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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER ON SUBSTANTIVE CRIMINAL LAW OF 2016

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CRIMINAL CODE

1. RESTING OF THE PERIOD OF LIMITATION (ARTICLE 104 §1 CC)

Pursuant to Article 104 §1 of the Criminal Code (hereinafter CC), limitation does not run if a provision of law does not permit the criminal proceedings to be instituted or to continue, with the exception of a lack of motion or a private charge. This concerns legal obstacles resulting from statute, which do not allow the initiation or continuation of the criminal proceedings, and not factual obstacles, e.g. a perpetrator's illness or inability to apprehend him/her.[1] Resting of the period of limitation results, inter alia, from the formal immunities. They consist in the fact that a person granted such immunity can face criminal liability after an authorised body gives consent or permission, e.g. in case of an MP – the Sejm (Article 105(1) of the Constitution of the Republic of Poland), in case of a judge – a disciplinary court (Article 80(1) of the Act of 27 July 2001: Law on the system of common courts[2]).

In order to stop the running of the period of limitation, it is important to establish the moment from which it should start. There are four different attitudes towards this matter in jurisprudence and the case law. According to them, the resting of the period of limitation starts:

1) when a judgement on refusal of such consent becomes final and valid.[3] It is indicated that the resting of the period of limitation started earlier might result

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[1] Supreme Court ruling of 24 October 2016, II KK 296/16, Prok. i Pr. – wkł. 2017, No. 1, item 3.

[2] Journal of Laws [Dz.U.] of 2016, item 2062, as amended.

[3] Supreme Court resolution of 30 August 2007, SNO 44/07, OSNKW 2007, issue. 11, item 84 with critical glosses by R. Kmiecik, PiP No. 7, 2008, pp. 130–135, K. Marszał, WPP No. 3, 2008, pp. 111–118, and partly critical by W. Wróbel, PiP No. 7, 2008, pp. 135–140; Supreme Court ruling

in prolonging it in such a way that it would exceed even the longest periods of limitation laid down in the Criminal Code. It would also take place in a situation when a perpetrator has not yet referred to formal immunity and reference to this immunity has not been envisaged in the future. The resting of the period of limitation would depend on a solely abstract circumstance and not a real legal obstacle. It would create a state of permanent uncertainty concerning the legal status of the given group of entities and would be in conflict with axiological assumptions of the Criminal Code;

2) at the moment of lodging a motion to an authorised body to give consent or permission to hold an immunised person liable for a criminal act;[4]
3) from a crime commission if the perpetrator was immunised at the moment of that crime commission;[5] when a disciplinary court gives permission to prosecute, the period of limitation starts running or continues and the resting stops;

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of 10 January 2008, SNO 84/07, OSNSD 2008, item 1; Supreme Court judgement of 10 June 2008, SNO 40/08, OSNSD 2008, item 59; W. Michalski, *Immunitety w polskim procesie karnym* [Immunity in the Polish criminal proceedings], Warsaw 1970, p. 121; W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów. Komentarz* [Disciplinary liability of judges: Commentary], Warsaw 2005, p. 58; A. Wąsek, [in:] O. Górniok, M. Kalitowski, S.M. Przyjmeski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Vol. II, Gdańsk 2005, p. 745.

[4] Supreme Court ruling of 18 February 2015, V KK 296/14, OSNKW 2015, issue 6, item 52 with glosses: partly critical by M. Kulik, PiP No. 10, 2016, pp. 141–146; of approval by J. Kosonoga, Ius Novum No. 4, 2015, pp. 145–153; K. Marszał, *Problemy spoczywania terminów przedawnienia karalności* [Issues of limitation of punishability], [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Z. Świdy* [Fair trial. Professor Z. Świda jubilee book], Warsaw 2009, p. 329; B. Janusz-Pohl, *Immunitety w polskim postępowaniu karnym* [Immunity in the Polish criminal proceedings], Warsaw 2009, pp. 222–223; B. Janusz-Pohl, *Spoczywanie biegu terminu przedawnienia karalności a ochrona immunitetowa* [Resting of the period of limitation versus immunity], PS No. 2, 2010, p. 79 ff.

[5] R. Kmiecik, *Gloss on the Supreme Court resolution of 30 August 2007, SNO 44/07*, PiP No. 7, 2008, pp. 133–135; R. Kmiecik, *„Spoczywanie" przedawnienia karalności przestępstw* ["Resting" of limitation of crime punishability], PiP No. 9, 2010, p. 11; R. Kmiecik, *Przedawnienie karalności* [Limitation of punishability], [in:] M. Jeż-Ludwichowska, A. Lach (eds), *System prawa karnego procesowego* [Criminal procedure law system], Vol. IV: *Dopuszczalność procesu* [Trial admissibility], Warsaw 2015, pp. 870–871; M. Kulik, *Początek okresu spoczywania biegu terminu przedawnienia karalności w związku ze względnym immunitetem procesowym na przykładzie sędziowskiego immunitetu formalnego* [Beginning of resting of the course of limitation in connection with procedural immunity exemplified by formal immunity of a judge], WPP No. 4, 2012, pp. 191–192; M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym* [Limitation of punishability and limitation of penalty execution in Polish criminal law], Warsaw 2015, p. 465 ff; M. Kulik, *Wpływ bierności oskarżyciela publicznego i organu prowadzącego postępowanie przygotowawcze na bieg terminu przedawnienia karalności* [Influence of a public prosecutor and a preparatory proceeding body's passiveness on the course of limitation], [in:] B. Dudzik, J. Kosowski, I. Nowikowski (ed.), *Zasada legalizmu w procesie karnym* [Principle of legalism in a criminal trial], Vol. I, Lublin 2015, pp. 267–268; K. Banasik, *Przedawnienie w prawie karanym w systemie kontynentalnym i angielskim* [Limitation in criminal law in the continental and English systems], Warsaw 2013, p. 340; L. Peiper, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 1936, p. 213; S. Śliwiński, *Prawo karne* [Criminal law], Warsaw 1946, p. 534; K. Marszał, *Spoczywanie terminu przedawnienia* [Resting of the period of limitation], RPEiS No. 2, 1966, p. 88; K. Marszał, *Przedawnienie w prawie karnym* [Limitation in criminal law], Warsaw 1972, pp. 181–182, p. 192; I. Andrejew, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem* [Criminal Code with a commentary], Warsaw 1973, p. 355; M. Siewierski, *Kodeks karny i prawo o wykroczeniach. Komentarz* [Criminal Code and

4) at the moment when a perpetrator is given a status of a suspect, i.e. when there are grounds for detention on remand or proceedings start against the immunised person.[6]

The Supreme Court dealt with the problem following the motion of the First President of the Supreme Court, who referred the issue of law interpretation to the Court, asking a question: Does the period of limitation stop running (Article 104(1) CC) at the moment when a motion is filed to a disciplinary court to give consent or permission to hold a judge or a prosecutor liable for a criminal act or when a resolution refusing such a permission becomes valid?

The Supreme Court, in the bench of seven judges, adopted a resolution on 25 February 2016, I KZP 14/15,[7] in which it explained that: **"The period of limitation stops running (Article 104(1) CC) on the day when a motion to give consent or permission to hold a judge or a prosecutor liable for the commission of a criminal act is lodged at a disciplinary court"**. The opinion met with approval in the literature but was supported with additional arguments,[8] although it raised justified doubts.

