for more theoretical and legislative interest. It is a pity that at least in Slovenia there was absolutely no step further made in this regard in the last decade.

Literature

1. See for instance § 18 of the present German Criminal Code (StGB) with the exact wording as follows: "Schwerere Strafe beibesonderen Tatfolgen. Knüpft das Gesetz an eine besondere Folge der Tat eine schwerere Strafe, so trifft sie den Täter oder den Teilnehmer nur, wenn ihm hinsichtlich dieser Folge wenigstens Fahrlässigkeit zur Last fällt."

2. Compare Damjan Korošec: Some problems with the institute, called liability for graver consequences in Slovenian criminal law. V: Problemi ta perpektivi pozvitku juridičnoï nauki ta osviti v Ukraïni: materiali Vseukraïns′koï naukovo-praktičnoï konferenciï do Dija nauki: Kiïv, 17 travnja 2012 roky. Kiïv: Nacional′niï aviaciîniî Universitet, cop. 2012. Str. 205-208.

3. In the region of former common Yugoslavia see a very clear picture of this topic by the famous Croatian criminal legal theoretician Petar Novoselec in his textbook of the general part of substantive criminal law (of Croatia): Novoselec P. 2004. Općidiokaznenogprava. Zagreb: Sveučilište u Zagrebu. 242-246. Slovenian legal theoreticians do not deal with this problem thoroughly.

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CASTIGATION OF MINORS AS A CIRCUMSTANCE EXCLUDING ILLEGALITY (A COUNTERTYPE)

Introductory remarks (the concept and the classification of the so called countertypes). Not in every case does the fulfilment of the statutory features of a forbidden act have to be the expression of the objective social harmfulness of the perpetrator's behaviour. Sometimes circumstances excluding illegality (the so called countertypes) occur which lead to the exclusion of the social harmfulness.[1] In other words, there are possible exception to the rule (implying the negative assessment) that a behaviour fulfilling the statutory features of a forbidden act is characterised by social harmfulness.[2] According to W. Wolter, the author of the concept of countertype "By countertypes we understand those and only those circumstances which, even though the act fulfils the statutory features of an act forbidden by the statute under the threat of punishment, make that act not socially harmful (possibly it can be positive), and hence not illegal; so these circumstance legalise an act generally considered to be illegal".[3] Every countertype is the description of a human act and its specific feature is that it has no autonomous sense (i.e. alone, isolated from the type, it makes no sense[4]). A countertype may therefore function only in connection

with a certain type (or rather types) of a forbidden act.[5] The range of individual countertypes is, of course, varied, yet each of them has to have some features of a generalising character. As no type constitutes a one-time concrete order (or interdiction), so no countertype can be perceived as an individual (isolated) case of the legality of an act. Naturally the construction of a type differs clearly from a countertype, since the latter has to contain the description of the conflict element of the situation, the occurrence of which enables it to work.

The criminal law doctrine representatives distinguish relative countertypes (which exclude only the criminal illegality) or absolute ones (excluding all illegality); statutory (codified) ones and non-statutory (uncodified) ones, as well as general ones (referring to an unspecified number of types of forbidden acts) and special ones (referring to a specified, strict group of types – e.g. Article 213 § 2 of the Criminal Code).[6]

The basic countertypes are described in Chapter II of the Criminal Code entitled "Exclusion of criminal responsibility". One finds there: self-defence (Article 25), state of higher necessity (Article 26), acceptable risk (Article 27). Outside that chapter the Criminal Code recognises the following countertypes: the countertype of acceptable criticism (Article 213), acting in extreme need (Article 319). The countertype of artistic, collector or scientific activity (Article 256 § 3 of the Criminal Code)[7], the countertype of not reporting an offence (Article 240 § 2 of the Criminal Code)[8] and the countertype of refusal to execute an order (Article 344 of the Criminal Code)[9] are also mentioned in literature. One should also not forget the countertype described by the Civil Code – the so called legal self-help (Art. 343 § 2. Article 432 § 1, Article 461 § 2, Article 496, 671 § 2 of the Civil Code). The above catalogue is not a closed one since there are also the countertypes not regulated by statutes (and at most "rooted" in the statutes), known as non-statutory countertypes, such as: the consent of the victim, castigation of minors, sports risk, medical activities, termination of pregnancy, acting within one's professional rights and obligations, custom. The following remarks will be devoted to castigation of minors.

