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The Concept of a "Criminal Case" in the Jurisprudence of the Polish Constitutional Tribunal against the Background of the Case Law of the European Court of Human Rights

Pojęcie sprawy karnej w orzecznictwie polskiego Trybunału Konstytucyjnego na tle orzecznictwa Europejskiego Trybunału Praw Człowieka

ABSTRACT

The subject of the study is the notion of a criminal case in Polish criminal law against the background of the jurisprudence of the European Court of Human Rights (ECtHR). The article seeks to analyse the case law of the ECtHR and the Polish Constitutional Tribunal (PCT) with regard to the interpretation of the concept of a "criminal case". The aim is to examine whether the ECtHR and the PCT apply similar criteria and whether the ECtHR case law influences the practice of the PCT. The article uses the formal-dogmatic method. The concepts of crime, misdemeanour and administrative

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tort are analysed in the context of the *Engel* standard and its influence on the understanding of the case in the jurisprudence of the PCT, in the historical and normative context. The answer to the question whether the PCT applies criteria similar to those developed in the case law of the ECtHR is affirmative, which means that the standard developed in this respect in the case law of both courts is similar. The article is of scientific and synthesizing character. The presented problems have an international scope. The article may have cognitive value for both science and practice.

Keywords: accusation; criminal offence; criminal proceedings; criminal punishment; administrative penalty

INTRODUCTION

The article seeks to analyse the case law of the European Court of Human Rights (ECtHR) and the Polish Constitutional Tribunal (PCT) with regard to the interpretation of the concept of a "criminal case". The aim is to examine whether the ECtHR and the PCT apply similar criteria and whether the ECtHR case law influences the practice of the PCT. The concept of a "criminal case" in ECtHR case law has developed gradually, leaving the jurisprudence of individual countries to adapt the requirements of the ECHR to their legislative traditions. It would be advisable to have a common understanding of a "criminal case" in the jurisprudence of the ECtHR and national courts, including the PCT. Differences could generate legal uncertainty and the need to examine whether the human rights protection standard is guaranteed in the case law of both courts. It is reasonable to ask whether the ECtHR uses the ECtHR's *acquis* in its jurisprudence on national laws. The article uses the formal-dogmatic method. The case law of the ECtHR, and then the case law of the PCT, is analysed in terms of the criteria that allow finding repressive liability.

THE PROBLEM OF LOCATING REPRESSIVE REGULATIONS OUTSIDE PENAL LAW

The problem of identifying a criminal case goes in line with the issue of placing repressive provisions in national legislations outside criminal law in a formal sense. This is largely due to: the decreasing usefulness of traditional criminal law in combating certain conduct; technological progress the traditional criminal law system lags behind;[1] the dynamics of the development of harmful phenomena and the need to respond to them; the specificity of the subject matter being regulated,

[1] As D. Szumiło-Kulczycka (*Prawo administracyjno-karne*, Kraków 2004, p. 68) puts it, "the development in technology, economy and market has given rise to 'new forms of crime' with which the existing system of criminal repression has not been able to keep up" and "the need to regulate the use of the achievements of civilisation, and an effective regulation enabling it to be enforced, has

which requires detailed, technical knowledge; the need to relieve criminal courts of workload (in minor cases), the lengthiness of criminal proceedings and even the resistance of continental-law scholars to the adoption of punitive regulations based on the concept of an "objectivised responsibility".[2]

Classical criminal responsibility is based on the condition of culpability which is not necessary for administrative responsibility,[3] which makes it easier and quicker to impose administrative sanctions than criminal ones.[4] In some jurisdictions, only a natural person may be subject to criminal responsibility[5] and the reason for placing repressive regulations outside criminal law may be the need to introduce liability for collective entities.[6] The principles typical of criminal law such as the principle of culpability, subjectivity, the rules under which punishment and other measures are imposed, or procedural guarantees are conducive to the fair use of repression.[7] However, this affects promptness of proceedings, which may even result in the inefficiency of the judicial system.[8]

In administrative liability, as a rule, there is no guilt involved. The administrative authority does not apply the rules of imposing a penalty, sometimes there may even be strictly defined sanctions, the distribution of the burden of proof is different than in criminal proceedings, and there are fewer guarantees for the parties. Penalties are imposed by a specialised body, sometimes more professional than a court of law. All this means that such proceedings can be faster and more effective than criminal proceedings. Administrative liability is also characterised by a simplified classification of wrongdoings.[9]

From the offender's point of view, the advantage of placing the regulation outside criminal law is the absence of the element of moral condemnation and that the offence is not registered in the criminal record. This may give rise to the state-

collided with the tendency to abandon the traditional path of criminal law, namely the depenalisation tendency".

[2] *Ibidem*, pp. 68, 70–71.

[3] M. Mozgawa, M. Kulik, *Wybrane zagadnienia z zakresu wzajemnego stosunku odpowiedzialności karnej i administracyjnej*, "Ius Novum" 2016, no. 3, p. 40. See also A. Wróblewski, *Wina w odpowiedzialności administracyjnej w aspekcie prawa do sądu w rozumieniu art. 6 EKPCz na przykładzie administracyjnych kar pieniężnych*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2022, vol. 20, p. 116.

[4] M. Mozgawa, M. Kulik, *op. cit.*, p. 44.

[5] See D. Szumiło-Kulczycka, *op. cit.*, pp. 30–31.

[6] *Ibidem*, p. 70.

[7] See M. Mozgawa, M. Kulik, *op. cit.*, p. 47.

[8] D. Szumiło-Kulczycka, *op. cit.*, p. 71. See also M. Kulik, *Kilka uwag o potencjalnym wpływie regulacji w zakresie prawnokarnej ochrony środowiska na polskie prawo karne (na przykładzie Dyrektywy Parlamentu Europejskiego 2008/99/WE z 19 XI 2008 r.)*, [in:] *Człowiek, społeczeństwo i państwo z perspektywy nauk kryminologicznych. Księga jubileuszowa Profesora Emila W. Pływaczewskiego*, eds. E. Guzik-Makaruk, K. Laskowska, W. Filipkowski, Warszawa 2023, p. 659.

[9] See M. Mozgawa, M. Kulik, *op. cit.*, p. 52.

ment that classical criminal repression should apply only to behaviours that entail social condemnation, negative moral evaluation, while administrative repression is to regulate new spheres of human activity which do not yet contain an element of social condemnation for wrong behaviour.[10]

Since the 1960s, there has been a tendency in Europe to decriminalise and transfer minor offences to administrative law regulations.[11] It can also be seen in Polish law, with an increase since the beginning of the 1990s. This tendency coincides with the fact that the place, which in most European countries contains criminal-administrative responsibility, in Poland is occupied by two branches of law – repressive administrative law and the law on infractions. The latter, to some extent contrary to the trend described above, has evolved not from criminal to administrative regulation, but in the opposite direction. This will be discussed below. However, it is worth noting at this point that it is sometimes difficult to notice the criteria according to which the legislature classifies infringements as administrative delicts, offences and infractions.[12] The confusion that exists in this regard may lead to the conclusion that we are dealing today with repressive law in the general sense, which includes classical criminal law, repressive administrative law and also (in the Polish system) the law of infractions.[13]

Some researchers argue that the considerations of pragmatism change gradually the philosophy underlying criminal justice. This results in departing from the fundamental principles of criminal law[14] and leads to a blurring of the boundaries between administrative law and criminal law. The same areas of social activity may be governed by both branches of law. The same conduct may constitute a criminal offence or administrative delict, depending on the decision of the legislature. Similar sanctions may exist in both systems, and under the influence of the ECtHR case law similar rights and guarantees for citizens are gradually implemented in different liability regimens.[15]

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[10] D. Szumiło-Kulczycka (*op. cit.*, p. 69) argues that the process of forming social moral assessments must be rooted in the awareness of a wide range of social rules governing the functioning of certain areas of life and takes a long time to develop.