In the justification, the Supreme Court emphasised that the periods of limitation are the same for all entities subject to criminal liability and the statutory difference between them consists in the type of penalty for a given type of crime (Article 101 §1–§4 CC). The obstacle to proceedings includes, inter alia, formal immunity because holding a public post by an immunised person makes it impossible to hold that person liable, unless an authorised body gives consent or permission to do this in a given case. In the Court's opinion, immunity does not constitute an obstacle to conduct proceedings at the *in rem* stage, and due to that does not constitute a procedural obstacle in any way. Thus, there are no arguments justifying the resting of the period of limitation at this stage of the proceedings. It comes into being at the moment when the evidence gathered in the case justifies a suspicion that an immunised person has committed a crime, which results in the necessity to lay charges. At that moment, it is necessary to lodge a motion to give consent or

misdemeanour law: Commentary], Warsaw 1965, p. 135; M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 1977, p. 291; W. Daszkiewicz, *Prawo karne procesowe – zagadnienia ogólne* [Procedural criminal law – general issues], Vol. I, Bydgoszcz 2000, pp. 154–155; J. Grajewski (ed.), *Prawo karne procesowe – część ogólna* [Procedural criminal law – General Part], Warsaw 2007, p. 158; T.W. Michalski, *Immunitety…* [Immunity...] p. 121; M. Leciak, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, p. 609.

[6] K. Sychta, *Okres spoczywania biegu terminu przedawnienia karalności przestępstw popełnionych przez osoby chronione względnym immunitetem* [Period of resting of limitation of punishability for crimes committed by persons protected by the relative immunity], [in:] A. Przyborowska-Klimczak, A. Taracha (eds), *Iudicium et Scientia. Księga jubileuszowa Profesora Romualda Kmiecika* [Iudicium et Scientia. Professor Romuald Kmiecik jubilee book], Warsaw 2011, pp. 181–183.

[7] OSNKW 2016 No. 4, item 22.

[8] A. Górski, K. Michalak, *Spoczywanie biegu przedawnienia a ochrona immunitetowa. Rozważania na tle orzecznictwa Sądu Najwyższego* [Resting of the period of limitation versus immunity: Considerations based on the Supreme Court rulings], [in:] B. Namysłowska-Gabrysiak (ed.), K. Syroka-Marczewska, A. Walczak-Żochowska, *Prawo wobec problemów społecznych. Księga jubileuszowa Profesor E. Zielińskiej* [Law and social issues. Professor E. Zielińska jubilee book], Warsaw 2016, pp. 107–108; A. Górski, Gloss on this resolution, LEX/el. 2016.

permission to hold an immunised person liable for the commission of a criminal act. The lodging of the motion means a legal obstacle referred to in Article 104 §1 CC has occurred. It exists until the issue of a valid decision concerning the consent or permission to hold the person liable.

The opinion is not right. One cannot agree with the statement that immunity does not constitute an obstacle to proceedings at the *in rem* stage. It is in conflict with Article 17 §2 of the Criminal Procedure Code (hereinafter CPC), which limits the scope of activities to those that must be undertaken without delay in order to protect evidence and to activities aimed to explain whether the permission will be given. This means that not all activities necessary to start an investigation or inquiry can be performed and they are limited by the requirement that they must be performed without delay or aim to explain the grounds for the motion.

In fact, such specification of the term makes the start of resting depend on the body authorised to file the motion to give consent or permission, because a public prosecutor is not required to file such motion without delay.

It is rightly emphasised in jurisprudence that the provisions concerning the resting of the period of limitation are not applied "in the period of negotiating the issue of permission with the authorised body".[9] Moreover, the decision of the authorised body on giving consent or permission to hold a person liable is the most important element of the proceedings concerning the permission to hold an immunised person liable.[10] A decision on refusal to give consent or permission to hold an immunised person liable constitutes the authorised body's confirmation that the obstacle in the form of immunity exists, and with respect to consequences laid down in Article 104 §1 CC, it is an important circumstance.

2. SCOPE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION (ARTICLE 113 CC)

The principle of universal jurisdiction expressed in Article 113 CC[11] allows the application of the Polish statute notwithstanding regulations in force in the place of commission of an offence to a Polish citizen or an alien, to whom no decision on extradition has been taken, in the case of the commission of an offence abroad that the Republic of Poland is obliged to prosecute under international agreements, or a crime referred to in the Rome Statute of the International Criminal Court adopted in Rome on 17 July 1998.[12]

In the light of this provision, a problem arose whether it applies to crimes classified in Article 56(1) and (3) of the Act of 29 July 2005 on preventing drug addiction[13] consisting in smuggling and trafficking in big amounts of intoxicants

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[9] L. Peiper, *Kodeks karny...* [Criminal Code...], p. 213.

[10] Supreme Court resolution of 30 August 2007, SNO 44/07, OSNKW 2007, No. 11, item 84.

[11] Z. Kukuła, *Kilka uwag na temat zasady represji wszechświatowej* [Some comments on the principle of universal jurisdiction] WPP No. 1, 2011, pp. 3–18.

[12] Journal of Laws [Dz.U.] of 2003, item 708.

[13] Journal of Laws [Dz.U.] of 2017, item 783, as amended.

exclusively outside Poland. The doubt results from the fact that Article 56 of the Act on preventing drug addiction makes reference to the provisions of this statute, which might suggest that it should be applied only to acts committed in the territory of Poland.

The Supreme Court, on the basis of the Act on preventing drug addiction that is not in force, stated that "the place of commission of an act referred to in Article 43 of the Act of 23 April 1997 on preventing drug addiction (Journal of Laws [Dz.U.] of 2003, No. 24, item 198, as amended) may also be in the territory of a foreign country. The feature 'notwithstanding regulations' should be interpreted as regulations that are in force in the place of commission of the offence".[14]

On the other hand, in the light of the Act that is currently in force, opinions of the judicature differ. It is stated that:

– "The analysis of the features of an act under Article 55(1) of the Act of 2005 on preventing drug addiction directly proves that the place of commission of the offence may be both the territory of Poland and the territory of another country".[15]
– "The conviction of the accused for an act under Article 56(1) and (3) committed outside the territory of Poland results in the obligation to prosecute trafficking in drugs, which results from the international conventions ratified by Poland, especially the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on 20 December 1988, ratified in 1995 (Journal of Laws [Dz.U.] No. 15, item 69) – Article 113 CC".[16]
– There is an opinion presented in the literature and the judicature that the place of commission of an offence under Article 56 of the Act on preventing drug addiction may only be in the territory of the Republic of Poland;[17] thus, the commission of such an act outside Poland does not constitute a crime, although there are different opinions, too.[18]

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[14] Supreme Court ruling of 21 May 2004, I KZP 42/03, with a critical gloss by S. Kosmowski, PS No. 7–8, 2005, p. 265; a gloss of approval by M. Bojarski, OSP No. 1, item 7, 2005, and comments of approval by R.A. Stefański, *Przegląd uchwał Izby Karnej oraz Wojskowej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2004 r.* [Review of the Supreme Court Criminal and Military Chambers resolutions on substantive criminal law, penalty execution law, fiscal penal law and misdemeanour law for 2004], WPP No. 1, 2005, pp. 121–126; A. Barczak-Oplustil, *Przegląd orzecznictwa Sądu Najwyższego i Sądów Apelacyjnych* [Review of the Supreme Court and appellate courts judgements], CzPKiNP No. 2, 2004, p. 199.

[15] Supreme Court judgement of 20 October 2011, III KK 120/11, LEX No. 1101661.

[16] Judgement of the Appellate Court in Warsaw of 12 June 2013, II AKa 170/13, LEX No. 1409347.

[17] K. Łucarz, A. Muszyńska, *Ustawa o przeciwdziałaniu narkomanii. Komentarz* [Act on preventing drug addiction: Commentary], Warsaw 2008, pp. 504–505; T. Srogosz, *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warsaw 2008, p. 394; P. Kładoczny, B. Wilamowska, P. Kubaszewski, *Ustawa o przeciwdziałaniu narkomanii. Komentarz do wybranych przepisów karnych* [Act on preventing drug addiction: Commentary on selected criminal law provisions], Warsaw 2013, pp. 59–61; judgement of the Appellate Court in Katowice of 20 December 2012, II AKa 409/12, LEX No. 1246644; judgement of the Appellate Court in Warsaw of 4 September 2013, II AKa 251/13, LEX No. 1372473.