Particular remarks (concept, conditions and range of the functioning of the castigation of minors). By castigation one should understand causing harm in order to make another person aware of the reprehensibility of his behaviour so as to influence that person's behaviour in the future.[10] There may be different types of castigation: we can talk about physical castigation, but also about castigation by word or gesture, and even about a disapproving look. Formally taken, types of behaviour which should be taken into account as castigation fulfil the statutory features of an offence, e.g. infringement on bodily inviolability (Article 217 of the Criminal Code), enforcing a behaviour (Article 191 § 1 of the Criminal Code) – in the case of verbal castigation – insult (Article 216 of the Criminal Code)[11]. As far as physical castigation is concerned, its two basic forms can be distinguished. The first one is castigation

as an organised reaction, in the case of which the child is punished for its behaviour in a predictable time and place, the second one is castigation as a spontaneous reaction, performed immediately after the discovery of the misconduct. I. Andrejew recognises also a third form of castigation in which the elements of both spontaneity and some organisation may appear, which he labels as "minor correction" (e.g. a slap, as long as it does not involve hitting the face).[12] One should not forget that castigation is associated with the issue, known in pedagogics and psychology, of applying the so called positive reinforcements (awards) and negative ones (punishments).[13] It is stressed in psychology that the necessary condition for learning a given reaction is its positive reinforcement by satisfaction (i.e. reduction of some need of the organism). It is known that a punishment does not reduce any need, on the contrary – it strengthens it. It can be therefore assumed that the most effective method is to limit unwanted reactions while strengthening the wanted ones at the same time. Henceforth, if a child is forbidden to do something, one should at the same time show (inform) it, what it should do and performance of the wanted action should be reinforced (awarded). One could risk stating that a punishment, should it at all be effective, is such due to its informative function (what should be done to avoid the punishment and to receive the award). The effectiveness of punishment requires some other factors to be also taken into account, i.e. the attitude of the child to the source of punishment (i.e. to the punishing person) and acceptance by the child of the norms which are endorsed by the castigator.[14]

There are no legal bases which would unequivocally permit the castigation of children. A certain point of reference can be found in the regulation of the statute of 25 February 1964 – Family and Guardianship Code (unified text: Journal of Laws 2019.2086): Article 92 ("A child remains under parental authority until its majority") and Article 95 § 2 ("A child remaining under parental authority should be obedient to its parents"). One should notice, however, that the statute of 10 June 2010 on the modification of the statute on preventing family violence and some other statutes (Journal of Laws No 125, position 842) introduced in Poland the interdiction to apply physical punishment to children (Article 96^1: "Persons executing parental authority and persons who are guardians of minors are forbidden to apply physical punishments").[15] It seems that this amendment definitively makes the application of physical castigation of children illegal. It does not mean, of course, that the circumstance excluding illegality in the form of castigation of minors has stopped functioning (with the reservation, however, that it is inadmissible to apply the most radical form of castigation, i.e. physical castigation). Other (than physical) forms of castigation should be taken into account. It would be difficult to forbid the parents (and sometimes the guardians or educators) to correct minors, to force them to do their homework, to reasonably limit where, when and with whom they meet or at what time they

return or leave home. In the case of doing the above we may formally recognise the execution of the actus reus of the offences of insult, enforcing a behaviour or depriving of liberty.

For castigation (other than physical) to be legal, the following conditions must be met:

– castigation may be performed only by entitled persons (first of all parents enjoying their parental authority, and sometimes other persons, e.g. teachers, guardians),

– castigation must be performed *cum animocorrigendi* (in order to improve),

– castigation must be just (i.e. in the child's consciousness it must be associated with its wrongful behaviour);

– castigation must be moderate,[16]

– castigation is possible until the children reach majority (i.e. as a rule – the age of 18).

