prevention of and recovery from child victimization in the United States, recorded an exponential rise in CSAM reports received[4]. In September 2020, INTERPOL communicated that "information from multiple sources including INTERPOL member countries indicate a significant increase in the sharing of online CSAM through the use of peer-to-peer networks during the COVID-19 pandemic[5]".

The picture emerging from the data being published as the COVID-19 pandemic continues its march indicates the growing scale of the CSAM problem. However, the reports and other publications available are usually based on fragmented data collected in different periods of time and different locations, whereas CSAM on the internet is a global issue. Despite the common interest, the reports mentioned above are based on divergent indicators, measured differently, and obtained from multiple sources. It is because the CSAM reporting, investigation, identification, and removal process involves many different actors and differs from country to country, depending on legal frameworks in this matter. CSAM is usually found on the internet by a member of public, or, in most cases as a result of proactive search, by law enforcement, hotlines combating CSAM, or Internet Service Providers (ISP). Further procedure varies depending on the entity filing a report, as well as the stakeholder handling it, and country of reporting, but also the country where CSAM is being hosted, among other factors. Thus, there are multiple scenarios for dealing with CSAM reports.

2 NetClean, NetClean report: Covid-19 impact 2020. A report about child sexual abuse crime, 2021, p. 15.

3 Europol, Exploiting isolation: Offenders and victims of online child sexual abuse during the COVID-19 pandemic, 2020, p. 2 (22.07.2021).

4 NCMEC CyberTipline, https://www.missingkids.org/gethelpnow/cybertipline (10.07.2021).

5 INTERPOL, Threats and trends child sexual exploitation and abuse. COVID impact, 2020, p. 10.

While it is impossible to measure the entire volume of CSAM available online and CSAM related offending, there are some indicators that can be used to assess the scale of CSAM, and whether there was an upward or downward trend in CSAM related online activity and reporting over the pandemic time[6]. Such indicators include the number of reports to hotlines combating CSAM, the number of criminal investigations and cases, and the measurements of the offenders' online activity monitored by law enforcement and other entities. I will analyse the data available in these areas and see how they picture the CSAM online problem during the COVID-19 pandemic.

1. Reports to Hotlines Combating CSAM

INHOPE is the global network connecting and supporting hotlines in their efforts to combat CSAM[7]. INHOPE Member Hotlines enable the public to anonymously report online material they suspect may be illegal. The hotline's analysts investigate the reports and, after confirming the material reported is illegal, act to remove the content from the internet as rapidly as possible. The network consists of 47 hotlines that receive CSAM reports in 43 countries and collaborate in its removal. One of the tools that INHOPE offers its partners is ICCAM, a secure platform that enables the exchange of CSAM between hotlines operating in different jurisdictions, with the aim of its quick removal from the internet. Once a hotline receives a possible CSAM report, the hotline analyst usually evaluates the reported material. If the site is believed to contain illegal material, the URL is entered into ICCAM. The system enables a recognition of previously assessed content URLs, which means fewer analysts' exposure to harmful material and more efficient removal of known CSAM. ICCAM supports INHOPE's hotlines around the world in classifying images and videos according to international legislation (INTERPOL's baseline criteria) as well as national regulations.

In 2020, more than 1 million URLs of individual media files, *e.g.*, video, images, *etc.*, were exchanged via ICCAM, of which 267,192 URLs were assessed as illegal[8]. 2020 was also a year when INHOPE started reporting data in their annual reports differently, presenting newly and previously assessed URLs separately, which allows observing that 60% of all assessed URLs in 2020 came from previously evaluated material[9]. This means that formerly known CSAM is continuously spreading, and the same content (although oftentimes hosted in different internet locations) is being

6 Europol, Catching the virus. Cybercrime, disinformation, and the COVID-19 pandemic, 2020, p. 7, NetClean, NetClean…, *op. cit.*, pp. 6–7.

7 INHOPE, Annual report 2020, Amsterdam 2021, p. 10.

8 *Ibidem,* p. 25.

9 *Ibidem,* p. 32.

repeatedly reported[10]. It is also worth noting that the number of CSAMs entered into ICCAM is lower than the total number of reports received by member hotlines for various reasons, *e.g.*, the material reported was not illegal or was only hosted in the hotline's jurisdiction[11].

Figures presented in the INHOPE 2020 Annual Report are not comparable to numbers published in the previous year's reports as they presented data differently (*i.e.*, they provided the number of reports assessed, not individual files, and volumes of previously assessed content URLs were not published[12]). Thus, based on INHOPE Annual Reports, we cannot tell if there were substantial differences in reporting to INHOPE hotlines during the COVID-19 pandemic compared to pre-pandemic times. According to INHOPE, "reports of child sexual exploitation activity to cybertip hotlines are up by an average of 30 percent globally[13]" as of 23 April 2020.

In 2020, the top reporting hotlines within the INHOPE network were the ones located respectively in Netherlands (21% from all worldwide reporting), Austria (21%), the United Kingdom (12%), Canada (10%), Colombia (9%), Germany (5%), Poland, the United States, Ireland (each; 3%), Czech Republic, and Finland (each; 2%)[14]. To see if there have been changes in the volume of CSAM reported to hotlines during the COVID-19 crisis, I will present 2020 reporting data from selected top reporters, depending mainly on the data availability in English.

CyberTipline is a hotline receiving reports about multiple forms of online child sexual exploitation, operated by the NCMEC[15]. In 2020, the total number of reports received by CyberTipline increased by 28% from 2019, with 21.7 million reports[16]. However, in March 2020 alone, NCMEC had recorded a 106% increase in CyberTipline reports of suspected child sexual exploitation – rising from 983,734 reports in March 2019 to over 2 million this year[17]. The number of reports was even higher in April 2020 (4.2 million reports according to press releases[18]). The majority of reports received in 2020 in general (99.6%) were related to suspected CSAM and included 65.4 million images, videos, and other files, including 33.6 million images, of which 10.4 million were unique, and 31.6 million videos, of which 3.7 million were

10 *Ibidem,* p. 32.
11 *Ibidem,* p. 32.
12 *Ibidem,* p. 26.
13 *Ibidem*, p. 32.
14 *Ibidem,* p. 32.
15 NCMEC…, *op. cit*.
16 *Ibidem*.
17 O. Solon, Child sexual abuse images and online exploitation surge during pandemic, https://www.nbcnews.com/tech/tech-news/child-sexual-abuse-images-online-exploitation-surge-during-pandemic-n1190506 (7.07.2021).
18 F. Alfonso III, The pandemic is causing an exponential rise in the online exploitation of children, experts say, https://www.cnn.com/2020/05/25/us/child-abuse-online-coronavirus-pandemic-parents-investigations-trnd/index.html (10.07.2021).

unique[19]. Compared to 2019, the absolute number of files included in the reports decreased by 5%[20]. The number of files reported being much larger than the number of reports shows that many of these materials were circulated or shared multiple times, appearing in different internet locations, thus being reported to helplines more than once[21].

The majority of CyberTipline's reports (99% of a total number of reports in 2019 and 2020) have been received from the US-based Electronic Service Providers (ESP) on US-based CSAM[22]. The US law requires that internet companies based in the US report to NCMEC any CSAM instances on their networks they are aware of. Because the majority of the largest ESPs in the world are based in the US, NCMEC "*de facto* centralizes the reporting of child sexual abuse globally[23]". Some of these companies detect and remove CSAM from their services. CyberTipline's analysts do not process such materials because they have already been removed from the internet. Nevertheless, US-based ESPs still have a legal obligation to report CSAM incidents to NCMEC in accordance with 18 USC 2258A[24]. This means that the CSAM volume detected by US-based ESPs is even larger than the number of files presented in NCMEC data. To date, over 1400 companies are registered to make reports, but most of them (94–95% in 2019 and 2020) came from Facebook[25]. This bias is believed to be largely a result of different levels of compliance with the mandatory reporting by ESPs. NCMEC points out, "Higher numbers of reports can be indicative of a variety of things including higher numbers of users on a platform or how robust an ESP's efforts are to identify and remove abusive content from their platforms[26]".

The Internet Watch Foundation (IWF) is a not-for-profit organization based in the United Kingdom, covering 43 countries, that enables reporting CSAM through the UK hotline and international reporting portals established for countries that do not have functioning hotlines[27]. IWF is also one of the few hotlines that actively searches the internet for CSAM[28]. In 2020, 299,619 CSAM reports were assessed by IWF (13% more than in 2019), with 154,311 reports being a result of an active

19 NCMEC…, *op. cit*.
20 *Ibidem.*
21 *Ibidem.*
22 *Ibidem.*
23 European Commission, EU strategy for a more effective fight against child sexual abuse, Brussels 2020, pp. 1–2.
24 INHOPE, Annual report 2020…, *op. cit.,* p. 33.
25 NCMEC…, *op. cit*.
26 *Ibidem.*
27 IWF, Face the facts. Annual report, https://annualreport2020.iwf.org.uk (10.07.2021).
28 S. Charitakis, D. Di Giacomo, G. Endrodi, F. Herrera, M. Kisat, B. Kudzmanaite, G. Maridis, N. Meurens, K. Noti, M. Pillinini, K. Regan, S. Talpo, Study on Framework of best practices to tackle child sexual abuse material online, European Commission, Luxembourg 2020, p. 5.

search[29]. A total number of 153,383 reports were assessed as CSAM or UK-hosted non-photographic CSAM[30]. This is a 16% increase from 2019. There has been a 50% increase in reports of CSAM from the public during the UK lockdown, with 44,809 reports. The increase over this period was registered predominantly in March with 11,689 public reports[31].

The number of URLs with images suspected to represent a sexual exploitation of minors investigated by Dutch hotline Meldpunt Kinderporno operating within The Expertise Centre for Online Child Sexual Abuse (EOKM) more than doubled in 2020 with 742,022 URLs (comparing to 308,430 URLs in 2019)[32]. However, EOKM argues that the considerable spike resulted from introducing a new, automated Sexual Child Abuse Reporting Tool system in 2020, making it harder to compare the number of investigated URLs to previous years[33]. For the Austrian Hotline Stopline, a total of 27,000 online reports were received in 2020, which marked an increase of 300% compared to the previous year[34]. In Australia, there was an 80% increase in reports of CSAM online from mid-March to mid-July[35]. On the other hand, the Polish Dyżurnet hotline noted a 12% decrease in received CSAM reports in 2020 with 8,021 reports.[36]

Drawing conclusions from the scattered data available on CSAM volume reported to hotlines proves difficult. Because of the lack of dedicated monitoring and evaluation (M&E) frameworks within the particular hotlines as well as the lack of a common M&E framework across INHOPE hotlines (beyond the use of ICCAM), the data is gathered and reported on an *ad hoc* basis[37]. Most of the hotlines publish their annual reports on their websites (however, accessing them might require some extensive searching, and they are not always available in English; publishing schedules also vary) but the metrics used are inconsistent – not only with the metrics used by other hotlines, but sometimes also across the reports produced by the same hotline. Indicator of CSAM cases confirmed by hotlines (vs. reports of suspected CSAM received), based on the data provided by all the hotlines operating in countries all over the world, would probably show a more accurate picture of the CSAM volume detected on the internet, especially considering the international nature of the phenomenon.

29 IWF, Face…, *op. cit.*
30 *Ibidem.*
31 *Ibidem.*
32 EOKM, Child sexual exploitation materials hotline. Annual report 2020, https://www.eokm.nl/wp-content/uploads/2021/04/EOKM-Jaarveslag-2020-DEF-ENG.pdf, p. 7 (10.07.2021).
33 *Ibidem*, p. 7.
34 Stopline, https://www.stopline.at/en/statistics (10.07.2021).
35 Paul Fletcher MP, Minister for Communications, Cyber Safety and the Arts. "Questions Without Notice: Children' eSafety", https://www.youtube.com/watch?v=Ql8A9QQHWBU (15.07.2021).
36 NASK Państwowy Instytut Badawczy, Dyżurnet.pl Raport 2020, Warsaw 2021, p. 17.
37 S. Charitakis et al., Study…, *op. cit.,* p. 7.

It is also important to note that the hotlines operate in different legal systems, and the legal definition of CSAM varies from country to country. Hence, some material that is considered illegal in certain countries (such as non-photographic CSAM in the UK) might be treated differently across the other hotlines. The main differences in legal definitions of CSAM include the age of consent to sexual relations, the scope of content being criminalized (*i.e.*, being considered CSAM), as well as legal sanctions for production, distribution, and possession of CSAM. The content that is regulated differently across countries include, among other things, drawing/manga/artistic interpretations of CSAM, digitally generated CSAM / realistic images representing a minor engaged in sexually explicit conduct, apparent self-generated sexual material, sexualized modelling or posing, sexualized images of children, text (also fictional) depictions of CSAM, manuals on CSA, declaration of committing CSA, and praise of paedophilia or CSA[38].

Not only the legal definition of CSAM, but also the legal framework of the scope of hotlines operation differs across the countries. As mentioned before, some hotlines receive most of the reports from the public, while others can also receive reports from ESPs or proactively search for CSAM. Hence, the CSAM reports volume changes might indicate not only changes in CSAM volume *per se* but also changes in reporting behaviours and hotlines' capacities of proactive searches. It is also important to note that the data available for hotlines' reports is skewed towards countries with established hotlines or using the IWF reporting portal. There is obviously no data on reporting CSAM to hotlines available in certain countries that do not have such mechanisms in place.

Considering all the limitations, the data available indicates an increase in received reports of suspected CSAM across the hotlines. The IWF data also shows an increase in the numbers of materials assessed as CSAM by their hotline analysts along with increased reporting. However, it is impossible to tell whether the increase in reporting means that there is more material online[39]. Many possible factors might have influenced the changes in numbers of reports other than increased CSAM volumes available online itself.

Due to the pandemic confinements, people spent more time online, which might have resulted in coming across CSAM accidentally more often while being active on the internet for other reasons[40]. There were several cases of CSAM going viral by being shared with an intent to identify the victim, as part of a public movement to actively search for and report CSAM to bring attention to the issue, or as comic

38 INHOPE, Annual report 2020…, *op. cit.,* pp. 18–21.

39 IWF, 'Definite jump' as hotline sees 50% increase in public reports of online child sexual abuse during lockdown, https://www.iwf.org.uk/news/%E2%80%98definite-jump%E2%80%99-as-hotline-sees-50-increase-public-reports-of-online-child-sexual-abuse-during (22.07.2021).

40 INTERPOL, Threats…, *op. cit.*, p. 11; NetClean, NetClean…, *op. cit.*, p. 27.

material, especially at the beginning of the pandemic[41]. It resulted not only in increased number of reports but, most importantly, in constant revictimizing of children pictured in the materials. After investigating the content, it reported to NCMEC, Facebook stated: "90% of this content was the same as or visually similar to previously reported content. And copies of just six videos were responsible for more than half of the child exploitative content we reported in that time period[42]."

On the other hand, previously shared and viral CSAM being responsible for 90% of Facebook's reports does not necessarily mean that CSAM rates on Facebook and other social media platforms have been low during the pandemic. Rather than that, it indicates that the platform struggles with detecting other types of CSAM, relying heavily on AI, which is more suitable for detecting already known CSAM, while human moderators are critical in assessing previously unreported CSAM[43].

"During the second quarter of 2020, the company removed less than half of the child sexual abuse material from Instagram than it did the quarter before — not because there was less of it, but because the company was less equipped to catch it.", press reports[44]. The reason behind it is the limited number of content moderators doing their job because of pandemic confinement, as CSAM viewing is not usually possible in remote work settings[45]. Research shows that both law enforcement and hotline analysts representatives working on CSAM cases have similar observations on Facebook's reporting[46]. In the words of a hotline manager: "A lot of people that are coming in and reporting to us have said or have claimed that they've reported directly to the platform on numerous occasions and the platform is either not responsive or they get that sort of auto generated message saying you know, because of COVID-19, their moderator team has decreased or there's not the same amount of staff and so it will take longer to get a response[47]."

41 NetClean, NetClean…, *op. cit*., p. 26, 34; O. Solon, Child…, *op. cit*.

42 A. Davis, Preventing Child Exploitation on Our Apps, https://about.fb.com/news/2021/02/preventing-child-exploitation-on-our-apps/(22.07.2021).

43 E. Bursztein, E. Clarke, M. DeLaune, D.M.Elifff, N. Hsu, L. Olson, J. Shehan, M. Thakur, K. Thomas, T. Bright, Rethinking the detection of child sexual abuse imagery on the Internet. In The world wide web conference, 2019, p. 2606, https://web.archive.org/web/20190928174029/https://storage.googleapis.com/pub-tools-public-publication-data/pdf/b6555a1018a750f39028005bfdb9f35eaee4b947.pdf (22.07.2021); I. Lapowsky, How COVID-19 helped — and hurt — Facebook's fight against bad content, https://www.protocol.com/covid-facebook-content-moderation (22.07.2021); NetClean, NetClean…, *op. cit*., pp. 38–39.

44 I. Lapowsky, How…, *op. cit.*

45 *Ibidem.*

46 NetClean, NetClean…, *op. cit*., pp. 38–39; M. Salter, W.K.T. Wong, Research report. The impact of COVID-19 on the risk of online child sexual exploitation and the implications for child protection and policing, Sydney 2021, p. 36–37, https://www.arts.unsw.edu.au/sites/default/files/documents/eSafety-OCSE-pandemic-report-salter-and-wong.pdf (22.07.2021).

47 M. Salter, W.K.T. Wong, Research…, *op. cit.*, p. 37.

2. Criminal Investigations and Cases

There is no universal system of registering CSAM related criminal cases in different jurisdictions around the world. Therefore, there is no indicator for the global volume of CSAM related crime investigations and convictions. It is only possible to look into criminal statistics for particular countries, being careful with making comparisons across the different legal frameworks. The data presented in this part of the paper results from (1) web searches for law enforcement crime statistics on CSAM available in English and (2) research conducted among law enforcement representatives on the perceived change in the numbers of criminal cases they were dealing with during the COVID-19 crisis.

On 3 April 2020, Europol reported an increase in the number of reports from the public to law enforcement for some countries[48]. It provided the data from the Spanish Police, which noted a "significant increase" in the number of complaints submitted by the public about suspected CSAM online since the beginning of March 2020, comparing to the same period in 2017–2019[49]. However, the graph provided shows that March 2020 reports' number increased only slightly compared to March 2018 and 2019, with respectively less than 100 and less than 50 reports[50]. From February to March 2020, there was a spike of 100 complaints more than in the previous month[51]. According to the data presented on the same graph, the volumes of CSAM reported to the Spanish Police over the years of 2017–2020 varied greatly, sometimes from month to month, and comparing the same month in different years as well, without a consistent pattern[52]. Drawing substantial conclusions based on the data from the very beginning of pandemic only (March 2020) proves difficult.

The data available for 2020 for Canada, and Poland, despite a very different sample size, both show some degree of an increase in police reports. Statistics for 2020 released by police in Canada show that the rate of police-reported CSAM incidents increased by 23% in 2020 with 11,055 crimes reported[53]. In Poland, on the other hand, the number of police case openings related to CSAM and presenting adult pornography increased only by 6% with 705 cases in 2020 compared to 2019

48 Europol, Catching…, *op. cit.*, p. 7, https://www.europol.europa.eu/publications-documents/catching-virus-cybercrime-disinformation-and-covid-19-pandemic (22.07.2021).

49 *Ibidem*, p. 7.

50 *Ibidem*, p. 7.

51 *Ibidem*, p. 7.

52 *Ibidem*, p. 7.

53 After five years of increases, police-reported crime in Canada was down in 2020, but incidents of hate crime increased sharply, https://www150.statcan.gc.ca/n1/daily-quotidien/210727/dq210727a-eng.htm (22.07.2021).

(however, due to legislation differences, those statistics include some offences not related to CSAM)[54].

The results of the survey conducted by the NetClean[55] between 12 June and 17 October 2020 among 470 police officers from 39 countries, show that half of the respondents reported an increase in possession, receipt, and distribution of CSAM cases[56]. One of the interviewed officers stated: "For my department, I have only seen an increase in cybertips which have uploads/downloads dates from the period when the lockdown started" which corresponds with the spike in reports received by NCMEC in the beginning of the pandemic[57]. However, there were some noticeable differences in responses from police officers from different countries and regions. Whereas 66% of the US and 53% of the UK respondents reported an increase in CSAM possession, receipt, and distribution cases, only 22% of Swedish respondents, and 31% of all European respondents said the same[58].

Results of the Salter & Wong study of 77 surveyed participants from the Australasian region, North America, Europe, the United Kingdom, Africa, and the Middle East, of which 62% represented law enforcement[59], confirm this picture. Over 50% of respondents reported "some" or a "major" increase in reports of online child abuse (59.3%) as well as an increase in investigations (61%)[60]. Some of the interviewed participants noticed more viral CSAM files were being shared, which is in line with previously described explanations for the spike in NCMEC reports.

On the other hand, INTERPOL registered a reduction in the use of its International Child Sexual Exploitation (ICSE) database by member countries since the introduction of confinement measures[61]. Namely, 60% of member countries who regularly use the ICSE database have either not accessed the database or reduced their database activities significantly during the COVID-19 pandemic[62]. It might indicate the disruptions in law enforcement capacity in investigating CSAM cases resulting from the COVID-19 crisis rather than a change in case openings. The other data available on the volumes of CSAM criminal investigations and cases presented earlier, however fragmented and unsystematic, indicate some increase in reports received by law enforcement agencies and case openings in samples analysed. It is not clear whether this increase can be attributed to the pandemic situation, or if it is

54 Komenda Główna Policji, Statystyka, https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-6/63503,Pornografia-art-202.html (22.07.2021).
55 NetClean, https://www.netclean.com/about-us (22.07.2021).
56 NetClean, NetClean…, *op. cit*., p. 31.
57 *Ibidem,* p. 31.
58 *Ibidem,* p. 31.
59 M. Salter, W.K.T. Wong, Research…, *op. cit.*, p. 11.
60 *Ibidem,* p. 22.
61 INTERPOL, Threats…, *op. cit*., p. 7.
62 *Ibidem,* p. 7.

a part of an ongoing trend. Typically, case openings "lag behind the online activity", so it is "too early to see a spike", according to Brian Herrick, assistant chief of the FBI's Violent Crimes Against Children and Human Trafficking Section[63].

3. Online Activity Monitored by Law Enforcement and other Entities

Online activity relating to CSAM, such as attempts to access CSAM, downloads of CSAM on peer-to-peer (P2P) networks, offenders' activity on social media, forums, and other locations of the surface web, and activity on the darknet, is monitored by law enforcement and used to provide intelligence. This information might give an indication of offenders' internet activity relating to CSAM[64]. In the reports released on 3 April[65] and 19 June 2020[66], Europol assured that since the beginning of the COVID-19 crisis, it has been monitoring various indicators to determine whether there is an increase in the production and distribution of CSAM. It signalled that there had been an increase in detection and reporting of CSAM on the surface web and an increase of CSAM related activity on the darknet during the national lockdowns period[67]. In the report released in September 2020, INTERPOL informed that its member countries and NGOs have reported increases in online activity relating to CSAM[68].

In April 2020, Brian Herrick noted: "Activity is peaking on the platforms where it takes place, very similar to how it peaks around holiday time when people are off work", confirming that "a lot of activity" took place in coded conversations on mainstream social media platforms, with the "most egregious child sexual abuse material "being shared on the dark web[69]. According to child safety experts and law enforcement," distributors of child sexual abuse images are trading links to material in plain sight on platforms including YouTube, Facebook, Twitter and Instagram using coded language to evade the companies' detection tools[70]".

The interest in this type of material may be evidenced by the increase in the number of searches for CSAM being conducted online. Europol member countries reported a spike in the number of attempts to access websites featuring CSAM blocked in their filters during their lockdown periods[71]. For instance, Denmark reported a three-fold increase in the number of attempts to access illegal websites featuring

63 O. Solon, Child…, *op. cit.*
64 NetClean, NetClean…, *op. cit*., p. 22.
65 Europol, Catching…, *op. cit.*, p. 3.
66 Europol, Exploiting…, *op. cit.*, p. 5.
67 *Ibidem*, p. 14.
68 INTERPOL, Threats…, *op. cit*., p. 9.
69 O. Solon, Child…, *op. cit*.
70 *Ibidem.*
71 Europol, Exploiting…, *op. cit.*, p. 7.

CSAM from one week to another, with 55 site searches comparing to 18 searches[72]. In the UK alone, IWF registered 8.8 million blocked attempts to access CSAM over one month (April 2020)[73]. The India Child Protection Fund (ICPF) reported a spike in online searches for CSAM in India since the beginning of its lockdown[74]. For India, interest in child pornography content is substantiated by online website monitoring data during the same time period, which shows that searches for CSAM related keywords also spiked during the same period[75].

Furthermore, law enforcement agencies noted an increased number of downloads of CSAM on peer-to-peer (P2P) networks. Spanish Police detected a 25% increase between the weeks commencing 17 March and 24 March 2020. Other Europol member countries reported similar trends, especially in the second part of March 2020, according to Europol's 2020 April and June reports[76]. Child Rescue Coalition (CRC) data on detections of CSAM on P2P networks in Italy and Spain confirm these findings, with both countries reporting a considerable increase in March and April 2020[77]. The CRC also noted an increase for other countries in the dataset, including the US, and China, but in the US numbers of downloads began to rise as early as in mid-February 2020[78]. However, before the numbers spiked, there was an initial decrease in sharing CSAM in the CRC data. According to the CRC COO Glen Pounder, "This may be attributed to predators quarantined at home with other family members, hindering their ability to access CSAM without getting caught[79]". In September 2020, INTERPOL also informed about the significant increase in the sharing of CSAM through the use of P2P networks referring to multiple sources, including member countries and CRC[80]. Observations made by law enforcement representatives surveyed by NetClean align with these findings: six in ten police officers reported an increase in downloads of CSAM on P2P networks[81].

72 Europol, Catching…, *op. cit.*, p. 7.

73 IWF, Millions of attempts to access child sexual abuse online during lockdown, https://www.iwf.org.uk/news/millions-of-attempts-to-access-child-sexual-abuse-online-during-lockdown (22.07.2021).

74 India Child Protection Fund, Child sexual abuse material in India. Report on demand for child pornography

& pilot deterrence using artificial intelligence, 2020, p. 5, https://7d53df5d-623a-479f-89b5-c88a0757a721.filesusr.com/ugd/aeb656_0247bfeedc04490b8e44e4fba71e3ad7.pdf (22.07.2021).

75 *Ibidem*, p. 5.

76 Europol, Catching…, *op. cit.*, p. 8.

77 Child Rescue Coalition, Online Safety Advisory: CRC finds increase in distribution of child sexual abuse material in file sharing networks during COVID-19, https://childrescuecoalition.org/online-safety-advisory-crc-finds-increase-in-distribution-of-child-sexual-abuse-material-in-file-sharing-networks-during-covid-19/ (22.07.2021).

78 *Ibidem.*

79 *Ibidem.*

80 INTERPOL, Threats…, *op. cit*., p. 10; Child Rescue Coalition, Online…, *op. cit.*

81 NetClean, NetClean…, *op. cit*., p. 23.

The increased activity of CSAM interested offenders on the surface web was accompanied by an increase in their activity on the darknet forums. Discussions about the COVID-19 situation and its possible effects on CSAM availability and access to children started appearing when the pandemic emerged, with offenders anticipating an increase of child sexual abuse opportunities and CSAM volumes as well as shortcomings of the restrictions[82]. Web-IQ, a specialist cybersecurity company that monitors dark web and other online activity, noted a more than 200% increase in new posts on known child sex abuse forums that link to downloadable images and videos hosted on the surface internet in March 2020, compared to the previous month, with 9,255 links believed to be "highly likely to point to child abuse material" identified[83]. Parks *et al*., recruiting participants on the darknet for the "Prevent It" program, an anonymous internet-based cognitive behavioural therapy program, established that in the largest forum monitored, there were typically 100–150 active persons at one time, but after the lockdown, the numbers increased to 300–400 on average[84]. Such change in activity was also seen in other, smaller forums[85]. They noted that "based on conversations of the individuals in the chat rooms, the impression is that the increase is a combination of current users having more time to spend online, new users taking the step to explore onion sites to find more extreme material, as well as users who have tried to quit but have now returned[86]". The increase of CSAM related activity on the darknet was also observed by the surveyed police officers and other professionals working on CSAM cases (with 50% and 74% of them noting an increase in different samples)[87]. Interviewed law enforcement representatives observed a rise of active individuals as well as an increase in shared CSAM[88].

The data collected indicate that there was an increase in searching for, accessing, downloading, and sharing CSAM. Europol's intelligence notes that: "Although the data is still fragmented and incomplete, there are strong indications there has been an increase in the number of cases of child sexual abuse. Referrals from industry and third-party countries have reached record highs in recent months, particularly in relation to material accessed and distributed on the surface web and in peer-to-

82 Europol, Catching…, *op. cit.*, p. 8; A. Parks, C. Sparre, E. Söderquist, S. Arver, G. Andersson, V. Kaldo, K. Görts-Öberg, C. Rahm, Illegal Online Sexual Behavior During the COVID-19 Pandemic: A Call for Action Based on Experiences From the Ongoing Prevent It Research Study, "Archives of Sexual Behavior" 2020, no. 49, p. 1434; NetClean, NetClean…, *op. cit*., p. 20, 23.

83 Europol, Exploiting…, *op. cit.*, p. 9; L. Donovan, C. Redfern, Online child abuse flourishes as investigators struggle with workload during pandemic, https://www.telegraph.co.uk/global-health/science-and-disease/online-child-exploitation-flourishes-investigators-struggle/ (22.07.2021)

84 A. Parks et. al., Illegal…, *op. cit.*, p. 1434.

85 *Ibidem*, p. 1434.

86 *Ibidem, op. cit.*, p. 1434.

87 NetClean, NetClean…, *op. cit*., p. 23; M. Salter, W.K.T. Wong, Research…, *op. cit*., p. 24.

88 NetClean, NetClean…, *op. cit*., p. 23–24.

peer (P2P) networks during the COVID-19 crisis. Activities on dark web forums have also increased, including high levels of posts and responses. In many ways, these discussions were «business as usual[89]»".