[11] According to the Resolution of the 14th International Congress of the AIDP, decriminalization of transgressions is in accord with the principle of subsidiarity of penal law. See *ibidem*, p. 73.

[12] See S. Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności*, Warszawa 2009, pp. 208–216.

[13] A. Błachnio-Parzych, *Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej*, Warszawa 2016, p. 82.

[14] A. Weyembergh. *Introduction*, [in:] *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU*, eds. F. Galli, A. Weyembergh, Brussels 2014, p. 9.

[15] P. Caeiro, *The Influence of the EU on the "Blurring" between Administrative and Criminal Law*, [in:] *Do Labels Still Matter…*, p. 177.

ECTHR CASE LAW

1. Terminological issues

The concept of a "criminal case" is analysed in ECtHR case law in the context of Articles 6 and 7 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and of Articles 2, 3 and 4 of Protocol No. 7 to the ECHR, drawn up on 22 November 1984 in Strasbourg. In Article 6 ECHR, which provides for the right to a fair trial (our interest covers the criminal aspect, i.e. the right to a fair criminal trial), in its para. 1, there is the term "criminal charge" (*accusation en matière pénale* in the French version), and in paras 2 and 3 the term "charged with a criminal offence" (*accusé d'une infraction* and *accusé*). Article 7 ECHR, providing for the prohibition of punishment without legal basis, uses the terms "criminal offence" (*infraction* in the French version), as well as "held guilty" and "penalty". In Article 4 of Protocol No. 7, introducing the principle *ne bis in idem*, the terms "criminal proceedings" and "offence" (as well as "penal procedure") appear.

The criteria for determining whether a charge is criminal and Article 6 is applicable to it also apply to Article 7 ECHR.[16] In case *Žajav v. Croatia*, the ECtHR stated: "Even though these criteria were initially developed for the purposes of determining the applicability of Article 6 of the Convention under its 'criminal head', they are equally pertinent to the issue of the applicability of Article 7".[17] The condition for the application of Article 4 of Protocol No. 7 (providing for the principle *ne bis in idem*) is, i.a., that both cases are criminal in nature. In order to examine whether a case is criminal under Article 4 of Protocol No. 7, the criteria developed in the case law under Article 6 ECHR apply.[18] Thus, the criteria determining the existence of an accusation under Article 6 ("criminal charge") can be applied to the interpretation of the concept of a "criminal punishment" under Article 4 of Protocol No. 7. However, it should be pointed out that the ECtHR has held in several judgments that the concept of a "criminal charge" under Article 4 of Protocol No. 7 is narrower than under Article 6 ECHR.[19] However, in the case *Zolotukhin*

[16] See *Brown v. the United Kingdom* (dec.), no. 38644/97, 24 November 1998; *Société Oxygène Plus v. France* (dec.), no. 76959/11, 17 May 2016, § 43; *Žaja v. Croatia*, no. 37462/09, 4 October 2016, § 86.

[17] *Žaja v. Croatia*, no. 37462/09, 4 October 2016, § 86.

[18] See, e.g., M. Kierska, T. Marek, *Zasada ne bis in idem w kontekście orzecznictwa ETPC*, "Monitor Prawniczy" 2015, no. 21, p. 1145. The authors point to, among others, the judgment of the ECtHR of 20 May 2014 in case *Glantz v. Finland*, no. 37394/11.

[19] See, e.g., *Haarvig v. Norway*, no. 11187/05, and *Storbråten v. Norway* (dec.), no. 12277/04, 11 February 2007, where the ECtHR, determining the autonomous meaning of the concept of a "criminal" in Article 4 of Protocol No. 7, invoked more criteria in a catalogue open in relation to the *Engel* criteria. See also G. Coffey, *An Interpretative Analysis of the European ne bis in idem Principle through*

v. Russia,[20] and subsequently *A. and B. v. Norway*,[21] which are milestones in the development of ECtHR case law on *ne bis in idem*,[22] this approach was rejected. In *Zolotukhin*, the ECtHR applying only the *Engel* criteria pointed out: "The notion of 'penal procedure' in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words 'criminal charge' and 'penalty' in Articles 6 and 7 of the Convention respectively".[23]

In the case *A. and B. v. Norway*, the applicants were accused of having failed to disclose their income in the tax statement, which resulted in failure to pay the tax. The perpetrators were held criminally liable for tax fraud and concurrently punished with administrative penalties in tax proceedings. When sentencing, the courts invoked and took into account the fact that the applicants had already been severely punished with the tax penalties imposed. The applicants alleged that, contrary to Article 4 of Protocol No. 7, two proceedings had been conducted against them for which they were convicted twice for the same offence. The ECtHR held, based on the *Engel* criteria, that the procedure in which the applicants were subject to a tax-law sanction concerned a "criminal" matter within the meaning of Article 4 of Protocol No. 7.[24] However, according to the ECtHR, there was no infringement of Article 4 of Protocol No. 7, since "there was a sufficiently close connection, both in substance and in time, between the decision on the tax penalties and the subsequent criminal conviction for them to be regarded as forming part of an integral scheme of sanctions".[25] The conditions for a sufficiently close connection in substance are: the complementary nature of the two proceedings, their predictability, the evidence taking aspects, the existence of offsetting mechanisms to ensure that the overall quantum of any penalties imposed is proportionate.[26] It can therefore be concluded that the very concept of criminal case under Article 4 of Protocol No. 7 is similar to that in Articles 6 and 7 ECHR (based solely on the *Engel* criteria), but other criteria are also pointed to for the application of the *ne bis in idem* principle. The weakest point of the decision in the case *A. and B. v. Norway* is that it has slurred over the circumstances in which the two proceedings had been conducted and the imposition of two penalties. That circumstance leads us to deny the consider that decision incorrect. It should be added that the ruling

the Lens of ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?, "New Journal of European Criminal Law" 2023, vol. 14(3), p. 3.

[20] *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECtHR, 2009.

[21] *A. and B. v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016.

[22] M. Szwarc, *Łączne zastosowanie sankcji administracyjnych i karnych w świetle zasady ne bis in idem (uwagi na tle orzecznictwa ETPC)*, "Państwo i Prawo" 2017, no. 12, p. 52.

[23] *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECtHR, 2009, § 52.

[24] *A. and B. v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016, § 139.