[18] P. Żak, *Odpowiedzialność karna za przemyt narkotyków poza obszarem Unii Europejskiej* [Criminal liability for narcotic drugs smuggling outside the European Union territory], Prok. i Pr. No. 4, 2014, pp. 72–81.

Resolving the problem, the Supreme Court in its ruling of 28 January 2016, I KZP 11/15,[19] rightly held that: **"Article 113 CC applies to crimes under Article 56(1) and (3) of the Act of 29 July 2005 on preventing drug addiction (Journal of Laws [Dz.U.] No. 179, item 1485) committed by a perpetrator operating exclusively outside the territory of Poland"**.

In the justification, the Court rightly emphasised that, based on the principle of universal jurisdiction, a trial may take place before a Polish court when:

– the crime was committed outside Poland;
– the perpetrator is a Polish citizen or an alien, with respect to whom no decision on extradition has been taken;
– the offence belongs to those that the Republic of Poland is obliged to prosecute under international agreements, or a crime referred to in the Rome Statute of the International Criminal Court.

The "double criminality" of the act is not required. Undoubtedly, an act referred to in Article 56(1) and (3) of the Act on preventing drug addiction is the a convention-related crime. It results from the fulfilment of obligations laid down in the conventions ratified by the Republic of Poland:

– Single Convention on Narcotic Drugs adopted in New York on 30 March 1961,[20] requiring that the signatory States undertake action ensuring that, inter alia, offering, offering for sale, popularising, purchasing, selling, delivering on any terms, brokerage of intoxicating substances contrary to the provisions of the Convention and any other action that, in the opinion of the given Party, may be contrary to the provisions of the Convention should be recognised as punishable offences when committed intentionally, and should be subject to adequate punishment, especially imprisonment or another penalty of deprivation of liberty (Article 36(1)). Moreover, each of the above-mentioned offences is recognised as a distinct offence if committed in different countries. The above-mentioned more serious offences, regardless of whether they have been committed by the citizens of the country or by aliens, should be prosecuted by the country where the offence was committed or the country in which a perpetrator was arrested if extradition is not possible because of the national legislation in force in the country to which a motion was lodged, and if such an offender has not already been prosecuted and the judgement given (Article 36(2)). The above regulation does not affect the principle that the offences to which it refers are defined, prosecuted and punished in conformity with the domestic law of the Party (Article 36 (1);
– Convention on Psychotropic Substances adopted in Vienna on 21 February 1971;[21]
– United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on 20 December 1988,[22] in accordance with which each Party must adopt such measures as may be necessary to establish

[19] OSNKW 2016, No. 3, item 18.
[20] Journal of Laws [Dz.U.] of 1966, No. 45, item 277, as amended.
[21] Journal of Laws [Dz.U.] of 1976, No. 31, item 180.
[22] Journal of Laws [Dz.U.] of 1995, No. 15, item 69.

a criminal offence under its domestic law, when committed intentionally, of offering, offering for sale, distribution, selling, delivery on any terms, brokerage of narcotic drugs or psychotropic substances contrary to the provisions of the 1961 Convention as amended or the 1971 Convention (Article 3(1)).

The provisions of the Conventions oblige the States-Parties not only to criminalisation of the listed offences, inter alia, consisting in trafficking in narcotic drugs but also to recognise them as crimes the perpetrators of which are subject to extradition.

3. SIMILARITY OF CRIMES (ARTICLE 115 §3 CC)

The issue of similarity of crimes has been given much attention in the literature and in case law. However, some issues still cause trouble in practice. One of such problems was referred to the Supreme Court for adjudication. Namely, it is a question whether the offences of the same type include offences against the same legal interest or also offences against different legal interests, and what criteria are decisive in the assessment of two not identical legal interests as interests of the same category. It concerned determination whether a crime under Article 209 §1 CC is similar to crime under Article 207 §1 CC. A far as this issue is concerned, the Supreme Court had already presented its opinion and it is that: "The offence of persistently evading the duty to pay for the support of a next of kin (Article 209 §1 CC) is not always similar to an offence of mistreating the next of kin or a person in a state of dependence to the perpetrator, or a minor or a person who is vulnerable in the meaning of Article 207 §1 CC."[23] The Court indicated that statute recognises offences as similar when they are against the same protected legal interest; from the point of view of the interest of a family, understood as an object of legal protection, both mistreating the family (Article 2017 §1 CC) and evading maintenance payment (Article 209 §1 CC) are against the spiritual and material interests of a family and endanger its proper functioning and security of its members.[24]

The Supreme Court, in a ruling of 30 March 2016, I KZP 23/15[25] held that:

1) **The issue of similarity of offences in the meaning of Article 115 §3 CC cannot be assessed from an abstract perspective – as a "similarity" of the types of prohibited acts, but exclusively from a real perspective. Therefore, real acts matching the features of the types of prohibited acts are the subject of assessment. It must be taken into consideration that a given type of a prohibited act may protect different legal interests, and only the assessment of particular conduct makes it possible to establish which protected interest has been infringed or endangered.**

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[23] Supreme Court ruling of 20 April 2001, V KKN 47/01, with a gloss of approval by A. Wąsek, OSP No. 3, item 43, 2002.

[24] Supreme Court ruling of 6 November 1997, II KKN 277/96, Prok. i Pr. – suppl. No. 6, item 3, 1998.

[25] OSNKW 2016, No. 3, item 19.

2) In case of a prohibited act referred to in Article 209 §1 CC committed by one of the parents who has a duty to pay maintenance of a minor child, the legal interest infringed is both the relation of taking care and proper functioning of the family.

This is a right opinion and it was rightly approved of in the literature.[26] Justifying its stand, the Supreme Court drew attention to the fact that there is no doubt in jurisprudence and case law that the criterion of "similarity" is met when offences are committed against identical legal interests.[27] Moreover, the Court noticed that the issue of similarity of offences in the meaning of Article 115 §3 CC cannot be assessed from an abstract perspective – as a "similarity" of the types of prohibited acts, but only from the real perspective. Real acts matching the features of the types of prohibited acts are the subject of assessment, and a given type of a prohibited act may protect various legal interests. Only the assessment of specific conduct allows establishing which of the protected interests was infringed or endangered by that act. It is necessary to thoroughly determine the nature of the legal interests and the relations between them. The Supreme Court had already emphasised that earlier stating that the similarities of offences must be established and assessed in

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[26] M. Małecki, Gloss on this ruling, OSP No. 3, item 30, 2017.

[27] A. Wąsek, *Gloss on the Supreme Court ruling of 20 April 2001, V KKN 47/01*, OSP No. 3, 2002, pp. 164–165; P. Daniluk, *Gloss on the Supreme Court ruling of 23 May 2013, IV KK 68/13*, OSP No. 5, 2014, pp. 637–643; P. Daniluk, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, pp. 670–672; D. Pleńska, *Przedmiotowe podobieństwo przestępstw* [Objective similarity of offences], NP No. 10, pp. 1415–1424; D. Pleńska, *Zagadnienia recydywy w prawie karnym* [Issue of relapse into crime in criminal law], Warsaw 1974, pp. 111–132; K. Daszkiewicz, *Przestępstwa popełnione z tych samych pobudek i przestępstwa tego samego rodzaju* [Offences committed for the same reasons and offences of the same type], NP No. 7–8, pp. 1023–1029; A. Rybak, *Kontrowersje wokół przestępstwa podobnego* [Controversies over a similar crime], RPEiS No. 2, pp. 71–91; A. Kabat, *Przestępstwa podobne w ujęciu Kodeksu karnego* [Similar offences in accordance with the Criminal Code], NP No. 11, 1970 pp. 1580–1590; A. Kabat, *Tożsamość rodzajowa przestępstw i jej krytyka w świetle orzecznictwa Sądu Najwyższego* [Offence type identity and its criticism in the light of the Supreme Court rulings], Pal. No. 12, 1967, pp. 44–53; A. Zoll, *Przestępstwa podobne* [Similar offences], PiP No. 3, pp. 76–87; W. Grzeszczyk, *Pojęcie przestępstwa podobnego w Kodeksie karnym* [Similar offence concept in the Criminal Code], Prok. i Pr. No. 9, 2001, pp. 147–151; J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2012, p. 457; J. Majewski, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 53–116* [Criminal Code. General Part: Commentary on Articles 53–116], Warsaw 2016, p. 961; M. Siwek, *Gloss on the judgement of the Appellate Court in Katowice of 3 July 2003, II AKa 214/03*, Lex/el. 2011; S. Tarapata, *Kontrowersje wokół wyznaczania granic dobra prawnego – uwagi na marginesie postanowienia Sądu Najwyższego z 23 września 2009 r. (sygn. I KZP 15/09)* [Controversies over determining the limits of legal interests: comments in connection with the Supreme Court ruling of 23 September 2009 (I KZP 15/09)], CzPKiNP No. 1, 2012, p. 91 ff; R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Vol. II, Warsaw 2015, p. 769; A. Sakowicz, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Vol. II, Warsaw 2015, p. 290; R. Hałas, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, p. 733; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016; G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny...* [Criminal Code...], p. 457; A. Marek, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2010, p. 310.

