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## THE PROPORTIONALITY OF CRIMINAL PUNISHMENT FROM THE PERSPECTIVE OF THIRD PARTIES – AN INTRODUCTION TO THE ISSUE\*

### I. THE ISSUES

To convict a person of a crime is to confirm the person's criminal liability as the perpetrator, and this leads to the possible imposition of a series of compensatory, preventive and repressive penalties on such persons. However, the fact of conviction has factual and legal consequences that extend beyond the perpetrator to third parties. The actual impact of a conviction on both the victims of crime and persons associated with the perpetrator, in terms of how they subsequently function in society, is studied in criminology and victimology.<sup>1</sup> Nevertheless, it seems reasonable to attempt to determine the impact of a conviction and the adjudicated measures on the situations of third parties from the perspective of criminal law itself, and to answer the question of whether this impact should be taken into account when sentencing. This question is of particular importance in the context of the requirement that the penalty imposed on the perpetrator should take into account factors related to the perpetrator's act and person (Article 53 para. 1 of the Penal Code [*Kodeks karny*]), in the absence of a requirement to take into account the onerousness of the penalty for persons who were not responsible for the commission of the crime.

### II. THE LEGAL CONSEQUENCES OF A CONVICTION FOR THIRD PARTIES

Before proceeding to further analysis, some examples of the impact of a perpetrator's conviction on the situations of third parties should prove useful.

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<sup>1</sup> Cf. e.g., Falandysz (1980): 209.

## 1. The impact of a conviction on family relationships

When a perpetrator is convicted of a crime, this opens the possibility for the court to apply penal measures, including a prohibition on contacting or approaching certain persons (Article 39 para. 2(b) of the Penal Code) and an order to leave the premises occupied together with the victim for a determined period of time (Article 39 para. 2(e) of the Penal Code). These measures are primarily adopted with the aim of eliminating the substantial risk that there will be a repetition of the criminal offence, and are only secondarily intended to meet the needs of the person from whom the court considers it necessary to isolate the perpetrator. As a result, the sentence is not subject to the consent of this person, and even their opposition does not constitute an argument against the application of those measures.<sup>2</sup> Moreover, the court is not obliged to examine how the application of such measures may interfere with the freedoms of other individuals affected by them, or how, for example, their application may affect a parent who cares for the perpetrator's child. It is the principles and directives of punitive response that constitute the criterion for assessing the legitimacy of using such instruments, rather than the requirement to act in accordance with the best interests of a child.<sup>3</sup> This state of affairs may entail that the child's right to contact with parent will be significantly limited, or may even be rescinded, despite the fact that the criteria appropriate for this purpose, determined by family law, is not applied.<sup>4</sup> A conviction for an intentional crime may also, among other things, prevent the adoption of a child by the perpetrator and his/her spouse (Article 114<sup>1</sup> of the Family and Guardianship Code [*Kodeks rodzinny i opiekuńczy*]), or hinder the perpetrator, and consequently by his/her spouse, in fulfilling the function of supporting a family or foster family, or their running a family orphanage.<sup>5</sup>

## 2. The impact of a conviction on the financial situation of the perpetrator's family

Article 28 para. 1 of the Executive Penal Code [*Kodeks karny wykonawczy*] allows, with certain restrictions, the imposition of a fine or damages, and the execution of court receivables from the assets of the perpetrator and their spouse, if satisfaction from their personal wealth proves impossible. Legal regulations also allow for the forfeiture of goods and benefits, even if at the time of adjudication they do not belong to the perpetrator,<sup>6</sup> and the forfeiture of – or

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<sup>2</sup> See the judgment of the EU CJEU of 15 September 2011 in joined cases *Magatte Gueye* (C-483/09) and *Valentin Salmerón Sanchez* (C-1/10), <<http://curia.europa.eu>> [accessed 22 August 2018].

<sup>3</sup> See the justification for resignation from an additional penalty of deprivation of parental and caring rights in the Penal Code of 1997. Justification to the draft Penal Code, 1994, Państwo i Prawo 69(3), 2014, Wkładka: 28.

<sup>4</sup> Zajączkowska (2018): 269 ff.

<sup>5</sup> Articles 30 and 42 of the Act of 9 June 2011, On the Support for the Family and the System of the System of Care [o wspieraniu rodziny i systemie pieczy zastępczej] (consolidated text – Journal of Laws of the Republic of Poland [JL RP] 2018, item 998).