Conclusions

It is essential to note that the data presented – not only on offenders' online activity, but in the other areas as well – is fragmented and incomplete, and, some of it, anecdotal. There is a lack of representative data on CSAM online as well as universal and reliable indicators of CSAM reports, criminal cases, and offenders' activity. Therefore, our knowledge of the CSAM phenomenon is limited by a scarcity of standardized or comparable categorization approaches. ECPAT recognizes the sources of this problem: "These challenges largely relate to differences in the sampling, case recording, and data categorisation approaches between existing studies. This in turn highlights the operational and research challenges presented by different categorisation approaches used by law enforcement operating around the world[90]." At the same time, UNICEF highlights that the lack of representative data to determine the scale of any form of violence against children is a "critical barrier to making an efficient investment and prioritizing a comprehensive child protection response[91]".

The data obtained from reports received by hotlines combating CSAM, volumes of criminal investigations and cases, as well as indicators on CSAM offenders' online activity show an increase since the surge of the COVID-19 pandemic, especially in its initial period. However, it is essential to note that neither administrative data from hotlines and law enforcement are indicators of CSAM volumes and CSAM related offending but rather of reported or detected CSAM online cases. In turn, intelligence on CSAM related online activities reflects an increase in searching for, accessing, downloading, and sharing CSAM, but more research and online activity monitoring is needed to assess the scale and trends in offenders' activity during the pandemic. The volume of CSAM law enforcement and hotlines are aware that it represents the "tip of the iceberg" of all the CSAM existing and shared online[92]. Interviewed in 2020, Brad Russ, executive director of the National Criminal Justice Training Center at Fox Valley Technical College in Wisconsin, which provides training and technical support to law enforcement, provided an estimate that CSAM on the internet is so

89 Europol, Exploiting…, *op. cit.*, p. 5.

90 INTERPOL, Towards a global indicator on unidentified victims in child sexual exploitation material, 2018, p. 14, https://www.ecpat.org/wp-content/uploads/2018/03/TOWARDS-A-GLOBAL-INDICATOR-ON-UNIDENTIFIED-VICTIMS-IN-CHILD-SEXUAL-EXPLOITATION-MATERIAL-Summary-Report.pdf (22.07.2020).

91 Unicef, Child Protection, https://www.unicef.cn/en/what-we-do/child-protection (22.07.2021).

92 S. Charitakis et al., Study…, *op. cit*., p. 5.

widespread that less than 10% of detected trading and downloading of the images are investigated[93].

Another reason why it is hard to know if the CSAM problem has been compounded because of the COVID-19 pandemic crisis is the growing scale of the phenomenon that had already been observed before. The number of public reports to INHOPE hotlines has more than doubled during the period 2017 to 2019[94]. CSAM on the internet has "outpaced the capabilities of independent clearinghouse analysts and law enforcement to respond[95]" already before the pandemic started. It seems that during the COVID-19 crisis, the problem escalated even further. Considering all the limitations, the available data indicate an increase in received reports of suspected CSAM across the hotlines. However, it seems that multiple factors other than those related with COVID-19 pandemic measures might have influenced the changes in numbers of reports raher than increased CSAM volumes available online itself. We need to establish how much of the increase in CSAM indicators can be attributed to the global pandemic, and what are the circumstances within this crisis that promote it, in order to be able to take preventive measures and formulate adequate preventive policies. Cathal Delaney from Europol's Child Sexual Abuse Europol Cybercrime Centre notes that, "If more new CSAM has been produced during the pandemic, we are unlikely to see it for some time. In the darknet communities, new material is connected to status and usually only shared among closed groups. Circulation to a wider community usually happens at a later stage[96]".

The picture of CSAM volumes during the pandemic that emerges from the data available is unclear. It is too early to know the factors that influenced a spike in CSAM reports, cases, and offender activity during the COVID-19 pandemic[97]. Future research will need to establish whether the escalation of the CSAM problem is attributable to the pandemic, a part of an ongoing trend, or both[98]. In order for that to be possible, it is necessary to develop universal CSAM indicators and establish routine data gathering mechanisms in order to provide robust data on CSAM volumes on the internet.

93 D. Racioppi, 'People don't want to talk about it,' but reports of kids being exploited online have spiked amid coronavirus pandemic, https://www.usatoday.com/story/news/nation/2020/10/22/coronavirus-child-abuse-nj-online-child-exploitation-reports-increase/6004205002/ (22.07.2021).

94 INHOPE, Annual report 2019, *op. cit.*, p. 4.

95 E. Bursztein et al., Rethinking…, *op. cit.*, p. 6.

96 NetClean, NetClean…, *op. cit.*, p. 20.

97 NetClean, NetClean…, *op. cit.*, p. 19–20.

98 M. Salter, W.K.T. Wong, Research…, *op. cit.*, p. 30; NetClean, NetClean…, *op. cit.*, p. 20.

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The Juvenile Reentry Mentoring Project: Adaptations During COVID-19

Abstract: Delinquent youths often do not receive the opportunity to be mentored. This is especially true for youths who have committed serious law violations or are detained for multiple law violations. In the United States, youths with the most serious offenses are often committed to detention, or rehabilitation, or treatment centers. Since 2011, the Juvenile Reentry Mentoring Project (JRMP) has matched mentors to youths detained in Nebraska Detention, and Treatment Facilities. The Nebraska Youth Rehabilitation, and Treatment Centers (YRTCs), specifically, are for youths with the highest level of needs and who have exhausted all other programs available in the community. From 2011 through February 2020, the JRMP developed as an evidence informed model for mentoring juveniles with the highest level of need and the most serious law violations. The onset of the COVID-19 pandemic disproportionately impacted youths in detention and treatment centers, and mentoring programs such as the JRMP adapted to continue to meet existing and emerging needs of youths. The aim of this article is to report on the evidence-based development of the JRMP and the adaptations that were necessary for it to continue to operate during COVID-19. We close with recommendations and lessons learned from the pandemic and ways that programs can resist a return to the status quo.
Keywords: COVID-19, evidence-based, juvenile justice, mentoring

Introduction

In the United States, individual states spend approximately 5.7 billion dollars annually to detain youths in facilities outside of their community, many of which could be managed more effectively and with fewer recommitments if detained within their own communities.[1] Recommitments account for a large number of all detention admissions, and high-risk youths are disproportionately represented in these recommitment statistics. A "high-risk youth" population refers to youths with intersecting needs, including emotional and behavioral problems, substance use, violence, and detachment from school.[2] Due to these constraints, youths may also be involved with intersecting systems of care, such as juvenile justice, child welfare, mental health, substance use, and special education programming. Furthermore, in the U.S., high-risk youths often belong to at least one minority group (*e.g.*, racial/ethnic, sexual orientation, special education, socio-economic status, gender).[3]

In systemic terms, high-risk youths encounter more struggles within their social-ecological system, particularly living in violent environments, with family dysfunction, and a lack of supervision and support.[4] Importantly, these youths are not usually involved in positive social activities (*e.g.*, mentoring programs, school clubs, sports teams, or private clubs like scouts), further limiting their access to positive adult models and support.[5] This is especially so for youths detained in juvenile facilities or rehabilitation centers. Many of these youths have a mental health diagnosis[6] and have had prior exposure to violence in their homes, schools, or communities.[7] Detained youths often have a history of complex trauma including: poly-victimization (*i.e.*, experiencing multiple types of trauma and victimization),

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3 M.H. Swahn, R.M. Bossarte, Assessing and quantifying high risk: Comparing risky behaviors by youth in an urban, disadvantaged community with nationally representative youth, "Public Health Reports" 2009, no. 124(2), pp. 224–233.

4 E.R. Frankford, Changing service…, *op. cit*., p. 594 and next.

5 S. Bauldry, T.A. Hartmann, The promise and challenge of mentoring high-risk youth: Findings from the national faith-based initiative, Public/Private Ventures, https://www.aecf.org/resources/the-promise-and-challenge-of-mentoring-high-risk-youth (21.06.2021).

6 B. Holman, J. Ziedenberg, The dangers…, *op. cit*., http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf (10.12.2020).

7 D. Finkelhor, H. Turner, R. Ormrod, S. Hamby, K. Kracke, National survey of children's exposure to violence. Office of Juvenile Justice and Delinquency Prevention, https://www.ojp.gov/pdffiles1/ojjdp/227744.pdf (12.01.2021).

multiple out of home placements, and disruptions in relationships[8]. These forms of maltreatment coupled with violent modeling and disengagement from positive youth activities have culminated in social maladjustment and attachment problems for most of the youths committed to a YRTC.

1. Mentoring Efforts to Reduce High-risk Youth Recidivism

Overall, interventions for high-risk youths that focus on enhancing protective factors and creating supportive relationships, like mentoring, have been found to be more effective than programming aimed at surveillance like drug testing or electronic monitoring.[9] While mentoring high-risk youths used to be somewhat uncommon, it has increased in recent years, as a low-cost strategy to increase emotional support, improve social skills[10], and as a mechanism to impact delinquency and recidivism outcomes.[11] In the U.S., the Office of Juvenile Justice and Delinquency Prevention (OJJDP) has devoted millions of dollars to increasing mentors available to prevent delinquency. This has led to an increase in community-based mentoring of high-risk youths, specifically aimed at reducing juvenile delinquency and recidivism.[12]

Research on mentoring high risk populations has been mixed. While some studies have found the effect size for mentoring interventions is relatively small, meta-analyses have documented promising gains for more than three million youths involved with mentoring in some capacity. The modest effect sizes are largely dependent on the quality of implementation.[13] With relatively few programs designed for this population, the University of Nebraska's Juvenile Justice Institute set out to create a high-quality mentoring program specifically designed for youths in detention or rehabilitation centers. The Juvenile Reentry Mentoring Project (JRMP)

8 J.D. Ford, D.J. Grasso, J. Hawke, J.F. Chapman, Poly-victimization among juvenile justice-involved youths, "Child Abuse & Neglect"' 2013, no. 37(10), p. 788 and next, https://doi.org/10.1016/j.chiabu.2013.01.005 (10.12.2020).

9 L.S. Abrams, S.M. Snyder, Youth offender…, *op. cit*., p. 1787 and next, https://doi.org/10.1016/j.childyouth.2010.07.023 (21.06.2021).

10 S. Bauldry, T. A. Hartmann, The promise…, *op. cit.,* https://www.aecf.org/resources/the-promise-and-challenge-of-mentoring-high-risk-youth (21.06.2021).

11 J.A. Bouffard, K.J. Bergseth, The impact of reentry services on juvenile offenders' recidivism, "Youth Violence and Juvenile Justice" 2008, no. 6(3), p. 295 and next.

12 L.S. Abrams, S.M. Snyder, Youth offender reentry: Models for intervention and directions for future inquiry, "Children and Youth Services Review"' 2010, no. 32(12), p. 1787 and next, https://doi.org/10.1016/j.childyouth.2010.07.023 (22.06.2021).

13 E.B. Raposa, J. Rhodes, G.J.J. M. Stams, N. Card, S. Burton, S. Schwartz, L.A.Y. Sykes, S. Kanchewa, J. Kupersmidt, S. Hussain, The effects of youth mentoring programs: A meta-analysis of outcome studies, "Journal of Youth and Adolescence" 2019, no. 48, p. 423 and next, https://doi.org/10.1007/s10964–019-00982–8 (22.06.2021).

utilized the six core standards of practice developed by MENTOR, an organization dedicated to mentoring practice standards and decades of research.[14]

Various mentoring programs and models outline practices and strategies for engaging youths, but establishing long-term relationships with high-risk youths poses unique challenges. Best practices generally facilitate longer matches, and longer mentor-mentee matches have been associated with better outcomes for youths.[15] When unpacking match length, research has suggested that longer relationships result when the relationship is more natural (*i.e.*, does not feel contrived)[16] and is characterized by a higher degree of 'chemistry' and connectedness.[17]

2. Theoretical Elements

Schwartz *et al.* (2013) designed the Youth Initiated Mentoring (YIM) model to include longer mentor-mentee matches. The YIM model has reported higher levels of reported satisfaction and better outcomes in education and social skills. Research indicates that because youths select their own mentors from pre-existing relationships, this increases levels of satisfaction among both mentors and mentees. Furthermore, many mentors have similar backgrounds to the youths (*e.g.*, are from the same community or of the same cultural background), allowing for matches to be built upon shared interests and assisting the pair to access resources and engage more in community activities. Other strengths of YIM include strong program retention, greater access to community resources, and lower costs for mentoring recruitment[18].

Because it is sometimes difficult to match high-risk youths, some researchers projected that the YIM model would increase the number of adult mentors who are comfortable and confident to work with high-risk youths. The aim of having a surplus of mentors is for mentoring agencies to reduce waiting lists, and have mentors begin to serve the youths quickly and competently immediately following

14 M. Garringer, J. Kupersmidt, J. Rhodes, R. Stelter, T. Tai, Elements of effective practice for mentoring 4thedition, https://www.mentoring.org/wp-content/uploads/2021/06/Final_Elements_Publication_Fourth-2.pdf (22.06.2021).

15 J. Rhodes, B. Liang, R. Spencer, First do no harm: Ethical principles for youth mentoring relationships, "Professional Psychology: Research and Practice" 2009, no. 40(5), p. 452 and next.

16 E.A. Blechman, A. Maurice, B. Bucker, C. Helberg, Can mentoring or skill training reduce recidivism? Observational study with propensity analysis, "Prevention Science" 2000, no. 1(3), p. 139 and next.

17 D. Hagner, J.M. Molloy, M. Mazzone, G.M. Cormier, Youth with disabilities in the criminal justice system: Considerations for transition and rehabilitation planning, "Journal of Emotional and Behavioral Disorders" 2008, no. 16(04), p. 240 and next.

18 J. Rhodes, B. Liang, R. Spencer, First…, *op. cit.*, p. 452 and next.

referral.[19] However, systems have often pushed back and have not permitted mentors identified by the youths as suitable matches, due to background checks and perceived unsuitability.

Another program, the Aftercare for Indiana through Mentoring Program (AIM) model, provided a framework for the successful reentry of youths, measuring things like recommitment and employment.[20] Recommitment, defined as a return to the YRTC facility, is sometimes used as a measure of recidivism. Recommitment occurs when a youth cannot safely remain living in the community into which he or she was released, and the judge determines that the youth must return to the YRTC facility. Youths committed to a YRTC typically meet regularly with their reentry team to help prepare for life after commitment. The team meets monthly prior to release, to review the youth's progress, but also so that the youth can prepare for reentry (enroll in school, find suitable housing or placement.) The youth then has a court hearing 60 days prior to release to cover specific expectations, such as where the youth will live, school enrollment and attendance, and other individualized requirements contained in the court order (refrain from contacting delinquent peers, *etc*.) Once released, the youth is supervised by a probation officer, who observes whether the youth complies with the conditions of release. If the youth has serious infractions, for example repeatedly failing to follow the court order, running away, or committing new law violations post release, the youth can be recommitted to the YRTC.

3. The Youth Rehabilitation and Treatment Centers (YRTCs)

The Nebraska Department of Health and Human Services (NDHHS) operates the Youth Rehabilitation and Treatment Centers (YRTCs). At the time of our research, there were four facilities: one male facility, one female facility, one facility dedicated to youths who sexually offend, and a fourth facility that provided substance abuse treatment. Mentors only served youths on the two main campuses that provided generalized care. As treatment facilities, the YRTCs offered evidence-based behavioral and skill building programming. Individual therapy is offered for youths with behavioral and mental health needs, and case managers and therapists develop individual case plans for each youth. The aim of the YRTC is to provide programming that encourages youths to look at the change process and to gain skills to address their thinking errors and develop new skills and habits (dhhs.ne.gov).

19 *Ibidem*, p. 456.

20 G.R. Jarjoura, They, all come back: Reflections on a juvenile reentry initiative (Paper presentation). ACJJ Statewide Conference on Juvenile Justice and Delinquency Prevention, Arkansas 2003.

4. The Juvenile Reentry Mentoring Project (JRMP) for High-Risk Youth Protocol

The JRMP was developed to be a robust mentoring program using both a theoretical and a practical lens.

The Juvenile Justice Institute developed the JRMP by adapting important elements from models like AIM[21] and YIM and integrating a developmental theoretical model and best practices in mentoring. Like the AIM, JRMP utilized college students as mentors for youths reentering the community from a YRTC. Because mentors receive extensive training on relational techniques, we expected that mentors would facilitate a developmental model of mentoring. The JRMP is based on a developmental mentoring model, which maintains that a healthy, trusting mentoring relationship can only be formed when the mentor believes and communicates that the young person is the expert on the subject of their own life, despite solid evidence of mistakes the youth has made. Therefore, mentors are encouraged to utilize motivational interviewing (MI) and coached to use this approach throughout the match. However, the day-to-day aspects of juvenile justice programs must go beyond theory and be shaped and molded by logical and practical operational considerations.

5. Practical Elements: Effective Practice for Mentoring

The *Elements of Effective Practice for Mentoring* arose out of a desire to ensure that mentoring programs offered services in a responsible way but were not originally intended for a high-risk population. In 1990, MENTOR and the United Way came together to produce a set of six standards that met the needs of both youths and volunteers, while also ensuring participant safety and better outcomes. Over the years, these principles have been enhanced to incorporate research conducted on hundreds of mentoring relationships. The fourth edition, published in 2015, incorporated more than 400 peer reviewed journal articles, as well as the in input of over 200 practitioners and mentoring programs.[22]These standards were applied systematically to the design of JRMP for work in the Nebraska YRTCs and altered to meet continued needs for youths during the COVID-19 pandemic.

5.1. Standard 1: Recruitment

Recruiting volunteers is critical for any mentoring program because it is the primary resource needed to operate the program. Some mentor programs

21 R. Jarjoura. Aftercare for Indiana through Mentoring. AIM Indiana's juvenile reentry program: Aftercare for Indiana through mentoring, 2004.

22 M. Garringer, J. Kupersmidt, J. Rhodes, R. Stelter and T. Tai. Elements of Effective Practice for Mentoring, 4th Edition 2015, Final_Elements_Publication_Fourth.pdf (mentoring.org) (25.09.2021).

have reported difficulty recruiting mentors to match to youths in detention and rehabilitation centers. To ensure mentor suitability, it is critical to realistically describe the program's aims and expected outcomes.[23]JRMP mentors are recruited from the undergraduate student population, generally from one of the following departments: Criminology, Sociology, Educational Psychology, or Law/Legal Studies. Faculties that work within each department post fliers describing the service-learning course, the minimum requirements, and objectives. Students must sign up with permission, after being interviewed by the instructor who teaches the course.

During the first interview with the instructor, students are advised of the intensive service-learning environment of the class. Students are expected to travel to a detention facility that may be 1–2 hours away. Students must also commit to enroll in two semesters and agree to meet or communicate with mentees over breaks, when many students are vacationing. Furthermore, the intent of the JRMP is to form a long-lasting relationship, so the matched mentee is expected to continue beyond the students' completion of the course and even beyond university graduation. Students are advised of the level of trauma that many detained youths have sustained. The instructor further explains that students should not enroll or should feel free to drop the course prior to the match commitment, if they feel like they cannot make a substantial commitment in time and relationship to the young person to whom they are matched. Many students do not enroll after the first interview, especially if they realize that they have current obligations that prevent them from making the commitment required.

Youths are invited to participate in this program by the YRTC counselor or the facility volunteer coordinator. After the youth is invited, they must attend a session held at the facility where the JRMP process is explained. When we created our model, we wanted to provide youths a voice. Consequently, we created a process for the detained youths to meet all mentors and voice an opinion of whom they would like to be mentored by. To facilitate this, after four classroom-training sessions, students travel to the YRTC and youths conduct ten-minute interviews with each mentor. Afterwards, the students submit a journal to the JRMP instructor to indicate the top two youths whom they wish to be paired with (they will only be matched to one.) The director sends a list of proposed pairs to the facility. All youths are encouraged to tell a facility staffer or counselor the mentor with whom they wish to be matched. Youths may opt out of the program at any time, but students are not allowed to request a different mentee after the selection is made. Students may drop the course, but it is strongly encouraged to do this prior to being matched to a youth mentee.

23 M. Garringer, J. Kupersmidt, J. Rhodes, R. Stelter and T. Tai. Elements of Effective Practice for Mentoring, 4th Edition2015, Final_Elements_Publication_Fourth.pdf (mentoring.org) (25.09.2021).

5.2. Standard 2: Screening

Screening involves interviewing potential volunteers to assure the student is suitable and safe to work with youths. To work in a detention center in Nebraska, mentors must be approved volunteers within the YRTCs. Consequently, mentors must complete the application required by the facility as well as necessary background checks: Criminal history records check to include Criminal Background, Sex Offender Registry, and the Nebraska Abuse/Neglect Registry. In addition to safety, students must have a certain level of resiliency, and be willing learn to not take youths actions too personally.

5.3. Standard 3: Mentor Training

Mentoring programs generally provide training prior to matching the mentor to a youth. The aim of training is to provide mentors with the basic knowledge of the population they will be working with, and to incorporate communication styles that match the philosophy of the mentoring program. JRMP mentors attend three class sessions prior to making the first trip to the facility. The early classes focus on ensuring that students know the exact commitment that they are making. We reiterate the trauma and disruption this population has already experienced and stress to students that they can drop the course without repercussion within the appropriate university timeline. Students are given an overview of juvenile law, juvenile practice, and working with an adolescent population. During this time, students are given regular writing assignments designed to reveal any bias, immaturity, or naïveté. These assignments may uncover potential problems like the mentee failing to show up for meetings. Or they may reveal the students' underlying thoughts and biases. It is not that these students are excluded, rather the instructor may pay closer attention to those matched with a mentee, to ensure the interactions are healthy. The writing assignments include a brief autobiography that is used during the matching phase.

5.4. Standard 4: Matching and Initiating

Matching is important because certain strategies help increase the chances that the matched pair will continue to meet long-term, thereby providing support for the youths, especially for reentry into the community. To facilitate the matching process, the JRMP instructor gathers information about the student volunteer, which includes geographic preference, background checks, and the autobiography. Generally, the facility selects specific youth to be mentored, matching youths who have limited family support, or who receive few or no visits while they are detained. The instructor must work with the facility closely to ensure that at least these additional factors are considered: (1) does the youth pose any risk to the student? and (2) which town or city will the youth return to?

The facility director generally also reads the student's autobiography to determine which youths may be good matches. Once an initial group is determined, the facility

director meets with each youth individually to determine whether they would like a mentor. Often, this requires explanation of what a mentor is and what the mentee should expect.

Facility site visits. The faulty member teaching the course and the facility director arrange a date and time for the students to come to the facility. YRTC facilities require that all persons working on-site receive training. The first visit allows for student mentors to receive any required training, to learn the rules of the facility, and to tour the physical location where they will meet with youths. The visit also involves mentor and mentee interviews, which is a round-robin style of questioning that allows each mentor and mentee the opportunity to get to know each other while still interacting as a group. A typical schedule is as follows:

Typical Agenda:

11:00 am arrival time at facility. Orientation to entry in a secure facility (check in; keys, cell phones, other items will need to be locked up for security purposes).

11:20 am – 11:50 am – Lunch with the youths in the dining hall.

11:50 am – 1:00 pm – Tour of the facility

1:00 pm – 2:00 pm – Orientation to the facility (rules and required policies)

2:00 pm – 3:00 pm – Interviews with youths

After the visit, mentors are asked to submit a journal to the instructor, with the names of two youths they are interested in mentoring. The facility director or staff will then ask the potential mentees for their feedback. Furthermore, the facility will work with the program to ensure that no youth feels "left out" for example, if a student misses the orientation. All youths are matched to a mentor. Final match approval must be given by the juvenile's legal guardian, but feedback from all interested parties is sought (probation, DHHS caseworkers, parent(s), foster parents, *etc.*). Instructors attempt to meet with the parent and guardian at this point in the case, but often the parents have disengaged, or parental rights have been terminated. However, mentors participate in the multi-disciplinary team that engages in the youth's reentry process, and legal guardians are invited to this team.

Introduction of mentors and mentees. After the match is determined, students send an introductory letter to the mentee with a description of themselves and their interests and a day and time that they propose to visit for the first time. The mentor is then able to begin setting up bi-weekly visits but must call the facility the morning of their intended visit to ensure that the youth's schedule and visitation status have not changed.

5.5. Standard 5: Monitoring and Weekly Support

Ongoing monitoring refers to the supervision of the mentor, and allows mentors to receive advice, brainstorm problems that come up in the match, increase their skills, and access resources the youths may need. Mentors participated in the JRMP from five college campuses that receive funding from a private foundation. Four of the universities fall under a state system, while the fifth is a private faith-based institution. On all campuses, students are expected to enroll in a year-long class, so that the match receives ongoing monitoring and support. After the introductory visits, mentors begin to meet with their mentee on average, every two weeks. Campuses that are closer to the facility generally require weekly meetings, while those further away require meetings once every three weeks. Mentors are expected to communicate via letter when they are unable to meet with their mentee. Students are required to submit a weekly journal to the instructor, in which they document activities the pair participated in and interactions with the youths. The journal is submitted for course credit. The journal also serves a larger purpose of informing the instructor of the student's perceptions, biases, preferences, concerns, and relationship with the youth. These journals may be shared with other involved juvenile justice professionals (the facility liaison, director, probation officer, or DHHS transition specialist) if deemed necessary and appropriate. Students are advised multiple times over the semester that their journals are documentation of visits and may be shared with the facility. However, if an issue arises that requires the instructor to share a journal, the student is notified and often asked to give further documentation.

Mentors initially meet with mentees onsite at the YRTCs or a secure facility. Visits continue in the facility until the juvenile has been released to the community. When a student travels to the facility independent of the class—this must be pre-arranged with the facility and is dependent upon visiting hours, facility programming, and youth behavior and/ or safety. Once the youths have been released, mentors are encouraged to meet with the youths at a location that helps the youths accomplish a reentry task (getting a state ID or driver's license, work on a class project.) Mentors may assist the youths with completing schoolwork, studying for the GED, applying for and obtaining a job, and listening and providing constructive feedback while the youths deal with friend/family relationships. However, mentors are also encouraged to intermix these with activities that the youths enjoy. The university may sponsor a group community-based activity annually, like attendance at a performance or a show.

Prior to COVID-19, mentors met within the facility for the first semester of the course. Facilities were instructed to select youths that had roughly 3–6 months or treatment left. Occasionally, a youth would be released prior to this time. Early release is generally associated with a youth making rapid progress, or a dramatic change in the youth's situation. Typically, mentors would meet with a youth for a minimum

of three months prior to the youth's release. The Faculty on each campus tracked youth release dates, compiled data, and followed an established curriculum. JRMP staff entered basic demographics, referral information, and outcomes for each case, and combine it with data from the NDHHS. After the course ends, JRMP staff would contact students every six months to inquire whether they remained in contact with their mentee and whether the program should close the case.

5.6. Standard 6: Closure

It is important to both the mentor and the mentee that matches close in a way that "affirms the contributions of the mentor and mentee, and offers them the opportunity to prepare for the closure."[24]At the end of the academic year, the mentor is required to tell the instructor his or her intention regarding the match. If the match remains open, the project coordinator will contact the mentor every 60 days to check-in with the mentor. When a mentor can no longer commit to meeting with the youth, the student is encouraged to meet the youth in person to explain that the mentor is unable to continue the match. Whenever possible we close the match at a time of natural transition, *i.e.*, the mentor's graduation, military deployment, getting married, or moving out of state. However, often it is the youth who ends the match, by failing to keep meeting times. If the youth is unable to be located for more than two months, the mentor sends a letter to the youth's last known address. If after two letters the mentor has not heard from the youth and cannot reach him or her, a third letter is sent notifying the youth and guardian that the match is being closed. A copy of this letter is emailed to the probation officer and legal guardian.

6. COVID -19 Protocol Adjustments

During the pandemic almost all educational systems reverted to online methods for instruction or shut down campuses altogether. Youths in detention facilities were not permitted visitors, even parents and guardians were not allowed to see their children. In the U.S., juvenile justice programming shut down from roughly February 2020 to August 2020, with curtailed services still in place in some jurisdictions. In Nebraska, roughly one third of all counties returned available funding because they were unable to provide services to youths. This totaled an estimated $1,077,290.[25]During the COVID-19 pandemic, many theoretical underpinnings of the project remained intact, while various practical elements of the program were

24 M. Garringer, J. Kupersmidt, J. Rhodes, R. Stelter, T. Tai, Elements of Effective Practice for Mentoring, 4th Edition, 2015, www.Final_Elements_Publication_Fourth.pdf (mentoring.org) (25.09.2021).

25 A. Hobbs, Private correspondence received 16.09.2021.

greatly impacted. Modifications to the program were made based on the outlined standards that guided program development.

6.1. Outcomes

On each of the campuses, JRMP students enrolled in the course during the fall semester, and the course continued through the spring. Consequently, when COVID-19 first appeared in the U.S, students had already undergone screening, matching, and training. This prevented the program from completely closing. Students also experienced a change in classroom format. Online classes allowed for ongoing mentor support and offered increased opportunities for private consultation with the instructor. However, when the JRMP began recruiting in fall 2020, class sizes were smaller due to the pandemic. Below we outline how COVID procedures impacted the best practice standards the program was built on.

6.2. Standard 1: Recruitment

Mentors continued to be recruited from the undergraduate student populations, across disciplines, but many students did not return to campus in the fall of 2020. Consequently, class sizes were smaller, and fewer mentors were available for youths. One of the University campuses had no students enroll for the JRMP course in fall 2020. This did not have a detrimental impact of the JRMP because detention rates in the U.S. (and Nebraska) also dropped by roughly 28% from March 202 to March 2021.[26]

6.3. Standard 2: Screening- COVID Procedures

During the pandemic, instructors utilized ZOOM to meet with interested students and to share information about the aims and expectations of the program. Students, however, were not required to make the same effort as they had prior to the pandemic. Prior to the pandemic, instructors intentionally required students take multiple steps to arrange the screening interview, the steps included: 1) the School's advisor instructed the student to contact the instructor; 2) the instructor worked with the student to find a time to meet in person; 3) the instructor rescheduled the appointment; 4) the student met for the interview on campus. Post COVID, students had only to access the ZOOM link.