a substantial and not abstract way.[28] It concerns the similarity of offences and not the types of prohibited acts.[29]

Offences under Article 207 §1 and Article 209 §1 CC are against family. As a result, according to the Court, one of the fundamental constitutional relations of the concept of "family" is the relationship between parents and children. The duty of parental care that the parents have towards children is an essential element of that relationship. Failure to fulfil that duty at the same time constitutes a violation of the proper functioning of a family. Therefore, in case of the commission of a prohibited act referred to in Article 209 §1 CC by one of the parents who has the duty to pay maintenance for a minor child, the legal interest infringed is the duty of parental care as well as the proper functioning of a family. The Supreme Court continued noting that, from the point of view of the legal interest, which "family" and "duty of parental care" are, one cannot treat the two terms in separation. Taking care is an element of social relations constituting a family. Particular conduct matching the features of offences referred to in Chapter XXVI CC may violate the duty of parental care and the proper functioning of a family at the same time, however, sometimes the duty of parental care does not result from family relations and then this act, matching the features of an offence under Article 209 §1 CC, although it infringes a legal interest in the form of "the relation of parental care", does not infringe a legal interest, which a "family" is. Thus, the Court held that an offence under Article 207 §1 CC consisting in mistreatment of the wife of the accused is against the family; it clearly infringes the functioning of a family and spouses' relations. In accordance with Article 23 of the Family and Guardianship Code, spouses are obliged to cohabit, support each other, be faithful and cooperate for the benefit of the family, which they started. A duty to respect a spouse is not only moral in nature, but also strictly normative, creating a specified group of rights and obligations, which may be protected by law and also exercised.[30] The Supreme Court is right that "the classification of two or more offences as 'the same type' depends on the legal interest which the offences are against. Single-type offences are those committed against legal interests of the same type, not necessarily identical ones".[31]

4. A PERSON LIVING IN COHABITATION (ARTICLE 115 §11 CC)

In accordance with Article 115 §11 CC, next of kin is, inter alia, "a person actually living in co-habitation". The interpretation of the term is not uniform either in jurisprudence or in case law, and differences concern mainly whether persons of the same gender may be living in co-habitation. It is assumed that cohabitation includes:

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[28] Supreme Court ruling of 6 November 1997, II KKN 277/96, Prok. i Pr. – suppl. No. 6, item 3, 1998; ruling of 20 April 2001, V KKN 47/01, OSNKW No. 7–8, item 54, 2001.

[29] K. Buchała, *Prawo karne materialne* [Substantive criminal law], Warsaw 1989, p. 201; D. Pleńska, *Przedmiotowe podobieństwo…* [Objective similarity...], p. 1415; A. Zoll, *Przestępstwa podobne…* [Similar offences...], p. 80; P. Kozłowska, *Gloss on Supreme Court ruling of 6 October 1995, II KRN 114/95*, Prok. i Pr. No. 12, 1997, p. 73; A. Rybak, *Kontrowersje…* [Controversies...], pp. 76–77; W. Grzeszczyk, *Pojęcie przestępstwa podobnego…* [Similar offence concept...], p. 148.

[30] Supreme Court judgement of 25 August 1982, III CRN 182/82, LEX No. 8448.

[31] Supreme Court ruling of 23 May 2013, IV KK 68/13, OSNKW issue 9, item 77, 2013.

– a relationship of two persons of different gender without a formal bond of marriage but characterised by the existence of emotional, physical and economic bonds;[32]

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[32] S. Zimoch, *Osoba najbliższa w prawie karnym* [Next of kin in criminal law], NP No. 9, 1971, p. 1303; Z. Czeszejko, *Kilka uwag na temat pojęcia „faktycznego wspólnego pożycia" w prawie karnym* [Some comments of the concept of "actual co-habitation" in criminal law], Pal. No. 3, 1972, p. 51; J. Stańda, *Stanowisko świadka w polskim procesie karnym* [Position of a witness in a Polish criminal trial], Warsaw 1976, p. 99; W. Wolter, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny...* [Criminal Code...], Warsaw 1973, p. 377, A. Szlęzak, *Gloss on the Supreme Court judgement of 31 March 1988, I KR 50/88*, OSPiKA No. 4, 1989, p. 205; E. Skrętowicz, [in:] J. Grajewski, E. Skrętowicz, *Kodeks postępowania karnego z komentarzem* [Criminal Procedure Code with commentary], Gdańsk 1996, p. 144; M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Vol. I, Warsaw 1987, p. 361; Z. Doda, A. Gaberle, *Orzecznictwo Sądu Najwyższego. Komentarz. Dowody w procesie karnym* [Supreme Court rulings: Commentary. Evidence in criminal proceedings], Warsaw 1995, p. 215 ff; R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański (ed.), S. Zabłocki (ed.), *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Warsaw 2003, pp. 819–820; R.A. Stefański, *Prawo odmowy zeznań w nowym kodeksie postępowania karnego* [Right to refuse to testify in the new Criminal Procedure Code], Prok. i Pr. No. 7–8, 1998, p. 118; P.K. Sowiński, *Prawo świadka do odmowy zeznań w procesie karnym* [Witness's right to refuse to testify in a criminal trial], Warsaw 2004, p. 38; A. Wąsek, [in:] O. Górniok. S. Hoc, M. Kalinowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Vol. I, Gdańsk 2005, p. 841; J. Mętel, *Prawo do odmowy zeznań w kodeksie postępowania karnego z 1997 r.* [Right to refuse to testify in the Criminal Code of 1997], Nowa Kodyfikacja Prawa Karnego Vol. VIII, 2001, p. 177; O. Górniok, [in:] O. Górniok (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2006, pp. 428–429; R. Góral, *Kodeks karny. Praktyczny komentarz z orzecznictwem* [Criminal Code: Practical commentary with case law], Warsaw 2005, p. 206; A. Zoll, [in:] K. Buchała, A. Zoll, *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Kraków 1998, p. 634; A. Zoll, [in:] K. Buchała, Z. Ćwiąkalski, M. Szewczyk, A. Zoll, *Komentarz do kodeksu karnego. Cześć ogólna* [Commentary on the Criminal Code: General Part], Warsaw 1994, p. 508; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Warsaw 2011, p. 1011; M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Warsaw 2013, p. 591; R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna* [Criminal Code. General Part], Vol. II, Warsaw 2015, p. 780; Supreme Court judgement of 5 September 1973, IV KR 197/73, Lex No. 63773; Supreme Court judgement of 15 October1975, V KR 93/75, Lex No. 63538; Supreme Court judgement of 12 November 1975, V KR 203/75, OSP No. 10, item 187, 1976, with comments by M. Cieślak, Z. Doda, *Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (I półrocze 1976 r.)* [Review of the Supreme Court rulings on criminal proceedings (1st half of 1976)], Pal. No. 12, 1976, p. 61, and A. Kafarski, *Przegląd orzecznictwa Sądu Najwyższego z zakresu postępowania karnego za rok 1976 (część pierwsza)* [Review of the Supreme Court rulings concerning criminal proceedings in 1976 (Part one)], NP No. 2, 1978, pp. 277–278; Supreme Court judgement of 13 August 1987, II KR 187/87, OSNKW No. 1, item 11, 1988; Supreme Court judgement of 31 March 1988, I KR 50/88, OSNKW No 9–10, item 71, 1988; Supreme Court judgement of 9 November 1990, WR 203/90, OSP No. 9, item 205, 1991, with a gloss by L. Stecki, OSP No. 9, item 205, 1991, and comments by Z. Doda, J. Grajewski, *Węzłowe problemy postępowania karnego w świetle orzecznictwa Sądu Najwyższego (lata 1995–1996)* [Key issues in criminal proceedings in the light of the Supreme Court rulings (1995–1996)], PS No. 5, 1996, p. 29 ff; Supreme Court judgement of 3 March 2015, IV KO 1/15, Biul. PK No. 3, 2015, pp. 59–63 with a gloss of approval by A. Skowron, LEX/el. 2015; Supreme Court ruling of 4 February 2010, V KK 296/09, OSNKW No. 6, item 51, 2010; Supreme Court ruling of 7 July 2004, II KK 176/04, Lex No. 121668; Supreme Court ruling of 27 May 2003, IV KK 63/03, Lex No. 80281; judgement of the Appellate Court in Kraków of 11 December 1997, II AKa 226/97, KZS No. 2, item 26, 1998; judgement of the Appellate Court in Lublin of 30 December 1997, II AKa 51/97, Apelacja Lubelska No. 1,