<sup>6</sup> Article 44 para. 7 of the Penal Code [*Kodeks karny*], Articles 45 para. 3 and 5 of the Penal Code.

prohibition on owning – animals, even if they constitute an important element of the holding providing for the maintenance of the family.<sup>7</sup> The justification for these regulations is essentially based on the fact that the family constitutes a single whole, and this also applies to the living situation of its members. This view was expressed by the Polish Constitutional Tribunal, as an aside to other considerations, in relation to doubts as to whether the perpetrator's reprehensible behaviour may cause them to lose a specific status and related benefits that were shared by the family.<sup>8</sup> Answering this question in the affirmative, the Tribunal ruled that the loss of, among other things, the family emoluments of members of a retired judge's family, would be legitimate in the event that the judge is sentenced to public disenfranchisement by a final court decision, or a legally-binding ruling on expulsion from service.<sup>9</sup> Accordingly, therefore, it will also be justified to demand, for example, that the apartment intended for police officers or border guard officers and their families be vacated in the event of an officer being convicted of a crime, under the conditions set forth in the Act.<sup>10</sup>

### 3. The impact of a conviction on gainful employment and the ability to conduct legal transactions

The loss of the ability to continue working in a specific profession due to a perpetrator's conviction for a particular type of crime,<sup>11</sup> or the inability to start practicing the profession for which the perpetrator had been preparing for some time, in a manner that imposes a financial burden on his or her family,<sup>12</sup> will naturally result in a deterioration in their financial situation, or a lack of the expected improvement. The conviction of the perpetrator for a specific offence, or a prohibition on conducting a specific business activity,<sup>13</sup> may also

<sup>7</sup> In accordance with Article 35 para. 3 of the Act of 21 August 1997, On the Protection of Animals [o ochronie zwierząt] (consolidated text – JL RP 2017, item 1840), in the event of a conviction for abusing, killing, or mutilating animals in violation of the provisions of the Act, the court decides the forfeiture of the animal, if the perpetrator is its owner. In accordance with paragraphs 3a and 3b, the court may decide to impose a penal measure (if the perpetrator acted with particular cruelty) prohibiting the ownership of any animals, or animals belonging to a specific category.

<sup>8</sup> See the judgment of the Constitutional Tribunal of 11 July 2000, K 30/99, OTK ZU 2000, no. 5, item 145.

<sup>9</sup> Article 104 para. 4 of the Act of 27 July 2001, On the Common Court System [Prawo o ustroju sądów powszechnych], JL RP 2018, item 23.

<sup>10</sup> Article 95 sec. 2 item 9 of the Police Act [o Policji] (consolidated text – JL RP 2017, item. 2067); Article 99a sec. 1 item 13 of the Border Guard Act of 12 October 1990 [ustawa o Straży Granicznej] (consolidated text – JL RP 2017, item 2365). The decision to vacate the premises is issued for all residents in the premises.

<sup>11</sup> For example, Article 41 sec. 1 item 4 of the Police Act, Article. 45 sec. 1 item 4 of the Border Guards Act, Article 43 sec. 2 item 4 of Act of 24 August 1991 on the State Fire Brigade [ustawa o Państwowej Straży Pożarnej] (consolidated text – JL RP 2018, item 1313).

<sup>12</sup> For example, Article 75 para. 1 item 1 of the Act of 28 January 2016, On the Prosecutor's Law [Prawo o prokuraturze] (consolidated text – JL RP 2017, item 1767); Article 61 para. 1 item 1 of the Common Court System; Article 6 sec. 2 item 2 of the Act of 5 December on the Professions of Medical Doctors and Dentists [o zawodach lekarza i lekarza dentystry] (consolidated text – JL RP 2018, item 617).

<sup>13</sup> Adjudicated by a criminal court (Article 39 point 2 of the Penal Code) or bankruptcy court if the perpetrator performs certain conduct fulfilling the features of a prohibited act (Articles

result in a burden on the part of persons or entities that cooperate with the perpetrator, leading to the dismissal of employees, and making it difficult to obtain and execute previously accepted orders and to pay creditors. The mere fact of being convicted of certain categories of offences entails that a contractor thus convicted, as a natural person, is excluded from the public procurement procedure; and the same applies to a contractor if an acting member of the management or supervisory body, or partner in a company or proxy, has been convicted of such an offence.<sup>14</sup> A person convicted of certain offences may not serve as a member of the management board, supervisory board, the audit committee, or as a liquidator in a commercial company (Article 18 para. 3 of the Commercial Companies Code [*Kodeks spółek handlowych*]). The nature of the crime may also impose an obligation on the employer to verify whether the perpetrator can be allowed to engage in work requiring, for example, contact with minors.<sup>15</sup> The court may also specify the scope of positions and professions which the perpetrator cannot occupy or practise (Article 39 item 2 of the Penal Code), which imposes on the competent administrative body, employer or the institution in which the convicted person occupies a prohibited position or practises a prohibited profession the obligation to comply with a court decision. A conviction for a criminal offence may also result in the loss of qualification to practice a profession, subject to the employer's assessment (Article 52 para. 1 item 2 of the Labour Code [*Kodeks pracy*]), and that of the professional self-government body (after disciplinary proceedings have been conducted), or this loss may result directly from legal provisions (e.g. in the case of teachers<sup>16</sup>). A conviction for a crime results in the expiry of a lay judge's mandate<sup>17</sup> and the need to conduct the criminal case in which he or she participated from the beginning (Article 404 para. 2 of the Code of Criminal Procedure [*Kodeks postępowania karnego*])<sup>18</sup>. In addition, if a natural person entrusts the performance of work to a foreigner or to an entity managing or controlling such work, the fact of a conviction for selected offences leads to the foreigner being refused temporary residence and a work permit.<sup>19</sup> If an entity that is another