6.4. Standard 3: Mentor Training- COVID Procedures

The COVID classroom covered identical material, but private meetings with students increased by 50% using an online format. Prior to COVID, students were encouraged to share match related questions in the classroom setting. The instructor

26 Annie E. Casey Foundation. As Pandemic Eases, Youth Detention Population Creeps Up. Posted May 10, 2021, https://www.aecf.org/blog/as-pandemic-eases-youth-detention-population-creeps-up (26.09.2021).

would frame the issue and ask for related incidents from other students. The aim of this was to share complicated matters and establish that many matches had met obstacles. If the student was concerned about confidentiality, or violating their mentees trust, they approached the instructor after class. Often this still was not a private environment. Students post COVID sought private ZOOM meetings with the professor at twice the frequency than prior to COVID. Perhaps because of the private environment, mentors shared more in-depth information about obstacles in the match.

6.5. Standard 4: Matching and Initiating – COVID Procedures

The first adaptations to be made impacted ongoing support and how students would meet and communicate with their mentees. Prior to the pandemic, youths in detention facilities were never allowed to access computers, electronic devices, or cellular phones outside of classroom use. In addition, all visitors (parents, mentors, professionals) are typically required to turn in any cell phones or tablets prior to entering a facility. With JRMP adaptations, youths were permitted access to a computer to communicate with the mentor.

Prior to the pandemic, student-youth interviews lasted approximately ten minutes and were conducted using semi-private conversations in a speed-dating format. When facilities stopped allowing in-person visits, the JRMP adapted by requesting ZOOM or WEBEX meetings. (WEBEX is the State of Nebraska's secure electronic meeting platform used by the courts). Instructors intended to send students and youths to break out rooms for the matching process. However, the facilities did not have adequate electronic capacity and each youth did not have their own computer or tablet. Instead of individual meetings, facility staff brought youths in front of the computer one by one. Students appeared on ZOOM, and asked youth questions in a round robin format. The responses were heard by staff and sometimes other youths waiting for their turn to be interviewed.

6.6. Standard 5: Monitoring and Weekly Support – COVID Procedures

Prior to COVID, students met with their mentee in-person, within the facility, approximately every two weeks. Students were encouraged to use "props" like playing a game and bringing snacks, to increase engagement and move through the initial awkwardness. After the initial meetings, the mentor and mentee usually moved into deeper, more personal conversations about the youth's drug or alcohol use, sexuality, relationships, reentry plan, and education. Students wrote about these topics in their journals and submitted these for a grade.

During COVID, the mentee and mentor conversations were truncated by lack of privacy. Although visits were supervised prior to COVID, staff had physical distance that allowed for some privacy. With COVID protocol, supervising staff, wearing masks, sat in close proximity, to the youth and the computer screen. While this was

likely due to a concern that the youths would misuse the technology (*i.e.*, go to an inappropriate site, or make contact with someone outside the facility beyond their mentor), the impact was that the mentor and mentee had almost no opportunity for private conversation. Additionally, prior to COVID, mentors brought games and snacks when they visited the facility in person, which increased the likelihood that youth showed up for initial meetings. COVID procedures led to a lack of interest in initial visits, and youths began missing electronic visits. In addition, staff within the facility often forgot to bring the youths to the electronic appointment, or other competing appointments got scheduled for the limited computers. In short, electronic visits were easier to ignore and cancel than when the student appeared in person.

6.7. Standard 6: Closure – COVID Procedures

The process for match closure remained the same, but due to the lack of depth in relationships, few pairs matured to strong mentor-mentee relationships, and few of the pairs in the Covid cohort had well-established relationships that continued after the youth was released from the facility.

6.8. Discussion

During the worldwide pandemic, youths residing in detention and treatment facilities were impacted more than the general population. Youths were not allowed family visits at the facility, nor did they earn furloughs home.[27]Once facilities went into stringent COVID lock-down, many youths went months without any contact from people outside of the facility. In addition, staffing shortages led to further confinement. In addition, if an individual within a facility contracted COVID, youths were often confined to their rooms to mitigate spread. Youths reported spending up to 23 hours a day in their detention cell.[28]

The JRMP was one of the few juvenile justice programs that remained, and continues to operate, despite COVID restrictions. The ability to pivot to an electronic meeting platform allowed the program to operate safely, but the format change impacted both the training the mentors received, as well as the quality of the relationships. Each of the elements of the JRMP curriculum were intentionally selected to enhance the mentor's skillset, establish expectations, and enhance the possibility that youth would have a long-term supportive person in their life.

Pre-COVID programmatic decisions allowed for college student mentors to build autonomy and responsibility through the multi-step processes required of them.

27 A. Kamenetz. COVID-19 Lockdowns Have Been Hard On Youth Locked Up. National Public Radio, https://www.npr.org/2021/03/29/979986304/covid-19-lockdowns-have-been-hard-on-youth-locked-up (03.29.21).

28 A. Chang. Conditions In The Juvenile Facilities Worsen During The Coronavirus Pandemic. National Public Radio – All Things Considered.https://www.npr.org/2020/05/15/857105187/conditions-in-the-juvenile-facilities-worsen-during-the-coronavirus-pandemic (05.15.20).

For example, students were required to contact an instructor, set up an appointment, and meet on campus. Often the instructor would reschedule. This process is identical to the process student mentors (and juvenile justice professionals) take with the youths they work with. The use of ZOOM meetings for screening removed the often frustrating multi-step process that prepared mentors for the thwarted meetings with the youths. While the meetings with the instructors became easier, the electronic format for meeting with the youths became more difficult.

Prior to COVID, the faculty screened out students who could not manage scheduling, and re-scheduling appointments adeptly. For instance, students who arranged meetings and then failed to show up, or called for a second meeting without acknowledging missing the first, were deemed unsuitable as mentors because they failed to demonstrate follow through and commitment. This basic, yet critical skill, is vital for mentoring youths in detention facilities because so many of the youths have experienced abandonment. During classroom instruction, faculties teach on abandonment issues, but students often do not connect this to missing appointments-and how the youths may respond. Youths who have experienced childhood trauma and abandonment issues may experience additional emotional harm when matched to a mentor who is cavalier about showing up.

Beyond the classroom, the use of ZOOM was even more detrimental to the formation of the mentor-mentee relationship. During the matching process, students were not able to meet one-on-one with potential mentees due to a lack of computers. Consequently, the matching process was done by bringing each youth before a panel of mentors. The format was overwhelming for many of the youths being interviewed, and the information shared was done in a group setting and was less intimate. Prior to the pandemic, during the match process youths would share important snippets from their life. Often the mentor keyed in on this and had a related experience and the common ground set the stage for the match. The group matching process limited sharing personal information, and this influenced how pairs formed.

Even once mentors were paired to a mentee, the ZOOM format did not allow for intimate and meaningful conversations. Staff closely supervised every aspect of the ZOOM meeting, often sitting within arm's reach of the computer. In some instances, staff spoke for the youth, or joined the conversation, especially if the youth was slow to respond. In addition, many meetings simply failed to happen. Students reported calling in at the appointed time for the ZOOM meeting and no one, neither staff, nor mentor, would appear. It was unclear whether youths were electing not to attend or if staff were failing to get them from their room, or if inadequate staffing led to an inability for staff to bring the youths forward. Prior to COVID, mentors would physically show up to the detention facility. The physical presence allowed the mentor to decipher whether the youth was refusing to meet or whether the youth had conflicting appointments. This was important information for the mentor to know about a developing match, and to discuss with the mentee. Prior to the pandemic,

if a mentee failed to keep two meetings, the JRMP directly asked whether the youth really wanted a mentor. Post COVID, youths did not even appear, aware that they had missed a meeting, and facility staff did not acknowledge it, leading to broken mentoring pairs.

Finally, prior to COVID, mentors sat in on the youth's reentry team meetings, where they met the youth's parent or guardian and juvenile justice professionals. This gave the mentor resources, for example the mentor might ask the probation officer for ways to help the youth complete the court plan. Or if the youth stopped attending pre-arranged meetings, mentors would ask the probation officer to gain insight on the youth's feeling about having a mentor.

Despite the impact on the mentoring relationship, there were some positive aspects that emerged from the adaption to COVID protocols. College campuses nationwide went to remote learning, and Nebraska followed suit. In many ways the online platform increased intimacy and connection between instructors and students. Students were virtually in the professor's living room, kitchen, or home office, and often got to meet other family members and family pets. Prior to the pandemic, students had to set up a time to meet during office hours, and many students simply did not make this extra step. The accessibility and more personal nature of class led to more specific conversations with students, and more honesty about the problems with the program.

Conclusions

The JRMP was one of the few juvenile justice programs in Nebraska that continued to operate during the pandemic. Major programmatic takeaways include utilizing Zoom for student training and relationship building with the instructor as well as connecting with youths using telephone calls. Rather that asking students to meet during office hours or speak with the instructor after class, Zoom was found to be an effective strategy for engaging with busy students and providing support on often difficult topics. Similarly, once in person visits resume, instructors will request that mentees be allowed to continue to utilize telephone calls to allow for additional methods of connection between mentors and youths. It is unlikely, however, that the JRMP will continue ZOOM meetings with mentor and mentee, while in the facility. Subsequent research will examine quantitative indicators of match quality, like the number of matches that ended prior to release from the facility and whether match lengths were statistically shorter during the pandemic. Future work should focus on recommitment rates and whether youths assigned a mentor have fewer subsequent law violations after release.

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I Will Kill You and Nothing Will Happen: Extra-Judicial Killings in Nigeria and Public Interest Litigation

Abstract: Public interest litigation is a mechanism of intervention in a matter that concerns the public. It could be about human rights, government policy, or some other issue that could present a challenge to public life. Public interest litigation is important because it presents hope to the powerless and offers justice where there might not previously have been the opportunity. The aim of public interest litigation is to recognise injustice and give a voice to the concerns of members of society who might not have the means to articulate them. In Nigeria there is a high tendency for people of low socioeconomic status to experience police brutality, or even become victims of extra-judicial killing. In this article, it was argued that although public interest litigation is a good strategy to engage the injustice of extra-judicial killings, the recurrence shows that the solution lies more in addressing a systemic problem.
Keywords: extrajudicial killings, police, public interest litigation, security forces

Introduction

Institutional weaknesses in Nigeria have often resulted in social challenges that vary in severity. Extra judicial killings for instance, are a problem in Nigeria, which is

a consequence of low executive constraint.[1] Since the change in political dispensation, from military regimes to democratically elected governments, there has been an increase in violence of varying degrees, perpetrated by uniformed men, bandits, religious fundamentalists, and cultists.[2] It appears that Nigeria, like many developing nations, is a Hobbesian state, since the value of human life becomes subject to a primeval prescription for survival, that suggests that 'might is right'. The monopoly of force which was exclusive to the Nigerian state, and which is one of the indicators to show whether a state has failed or not, has now become lost to a proliferation of arms in the wrong hands.[3] There is a rising level of lawlessness caused by extra-judicial killings, especially by the police force, and with the worsening policing in Nigeria, extra-judicial killings seem to be on a rising curve.[4] The police force is crucial to the domestic security of a country. To know how orderly and secure a society is, the professionalism and effectiveness of the police force is a very pertinent factor.

Public interest litigation is the balance that counters police brutality. Public interest, as a term was, a creation of the social unrest that took place in the 1960s in the United States. It was consolidated by the normative practice advanced by Louis Brandeis. Before he was appointed a U.S. Supreme Court justice, he had, as a lawyer, integrated advocacy for the public interest into private practice.[5] In a popular speech made in 1905, Brandeis had lamented the legal profession at the time that:

> Able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people.[6]

1 Low executive constraint is a term for the power imbalance that could occur in a developing state, which is characterized by a severe political or legal incapacitation of the legislative arm and the judicial arm of government to check the excesses of the executive arm. This usually occurs when the executive arm of government becomes too powerful by means of a defect in the constitutional allocation of power or resources.

2 A.E. Ojie Ethnicity, and the Problem of Extrajudicial Killing in Nigeria, "Journal of Black Studies" 2006, vol. 36 no. 4, p. 546, https://www.jstor.org/stable/40034770 (2.11.2020).

3 International Crisis Group, Violence in Nigeria's North West: Rolling Back the Mayhem (18.05.2020), https://reliefweb.int/sites/reliefweb.int/files/resources/288-violence-in-nigerias-north-west.pdf (1.10. 2021); D.E. Agbiboa, The Precariousness of Protection: Civilian Defense Groups Countering Boko Haram in Northeastern Nigeria, "ASR" 2020, vol. 64 no.1; C. Danjuma Dami, Impact of Terrorism, Banditry and Kidnapping on Human Security in Nigeria, "Saudi J. Humanities Soc. Sci." 2021, vol. 6 no. 8.

4 E.U.M. Igbo, The Use and Abuse of Police Powers and Extrajudicial Killings in Nigeria, "African Journal of Criminology and Justice Studies" 2017, vol. 10 no. 1.

5 E. Rekosh, K.A. Buchko, V. Terzieva, Pursuing the Public Interest: A Handbook for Legal Professionals and Activists, Public Interest Law Initiative in Transitional Societies, Columbia 2001.

6 *Ibidem.*

This was a reflection that today mirrors the reactive state of legal practice in Nigeria, where it seems that lawyers have chosen to be passive actors in the social sphere. Public interest litigation, although it has been a veritable tool of resistance employed by human rights activists and legal professionals in many countries of the world, has its own challenges. Literally, extra-judicial execution is an unethical crime by governmental authorities in contradiction of humanity. It is basically the unlawful killing of human beings that is *void ab initio*, and *ultra vires* since it is without legal process and or judicial proceedings.[7] While public interest litigation simply means using the law to augment human rights, public as well as sometimes private issues, and address far-reaching concerns of the public.[8] The Constitution of the Federal Republic of Nigeria (as amended), being the grundnorm of all laws, is the supreme law of the land.[9] Accordingly, unlawful arrests and extra judicial killings contravenes the constitutional rights to personal liberty, and life, guaranteed under sections 33–35.[10] Particularly, 33 which stipulates the right of life to every person except in the instances of the sentence of a court of law in respect of a criminal offence found guilty of in Nigeria. And section 46 further provides for the special jurisdiction of the high court and legal aid in such instances.[11] Thus, the basic principles of necessity, legality, and proportionality must be in *tandem* with the seriousness of the offence and the legitimate objective to be achieved in accordance with the strict rule of law.

Historically, Nigeria has a deep-rooted genesis of violation of human rights and extra judicial killings from her colonial roots.[12] The British colonial masters, in an effort to consolidate and expand their power, grossly violated the rights of Nigerians. In addition, the mutual pledge system was a prototype to the institution of the Police force in Britain. Under this system, villagers were responsible for their safety as well as protection of their settlements from thieves and marauders. It was a sort of collective responsibility for everybody.[13] Arguably, this was a distinct time in history as there were little to no extra-judicial killings at the time, based on being each other's neighbour's keeper, and communal living of sisterhood and brotherhood. However, sixty-one (61) years after independence, Nigeria continues to experience extra judicial killings despite some measures of public interest litigation. Nigeria's experiences date

7 O.O. Elechi, Extra-Judicial Killings in Nigeria: The Case of Afikpo Town, National Criminal Justice, Case Number 202800 (2003), https://www.ojp.gov/ncjrs/virtual-library/abstracts/extra-judicial-killings-nigeria-case-afikpo-town (4.10.2021).

8 A.T. Vahyala, Dissecting Management Strategies of Farmer-Herder Conflict in Selected Vulnerable States in North-Central Nigeria, "GIJMSS" 2021, vol. 4 no. 2 p. 17.

9 Section 1 CFRN 1999 Third Alteration Act as amended 2011.

10 M. Ladan, Combating Unlawful Arrests, Torture and Extra-Judicial Killings in Nigeria, "SSRN Electronic Journal" 2013.

11 Anti-Torture Act, Laws of the Federal Republic of Nigeria, Number 21, 2017.

12 A. Jauhari, Colonial and Post-Colonial Human Rights Violations in Nigeria, "IJHSS" 2011, vol. 1, issue 5, p. 53.

13 *Ibidem.*

back to the epochs of military and civilian rule. The military rule denoted absolute authoritarianism, coup d'etat, unconstitutionalism, and abuse of power.[14] After every military coup, the government suspended the constitution and, thus, liberated itself of the accountability towards its people.[15] It is against this backdrop that Nigerian Afro beat king, Fela Anikulapo Kuti and the Egypt 80 Band, which debuted "Animal Rights", satirized the military on its abuse of human rights.[16] Arguably, it suffices to assert that extra judicial killings were primarily the order of the day during that brutal military era.[17]

On the other hand, civilian rule also came, a supposed democratic and peaceful regime with the unique opportunities of public interest litigation and the acclaimed protection of fundamental rights. Yet, it is said to be characterized by an institutional failure in observing people's rights.[18] In order to hold on to power, the civilian leaders denied freedom of expression, practiced unlawful and extra-judicial killings, and rigged elections. With successful transition to democracy in 1999, and the consequent stabilization with the conduct of four successive elections as of 2011, Nigeria continues to confront serious human rights challenges politically and socio-economically, including the culture of impunity where perpetrators are often not held accountable for their actions in forms of corrupt practices, extra-judicial killings by the police, and the Boko Haram insurgency.[19] This indicates the worsening human rights situation even after independence as compared to the colonial period.[20] Nigeria is a signatory to many international human right initiatives; nonetheless, the country also has a history of human rights violations involving unjustifiable torture and extra-judicial killings.[21] The almost daily occurrence of extra judicial killings, and or accidental discharge, causing fatal harm to innocent citizens, and abuse of

14 J. Mbagwu, A. Mavalla, Nonviolent Approach: Alternative to Military Strategy for Curbing Terrorism in Nigeria, "ASRJETS" 2016, vol. 26, issue 3, p. 124.

15 *Ibidem.*

16 S. Chukwu, G. Emerinwe, Police Brutality and Human Rights in Nigeria's Democracy: Focus on Restoration of Man's Dignity, "Revista Brasileira de Gestão Ambiental e Sustentabilidade" 2020, vol. 15 issue 7 p. 155.

17 S. Zems, Police-Public Relations as a Potent Tool for Combating Crime, Insecurity, and Social Disorder in Nigeria. "IJBMI" 2016, vol. 5, issue 11, p. 20.

18 C. Ugochukwu, O. Nwolu, The Influence of Social Media Framing on Audience Perception of EndSARS Agenda Protest, "J. Media Commun. Stud." 2021, vol. 2, issue 1, p. 14.

19 G.L. Animasawun, Causal Analysis of Radical Islamism in Northern Nigeria's Fourth Republic, "Afr. Secur. Rev." 2013, vol. 22, Issue 4, p. 231, G. Animasawun, The Military and Internal Security Operations in Nigeria's Fourth Republic: Rethinking Security for Positive Peace in Maiduguri Nigeria, "J. Peace Res." 2012 vol. 45, Issue 2, p. 113.

20 O.C. Obi-Nwosu, H.C. Nwafor et al., The Psychological Implications of #EndSARS Protest in Nigeria: A Theoretical Expository Approach. Curr. j. appl. 2021, p. 20.

21 J. Dada, Impediments to Human Rights Protection in Nigeria, "Ann. Surv. Am. L." 2012, vol. 18, issue 1, p. 67; I. Adegbite, Human Rights Protection and the Question of Good Governance in Nigeria, "Journal of Humanities" 2018, vol. 4, p. 219; U. Emelonye, Non-Governmental Appraisal

firearms by security agencies is a source of serious security and safety concerns. After about two decades of military rule in Nigeria, Nigerians appeared to have misplaced their ability to contend for their rights up until the 2020 #EndSARs protest, which resulted in more extra judicial killings. In this vein, the Nigerian government have continued to remain untouchable. More so, any attempt to talk about human rights has been very controversial since the return of democracy in 1991, because the police have problematically taken over the lawlessness of the military.[22] Idiomatically, it seems to be the case of the dark spots of a leopard which cannot be washed away by rain.[23] Therefore this article will discuss the serious problem of extrajudicial killing in Nigeria, and how public interest litigation can be used to get justice for the families of victims. It will also discuss the challenges of public interest litigation. This article uses desk, and analytical, research. Data such as journal articles, newspaper reports, online sources, and international instruments were collected. The data was processed through content analysis.

1. The Meaning and Concept of Extra Judicial Killings

The right to life is very important in the realization of human rights and without it being protected, human rights are in danger of violation. This is because human rights are just as essential to a living person as personal possessions are. This is why for the African Commission, the right to life is the foundation of all other rights. Kayitesi also observed in a general comment that the right[24] to life is so important that 'without it, there can be no human rights.'[25] The right to life is at the core of the philosophical basis for human existence and was the provision in Article 3 of the Universal Declaration of Human Rights 1948, where it was stated that everyone, without exception, has a right to life and the security of their person.[26] At the regional level, the African multilateral human rights instrument provides for the right to life

of the Frameworks for the Promotion and Protection of Human Rights in Nigeria, "GJPLR" 2021, vol. 9, no. 5, p. 31.

22 S. Chukwu, G. Emerinwe, Police brutality and human rights in Nigeria's democracy: Focus on restoration of man's dignity, "Revista Brasileira de Gestão Ambiental e Sustentabilidade" 2020, issue 7, vol. 15, p. 155.

23 S.I. Ifejika, The Nigerian State and International Human Rights Laws in the Fourth Republic, "Pertanika J. Soc. Sci. Humanit.: 2021, vol. 29, issue 1, p. 581.

24 African Commission on Human and Peoples' Rights, General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4), Pretoria University Law Press November (2015), https://www.achpr.org/legalinstruments/detail?id=10 (1.10.2021).

25 S.Z. Kayitesi, General Comment No. 3 On the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), ACPHR (2015), https://www.achpr.org/legalinstruments/detail?id=10 (1.10. 2021).

26 Universal Declaration of Human Rights, 1948 (UDHR) Article 3.

in Article 4 of the African Charter on Human and Peoples' Rights (African Charter). It provides that:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person, and no one shall be deprived of this right.[27]

The Nigerian constitution, deriving from state practice, provides for the right to life thus:

> Persons living in Nigeria, shall have a right to life and no one shall be deprived intentionally of his life unless in execution of the sentence of a court of a criminal office of which he has been found guilty.[28]

The description of the social contract[29] in Thomas Hobbes's Leviathan, makes it correct to assume that it is the duty of the government in any country to protect the right to life and all other rights for that matter, because in any state, the government is expected to have monopoly of the use of force. This is why the right to life becomes endangered in countries where executive power is unrestrained and where impunity overrides the rule of law. In some developing states where executive power is unrestrained, governments violate the right to life of citizens where there is a threat to the private interests of the people in government or resulting from police brutality. Extra-judicial killing is a violation of the right to life, and it is any killing that is not sanctioned by law and that is carried out by agents of the state. Sommer and Assal defined extra-judicial killings as the instances where a government murders its subjects without judicial oversight.[30] It is the brutish and highhanded display of executive power and the corrosion of constitutional processes. Many times, extra-judicial killings are often a sign of a weak rule of law and institutional decay.

Some people who are in support of extra-judicial killing believe it is a short-cut to justice especially where the judicial system is slow and ineffective.[31] The Queensland Human Rights Commission wrote that public entities should not engage upon the negative duty of depriving the right to life, but take on the positive duty to ensure that the right to life is protected as it should.[32] Extra-judicial killing is a betrayal of the

27 African Charter on Human And Peoples' Rights (African Charter), Article 4, https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (1.10. 2021)

28 Constitution of the Federal Republic of Nigeria (as amended) 1999, Section 33.

29 T. Hobbes, Leviathan, Create Space Independent Publishing Platform 2011.

30 U. Sommer, V. Asal, Examining Extra-judicial Killings: Discriminant Analyses of Human Rights' Violations, "Dynamics of Asymmetric Conflict: Pathways toward terrorism and genocide" 2019, vol. 12, issue 3.

31 J. Fernquest, State Killing, Denial, and Cycles of Violence in the Philippines, "PSR" 2018, vol. 66.

32 Queensland Human Rights Commission, Right to Life, Queensland Human Rights Commission (2019), https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-life (1.10. 2021).

responsibility to protect, and it is an indictment on state power. There are evolving meanings of extra-judicial killing and one is the new definitions presented by the Philippine law, the Special Protection of Children in Situations of Armed Conflict Act (Republic Act 11188) signed on 10 January 2019, which defines extra-judicial killing as:

> Extrajudicial killings refer to all acts and omissions of State actors that constitute violation of the general recognition of the right to life embodied in the Universal Declaration of Human Rights, the United Nations Covenant on Civil and Political Rights, the UNCRC and similar other human rights treaties to which the Philippines is a state party.[33]

Extra-judicial killing is not only a problem in developing countries, but it has also become expressed in police brutality that has led to the deaths of suspects in developed countries like the United States,[34] this has proved that extra-judicial killing is a real problem that must be resolved in states across the world to protect human rights. It is even more urgent as the United Nations has noted that there has been a rise in extra-judicial killings in some African countries, particularly, Nigeria, and Sudan.[35] It is important that the context of extra-judicial killings in developing countries is expanded a little bit to accommodate the mob lynching that is done by non-state actors to suspects. However even extra-judicial killing that is done through mob lynching results from the failure of government in the countries where such events take place, to protect the right to life.

2. Extra Judicial Killings in Nigeria

There is no doubt that many lives have been lost to extra-judicial killings in Nigeria; however, this article will focus on extra-judicial killings executed by members of the police force. One of the several instances of extra-judicial killings

33 Special Protection of Children in Situations of Armed Conflict Act (Republic Act 11188), 2019 Section 5.

34 The Center for Justice & Accountability, Extrajudicial Killing of Black Americans, The Center for Justice & Accountability (2020), https://cja.org/what-we-do/litigation/extrajudicial-killing-of-black-americans/ (1.10. 2021); HRMI Rights Tracker, United States: How Well is the United States Respecting People's Human Rights? Human Rights Measurement Iniative (2019), https://rightstracker.org/en/country/USA (1.10. 2021).

35 United Nations Human Rights Council, Disturbing Wave of Extrajudicial Executions on the Rise in South Sudan's Warrap State – UN Experts Note, United Nations Human Rights Council (2021), https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27345&LangID=E (1.10. 2021); V. Ojeme, UN Expresses Concern Over High Rate of Extra-Judicial Killings in Nigeria, Vanguard, https://www.vanguardngr.com/2019/09/un-expresses-concern-over-high-rate-of-extra-judicial-killings-in-nigeria/ (1.10. 2021).

by the Nigerian police was the case as far back as 2008, of a 22 year old student, Chukwuemeka Matthew Onovo, who left his father's house one morning in 2008 and never returned.[36] The boy's father, who had gone to report to the police about his missing son, was later told by his son's neighbours that there had been a gunfight with the police around his house. When Chukwuemeka's father got to his son's place, he found the boy's glasses on the ground. The police had told Chukwuemeka's father that his son was an armed robber. Even though someone who was a witness to the whole incidence said that Chukwuemeka was unarmed when the police killed him.[37] There was no further action to find Chukwuemeka's killer despite a court-ordered autopsy finding that he had died of a bullet injury.[38] Chukwuemeka was his father's only son and child. This kind of story is similar to the cases of so many people who have lost their loved ones to extra-judicial killings by the Nigerian police, as the Nigerian Police Force is guilty of many extra-judicial executions. In many instances, no one is held accountable for the murders.[39] Extra-judicial killings are one way the Nigerian security forces manifests its high-handedness.

In many other ways, police oppression manifests in arbitrary arrests, torture, and false detention. It is without doubt that extra-judicial killings are a threat to the collective existence of every Nigerian citizen, since the risk remains of the growth of such an ugly reality in the law enforcement of Nigeria. Not all the victims of extra-judicial killings in Nigeria die from gunshots; some are tortured to death in detention.[40] The monstrosity of extra-judicial killings perpetrated by the Nigerian Police Force came up again into the public space when in April, Kolade Johnson, a young man who had just returned from South Africa, was killed by police stray bullet at a football viewing centre.[41] It becomes even worse when the police authorities are silent and pretend that these things do not happen. There are some regulatory defects within institutions in Nigeria that allow for exploitation of whatever benefits or power such institution is embodied with. For instance, the old Police Force Order 237, allowed the police the liberty to shoot any suspect or detainee who attempted to escape or resist arrest. The thought behind that directive negated the presumption of innocence and has made many people victims of a system lacking in administrative coordination and insight. Recently there has been a modification of Police Force

36 Amnesty International, Killing at Will Extrajudicial Executions and Other Unlawful Killings by the Police in Nigeria, Amnesty International Publications (2009).

37 *Ibidem.*

38 *Ibidem.*

39 *Ibidem.*

40 *Ibidem*.

41 B. Adebayo, The Fatal Shooting of a Nigerian Man Brings more Demands to Shut Down a Controversial Police Unit, https://www.google.com/cnn/2019/04/02/africa/nigeria-police-shooting-outrage-int/index.html (4.11.2019).

Order 237,[42] and this is driven towards addressing the abuse of force by the officers of the Nigerian Police Force. The abuse of the use of force by the Nigerian police is something which seems deeply entrenched and cannot just be addressed by a window-dressing review of the Police Force Order 237. It becomes quite pertinent to point out that the problems of policing in Nigeria and the non-conforming unprofessionalism that marks certain practices in the Nigerian Police Force are issues that reach far deeper into the institutional integrity of the force itself.

With the institutional rot in the police system in Nigeria, it is time to ask very important questions about the recruitment procedures; if there ever is a background check on candidates, as there is a huge possibility that without background checks on candidates, the system would have handed a country's security into the hands of criminals and cutthroats. This is true when stories that some police officers give out service arms to robbers emerge, highlighting the need to weed the police force of some criminally minded officers, as these people pose a threat to society. The Latin phrase, '*Quis custodiet ipsos custodes*'[43] written by the Roman poet, Juvenal in the 2nd century AD, and which translates to 'Who watches the watchers themselves' aptly captures the institutional dilemma that confronts policing in Nigeria. If the common people are dying from police excesses, as long as the rich and powerful people are not affected, change is not necessary. The lack of accountability which is rife in Nigeria's institutions does not exempt the Nigerian Police Force. The lack of accountability within the Nigerian Police Force cascades down from the top down to the lower ranks. The posturing of the top ranks of the police force signals to the lower ranks that a police officer is above the rule of law, and that as guardians, they possess limitless powers to do whatever they want.