[25] *Ibidem*, § 153.

[26] See *ibidem*, § 132.

in the case *A. and B. v. Norway* shows some similarity to the ruling of the PCT in relation to Article 10 (1) of the Infractions Code, which creates an ideal concurrence of a criminal offence with an infraction.

2. Autonomous meaning of the concept of criminal case

As stated above, the rights guaranteed by the ECHR (including those under Article 6 in criminal matters and Article 7, as well as Article 4 of Protocol No. 7) apply only if the case is of a criminal nature. The ECHR does not define a "criminal case". A case not designated as "criminal" in a national legal system may be considered criminal within the meaning of the ECHR and be subject to the guarantees contained therein if the *Engel* standard is met. It is worth recalling that in this case the applicants were soldiers punished with disciplinary measures, including by a few days of minor-gravity detention. A disciplinary case was not classified as criminal in the relevant national law. The ECtHR nevertheless deemed it criminal.[27] It emphasised that if States could, at their discretion, classify an offence as disciplinary rather than criminal, the application of the guarantees provided for in Articles 6 and 7 would be subject to their sovereign will, which could lead to results incompatible with the purpose and subject-matter of the ECHR.[28] Let us add that the autonomous understanding of the concept of a "criminal case" operates unidirectionally. The classification of an act as a criminal offence in the national legal system is binding on the ECtHR and entails the application of Articles 6 and 7 ECHR. If the act is an administrative wrong, the issue of assessment under the ECHR remains open – the criteria for basing the responsibility on the principle of fault and severity of the penalty are then applied. The ECtHR argued that: "The prominent place held in a democratic society by the right to a fair trial favours a 'substantive', rather than a 'formal', conception of the 'charge' referred to by Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a 'charge' within the meaning of Article 6 (…)".[29]

The autonomous interpretation of the concept of a "criminal case" viewed through the *Engel* criteria has contributed to the gradual widening of the scope of

[27] *Engel and Others v. the Netherlands*, 8 June 1976, Series A, no. 22.

[28] This idea has been put even clearer in *Campbell and Fell v. the United Kingdom*, 28 June 1984, Series A, no. 80, § 68, where the Court stated as follows: "If the Contracting States were able at their discretion, by classifying an offence as disciplinary instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention".

[29] *Adolf v. Austria*, 26 March 1982, series A, no. 49, § 30.

criminal case law to include matters outside traditional criminal law, e.g. disciplinary, administrative, tax, customs, competition, environmental and juvenile cases.[30]

3. Criteria of a criminal case

The *Engel* criteria are: the classification of the act under national law, the nature of the act, and the nature and severity of the penalty that may be imposed.[31] The first of these is of relative importance and is the starting point for assessing the case as criminal one.[32] If the act is criminalised under national law, the case is considered criminal. This is usually easy to determine, although the location of the provision can sometimes be misleading.[33] An examination of the subsequent criteria takes place when the case is not considered as criminal under national law.[34]

The second criterion (nature of the act) is more important.[35] In analysing it, the ECtHR first examines whether the norm is addressed to the general public. Addressing it only to a specific group tends to indicate its disciplinary nature, while addressing it to the general public tends to point to its penal nature.[36]

Another factor that the ECtHR takes into account when examining the nature of the act is whether the regulation has a repressive or deterrent purpose,[37] which distinguishes the criminal sanction from sanctions that are of a purely offsetting nature.[38] Sometimes it invokes other factors, such as whether the legal norm is intended to protect the general interests of society, usually protected by criminal law.[39]

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[30] See *Jussila v. Finland* [GC], no. 73053/01, ECtHR, 2006-XIV, § 43.

[31] *Engel and Others v. the Netherlands*, 8 June 1976, Series A, no. 22, § 82.

[32] *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020, § 85; J.T. Theilen, *European Consensus between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication*, Baden-Baden 2021, pp. 288–289.

[33] See *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020, § 80.

[34] M. Guran, *Short Considerations on the Scope of the Right to a Fair Trial Provided by Art. 6 of the ECHR – the Concept of "Criminal Charge"*, "Law Review" 2019, vol. 2(157), p. 163.

[35] *Engel and Others v. the Netherlands*, 8 June 1976, Series A, no. 22, § 82.

[36] L. Ansems, C. Loeve, *Targeted Financial Sanctions: Criminal in Nature? An Analysis of the Case Law of the ECtHR and the CJEU on the Nature of Targeted Financial Sanctions*, "European Criminal Law Review" 2016, vol. 6(1), p. 65; P. Caeiro, *op. cit.*, p. 176; *Bendenoun v. France*, 24 February 1994, Series A, no. 284, § 47.

[37] *Lauko v. Slovakia*, 2 September 1998, Reports of Judgments and Decisions 1998-VI, § 58; *Bendenoun v. France*, 24 February 1994, Series A, no. 284, § 47.

[38] M. Kłopocka-Jasińska, *Pojęcie sprawy w świetle art. 6 Konwencji o ochronie praw człowieka i podstawowych wolności*, "Przegląd Prawa Konstytucyjnego" 2016, no. 3, p. 318. The author refers to P. van Dijk, [in:] *Theory and Practice of the European Convention on Human Rights*, eds. P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, Antwerp–Oxford 2006, p. 546.

[39] See *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, no. 47072/15, 23 October 2018, § 42.

The third criterion is the nature and severity of the punishment that may be imposed. This is not the penalty actually imposed in the case, but the upper limit of the penalty range.[40] As a general rule, sanctions consisting of imprisonment or subject to conversion to imprisonment in the event of non-enforcement are criminal in nature.[41]

Financial sanctions, in so far as they are severe or can be converted into imprisonment when unpaid, are also criminal in nature.[42] The ECtHR also considered as a criminal sanction e.g. a 10-year ban on holding public positions. It is severe because it has a significant impact on the defendant's personal situation and is also repressive and preventive,[43] and the ECtHR similarly treats the withdrawal of a driving licence for an infringement of traffic rules.[44] The repressive and deterrent nature and severity of the sanctions are therefore important. Sometimes, when considering the severity of a particular measure, the ECtHR assesses the accompanying element of stigmatisation.[45] As a general rule, the second and third criteria are used as an alternative.[46] Cumulative application of the criteria is not excluded if a separate analysis of each of them does not give unambiguous results.[47]

4. "Criministrative law"?

It is important to note the slightly different approach of the ECtHR to the problem of the application of guarantees when a case is considered criminal in the case *Jussila v Finland*. The case concerned tax penalties imposed for accounting errors, which amounted to 10% of the relevant tax liability (in the case at issue, this

[40] See *Demicoli v. Malta*, 27 August 1991, Series A, no. 210, § 34.

[41] P. Hofmański, A. Wróbel, *Komentarz do art. 6*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz*, ed. L. Garlicki, vol. 1, Legalis 2019, margin no. 78. The authors state, however, that the fact that the offence is punishable with an isolation-type penalty does not constitute an absolutely firm criterion for identifying the case as criminal, but nonetheless provides a strong presumption. See *Engel and Others v. the Netherlands*, 8 June 1976, Series A, no. 22, § 82; *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECtHR, 2009, § 56; *Escoubet v. Belgium*, no. 26780/95, § 36; *Campbell and Fell v. the United Kingdom*, 28 June 1984, Series A, no. 80, § 72.