– persons who, regardless of gender and age, live together and share a household and have certain psychical bonds;[33]
– apart from the obvious presumption resulting from the institution of marriage, persons who are not married but are bound in an emotional, physical and economic way as well as persons whose relations, because of living together for a long time and adopting a certain lifestyle, became the same as the relations between the next of kin referred to in Article 115 §11, e.g. relations between parents and children or between siblings".[34]

The Supreme Court, in a resolution of seven judges of 25 February 2016, I KZP 20/15,[35] explained that: **"the term 'a person living in cohabitation' used in Article 115 §11 CC defines a person who lives with another person in an actual relation in which there are spiritual (emotional), physical and economic bonds between them. Determining the existence of such a relation, i.e. 'living in cohabitation', is possible also when lack of a certain bond is objectively justified. A different gender of persons being in such a relation is not a requirement for recognition of living in cohabitation in the meaning of Article 115 §11 CC."**

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item 7, 1998; judgement of the Appellate Court in Warsaw of 5 December 1995, II AKr 459/95, OSA No. 4, item 15, 1996; judgement of the Appellate Court in Szczecin of 21 December 2006, II AKa 157/06, Lex No. 283401; judgement of the Appellate Court in Katowice of 15 March 2007, II AKa 24/07, KZS No. 7–8, 2007, p. 109; judgement of the Appellate Court in Kraków of 27 June 2002, II AKa 135/02, KZS No. 7–8, 2002, p. 52.

[33] Supreme Court judgement of 21 March 2013, III KK 268/12, Lex No. 1311768; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo* [Criminal Code: Commentary. Case law], Warsaw 1998, p. 206; M. Jachimowicz, *Prawo do odmowy składania zeznań przez osobę najbliższą* [Next of kin's right to refuse to testify], Prokurator No. 1, 2007, p. 72; R. Krajewski, *Osoba najbliższa w prawie karnym* [Next of kin in criminal law], PS No. 3, 2009, pp. 112–113; A. Marek, *Kodeks karny…* [Criminal Code...], pp. 316–317; I. Haÿduk-Hawrylak, S. Szołucha, *Wybrane zagadnienia prawa do odmowy składania zeznań* [Selected aspects of the right to refuse to testify], [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego* [Key issues of criminal proceedings], Warsaw 2010, pp. 1009–1010; A. Siostrzonek-Sergiel, *Partnerzy w związkach homoseksualnych a „osoby najbliższe" w prawie karnym* [Partners in homosexual relationships and "next of kin" in criminal law], PiP No. 4, 2011, p. 82; J. Giezek [in:] J. Giezek (ed.), *Kodeks karny...* [Criminal Code...], p. 705; J. Piórkowska-Flieger, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2013, pp. 266–268; P. Rogoziński, *Dopuszczalność i zakres badania przez organ procesowy istnienia przesłanek warunkujących uchylenie się świadka od zeznawania* [Admissibility and scope of examining by the procedural body a witness's reasons for refusing to testify], Ius Novum No. 1, 2014, p. 121; P. Daniluk, *Wspólne pożycie jako pojęcie karnoprawne* [Cohabitation as a legal term], Prok. i Pr. No. 6, 2015, p. 5 ff; P. Daniluk, [in:] *Kodeks karny…* [Criminal Code...], p. 690; V. Konarska-Wrzosek, [in:] J. Warylewski (ed.), *System prawa karnego. Przestępstwa przeciwko dobrom indywidualnym* [Criminal law system: Offences against individual interest], Warsaw 2012, p. 916; R.A. Stefański, *Znaczenie związku partnerskiego osób tej samej płci w prawie i procesie karnym* [Importance of same-sex civil unions in law and in a criminal trial], [in:] T. Gardocka, D. Jagiełło, P. Herbowski (eds), *Zamęt w wymiarze sprawiedliwości karnej* [Confusion in criminal justice institution], Warsaw 2016, pp. 145–157; T. Oczkowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, p. 587; D. Gruszecka, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego, Komentarz* [Criminal Procedure Code: Commentary], Warsaw 2016, p. 401.

[34] Supreme Court ruling of 4 March 2015, IV KO 98/14, OSNKW No. 8, item 67, 2015.

[35] OSNKW 2016, No. 3, item 19.

It is a right opinion and supported by broad and deepened substantiation. It is mostly approved of in the literature,[36] although there are also critical opinions.[37]

The content of Article 18 of the Constitution, which stipulates that: "Marriage, being a union of a man and a woman, (…) shall be placed under the protection and care of the Republic of Poland" is an argument limiting the scope of cohabitation to the relations between persons of the same gender. From this provision, it is deduced that concubinage is a relationship similar to marriage but without the formal tie, i.e. exclusively a relation between a man and a woman.[38]

It is not an obvious argument. The Constitutional Tribunal rightly noticed that "the only normative element that can be decoded from Article 18 of the Constitution is the heterosexuality of marriage"[39] and the provision obliges the State to undertake action that will strengthen the bonds between persons composing a family, especially bonds between parents and children and between spouses.[40] On the basis of criminal law, there are no evident reasons for stating that the differentiation with regard to gender is purposeful and justified.[41] It is necessary to agree with the statement that Article 18 is not an obstacle to legalise both heterosexual and homosexual relationships, however, in a form different than marriage, because in order to ban such unions, they would have to be explicitly banned by a provision of the Constitution.[42]

Also, it is not convincing that informal partnerships are in conflict with the constitutional value of the protection of a family, including its stability that constitutes an important element of the pro-family policy of the State, because they can be established and dissolved with greater ease and they are treated as specific relationships on trial, which can make them more attractive than the traditional marriage in the era of a certain crisis of the institution of marriage and a family, and because of that can depreciate marriage and its social significance to a greater extent.[43] In the doctrine, it is rightly believed that Article 1 of the Constitution, which stipulates that: "The Republic of Poland shall be the common good of all its citizens", indicates that public authorities cannot ignore citizens' needs and their role is to serve citizens.[44] Therefore, public authorities are obliged to undertake

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[36] See, glosses of approval on this resolution by P. Daniluk, Pal. No. 1–2, 2017, pp. 156–161; M. Popiel, M. Tokarska, Pal. No. 1–2, 2017, pp. 170–173; A. Skowron, LEX/el. 2016; J. Nowak, OSP No. 4, item 32, 2017; R.A. Stefański, *Znaczenie związku partnerskiego*… [Importance of same-sex civil unions...], p. 156.