To an average Nigerian citizen, the police represent 'images of surveillance, inconvenience, embarrassment, frustration, and indignation, as well as the prospect of coercion and violence.'[44] It has become so bad that there is so much public mistrust of the police that many people would not see a difference between the police force and what they are to protect people from. The image of the Nigerian Police Force, internationally, is depictive of how the world views the security situation in Nigeria. The police leadership in Nigeria appear lacking in the will necessary for the reformation of the police force. Often times, policies brought about by different police Inspectors General only seem to go a short way in addressing what is obviously a systemic problem. There are many things wrong with the police system in Nigeria,

42 Channels Television, IG Unveils New Police Order 237 on Use of Force, https://www.channelstv.com/2019/10/03/ig-unveils-new-police-order-237-on-use-of-force/ (4.11.2019).

43 Juvenal, Satire: Satire VI, Juvenal, 2nd century AD.

44 M.R. White, T.C. Cox, J. Basehart, Theoretical Consideration of Officer Profanity and Obscenity in Formal Contacts with Citizens, (in:) T. Barker, D.L Carter (eds.), Police Deviance, Anderson 1991.

and this is made more obvious by the fact that there have never been serious reforms to restructure the police force in Nigeria, and the system through which it operates.[45]

3. Meaning and Historical Background of the Concept of Public Litigation in Nigeria

Public interest litigation as a concept is the initiation and sustenance of legal action in court so as to derive a monetary or legal entitlement in 'favour of the general public, a community or class of persons by an individual, group, or organization, who might have some or no personal interest in the outcome.'[46] Public interest litigation has come a long way as a tool in the derivation of justice for social change. Public interest litigation developed from the need to address widespread social injustice. The origin of public interest litigation is entrenched in the history of social activism in the United States when it became popular and was employed in the social chaos of the 1960s.[47] Civil rights groups and lawyers advocating against racism resorted to public interest litigation in the resolution of injustices. The concept of public interest litigation was made popular by Louis Brandeis, lawyer who was an advocate for communal interests as regards justice.[48] Public interest litigation history in Nigeria began with the flourish of legal activism in Nigeria, during the military regime that saw many human rights abuses. Prior to that time, public interest litigation had no strong antecedence, and was a child of necessity at a time military repression was most debilitating.[49] The rise of lawyers like the late Gani Fawehinmi, was on his dedication to the development of public interest litigation and in the training of lawyers like Femi Falana who continued its development in Nigeria. It was said of Gani Fawehinmi that he:

> …resisted arbitrary actions of government that were arguably inconsistent with the rule of law using PILs whether it was to force military governments to render an account of oil export earnings, or to challenge the misuse of public funds by the wife of a military president, her 'office' not being created by law, or to declare unconstitutional, the setting aside of 5% of the

45 D.D. Ayoyo, Police Officers' Assessment of NPF Reforms: Evidence from an Area Command in Ondo State, "Police Practice and Research" 2019, vol. 20, issue 1.

46 O.I. Usang, Public Interest Litigation: A Veritable Avenue for the Fight Against Corruption in Nigeria, "NAU.JCPL" 2021, vol. 8, issue 1.

47 A. Mukherjee, Public Interest Litigation- Genesis and Evolution, Law Circa, https://lawcirca.com/public-interest-litigation-genesis-and-evolution/ (3.10.2021); O.I. Usang, Public Interest Litigation: A Veritable Avenue for the Fight Against Corruption in Nigeria, "NAU.JCPL" 2021, vol. 8, issue 1.

48 J.S. Dzienkowski, The Contributions of Louis Brandeis to the Law of Lawyering, "Touro Law Review" 2016, vol. 33.

49 J. Otteh (ed.), Litigating for Justice: A Primer on Public Interest Litigation, Access to Justice 2012.

> Federal Government allocation to all Local Government Authorities for the maintenance of traditional rulers.[50]

Today, activities of the human rights organization, The Socio-Economic Rights and Accountability Project (SERAP) is well represented in Nigeria's public interest litigation scene, as the organization has contributed so much to public interest litigation in Nigeria. From challenging government policies that threaten citizens' human rights, to instituting action to give legal force to the right to quality education, SERAP has been at the forefront of contemporary public interest litigation in Nigeria.[51]

4. Public Interest Litigation to the Rescue?

Impunity is the empowerment factor for extra-judicial killing in Nigeria. Where it concerns the police force, impunity means that there are no effective checks to the executive power that the police wield, therefore it is common to hear a police officer in Nigeria saying, 'I will kill you and nothing will happen.' Impunity is also the trigger factor in extra-judicial killings that happen through mob-lynching where citizens are concerned. This is because there are rarely any sanctions for extra-judicial killings in Nigeria. Public interest litigation as a tool for social change holds much promise in tackling the high rate of extra-judicial killings in Nigeria. However, there are some challenges to its practice. Firstly, the reality of litigation in Nigeria is that it can be slow and costly, and justice can only be realized where the judicial system is fast and efficient.[52] The Nigerian state, as a developing one, has a weak judicial structure, just like many developing states, with judicial structures mired by institutional decadence.[53] Public interest litigation as a tool for social change is largely dependent on good judicial structures, since justice is its aim. Another problem that public litigation can face in Nigeria is the enforcement of judgments. The enforcement of judgment is dependent on the seamless, effective interaction of institutions and the accountability of institutional leaders. This is also lacking in Nigeria, with unlawful actions committed by security officers done with impunity. To get public litigation to serve the interest of justice in Nigeria, there should be an attempt to tackle the problems that would limit its effectiveness. One reason public interest litigation is

50 *Ibidem.*

51 O.I. Usang, Public Interest Litigation: A Veritable Avenue for the Fight Against Corruption in Nigeria, "Nnamdi Azikiwe University Journal of Commercial and Property Law" 2021, vol. 8, no. 1.

52 H. Doma, Enhancing Justice Administration in Nigeria through Information and Communications Technology, "The John Marshall Journal of Information Technology & Privacy Law" 2016, vol. 32, no. 2.

53 O.M. Lalude, A. Fatehinse, Economic Justice and Judicial Structure: Realizing Economic Growth in Nigeria, "Society & Sustainability" 2020, vol. 2 no.1.

engaged in the developed state is to challenge existing state policy or address a social problem. In Nigeria, the flagrant disregard for the rule of law and the impunity has emasculated the power of legal advocacy.

The ambition of legal practitioners to enrich themselves, which has become heightened by the deepening poverty rates in Nigeria is killing advocacy and has made the career trajectory of public interest advocates seem almost unpragmatic. Furthermore, there is a legal technicality in Nigeria that impedes the successful prosecution of public interest litigation cases, which is the requirement of a 'sufficient interest' or 'injury' that supersedes that of the other members of the community.[54] This legal challenge, notwithstanding that it hopes to curb the abuse of legal processes, still stands against justice in matters that would be better prosecuted through public interest litigation. One of the risk factors for extrajudicial killings in Nigeria is the congestion of prisons with people awaiting trial. World Prison Brief shows that 49,139 inmates, which is about 74.8% of the prison population and 23 percent of the national population are pre-trial inmates.[55] This stretches the fragile infrastructure of the prison system wafer thin and allows for the possibility of extra-judicial executions off the radar of the justice system. In some cases, extra-judicial killings may result from extreme torture. From 2017 to 2019, Amnesty International did field research into human rights abuses committed by the Nigerian police, especially the Special Anti-Robbery Squad (SARS), the notorious police unit that inspired the End SARS protests of 2020 in Nigeria. The findings of their research revealed the sordid practices of the Nigerian police that has led to the loss of many lives. They also found that, despite the legislation against torture, which is the Anti-Torture Act, the lack of interest of the authorities makes it seem like torture is institutionalized.[56] One of the victims of SARS brutality, Sunday Bang, who had been arrested because his girlfriend's house had been robbed some few hours after he went visiting, told Amnesty International:

> They took me to the torture chambers the second day after my arrest. One police officer, in charge of torture, came with a bicycle/car tyre tube and a hard piece of wood. He tied my left arm with the tube. It was very painful, and my arm went numb. He tied me from my palm to the end of my upper arm. They beat me with a stick and rod on my arms, knees, and legs. They broke my two legs… I couldn't stand... I was bleeding from my legs and body. My blood was flowing all over the floor. I kept telling them that I was innocent of the accusation. The police officer was threatening he would

54 J.N. Mbadugha, Locus Standi and Public Interest Litigation in Environmental Matters in Nigeria: Lessons from Centre for Oil Pollution Watch V Nigerian National Petroleum Corporation, "The Gravitas Review of Business & Property Law" 2020, vol. 11, no. 3.

55 World Prison Brief, Nigeria, https://www.prisonstudies.org/country/nigeria (20.07.2021).

56 Amnesty International, Nigeria: Time to End Impunity: Torture and Other Violations by Special Anti-Robbery Squad (SARS), Amnesty International Nigeria 2020, AFR 44/9505/2020.

> shoot me, if I didn't admit that I participated in the robbery. I was very weak, because I had not eaten any food since my arrest.[57]

He had been beaten severely and even kept further in detention, after the robbers had been arrested, so as to make sure his injuries healed, thereby wiping any evidence for the torture. They had gone ahead to extort his family members before releasing him.[58] When he had been arrested, he was denied a lawyer, and from seeing his family.[59] This sort of story is typical of many others and part of a pattern of operation. SARS brutality had been so widespread that it was the original demand of the countrywide End SARS protests that rocked Nigeria in 2020. The occurrence of police brutality, and the effect of its viciousness that sometimes leads to the death of the victims, often cannot be matched by the legal interventions of public interest lawyers. Even if there were more public interest lawyers to cope with the many incidents of severe human rights abuse, or extra-judicial killings, the Nigerian courts, already congested with numerous cases, would only be burdened further by cases that would never be resolved in time to apprehend the injustice. Since it appears that public interest litigation, as a form of intervention, in Nigeria, is beyond the sole capacity of legal aid groups or human rights lawyers, the Nigerian Bar Association (NBA) set up a public interest litigation committee to coordinate public interest litigation for the association.[60] Unfortunately, even a committee of the NBA cannot achieve so much, as the pressure of many incidents of police brutality outweighs the intervention of advocacy.[61] Even though public interest litigation faces challenges in Nigeria, this does not mean that it has failed, and will fail, in achieving justice. What it means is that the challenges would have to be taken as its reality and its expectations rationed. It would mean that public interest litigation would not rise above institutional challenges, but would have to be adapted to it. Public interest litigation would not just be about arguments in court, or resistance in the form of legal advocacy, it would also involve the strong engagement of the public sphere. This could be on the virtual spaces of social media or on the insistent waves of radio stations. The power of the public sphere should never be missing where public interest litigation is concerned in Nigeria.

57 *Ibidem.*

58 *Ibidem.*

59 *Ibidem.*

60 Premium Times, NBA Sets Up 'Public Interest Litigation Committee', https://www.premiumtimesng.com/news/more-news/436537-nba-sets-up-public-interest-litigation-committee.html (4.10.2021).

61 Gboyega Akinsanmi, Nigeria Records 122 Extra-Judicial Killings in Nine Months, This Day, https://www.thisdaylive.com/index.php/2020/10/11/nigeria-records-122-extra-judicial-killings-in-nine-months/ (4.10.2021).

Conclusion

Extra-judicial killings in Nigeria cannot be resolved by public interest litigation. This is not to say public interest litigation would have no effect whatsoever in decreasing the rate of extra-judicial killings. Extra-judicial killings in Nigeria have their roots in the institutional failure and the lack of accountability that has come to characterize public service in Nigeria. Therefore, to make any significant impact would be to attempt to build institutional integrity and improve public service structures. Public interest litigation is a good short-term tool to address social injustices on a case-by-case basis. There are conditions on which it must be supported before it records any success. The engagement of public opinion and social capital is a necessity for public interest litigation in Nigeria. The use of social media spaces to generate discussions on social issues has shown much promise in its political and social value. Public interest lawyers could make use of virtual spaces to engage the public in their work, especially in regard to extra—judicial killings. This is because the need to maintain good optics has become motivation for institutional interaction with the public in Nigeria. Finally, it is important that public interest lawyers in Nigeria should collectively insist on institutional change in the judiciary, and in the legal profession. This would help with the procedural obstacles in litigation and would also ensure that the legal profession is united in its stand for the rule of law. Up to now, it is somewhat disturbing that despite the constitutional power granted to the police to maintain public peace, safety, and general security in Nigeria, the quality of security is nothing to be proud of, and has, no doubt, generated a great deal of controversies.[62] It could therefore be adduced, that the crucial way forward now, is to look internally with a readiness to use political will in the right direction.[63] Impliedly, a culture of lawfulness is imperative as a foundation for collaborative cooperation in addressing political failures, accountability, fairness, and transparency.[64] The culture, albeit the genuine willingness of government officials and members of society to hold themselves and one another accountable to the law, which requires a certain level of trust, impartiality, confidence, checks and balances, respect for the Nigerian justice system, and their ability to protect everyone from injustice and insecurity is apparently of the essence in curbing and/or eradicating the prominent issue of extra-

62 A.J. Aderinto, The Nigeria Police and Crime Control in Lagos Metropolis, "Afr. J. Psychol. Study Soc." 2008, vol. 11, issue 1, p. 145; V. Ibezim-Ohaeri, Spaces for Change: Galvanizing Collective, Action to Protect the Civic Space in Nigeria, https://yaraduafoundation.org/files/Galvanizing%20Collective%20Action.pdf (03.10.2021).

63 K.D. Nwideeduh, The Political Economy of Criminal Justice System Reform in Nigeria 2000–2009, "Int. j. trend res." 2017, vol. 1, issue 5, p. 550.

64 S.C. Igwe, A.O. Obari, Towards a Systems Theory Approach to Managing Human Rights Violations in Nigeria, "CSCanada" 2021, vol. 17, no. 3, p. 52; C.C. Ajibo, N. Itanyi, E. Okiche, I. Chime, S. Mosanya, F. Nwodo, Sustainable Development Enforcement Conundrum in Nigeria: Challenges and Way Forward, "Commonwealth Law Bulletin" 2020, vol. 47 issue 2, p. 197.

judicial killings.[65] There should be other comprehensive reforms and reorientations necessary to bring Nigeria's policing operations and government authorities into conformity with constitutional and international human rights standards.

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Conflicts of Doctor's Duties in the Case of an Extreme Shortage of Intensive Care Beds and the Good Samaritan Clause from the Perspective of Criminal Law

Abstract: The Covid-19 pandemic has exposed many weaknesses of healthcare systems. An example of a crisis situation is the case of a doctor who has to make a decision about qualifying a patient with COVID-19 for an intensive care bed when there are not enough such beds and when, out of the many obligations to save lives, he can choose and fulfil only one. The aim of this paper is to analyse the criteria of establishing the priority in access to intensive care, to settle the conflict of obligations in regard to criminal liability, with respect to Art. 26 § 5 of the Polish penal code regarding the doctor's decision to provide, or to not provide, healthcare services including intensive care given the extreme shortage of the beds, to determine the scope of legal safety guarantees laid down in the good Samaritan clause and the relationship between the conflict of duties and the clause. The work is theoretical with the use of a formal-dogmatic and functional analysis of Polish criminal law.
Keywords: criminal responsibility, intensive care, prioritising, rationing, triage

Introduction

Due to the Covid-19 pandemic, it has become necessary to redefine many social interests and relations and, in consequence, to adapt to the present situation the scope of their criminal law protection. Among other things, it has exposed many weaknesses of healthcare systems, including the Polish health care system. Its variable course, which is only partly predictable, forces each legislative body to regulate the ways and means of controlling the spread of SARS-COV–2, and its death toll, in a swift but rational manner. However, such regulations are not always sufficient.

Healthcare professionals have found themselves at the very centre of the fight against the pandemic, taking personal risks and working at the "Covid wards" with the highest commitment. When discussing the risks, one cannot mean only the potential for catching the infection, as the decisions the doctor takes regarding the patient care can be subject to assessment with regard to criminal law, which exposes the doctor to liability. The care for the patient's life and health is intertwined with the need to keep one's conduct within the limits provided for by the law. A shortage of equipment, including personal protection equipment and – most importantly – medical personnel, creates situations when such boundaries are relatively easily crossed. It is extremely important to guarantee legal safety to people who take decisions on human life and health on a daily basis when it is under constant threat.

Among the drawbacks of the Polish healthcare system, which have become manifest in the current situation, there is the lack of sufficient regulations (laws, standards, guidelines) regarding different areas of healthcare, including public health. Healthcare professionals seem to be concerned about the lack of sufficient guarantees regarding the exclusion of the criminality of an act in the event of a conflict of duties when only one can be fulfilled at a time. Intensive care (IC) is one of the clearly "underregulated" areas of healthcare in Poland.

Examples of crisis situations include desperate doctors in Italy, and Spain, who – faced with an insufficient number of ventilators – had to decide which of the patients would be given a chance to survive. In the face of such experiences, healthcare professionals in Poland demanded from the first months of the pandemic that doctors should be given regulatory support rather than left to themselves and being forced to rely only on their individual "conscience"[1]. In an attempt to meet their expectations, and fearing a similar scenario in Poland, the Polish authorities introduced the "good Samaritan clause", but – for many reasons – it does not provide a full guarantee of the legal safety to healthcare professionals who have to make tough decisions regarding the protection of human life and health.

The absence of a consistent system of regulations justifies an attempt to analyse the existing legislation concerning the doctor's criminal liability if he or she has to take a decision to qualify a COVID-19 patient for intensive care when there are not enough beds and when, out of the many obligations to save lives, a doctor can choose and fulfil only one.

1 W. Galewicz, O potrzebie sformułowania wytycznych na wypadek dramatycznego niedostatku zasobówratujących życie w polskich oddziałach intensywnej terapii: Wprowadzenie do dyskusji, (in:) Intensywna terapia w warunkach kryzysu, Interdyscyplinarne Centrum Etyki UJ (INCET), „Debata" 2020, DOI: 10.26106/BWDC-A853, p. 2; F.R. Trabucco, The COVID -19 Post – lockdown Italian Scenario from an Eco – Socio – Legal Perspective, "Białostockie Studia Prawnicze" 2020, vol. 25, no. 3, pp. 99–116.

The aim of this paper is to analyse the criteria of establishing the priority in access to intensive care, to settle the conflict of obligations in regard to criminal liability, with respect to Art. 26 § 5 of the penal code regarding the doctor's decision to provide or to decline to provide healthcare services including intensive care given the extreme shortage of the beds, to determine the scope of legal safety guarantees laid down in the good Samaritan clause and the relationship between the collision of duties and the clause.

Therefore, the analysis is based on two research problems:

1) What are the leading criteria for determining the priority of access to intensive care in the event of an extreme shortage of equipment and medical personnel during an epidemic? and
2) Does the Good Samaritan clause replace the general institution of a conflict of duties specified in Art. 26 § 5 of the penal code?

Two hypotheses were formulated for such research problems:

1) Only medical criteria may be used to assess the priority in providing a medical service in the above-mentioned situation and
2) the Good Samaritan clause cannot replace the general structure of the conflict of duties.

The formal-dogmatic method and the functional method coupled with it (in the integration model) were used in the work[2]. The first was used to reconstruct the norms on the basis of the provisions of applicable law in the field of the conflict of duties and the so-called the Good Samaritan clause, and the second for the legal and ethical assessment of the facts relating to the normalized area of social life, which is the issue of the doctor's criminal liability for failing to provide assistance to the patient in the event of an extreme shortage of intensive care beds.

1. Criteria of Establishing Priority of Access to Intensive Care in COVID-19

The epidemic situation in many countries has necessitated discussions and decisions regarding the priorities and rationing (in the language of economics and bioethics – allocation) of medical technologies. Prioritising denotes establishing the priority in access to resources for specific individuals (groups of individuals), rationing – restriction of access to scarce goods, and allocation – distribution of material resources assigned for specific purposes[3].

2 D. van Kędzierski, Metodologia i paradygmat polskich szczegółowych nauk prawnych, "Transformacje Prawa Prywatnego" 2018, no. 3, p. 59.

3 J. Pawlikowski, Etyczny wymiar decyzji priorytetyzacyjnych i alokacyjnych dotyczących stosowania zaawansowanych technologii medycznych w kontekście pandemii COVID-19,

All activities associated with prioritisation and rationing of medical resources is sometimes called "triage". It is a procedure of patient segregation, originating in military medicine, where it was applied in the categorisation of the wounded; it is now conducted in rescue medicine and disaster handling. The pandemic necessitates the segregation of patients with indications for intensive care, in particular for access to mechanical ventilation, *i.e.*, allocation of ventilators. This is often tantamount to the choice between life and death. The egalitarian criteria are replaced by utilitarian criteria in an epidemic situation, as the latter provide an opportunity for a beneficial effect of intensive care[4], which is controversial, to say the least.

The utilitarian criteria include the patient's age as an isolated factor. Taking a decision based only on the patient's age is tempting, as this criterion does not usually require any special verification, but it is deeply unethical as a manifestation of age discrimination. Indeed, the patient's age also affects their health status, their weaker immune response, comorbidities and the body's regeneration capabilities. Prioritisation based solely on the age criterion without a comprehensive evaluation of the patient's health status should be strongly opposed.

Another utilitarian criterion is one related to the patient's social value[5], which – unlike the previous criterion – is not associated with the patient's health status. It involves an assessment of the patient's social usability, performing a specific profession or a significant role in the community. It seems contrary to the principles of egalitarianism, although, in a specific situation of a threat to the life of a public, widely respected person, or simply a popular figure, it is difficult to imagine that it would be disregarded. The doctor's motives regarding their individual decision must be taken into consideration, whereas giving this criterion an official form has to be opposed. It is deeply unethical and downright unconstitutional. The application of the aforementioned criterion, due to the fact that it would lead to the objectification of a human being, would not only obviously violate the constitutional principle of equality, but would also, in an unacceptable manner, violate the expressed in Art. 30 of the Basic Law the principle of protection of inalienable and inherent human dignity, prohibition of discrimination under Art. 32 (2), and the order to protect the life of every human being expressed in art. 38 of the Polish Constitution[6].

"Medycyna Praktyczna" 2020, no. 4, https://www.mp.pl/etyka/terapia_chorob/231724,etyczny-wymiar-w-kontekscie-pandemii-covid-19 (21.06.2021).

4 A. Kübler, Stanowisko w sprawie racjonowania intensywnej terapii w sytuacji niedoboru zasobów ratujących życie, (in:) Intensywna …, *op. cit.*, pp. 9–10.

5 Report by Semicyuc Los Profesionales del Enfermo Crítico: Recomendationes éticas para la toma de decisionesen la situación excepcional de crisis por pandemia COVID-19 en las unidades de cuidados intensivos, p. 12, www.semicyuc.org (21.06.2021).

6 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. z 1997 r., Nr 78 poz. 483 ze zm.).

However, in an extreme situation, a situation may occur in which the priority in access to a health service should be granted to healthcare professionals, given their insufficient number.

An assessment of the legal and factual situation in Poland leads one to the conclusion that the "first come, first served" rule is a common, although not too ethical, priority criterion. It arises if only from Art. 20 (1) of the Act on health services financed from public funds of 27 August 2004, which states that providing healthcare in hospitals, specialist services in ambulatory healthcare, and in-patient and 24-hour health services other than hospital-based ones are provided on the "first come, first served" basis on the days and at a time when they are provided by the service provider, which has concluded an agreement for healthcare service provision[7]. It is obvious that this criterion favours patients who live close to healthcare facilities, while it discriminates against those who live a long way from hospitals.

According to medical ethics, prioritisation should be based only on medical criteria, *i.e.*, those arising from the need to apply a given technology and its predicted positive effects (benefits) for the patient's life and health[8]. Therefore, aid should be given first to those for whom it is necessary to survive, and those with the greatest chances for survival should be selected from among this group. In an epidemic or mass disaster situation, the scope of aid should be minimised so that as many people as possible should be able to use it[9].

When establishing priority in access to intensive care in COVID-19, one can consider only expected short-term benefits for the patient, as the delayed effects of the disease are still unknown. The medical criteria should provide the basis for assessment of the opportunities and benefits and, therefore, in establishing the priorities in access to medical procedures. Adopting the medical criteria as the basis is a burden for doctors, who must make such decisions based on scientific research and clinical studies[10].

Decisions to refuse mechanical ventilation, or to abandon such treatment, are without doubt the most dramatic as they usually mean the choice between life or

7 Ustawa z 27.08.2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych (Dz.U. z 2019 r. poz. 1373 ze zm.).

8 In the World Medical Association's (WMA) Declaration of Lisbon on the Rights of the Patient (1981), we read: "In circumstances where a choice must be made between potential patients for a particular treatment that is in limited supply, all such patients are entitled to a fair selection procedure for that treatment. That choice must be based on medical criteria and made without discrimination", point 1e, https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient (21.06.2021).

9 K. Marczewski, Rozważania o etyce medycznej czasu wojen i katastrof, (in:) K. Marczewski (ed.), Notatki do ćwiczeń z etyki medycznej, czyli jak i po co odróżniać eutymię od eutanazji, Lublin 2003, pp. 305–310.

10 P.G. Nowak, Terapia daremna i racjonowanie opieki w dobie kryzysu. Dlaczego niektórych pacjentów należy odłączać od respiratora?, (in:) Intensywna …, *op. cit*., p. 37.

death of the patient. At the same time, the decision to initiate the treatment engages the technical resources for several weeks, which excludes their use for the benefit of other patients, and the dynamics of the situation and the size of the population whose lives are threatened require quick decisions. As P.G. Nowak rightly claims, that – psychologically – a decision to refuse treatment is easier than one to discontinue it, which emphasises the importance of the preliminary assessment and the need to develop algorithms with proper procedures[11].

Regarding the possibility of taking a decision to disconnect a patient from the ventilator, two positions can be noted in the legal and medical doctrine. According to A. Paprocka-Lipińska, no legal or ethical regulations are in force in Poland which would provide the basis for a decision to disconnect the patient from a ventilator, except when the patient is confirmed to be brain dead[12]. A different opinion is presented by A. Kübler, who claims that withdrawing futile therapy, including therapy with a ventilator, can have "(...) a form of withholding, or not implementing a new treatment, or failure to increase the intensity of the treatment method already applied, or withdrawing the applied treatment"[13]. In another text, the author and co-workers claim that the ventilator treatment was withheld in the case of one patient[14].

This is the place where the issue of futile therapy should be brought up. It is a therapeutic procedure which brings no benefit to the patient or a situation when the burden far exceeds the progress in therapy – it is a known situation in contemporary medicine. In practice, this term usually applies to life-sustaining treatment. Intensive care is an area where futile therapy is so common because the vital functions of the body are so easily maintained. As a result, maintaining the blood circulation, breathing, or kidney function becomes the purpose in itself, without a defined direction of the therapy in line with the patient's interest. The organ function can be maintained to avoid a confrontation with the family till the end of the doctor's duty time or until someone else takes over the responsibility for the patient, *etc*. This has nothing to do with good clinical practice or with the principles of medical ethics, or with the general ethical principles, *e.g.*, arising from Christian ethics. A. Kübler claims that, given the shortage of life-saving resources in intensive care units, futile therapy becomes extremely harmful in that it restricts access to intensive treatment for patients with actual chances for survival dramatically[15].

11 *Ibidem,* p. 37.

12 A. Paprocka-Lipińska, Głos w debacie, (in:) Intensywna …, *op. cit*., p. 13.

13 A. Kübler, J. Siewiera, G. Durek, K. Kusza, M. Piechota, Z. Szkulmowski, Guidelines Regarding the Ineffective Maintenance of Organ Functions (Futile Therapy) in ICU Patients Incapable of Giving Informed Statements of Will, "Anaesthesiology Intensive Therapy" 2014, no. 46(4), pp. 215–220; (Polish version: "Anestezjologia Intensywna Terapia" 2014, no. 46(4), pp. 229–234.

14 P.G. Nowak, Terapia …, *op. cit*., p. 36.

15 A. Kübler, Stanowisko…, *op. cit*., p. 8.

The ability to take a decision to withdraw futile therapy and extraordinary measures in terminal states based on an assessment of the therapeutic chances is also provided for by the Medical Ethics Code (Art. 32). It does not release the doctor from the duty to make an effort to provide the patient with humanitarian terminal care and conditions of dignified death or to care about the quality of the last moments of the patient's life (Art. 30)[16].

It is understandable in the current, exceptional, situation that applying IC, especially mechanical ventilation, can be regarded as an extraordinary measure, from which one can withdraw if it gives no benefits, replacing it with ordinary measures and palliative care. However, treatment at intensive care units (ICUs) in other circumstances, when the shortage of life-saving equipment is not so severe, can be part of the standard of care treatment. These comments also apply to the Extra Corporeal Membrane Oxygenation (ECMO), which should also be regarded as an extraordinary measure due to the novelty of the technology, its cost, limited availability, a small practical experience, and a limited number of personnel skilled in its use[17].

Some solutions taken from the Italian, and Spanish guidelines are worth quoting, which provide criteria for using mechanical ventilation and hospitalisation at intensive care units, with three characteristic levels taken into account, such as:

- "micro" level – prioritising and rationing as a result of the doctor's individual decision regarding the application of specific medical technologies;
- "meso" level – rational allocation during the epidemic as a result of the hospital management's decision to deploy personal protection or specialist equipment between the emergency department, infectious disease ward, intensive care unit, and
- "macro" level – referring to the national government's decision to create a network of infectious disease hospitals, subsidising and providing specialist equipment to selected centres, and determination of the population to be tested for the presence of the virus.

These guidelines also took into account important ethical issues concerning the withdrawal of extraordinary measures and futile therapy, respecting the autonomy (the patient and their relatives co-deciding whether the therapy should be continued or abandoned, taking decisions "not to intubate" and the obligation to justify and document them, and to communicate them to the patient and to their relatives), taking decisions jointly and their being open to verification, gradation of advanced

16 Uchwała Nadzwyczajnego II Krajowego Zjazdu Lekarzy z dnia 14 grudnia 1991 r. w sprawie Kodeksu Etyki Lekarskiej podjęta na podstawie art. 33 pkt 1 w związku z art. 4 ust. 1 pkt 2 ustawy z dnia 17 maja 1989 r. o izbach lekarskich (Dz.U. Nr 30, poz. 158, z 1990 r. Nr 20, poz. 120).

17 Extracorporeal Life Support Organization (ELSO): Guidance Document: ECMO for COVID-19 patients with severe cardiopulmonary failure, http://elso.org/covid19 (21.06.2021).

medical technologies applied in the ICU, and taking into account the interest of other patients waiting for help (not only those with COVID-19 symptoms, but also those with other diseases requiring immediate intervention, hospitalisation, and intensive care)[18].