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373–375 of the Act of 28 February 2003, On Bankruptcy Law [Prawo upadłościowe] (consolidated text – JL RP 2017, item 2344).

<sup>14</sup> Article 24 sec. 1 items 13 and 14 of the Act of 29 January, On Public Procurement [Prawo zamówień publicznych] (consolidated text – JL RP 2017, item 1579); although Article 24 sec. 8 and 9 of the Act allow resignation from exclusion if the contractor demonstrates the reliability necessary to perform the contract.

<sup>15</sup> Cf. Article 23 sec. 2 of the Act of 13 May 2016, On Counteracting the Threat of Sexual Crime [o przeciwdziałaniu zagrożeniu przestępczością na tle seksualnym] (consolidated text – JL RP 2018, item 405).

<sup>16</sup> Article 26 sec. 1 item 3 of the Act of 26 January 1982, On the Teacher's Charter [Karta Nauczyciela] (consolidated text – JL RP 2018, item 967).

<sup>17</sup> Article 116 para. 1 of the Law on the System of the Common Courts.

<sup>18</sup> Lay judges sit on criminal cases for crimes and in other cases if, due to the special complexity or importance of the case, the court in the first instance decides this should be done (Article 28 para. 2 and 4 of the Code of Criminal Procedure).

<sup>19</sup> Articles 9 and 10 of the Act of 15 June 2012, On the Consequences of Entrusting the Performance of Work to Foreigners Residing Unlawfully in the Territory of the Republic of Poland [o skutkach powierzenia wykonywania pracy cudzoziemcom przebywającym wbrew przepisom na terytorium Rzeczypospolitej Polskiej] (consolidated text – JL RP 2012, item 769).

employer or a host entity is managed or supervised by a natural person who has been convicted by a final judgment of an offence against the rights of persons engaged in gainful employment, a temporary residence permit for the purpose of intra-corporate transfer work is refused to a foreigner.<sup>20</sup> Lastly, the fact of conviction may be grounds for prosecuting a collective entity for a criminal act through association with the perpetrator.<sup>21</sup> In such situations, the fact of a conviction may entail that the entity cooperating with the perpetrator is significantly impeded with regard to the ability to conduct legal transactions.

### III. THE SCOPE OF PROTECTION OF THIRD PARTIES FROM THE CONSEQUENCES OF A CONVICTION

Criminal punishment is the expression of social and ethical condemnation which targets the behaviour of perpetrators who commit crimes.<sup>22</sup> The fact that persons who were not involved in the commission of the crime can nevertheless bear the consequences of the perpetrator's action may cause them, and the wider public, to feel a sense of injustice. However, citizens' trust in the justice and rationality of the legislator's actions should not be undermined. Recognising this problem, Poland's Constitutional Tribunal argued that there is a need to protect third parties who have not acted in bad faith from the application of forfeiture.<sup>23</sup> Consequently, criminal statutes currently limit the possibility of forfeiture of the business and property that do not belong to the perpetrator, and limit the forfeiture of those used in the commission of a crime to selected cases;<sup>24</sup> it is also permissible to waive the forfeiture of a business organisation if this is incommensurately onerous for its owner. In addition, a person who has obtained property constituting the proceeds of a crime is protected if they acted in good faith when purchasing it. In the event of joint ownership, property or material benefit are forfeited only for the share of the property belonging to the perpetrator, or forfeiture of the equivalent-in-value of this share (Articles 44–45 of the Penal Code).

At the same time, with regard to the family of the perpetrator, the Constitutional Tribunal expressed the aforementioned opinion that the family constitutes a single whole, also in terms of the living circumstances of its individual members; therefore, they share, among other things, their common economic

<sup>20</sup> Articles 117 and 139f of the Act of 12 December, On Foreigners [o cudzoziemcach] (consolidated text – JL RP 2017, item 2206).

<sup>21</sup> Article 3 of the Act of 27 November 2012, On the Liability of Collective Entities for Acts Prohibited under Penalty [o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary] (consolidated text – JL RP 2018, item 703).

<sup>22</sup> Jescheck, Weigend (1996): 65.

<sup>23</sup> The judgment of the Constitutional Tribunal of 29 June 2005, SK 34/04, OTK ZU 2005, no. 6A, item. 69.