[42] M. Guran, *op. cit*. See also *Öztürk v. Germany*, 21 February 1984, Series A, no. 73, § 53; *Escoubet v. Belgium*, no. 26780/95, § 36; *Weber v. Switzerland*, 22 May 1990, no. 11034/84, § 34.

[43] *Matyjek v. Poland*, no. 38184/03, 24 April 2007, § 53; M. Guran, *op. cit*.

[44] *Malige v. France*, 23 September 1998, Reports of Judgments and Decisions 1998-VII, § 37; P. Hofmański, A. Wróbel, *op. cit.*, margin no. 80.

[45] *Grande Stevens v. Italy*, § 122; A. Andrijauskaitė, *Exploring the Penumbra of Punishment under the ECHR*, "New Journal of European Criminal Law" 2019, vol. 10(4), p. 11.

[46] *Blokhin v. Russia* [GC], no. 47152/06, 23 March 2016, § 179; *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020, § 76; *Jussila v. Finland* [GC], no. 73053/01, ECtHR, 2006-XIV, § 38. See also *Lutz v. Germany*, 1987, § 55; *Öztürk v. Germany*, 21 February 1984, Series A, no. 73, § 54.

[47] *Kasparov and Others v. Russia*, § 40. We can find an example of the cumulative approach in *Bendenoun v. France*, 24 February 1994, Series A, no. 284, § 47.

was approximately EUR 300). Applying the *Engel* criteria, the ECtHR held that the case was criminal in nature. However, it suggested that a distinction should be made between criminal cases belonging to the "core" criminal law and those which constitute its "periphery". In the latter, it is not necessary to fully apply the ECHR guarantees applicable in criminal cases. The ECtHR noted that the autonomous interpretation of the concept of criminal case using the *Engel* criteria justified the gradual extension of this concept to include cases that do not strictly fit within the traditional categories of criminal law. However, there are criminal cases of varying gravity. Some of them do not involve stigmatisation. Tax charges differ from the hard core of criminal law, therefore the Court considered that criminal guarantees would not necessarily apply in their full severity.[48] The established scholarly opinion is that the ruling issued in *Jussila v. Finland*, decided 30 years after the *Engel* case, marks the introduction of a range of shades of grey into the criminal law sphere and may be the beginning of a field situated between criminal law and administrative law, which may be described as "criministrative law".[49]

SOFT LAW

The problem of placing repressive regulations outside criminal law and the need to establish certain guarantees for individuals have also been recognised in documents of the Committee of Ministers of the Council of Europe. Recommendation R (91) 1 of 13 February 1991 on administrative sanctions[50] recommended that Member States' governments comply with minimum common standards. The Recommendation sets out several substantive and formal legal rules, such as the specificity of sanctions and the conditions for imposing them, the prohibition of double punishment for the same acts, leaving the case unresolved or the imperative of undertaking activities involving administrative penalties within a reasonable period of time.

Furthermore, in accordance with the principles laid down in Resolution (77) 31 of the Committee of Ministers of the Council of Europe on protection of the individual in relation to the acts of administrative authorities adopted on 28 September 1977, requirements relating to the procedure for imposing an administrative sanction are as follows: the right of a party to be informed of the allegations made against the party, of the evidence against the party, the right to be heard, the principle

[48] *Jussila v. Finland* [GC], no. 73053/01, ECtHR, 2006-XIV, § 43.

[49] R. Roth, *Concluding Remarks*, [in:] *Do Labels Still Matter…*, p. 249.

[50] Recommendation No. R (91) 1 of the Committee of Ministers to Member States on administrative sanctions, adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies.

that the burden of proof lies with the public authority or the obligation of judicial review of an act of an administrative authority.[51]

CHARACTER OF THE CRIMINAL CASE UNDER POLISH LEGAL ORDER

The picture of criminal case under Polish law is, to some extent, unusual. While in most European legal systems the broadly understood repressive law is divided into classic criminal law and the law of infractions or criminal-administrative law, in Poland the equivalent of the law of infractions within the meaning of most legal systems, are two branches of law, which are the law of infractions and (repressive) administrative delict law.[52]

The development of the concept of criminal case, especially in terms of the approach of classical criminal law to the administrative wrong, was non-linear. Its original source was the fact that the legislature, when drafting the new 1932 Infractions Law,[53] did not determine whether the law of infractions belongs to criminal law or administrative law.[54] During its further historical development, the law of infractions had the features of either criminal law or administrative law, and finally in the codification of 1971 approached the characteristics of criminal law and even took the form of a "little criminal law".[55]

The transformation of the law of infractions into "the little criminal law" generated the need for a purely public-order law. It was as early as in the 1950s, when public-order administrative responsibility emerged.[56] It was originally based on the principle of objective responsibility, with no right of defence, and cases were examined and decided by administrative authorities. Originally, the most important difference between infraction responsibility and administrative responsibility was that only a human being could be responsible for an infraction and only a juridical

[51] R. Kozioł, *Administrative Pecuniary Penalty in the Light of Amendments to the Administrative Procedure*, "Toruń Business Review" 2016, vol. 15(4), pp. 41–50; E. Kruk, *Sankcja administracyjna*, Lublin 2013, pp. 297–298.

[52] See M. Kulik, M. Błotnicki, *Petty Offences in Poland between Criminal Law and Administrative Law*, "Croatian and Comparative Public Administration" 2021, vol. 21(3), p. 472.

[53] Regulation of the President of the Republic of Poland of 11 July 1932 – Infractions Law (Journal of Laws 1932, no. 60, item 572, as amended).

[54] M. Łysko, *Prace nad kodyfikacją materialnego prawa wykroczeń w Polsce Ludowej (1960–1971)*, Białystok 2016, pp. 26–27; M. Kulik, [in:] *Reforma prawa wykroczeń*, ed. P. Daniluk, vol. 2, Warszawa 2020, p. 139 ff.; M. Kulik, M. Błotnicki, *op. cit.*, p. 464.

[55] See M. Kulik, [in:] *Reforma…*, 2020, p. 163; M. Kulik, M. Botnicki, *op. cit.*, p. 462; G. Heine, *Unterschiedung zwischen Straftaten und Ordnungswidrigkeiten*, "Jurisprudencija" 1999, vol. 12, p. 19.