There are no such detailed recommendations in Poland. It is noteworthy that the difficulty of taking an individual decision by the doctor on the micro-level depends on the way organisational decisions are taken regarding technological and human resources on the meso-level, which, in turn, depend on the government decisions on the macro-level. The widely adopted life-saving procedures and guidelines regarding withdrawing futile therapy in standard situations can be helpful in such decisions to some extent, but they require at least an attempt to supplement them[19]. According to guidelines, withdrawing life-sustaining therapy cannot depend on "organisational aspects (*e.g.*, vacating an intensive care bed for another patient)"[20]. Therefore, the organisation must provide for the need to supply more IC beds and, further, for using the hospital network to which a patient can be transported. This organisational mechanism has to be very precise and discussed in advance. Otherwise, an "organisational fault" may occur, which lies with the healthcare provider[21]. Organisational negligence creates an immediate threat to human life and health[22]. A doctor who takes an individual decision is not to blame for this threat, which may create a collision of duties which must be settled on the basis of criminal law.

2. Settling a Conflict of Doctor's Duties in the Case of an Extreme Shortage of Intensive Care Beds in Light of Art. 26 § 5 of the Penal Code

The starting point for assessing the legality of a doctor's behaviour in a specific case is the pattern of a rational (using the available knowledge, skills, organizational possibilities, and tools) representative of a given medical profession. It allows to rationally determine the legality of an act, even before the stage of examining the implementation of the statutory features of crimes related to failure in treatment. It is not always the case in question that the statutory criteria of a crime are realized and then it is not possible to speak of an attack on the object of protection at all. A doctor's

18 J. Pawlikowski, Etyczny…, *op. cit*.

19 J. Suchorzewska, Głos w debacie, (in:) Intensywna …, *op. cit*., p. 17.

20 A. Kübler, J. Siewiera, G. Durek et al., *op. cit*., s. 231.

21 A. Paprocka-Lipińska, Głos w debacie, (in:) Intensywna …, *op. cit*., p. 14.

22 M. Werbel-Cieślak, Kolizje obowiązków i wina organizacyjna na tle nieumyślnego spowodowania uszczerbku na zdrowiu – art. 156 §2 k.k. (case study), (in:)W. Cieślak, J.J. Zięty, M. Romańczuk-Grącka (eds.), Glosator Warmiński. Olsztyńskie miniatury. Z zagadnień stosowania prawa, Olsztyn 2021, pp. 65–76.

procedure with the good of the patient's health and life based on medical knowledge and the objective availability of treatment measures is then completely legal.

Only when the chosen method of treatment is considered excessively risky (unacceptable), will it be possible to establish the unlawfulness of the doctor's behaviour. However, for the assignment of criminal liability, it will be necessary to demonstrate that other elements of the offense structure have also been realised[23].

For example, in terms of assessing the implementation of the statutory features of crimes, the deficit of knowledge about the treatment, course, and consequences of COVID-19 makes it difficult to demonstrate a normative relationship between a medical error and the effect of a prohibited act. In order to assign the characteristics of the subjective side (assuming that it is an unintentional crime) it is necessary, *inter alia*, to demonstrate that the caution required under "given circumstances" was not observed (Art. 9 § 2 of the penal code). Therefore, also in this case, the circumstances generated by the pandemic influence the assessment of the medic's action. A reference can also be made to an open clause of guilt in Art. 1 § 3 of the penal code, and any criminal responsibility can be excluded because of an abnormal motivational situation.

Only in the last place, in order to exclude criminal liability, one should refer to the circumstances of the secondary exclusion of the offense of an act (fault and unlawfulness), such as *error facti*, *error iuris* and error as a circumstance excluding unlawfulness or blame, state of necessity, conflict of duties, or the Good Samaritan clause that has been specially designed for this purpose[24].

Each of the above-mentioned circumstances requires a separate analysis, but due to the limited framework of the study, it is not possible for all of them. The last two of the above-mentioned ones will be discussed, which results from the subject of this work defined in the same way.

If a person has duties that cannot be fulfilled simultaneously, one cannot be obligated to fulfil them at the same time. Therefore, it should be assumed that the person has only one duty to fulfil. A person to whom a legal norm applies cannot be required to take actions that are impossible to perform (*impossibilium nemo obligatur/ultra posse nemo obligatur*)[25].

The most general criminal law construction based on which the criminal responsibility of a doctor can be excluded in the event of a refusal to perform a healthcare service in the ICU, is a conflict of duties specified in Art. 26 § 5 of the penal code: "The provisions of § 1–3 are applied accordingly when only one duty

23 S. Tarapata, Problem rozstrzygania prawnokarnej kolizji dóbr w trakcie wykonywania świadczeń zdrowotnych, "Palestra" 2020, no. 6, p. 177.

24 E. Plebanek, Wyłączenie odpowiedzialności karnej za niewłaściwe leczenie w czasie pandemii COVID – 19 a klauzula dobrego Samarytanina, "Palestra" 2021, no. 1, p. 61, 74.

25 S. Tarapata, Problem rozstrzygania … *op. cit*., p. 177.

out of the several imposed on the offender can be fulfilled". This provision has been raising concerns in the legal doctrine for years. Due to reference to various situations specified in Art. 26 § 1–3 of the penal code, it is a conglomerate of circumstances that make the act illegal (§ 1), place the blame on the offender (§ 2) or make the act punishable (§3). Given the unclear relations between these provisions, it has even been proposed that Art. 26 § 5 of the penal code should be eliminated[26]. In such a case, satisfying results could be achieved by reference only to Art. 26 § 2 of the penal code, according to which whoever rescues any interest protected by law in order to avoid an immediate threat to any interest protected by law, if such a threat cannot be avoided in a different way, sacrifices an interest which does not represent a value manifestly greater than the interest being rescued, he shall be deemed to have not committed an offence.

One may agree that Art. 26 § 5 of the penal code is not particularly necessary, but as it has been introduced to the system, it must not be regarded as *non est*. Only a rational and consistent interpretation of the provision should be introduced[27]. Such an interpretation should start with the phrase "is applied accordingly" included in the provision and juxtaposed with the preceding norms defining the forms of states of necessity. Depending on the relation between the interest sacrificed and the one protected, they exclude the criminal illegality or guilt, which allows for the conclusion that a clash of duties is not a countertype or a situation that excludes guilt, but rather a specific situation that excludes criminal responsibility, whose essence lies in a conflict of norms that specifies the duties[28].

Obviously, such an approach breeds another question, mainly on the number and type of norms that affect the formulation of a duty and the inter-relations between them (two or more norms that impose a duty, a duty to act or to not act, the relationship of equality, superiority or subordination), as well as potential sequences of performing them as a function of time and the criteria for the choice of the duty which should be given priority in a clash situation[29].

As M. Kulik rightly observes, the clash of duties is in fact a clash of certain legal goods. Therefore, it should be assumed that its assessment should take place through the prism of good, the protection of which is served by the duties that remain in the clash. Therefore, in the event of a conflict of obligations regarding the protection of goods of different values, the priority is given to the one that protects the more

26 J. Majewski, Tak zwana kolizja obowiązków w prawie karnym, Warsaw 2002, pp. 240–248; Ł. Pohl, Prawo karne. Wykład części ogólnej, Warsaw 2012, pp. 271–272.

27 S. Tarapata, Problem …, *op. cit*., p. 179.

28 J. Majewski, Tak zwana kolizja … *op. cit*., p. 25; A. Zoll, (in:) A. Zoll (ed.) Kodeks karny. Część ogólna. Komentarz, t. I, wyd. II, Zakamycze, 2004, p. 509; J. Lachowski, (in:) M. Królikowski, R. Zawłocki (eds.) Kodeks karny. Część ogólna. Komentarz do art. 1–31, t. I, , Warsaw 2010, pp. 26–27.

29 M. Werbel-Cieślak, Kolizje …, *op. cit*., pp. 353–355.

valuable. Such a conflict of obligations excludes the unlawfulness of the prohibited act[30].

As in the case of a state of necessity, first of all, the weight of the endangered good and the probability of the damage should be taken into account[31]. As P. Zawiejski rightly emphasizes, therefore, as a rule, life should be saved first, and then health. However, it may happen that the threat to life is minor or distant (rescue may wait) – in this case, priority should be given to protecting health against significant (especially severe) damage. In this context, it is necessary to refer to the thought present in the subject literature, that in the case of goods of equal importance, one should save the good for which the chance of effective rescue is greater. If, however, we are dealing with people exposed to the same danger, it is justified to save the person in relation to whom the chance of saving him is greater (it is easier to reach him or it is better to help him)[32].

Referring to the situation specified at the beginning of this study, in assessing the degree of probability of saving a given person, specialist criteria relating to medical knowledge and the actual state of functioning of the health service should be used. Therefore, the issue of medical prioritisation and rationing is of key importance for the exclusion of a doctor's criminal responsibility.

Looking at the problem of allocating resources or medical equipment in a situation of shortage from the perspective of the theory and doctrine of criminal law, it is easy to find a number of statements on how to solve this type of accidents based on variously constructed rules of priority used to solve cases of conflicts of values and norms, as well as clashes of duties. . In particular, it is indicated that the clash of duties is in fact a clash of goods assessed *in concreto*, to which these duties relate[33].

Taking these criteria into account is to optimize the protection of converging socially and legally significant interests. In a situation of a conflict of duties relating to goods of different importance, the one that protects the good of greater value should be executed. In the case of equal value of legal goods, it is necessary to save the good which has a better chance of being saved[34].

The method of resolving the clash of duties is therefore always entangled in certain philosophical and ethical choices. Therefore, resolving a conflict of obligations

30 M. Kulik, (in:) Kodeks karny. Komentarz aktualizowany, ed. M. Mozgawa, LEX/el. 2021, art. 26.

31 M. Filar, Wyłączenie odpowiedzialności karnej (in:) Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze, Warsaw 1998, no. 18, p. 31; J. Majewski, Tak zwana kolizja ..., p. 247.

32 P. Zawiejski, Kolizja obowiązków, (in:) T. Dukiet-Nagórska, A. Liszewska, E. Zielińska (eds.), System Prawa Medycznego. Tom III. Odpowiedzialność prawna w związku z czynnościami medycznymi, Warsaw 2021, Lex/el.

33 J. Majewski, Tak zwana kolizja ..., *op. cit*., p. 159; P. Kardas, Konstytucyjne podstawy rozstrzygania kolizji obowiązków i konfliktów dóbr w czasie epidemii, "Palestra" 2020, no. 6, p. 16.

34 A. Zoll, (in:) Kodeks karny. Część ogólna, t. 1, Komentarz do art. 1–52, Warsaw 2016, p. 590.

requires referring to specific optimization directives. With regard to these rules, it is indicated that, in principle, their source may be: a) legal provisions (of different status, both statutory and sub-statutory); (b) principles of specialist knowledge as well as deontological and ethical rules adopted in a given sphere of activity; c) *ad hoc* benchmarks, standards or rules[35]. Medical standards of prioritization and rationing are therefore important criteria for rating goods in resolving clashes of duties.

S. Tarapata rightly claims that it is similar to the rules of conduct concerning the legal interest (principles of caution). The principles of caution are applied to determine the conduct of a personal model of an ideal citizen in a given situation. This figure is used to establish the limits of acceptable risk for a legally protected interest. Meanwhile, the criteria of preference are used to identify the choice regarding the action that should be taken in a given situation that would be made by the average citizen[36].

The author also rightly points out that – like the rules of conduct with the legal interest – the criteria of preference can arise from three sources: a legal act, a different normative act (legal regulations) or agreements (legal sources); from a specific field of knowledge (*e.g.*, medicine); from a specific situation in which they are developed *ad hoc*[37].

A large number of scientific studies regarding control of SARS-COV–2 spread are being conducted, which makes it difficult to provide universal guidelines. They require constant updating, due to which the preference is most often based on the individual knowledge of the doctor who decides *in concreto* to provide or to refuse to provide a specific medical service.

The situation becomes complicated if it is objectively impossible to provide the service at the same time to many people whose health status justifies the use of IC measures. B. Chyrowicz uses the term "moral residuum" to describe such a situation[38]. If a duty is beyond our capabilities, it cannot be morally binding on us, and an assessment of an action should depend on whether its performance lays within our capabilities. The moral residuum dilemma refers to an internal effect of

35 P. Kardas, Konstytucyjne podstawy …*op.cit*., p. 16.

36 S. Tarapata, Dobro prawne w strukturze przestępstwa. Analiza teoretyczna i dogmatyczna, Warsaw 2016, pp. 279–320; S. Tarapata, Przypisanie sprawstwa skutku w sensie dynamicznym w polskim prawie karnym, Cracow 2019, pp. 187–212; K. Lipiński, Wzorce osobowe w prawie karnym, Warsaw 2020, p. 119.

37 S. Tarapata, Problem …, *op. cit*., p. 181.

38 B. Chyrowicz, Głos w dyskusji podczas zebrania naukowego Katedry Prawa Karnego Uniwersytetu Jagiellońskiego na temat: Kolizje obowiązków w medycynie w stanieepidemii, 17.04.2020, https://karne24.com/kolizje-obowiazkow-w-medycynie-w-stanie-epidemii-zebranie-naukowe-i-dyskusja/ (21.06.2021).

an act, the subject's discomfort, which comprises: regret, remorse, or the feeling of guilt[39].

Such discomfort appears not only on the moral or ethical levels, but it raises doubts regarding whether it was legal or illegal. Although formalised guidelines could provide a kind of guarantee of legal safety for the doctor, one should expect non-standard situations, in which failure to follow the guidelines, though rational from the doctor's perspective, could expose them to liability (if only disciplinary)[40]. According to R. Zawłocki, the normative matrix is usually a simplification of a complex reality. A situation in which a doctor finds him- or herself almost never corresponds exactly to the normative state[41]. This opinion is shared by E. Plebanek, who claims that the normativisation of ethical standards creates the danger of it being violated in a non-typical situation[42].

From the legal perspective, the broader the scope of a regulation, the less space for individual decisions. The regulations applicable to intensive care procedures may have been developed without reference to extraordinary situations, but – in the opinion of some doctors – even the epidemic situation does not justify creating "superregulations"[43]. The words of K. Kusza are worth quoting here: "Recommendations and guidelines developed for unpredictable times, for the case of no-one-knows-what war, with an unknown enemy, prepared in a hurry, do not necessarily provide support to those on the front line"[44].

Therefore, how to settle a moral residuum dilemma? According to B. Chyrowicz, emphasis should be shifted from formal rules to a subjective reconstruction of medical knowledge by the doctor *in concreto*. If the decision is rational and taken with a view to saving as many people as possible, it settles the conflict of duties correctly and excludes criminal liability[45]. S. Tarapata also reminds that if no rules of conduct regarding the legal interest are formulated, one should refer to the figure of the good and competent doctor, who makes rational decisions[46].

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39 B. Chyrowicz, O sytuacjach bez wyjścia w etyce. Dylematymoralne, ich natura, rodzaje i sposoby rozstrzygania, Cracow 2008, p. 146.

40 W. Wróbel, Pytanie w dyskusji podczas zebrania naukowego Katedry Prawa Karnego Uniwersytetu Jagiellońskiego na temat: Kolizje obowiązków w medycynie w stanie epidemii, 17.04.2020, *op. cit*.

41 R. Zawłocki, Głos w dyskusji podczas zebrania naukowego Katedry Prawa Karnego Uniwersytetu Jagiellońskiego na temat: Kolizje obowiązków w medycynie w stanie epidemii, 17.04.2020, *op. cit*.

42 E. Plebanek, Głos w dyskusji podczas zebrania naukowego Katedry Prawa Karnego Uniwersytetu Jagiellońskiego na temat: Kolizje obowiązków w medycynie w stanie epidemii, 17.04.2020, *op. cit*.

43 A. Paprocka-Lipińska, Głos w debacie, (in:) Intensywna terapia…, *op. cit*., p. 13.

44 K. Kusza, W odpowiedzi na apel do polskich lekarzy o sformułowanie rekomendacji na wypadek dramatycznego niedostatku zasobów na oddziałach intensywnej terapii, (in:) Intensywna terapia…, *op. cit*., p. 33.

45 B. Chyrowicz, Głos w dyskusji…, *op. cit*.

46 S. Tarapata, Przypisanie..., p. 191–193; S. Tarapata, Problem …, *op. cit*., p. 183.

Given the dynamic development of medical knowledge on handling infections with SARS-COV–2, an assessment of whether the rule of priority was applied adequately must be made *ex-ante*. Therefore, if a doctor correctly follows the rule of priority, they cannot be made criminally liable even if the *ex-post* assessment shows that they made a wrong choice[47].

It is also necessary to develop an objective directive on proceeding with good faith referring to the figure of a model doctor. If a model doctor in conditions of knowledge and equipment deficit would use a given device or apply a specific method, assessing it *ex ante* as acceptable, then such a procedure should be considered legal. The model doctor is not a uniform figure. High specialization within the profession, as well as dividing the medical education process into stages, forces the diversification of the pattern. It seems that it is necessary to distinguish between the standards of a specialist and non-specialist physician (criterion of the type of specialization) or a specialist and trainee physician (criterion of the education stage). This issue is important because the epidemic situation may involve the need to redirect doctors of other specializations to work in infectious or intensive care units. As part of their work, they will have to make decisions in the field of therapy, which they do not have in-depth knowledge of[48].

If the doctor did not violate the norm of Art. 26 § 5 of the penal code, *i.e.*, performed only one of the duties imposed on them in the conflict situations presented above, their criminal liability – as long as they focused on protecting the interest whose value is obviously lower than that of the sacrificed one – should be excluded, even if the choice criteria were contested from the point of view of their optimisation based on ethical, praxeological or economic grounds[49].

3. Good Samaritan Clause

The Good Samaritan clause is contained in Art. 24 of the act amending some acts in relation to preventing the crisis situations associated with COVID-19 of 28 October 2020[50]. According to the clause, a person does not commit the offence mentioned in Art. 155 of the penal code (causing death unintentionally), Art. 156 § 2 (causing a crippling injury unintentionally), Art. 157 § 3 (causing a bodily injury or impairment to health unintentionally) or Art. 160 § (exposing another person

47 S. Tarapata, Problem …, *op. cit*., p. 183.

48 D. Zając, Modyfikacja reguł sztuki lekarskiej w czasach epidemii Covid – 19, "Palestra" 2020, no. 6, pp. 105–106.

49 J. Giezek, Kolizja obowiązków spoczywających na pracownikach opieki medycznej w dobie pandemii COVID-19, "Palestra" 2020, no. 6, pp. 29–50.

50 Ustawa z dnia 28.10.2020 r. o zmianieniektórychustaw w związku z przeciwdziałaniem sytuacjom kryzysowym związanym z wystąpieniem COVID- 19 (Dz.U. poz. 2112 ze zm.).

to danger unintentionally) if this person, during a state of pandemic threat or a pandemic state, when providing health services under the Act on the profession of physician and dentist of 5 December 1996[51], the Act on the profession of paramedic of 20 July 1950[52], the Act on the profession of nurse and midwife of 15 July 2011[53], the Act on State Medical Rescue Service of 8 September 2006[54] or the Act on prevention and controlling infections in humans of 5 December 2008 as part of preventing, diagnosing, or treating COVID-19, and acting in extraordinary circumstances committed an offence, unless the effect was a consequence of a gross failure to exercise caution in those circumstances.

This regulation was intended to introduce to the Polish legal system a measure aimed at protection against criminal responsibility for some acts of healthcare professionals during the COVID-19 epidemic because of a higher risk of making a mistake in this specific situation. The Good Samaritan clause is of considerable importance for healthcare professionals. However, it has some gaps.

Limiting the clause only to offenders providing medical services related to the diagnosis or treatment COVID-19 is too narrow an approach. The COVID-19 pandemic has caused a disturbance in the whole healthcare system. One should not differentiate between the situation of these individuals and those diagnosing or treating COVID-19 from the perspective of the penal code[55]. It should be noted that a conflict of duties can also apply to patients who are not infected with SARS-COV–2. Given the currently restricted access to healthcare services, doctors attending to patients dying from a heart attack or another cardiological disease are unaffected by this regulation[56]. Regarding the scope of the clause, it leaves out laboratory diagnosticians for unknown reasons. They take actions related to diagnosing COVID-19, so they can certainly face special circumstances which justify a violation of the principles of caution.

It is not clear whether the clause excludes the illegality of an act or the guilt. According to J. Potulski[57], this is a countertype. M. Kwiatkowska[58] and P. Bielska-Siudzińska[59] are of a similar opinion. This is certainly supported by the reference to

51 Dz.U. z 2020 r. poz. 514, 567, 1291 i 1493.
52 Dz.U. z 2018 r. poz. 2150 oraz z 2020 r. poz. 1291.
53 Dz.U. z 2020 r. poz. 562, 567, 945 i 1493.
54 Dz.U. z 2020 r. poz. 882 i 2112.
55 P. Zawiejski, Tak zwana klauzula dobrego Samarytanina, (in:) T. Dukiet-Nagórska, A. Liszewska, E. Zielińska (eds.), System Prawa Medycznego. Tom III. Odpowiedzialność prawna w związku z czynnościami medycznymi, Warsaw 2021, Lex/el.
56 M. Burdzik, Obecne przepisy nie chronią wystarczająco lekarzy, Lex/el. 2021.
57 J. Potulski, Polski model "Klauzuli dobrego samarytanina" – perspektywa karnoprawna, "Studia Prawnicze KUL" 2021, no. 3(87), pp. 163–164.
58 M. Kwiatkowska, Odpowiedzialność za błąd medyczny w czasie epidemii, klauzula dobrego Samarytanina, LEX/el. 2020.
59 P. Bielska-Siudzińska, Klauzula dobrego Samarytanina, "Monitor Prawniczy" 2021, no. 13, p. 709.

the types of prohibited acts listed in the clause, the crime of which would be excluded. However, it is noteworthy that it excludes the criminality of violation of the principles of caution, as long as it happened in special circumstances, and it was not a gross violation. Therefore, P. Zawiejski rightly notes that although special circumstances may be associated with a clash of interests, typical of countertypes, as well as with the related circumstances justifying the offender that exclude the guilt, because of which they did not fulfil the duties imposed by the law, the gradation of violation of the principles of caution introduced in the last fragment of the clause is typical of a circumstance that excludes guilt[60].

Such "special circumstances" may include shortage of equipment, inadequate organisation, too many patients, *etc*. Such conditions may also include those affecting the offender themselves (fatigue, illness, old age, *etc*.)[61]. Special circumstances will include all real obstacles which make following the rules of medicine in diagnosing or treatment of COVID-19 significantly more difficult than in typical situations[62].

Finally, the legislation requires that the effect should not be caused by gross failure to exercise the caution necessary in the specific circumstances. The point is that the special circumstances of diagnosing or treating COVID-19 should not lead to the exclusion of guilt in extreme situations. These occur only if the offender disregards clear rules of caution (rules of the medical profession) without a reasonable justification[63].

Doubts are also raised by the time stamp defined with the words "when announcing the threat of an epidemic or state of epidemia", which in the light of Art. 46 of the Act of December 5, 2008, on preventing and combating infections and infectious diseases in humans, assumes that the announcement of the indicated states may be not only temporary, but also territorial[64].

Regardless of the aforementioned doubts as to the subjective and objective scope of the clause, its *ratio legis* is questioned in the subject literature. E. Plebanek claims that the Good Samaritan clause does not substantially affect the situation of a medic in criminal proceedings. The universal institutions existing in the Penal Code make it possible to terminate any criminal proceedings at an earlier stage than the clause in question[65]. J. Potulski, on the other hand, points out that the regulation in question

60 P. Zawiejski, Tak zwana …, *op. cit*.

61 M. Kwiatkowska, Odpowiedzialność za błąd medyczny w czasie epidemii, klauzula dobrego Samarytanina, LEX/el. 2020; K. Izdebski, K. Kolankiewicz, Niezbyt dobra klauzula dobrego Samarytanina, https://www.infodent24.pl/lexdentpost/niezbyt-dobra-klauzula-dobrego-samaryt anina,116615_4.html (21.06.2021).

62 P. Zawiejski, Tak zwana …, *op. cit*.

63 *Ibidem*.

64 J. Potulski, Polski model …, *op. cit*., p. 168.

65 E. Plebanek, Wyłączenie …, *op. cit*., p. 75.

was created and is applied. Therefore, there is no doubt that this provision is important from the perspective of criminal liability of health care system employees[66].

Conclusions

Decisions on the priority in access to advanced life-saving technologies as well on allocation and rationing of limited medical resources should be based only on medical, rather than on social or economic criteria. It should be desirable that such decisions should be taken jointly to relieve one person from the sole responsibility for other people's life or death[67].

The Good Samaritan clause was introduced to guarantee legal safety when a decision is taken to provide healthcare services of intensive care in the event of an extreme shortage of IC beds. It may exclude the guilt, but only of selected healthcare professionals, only for four offences listed in the act, and only in relation to diagnosing, treating, and preventing COVID-19, and not other diseases. In consequence, the Good Samaritan clause fails to provide the promised effective protection to healthcare professionals during the COVID-19 pandemic.

When answering the research question about the criteria for prioritizing access to intensive care in the event of an extreme shortage of equipment and medical personnel in the state of an epidemic, it should be clearly stated that in order to assess the priority in providing medical services in the above-mentioned situation, no utilitarian criteria can be adopted, and only the medical criteria are appropriate. The hypothesis in this regard was fully confirmed.

In response to another problem, whether the Good Samaritan clause can replace the general institution of a collision of obligations set out in art. 26 § 5 of the penal code as a result of the analysis carried out, this possibility should be clearly denied. Therefore, this hypothesis was also positively verified.

While not contesting the clause in question totally, one must point out that it reproduces a typical course of a medical error under extremely difficult conditions of the epidemic. When it comes to the relation between the clause and exclusion of guilt in the case of a clash of duties, one can claim that the Good Samaritan clause is a *lex specialis* in relation to the conflict of duties specified in Art. 26 § 5 of the penal code, which is a more general and flexible solution, although one which sometimes raises concerns. Therefore, one should, first, follow the clause, and if it proves to be insufficient to release one from criminal responsibility because of its obvious flaws, there are general code measures that can be applied. However, it should be clearly emphasized that such a situation may occur relatively often, because the clause is intended to limit liability for unintentional acts specified in the closed directory, and

66 J. Potulski, Polski model, *op. cit*., p. 175.

67 J. Pawlikowski, Etyczny …, *op. cit*.

the collision of duties has a much wider objective and subjective scope. It is worth emphasizing that the subjective side in a counter-type situation defined by a clash of duties relies on intent, because the will and awareness of saving one good at the expense of another is needed. When referring to the rational medic model, we are also convinced that his action is deliberate, so there is no mistake or violation of the precautionary principles.

E. Plebanek is right to say that a model medic does not need the Good Samaritan clause[68]. In a situation of extreme shortage of equipment and medical personnel, there should, in principle, not be a need to exclude the unlawfulness or guilt of a physician failing to undertake one of the many irreconcilable duties. The behaviour of a rational medic should always be initially legal. But this statement does not provide legal certainty for doctors. Therefore, any guarantee instruments specified in the Act should not be rejected. However, efforts should be made to improve them.

We cannot forget about pre-crime prevention as well. Taking into account the dramatically limited access to treatment in Poland, it is difficult to suggest directions for the development of technologies in medicine[69]. However, in order to relieve the stress associated with a choice between two interests, the criteria of prioritisation and allocation should be moved to the macro level. It should not mean that a doctor or a group of doctors would have to behave in a specific manner, but that they could make a decision under conditions favourable to protecting human life and health.

The proposed solutions include reform of the intensive care system in Poland, at least doubling the number of intensive care beds, including so-called "intermediate beds", at least doubling the number of trained personnel by propagation and development of interdisciplinary training[70]. These measures will contribute to preventing offences related to the provision or refusal to provide healthcare services involving intensive care, providing a better guarantee of human life and health protection than any specific measures related to criminal law.

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68 E. Plebanek, Wyłączenie…, *op. cit*., p. 64.

69 A. Breczko, Human Enhancement in the Context of Disability (Bioethical Considerations from the Perspective of Transhumanism), "Białostockie Studia Prawnicze" 2021, vol. 26, no. 3, p. 107.

70 A. Kübler, Stanowisko…, *op. cit*., p. 8.

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Wprowadzenie art. 276a k.p.k. jako wynik wpływu pandemii SARS-CoV–2 na proces karny

Introduction of Art. 276a of the CCP as a Result of the Impact of the SARS-CoV–2 Pandemic on the Criminal Trial

Abstract: One of the consequences of the coronavirus pandemic (SARS-CoV–2) in the context of the impact on the Polish criminal trial was the introduction to the Code of Criminal Procedure of a new preventive measure related to the protection of medical personnel, specified in the new editorial unit – Art. 276a of the CCP. This measure was introduced by the Act of March 31, 2020, amending the Act on special solutions related to the prevention, counteraction, and combating of COVID-19, other infectious diseases and the crisis situations caused by them, and some other acts, and is a novelty in the Polish criminal procedure. The purpose of this article is to investigate a new preventive measure defined in Art. 276a of the Code of Criminal Procedure in terms of the legitimacy of its introduction to the Polish Code of Criminal Procedure. Three research problems will be analysed. The first concerns the extent to which the introduction of the new preventive measure under Art. 276a of the Code of Criminal Procedure was necessary in terms of the need to provide special protection to medical personnel in Poland. The second research problem concerns the extent to which the application of the new preventive measure under Art. 276a of the Code of Criminal Procedure corresponds to the assumptions of the Polish legislator and what is the *ratio legis* of the analysed regulation. The third research problem boils down to the extent to which the amendment to Art. 276a of the Code of Criminal Procedure corresponds to the rules of legislative technique.
Keywords: criminal trial, medical staff, SARS-CoV–2 pandemic
Słowa kluczowe: proces karny, personel medyczny, pandemia SARS-CoV–2

Wprowadzenie

Sytuacja w Polsce podczas pandemii koronawirusa (SARS-CoV–2) rzutowała na wiele aspektów i dziedzin życia, w tym też na prawo, które w szybkim tempie

dostosowywano do ogólnie panujących warunków. Jedną z konsekwencji pandemii w kontekście wpływu na polski proces karny było wprowadzenie do Kodeksu postępowania karnego[1] (dalej k.p.k.) nowego środka zapobiegawczego związanego z ochroną członków personelu medycznego, określonego w nowej jednostce redakcyjnej – art. 276a k.p.k. Środek ten został wprowadzony Ustawą z dnia 31 marca 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw[2] i stanowi *novum* w polskiej procedurze karnej.