<sup>24</sup> Cf. the Act of 13 December 1995, On Hunting [Prawo łowieckie] (consolidated text – JL RP 2017, item 1295); the Act of 23 July 2003, On the on the Protection and Care of Monuments [o ochronie zabytków i opiece nad zabytkami] (consolidated text – JL RP 2017, item 2187); Article 31 of the Penal Fiscal Code [*Kodeks karny skarbowy*].

situation.<sup>25</sup> At the enforcement stage, the spouse of the convicted person may attempt to limit the seizure of the couple's common property. However, then it falls to the spouse to prove that the perpetrator did not contribute, or contributed only marginally, to the creation of the assets or the acquisition of their components, or that the satisfaction of the creditor from the common assets would be contrary to the principles of social coexistence (Article 28 of the Executive Penal Code [*Kodeks karny wykonawczy*]). Outside of criminal law, the possibility of protecting family members from the consequences of conviction is even more limited. The current regulations do not allow for a derogation from dismissal of the convicted person from employment, or from the decision to vacate the apartment, on the grounds of the need to protect third parties.

Due to the functions that are combined with various branches of law, however, it is possible to ensure support for the family of the perpetrator if, as a result of a conviction, their financial situation has significantly deteriorated, or they are exposed to loss of the livelihood previously provided by the perpetrator. The consequences of the conviction, which affect the perpetrator themselves, are perceived from the justice perspective of repressive law (e.g. the loss of the retired judge's salary). If in such a situation there is a need to provide a means of subsistence for the perpetrator and their family members, especially those who do not (yet) have an income of their own, this will be implemented by social law (the judge and a member of their family acquire the right to social benefits in accordance with general principles<sup>26</sup>). The applicable regulations also enable convicted persons and their family to receive material and other support, should this prove necessary.<sup>27</sup> Nevertheless, because this support serves the purpose of facilitating social readaptation, it mainly concerns persons detained in prisons and their relatives.<sup>28</sup> Separate provisions also regulate the possibility for victims of selected offences or their relatives (including those related to the perpetrator) to obtain compensation from public funds, if they have not received financial support from other sources.<sup>29</sup> On the other hand, in the case of compulsory motor insurance and other voluntary business insurance, the victim (and in principle also a person related to the perpetrator) may obtain compensation from the insurance company. However, there is no general system of support for third parties that would compensate them for the deterioration of their financial situation due to the conviction of the perpetrator. Such persons may, on general principles, be entitled to social welfare, which is, however, subsidiary, supplementary and individualized.<sup>30</sup>

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<sup>25</sup> Cf. the judgment of the Constitutional Tribunal of 11 July 2000, K 30/99 (*supra* n. 9).

<sup>26</sup> If it meets the conditions set out in social security regulations (Article 104 para. 5 Laws on the System of the Common Courts).

<sup>27</sup> Article 38 para. 1, Articles 41 and 43 of the Executive Penal Code; Article 7 item 12 of the Act of 12 March, On Social Assistance [o pomocy społecznej] (consolidated text – JL RP 2018, item 1508).

<sup>28</sup> Lelental (2017): Article 41, thesis 3.

<sup>29</sup> The Act of 7 July, On Compensation to Victims of Certain Crimes [o państwowej kompensacie przysługującej ofiarom niektórych czynów zabronionych] (consolidated text – JL RP 2016, item 325).

<sup>30</sup> Jończyk (2001): 393.

In addition, the Polish legal system does not assume the existence of the right to a minimal basic income.<sup>31</sup>

Where legal regulations tie certain consequences for the perpetrator and their family to the mere fact of their being convicted of a crime (of a certain type), the court adjudicating on a criminal case has little room for avoiding the imposition of such consequences; under Polish criminal law this is currently limited to the proceedings being conditionally discontinued. The court is granted more freedom, and thus the possibility to take the situation of third parties into account, where certain consequences are only tied to a certain minimum penalty (e.g. over one year imprisonment<sup>32</sup>), and where the court itself decides at its own discretion whether to apply a measure which affects the situation of third parties (e.g. the prohibition of contact between the perpetrator and those persons). However, it seems justified to advocate for the introduction of a universal requirement to consider the situation of these people in the process of adjudication, which is bound up with the need for the explicit inclusion of such a requirement in a criminal statute. Currently, the basis from which such a requirement can be derived exists in the Act of 28 November 2002 on the Liability of Collective Entities for Acts Prohibited under Penalty [*ustawa o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*],<sup>33</sup> which requires the court to take into account the social consequences of the conviction at the adjudication stage; however, it does not find application to convictions in criminal cases.