[37] See, a critical gloss on this resolution by J. Kędzierski, Pal. No. 1–2, 2017, pp. 162–169.

[38] J. Izydorczyk, *Rozbieżność orzecznictwa – czy próba zmiany prawa* [Differences in judicial decisions or an attempt to change the law], Pal. No. 1–2, 2016, p. 157.

[39] Constitutional Tribunal judgement of 9 November 2010, SK 10/08, OTK-A No. 9, item 99, 2010.

[40] Constitutional Tribunal judgement of 18 May 2005, K 16/04, OTK ZU No. 5A, item 51, 2005.

[41] A. Siostrzonek-Sergiel, *Partnerzy*… [Partners in...], pp. 79–82.

[42] R. Piotrowski, *Opinia w sprawie projektu ustawy o związkach partnerskich* [Opinion on the Bill on civil unions], Przegląd Sejmowy No. 4, 2012, p. 187.

[43] D. Dudek, *Opinia w sprawie projektu ustawy o związkach partnerskich* [Opinion on the Bill on civil unions], Przegląd Sejmowy No. 4, 2012, p. 175.

[44] M. Grzybowski, *Zasada suwerenności narodu* [National sovereignty principle], [in:] M. Grzybowski (ed.), *Prawo konstytucyjne* [Constitutional law], Białystok 2009, p. 74; Z. Witkowski,

respective legislative activities.[45] Article 1 of the Constitution means that the State is under an obligation not to ignore citizens' needs and to act to improve their living conditions, and not discriminate against them on any grounds in the course of performing public tasks. The State is also obliged to take care of homosexual persons even if they constitute a minority in the mostly heterosexual community. The State should strive to satisfy various needs of those persons, including the need to enter into formal relationships.[46] A democratic State is obliged to respect the rights and freedoms of a person and a citizen, including the rights and freedoms of social groups that have a weaker position in the State.[47]

Another argument for limitation of cohabitation of people to those of different gender is derived from the ban on the application of broadened interpretation of Article 115 §11 CC in relation to Article 182 §1 CPC because the latter is exceptional in nature.[48] It is not right because the application of the term cohabitation to persons of the same gender does not mean broadened interpretation of the provision, which linguistic interpretation, presented below, confirms. It is hard to agree with an argument that in the Polish language "cohabitation" has always meant a bond existing between a man and a woman.[49] It is true that for many years cohabitation was believed to concern only persons of different gender, but it is necessary to take into account changes that have taken place in the Polish society, in which an evident revolution has observed with respect to the homosexual partnerships assessment.

Also emphasising the linguistic meaning of cohabitation in Polish, which suggests two persons' physical intercourse connected with a sexual intercourse, which can occur only between men and women, is not a reasonable argument.[50]

The Supreme Court rightly noted in the above-mentioned resolution that, in accordance with the Family and Guardianship Code, cohabitation of spouses consists in spiritual (emotional), physical (sexual) and economic (common household) bonds that constitute the objective of marriage and make it possible to meet its basic tasks.[51]

Wybrane zasady ustroju Rzeczypospolitej [Selected principles of the political system of the Republic of Poland], [in:] Z. Witkowski (ed.), *Prawo konstytucyjne* [Constitutional law], Toruń 2011, p. 81.

[45] R. Piotrowski, *Opinia*... [Opinion...], pp. 187–188.

[46] *Ibid*., p. 192.

[47] R. Piotrowski, *Opinia*… [Opinion...], p. 186; P. Tuleja, *Demokracja* [Democracy], [in:] W. Skrzydło, S. Grabowska, R. Grabowski (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny* [Constitution of the Republic of Poland: Encyclopaedic commentary], Warsaw 2009, pp. 136–137; T. Litwin, *Instytucja związków partnerskich w świetle przepisów Konstytucji z 1997 roku* [Institution of civil unions in the light of the Polish Constitution of 1997], Miscellanea Historico-Iuridica Vol. 13, book 2, Białystok 2014, p. 179.

[48] J. Izydorczyk, *Rozbieżność*… [Differences...], p. 157.

[49] *Ibid*.

[50] M. Derlatka, *Wspólne pozycie a prawo do odmowy zeznań* [Cohabitation versus the right to refuse to testify], Pal. No. 1–2, 2016, pp. 159–160.

[51] Supreme Court resolution of 28 May 1955, I CO 5/56, OSNCK No. 3, item 46, 1955; Supreme Court resolution of 28 May 1973, III CZP 26/73, No. 4, item 65, OSNCP 1974; Supreme Court judgement of 14 December 1984, III CRN 272/84, OSNCP No. 9, item 135, 1985; Supreme Court judgement of 27 September 1997, II CKN 329/97, Lex No. 12227829; Supreme Court judgement of 22 October 1999, III CKN 396/98, Lex No. 1217913, S. Breyer, S. Gross, [in:] J. Ignatowicz (ed.), *Kodeks rodzinny i opiekuńczy. Komentar*z [Family and Guardianship Code: Commentary], Warsaw 1966, p. 62; J.S. Piątkowski, [in:] J.S. Piątkowski (ed.), *System prawa*

The linguistic interpretation is for covering mainly heterosexual relationships with the term cohabitation. In the Polish language "cohabitation" (*pożycie*) means "(1) a social intercourse, being in close relation with a family member, some kind of emotional bond, or residing together (…); (2) a physical, sexual intercourse of two persons";[52] "cohabitation" does not only mean a social intercourse, being together, residing with another person but also a physical, sexual intercourse of two persons, especially in marriage.[53] It is rightly emphasised that in the light of linguistic interpretational directives, there are no grounds for stating that cohabitation may only be associated with the relationship of people of different gender.[54] Apart from that, the existence of actual stable relations between persons of the same gender is a social fact, which cannot be ignored on the juridical plane.[55]

It is rightly noticed that Article 115 §11 CC does not indicate that it applies only to heterosexual relationships. The provision does not make any reference to the issue of gender of the persons concerned. Therefore, it also allows granting homosexual partners the right to refuse to testify if their relationship constitutes cohabitation.[56]

The Supreme Court, in the resolution discussed, rightly drew attention to the fact that Article 115 §11 CC lacks specification indicating that it covers only the relationship between persons of different sex (a heterosexual relationship). The phrase "in cohabitation" is not defined by the addition of an adjective "marital" and, therefore, in compliance with the directive *lege non distinguente nec nostrum est distinguere*, the differentiation cannot be introduced based on interpretation.

As it has already been signalled, the changes that are taking place in social awareness are not insignificant. Informal partnerships take new forms with the

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rodzinnego i opiekuńczego. Część pierwsza [Family and guardianship law system. Part one], Warsaw 1985, pp. 232–233; S. Grzybowski, *Prawo rodzinne. Zarys wykładu* [Family law: lecture overview], Warsaw 1980, p. 70; J. Ignatowicz, *Prawo rodzinne. Zarys wykładu* [Family law – lecture overview], Warsaw 1996, pp. 80–81; J. Ignatowicz, K. Piasecki, J. Pietrzykowski, J. Winiarz, *Kodeks rodzinny i opiekuńczy z komentarzem* [Family and Guardianship Code with a commentary], Warsaw 1990, pp. 121–122; J. Winiarz, J. Gajda, *Prawo rodzinne* [Family law], Warsaw 2001, p. 86; A. Zieliński, *Prawo rodzinne i opiekuńcze w zarysie* [Family and guardianship law – overview], Warsaw 2011, p. 62; T. Sokołowski, [in:] M. Andrzejewski, H. Dolecki, J. Haberko, A. Lutkiewicz-Rucińska, A. Olejniczak, T. Sokołowski, A. Sylwestrzak, A. Zielonacki, *Kodeks rodzinny i opiekuńczy* [Family and Guardianship Code], Warsaw 2013, p. 95; J. Gajda, [in:] K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary], Warsaw 2015, p. 211; W. Borysiuk, [in:] J. Wierciński (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary], Warsaw 2014, pp. 221–222.