[56] Decree of 28 January 1953 on ensuring rational and economical use of electrical and thermal energy (Journal of Laws 1953, no. 9, item 26).

person could be responsible for an administrative delict. With time, the possibility for a natural person to be held responsible also appeared, and on the other hand, although fault-based responsibility did not develop, some replacements of it emerged.[57]

While, from the point of view of the *Engel* standard, the responsibility for an infraction was and still is a criminal responsibility,[58] the responsibility for an administrative delict in this respect seems at first sight to be ambiguous. Formally, neither an infraction nor an administrative delict is considered a criminal offence under Polish law. The responsibility for an infraction is based on the principle of fault. The responsibility for an administrative delict involves the very infringement of law and is therefore objective in nature. Within the Infractions Law, there are a number of mechanisms that provide an adequate level of responsibility, typical of criminal law, including in particular mechanisms concerning determination of the penalty.[59] Until recently, such mechanisms did not exist under administrative delict law, but in 2017 they appeared, albeit in a form that is not very complex and operable. However, in 2017, the Administrative Procedure Code (APC) was amended to introduce quite scarce regulations regarding the rules for the imposing of administrative fines. Article 189b APC provides that an administrative fine is a statutorily specified penalty of a financial nature imposed by a public administration authority by way of decision as a consequence of a breach of law consisting in failure to comply with an obligation or breach of a prohibition imposed on a natural person, juridical person or organizational unit without legal personality. Further provisions cover temporal conflicts between statutory provisions, the rules on imposing penalties, exclusion of responsibility due to force majeure, cases of withdrawal from punishment, including due to negligible gravity of the infringement and res judicata. Subsequent provisions regulate limitation and reduction of penalties. Worth noting

[57] D. Szumiło-Kulczycka, *op. cit.*, p. 29; W. Radecki, [in:] *Reforma prawa wykroczeń*, ed. P. Daniluk, vol. 1, Warszawa 2019, p. 30; M. Kulik, [in:] *Reforma…*, 2020, p. 165.

[58] M. Cieślak, *Polskie prawo karne*, Warszawa 1990, p. 15; W. Radecki, *Kilka uwag o zastępowaniu odpowiedzialności karnej odpowiedzialnością administracyjną*, [in:] *Współczesne problemy nauk penalnych. Zagadnienia wybrane*, ed. M. Bojarski, Wrocław 1994, p. 13; idem, *Normatywne ujęcie wykroczenia*, "Prokuratura i Prawo" 2003, no. 2, p. 64; idem, *Dezintegracja polskiego prawa penalnego*, "Prokuratura i Prawo" 2014, no. 9, pp. 5–6; M. Górski, *Odpowiedzialność administracyjna w ochronie środowiska. Zagadnienia podstawowe*, Poznań 2007, p. 12; D. Danecka, *Konwersja odpowiedzialności karnej w administracyjną w prawie polskim*, Warszawa 2018, pp. 37–38; A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa 2002, p. 6; J. Skupiński, J. Szumski, *Problemy kodyfikacji prawa wykroczeń*, "Państwo i Prawo" 1998, no. 9–10, p. 189; A. Błachnio-Parzych, *Zbieg odpowiedzialności karnej…*, p. 32; M. Kulik, [in:] *Reforma…*, 2020, p. 169.

[59] See C. Nowak, *Prawo do rzetelnego procesu sądowego w świetle EKPC i orzecznictwa ETC*, [in:] *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*, ed. P. Wiliński, Kraków 2006, p. 147; M.A. Nowicki, *Wokół Konwencji Europejskiej. Krótki komentarz do Europejskiej Konwencji Praw Człowieka*, Kraków 2006, p. 319 ff.; V. Vachev, *Racjonalizacja prawa wykroczeń – potrzebna jest reforma*, [in:] *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?*, eds. M. Kolendowska-Matejczuk, V. Vachev, Warszawa 2016, pp. 68–69.

is Article 189a § 2 APC, which provides that the provisions of Chapter IVa APC are not applicable to the extent provided for in special legislation. All this did not make the repressive administrative responsibility a responsibility based on fault, but introduced elements that brought elements aligning the level of responsibility with the degree of gravity of the deed.[60]

The question of the severity of the penalty looks unclear. Infractions are punishable by custody and community work or a fine. Administrative delicts are punishable only by a fine. From this point of view, infractions are subject to a more severe penalty than an administrative delict. However, the maximum penalty for an infraction is PLN 5,000 while for an administrative delict a fine of several million PLN can be imposed. From that point of view, the assessment of an infraction case and an administrative delict case as a criminal case is not unequivocal.

It should also be added that in 2001 criminal courts were granted powers to rule on infractions in a procedure which is autonomous from criminal proceedings, but very similar,[61] while deciding cases of administrative is still carried out in administrative proceedings; they are decided by an administrative authority and judicial review covers only formal matters.

All this combined means that in terms of content, infractions and administrative delicts are basically similar. Anyway, there are cases of specific types shifting between these categories.[62]

Therefore, in substantive terms, there is no doubt that both categories of these acts are criminal matters,[63] which means that the lack of statutory guarantee in ad-

[60] R. Stankiewicz, *Regulacja administracyjnych kar pieniężnych w Kodeksie postępowania administracyjnego po nowelizacji*, "Radca Prawny. Zeszyty Naukowe" 2017, no. 2, p. 9 ff.

[61] Act of 24 August 2001 – Code of Procedure for Petty Offences (consolidated text, Journal of Laws 2022, item 1124, as amended).

[62] For example, under the Act of 22 June 2017 amending the Act on the protection of monuments and care of monuments and certain other acts (Journal of Laws 2017, item 1595) all infractions listed in the Act on the protection of monuments and care of monuments were transformed into administrative delicts.

[63] To be fair, it must be acknowledged that there is a view, still prevailing among administrative law scholars, that an administrative sanction, including a repressive sanction, does not have the characteristics of a criminal sanction, which would necessarily mean that the *Engel* standard does not apply to them. It is argued that there are attempts to transfer criminal-law constructs to administrative law. Responsibility under administrative law begins to operate in the event of a breach of administrative obligations by obliged entities. It is imposed under administrative law in an administrative procedure by public administration authorities. Sanctions depend on the type of norm infringed and are administrative sanctions. The apparent intensity, especially of financial penalties, is generally a reflection of the threat posed by infringements of the relevant provisions of administrative law. They are a manifestation of the specific protection of the public interest and their amount is, in principle, adapted to the material situation of the addressees of the norms and the intensity of the infringement of the public interest. See M. Błachucki, *Wstęp*, [in:] *Administracyjne kary pieniężne w demokratycznym państwie prawa*, ed. M. Błachucki, Warszawa 2015, p. 6. Similar approach is presented by M. Stahl, *Sankcje administracyjne – problemy węzłowe*, [in:] *Sankcje*

ministrative sanction proceedings at the level typical of criminal law and criminal procedure must raise an objection,[64] particularly in a situation where the law does not resolve the concurrence between the two forms of responsibility.[65] How, then, does the jurisprudence of the PCT treat them?