It would seem that third parties can count on the court applying the requirement of the proportionality of a penal measure, in accordance with general principles; however, such proportionality applies, pursuant to Article 53 para. 1 of the Penal Code, to the relation between the degree of fault, the aims of the penalty, and the harm inflicted by the perpetrator.<sup>34</sup> Thus, there is no requirement that proportionality should also be maintained in the relation between the measure used and the anticipated social consequences of the conviction borne by third parties. Although the catalogue of circumstances to be taken into account – enumerated in Article 53 para. 2 of the Penal Code – is open, and as such does not preclude the inclusion of further factors in it, the link in Article 53 para. 1 of the Penal Code (of which paragraph 2 is only a clarification) between the process of adjudication and the requirement of individual-preventive impact of the penalty on the perpetrator – and their general-preventive impact on society, in the context of a specific act – results in the omission of reference to third parties whose situation is also shaped by the judicial decision. Although the doctrine sometimes draws attention to the need to minimize the negative consequences that a conviction may have on the perpetrator's family (including children and minors) in the process of adjudi-

<sup>31</sup> In Germany, the claim for securing a dignified minimum existence was derived by the German Federal Constitutional Court (Bundesverfassungsgericht) from the requirement to protect human dignity and the principle of the social state – the judgment of 9 February 2010, 1 BvL 1/09, <<https://www.bundesverfassungsgericht.de>> [accessed 22 August 2018].

<sup>32</sup> Mestek-Schmulling (2004): 138–139.

<sup>33</sup> JL RP 2018, item 703.

<sup>34</sup> Wróbel, Zoll (2016): Article 53, theses 24, 78 and 144.

cation, it is noted that this issue is ignored in the process of determining the sentence,<sup>35</sup> and the principle of humanitarianism (Article 3 of the Penal Code) tends to only be applied to the perpetrator of the offence.<sup>36</sup>

The situation is similar with regard to the victim of a crime having the status of an injured party in criminal proceedings (in accordance with Article 49 of the Code of Criminal Procedure) and one who does not have this status but has felt the impact of a crime on the sphere of their property or rights. For the victim, the mere acquisition of victim status may have positive effects in terms of securing, within the framework of criminal proceedings, some of their needs which arise as a result of the crime. However, in the process of adjudication the individual needs of the victim<sup>37</sup> are often overlooked in order to fulfil the social needs and goals related to the perpetrator.<sup>38</sup> As a result, the victim's views as to the desired response to a crime are taken into account mainly where the principles and directives for the use of penal measures are not applicable (compare Article 46 para. 1 of the Penal Code in connection with Article 56 of the Penal Code), while the victim's interests in individual cases may be different from those attributed to it 'in an exemplary manner' by the courts. As a result, adjudicating even 'in the interest of the victim' may in fact result in an outcome that is harmful for such persons. This may concern, for example, a prohibition on contacting or approaching the victim, while the victim wants to maintain contact with the perpetrator, or a non-custodial sentence to help the perpetrator meet the obligation to pay compensation, when the victim primarily desires the perpetrator's imprisonment.<sup>39</sup>

This state of affairs may give cause for concern. In the process of adjudication, omitting an individualized assessment of the consequences that the conviction and the application of specific measures of criminal law will have on third parties may result in the actual degree of harm contained in those measures being disregarded. The sense of injustice felt as a result may lead to third parties being willing to circumvent injunctions, prohibitions and obligations imposed on the perpetrator, which in turn may lead to a decrease in their effectiveness. In addition, by causing harm to third parties not involved in the commission of a criminal act, the principle of the individualization of criminal liability is violated. The different treatment of some persons because of their relationship with the perpetrator of the crime may also raise objections from the point of view of the principle of equal treatment. These arguments support – at the very least – discussion on including in the Penal Code the requirement for courts to consider the individual and social consequences of the conviction in the adjudication process, including the use of measures of criminal law.

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<sup>35</sup> Wróbel, Zoll (2016): Article 53, thesis 109.

<sup>36</sup> Marek (2010): Article 3, thesis 1; Giezek (2012): theses 1–4.

<sup>37</sup> For more detailed discussion on the inclusion of an individualized determination of the impact of the crime and its consequences on the subsequent life of the victim (*victim impact statement*), see Ashworth(1993): 498–503; Moore (2000): 91, 100–103.

<sup>38</sup> Cf. the judgment of the CJEU of 15 September 2011 (above n. 5).

<sup>39</sup> See Hryniewicz-Lach (2017): 345–379.



#### IV. THE REQUIREMENT THAT THE COURT CONSIDER THE CONSEQUENCES OF A CONVICTION

A criminal conviction can have an indirect effect on the situation of third parties, as a result of primary impact on the perpetrator (for example, the loss of a source of income due to the perpetrator's dismissal from employment), or it may have a direct impact (for example, if the third party has to vacate an apartment provided as part of the perpetrator's employment contract). This indicates that there is a need for the court to take into account the consequences of a conviction for both the perpetrator and third parties. The fact that the court adjudicating on criminal liability does not comprehensively decide on the consequences of the conviction (which include in particular the so-called legal consequences of conviction, that is, its consequences as regulated by other branches of law<sup>40</sup>), does not mean that the court should not take them into consideration. Where they constitute the automatic consequences of conviction, they become, in a sense, an integral part of it and contribute to its onerousness.