Celem artykułu jest zbadanie nowego środka zapobiegawczego określonego w art. 276a k.p.k. pod kątem zasadności jego wprowadzenia do polskiego Kodeksu postępowania karnego. Hipoteza badawcza zakłada, że regulacja nowego środka zapobiegawczego z art. 276a k.p.k. spełnia cel określony przez ustawodawcę w postaci wzmożonej ochrony ogólnie pojętego personelu medycznego, jednak od strony normatywnej przepis ten stanowi *superfluum* ustawowe i jego wprowadzenie było wywołane naciskiem społecznym i panującymi okresowymi tendencjami w społeczeństwie. Jego wprowadzenie nie było konieczne, ponieważ obowiązujące przed wprowadzeniem tego środka uregulowania Kodeksu postępowania karnego skutecznie i wystarczająco zabezpieczały prawidłowość procesu karnego.

Realizacja wyżej określonego celu badawczego oraz weryfikacja hipotezy badawczej możliwa będzie dzięki przeprowadzaniu analizy trzech problemów badawczych, które zawierają się w pytaniach:

1) w jakim zakresie wprowadzenie nowego środka zapobiegawczego z art. 276a k.p.k. było niezbędne w aspekcie konieczności zapewnienia szczególnej ochrony personelowi medycznemu w Polsce?
2) w jakim stopniu stosowanie nowego środka zapobiegawczego z art. 276a k.p.k. odpowiada założeniom polskiego ustawodawcy oraz jakie jest *ratio legis* analizowanego unormowania?
3) w jakim zakresie wprowadzona nowelizacja art. 276a k.p.k. odpowiada zasadom techniki prawodawczej?

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1 Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Dz.U. z 1997 r. Nr 89, poz. 555 ze zm.).

2 Ustawa z dnia 31 marca 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (Dz.U. poz. 568), która w odniesieniu do uregulowań Kodeksu postępowania karnego weszła w życie 31 marca 2020 r. Zmiany Kodeksu postępowania karnego wprowadzone zostały także Ustawą z dnia 19 czerwca 2020 r. o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorcom dotkniętym skutkami COVID-19 oraz o uproszczonym postępowaniu o zatwierdzenie układu w związku z wystąpieniem COVID-19 (Dz.U. z 2020 r. poz. 1086), która weszła w życie w odniesieniu do uregulowań Kodeksu postępowania karnego 24 czerwca 2020 r. (dalej: ustawy covidowe).

W artykule wykorzystana została przede wszystkim metoda badawcza analizy dogmatyczno-prawnej i teoretyczno-prawnej. Szczegółowo przeprowadzona została analiza językowa oraz systemowa przepisu art. 276 k.p.k. Dużą rolę odegrała przy tym metoda analizy piśmiennictwa oraz orzecznictwa. Należy wyraźnie zaznaczyć, że zagadnienie nowego środka zapobiegawczego z art. 276a k.p.k. nie było szerzej poruszane w piśmiennictwie. O ile w literaturze przedmiotu pozytywnie ocenia się rozszerzanie katalogu nieizolacyjnych środków zapobiegawczych[3], o tyle konstrukcja poszczególnych środków zapobiegawczych niekiedy oceniana jest krytycznie. Z tego względu konieczne było poruszenie tej problematyki i przeprowadzenie w tym zakresie pogłębionej analizy. Ponadto uzupełniająco wykorzystana została także metoda komparatystyczna mająca na celu ukazanie podobnych tendencji ustawodawczych w innych państwach. Warto bowiem zweryfikować, czy inne państwa również otoczyły szczególną ochroną w postępowaniu karnym grupę pokrzywdzonych, jaką jest personel medyczny i osoby związane z udzielaniem pomocy medycznej, oraz przedstawić rozwiązania prawne przyjęte w wybranym państwie.

1. Uzasadnienie zmian w procedurze karnej wprowadzonych ustawą z dnia 31 marca 2020 r.

Zanim przedstawiona zostanie szczegółowa analiza dotycząca środka zapobiegawczego stosowanego wobec oskarżonego o przestępstwo popełnione w stosunku do członka personelu medycznego lub osoby przybranej personelowi medycznemu do pomocy, warto przyjrzeć się celom, jakie chciał osiągnąć ustawodawca, wprowadzając taki rodzaj środka zapobiegawczego. Cele te określone zostały w uzasadnieniu do projektu ustawy z dnia 31 marca 2020 r. Ustawą tą wprowadzono m.in.:

- możliwość nieodpłatnego przekazania podmiotom leczniczym przedmiotów przechowywanych w ramach postępowania karnego a mających znaczenie dla zdrowia lub bezpieczeństwa publicznego (art. 232b k.p.k.);
- obligatoryjne zastosowanie środka zapobiegawczego w sytuacji naruszenia przez oskarżonego warunków wykonywania środka zapobiegawczego orzeczonego wcześniej (art. 258a);
- środek zapobiegawczy, który można orzec wobec oskarżonego o przestępstwo popełnione w stosunku do członka personelu medycznego (art. 276a k.p.k.).

Z uzasadnienia projektu ww. ustawy wynika, że w ocenie ustawodawcy zaistniała potrzeba wprowadzenia szczególnych rozwiązań mających na celu przeciwdziałanie negatywnym skutkom gospodarczym, jakie powstały w wyniku szerzenia

3 J. Kosonoga, System nieizolacyjnych środków zapobiegawczych, „Ius Novum" 2014, nr 1, s. 94.

się pandemii[4]. We wstępie uzasadnienia projektu ustawy wskazano ogólne cele związane z zapobieganiem ekonomicznym skutkom rozprzestrzeniania się wirusa, zaś w dalszej części uzasadnienia wskazano inne cele, szczególne takie jak: zapewnienie możliwości sprawowania przez sądy powszechne, sądy wojskowe i wojewódzkie sądy administracyjne wymiaru sprawiedliwości w określonych kategoriach spraw pilnych, wymagających bezwzględnego rozpoznania, także w przypadkach, gdy sąd miejscowo właściwy całkowicie zaniecha jakichkolwiek czynności z powodu COVID-19, czy też natychmiastowe podniesienie poziomu bezpieczeństwa publicznego przez przekazanie depozytów pochodzących z przestępstwa do wykorzystania. Odnośnie do środka zapobiegawczego, który można orzec wobec oskarżonego o przestępstwo popełnione w stosunku do członka personelu medycznego (art. 276a k.p.k.), w motywach ustawodawczych podnoszono, że art. 276a k.p.k. „jest odpowiedzią na wielokrotne postulaty środowiska medycznego zapewnienia szczególnej ochrony pracownikom służby zdrowia, którzy są narażeni na ataki zarówno słowne, jak i fizyczne w związku ze swoją pracą. W szczególności przywoływane były ataki na ratowników medycznych pracujących w karetkach pogotowia. W okresie epidemii ataki te przybrały na szczególnej sile w postaci publikacji na forach internetowych danych osobowych lekarzy wraz z ostrzeżeniami o konieczności unikania tych osób"[5]. Wedle ustawodawcy przepis zapewnić ma możliwość natychmiastowej reakcji w postaci środka zapobiegawczego na wzór środków stosowanych w przypadku przemocy domowej, określonych między innymi w art. 275a k.p.k. W wyraźny sposób ustawodawca zaakcentował, że motywem przewodnim wprowadzenia tego środka zapobiegawczego była chęć ochrony grupy pokrzywdzonych, jaką jest szeroko pojęty personel medyczny.

Każda nowelizacja procedury karnej, a zwłaszcza dotycząca środków przymusu, wymaga wnikliwego uzasadnienia. Odnosi się to także do wolnościowych środków zapobiegawczych, które mimo iż nie powodują izolacji oskarżonego, w sposób istotny ingerują w jego sferę praw i wolności, w tym również i takich, które są gwarantowane przepisami Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności[6]. Jakakolwiek zmiana legislacyjna w tym zakresie wymaga zatem

4 Uzasadnienie do rządowego projektu ustawy o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw, Druk nr 299, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=299 (15.06.2021).

5 Uzasadnienie do rządowego projektu ustawy o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw, Autopoprawka, Druk nr 299A, https://orka.sejm.gov.pl/Druki9ka.nsf/0/5EDFDA5A0BA099CBC1258538003A6786/%24File/299-A.pdf (15.06.2021).

6 J. Kosonoga, Komentarz do art. 276a k.p.k., (w:) J. Skorupka (red.), Komentarz do Kodeksu postępowania karnego, Warszawa 2020, wyd. 33, lex-el; wyr. ETPCz z 15.1.2008 r. *Zmarzlak przeciwko Polsce*, skarga Nr 37522/02; wyr. ETPCz z 31.3.2009 r., *A.E. przeciwko Polsce*, skarga Nr 14480/04;

wykazania rzeczywistej potrzeby i procesowej zasadności rozszerzenia katalogu środków przymusu[7]. Ustawodawca w uzasadnieniu projektu wskazanej wyżej ustawy covidowej odniósł się do rzeczywistych potrzeb ochrony w głównej mierze szeroko pojętego personelu medycznego, jednak nie uzasadnił procesowej zasadności rozszerzenia katalogu środków przymusu, jak również nie przeanalizował dotychczas funkcjonujących w procedurze karnej wolnościowych środków zapobiegawczych. W uzasadnieniu projektu ww. ustawy powoływano się natomiast na zjawisko epidemii. W literaturze przedmiotu sformułowano jednak w tym zakresie słuszną konkluzję. Jacek Kosonoga celnie bowiem zauważa, że zjawisko to z założenia ma charakter przemijalny, zaś istota regulacji kodeksowej zakłada pewność i trwałość określonych relacji i stosunków społecznych[8].

Na marginesie można dodać, że sytuacja pandemii wywołała skutki w postaci zmian nie tylko przepisów Kodeksu postępowania karnego, ale także skutki w postaci zmian przepisów Kodeksu karnego[9] (dalej k.k.), gdzie zaostrzono sankcje karne za niektóre przestępstwa (np. art. 161 k.k. – narażenie człowieka na zarażenie chorobą, art. 165 § 1 pkt 1 k.k. – sprowadzenie stanów powszechnie niebezpiecznych dla życia lub zdrowia, art. 190a § 1 k.k. – uporczywe nękanie; kradzież tożsamości). Na gruncie Kodeksu karnego sankcje te również są wynikiem pandemii, bowiem wymienione przestępstwa związane są z powodowaniem rozprzestrzeniania się choroby. Z kolei zmiana w zakresie przestępstwa uporczywego nękania związana jest m.in. z tym, że osoby należące do poszczególnych grup zawodowych mogą być w czasie pandemii szczególnie narażone na stanie się ofiarą takiego czynu.

2. Ochrona personelu medycznego w innych państwach na przykładzie Indii

Sytuacja pandemii dotknęła nie tylko państwo polskie. Z podobnymi problemami borykają się również inne państwa, które w różnorodny sposób radzą sobie z przestępczością spowodowaną pojawieniem się epidemii. W szczególny sposób ochronie poddawani są pracownicy medyczni, którzy w dobie pandemii szczególnie narażeni są na przejawy agresji ze strony społeczeństwa, w tym pacjentów. Problem ten jest o tyle ważny, że Organizacja Narodów Zjednoczonych – Światowa Organizacja Zdrowia (WHO) przedstawiła również ramy dotyczące przeciwdziała-

zob. również J. Kosonoga, Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 31 marca 2009 r., *A.E. przeciwko Polsce*, skarga nr 14480/04, IN 2012, Nr 3, s. 188.

7 J. Kosonoga, Komentarz do art. 276a k.p.k.…, *op. cit*.

8 *Ibidem*.

9 Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz.U. z 1997 r. Nr 88, poz. 553 ze zm.).

nia przemocy w miejscu pracy w sektorze opieki zdrowotnej[10]. Warto z tego powodu zweryfikować, czy tendencje ustawodawcze podobne do tych, które miały miejsce w Polsce, występowały także w innych krajach, a następnie przyjrzeć się wybranym rozwiązaniom ustawodawczym.

Z ogólnodostępnych źródeł wynika, że takie tendencje zaistniały na przykład w Indiach. W państwie tym wydano odrębny akt prawny dotyczący ochrony personelu medycznego – ustawę o zapobieganiu przemocy wobec lekarzy, co stanowi istotny krok w kierunku przeciwdziałania przemocy wobec lekarzy[11], gdyż od dłuższego czasu dochodziło tam do napaści na pracowników medycznych. Epidemia COVID-19 w wyraźny sposób uwydatniła ten rodzaj przemocy i wzmogła częstotliwość popełniania przestępstw wobec lekarzy. Z przeprowadzonych w tym państwie badań empirycznych wynika, że ponad 75% lekarzy w tym kraju spotkało się z przemocą, nadto roczna częstość występowania przemocy w miejscu pracy w opiece zdrowotnej i pomocy społecznej jest czterokrotnie większa niż w innych zawodach[12]. Polski ustawodawca, wprowadzając zmiany w k.p.k. związane z ochroną personelu medycznego nie powołał się na wyniki badań empirycznych.

W Indiach problematyka zdrowia leży w zakresie legislacyjnym rządów stanowych i to one stosują przepisy, które penalizują przemoc wobec lekarzy i szpitali. W tym zakresie nie funkcjonuje tzw. centralne ustawodawstwo. Ustawa o ochronie osób korzystających z usług Medicare i o instytucjach usług Medicare, nazywana ustawą o zapobieganiu przemocy i uszkodzeniom mienia, znana również jako ustawa o ochronie medycznej (MPA), jest obecnie wdrożona w około 23 stanach w Indiach[13]. Oto niektóre z kluczowych punktów tej ustawy[14]:

– zabroniony jest jakikolwiek akt przemocy wobec „Osoby Służby Medicare" lub uszkodzenie lub utrata mienia "Zakładu Służby Medicare";
– każdy sprawca, który popełni lub usiłuje popełnić akt przemocy, podżega lub nakłania do popełnienia aktu przemocy, podlega karze pozbawienia wolności do lat 3 i grzywnie, która może wydłużyć się do 50 tys.;

10 World Health Organization, Geneva: Violence and Injury Prevention; c2020 [cited 2020 May 10]. Violence against health workers; [about 2 screens], https://www.who.int/violence_injury_prevention/violence/workplace/en/ (15.06.2021).

11 G. Kuppuswamy, U. Warrier, COVID-19 and Violence against doctors – Why a law is needed? https://www.jfmpc.com/article.asp?issn=2249–4863;year=2021;volume=10;issue=1;spage=35;epage=40;aulast=Kuppuswamy (15.05.2021).

12 Asian Age. Over 75% of doctors have faced cases of violence; New Delhi: The Asian Age; 2017, http://www.asianage.com/metros/delhi/300417/over-75-per-cent-doctors-have-faced-cases-of-violence.html (15.06.2021).

13 G. Kuppuswamy, U. Warrier, COVID-19 and Violence…, *op. cit.*

14 *Ibidem*.

– każde przestępstwo popełnione na mocy tego aktu będzie rozpoznawalne, nie podlega kaucji i może być osądzone przez Sędziego Sądu „First Class Magistrate".
– W ustawodawstwie indyjskim nadto sprecyzowano, iż:
– „Akt przemocy" obejmuje dowolny z następujących czynów popełnionych przeciwko personelowi służby zdrowia: molestowanie mające wpływ na warunki życia lub pracy, krzywdę, uraz, zranienie lub zagrożenie życia, utrudnianie życia, wykonywania swoich obowiązków oraz utratę lub uszkodzenie mienia lub dokumentów personelu służby zdrowia.
– Mienie definiuje się jako obejmujące: placówkę kliniczną, miejsce kwarantanny, mobilną jednostkę medyczną oraz używane przez personel medyczny mienie, które ma bezpośredni związek z epidemią .
– Żadna osoba nie może popełnić aktu przemocy wobec personelu służby zdrowia ani podżegać do niego, nie może podżegać lub spowodować szkody lub straty w mieniu podczas epidemii; za naruszenie tego przepisu grozi kara pozbawienia wolności od 3 miesięcy do 5 lat oraz grzywna.

Powyższe skłania do wniosku, że ustawodawca indyjski wprowadził nowe regulacje odnoszące się do potrzeby ochrony personelu medycznego, jednak uczynił to w inny sposób aniżeli ustawodawca polski. Uregulowania indyjskie skupiają się na prawie karnym materialnym, a nie procesowym. Wprowadzają bowiem nowe rodzaje przestępstw i to na płaszczyźnie prawa karnego materialnego personel medyczny objęty został szczególną ochroną. Natomiast ustawodawca polski ochronę tę uwydatnił na płaszczyźnie prawa karnego procesowego poprzez wprowadzenie nowego środka zapobiegawczego z art. 276a k.p.k..

3. Nowy środek zapobiegawczy z art. 276a k.p.k.

Cel, w jakim mogą być w postępowaniu karnym stosowane środki zapobiegawcze, związany jest przede wszystkim z zabezpieczeniem prawidłowego toku prowadzonego postępowania, a wyjątkowo także z zapobiegnięciem popełnieniu przez oskarżonego nowego ciężkiego przestępstwa. Oznacza to, że stosowanie środków zapobiegawczych ma charakter procesowy i jest związane z prowadzonym postępowaniem, a wyjątkowo także ma cel prewencyjny.

Istotną instytucją, która pojawiła się w k.p.k. w związku z ustawami covidowymi, jest nowy środek zapobiegawczy stosowany wobec oskarżonego o przestępstwo popełnione w stosunku do członka personelu medycznego lub osoby przybranej personelowi medycznemu do pomocy. Środek ten, jak już wcześniej wskazano, określony został w art. 276a k.p.k. i dodany mocą ustawy z dnia 31 marca 2020 r. Ustawą z dnia 19 czerwca 2020 r. przepis ten został uzupełniony o § 1a. Zgodnie z art. 276a § 1 k.p.k. „tytułem środka zapobiegawczego można orzec wobec oskarżonego o przestępstwo

popełnione w stosunku do członka personelu medycznego, w związku z wykonywaniem przez niego czynności opieki medycznej lub osoby przybranej personelowi medycznemu do pomocy w związku z wykonywaniem tych czynności, zakaz zbliżania się do pokrzywdzonego na wskazaną odległość, zakaz kontaktów lub zakaz publikacji, w tym za pośrednictwem systemów informatycznych lub sieci telekomunikacyjnych, treści godzących w prawnie chronione dobra pokrzywdzonego". Natomiast zgodnie z art. 276a § 1a k.p.k. „środek zapobiegawczy, o którym mowa w § 1, można orzec również wobec oskarżonego o przestępstwo, o którym mowa w art. 190a ustawy z dnia 6 czerwca 1997 r. – Kodeks karny, popełnione z powodu wykonywanego przez pokrzywdzonego zawodu". Z kolei zgodnie z art. 276a § 3 k.p.k. „zakazy, o których mowa w § 1, mogą być połączone z określeniem poręczenia majątkowego. Do poręczenia majątkowego zastosowanie mają przepisy art. 266–270, z tym że stanowiące przedmiot poręczenia wartości majątkowe lub zobowiązania ulegają przepadkowi albo ściągnięciu również w razie niezastosowania się do zakazów, o których mowa w § 1".

Przepis ten wprowadził zatem nowy rodzaj wolnościowego środka zapobiegawczego, który w istocie podobny jest do dozoru Policji, a jego zadanie stanowi ochrona członków personelu medycznego w związku z wykonywaniem przez nich czynności opieki medycznej lub ochrona osoby przybranej im do pomocy, a także ochrona osoby uporczywie nękanej i której wizerunek wykorzystano (art. 190a k.k.) z powodu wykonywanego przez nią zawodu.

W nielicznie prezentowanej literaturze przedmiotu poświęconej nowym regulacjom prawnym wprowadzonym wymienionymi wyżej ustawami wskazuje się, że zakazy z art. 276a k.p.k. mogą być stosowane wówczas, gdy zrealizowane są przesłanki ogólne zastosowania środków zapobiegawczych (określone w art. 249 § 1 k.p.k.) i szczególne stosowania środków zapobiegawczych (określone w art. 258 § 1–3 k.p.k.), choć z tych ostatnich nie może wchodzić w grę przewidziana w art. 258 § 3 k.p.k., gdyż uzasadniona obawa, że oskarżony, któremu zarzucono popełnienie zbrodni lub umyślnego występku, popełni przestępstwo przeciwko życiu, zdrowiu lub bezpieczeństwu powszechnemu, dotyczy tymczasowego aresztowania, bowiem środek ten nie jest adekwatny dla tej przyczyny[15]. Innymi słowy, aby można było zastosować środek zapobiegawczy określony w omawianym przepisie, z pewnością musi być zachowany warunek dowodowy, tzn. zebrane w sprawie dowody muszą wskazywać na duże prawdopodobieństwo, że oskarżony popełnił przestępstwo. Jest to bowiem pierwszy i podstawowy warunek w odniesieniu do każdego środka zapobiegawczego. W literaturze przedmiotu poddano w wątpliwość to, czy w przypadku środka z art. 276a k.p.k. zachowują aktualność szczególne podstawy środków zapo-

15 *Ibidem*.

biegawczych ujęte w art. 258 § 1–3 k.p.k.[16]. W przepisie art. 276a k.p.k. wyodrębniono bowiem warunek zastosowania przewidzianego w nim środka w postaci prowadzenia postępowania o przestępstwo popełnione w stosunku do członka personelu medycznego w związku z wykonywaniem przez niego czynności opieki medycznej lub osoby przybranej personelowi medycznemu do pomocy w związku z wykonywaniem tych czynności. Jak wskazuje R. Koper, struktura komentowanego przepisu oraz jego kontekst, w pewnym sensie znajdujący potwierdzenie w motywach ustawodawczych, zdają się wskazywać, że w art. 276a k.p.k. samodzielnie i wyczerpująco unormowano kwestię podstaw zastosowania tego środka zapobiegawczego i w tym zakresie ten przepis wyłącza stosowanie art. 258 § 1–3 k.p.k. Można tym samym wysnuć kolejną, dalej idącą konkluzję – iż środek z art. 276a k.p.k. nie służy do zabezpieczenia prawidłowego toku procesu karnego. Odstaje od pozostałych środków tego rodzaju i burzy dotychczasową kodeksową koncepcję środków zapobiegawczych, gdzie musi być spełniona przesłanka ogólna (dowodowa) oraz któraś z przesłanek szczególnych określonych w art. 258 § 1–3 k.p.k. Co więcej, wydaje się, że odrębna szczególna podstawa zastosowania tego środka zapobiegawczego jest przesłanką pozaprocesową, chronione są bowiem dobra pokrzywdzonego mieszczące się w kategorii jego „bezpieczeństwa osobistego", a także jego cześć, prywatność, wizerunek itd. (można bowiem orzec zakaz publikacji określonych treści godzących w dobra pokrzywdzonego[17]. Innymi słowy, tak szerokie ujęcie skłania do przyjęcia, że *ratio* omawianego środka to ochrona dóbr osobistych pokrzywdzonego, a nie ochrona toku postępowania karnego.

Przed dokonaniem szczegółowej analizy brzmienia nowego środka zapobiegawczego z art. 276a k.p.k. warto porównać go z określonym w art. 275a k.p.k. **środkiem zapobiegawczym w postaci** nakazu opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonym. Środek ten można zastosować wówczas, gdy zachodzi uzasadniona obawa, że oskarżony o przestępstwo popełnione z użyciem przemocy na szkodę osoby wspólnie zamieszkującej ponownie popełni przestępstwo z użyciem przemocy wobec tej osoby, zwłaszcza gdy popełnieniem takiego przestępstwa groził. Zgodnie z przepisem art. 275a § 4 k.p.k. nakaz opuszczenia przez oskarżonego lokalu mieszkalnego „stosuje się na okres nie dłuższy niż 3 miesiące. Jeżeli nie ustały przesłanki jego stosowania, sąd pierwszej instancji właściwy do rozpoznania sprawy, na wniosek prokuratora, może przedłużyć jego stosowanie na dalsze okresy, nie dłuższe niż 3 miesiące". Oba te środki konstrukcyjnie są zatem do siebie zbliżone – stosowane mogą być z uwagi na chęć ochrony i zapewnienie bezpieczeństwa pokrzywdzonym

16 R. Koper, Komentarz do art. 276a k.p.k., (w:) A. Sakowicz (red.), Komentarz do Kodeksu postępowania karnego, Warszawa 2020, wyd. 9, Legalis, s. 772.

17 *Ibidem.*

określonego rodzaju[18], mogą być stosowane na dany okres, przy czym po przekroczeniu określonego czasu władnym do wydania rozstrzygnięcia w przedmiocie zastosowania tych środków zapobiegawczych jest sąd (odpowiednio sąd rejonowy w przypadku środka zapobiegawczego z art. 276a k.p.k. lub w przypadku środka zapobiegawczego z art. 275a k.p.k. sąd pierwszej instancji właściwy do rozpoznania sprawy). Również umiejscowienie obu tych jednostek redakcyjnych przepisów (art. 275a k.p.k. i art. 276a k.p.k.) niemalże obok siebie sugeruje, iż istota i konstrukcja tych środków zapobiegawczych jest zbliżona. Niewątpliwie nie służą one wyłącznie zabezpieczeniu prawidłowego toku postępowania, jak ma to miejsce w przypadku pozostałych środków zapobiegawczych, bowiem najważniejszym ich celem jest zapewnienie bezpieczeństwa określonym pokrzywdzonym (odpowiednio pokrzywdzonemu, z którym sprawca wspólnie zajmuje lokal mieszkalny, i członkowi personelu medycznego, osobie przybranej personelowi medycznemu do pomocy lub osobom dla nich najbliższym). Wydaje się, że dopiero na drugim miejscu ujawnia się potrzeba zabezpieczenia prawidłowego biegu postępowania karnego. Jednak wyodrębnienie grupy pokrzywdzonych w środku określonym w art. 275a k.p.k. ma rację bytu, gdyż zjawisko przemocy domowej jest zjawiskiem trwałym. W przypadku zaś środka zapobiegawczego z art. 276a k.p.k. należy zauważyć, że stan epidemii jest zjawiskiem przemijalnym i personel medyczny po pewnym czasie nie będzie musiał być chroniony. Zauważyć nadto należy, iż zjawisko stalkingu ma charakter marginalny w porównaniu z przestępstwami z użyciem przemocy.

Badanie i ocena opisywanego środka zapobiegawczego z art. 276a k.p.k. w dalszej kolejności wymaga zajęcia się kilkoma zagadnieniami:

- należy przyjrzeć się pojęciom: członek personelu medycznego, osoba przybrana personelowi medycznemu do pomocy, wykonywanie czynności opieki medycznej;
- należy poddać analizie zakazy/nakazy, jakie mogą być nałożone na podejrzanego na etapie postępowania przygotowawczego lub oskarżonego na etapie postępowania sądowego, w związku z zastosowaniem instytucji z art. 276a k.p.k.;
- należy poddać analizie podstawy zastosowania tego środka zapobiegawczego;
- z racji tego, że środek ten jest podobny do funkcjonującego już w procedurze karnej środka zapobiegawczego w postaci dozoru Policji, warto porównać oba te środki zapobiegawcze.

Analiza użytych terminów w przepisie art. 276a k.p.k. skłania do wniosku, że przepis ten nie definiuje określenia „personel medyczny". Również przepisy Kodeksu karnego nie definiują tego pojęcia. W orzecznictwie sądów administracyjnych

18 R.A. Stefański, S. Zabłocki, Komentarz do art. 275a k.p.k., (w:) R.A. Stefański, S. Zabłocki, Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296, Warszawa 2019, s. 1152.

podkreśla się, iż pojęcia „personelu medycznego" nie można utożsamiać z definicją „zawodu medycznego", zawartą w ustawie o działalności leczniczej. Niewątpliwie pojęcie „personel medyczny" jest pojęciem szerszym niż definicja „zawodu medycznego" i może obejmować także np. salowe, ratowników pogotowia ratunkowego[19], felczera, diagnostę laboratoryjnego, farmaceutę. Za personel medyczny uznać więc należy wszystkie osoby, których praca polega bądź na udzielaniu świadczeń zdrowotnych, bądź też ma związek z udzielaniem świadczeń zdrowotnych i wykonywana jest w bezpośrednim kontakcie z pacjentami[20]. Opisywany środek zapobiegawczy można zastosować także w przypadku popełnienia przestępstwa wobec osoby przybranej przez personel medyczny do pomocy w związku z wykonywaniem czynności opieki medycznej. Ochrona obejmuje zatem także np. wolontariuszy, studentów, którzy udzielają pomocy w placówkach opieki zdrowotnej. Nie jest przy tym wymagane, aby osoba taka posiadała odpowiednie wykształcenie wiązane ze świadczeniem opieki medycznej.

Opisywany środek zapobiegawczy może być zastosowany wobec podejrzanego lub oskarżonego o przestępstwo popełnione w stosunku do członka personelu medycznego, o ile popełnione przestępstwo pozostawać będzie w związku z wykonywaniem przez niego czynności opieki medycznej. W motywach ustawodawczych wskazano, że pojęcie „opieki medycznej" zostało zaczerpnięte z art. 118a § 1 k.k., aby również zapewnić maksymalnie szeroki zakres ochrony. Pojęcie „opieki medycznej" zawarte w projektowanym art. 267a k.p.k. jest tożsame zakresowo z tym samym pojęciem użytym przez ustawodawcę w art. 123 § 1 k.k.[21] Jest ono celowo szersze niż sformułowania lekarz lub pielęgniarka, aby zapewnić ochronę prawnokarną wszelkim osobom wykonującym czynności opieki medycznej. Ochrona ta nie jest zależna również od miejsca pracy personelu, tj. czy jest to publiczny, czy prywatny zakład opieki zdrowotnej[22].

Konkluzją, jaka wyłania się na kanwie analizy przepisu art. 276a k.p.k., jest to, że Kodeks postępowania karnego obejmował początkowo ochroną tylko jedną grupę pokrzywdzonych. Krąg osób, jakie były objęte ochroną, był bowiem istotnie ograniczony – do personelu medycznego, osób przybranych przez ten personel do pomocy, a także osób dla nich najbliższych. W paragrafie 4 tego przepisu wyraźnie

19 K. Dudka, Komentarz do art. 276a k.p.k., (w:) M. Janicz, C. Kulesza, J. Matras, H. Paluszkiewicz, B. Skowron, K. Dudka, Kodeks postępowania karnego. Komentarz, wyd. II, Warszawa 2020, s. 549–550.