[52] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny* [Practical dictionary of the contemporary Polish language], Vol. 32, Poznań 2001, p. 124.

[53] S. Dubisz, *Uniwersalny słownik języka polskiego* [General dictionary of the Polish language], Vol. III, Warsaw 2003, p. 828; M. Szymczak (ed.), *Słownik języka polskiego* [Dictionary of the Polish language], Vol. II, Warsaw 1999, p. 855.

[54] J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Vol. I, Warsaw 2012, pp. 1394–1396; I. Haÿduk-Hawrylak, S. Szołucha, *Wybrane zagadnienia prawa do odmowy…* [Selected aspects of the right...], p. 1007.

[55] A. Siostrzonek-Sergiej, *Partnerzy…* [Partners in...], p. 73 ff.

[56] B. Rodak, *Gloss on ECtHR judgement of 3 April 2012, 42857/05*, LEX/el. 2012.

change of life realities.[57] There are examples of registered domestic partnerships of persons of the same gender.[58] The development of societies indicates the evolution of opinions about cohabitation of persons of the same gender. In the historical development, an intimate intercourse of persons of the same gender was gradually released from penalisation; life in a chosen way has become accepted, provided that it is not overtly displayed. It has also been slowly integrated in the system of kinship and the system of law. With the decreasing social opposition, a process of granting homosexual partnerships rights equal to heterosexual marriages is taking place and a possibility of registering homosexual cohabitation has been introduced.[59] Also same-sex marriages became admissible in some countries, e.g. the Netherlands (2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Island (2010) and Portugal (2010).

5. LEGAL PROTECTION OF A PHYSICIAN (ARTICLE 226 §1 CC)

In accordance with Article 44 of the Act of 5 December 1996 on the jobs of a physician and a dentist,[60] a physician who performs activities in emergency services or in case delay in providing medical assistance might result in a threat of death, a severe damage to the body or a severe health disorder, and other emergency situations, is entitled to legal protection as a public official. Physicians providing first aid, specialist first aid and undertaking medical life saving activities are entitled to the same protection (Article 5(1) of the Act of 8 September 2006 on the State Medical Rescue Service[61]).

The regulation raised doubts whether a physician on duty in a hospital emergency ward as a member of an ambulance staff waiting on call is also subject to this protection.

The Supreme Court in a ruling of 28 April 2016, I KZP 24/15,[62] rightly held that: **"Legal protection for a public official granted to a physician in Article 44 of the Act of 5 December 1996 on the jobs of a physician and a dentist, Journal of Laws of 2015, item 464, and in Article 5(1) of the Act of 8 September 2006 on the State Medical Rescue Service, Journal of Laws of 2013, item 757 as amended, does not cover situations other than providing emergency assistance (i.e. first aid and medical rescue activities) or medical aid if delay in its provision might result in a threat of death, a severe damage to the body or a severe health disorder, and**

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[57] F. Hartwich, *Związki partnerskie. Aspekty prawne* [Civil unions: Legal aspects], Warsaw 2011, p. 17.

[58] P. Szukalski, *Rejestrowane związki osób tej samej płci we współczesnej Europie. Dysfunkcje Rodziny* [Registration of same-sex unions in contemporary Europe: Family dysfunctions], Roczniki Socjologii Rodziny UAM, Vol. XXI, Poznań 2011, p. 169.

[59] P. Szukalski, *Rejestrowane…* [Registration of...], pp. 169–183. Also, see J. Pawliczak, *Zarejestrowany związek partnerski a małżeństwo* [Registered civil union versus marriage], Warsaw 2014.

[60] Journal of Laws [Dz.U.] of 2017, item 125, as amended.

[61] Journal of Laws [Dz.U.] of 2016, item 1868, as amended.

[62] OSNKW 2016, No. 7, item 4.

other emergency situations. The activities performed in this scope also include those directly leading to their provision from the moment of an individual call to provide them or from the moment a physician undertakes adequate action on his/her own initiative. The protection does not cover the period of being on duty in the hospital emergency ward if it consists in waiting for a call to join the ambulance staff."

Justifying the opinion, the Supreme Court indicated that the scope of a physician's protection laid down in Article 44 of the Act of the jobs of a physician and a dentist and Article 5 of the Act on the State Medical Rescue Service was strictly limited to the performance of specific activities.

It concerns situations in which a physician really and at a particular moment provides emergency medical assistance or performs his/her duties laid down in Article 30 of the Act on the jobs of a physician and a dentist. Moreover, the features of an offence under Article 226 §1 CC include being insulted "in the course of and in connection with the performance of official duties". In fact, it does not mean an absolute time correlation of the act of insulting a physician and a physician's performance of emergency aid or activities referred to in Article 30 of the Act on the jobs of a physician and a dentist, but can also cover situations in which the activities have already been performed or will be performed soon.[63] The Court, taking into consideration the protection of a physician as a public official *ratio legis*, decided that there are no grounds for extending the scope of that protection, even if the extraordinary significance of the work of a medical rescue physician is taken into account.

6. OBJECT OF PROTECTION UNDER THE PROVISION CONCERNING A CRIME OF MATERIAL FORGERY (ARTICLE 270 §1 CC)

The Supreme Court, analysing the status of a person whose signature on a tax return was forged, also referred to the object of protection under Article 270 §1 CC.

The Court in the ruling of 24 August 2016, I KZP 5/16,[64] held that: **"The direct object of protection under Article 270 §1 CC is trust to a document as a formal way of confirming the existence of law, a legal relation or a circumstance that may be legally important, and not just law or a legal relation in which a given entity sees one's own interest. Thus, the interest, if at all, is infringed or endangered only in an indirect way that is not directly specified by the features of the act concerned."**

It is a right opinion, appropriately substantiated and has been approved of in the literature.[65] It is in conformity with case law that Article 270 §1 CC protects only the general legal interest, not the interests of an individual.

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[63] Constitutional Tribunal judgement of 11 October 2006, P 3/06, OTK-A No. 9, item 121, 2006; and Supreme Court judgement of 9 February 2010, II KK 176/09, OSNKW No. 7, item 61, 2010.

[64] OSNKW 2016, No. 10, item 66.

[65] D. Krakowiak, Gloss on this ruling, LEX/el. 2016.

The Supreme Court held that:
- "The category of objects of protection under the provisions of Chapter XXXIV of the Criminal Code ('Crimes against the credibility of documents') is certainty of legal relations based on trust in documents, credibility of official documents and public trust in documents";[66]
- "The object of protection of the norm referred to in Article 270 §1 CC is credibility of documents and certainty of legal relations resulting from them";[67]
- "The offence under Article 270 §1 CC is against credibility of documents and the interest of the object, the document of which was forged, is not a general, or category-related, or individual object of protection; and the act, due to its nature, does not directly infringe the legal interest of a particular person".[68]

ACT OF 19 NOVEMBER 2009 ON GAMBLING GAMES (JOURNAL OF LAWS [DZ.U.] OF 2016, ITEM 471, AS AMENDED)

7. DOING BUSINESS IN THE FIELD OF CYLINDRICAL GAMES, CARD GAMES, DICE GAMES, MACHINE GAMES (ARTICLE 6)

In accordance with Article 6 of the Act on gambling games, doing business in the field of cylindrical games, card games, dice games and machine games is admissible after obtaining a casino licence with the exception of games on which the State has a monopoly: number games, cash lotteries, telebingo, machine games outside casinos and gambling on the Internet with the exception of a betting pool and promotional lotteries as well as poker tournaments organised outside casinos. As far as this provision is concerned, a legal question was referred to the Supreme Court whether, due to the lack of notification of Article 6(1) of the Act on gambling games, which has been recognised as a technical provision so far, while there was a provision of information about Article 14(1)–(3) of the Act on gambling games (in the wording of the Act of 12 June 2015 amending the Act on gambling games),

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[66] Supreme Court ruling of 30 September 2013, IV KK 209/13, Biul. SN No. 10, item 1.2.7, 2013.