This problem is recognized in the German Penal Code, where the regulation on the rules of adjudication states: 'The guilt of the perpetrator is the basis for sentencing. The effects which the sentence can be expected to have on the perpetrator's future life in society shall be taken into account' (Paragraph 46 sec. 1 of the German Penal Code). In the German scholarship, it is assumed that the impact of a penalty on the perpetrator within the meaning of the Penal Code does not only concern punishment, but also other measures for responding to a crime, and includes both the intentional and unintentional (though foreseeable) impact on the functioning of the perpetrator in society. Examples of such an impact are: loss of the ability to practice a profession, dismissal from work (especially in the case of people who, due to age or lack of qualifications, may have great problems finding new employment), and loss of the means of subsistence – in each case in the context of the perpetrator's future ability to function properly in society.<sup>41</sup> Therefore, the needs of perpetrator's closest relatives are also seen in the light of the onerousness experienced by the perpetrator, such as the possible weakening of their relationship with their children in the process of execution of punishment.<sup>42</sup> With a view to taking into consideration circumstances not related to the offence in the adjudication process, emphasis is given to the legitimacy of assessing the impact of the penalty on the life of the perpetrator from the perspective of its proportionality, not only with regard to the offence (its severity and the perpetrator's degree of guilt), but also to its onerousness for the perpetrator.<sup>43</sup>

With the criterion of the proportionality of the response thus conceived, in the process of adjudication the basis for determining the severity of the penal measure applied should always be the consequences that the legal system au-

<sup>40</sup> Waszczyński (1968): 807–818; Stefańska (2008a): 86–100; (2008b): 58–72.

<sup>41</sup> Fischer (2018): 380–381 (esp. 7–9).

<sup>42</sup> Satzger, Schluckebier, Widmaier (2017): 398 (esp. 156).

<sup>43</sup> „[Es wird] von einer Tatproportionalität der Strafe auf die Wirkungsproportionalität umgeschaltet” – Satzger, Schluckebier, Widmaier (2017): 397–400 (esp. 152–162).

tomatically or obligatorily associates with the fact of conviction, or those which are expected to follow from adjudication on the perpetrator with a probability bordering on certainty, and as such they can be considered to be embedded in the penal measure of the conviction. Only on this basis, taking into account the limit set by the degree of guilt, could it be possible to construct within the punishment further measures to increase the degree of onerousness.

It is worth noting that such a solution was initially met with criticism in German jurisprudence, where it was pointed out that such a situation – that is, when there is a select group of perpetrators with regard to whom the legal system considers specific consequences of a conviction, conceived of as consequences lying outside the scope of criminal law – thereby creates, on the basis of the statute, an unjustified separate premise for lenient sentencing. However, a counter argument was raised in the doctrine, asserting that other perpetrators would not be affected by similar consequences, and it was pointed out that a case-by-case approach should be used in the adjudication process, because of the differing onerousness of the conviction for perpetrators, depending on their life situation. Over time, the German Federal Supreme Court (*Bundesgerichtshof*) adopted the latter position, recognizing that it is an obligation for a court adjudicating on a criminal case to take into account the effects of a conviction in the legal system, in particular in the professional and personal spheres (*berufs- und standesrechtliche Folgen*) – and not only where these consequences arise automatically or obligatorily, but also wherever they may appear (for example, in disciplinary proceedings).

It should be noted that this position also met with the criticism that taking into account factors unrelated to the criminal act may cause an excessive departure from the requirement that the punishment should be proportionate to the degree of guilt (and not only that the punishment should not exceed this degree). In the literature, attention was also drawn to the fact that excessive individualization of responses to crimes due to consideration of the impact of these responses on the further functioning of perpetrators in society will lead to the creation of class justice (*Klassenjustiz*), in which people with a high social status will be punished more leniently, because the very fact that they have been convicted may cause them to lose their exalted position; and this state of affairs would have a negative impact on the general and preventive impact of convictions.<sup>44</sup> This constitutes an argument for weighing up the importance of particular factors affecting the degree of severity of the punishment; this in itself, however, does not justify resigning from the postulate of taking into account the individual and social consequences of the conviction in the adjudication process.