Trespassing the boundaries of castigation may imply responsibility for e.g. maltreatment (Article 207 of the Criminal Code), causing bodily injury (Article 156, 157 of the Criminal Code). It is obvious that in the practical application of law there will be many cases of parents who may have problems because of spanking their child. It seems that in such (minor) cases it should be a rule to consider them as acts of inconspicuous degree of social harmfulness (and hence as not constituting offences). The introduction of the interdiction to physically castigate minors into the Family and Guardianship Code should be disapproved. Such an interdiction had already existed in fact and was expressed by other regulation of the Criminal Code (forbidding e.g. to infringe on bodily inviolability, to maltreat, to cause bodily harm). It is worth remembering that family relations are not easily accommodated with legal intervention, and if the state's intention was to eliminate "spanking" from the repertory of parental educative methods, a decidedly better way was to choose widespread educational actions than introducing a legal interdiction (which shall not change the mentality and existing practice).[17]

Closing remarks. Castigation of minors is one of the so called non-code countertypes (of great social importance). After the modification of the Family and Guardianship Code from 10 June 2010 the total interdiction to apply physical punishment to children was introduced. It does not mean, however, that the countertype of castigation of minors stopped existing, but only that its most radical form (physical punishment) can no longer be applied, while the other forms of castigation remain valid. It is, obviously, crucial that all the conditions for legality are met in every case (it must be performed by an entitled person, acting *cum animocorrigendi*; it must be just, moderate add applied only to persons who have not reached the age of 18).

Literature

1. A. Krukowski accepts the possibility that a countertype may exclude only the illegality, while the act remains socially harmful; A. Krukowski, *Materialna treść czynu a okoliczności wyłączające odpowiedzialność karną*, Nowe Prawo 1971, no 12, p. 1764. A similar opinion is expressed by A. Marek, who claims that in the case of a countertype occurring it is only the illegality that is excluded, while the social assessment may be varied (e.g. causing bodily harm during a boxing fight is undoubtedly socially harmful); A. Marek, *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warszawa 2008, p. 27–28.

2. W. Wolter emphasises that the scheme rule – exception plays „(…) in practice a very important role, which cannot be taken for granted because of the problem of a conjunctive association of the social harmfulness of the act with the statutory interdiction of an act"; W. Wolter, *O stopniowaniu połecznego niebezpieczeńst waczynu karalnego*, Krakowskie Studia Prawnicze 1970, year III, p. 111.

3. W. Wolter, *Nauka o przestępstwie*, Warszawa 1973, p. 163.

4. The same opinionisexpressed by, amongothers, W. Wolter, *O kontratypach i braku społecznej szkodliwości czynu*, Państwo i Prawo 1963, issue. 10, p. 504; I. Andrejew, *Ustawowe znamiona czynu. Typizacja i kwalifikacja przestępstw*, Warszawa 1978, p. 128. A contrary opinion is presented by Cieślak, who does not agree with the thesis about the subsidiarity of a countertype and its strict connection with the type of a forbidden act. M. Cieślak, *Polskie prawo karne, Warszawa 1990*, p. 231–232.

5. W. Wolter, *O kontratypach…*, p. 504.

6. Compare in moredetail: M. Cieślak, *Polskie…*, p. 232–234; J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2012, p. 246.

7. According to Article 256 § 3 of the Criminal Code no offence is committed if a person commits the forbidden act described in Article 256 § 2 of the Criminal Code (i.e. a person who, in order to disseminate, produces, captures or imports, acquires, stores, possesses, presents, transports or sends a print, recording or another object whose content propagates the fascist or another totalitarian regime), if the act is committed within the frame of artistic, educational, collector or scientific activity

8. According to Article 240 § 2 of the Criminal Code the offence described in § 1 (not reporting a crime) is not committed when the person who did not report, had sufficient grounds to assume that a law enforcement organ knew about the prepared, attempted or completed forbidden act, no offence is also committed by the person who prevents the commission of a prepared or attempted forbidden act described in § 1 (i.e. offences from Articles: art. 118, 118a, 120–124, 127, 128, 130, 134, 140, 148, 163, 166, 189, 252 or an offence of a terrorist character).