It does not come as a surprise that the PCT, without hesitation and quite quickly, recognised an infraction case as a criminal case[66] and met in this regard strong support from scholars in the field.[67] The problem was not whether it was a criminal

administracyjne – blaski i cienie, eds. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, p. 25. This view cannot be accepted, as administrative delicts operate with sanctions of such a high degree of severity that it is difficult to imagine the possibility of imposing them in a state ruled by law in a way other than in a trial which ensures the citizen that his/her case is subject to impartial examination by the court and that he/she is held liable based on the principle of fault (see M. Kulik, [in:] *Reforma…*, 2020, p. 164). This is the case of the process of "administrativisation" of criminal law, mentioned above with regard to international regulations, which in Polish circumstances is characterised by the existence of not two but three categories of prohibited acts. See J. Skupiński, *Odpowiedzialność podmiotów zbiorowych na tle polskiej ustawy z dnia 28 października 2002 r. (próba zarysu problematyki)*, [in:] *Aktualne problemy prawa i procesu karnego. Księga ofiarowana profesorowi Janowi Grajewskiemu*, ed. M. Płachta, Gdańsk 2003, p. 368; Z. Kmieciak, *Charakter prawny orzeczeń w sprawach o naruszenie dyscypliny budżetowej a koncepcja sankcji administracyjnej*, "Glosa" 1997, no. 11, p. 56; W. Wróbel, *Zakaz podwójnej karalności i zasada ne bis in idem w obszarze przestępstw, wykroczeń oraz deliktów administracyjnych – wybrane zagadnienia*, [in:] *Zagadnienia prawa dowodowego*, eds. J. Godyń, M. Hudzik, L.K. Paprzycki, Warszawa 2011, p. 149; M. Mozgawa, M. Kulik, *op. cit.*, p. 32.

[64] B. Wierzbowski, *Problem kar administracyjnych w demokratycznym państwie prawnym*, [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, eds. P. Kardas, T. Sroka, W. Wróbel, vol. 1, Warszawa 2012, pp. 961–962; M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warszawa 2001, p. 37; L. Staniszewska, *Materialne i proceduralne zasady stosowane przy wymierzaniu administracyjnych kar pieniężnych*, [in:] *Administracyjne kary pieniężne…*, p. 30; M. Kulik, [in:] *Reforma…*, 2020, p. 167.

[65] P. Nowak, *Zbieg sankcji penalnej z sankcją administracyjną – de lege lata i postulaty de lege ferenda*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2012, no. 2, p. 137 ff.; B. Nita, *Zakaz podwójnego karania w ujęciu konstytucyjnym*, "Zagadnienia Sądownictwa Konstytucyjnego" 2011, no. 2, p. 7, 14 ff.; E. Kruk, *Zbieg odpowiedzialności administracyjnej i karnej*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2011, no. 4, p. 53; P. Kardas, M. Sławiński, *Przenikanie się odpowiedzialności wykroczeniowej i administracyjnej – problem podwójnego karania*, [in:] *Węzłowe problemy prawa wykroczeń…*, p. 32.

[66] Judgment of the PCT of 29 April 1998, K 17/97, OTK 1998, no. 3, item 30; judgment of the PCT of 4 September 2007, P 43/06, OTK-A 2007, no. 8, item 95; judgment of the PCT of 15 April 2008, P 26/06, OTK-A 2008, no. 3, item 42; judgment of the PCT of 18 November 2010, P 29/09, OTK-A 2010, no. 9, item 104.

[67] A. Błachnio-Parzych, *The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of "Criminal Charge" in the Jurisprudence of the European Court of Human Rights*, "Yearbook of Antitrust and Regulatory Studies" 2012, vol. 5(6), p. 49; P. Daniluk, *Zbieg odpowiedzialności represyjnej za nieopłacenie składek na ubezpieczenia społeczne*, [in:] *Aktualne problemy konstytucyjne w świetle wniosków, pytań prawnych i skarg konstytucyjnych do Trybunału Konstytucyjnego*, eds. P. Daniluk, P. Radziewicz, Warszawa 2010, p. 551 ff.; B. Nita, *op. cit.*, p. 14; T. Oczkowski, *Delikty administracyjne jako szczególna forma represji publicznej. Próba określenia coraz większego znaczenia*

case, but resolving the concurrence of criminal responsibility for a criminal offence with responsibility for an infraction. The point is that the Infractions Code provides for a situation in which the perpetrator by committing one act meets the criteria of a criminal offence and infraction at the same time. Moreover, the Infractions Code solves this in a way that violates the *ne bis in idem* standard. It adopts, in Article 10 (1), the construction of an ideal concurrence of criminal offence with infraction which leads to a multiplication of punishing for one and the same act, on the ground that one act is treated as if it were two different prohibited acts, one of which being a criminal offence and the other being an infraction.[68]

The solution has a number of consequences, both substantive-law and procedural. The most striking of these is the procedural effect, involving the possibility of conducting two proceedings for one and the same act.[69] The existence of this construct is justified in the literature by praxeological considerations. It is argued therein that, due to the existence of the provision of Article 10 of the Infractions Code, it is not possible that, e.g., the absence of private accusation or an application for prosecution results in impunity for the offender who is also the perpetrator of the infraction and, on the other hand, the same provision sets out a solution preventing the multiplication of punishment for a criminal offence and an infraction.[70]

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sankcji administracyjnych, [in:] *Teoretyczne i praktyczne problemy współczesnego prawa karnego*, eds. T. Bojarski, A. Michalska-Warias, I. Nowikowski, K. Nazar-Gutowska, J. Piórkowska-Flieger, D. Firkowski, Lublin 2011, p. 176; M. Król-Bogomilska, *Z problematyki zbiegu odpowiedzialności karnej i administracyjnej – w świetle orzecznictwa Trybunału Konstytucyjnego*, [in:] *Wina i kara. Księga pamięci Profesor Genowefy Rejman*, eds. M. Płatek, M. Dziewanowska, Warszawa 2012, p. 69 ff.; A. Zientara, *Odpowiedzialność karna i administracyjna za udział w zmowie przetargowej – możliwość podwójnego ukarania*, [in:] *Administracyjne kary pieniężne…*, p. 106; M. Kulik, [in:] *Reforma…*, 2020, p. 167.

[68] S. Waltoś, *Kolizja postępowania karnego i karno-administracyjnego*, "Palestra" 1961, no. 12, p. 22 ff.; idem, *Konsekwencje prawne zbiegu znamion przestępstwa i wykroczenia w czynie społecznie niebezpiecznym*, "Państwo i Prawo" 1970, no. 11, p. 700 ff.; A. Marek, *Zbieg przestępstw i wykroczeń*, "Nowe Prawo" 1970, no. 9, p. 1269 ff.; W. Steppa, *Zasada ne bis in idem a idealny zbieg przestępstwa i wykroczenia*, "Prokuratura i Prawo" 2016, no. 5, p. 120 ff.; P. Kardas, *Zbieg przepisów ustawy w prawie karnym. Analiza teoretyczna*, Warszawa 2011, p. 368 ff.; idem, *Konstrukcja idealnego zbiegu przestępstw a konstytucyjna i konwencyjna zasada ne bis in idem. Rozważania o konstytucyjnych granicach władzy ustawodawczej*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2010, no. 4, p. 5 ff.; idem, *Problem reakcji na tzw. czyny przepołowione w świetle ciągłości popełnienia przestępstwa, konstrukcji idealnego zbiegu czynów karalnych oraz zasady ne bis in idem*, "Prokuratura i Prawo" 2018, no. 3, p. 31; M. Kulik, [in:] *Kodeks wykroczeń. Komentarz*, ed. P. Daniluk, Warszawa 2018, p. 75.