Although the above remarks apply to consideration of the consequences of the conviction for the perpetrator, rather than for other persons, it seems that the requirement formulated in German scholarship on the necessity of avoiding the negative effects of punishment, insofar as this would not be contrary

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<sup>44</sup> See the case law and positions cited in: Sobota (2015): 199–205; Mestek-Schmülling (2004): 29–89.

to its generally preventive effect,<sup>45</sup> may apply to the consequences of convictions for third parties. The response to crime is not limited to the application of criminal law measures; it has various consequences in a wider systemic perspective. These consequences are borne by not only the perpetrator but also other persons, including members of their family, who share their circumstances. This reaction should therefore be a holistic one, commensurate not only with the gravity of the crime, but also with what can be expected from the social environment of the perpetrator, following the commission of a crime. It seems that these comments could also apply to Polish law.

Examination of the commensurability of the consequences of convictions under Polish law should, however, be preceded by determining whether the very fact of differentiating the situation of persons who are affected by these consequences is consistent with the principle of equal treatment. In attempting to specify the criteria for equal treatment under Article 32 of the Constitution of the Republic of Poland, the Constitutional Tribunal expressed the position that: 'equality allows for different treatment by law of entities differing from each other, nevertheless the possible different treatment of certain entities must be justified, that is, based on recognized criteria, the legitimacy of the choice of this and not another differentiation criterion must be assessed on a case-by-case basis, among others from the point of view of the principle of social justice'.<sup>46</sup> In the doctrine, an attempt was made to define these criteria, including: the existence of an objective and significant legal difference between those affected by the differential treatment and the fairness of the differentiation resulting from the system of values adopted.<sup>47</sup> The extent to which such values/principles can be identified and specified requires in-depth analysis and such examination lies beyond the scope of this article. The only thing to be noted here is that the principle of equal treatment may support an argument both for not differentiating between perpetrators according to their family, property or professional status (in order to prevent the above-mentioned phenomenon of *class justice*), as well as for their differentiation if a given attribute is considered to be an important circumstance justifying the differentiation. In this regard, it seems – at the very least – it is impossible to exclude *a priori* the possibility of interpreting principles from the Constitution of the Republic of Poland which could serve to justify the differentiation of the legal situation of the perpetrator affected by such consequences, depending on their family, property or professional status.

The inclusion of the situation of third parties in this sphere makes the issue even more complex. If these persons have not participated in the perpetrator's commission of the offence, it seems that – from the point of view of the consequences of the conviction – they should be treated equally, regardless of the status of the perpetrator. This state of affairs, however, presupposes the differential treatment of the perpetrator because of their family situation, for example. However, the desire to protect third parties, such as the children of the perpetrator,

<sup>45</sup> Mestek-Schmülling (2004): 137.

<sup>46</sup> The judgment of the Constitutional Tribunal of 11 July 2000, K 30/99 (*supra* n. 9).

<sup>47</sup> Sadurski (1978): 58–59; (1988): 98–99.

from the consequences of his/her conviction, should not justify *per se* a difference in treatment between a perpetrator who has children and one who is childless. At the same time, adopting the position – as the Constitutional Tribunal did – that the family should, as a rule, share the financial situation of the perpetrator, also seems to be a too far-reaching conclusion. On the other hand, neither does differentiating between the situations of perpetrators of different status (for example, those performing and not performing a public function) allow the same consequences of a conviction to be maintained for members of their families (which depends, for example, on whether the perpetrator performs a public function). In this situation, the optimal solution seems to be in each case striving to balance, at the adjudication stage, various aspects of equal treatment – both for perpetrators and third parties bearing the consequences of the criminal conviction, which requires, however, an appropriate statutory basis.

The assumption that there may be reasonable grounds for differentiating between the situations of individuals due to the behaviour of other persons makes current the problem of determining the criteria for the proportionality of the harm affecting these individuals in connection with the conviction of the perpetrator. In the literature concerning the issue of the constitutional principle of proportionality (based on Article 31 sec. 3 of the Constitution of the Republic of Poland) it is pointed out that the assessment of the compliance of a specific regulation with this principle requires that all the social costs of a given regulation be taken into account, both those relating to the protection of certain legal interests, and to the infringement of other interests (rights and freedoms) protected by this regulation.<sup>48</sup> Therefore, when examining the compliance of a given regulation with the Constitution, not only its intended impact on the legal system should be taken into account, but also the necessary and foreseeable consequences of its functioning in that system, in particular its onerous nature for individuals in relation to the benefits expected from its application.<sup>49</sup> However, these assessment criteria relate to the assessment of the compliance of the very existence of a given regulation with the Constitution, not necessarily to its application in a particular case, on the basis of a presumption of its general compliance with the Constitution. In addition, in the course of adjudicating on a case, the proportionality of the onerousness does not, by definition, refer to third parties, but to the perpetrator of the act. In such a situation, it seems justified to introduce a statutory requirement to examine the proportionality of the onerousness of the conviction (where there is a possibility of conditional discontinuance of proceedings) and the application of a given measures of punishment, in view of its consequences for these persons, to the importance of the protected goods and interests and the objectives of criminal law thus pursued. Such an assessment requires the determination of what can be expected and agreed upon with regard to the necessary and foreseeable impact of the conviction on third parties, taking into account their relationship with the perpetrator, the extent to which they may have been involved in the commission of the offence and benefited from the proceeds of the offence, and the existence in

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<sup>48</sup> Wojtyczek (1999): 42–43.