9. According to Article 344§1 of the CriminalCode the offencedescribed in Article 242 (refusal to executean order) is not committedwheh the soldierrefuses to executeordoes not executean order who se execution would mean commit ting anoffence.

10. I. Andrejew, *Oceny prawne karcenia nieletnich*, Warszawa 1964, p. 16.

11. One cannot also exclude the deprivation of liberty as one of the methods of castigation. Compare on this: M. Mozgawa, *Odpowiedzialność karna za bezprawne pozbawienie wolności,* Lublin 1994, p. 115.

12. I. Andrejew, *Oceny…*, p. 18–19.

13. Por. na ten temat S. Mika, *Skuteczność kar w wychowaniu*, Warszawa 1969, p. 29 and the following.

14. *Ibidem*, p. 176 and the following.

15. In greater detail compare: R. Krajewski, *Karceniedzieci. Perspektywa prawna*, Warszawa 2010, p. 122 and the following.

16. Compare: I. Andrejew, *Oceny…*, p. 84. I. Andrejew mentions one more condition, i.e. he claims that castigation should be executed in a way that is customarily accepted in a given society, *ibidem*, p. 84–85.

17. Compare on thissubject: E. Czyż, *Prawo, którego nie można egzekwować – wokół postulatów delegalizacji stosowania kar fizycznych wobec dzieci*, Dziecko Krzywdzone 2003, vol. 2, no 2, p. 45–46.

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PRZESTĘPSTWO DOPROWADZENIA DO UPRAWIANIA PROSTYTUCJI (ART. 203 K.K.)

Wprowadzenie. Stosownie do art. 203 polskiego k.k. z 1997 r. kto przemocą, groźbą bezprawną, podstępem lub wyzyskując stosunek zależności albo krytyczne położenie, doprowadza inną osobę do uprawiania prostytucji, podlega karze pozbawienia wolności od roku do lat 10. Ten typ czynu zabronionego nie miał bezpośredniego odpowiednika ani w k.k. z 1932 r, ani też w k.k. z 1969 r. W k.k. z 1932 r (w art. 210) penalizowane było nakłanianie innej osoby do zawodowego oddawania się nierządowi (pod groźbą kary więzienia do lat 5 i grzywny)[1]; podobnie ujmował to art. 174 § 1 k.k. z 1969 r. (kto nakłania inna osobę do uprawiania nierządu, podlega karze pozbawienia wolności od roku do lat 10).[2]

Pojęcie prostytutki i systemy prawne reglamentacji prostytucji. M. Jasińska definiuje prostytutkę jako osobę, która zaspokaja potrzeby seksualne przypadkowych partnerów w zamian za pieniądze albo inne dobra materialne i bez zaangażowania uczuciowego, z ograniczonym prawem wyboru klienta – partnera seksualnego.[3] Natomiast według. M.Antoniszyna i A.Marka „prostytutką jest osoba, która stale lub dorywczo uprawia proceder polegający na świadczeniu usług seksualnych w dowolnej formie w zamian za korzyści materialne, które stanowią decydujący motyw jej działania.[4]”. W nauce wskazuje się, że zawodowe uprawianie prostytucji nie jest konieczne aby uznać daną osobę za prostytutkę; możliwa jest bowiem tzw. prostytucja okolicznościowa.[5] Nie ulega wątpliwości to, ze prostytucję mogą uprawiać zarówno kobieta, jak i mężczyzna.[6] Znane są cztery systemy prawne regulujące zjawisko prostytucji (prohibicyjny, reglamentacyjny, neoreglamentacyjny,