[69] P. Daniluk, *Idealny zbieg wykroczenia z przestępstwem*, [in:] *Aktualne problemy konstytucyjne w świetle wniosków, pytań prawnych i skarg konstytucyjnych do Trybunału Konstytucyjnego 2010–2012*, eds. P. Daniluk, M. Laskowska, Warszawa 2013, p. 564; K. Witkowska, *Idealny zbieg czynów karalnych w Kodeksie wykroczeń a zasada ne bis in idem*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2012, no. 2, p. 110.

[70] A. Gubiński, *W kwestii rozgraniczenia niektórych kategorii wykroczeń i przestępstw*, "Państwo i Prawo" 1972, no. 2, p. 43; J. Raglewski, *Kilka uwag o specyficznych mechanizmach redukcyjnych kar w prawie karnym skarbowym i prawie wykroczeń*, [in:] *Zagadnienia teorii i nauczania prawa*

In turn, the construct of ideal concurrence of a criminal offence with an infraction results in the perpetrator being held responsible for the infraction in a situation where there is a single-act concurrence of an infraction with, e.g., a criminal offence prosecuted upon application and the application for prosecution has not been submitted. In this sense, Article 10 of the Infractions Code tightens up the responsibility.[71] However, since both responsibility for a criminal offence and responsibility for an infraction are criminal responsibility, a provision allowing double adjudication in a criminal case is an exception to the *ne bis in idem* principle. However, it should be noted that the consequences of that exception are mitigated by the responsibility reduction mechanism, and if one is convicted of a criminal offence and an infraction at the same time, only the more severe penalty or penal measure is enforced and, in the case of early enforcement of a more lenient penalty or measure, it is credited towards the more severe penalty or measure, as is clear from Article 10 § 1 of the Infractions Code. The more lenient penalty is credited. They do not have to be penalties of the same kind. The crediting of different types of penalties is technically feasible on the basis of the mechanism for the conversion of penalties contained in Article 10 § 2 of the Infractions Code.

However, a penal measure which has already been enforced may be credited towards a more severe measure only if it is of the same type. That circumstance alone means that the reduction mechanism in question does not cover all the consequences of the conviction. Furthermore, it does not cover the possibility of conduction two separate proceedings for the same act and of a double conviction, which means that the standard *ne bis in idem* as such is indeed breached in a purely procedural sense,[72] which is relevant for the general severity of punishment suffered by the offender. Nevertheless, the PCT found that Article 10 § 1 of the Infractions Code does not violate the prohibition of double punishment, claiming that the construct of the ideal concurrence of criminal offence and infraction is characterized by the fact that one criminal act is divided into a criminal offence and an infraction. The principle of *ne bis in idem* prohibits running a case and punishing the same person twice for the same act. According to the PCT, this prohibition is not breached by the submission of a separate indictment and application for punishment for an infraction, adjudication and punishment for various parts of an act contrary to criminal law, as is the case with

karnego. Kara łączna. Księga jubileuszowa Profesor Marii Szewczyk, eds. W. Górowski, P. Kardas, T. Sroka, W. Wróbel, Warszawa 2013, p. 670. The very mechanism is discussed below.

[71] T. Bojarski, *Polskie prawo wykroczeń. Zarys wykładu*, Warszawa 2009, p. 119.

[72] M. Rogalski, *Przesłanka powagi rzeczy osądzonej w procesie karnym*, Kraków 2005, p. 435; P. Daniluk, *Zbieg odpowiedzialności represyjnej za ten sam czyn wypełniający znamiona wykroczenia i przestępstwa*, [in:] *Aktualne problemy konstytucyjne…*, 2013, pp. 568–569; K. Witkowska, *op. cit.*, p. 130; S. Waltoś, *op. cit.*, p. 27; M. Kulik, [in:] *Reforma…*, 2020, p. 158.

the ideal concurrence of criminal offence and infraction.[73] This view is not convincing. A separate legal assessment of different parts of criminal conduct does not alter the fact that it is a single act and that two separate proceedings are being conducted for this single act. The approach presented by the PCT shows some similarity to the subsequent ECtHR judgment in the case *A. and B. v. Norway*,[74] but with both courts using slightly different techniques to arrive at the flawed final conclusion. The ECtHR considers that two proceedings conducted with regard to one act constitute one proceeding. The PCT, in a less risky way, but also wrongly, assumes that for the purposes of the proceedings one act can be divided into two.

However, a breach of the *ne bis in idem* rule is a fact. Admittedly, the responsibility reduction mechanism as such is effective as regards the imposing of penalties and penal measures. It has been pointed out in the literature that it does not cover, e.g., exemplary damages, where these have been adjudicated in favour of equal parties for the criminal offence and the infraction, and the obligation to rectify the damage, where different types of compensation have been adjudicated for the criminal offence and the infraction.[75] In our opinion, this reservation is not correct with regard to the obligation to rectify damage. The reparation obligation is currently shaped in a civil-law fashion. It would not be reasonable to repeal the effects of a double conviction in this respect. The same is true with regard to exemplary damages. Although they are largely penal in nature, the legitimate interest of the victim also comes into play here.

The above means that two arguments can be stated. First, from a procedural point of view, the existing legislation breaches the *ne bis in idem* standard. Secondly, from a substantive-law point of view, the effects of a breach of that standard are effectively neutralised, despite certain doubts. The existing legislation may have a real negative impact on the perpetrator in certain factual arrangements. It is rightly observed by scholars in the field that the possibility of conducting two proceedings in the same case may limit the effectiveness of the defence in the second case, for example because it may not be effective to put forward arguments already used in the previous case.

As regards administrative delict, it is worth noting that there is no statutory basis for resolving conflicts between repressive disciplinary responsibility and criminal responsibility (for a criminal offence or infraction). However, as mentioned above, the PCT considers it to be a form of criminal responsibility, at least in some cases. These issues are not resolved *en bloc* by the PCT, but it resolves them in detail in relation to individual cases of repressive administrative responsibility. In doing so, the PCT has repeatedly applied the *Engel* criteria in its jurisprudence, referring di-

[73] Judgment of the PCT of 1 December 2016, K 45/14, Journal of Laws 2016, item 220. See also judgment of the PCT of 21 October 2015, P 32/12, Journal of Laws 2015, item 1742.

[74] *Ibidem*.

[75] P. Daniluk, *Zbieg odpowiedzialności represyjnej…*, p. 569.

rectly not only to the Constitution of the Republic of Poland, but also to the ECtHR case law. Therefore, it examines the compatibility of a specific provision providing for repressive responsibility not only with Article 2 of the Polish Constitution, but also with Article 4 (1) of Protocol No. 7 and Article 14 (7) of the International Covenant on Civil and Political Rights. The introduction of international provisions into the basis of the decision was, in a given case, associated with such a perspective on Article 2 of the Polish Constitution,[76] in which the subject of analysis is not only the rule of law, but the *ne bis in idem principle*, derived from Article 2 of the Polish Constitution, but also from Article 14 (7) of the International Covenant on Civil and Political Rights, which explicitly establishes the principle of *ne bis in idem*, and in reference to Article 4 (1) of Protocol No. 7. The problem is therefore solved on the basis of the rule of law, but indirectly. It is directly transferred to the area of the *ne bis in idem* principle, which in this sense is a value in itself, with the PCT referring here directly to the case law of the ECtHR.[77] The finding that there is a breach of the *ne bis in idem* principle seems to mean that certain cases of administrative responsibility are equated with criminal responsibility.