20 Wyrok WSA w Lublinie z 18.11.2010 r., III SA/Lu 337/10, LEX nr 757110.

21 Uzasadnienie do rządowego projektu ustawy o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw, Autopoprawka, Druk nr 299A, https://orka.sejm.gov.pl/Druki9ka.nsf/0/5EDFDA5A0BA099CBC1258538003A6786/%24File/299-A.pdf (15.06.2021).

22 *Ibidem*.

wskazano, że czas stosowania zakazów określa się przy uwzględnieniu potrzeb w zakresie zabezpieczenia prawidłowego biegu postępowania karnego oraz zapewnienia odpowiedniej ochrony pokrzywdzonemu lub osobom dla niego najbliższym. Trudno nie zgodzić się ze stanowiskiem, że taki zabieg rodził obawę wyodrębniania nowych środków adresowanych do coraz to innych grup społecznych czy zawodowych, z uwagi na realną pokusę podnoszenia zarzutów naruszenia zasady równości[23]. Na podobnych zasadach można bowiem postulować ochronę innych zawodów szczególnie narażonych w czasach epidemii (np. kierowców komunikacji miejskiej, listonoszy, nauczycieli). Ustawodawca, dostrzegając niewątpliwie pewną dysproporcję i uprzywilejowanie jednej (aczkolwiek szerokiej) grupy zawodowej (personelu medycznego), postanowił w drodze ustawy z dnia 19 czerwca 2020 r. poszerzyć krąg podmiotów podlegających ochronie, dodając do art. 276a § 1a k.p.k. Jak wskazano w uzasadnieniu do projektu tej ustawy, zasadniczym celem regulacji (276a § 1a k.p.k.) była ochrona tych grup zawodowych, które są szczególnie narażone na różne formy przestępczego nękania. Krąg osób podlegających ochronie uległ zatem rozszerzeniu. Do takich grup zaliczyć należy m.in. nauczycieli oraz innych pracowników szkolnictwa i edukacji, którzy nierzadko narażeni są na powtarzającą się, nie tylko werbalną, agresję uczniów. Przepis znajdzie również zastosowanie w sytuacjach, w których określone grupy zawodowe padają celem ataków ze względu na okoliczności o charakterze tymczasowym i obiektywnym, takie jak na przykład panująca epidemia. Zaliczyć do nich można m.in. górników i ich rodziny lub pracowników domów opieki społecznej i hospicjów. W uzasadnieniu projektu ustawy ustawodawca podkreślił, że zjawisko stalkingu jest coraz bardziej powszechne i przybiera nową, coraz bardziej dotkliwą postać, pociągającą za sobą liczne negatywne skutki dla pokrzywdzonego[24]. Przywołał tym samym na potwierdzenie swojej argumentacji wyniki badań empirycznych, zgodnie z którymi w Polsce w przypadku 62% ofiar stalkingu dało się zauważyć jego negatywny wpływ na ich życie i zdrowie, w szczególności odczuwały one niepokój, miały poczucie zagrożenia, zaburzenia psychosomatyczne i problemy w kontaktach międzyludzkich, u 49% ofiar występowały ataki paniki, fobie itp., u 22% ofiar – zaburzenia odżywiania, a u 57% – trudności w kontaktach interpersonalnych[25]. Rozbudowanie zatem art. 276a k.p.k. poprzez dodanie § 1a k.p.k. należy ocenić pozytywnie. Niemniej jednak na pierwszy plan wysuwa się wątek zbytniego wyodrębniania i uprzywilejowania jednej grupy społecznej, co wywołuje zastrzeżenia. Warto zaznaczyć, że epidemia ma charakter okresowy i przemi-

23 *Ibidem*.

24 Uzasadnienie do rządowego projektu ustawy o dopłatach do oprocentowania kredytów bankowych udzielanych na zapewnienie płynności finansowej przedsiębiorcom dotkniętym skutkami COVID-19 oraz o zmianie niektórych innych ustaw, Druk nr 382, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=382 (15.06.2021).

25 J. Skarżyńska-Sernaglia, Stalking w Polsce – występowanie i charakterystyka zjawiska, http://psychologia.net.pl/artykul.php?level=415 (15.06.2021).

jalny, więc później uprzywilejowane grupy zawodowe (personel medyczny) nie będą musiały być aż tak chronione. Po drugie, wydaje się, że w sprawach, w których występują tego rodzaju pokrzywdzeni (personel medyczny), nie ma przeszkód do stosowania dozoru Policji w takiej samej postaci, jak w art. 276a k.p.k., o czym już wcześniej była mowa.

Wobec podejrzanego na etapie postępowania przygotowawczego (oskarżonego na etapie postępowania sądowego) o przestępstwo popełnione w stosunku do członka personelu medycznego w związku z wykonywaniem przez niego czynności opieki medycznej lub osoby przybranej personelowi medycznemu do pomocy w związku z wykonywaniem tych czynności, a także wobec oskarżonego o przestępstwo uporczywego nękania i kradzieży tożsamości (art. 190a k.k.), popełnione z powodu wykonywanego przez pokrzywdzonego zawodu, można orzec trzy zakazy:

- zakaz zbliżania się do pokrzywdzonego na wskazaną odległość (zakaz ten konkretyzuje organ procesowy, określając odległość, jaką oskarżony musi zachować od pokrzywdzonego);
- lub zakaz kontaktów (chodzi tutaj o wszelkie formy kontaktowania się, zarówno osobiste, jak i za pomocą środków technicznych, np. telefonu, poczty e-mailowej);
- lub zakaz publikacji, w tym za pośrednictwem systemów informatycznych lub sieci telekomunikacyjnych treści godzących w prawnie chronione dobra pokrzywdzonego.

Wskazane zakazy mogą być stosowane pojedynczo lub kumulatywnie; dopuszczalne jest orzeczenie wszystkich zakazów (zakazy zintegrowane)[26]. W projekcie ustawy wskazano, że zakazy zbliżania się i zakaz kontaktów z pokrzywdzonym mogą być stosowane jako uzupełnienie dozoru policyjnego z art. 275 § 2 k.p.k.[27] Zgodnie z tym przepisem oddany pod dozór ma obowiązek stosowania się do wymagań zawartych w postanowieniu sądu lub prokuratora. Zgodnie z art. 275 § 2 k.p.k. obowiązek ten może polegać na zakazie opuszczania określonego miejsca pobytu, zgłaszaniu się do organu dozorującego w określonych odstępach czasu, zawiadamianiu go o zamierzonym wyjeździe oraz o terminie powrotu, zakazie kontaktowania się z pokrzywdzonym lub z innymi osobami, zakazie zbliżania się do określonych osób na wskazaną odległość, zakazie przebywania w określonych miejscach, a także na innych ograniczeniach swobody oskarżonego, niezbędnych do wykonywania dozoru.

26 R.A. Stefański, Stosowanie zakazów w stosunku do pokrzywdzonego członka personelu medycznego, Lex-el.

27 Uzasadnienie do rządowego projektu ustawy o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw, Autopoprawka, Druk nr 299A, https://orka.sejm.gov.pl/Druki9ka.nsf/0/5EDFDA5A0BA099CBC1258538003A6786/%24File/299-A.pdf (15.06.2021).

Ograniczenia swobody w postaci zakazu zbliżania się do pokrzywdzonego na wskazaną odległość oraz zakazu kontaktowania się (przewidziane w art. 276a k.p.k.) wprost przewiduje zatem art. 275 § 2 k.p.k., stąd też w literaturze trafnie ocenia się tę regulację jako *superfluum* ustawowe[28].

Dodatkowo w przepisie art. 276a k.p.k. na wzór zabezpieczenia w postępowaniu cywilnym zamieszczony został zakaz publikacji. Taką instytucję przewiduje art. 755 § 2 Kodeksu postępowania cywilnego (dalej k.p.c.)[29]. Wprowadzenie takiego zakazu należy uznać za reakcję na zjawisko zamieszczania pełnych agresji i obraźliwych komentarzy w Internecie. Wysnuć można z tego konkluzję, iż rozwiązanie to jest dostosowane do wymogów współczesności i uwzględnia potencjalnie najczęściej wybierany sposób godzenia w prawnie chronione dobra pokrzywdzonego – za pośrednictwem internetowych portali. Zakaz publikacji treści godzących w prawnie chronione dobra pokrzywdzonego, o którym mowa w § 1, obejmuje zakaz publikowania i innego udostępniania tych treści niezależnie od tego, czy zostały wytworzone przez oskarżonego czy inną osobę, za pośrednictwem internetowych portali, stanowiących usługę świadczoną drogą elektroniczną w rozumieniu ustawy z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną[30]. Członkowie personelu medycznego z racji wykonywanych czynności mogą być szczególnie narażeni na naruszanie ich dóbr osobistych na różnego rodzaju portalach społecznościowych oraz stronach internetowych umożliwiających komentowanie opublikowanych treści. Szczególnie chodzi tutaj o sytuacje, w których członkowie personelu medycznego zmuszeni są do podejmowania niepopularnych decyzji, jak selekcja pacjentów przy brakach sprzętu do ratowania życia[31]. Zakaz publikacji obejmuje wszystkie środki społecznego przekazu: od druków ulotnych przez prasę, radio, telewizję aż do portali internetowych.[32] Zakaz obejmuje tym samym zamieszczanie za pomocą systemów informatycznych lub sieci telekomunikacyjnych godzących w prawnie chronione dobra pokrzywdzonego nagrań audio i audio-wideo, niezależnie od tego, kto był ich twórcą. Słusznie zauważa się w literaturze, że zakaz publikacji możliwy był również do orzeczenia w ramach dozoru Policji[33]. Zakaz publikacji treści godzących w prawnie chronione dobra pokrzywdzonego można wywodzić z innych ograniczeń swobody oskarżonego niezbędnych do wykonywania dozoru określonego w art. 275 § 2 k.p.k. Przepis

28 Tak np. K. Dudka, Komentarz do art. 276a k.p.k. …, *op. cit.*, s. 549.

29 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Dz.U. z 1964 r. Nr 43, poz. 296).

30 Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną (tekst jedn. Dz.U. z 2020 r. poz. 344).

31 M. Nawacki, Komentarz do art. 276a k.p.k., (w:) D. Drajewicz (red.), Kodeks postępowania karnego, t. 1, wyd. 1, Warszawa 2020, Legalis.

32 *Ibidem*.

33 K. Dudka, Komentarz do art. 276a k.p.k. …, *op. cit.*, s. 549.

ten prezentuje bowiem otwarty katalog obowiązków/zakazów, jakie można nałożyć na oskarżonego, i taki zakaz można orzec na podstawie tego przepisu.

Jak już wcześniej wskazano, wymienione w art. 276a k.p.k. trzy zakazy mogą być połączone z poręczeniem majątkowym. Radosław Koper wyróżnił w związku z tym dwie formy zastosowania tego środka[34]:

a) prostą – poprzez orzeczenie jednego lub kilku zakazów określonych w art. 276a § 1 k.p.k.;
b) złożoną – poprzez połączenie wymienionych zakazów z poręczeniem majątkowym.

W literaturze przedmiotu słusznie wskazuje się, że również pod tym względem przepis ten stanowi zupełnie zbędne *superfluum* ustawowe[35]. Jak bowiem zauważa Katarzyna Dudka, organ procesowy w każdym przypadku może zastosować łącznie kilka nieizolacyjnych środków zapobiegawczych, jeżeli jest to konieczne do zabezpieczenia prawidłowego toku postępowania lub zapobieżenia popełnieniu nowego, ciężkiego przestępstwa[36]. Jeśli zaś chodzi o samą konstrukcję art. 276a § 3 k.p.k., komentatorzy krytykują użyty przez ustawodawcę zwrot „określa się" poręczenie, podczas gdy w istocie chodzi o jego orzeczenie[37]. Nie wystarczy bowiem „określić" wysokość poręczenia, konieczne jest jego zastosowanie, czyli orzeczenie jako dodatkowego środka[38]. Jeśli orzeka się ten środek zapobiegawczy w drodze postanowienia, konieczne jest przywołanie właściwej kwalifikacji prawnej z art. 266 k.p.k. Zgodnie z art. 266 § 2 k.p.k. wysokość, rodzaj i warunki poręczenia majątkowego, a w szczególności termin złożenia przedmiotu poręczenia, należy określić w postanowieniu, mając na względzie sytuację materialną oskarżonego i składającego poręczenie majątkowe, wysokość wyrządzonej szkody oraz charakter popełnionego czynu.

W uzasadnieniu projektu ustawy wskazano, że taka piętrowa konstrukcja środka ma zapewnić z jednej strony jego skuteczność, a z drugiej proporcjonalność, nadto potencjalny przepadek poręczenia w wielu sytuacjach będzie działał bardziej motywująco na oskarżonych niż dozór policyjny, a będzie mniej surowy niż tymczasowe aresztowanie[39]. Zauważyć wypada, że wedle art. 276a § 2 k.p.k. „do poręczenia majątkowego zastosowanie mają przepisy art. 266–270, z tym że stanowiące przedmiot poręczenia wartości majątkowe lub zobowiązania ulegają przepadkowi albo ściągnięciu

34 R. Koper, Komentarz do art. 276a k.p.k. …, *op. cit.*
35 K. Dudka, Komentarz do art. 276a k.p.k. …, *op. cit.*, s. 549.
36 *Ibidem*.
37 J. Kosonoga, Komentarz do art. 276a k.p.k. …, *op. cit.*
38 *Ibidem*.
39 Uzasadnienie do rządowego projektu ustawy o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw, Autopoprawka, Druk nr 299A, https://orka.sejm.gov.pl/Druki9ka.nsf/0/5EDFDA5A0BA099CBC1258538003A6786/%24File/299-A.pdf (15.06.2021).

również w razie niezastosowania się do zakazów, o których mowa w § 1". Przepis ten stanowi zatem *lex specialis* wobec art. 268 § 1 k.p.k., zgodnie z którym „stanowiące przedmiot poręczenia wartości majątkowe lub zobowiązania ulegają przepadkowi albo ściągnięciu w razie ucieczki lub ukrycia się oskarżonego. W wypadku utrudniania w inny sposób postępowania karnego można orzec przepadek lub ściągnięcie tych wartości".

Analizując *ratio legis* wprowadzenia opisywanego środka zapobiegawczego z art. 276a k.p.k., postawić można tezę, że środek ten związany jest ściśle z sytuacją pandemii wirusa COVID-19, bowiem ma na celu ochronę personelu medycznego, który jest szczególnie narażony na ataki ze strony społeczeństwa. Wskazana wyżej ustawa covidowa, jak wynika z uzasadnienia projektu ustawy, odnosi się wyłącznie do działań związanych ze zwalczaniem wirusa COVID-19 i służących temu celowi. W literaturze przedmiotu sformułowano w związku z tym wniosek, iż działanie ustaw covidowych ma charakter ograniczony do wskazanych w uzasadnieniu celów, przez co przepis art. 276a k.p.k. ma zastosowanie wyłącznie w zakresie, w jakim służy to zapobieganiu wystąpienia i rozprzestrzeniania oraz zwalczaniu zakażenia oraz choroby zakaźnej wywołanej wirusem SARS-CoV–2 i nie może być stosowany w postępowaniach niedotyczących zwalczania i przeciwdziałania epidemii koronawirusa[40]. Jednak redakcja tego przepisu nie wskazuje na to, aby opisywany środek zapobiegawczy skupiający się na grupie pokrzywdzonych (personelu medycznym) miał być ograniczony wyłącznie do postępowań dotyczących zwalczania i przeciwdziałania epidemii koronawirusa.

Kolejną konkluzją płynącą z analizy brzmienia przepisu art. 276a k.p.k. jest to, że środek ten może być stosowany w postępowaniu przygotowawczym przez prokuratora na okres łącznie 6 miesięcy. Zgodnie bowiem z § 5 tego przepisu przedłużenie stosowania zakazu na dalszy okres, przekraczający łącznie 6 miesięcy, w postępowaniu przygotowawczym może dokonać, na wniosek prokuratora, sąd rejonowy, w okręgu którego prowadzone jest postępowanie. W toku postępowania sądowego środek ten stosuje sąd, przed którym toczy się postępowanie. Ustawa ogranicza zatem okres stosowania tego środka zapobiegawczego, a także ustanawia ograniczenia co do organu, który go stosuje (jeśli środek ten miałby być stosowany dłużej niż 6 miesięcy, wówczas organem procesowym podejmującym w tym przedmiocie decyzję jest sąd rejonowy). Warto dodać, że na postanowienie prokuratora wydane w postępowaniu przygotowawczym służy zażalenie do sądu rejonowego, w którego okręgu prowadzi się postępowanie (art. 252 § 2 k.p.k.), zaś na postanowienie sądu do sądu wyższej instancji nad sądem, który wydał zaskarżone postanowienie (art. 252 § 1 k.p.k.)[41] Konsekwencją opisanego wyżej *superfluum* ustawowego może być to, że po upływie

40 K. Dudka, Komentarz do art. 276a k.p.k. …, *op. cit.*, s. 548.

41 K. Eichstaedt, Komentarz do art. art. 276a k.p.k., (w:) D. Świecki (red.), Kodeks postępowania karnego. Tom I. Komentarz aktualizowany, LEX/el. 2021, https://sip.lex.pl/#/

wskazanego okresu określony w postanowieniu zakaz może być w dalszym ciągu stosowany, jednakże wymagałoby to wydania nowego postanowienia w oparciu wyłącznie o art. 275 k.p.k.

Wnioski

Analiza nowelizacji polskiego Kodeksu postępowania karnego, poczynając od marca 2020 r., prowadzi do wniosku, że większość zmian procedury karnej spowodowana była panującą pandemią wirusa SARS-CoV–2. Jak wspomniano już wcześniej, zasadniczy cel ustawodawcy stanowiło przeciwdziałanie negatywnym skutkom, jakie powstały w wyniku szerzenia się pandemii i z tej perspektywy zmiany Kodeksu postępowania karnego należy oceniać pozytywnie. Również wprowadzenie analizowanego w artykule przepisu art. 276a k.p.k. bezpośrednio związane było z wystąpieniem sytuacji pandemicznej i miało na celu wyeliminowanie lub przynajmniej zmniejszenie występowania niekorzystnych zjawisk, jakie pojawiły się w wyniku szerzenia się pandemii. Nie oznacza to jednak, że wprowadzenie tego przepisu było konieczne i poprawne pod względem normatywnym. Poddany w niniejszym artykule analizie środek zapobiegawczy określony w art. 276a k.p.k. wywołuje wiele wątpliwości.

Po pierwsze, wprowadzenie nowego środka zapobiegawczego z art. 276a k.p.k. było zabiegiem wywołanym przez nacisk społeczny i panujące tendencje w społeczeństwie. Od strony normatywnej zgodzić się należy z zaprezentowanym już w doktrynie stanowiskiem, że przepis ten stanowi *superfluum* ustawowe, ponieważ dubluje istniejące już regulacje prawne. Zakazy określone w środku zapobiegawczym z art. 276a k.p.k. mogą być nałożone w ramach dozoru Policji. Ograniczenia swobody oskarżonego w postaci zakazu zbliżania się do pokrzywdzonego na wskazaną odległość oraz zakazu kontaktowania się, które przewidziane są w art. 276a k.p.k., wprost przewiduje art. 275 § 2 k.p.k. W ramach dozoru Policji, w ramach „innych ograniczeń swobody oskarżonego", może być także orzeczony zakaz publikacji (w tym za pośrednictwem systemów informatycznych lub sieci telekomunikacyjnych) treści godzących w prawnie chronione dobra pokrzywdzonego. Katalog ograniczeń swobody oskarżonego zawarty w art. 275 § 2 k.p.k. nie ma bowiem charakteru zamkniętego, pozwala na efektywne stosowanie dozoru także dla zapewnienia bezpieczeństwa członkom personelu medycznego czy osobom wykonującym inne zawody, przy wykonywaniu których występuje szczególne narażenie na uporczywe nękanie. Nadto k.p.k. przewiduje możliwość orzeczenia jednocześnie kilku nieizolacyjnych środków zapobiegawczych – określonego zakazu wraz z poręczeniem majątkowym, przez co regulacja z art. 276a § 3 zd. 1 k.p.k. jest zbędnym powtórzeniem. Płynie z tego konkluzja, że obowiązujące uregulowania procedury karnej, z wyłączeniem nowego art.

commentary/587830154/644727/swiecki-dariusz-red-kodeks-postepowania-karnego-tom-i-komentarz-aktualizowany?cm=URELATIONS (15.06.2021).

276a k.p.k., skutecznie zabezpieczają prawidłowość procedury karnej w Polsce oraz interesy pokrzywdzonych będących przedstawicielami personelu medycznego i osobami udzielającymi im pomocy w pełnieniu obowiązków.

Po drugie, do Kodeksu postepowania karnego wprowadzono środek zapobiegawczy, który tworzy odrębną od przyjętej systematyki podstawę szczególną zastosowania środka zapobiegawczego. Oparty jest na nowej podstawie szczególnej, która wyróżnia ten środek zapobiegawczy. Tą podstawę stanowi prowadzenie postępowania o przestępstwo popełnione w stosunku do członka personelu medycznego w związku z wykonywaniem przez niego czynności opieki medycznej lub osoby przybranej personelowi medycznemu do pomocy w związku z wykonywaniem tych czynności. Zaryzykować przez to można stwierdzenie, że przepis wyłącza stosowanie szczególnych podstaw zastosowania środków zapobiegawczych wskazanych w art. 258 § 1–3 k.p.k., przez co całkowicie różni się od pozostałych środków zapobiegawczych i burzy dotychczasową kodeksową koncepcję środków zapobiegawczych.

Po trzecie, podstawa szczególna zastosowania opisywanego nowego środka zapobiegawczego z art. 276a k.p.k. ma charakter pozaprocesowy, przez co środek ten nie służy zabezpieczeniu prawidłowego toku procesu karnego. Z treści tego przepisu wprost wynika, że chodzi o ochronę pokrzywdzonego. Przepis pełni bardziej funkcję ochronną w stosunku do określonej wąskiej kategorii pokrzywdzonych, niż służy potrzebie zabezpieczenia prawidłowego toku postępowania.

Po czwarte, analiza środka zapobiegawczego z art. 276a k.p.k. wskazuje na uprzywilejowanie jednej grupy społecznej, co wywołuje wątpliwości pod kątem naruszenia zasady równości. Jednocześnie wydaje się, że ustawodawca wprowadził nowy środek zapobiegawczy w panice i pod naciskiem społecznym, na co wskazuje uzasadnienie projektu ustawy covidowej, przywołujące postulaty środowiska medycznego.

Po piąte, przegląd ustawodawstwa innych państw sąsiadujących z Polską nie wskazuje, aby wprowadzane były w tych państwach podobne regulacje do procedury karnej. Z kolei przegląd zmian prawa w państwach na świecie ujawnił godne uwagi rozwiązanie prawne przyjęte w Indiach. Zarówno ustawodawca polski, jak i ustawodawca indyjski obrał sobie za cel w dobie pandemii ochronę i wsparcie pokrzywdzonych – personelu medycznego przed sprawcami przestępstw. Uczyniono to jednak w całkowicie odrębny sposób. Ustawodawca polski wprowadził zmiany w zakresie procedury karnej, natomiast ustawodawca indyjski sporządził odrębny akt prawny dotyczący ochrony personelu medycznego – ustawę o zapobieganiu przemocy wobec lekarzy. Ustawa ta dotyczy jednak prawa karnego materialnego, a nie procesowego. Tym samym taka regulacja prawnomaterialna czyni ochronę personelu medycznego bardziej realną i skuteczną.

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COMMENTARY

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Has the CJEU Made the First Step to Put a Stop to the Criminalisation of Migration? Commentary to the Judgement in the Case of JZ in the Context of the COVID-19 Pandemic

Abstract: The paper presents a critical discussion of the CJEU judgment in the JZ case (C 806/18), in which the Court interpreted Article 11 of Directive 2008/115 that regulates entry ban issuance. The author asks a question of whether an entry ban as a measure limiting the right to free movement has a moral and legal ground in international law and EU law. Moreover, the author focuses on the problem of the criminalisation of irregular migration – both in the context of the established line of the Court's case law and in the case of a vague national law standard that penalizes illegal stays – the possibility to apply the criminal law concept of error in law and thus exclusion of criminal liability of an illegal migrant.
Keywords: COVID-19 pandemic, criminalisation of migration, Directive 2008/115, entry ban, irregular migration, return policy

Introduction

In the JZ judgement[1] that is the subject matter of this commentary, the Court of Justice of the European Union (hereinafter the Court) interpreted Article 11 of Directive 2008/115[2]. Governance of irregular migration is a particular challenge for

1 Judgment of CJEU of 17 September 2020 in the case of criminal proceedings against JZ, C806/18; hereinafter the JZ judgement, judgment in C 806/18.

2 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country

the Member States of the European Union (EU), which on the one hand are obliged to respect guarantees of human rights that result from acts of international law and the EU law alike[3], and on the other are trying to mitigate the threats for the security of the host country likely to be brought by flows of irregular migrants.

Ethical and moral problems resulting from governance of illegal migration are reflected in the semantics of the language of the law and the legal language as well as the semantics of the scholarly human rights discourse that is carried out parallel to the implementation of return law standards – Directive 2008/115 is sometimes called a "directive of shame"[4] by scholars and NGOs' representatives. In turn, terms such as "unwanted migrants" or "illegal migrants" used to denote third-country nationals that stay in the territory of Member States (MS) in breach of the law do not encourage a positive attitude towards such migration flows either[5].

Therefore, can the case law of the Court of Justice of the European Union and the opinions of Advocates General provide an advocacy mainstream in the context of the need to ensure special protection of, and sensitivity to, the rights of a group which in administrative and court proceedings is unquestionably particularly vulnerable to violations?

1. EU Law Analysed

In the judgement that is the subject matter of this commentary, the Court interpreted Article 11 of the Return Directive. According to Article 11(1) of this directive:

> *Return decisions shall be accompanied by an entry ban:*
> *a) if no period for voluntary departure has been granted, or*
> *b) if the obligation to return has not been complied with.*
> *In other cases, return decisions may be accompanied by an entry ban.*

An entry ban was defined in Article 3 of the Directive, and pursuant to point 6 it means "an administrative or judicial decision or act prohibiting entry into and stay

nationals (O.J. L 348, 24.12.2008, p. 98–107); hereinafter Directive 2008/115, Return Directive, Directive.

3 These guarantees result, in particular, from Articles 18 and 19 of the Charter of Fundamental Rights of the European Union, hereinafter as Charter (O.J. C 202, 7.06.2016, p. 389–405).

4 A. Crosby, The Political Potential of the Return Directive, "Laws" 2014, no. 3, p. 7, www.mdpi.com/journal/laws/ (12.03.2021).

5 T.G. Eule, L. M. Borrelli, A. Lindberg, A. Wyss, Migrants Before the Law. Contested Migration Control in Europe, London, and Basingstoke 2019, pp. 25–26. The authors of the research introduce an interesting term "migrants with precarious legal status" which does not seem to have pejorative undertones. See also H. Motomura, Immigration Outside the Law, New York 2014, pp. 21–22.

on the territory of the Member States for a specified period, accompanying a return decision". Moreover, Article 11 of the Directive stipulates that an entry ban shall not in principle exceed five years, but if the third-country national represents a serious threat to public security, national security, or public policy this period may be longer. An entry ban may be withdrawn or suspended (upon a discretionary decision of a Member State) where a third-country national demonstrates that he or she has left the territory of a Member State and thus fully complied with a return decision[6].

2. Facts and Domestic Proceedings

Domestic proceedings in the discussed case were carried out before the Supreme Court of the Netherlands. Mr JZ, born in Algeria in 1969, was the party to the proceedings. Mr JZ was staying in the territory of the Netherlands when he was declared "undesirable" in a 2000 decision. Following the implementation of the Return Directive in the Netherlands, a relevant national law on foreign nationals was amended on 31 December 2011. On this basis Mr JZ requested that the declaration of undesirability should be lifted, and the State Secretary for Security and Justice decided in favour of the applicant. However, by order of 19 March 2013, the applicant was obliged to leave the territory of the host country and a five-year entry ban was also issued with respect to him[7]. The reasons for the entry ban for Mr JZ included *i.a.*, the fact that he had been previously convicted of various offences. It is worth emphasizing that pursuant to Dutch law (A4/3.3 Vreemdelingencirculaire 2000 – Circular on Foreign Nationals) "any suspicion or conviction in respect of an offence constitutes a danger to public order"[8] – thus Mr JZ constituted a threat to public order in the light of the national law. In turn, pursuant to the Vw law (Article 66a(4)(b)) a foreign national who represents a threat to public policy and who is subject to an entry ban may not, under any circumstances, be lawfully resident in the territory of the Netherlands[9].

Mr JZ was arrested in 2015 in Amsterdam. Because he did not leave the Netherlands immediately after a decision imposing an entry ban was ordered against him, it was determined that he stayed in the territory of the Netherlands illegally. Thus, the national authorities concluded that there were grounds for applying

6 Article 11(3) sentence 1 of Directive 2008/115. Moreover, "Member States may refrain from issuing, withdraw, or suspend an entry ban in individual cases for humanitarian reasons. Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons".

7 Judgment in C 806/18, para. 17; Opinion of Advocate General – Opinion of Advocate General Szpunar, delivered on 23 April 2020, C 806/18, JZ, hereinafter as Opinion of Advocate General in C 806/18.

8 Opinion of Advocate General in C 806/18, para. 16.

9 *Ibidem*, para. 12.

criminal sanctions under Article 197 of the Code of Criminal Law (hereinafter CCL) against Mr JZ. Pursuant to this provision "a third-country national who remains in the Kingdom of the Netherlands while knowing, or having serious reason to suspect, that he has been declared 'undesirable' pursuant to a statutory provision or that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw is, *inter alia*, liable to be sentenced to a term of imprisonment not exceeding six months".[10] On this basis Mr JZ was sentenced to a term of imprisonment of 2 months[11].

In his appeal Mr JZ asserted that a breach of an entry ban cannot be penalized where a third-country national did not leave the territory of a Member State as such a ban only takes effect upon leaving a Member State[12]. Thus, Mr JZ concluded that he committed no crime.