[67] Supreme Court judgement of 4 August 2005, II KK 163/05, Biul. PK No. 4, item 1.2.3, 2005; Supreme Court judgement of 1 April 2008, V KK 26/08, Prok. i Pr. – suppl. No. 7–8, item 10, 2008; Supreme Court judgement of 4 September 2008, V KK 171/08, Prok. i Pr. – suppl. No. 1, item 6, 2009, with a gloss of approval by P. Iwaniuk, Prokurator No. 3–4, 2009, pp. 126–134; Supreme Court judgement of 26 November 2008, IV KK 164/08, Prok. i Pr. – suppl. No. 5, item 11, 2009, with a gloss of approval by D. Jagiełło, Pal. No. 3, 2010, pp. 271–277; Supreme Court judgement of 1 April 2008, V KK 26/08, Prok. i Pr. – suppl., No. 7–8, item 10, 2008; Supreme Court judgement of 8 January 2009, WK 24/08, OSNwSK No. 1, item 47, 2009; Supreme Court judgement of 12 January 2010, WK 28/09, OSNwSK No. 1, item 31, 2010; Supreme Court ruling of 24 May 2011, II KK 13/11, Biul. PK No. 10, item 1.2. 9, 2011; Supreme Court ruling of 9 July 2014, II KK 152/14 LEX No. 1488795; Supreme Court ruling of 25 March 2015, II KK 302/14, LEX No. 1666887; Judgement of the Appellate Court in Szczecin of 16 January 2014, II AKa 213/13, Prok. i Pr. – suppl., No. 11–12, item 23, 2014.

[68] Supreme Court judgement of 3 October 2013, II KK 117/13, Prok. i Pr. – suppl., No. 1, item 10, 2014.

there are grounds for the application of Article 107 §1 FPC in criminal cases if the norms supplementing a blank rule under Article 107 §1 FPC should be referred to together with Article 6 and Article 14 of the Act on gambling games.

Resolving the problem, the Supreme Court in the ruling of 29 November 2016, I KZP 8/16,[69] rightly held that: **"The provision of Article 6(1) of the Act on gambling games, Journal of Laws of 2016, item 471, in the light of the Court of Justice of the European Union judgement of 13 October 2016 in the case C-303/15, is not classified in the group of technical regulations in the meaning of Article 1 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998."**

ACT OF 12 JUNE 2015 AMENDING THE ACT ON GAMBLING GAMES (JOURNAL OF LAWS [DZ.U.] OF 2015, ITEM 1201)

8. THE PERIOD OF ADJUSTING A BUSINESS IN THE FIELD OF SOME GAMES TO THE AMENDED PROVISIONS (ARTICLE 4)

In accordance with Article 4 of the Act of 12 June 2015 amending the Act on gambling games,[70] entities doing business in the field of cylindrical games, card games, dice games, machine games, bingo, a betting pool or audio-text lotteries on the date of the Act entry into force must adjust to the requirements laid down in the Act of 19 November 2009 on gambling games in the wording of the Act until 1 July 2016.

The provision raised doubts whether it applies to entities doing business in the field of machine games, regardless of whether they did that business in accordance with the provisions of the Act of 19 November 2009 being in force then or regardless of its conformity with the provisions.

The Supreme Court, in the judgement of 28 June 2016, I KZP 1/16,[71] rightly held that: **"The provision of Article 4 of the Act of 12 June 2015 amending the Act on gambling games (Journal of Laws 2015, item 1201), allowing entities doing business in the field referred to in Article 6(1) to (3) or in Article 7(2) of the amended Act, to adjust to the requirements laid down in the amended Act on gambling games until 1 July 2016, applies exclusively to entities that did such business in compliance with the Act on gambling games of 3 September 2015 based on a licence or permission)."**

In the justification, the Court indicated that the statutory specification of addressees in Article 4 of the amending Act as: "entities doing business in the field referred to in Article 6(1) to (3) or Article 7(2) on the date of the Act entry into force", applies only to the entities that on that day met the requirements referred to in the quoted provisions on gambling games. The types of activities were not listed, however, reference was made to those specified in Article 6(1) to (3) or Article 7(2). The Supreme Court drew a right conclusion that this applies to only to entities that

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[69] OSNKW 2016, No. 12, item 84.
[70] Journal of Laws [Dz.U.] of 2015, item 1201.
[71] OSNKW 2016, No. 6, item 36.

on the day of the Act entry into force did business in the whole field covered by the indicated regulations. According to the Court, the linguistic interpretation of Article 4 is in conformity with the systemic interpretation based on the whole Act on gambling games. As the requirements for doing business in the field of gambling games were modified or new ones added by the amended provisions, the entities doing business based on the licences that had been issued earlier, should have time to meet them. Moreover, if we held that the period for adjustment applied not only to entities doing business based on the already granted casino licences but also an unlimited group of entities, it would be in conflict with the legal order in this area.

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER ON SUBSTANTIVE CRIMINAL LAW OF 2016

Summary

The article analyses resolutions and judgements of the Supreme Court concerning substantive criminal law issues submitted as legal queries to the Supreme Court by appellate courts and court adjudicating bodies. The article discusses the issues concerning: resting of the period of limitation (Article 104 §1 CC), the scope of the principle of universal jurisdiction (Article 113 CC), similarity of crimes (Article 115 §3 CC), a person living in cohabitation (Article 115 §11 CC), legal protection of a physician (Article 226 §1 CC), the object of protection under the provision concerning a crime of material forgery (Article 270 §1 CC), doing business in the field of cylindrical games, card games, dice games, machine games, number games, cash lotteries, telebingo, machine games outside casinos, gambling on the Internet (Article 6 of the Act of 19 November 2009 on gambling games), and the period of adjusting a business in the field of some games to the amended provisions (Article 4 of the Act amending the Act on gambling games).

Keywords: document forgery, gambling game, similarity of crimes, judgement, limitation, universal jurisdiction, Supreme Court, resolution, cohabitation

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO MATERIALNEGO ZA 2016 R.

Streszczenie

W artykule została przeprowadzana analiza uchwał i postanowień wydanych przez Sąd Najwyższy w zakresie prawa karnego materialnego w sprawach, które zostały przedstawione w formie zagadnienia prawnego przez sądy odwoławcze i składy orzekające Sądu Najwyższego. Przedmiot rozważań stanowią: spoczywanie biegu przedawnienia (art. 104 §1 k.k.), zakres zasady represji wszechświatowej (art. 113 k.k.), podobieństwo przestępstw (art. 115 §3 k.k.), osoba pozostająca we wspólnym pożyciu (art. 115 §11 k.k.), ochrona prawnokarna lekarza (art. 226 §1 k.k.), przedmiot ochrony przepisu określającego przestępstwo fałszerstwa materialnego (art. 270 §1 k.k.), prowadzenie działalności w zakresie gier cylindrycznych, gier w karty, gier w kości i gier na automatach, gier liczbowych, loterii pieniężnych, gry telebingo, gier na automatach poza kasynem gry, gier hazardowych przez sieć Internet (art. 6 z dnia 19 listopada 2009 r. o grach hazardowych) oraz okres dostosowania działalności w zakresie niektórych gier do zmienionych przepisów (art. 4 ustawy o zmianie ustawy o grach hazardowych).

Słowa kluczowe: fałszerstwo dokumentu, gra hazardowa, podobieństwo przestępstw, postanowienie, przedawnienie, represja wszechświatowa, Sąd Najwyższy, uchwała, wspólne pożycie