The PCT has defended this view in a number of rulings. This applies both to judgments in which it recognised certain cases of formally administrative responsibility as cases of criminal responsibility and to those in which it refused to identify such nature. It takes the view that combining pecuniary penalty for stating factually inaccurate data and information in a bill of lading or other documents[78] with the responsibility for the offence of attestation of untruth (Article 271 of the Criminal Code) constitutes an infringement of *ne bis in idem*, given, in essence, the criminal nature of responsibility under the Road Transport Act,[79] that the provisions of administrative law may be repressive,[80] since there is no penal sanction with a relatively low degree of severity;[81] that the administrative surcharges provided for in the social system legislation may serve as criminal penalties;[82] that the reimbursement

[76] Establishing the principle of democratic state ruled by law.

[77] Judgment of the PCT of 29 April 1998, K 17/97, OTK 1998, no. 3, item 30; judgment of the PCT of 4 September 2007, P 43/06, OTK-A 2007, no. 8, item 95; judgment of the PCT of 18 November 2010, P 29/09, OTK-A 2010, no. 9, item 104; judgment of the PCT of 21 October 2015, P 32/12, Journal of Laws 2015, item 1742.

[78] Article 92a of the Act of 1 September 2001 on road transport (Journal of Laws 2001, no. 125, item 1371).

[79] Judgment of the PCT of 20 June 2017, P 124/15, Journal of Laws 2017, item 1214.

[80] Justification of the judgment of the PCT of 15 April 2008, P 26/06, OTK-A 2008, no. 3, item 42.

[81] Interestingly, the Constitutional Tribunal analysed the issue of the concurrence of an administrative sanction consisting in the withdrawal of a driving licence with a fine for an infraction, and assumed that none of them was of a criminal nature in a given case. See judgment of the PCT of 11 October 2016, K 24/15, OTK-A 2016, item 77.

[82] Judgment of the PCT of 18 November 2010, P 29/09, OTK-A 2010, no. 9, item 104.

of unpaid tax does not have a penal nature,[83] but that is the nature of the additional tax liability imposed in addition to the penalty for a tax infraction or offence.[84] When deciding on this, the PCT always applies the *Engel* criteria, assuming that a number of cases of formally administrative responsibility are indeed criminal responsibility. All the more interesting is that, although the administrative decree is based on the *ne bis in idem* principle, it has not challenged the existing duality of proceedings in the area of infractions. Hence, there is some inconsistency here.

The inconsistency referred to above can be overcome by undertaking the reform of the law of infractions proposed not long ago in the literature.[85] Namely, the Infractions Code should be abolished. Those infractions that constitute "minor offences" should be transferred to the Criminal Code as minor misdemeanours. Administrative delicts and infractions should be merged into a single category under whatever name, but with a general part characteristic of a simplified criminal case, with elements of administrative responsibility. The category of criminal law thus created could be called administrative criminal law, and it would certainly be a form of criminal responsibility in the broadest sense, without any serious structural inconsistencies.

INSTEAD OF CONCLUSIONS

The aforementioned inconsistency in the treatment of administrative delicts and infraction slightly obscures the view of the criminal case under Polish law. When comparing the application of the *Engel* criterion in the case law of the ECtHR and of the PCT, the specificity of the Polish solution should be taken into account. However, this specificity – as can be seen when analysing the provisions of the Infractions Code on the concurrence of criminal offence and infraction compared to the provisions on administrative pecuniary penalties against the background of the case law of the PCT – does not concern the very criteria, but the way of resolving the concurrence of various forms of repressive responsibility. In this respect, it can be noted that the PCT applies criteria similar to the *Engel* standard. The answer to the question posed at the outset whether the PCT applies criteria similar to those developed in the case law of the ECtHR is therefore affirmative, which means that the standard developed in this respect in the case law of both courts is similar. Both courts apply exceptions to the *ne bis in idem* rule, although in the case law of the ECtHR the exception introduced by the judgment in the case *A. and B. v. Norway* is not regarded as an exception, but it is assumed (which cannot be accepted) that it is not a *ne bis in idem* case. The PCT, on the other hand, accepts the violation of the *ne bis in idem* principle in the case of

[83] Judgment of the PCT of 29 April 1998, K 17/97, OTK 1998, no. 3, item 30.
[84] Judgment of the PCT of 4 September 2007, P 43/06, OTK-A 2007, no. 8, item 95.
[85] M. Kulik, [in:] *Reforma…*, 2020, p. 178.

infractions, considering the reduction mechanism at the level of enforcement of the sentence, provided for in the Infraction Code, to be effective. Both solutions may raise doubts from the point of view of the *ne bis in idem* principle. The exception existing in the Polish system may raise serious doubts from the point of view of the internal coherence of the system, as the possibility of violating the *ne bis in idem* rule concerns infractions, i.e. cases of responsibility based on the principle of fault, and not administrative delicts, i.e. cases of objective responsibility. Finally, it is quite clear from the analysis of the case law of the PCT that the PCT eagerly refers to the jurisprudence of the ECtHR, and the arguments contained therein is often adopted as an important validating factor in the rulings of the PCT. Interestingly, it did not refer, either approvingly or critically, to the view contained in the controversial ECtHR decision in the case *A. and B. v. Norway*. This may be due to the crisis of the PCT in recent years and its associated low activity, but as of today, this latter view expressed by the ECtHR has not been accepted by the PCT.

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ABSTRAKT

Przedmiotem opracowania jest pojęcie sprawy karnej w polskim prawie karnym na tle orzecznictwa Europejskiego Trybunału Praw Człowieka (ETPC). Celem artykułu jest analiza orzecznictwa ETPC i polskiego Trybunału Konstytucyjnego (TK) w zakresie wykładni pojęcia sprawy karnej. Praca ma za zadanie zbadać, czy ETPC i TK stosują te same kryteria oraz jaki wpływ ma orzecznictwo ETPC na wykładnię TK. W artykule zastosowano metodę formalno-dogmatyczną. Pojęcia przestępstwa, wykroczenia i deliktu administracyjnego analizowane są w kontekście standardu ze sprawy *Engel* oraz jego wpływu na rozumienie sprawy w orzecznictwie polskiego TK w kontekście historycznym i normatywnym. Odpowiedź na pytanie, czy TK stosuje kryteria zbliżone do tych wypracowanych w orzecznictwie ETPC, jest twierdząca, co oznacza, że standard wypracowany w tym zakresie w orzecznictwie obu sądów jest podobny. Artykuł ma charakter naukowo-badawczy i syntetyzujący. Podjęta problematyka ma zasięg międzynarodowy. Artykuł może mieć wartość poznawczą zarówno dla nauki, jak i dla praktyki.

Słowa kluczowe: oskarżenie; przestępstwo; postępowanie karne; kara kryminalna; kara administracyjna