The national court that heard the case in the next instance, the Supreme Court of the Netherlands, had doubts as to the legal assessment of a breach of an entry ban if a third-country national has never left the host country. Therefore, pursuant to Article 267 of the Treaty on the Functioning of the European Union[13], the Supreme Court, as the court of final instance for hearing this case, decided to stay the proceedings and referred a question for a preliminary ruling to the Court of Justice of the EU[14].

3. Questions Referred and the Court's Rulings

The national court requested that the CJEU should examine compliance of the Dutch criminal statute (namely Article 197 of the aforementioned Code of Criminal Law) with Article 11 of Directive 2008/115. The national court wished to determine whether a criminal sanction may be imposed on a third-country national who failed to comply with the return decision and against whom an entry ban was ordered but who did not leave the territory of a Member State, while the criminal act he is accused of is defined as: "an unlawful stay with notice of an entry ban, issued in particular on account of that third-country national's criminal record or the threat he represents to public policy or national security"[15]. The Court, following the doubts presented by the national court, decided to interpret Article 11 of the Directive also in the context of the judgement in the Ouhrami case[16].

10 Judgment in C 806/18, para 15.
11 *Ibidem*, para. 20.
12 Judgment in C 806/18, para. 19.
13 Treaty on the functioning of the European Union (consolidated version O.J. C 202, 7.06.2016, p. 47).
14 Case C 806/18: Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 20 December 2018 — JZ (O.J. C 122, 1.4.2019, p. 8).
15 Judgment in C 806/18, para. 23.
16 Judgment of CJEU of 26 July 2017 in the case of criminal proceedings against Mossa Ouhrami, C 225/16, hereinafter as judgment in C 225/16.

In its preliminary observations the Court emphasized, in line with the established case-law (judgments in Achunghbabian and Sagor)[17], that Member States may qualify an illegal stay as an offence and apply criminal sanctions so as to discourage third-country nationals from irregular stay in the EU. Criminal penalties cannot, however, jeopardise the achievement of the objectives pursued by the Directive or deprive it of its effectiveness[18] – the Directive's main objective is to return third-country nationals to their countries of origin. Thus, criminal penalties may only be applied where all procedural measures for implementation of the return or forcing the third-country national to return stipulated in the Directive have been exhausted[19] – according to the Court, a formula devised in the Achughbabian judgment may be applied and the national solutions criminalising illegal stay that were examined in the case are not contrary to the Directive.

Another key problem appeared in the investigated case, which is the legal qualification of a breach of an entry ban ordered against a third-country national when he did not leave the territory of a Member State. The Court noted that an entry ban order produces effects from the point when the third-country national actually leaves the EU territory, whereas Mr JZ is in a specific unlawful situation which is not a consequence of a breach of an entry ban under Article 11 of the Return Directive, but it results from his initial illegal stay in the territory of the Kingdom of the Netherlands[20]. In domestic proceedings Mr JZ claimed that, since he never left the EU, the criminal penalty for a breach of an entry ban cannot be applied against him. In turn, *a contrario*, the Dutch government claimed that Article 197 of the Code of Criminal Law is intended to penalise any illegal stay of a third-country national with notice that an entry ban has been imposed on him. In the opinion of the Dutch government, it is irrelevant whether that ban was actually breached or not.

The Court believed that a requirement for an offence must be satisfied if the criminal penalty under the law is to be applied. In the case of Mr JZ there are no grounds to believe that he violated the entry ban and thus he cannot be sentenced to deprivation of liberty[21].

However, in the Court's opinion, in cases such as that of Mr JZ a criminal penalty for illegal stay may be imposed on a person who did not breach an entry ban but stayed in the territory of a Member State with notice of an entry ban issued on account of that third-country national's criminal record or the threat he represents to public policy or national security[22].

17 Judgment of CJEU of 6 December 2011 in the case of Alexandre Achughbabian v Préfet du Val-de-Marne, C 329/11; Judgment of CJEU of 6 December 2012 in the case of Md Sagor, C 430/11.

18 Judgment in C 806/18, para. 26.

19 Judgment in C 806/18, para. 27; see also C 329/11.

20 Judgment in C 806/18, para. 33 and 34 of the

21 *Ibidem*, para. 40.

22 *Ibidem*, para. 43.

The Court laid down two conditions for imposing penal sanctions on third-country nationals such as Mr JZ. First, the criminal act the third-country national is accused of subject to penalty cannot be defined by a reference to a breach of an entry ban, but it must have a previous justified ground, when *e.g.*, the third-country national committed criminal acts and was convicted for them by a final judgment. Secondly, the national criminal provision must be compliant with standards of the case-law of the European Court of Human Rights (hereinafter also ECtHR), that is: "any law empowering a court to deprive a person of his or her liberty must be sufficiently accessible, precise, and foreseeable in its application in order to avoid all risk of arbitrariness"[23]. The court decided that it is for the national court to examine if these conditions are met in the case of Mr JZ.

4. Assessment of the Judgement

The ruling at issue should be, in my opinion, analysed in terms of the standards of protection of fundamental rights implemented by the European Union.

Legal scholars and commentators broadly address the problem of unequal protection of migrants in relation to host country nationals[24]. David Miller goes as far as to argue that migrants lose some of their human rights as a result of illegal border crossing[25]. Host countries are obliged to protect migrants' fundamental rights according to their territorial jurisdiction, regardless of whether the foreign nationals stay there legally or not. A host country is responsible for finding a fair balance between protection of its own interests and protection of the rights of an individual.

Therefore, do irregular migrants have only the right to enter or the right to remain too?[26]

4.1. Entry Ban as a Measure Restricting the Right to Free Movement

Freedom of movement as a human right was most comprehensively guaranteed in the Universal Declaration of Human Rights, according to which: "Everyone has the right to freedom of movement and residence within the borders of each state"[27].

23 *Ibidem*, para. 41; see also judgment of ECtHR of 21 October 2013 in the case of Del Río Prada v. Spain, application no. 42750/09.

24 C. Grey, Justice and Authority in Immigration Law, Oxford and Portland, OR 2017, p. 55.

25 D. Miller, Strangers in Our Midst, The Political Philosophy of Immigration, Cambridge, MA 2016, p. 117.

26 S. Grant, The Recognition of Migrants' Rights within the UN Human Rights System: the first 60 years, (in:) M.B. Dembour, T. Kelly (eds.), Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, London 2011, pp. 30–33.

27 Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A), https://www.un.org/en/

This right is derogable, *i.e.*, it may be removed in specific circumstances stipulated by the legislator. Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights provide that the right to free movement is limited to the right to leave one's place of residence, whereas when it comes to the freedom of choice of a place of residence, they stipulate the exercise of this right only when the stay is legal[28]. Moreover, this right is limited due to "national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[29] The Charter guarantees the right to free movement only to EU citizens[30], with a reservation that it may be legally extended to include third-country nationals who legally stay in the EU.

An entry ban stipulated in the Return Directive is thus a measure intended to limit the right to free movement. As noted by Eleonora di Molfetta, a re-entry ban is a form of exclusion, and the migrant himself starts to be treated as *persona non grata*[31] in the EU territory.

Entry bans ordered against third-country nationals are issued on the basis of Article 11 of Directive 2008/115. As follows from the Report of the European Migration Network, most Member States issue entry bans on the basis of circumstances foreseen in Article 11(2) of the Directive, while some, such as Hungary, or the Czech Republic, issue entry bans automatically for every return decision[32]. The report also shows that entry bans that exceed 5 years are issued where a third-country national represents a serious threat to public or national security[33]. Therefore, an entry ban enables national administrative measures to have European-wide effects[34].

about-us/universal-declaration-of-human-rights. Moreover, pursuant to Article 13(2): "Everyone has the right to leave any country, including his own, and to return to his country".

28 International Covenant on Civil and Political Rights, 16 December 1966 (United Nations, Treaty Series, vol. 999, p. 171); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 (European Treaty Series – No. 5), hereinafter as Convention.

29 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963 (Council of Europe, European Treaty Series – No. 46), Article 2.

30 Article 45 of the Charter.

31 E. di Molfetta, J. Brouwer, Unravelling the 'Crimmigration Knot': Penal Subjectivities, Punishment, and the Censure Machine, "Criminology & Criminal Justice" 2020, vol. 20, no. 3, pp. 312–313.

32 European Migration Network (EMN), The Effectiveness of Return in EU Member States. Synthesis Report for the EMN Focussed Study, 2017, p. 76, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports_en (12.03.2021).

33 *Ibidem*, p. 79. In such cases, as is seen in the report, some Member States, such as Hungary, or the Netherlands, issue entry bans that are valid for up to 20 years – p. 80.

34 M. Strąk, Polityka Unii Europejskiej w zakresie powrotów. Aspekty prawne, Warsaw 2019, p. 146.

Given the above, a question arises as to whether the judgment in question brings a new light to the application and interpretation of the validity of entry bans. Interpretation of Article 11 of the Directive has an established line of CJEU case-law. The Court has addressed the validity of entry bans in Filev and Osmani,[35] and in Celaj[36]. The most comprehensive interpretation of Article 11 of Directive 2008/115 so far has been delivered in Ouhrami[37], where the Court asserted that an entry ban "must be calculated from the date on which the person concerned actually left the territory of the Member States"[38]. This ruling had a real impact on legislative changes in Member States – according to the aforementioned 2017 European Migration Network report, as a result of the judgment in the Ouhrami case, national legislations in Sweden, and Finland were adjusted to EU standards[39].

In the judgement in question the CJEU upheld the established case-law concluding that an entry ban produces effects only when the third-country national leaves the territory of a MS[40]. In the CJEU's belief, provisions of the Directive should be interpreted strictly – restriction of the freedom of movement by a valid entry ban should depend on meeting the basic requirement for the ban's validity, *i.e.*, the third-country national's leaving the EU territory. Thus, the Court does not leave any room for the interpretation to expand, concluding that all restrictions of personal rights must be clearly rooted in the law – in national laws implementing the Return Directive in this case.

An entry ban that appears in the narrative of reception by irregular migrants themselves as a "message of disapproval"[41] does not constitute violation of the right to freedom of movement, but it is an administrative law consequence of the third-country national's non-compliance with the host country's rules for receiving foreign nationals. However, leaving aside the legal positivism that dominates in the return law, is it worth asking the question of whether the European migration policy should not have an ethical goal to lead the migrants out of the legal limbo instead of prioritising the execution of their return.

35 Judgment of CJEU of 19 September 2013 in the case of criminal proceedings against Gjoko Filev and Adnan Osmani, C 297/12; see para. 44.

36 Judgment of CJEU of 1 October 2015 in the case of criminal proceedings against Skerdjan Celaj, C 290/14.

37 Judgment in C 225/16.

38 *Ibidem*, operative part.

39 EMN, The effectiveness…, *op. cit.,* p. 81. An interesting issue that has surfaced in the discussion on the consequences of the Ouhrami judgment and on ensuring its effectiveness was a question about allocating the burden of proof when the person involved has left the Member State, *i.e.*, whether the burden of proof for leaving a Member State will rest with the third-country national or with the MS bodies. *Ibidem*.

40 Judgment in C 806/18, para. 33; Opinion of Advocate General in C 806/18, para. 27.

41 E. di Molfetta, J. Brouwer, Unravelling…, *op. cit*., pp. 312–313.

4.2. Is there a Future for Criminalisation of Illegal Migration?

In the discussed judgment, with reference to the situation of third-country nationals like Mr JZ's, the Court clearly asserted that a criminal penalty for illegal stay can be imposed when the person in question is undesirable on the MS's territory. In Mr JZ's situation there are no doubts – the return procedure for him was completed and he was previously convicted and sentenced for offences committed on the territory of the host country. However, the Court added that the wording of such a provision, thus the quality of the legislative technique, should meet the standards resulting from the ECtHR case-law in connection with Article 5 of the Convention.

In my opinion the following issues should be discussed in the light of the judgment in question: firstly, the problem of criminalisation of irregular migration and its moral assessment that recurs in the human rights discourse; secondly, an answer to the question of how this judgment fits within the existing, relatively robust CJEU case-law in matters of criminalisation of migration; thirdly, it is worth addressing the Court's comment on the need to investigate the construct of a criminal regulation (stipulated in national legislation) that allows an illegal stay to be criminalised.

With reference to the first disputed question, it is first and foremost worth noting that third-country nationals with an irregular status should not be regarded as criminals or treated as such[42]. For example, a forced return (deportation) is not considered to be "double punishment". Unfortunately, as seen in practice, the so-called "double criminalisation" trend can be observed in some third countries and third-country nationals removed from the EU risk fines and arrest in their countries of origin[43].

The offence analysed in this case, involving a breach of an entry ban, is criminally penalised in most MSs[44]. The possibility to introduce such criminal penalties results from the division of powers between the EU and Member States stipulated in treaties – MSs have the autonomy in enacting national criminal laws[45]. As Emmanuele Pistoia rightly emphasizes: "Domestic criminal sanctions against illegal migrants on ground of their illegal entry or stay in a Member State surely cover an area where no EU provision is directly applicable"[46]. Thus, the Union cannot adopt common

42 L. Pasquali, La pena de prision para immigrantes irregulares perjudica la politica del retorno de la Union?, "RDCE" 2011, no 39, p. 553, as quoted in: M. Strąk, Polityka…, *op. cit*., p. 93;

43 J. Waasdorp, A. Pahladsingh, Expulsion or Imprisonment? Criminal Law Sanctions for Breaching an Entry Ban in the Light of Crimmigration Law, "Bergen Journal of Criminal Law and Criminal Justice" 2019, vol. 4, no 2, p. 9.

44 EMN, The effectiveness…, *op. cit.,* p. 89.

45 J. Waasdorp, A. Pahladsingh, Expulsion…, *op. cit*., p. 9.

46 E. Pistoia, Unravelling Celaj, "European Papers" 4.05.2016, p. 709, https://www.europeanpapers.eu/en/authors/emanuela-pistoia (2.03.2021).

uniform criminal regulations in this area and Member States' practices in treating third-country nationals may vary and in effect may not guarantee uniform standards of treatment.

Criminalisation of migration is defined by Shahram Khosravi as "a political strategy that redefines a social issue into a crime: acts, positions and even human beings are made criminal by the law"[47].

In its case-law, the Court does not conduct moral inquiries into the validity of criminal sanctions for a breach of stay or entry, but only analyses the national law in force in its consistency with the EU law and with the objectives of the Return Directive. The assessment of the validity of the criminalisation of migration is, therefore, left to scholars. Eleonora di Molfetta and Jelmer Brouwer use the term "crimmigration crisis" to describe a situation in which the boundaries between crime control and migration control have blurred[48]. Crimmigration law, in turn, is defined as regulating the migration process by "immigration – related criminal grounds such as unlawful entry"[49]. These are types of misdemeanours and offences that only immigrants can commit[50].

The status of an undesirable migrant, such as that of Mr JZ in the discussed case, results in fact from a breach of hospitality and violation of principles of the host society – commission of criminal acts which cause harm to the host society. Criminalisation of such acts seems admissible and right in the context of international law – especially in the context of the so-called *ius communicationis* in Francisco de Vittoria's approach, who postulated that "it is not lawful to banish visitors who are innocent of any crime"[51]. Hugo Grotius spoke in a similar tone about *ius communicationis*, emphasizing that the right to remain in a host country is not absolute and may be guaranteed only to third-country nationals who obey the law of that host country[52]. In the context of these reflections, an analysis of criminalisation detached from its social consequences, though raising doubt, on the surface seems to be consistent with the principles of human rights.

Nevertheless, criminalisation of migration has its specific social effects which in turn have their consequences in standards of reception and treatment of migrants.

47 M. Kolankiewicz, M. Sager, Clandestine Migration Facilitation and Border Spectacle: Criminalisation, Solidarity, Contestations, "Mobilities" 2012, vol. 16, p. 4, https://www.tandfonline.com/doi/full/10.1080/17450101.2021.1888628 (12.03.2021).

48 E. di Molfetta, J. Brouwer, Unravelling…, *op. cit*., p. 303.

49 J.P. Stumpf, The Process is the Punishment in Crimmigration Law, (in:) K. Franko Aas, M. Bosworth (eds.), The Borders of Punishment. Migration, Citizenship, and Social Exclusion, Oxford 2013, p. 61. See also – J. Waasdorp, A. Pahladsingh, Expulsion…, *op. cit*., p. 5.

50 J.P. Stumpf, The Process…, *op. cit*., p. 62.

51 V. Chetail, International Migration Law, Oxford 2019, p. 21.

52 *Ibidem*.

It leads to the creation of the image of migrants as "external enemies"[53] and to "fuelling the threat" of the presence of TCNs in the European Union[54]. It is also worth remembering that consequences of detention are not neutral to the mental state of migrants themselves[55].

Legal arguments also advocate that migration should be decriminalised – Mary Bosworth points out that rights of detained persons are less protected than rights of prisoners-host country nationals, and she calls this "under – criminalization"[56]. In my opinion, Emanuela Pistoia delivers a key argument against criminalisation of irregular migration – deprivation of liberty of a migrant as a result of a criminal judgment delays the process of removal and thus weakens the return policy implemented by the EU[57].

There is no doubt that it would be immensely valuable if the CJEU, when analysing national legislations and not having a real opportunity to rule on criminal law, addressed moral and social consequences of criminalisation of migration, especially in the context of the guarantees of fundamental rights under the Charter and the obligation to respect the dignity of each person[58].

This postulate seems even more valid in the time of the COVID-19 pandemic. The priority in an extraordinary situation such as a pandemic should involve conducting an effective and fastest possible third-country national's return to his country of origin, which in the time of the pandemic is still more difficult[59]. All the more so since criminal law detention of a third-country national with an unregulated status may pose a real risk of quicker an accelerated spread the virus. As results from the *ad hoc* inquiry of the European Migration Network conducted in Member States in 2021, they have come across numerous difficulties in enforcement of returns during the pandemic–*i.a.*, third-country nationals did not have the chance to have face-to-face return and reintegration counselling[60]. The security of a migrant's return

53 M. Bosworth, Human Rights and Immigration Detention in the United Kingdom, (in:) M.B. Dembour, T. Kelly (eds.), Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, London 2011, p. 171.

54 A. Tsoukala, Turning Immigrants into Security Threats: A Multi – Faceted Process, (in:) G. Lazardis (ed.), Security, Insecurity and Migration in Europe, London 2016, p. 188.

55 M. Kox, M. Boone, The Pains of Being Unauthorized in the Netherlands, "Punishment & Society" 2020, vol. 22, no. 4, p. 537.

56 M. Bosworth, Human Rights…, *op. cit*., p. 173.

57 E. Pistoia, Unravelling…, *op. cit*., p. 20.

58 Pursuant to Article 1 of the Charter, "Human dignity is inviolable. It must be respected and protected."

59 G. Sanchez, L. Achilli, Stranded: The Impacts of COVID-19 on Irregular Migration and Migrant Smuggling, "Policy Briefs" 2020, no. 20, p. 4, https://cadmus.eui.eu/bitstream/handle/1814/67069/PB_2020_20_MPC.pdf?sequence=1&isAllowed=y (29.06.2021).

60 *Ad Hoc* Query on 2020.81 Umbrella Inform – Covid-19 and Return – Part 2 (REG Practitioners and NCPs). Requested by COM on 21 December 2020, Document available at: www.ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network_en (12.03.2021).

to his country of origin in the time of the pandemic should involve limitation of pre-removal detention and instead applying an alternative to detention. Following this postulate, I believe that in the time of the pandemic Member States should also limit the application of criminal law provisions towards irregular migrants.

In answer to the question of how the discussed ruling fits within the existing, relatively robust, CJEU case-law in matters of criminalisation, one must first note that the Court believed in JZ that a breach of an entry ban cannot be criminally penalised where the third-country national did not leave the MS. Nevertheless, a penal sanction can be imposed on a third-country national in a situation such as that of Mr JZ, that is he may be punished for illegal stay. Such a sanction may be applied if it does not deprive the Directive[61] of its effectiveness and when application of national law ensures observance of the EU law – the CJEU invoked the existing case-law here, that is judgments in El Dridi[62], Achughbabian[63] and Sagor[64]. Allowing criminalisation of a breach of an entry ban – as the CJEU rules in, *inter alia,* Celaj[65] – constitutes in fact the EU's indirect involvement in criminalising illegal migration[66]. The Court rightly concluded that the situation of Celaj does not apply to Mr JZ since he is in a situation of initial illegality resulting from non-compliance with a return decision, not from breaching an entry ban and a re-entry.

In the JZ case the CJEU also upheld its findings from Ouhrami that an entry ban produces effects only upon the TCN leaving the MS. In fact, both the AG and the CJEU believe that the so-called the Achughbabian situation may be applied to Mr JZ, according to which an illegal stay may be punished as an offence when the third-country national stays in the EU territory without a well-founded reason for not pursuing a return[67].

As much as legal scholars and commentators emphasize that in Filev and Osmani and in Celaj the Court filled a certain legislative gap left by the EU legislator[68], the

61 Judgment in C 806/18, para. 26.

62 See A. Crosby, The Political…, *op. cit*., p. 10.

63 Judgment in C 329/11.

64 Judgment in C 430/11; see judgment in C 806/18, para. 26.

65 Judgment in C 290/14.

66 J. Waasdorp, A. Pahladsingh, Expulsion…, *op. cit*., p. 2. In its judgment in Affum, another entry ban case, the CJEU also specified three situations in which a criminal sanction may be imposed for breaching an entry-ban, *ibidem*, p. 18. See Judgment of CJEU of 7 June 2016 in the case of Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai, C 47/15.

67 Judgment in C 806/18, para. 25; Opinion of Advocate General in C 806/18, para 25. The Court issued a similar ruling in Sagor, *op. cit.*

68 A. Pahladsingh, The Legal Requirements of the Entry Ban: The Role of National Courts and Dialogue with the Court of Justice of the European Union, (in:) M. Moraru, G. Cornelisse, Ph. De Bruycker (eds.), Law and the Judicial Dialogue on the Return of Irregular Migrants from the European Union, Oxford 2020, p. 122.

CJEU case-law does not seem to be likely to change as a result of the judgment in JZ. The question of the applicability of a vague criminal standard to the so-called Achughbabian situation (thus also JZ's situation) invoked by the AG, and the CJEU, is much more important in this case.

When it comes to the discussed problem, both the AG, in his opinion, and the CJEU, in its judgment, refer to the questionable quality of the structure of the national criminal regulation that penalizes illegal stay. Pursuant to the afore-mentioned Article 197 of the Dutch Code of Criminal Law, "a third-country national who remains in the Kingdom of the Netherlands while knowing, or having serious reason to suspect, that he has been declared 'undesirable' pursuant to a statutory provision or that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw is, *inter alia*, liable to be sentenced to a term of imprisonment not exceeding six months"[69]. Mr JZ argued in his case that, in his opinion, the legal standard is intended to penalise a breach of an entry ban[70], whereas the Dutch government argued that Article 197 penalizes any illegal stay of a third-country national with notice of an entry ban ordered against him. It is irrelevant whether or not the third-country national has breached an entry ban.[71]

When ruling on the question about the applicability of Article 197 CCL towards Mr JZ, the Court concluded that the national court should assess its compliance with standards resulting from the case law of the ECtHR concerning Article 5 of the Convention. Thus the Court indirectly obliged the national court to examine the consistency of the national legislation with the standards of the Charter, since pursuant to Article 6 TEU "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[72], whereas the so-called horizontal clauses in the Charter guarantee that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"[73].

As emphasized by the CJEU in paragraph 41 of the JZ judgment, a legal standard must be sufficiently accessible, precise, and foreseeable. Article 5 of the Convention guarantees the right to liberty and security of person (parallel guarantees are laid down in Article 6 of the Charter). The ECtHR has ruled numerous times on violation

69 Judgment in C 806/18, para. 15.
70 *Ibidem*, para. 36.
71 *Ibidem*, para. 37.
72 Treaty on European Union (consolidated version O.J. C 202, 7.06.2016, p. 13–46).
73 Article 52(3) of the Charter.

of Article 5 of the Convention in cases brought by third-country nationals – the ECtHR's case-law demonstrates that, *inter alia*, detained illegal migrants are entitled to free legal assistance[74], while the authorities of the Member State should act with care and accuracy when it comes to translation of documents in cases of migrants who do not understand the language of the host country[75].

The national criminal provision should be also interpreted, in my opinion, in the light of the so-called "harm principle" – it must be demonstrated whether a criminal law standard that criminalises migration meets the requirement of this principle in the perception of John Stuart Mill, who emphasized that: "(…)the only purpose for which power can rightfully be exercised over any member of civilised community, against his will, is to prevent harm to others"[76]. Gabriel J. Chin emphasizes that national courts often apply criminal sanctions against undocumented third-country nationals on grounds that they are unsuitable for probation[77].

The Dutch legal norm analysed in the light of the judgment contains a rather blurry expression "an unlawful stay with notice of an entry ban". In the context of this discussion, it is worth attempting to answer the question regarding the degree of legal awareness of third-country nationals. Persons who legally stay in the MS's territory have the opportunity to participate in orientation courses, whereas migrants from the so-called grey zone do not have real opportunities to learn about their rights, especially rights of a party to an administrative procedure and court proceedings. Admittedly, Article 12 of Directive 2008/115 guarantees that:

> *1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.*
>
> *(...)*
>
> *2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.*

74 Report of the Commission of 13 July 1982 in the case of Mohammed Zamir v. United Kingdom, application no. 9174/80. See A. Szklanna, Ochrona prawna cudzoziemca w wietle orzecznictwa Europejskiego Trybunału Praw Człowieka, Warsaw 2010, p. 167.

75 Judgment of ECtHR of 12 April 2005 in the case of Shamayev and Others v. Georgia and Russia, application no. 36378/02. See A. Szklanna, …, *op. cit*., p. 167.

76 L. Zedner, Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment, (in:) K. Franko Aas, M. Bosworth (eds.), The Borders of Punishment. Migration, Citizenship, and Social Exclusion, Oxford 2013, p. 51.

77 G.J. Chin, Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process, "UCLA Law Review" 2011, p. 1431, https://www.uclalawreview.org/illegal-entry-as-crime-deportation-as-punishment-immigration-status-and-the-crim[inal-process/ (12.03.2021).

Thus, it may be presumed that the third-country national is aware of the content of the administrative decision ordered against him. However, in the light of Article 12(3) this presumption is not so obvious, as:

> *3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.*
>
> *In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.*

Given the above, it is possible that a third-country national might not be aware of being "undesirable" in the territory of a Member State. The so-called error in law may occur and thus, a situation in which a third-country national will not be aware he has committed an offence of illegal stay due to his poor degree of understanding of the legal provision or due to the offender's mental level – third-country nationals in the grey zone are often less educated and less integrated than economic migrants. In such a situation we may be dealing with a lack of awareness of the unlawfulness of a prohibited act, which excludes the offender's criminal liability. Where national authorities conclude that the error in law was unjustified (*i.e.*, the third-country national on his own wrongly interpreted legal standards rarely applied in a given legislation), there are still measures that allow for this migrant to be treated as part of a vulnerable group and for extraordinary leniency[78].

In my assessment, the standard under Article 197 CCL gives room for arbitrariness towards TCNs who should be classified as a vulnerable group in proceedings before administrative and court authorities, due to their lack of knowledge of the legal culture of the host country. A criminal regulation should not be characterised in such a way, as AG mentioned in his opinion: "Even a benevolent reading of this provision requires intellectual pirouettes"[79].

Thus, perhaps, in the light of scholarly interpretation of the JZ judgment, a review of national legislations of Member States will be necessary to ensure full protection of migrants' rights. I also believe that this judgment opens a door for the elimination of criminalisation of migration in the EU countries. Recognition of absence of the awareness of the unlawfulness of a prohibited act may become an effective instrument that protects migrants against criminal sanctions for illegal stay. Involvement of legal

78 Such a measure is stipulated in Article 30 of the Polish criminal code – the Act of 6 June 1997—Criminal Code (consolidated text Journal of Laws 2020.1444). For the unequal situations of migrants and the so-called "national criminals" see D. Weissbrodt, M. Divine, International human rights of migrants, (in:) B. Opekin, R. Perruchoud, J. Redpath-Cross (eds.), Foundations of International Migration Law, Cambridge 2012, p. 159.

79 Paragraph 40 of the Opinion of Advocate General in C 806/18.

scholars, and commentators, and non-governmental organizations will reinforce it and so will encouragement for such interpretation of provisions that criminalize migration.

Conclusions

To sum up, it seems almost certain that the discussed judgment opens great possibilities for a scholarly discussion on the moral basis of the existence, and possibilities of elimination, of the criminalisation of illegal immigration. The problem of effectiveness of the criminalisation of migration, in the light of the return policy, gains special importance in the time of the COVID-19 pandemic[80] – in my opinion the coronavirus epidemic should encourage effective implementation of returns rather than placement of migrants in prisons, which, unfortunately, are often overcrowded and facilitate transmission of the virus. Another solution for managing illegal migration which is worth discussing is the possibility of implementing regularisation operations (amnesties)[81].

The judgment fits within the human rights discourse on the elimination of the criminalisation of irregular migration. It is worth noting that this is the first CJEU judgment on this phenomenon issued during the COVID-19 pandemic. Given the current social situation, it gains particular significance. Prisons are not safe places during the pandemic, and it is difficult to find arguments for risking the health and lives of third-country nationals, especially where they do not fully realize the nature of the prohibited act committed since they do not know criminal law regulations of the host country. All the more so, since in the light of the Union's law, an effective return is to be a priority with regard to such persons. Complaints filed by prisoners to the Commissioner for Human Rights on the conditions in penitentiaries raise concerns (*i.a.*, guards not applying personal protection measures, or the lack of warm water)[82]. We have nothing but hope that the publicizing of the judgment in question among practitioners, including judges adjudicating in criminal cases concerning third-country nationals, will have a positive impact on at least a partial elimination of the criminalisation of irregular migration.

80 Ad Hoc Query…, *op. cit.*

81 J.H. Carens, The Ethics of Immigration, New York 2013, p. 147.

82 Koronawirus a więzienia. Skargi do RPO – na brak środków ochrony, nieprzestrzeganie zaleceń sanitarnych, dostęp do badań, https://www.rpo.gov.pl/pl/content/koronawirus-a-wiezienia-skargi-rpo-od-osadzonych-i-rodzin (29.05.2021).

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