<sup>49</sup> Zakolska (2008): 28–29, 134.

the legal system of rules correcting and compensating for the excessive impact on those persons of the consequences of the conviction. This evaluation should also take into account the importance of their interests with which a judicial decision directly or indirectly interferes, particularly in view of the need to preserve and protect the essence of the constitutional rights and freedoms of third parties, so that the decision does not result in the elimination of the protection of their legal interests in a specific case.<sup>50</sup>

## V. SUMMARY AND PROPOSALS FOR LEGISLATIVE CHANGES

This analysis is merely an outline of the issue of the legal approach to the impact of convictions on the situations of third parties, with reference to examples of legal regulations currently in force, and was undertaken with the intention of stimulating discussion. However, at this stage some conclusions can be drawn from the above considerations. They validate the assumption that the proportionality of the response to the crime should be understood in a systemic way, that is, by taking into account all the foreseeable consequences (and those likely to occur in a specific case) that the legal system associates with the conviction, both in the regulation of criminal law and in other branches of law, including those that concern the sentenced person and those that affect third parties who suffer these consequences, in terms of family, property and economic relations. Only then will it be possible to take account of the full punitive effect of the criminal response. The protection of third parties from the consequences of the conviction of the perpetrator in a broad sense, including the consequences of the application of certain measures in response to the offence, must be based on the requirement that the burden of such consequences be commensurate in relation to the weight of their legally protected interests, the possibility of correcting and compensating the burdens existing in the legal system, taking into account the possible contribution of these persons to the crime and the benefits that they might have derived from it. It is crucial to maintain the requirement of a proportionate response with regard to third parties: to overburden them with the consequences of another's conviction for an act in which they did not cooperate, can give rise to a sense of injustice resulting from their unequal treatment and can encourage them to refuse to comply with the court's decision. The arguments put forward seem to provide sufficient support for the position that the court hearing a case is obliged to take into account the punitive consequences of the conviction, including the use of penal measures, not only on the perpetrator, but also on third parties.

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<sup>50</sup> Cf. the Constitutional Tribunal's statement that the regulation providing for the obligatory forfeiture of the tools used to commit a fiscal offense, which are the property of a third party, which did not contribute to the commission of the offense, is deprived of preventive value, and at the same time disproportionately onerous in relation to its fiscal goals, especially when, as a result, it leads to the suspension or termination of a business. The judgment of the Constitutional Tribunal of June 29, 2005, SK 34/04 (*supra* n. 26).

In the law as it currently stands, however, there is no basis for meeting this need, which justifies the recommendation to supplement Article 53 para. 1 of the Penal Code in this regard. Article 53 para. 1 of the Penal Code could therefore read as follows: 'The court imposes the punishment according to its own discretion, within the limits prescribed by a statute, observing that its onerousness does not exceed the degree of fault, taking into account the degree of social harmfulness of the act and taking into consideration preventive and educational aims it is to achieve with regard to the sentenced person, as well as the need to develop legal awareness of the society. The assessment of the onerousness of the sentence should take into account the legal and factual consequences of the sentence, both for the perpetrator and for other persons'. Article 56 of the Penal Code, which requires that the aforementioned regulation be applied accordingly to the imposition of other measures provided for in this Code, while penal measures (for example, the ban on having animals) are also provided for outside the Penal Code. This provision could therefore read: 'The provisions of Article 53, Article 54 para. 1 and Article 55 apply accordingly to adjudication on other means of response to a crime, [...]'.

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THE PROPORTIONALITY OF CRIMINAL PUNISHMENT  
FROM THE PERSPECTIVE OF THIRD PARTIES  
– AN INTRODUCTION TO THE ISSUE

Summary

A conviction for a crime raises a number of legal consequences not only for the convicted person, but also for those who are in a family or professional relationship with this person, as well as for the victims of crime. However, the existing regulations applicable to adjudication in criminal matters do not require consideration of the influence of the conviction on the situation of third parties. This fact justifies an attempt to investigate whether the legal system protects these persons from the negative influence of a conviction, and from the effect of the use of instruments of criminal punishment on their family and property, and whether the consequences of a conviction for third persons should be taken into account by the court in the process of adjudication regarding the response to a crime. The author also attempts to formulate a statutory requirement for the criminal court to take into account the individual and social consequences of a conviction, including the consequences of the use of punitive measures, referring in particular to the problem of equality under the law and proportionality of the criminal punishment to the harm suffered by third parties in the event of its application.

Keywords: consequences of conviction; adjudication of punishment; equality under the law; proportionality of punishment; proportionality of punitive measures

