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Liability of Juveniles Under Article 10 § 2 of the Criminal Code for Various Forms of Criminal Cooperation. Part Two

O odpowiedzialności nieletnich w warunkach określonych w art. 10 § 2 Kodeksu karnego za różne postaci współdziałania przestępnego. Część druga

SUMMARY

The entire study is devoted to the question of the imputability of criminal responsibility to a minor acting under the conditions set out in Article 10 § 2 of the Criminal Code for acts committed in various phenomenal forms. In the second part of the study, the author justifies his own concept, referring it to the construction of a single entity, in particular using the so-called indirect agency as well as incitement and aiding. The work ends with a concise conclusion combined with a reference to the general rules of interpretation.

Keywords: criminal responsibility of minors; single entity; indirect agency; incitement; aiding

The first part of this study concluded that the offence description contained in a provision of the special part of the Criminal Code (hereinafter CC) was not complete. To reconstruct it, the content contained in the provisions of the general part thereof needs to be taken into account. If this is the case, why not consider the content of Article 18 § 1 CC when reproducing the scope of direct perpetration? The basis for a concept differing from that presented herein is the assumption that in the case of incitement, aiding/abetting, directing the commission of offence and solicitation to commit an offence, the definition of a prohibited conduct is determined based on the general part of CC, forming embodiments of complicity of a prohibited act in conjunction with the relevant special part provision, and for

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direct perpetration the content of the prohibition stems directly from the provision of the special part of CC without the need to resort to the provision defining a given embodiment of complicity[1]. However, it has been found above that a particular accomplice can never be attributed full statutory criteria of an offence committed in actual complicity without applying the criteria of complicity set out in Article 18 § 1 CC, and sometimes they cannot be attributed to a parallel perpetrator[2]. It is acting in concert which forms the criterion whose determination allows to assign to each of the accomplices what the others have done. If this element were to be omitted, one would have to admit that each of them is responsible for fulfilling the criteria that he met himself, which in the case of actual complicity disassembles the set of the criteria, and in the case of parallel perpetration of some deeds (especially against property)[3] it is possible to do.

It is worth looking from this perspective at perpetration by a single individual. From the point of view of the criterion of solitary action, perpetration by a single individual and parallel perpetration do not differ, except for the case mentioned above. As a rule, both an individual perpetrator and a parallel perpetrator fulfil on their own all the statutory criteria of a prohibited act. The assumption for concepts different from that presented herein is that they do it exactly as described in the special part of CC, and that the definition provided for in the special part provision is just a perpetration by a single individual and nothing more[4]. As mentioned above, this view raises certain doubts, especially on grounds of complicity. However, it can be challenged with regard to perpetration by a single individual.

A provision defining the type of prohibited act is typically structured as follows: X, who does Y, shall be punished. It follows that X is forbidden to behave (i.e. act or omit to act) in a way defined as Y. This behaviour, suitable for criminal-law valuation, and therefore corresponding to the concept of action, is defined in various ways in literature, but, following the assumption formulated by Ł. Pohl, it is always about fulfilling the activity criterion. However, it is worth noting that while

[1] Ł. Pohl, *Zakres odpowiedzialności karnej nieletniego w Kodeksie karnym z 1997 r. (o konieczności pilnej zmiany art. 10 § 2 k.k. – problem form popełnienia czynu zabronionego)*, „Prawo w Działaniu" 2017, nr 30, p. 16.

[2] See M. Kulik, *Liability of Juveniles Under Article 10 § 2 of the Criminal Code for Various Forms of Criminal Cooperation. Part One*, „Studia Iuridica Lublinensia" 2018, nr 2, DOI: http://dx.doi.org/10.17951/sil.2018.27.2.77.

[3] It seems that the situation may be most frequent in the case of dual-classification deeds (which may be deemed either a felony or misdemeanour). However, this may be the case with regard to different types in which there are quantitative criteria. As A. Wąsek rightly observes, the function of complicity which extends the scope of liability was particularly important in offence types whose subjective criteria are provided in a quantitative form, e.g. "significant value" or "considerable damage". See A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny*, t. 1, Gdańsk 2005, p. 251.

[4] Ł. Pohl, *Zakres odpowiedzialności*..., p. 9.

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remaining within the Pohl's concept of act defined by its effects (the perpetrator is who caused a particular state of affairs), it may be assumed that the perpetrator is not only the one who personally performs the activity, but also anyone who causes the state of affairs defined in the provision. In other words, one could defend the position that the very wording of the CC special part provision covers all forms of agency, not only self-made, but also indirect. It could be argued, as an example, that a situation of killing a human being is accomplished not only by the person who himself performs the killing activity, but also by anyone who causes it in a different way, and thus, for example, initiates a process that will result in death of a human. Such persons will include, apart from perpetrators and accomplices, both actual perpetrators and parallel perpetrators, also those directing and soliciting the commission of an offence, that is indirect perpetrators in general. While maintaining that incitement and aiding/abetting are of a result-oriented character, one could defend the view that this group covers also the inciters and aiders/abettors[5], although it seems that such a proposal would go too far.

The problem of incitement and aiding/abetting will be discussed further on. While remaining with the subject of perpetration, it should be concluded that with such an approach the provision of the special part of CC does not refer at all to direct perpetration, but to any behaviour that leads to the implementation of the prohibited state of affairs. Leaving aside the incitement and aiding for a while, it should be said that the provision of the special part would simply refer to all conceivable forms of perpetration. It would include not only individual perpetration, but also both forms of complicity, directing the commission of an offence and solicitation to commit an offence, as well as all indirect perpetration including those that were not covered by the construct of directing the commission of offence and solicitation to commit an offence. According to that perspective, the provision of Article 18 § 1

[5] The author hereof considers incitement and aiding/abetting as offences defined by their result. However, he is of the opinion that the result is not the commission of an offence by a direct offender, but causing a specific subjective side on part of the direct perpetrator. A similar view in A. Liszewska, *Podżeganie i pomocnictwo a usiłowanie*, „Państwo i Prawo" 2000, z. 6, p. 55 ff.; P. Kardas, *Teoretyczne podstawy odpowiedzialności karnej za przestępne współdziałanie*, Kraków 2001, p. 845 ff.; *idem*, *Regulacja współdziałania przestępnego jako podstawa zwalczania przestępczości zorganizowanej*, „Prokuratura i Prawo" 2002, nr 10, p. 84; J. Giezek, *„Sprawstwo" polecające – między kierowaniem czynem zabronionym a nakłanianiem do jego popełnienia*, [in:] *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi*, red. V. Konarska-Wrzosek, J. Lachowski, J. Wójcikiewicz, Warszawa 2010, p. 72. Naturally, the assumption that the result would be commission of an act by a direct perpetrator would significantly facilitate proving a position that the inciter and the aider or abettor had caused the situation of "killing a man", if we still stick to the example of homicide. However, even assuming a much less advanced behaviour of an inciter and aider/abettor, it is possible to conclude from this construct that their conduct affects the execution of the prohibited state of affairs. This issue seems to be relevant for the subject being analysed, so it will be further developed below.

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CC in the part concerning single perpetration would not be a statutory *superfluum*, but would rather constitute an important element determining what perpetration is[6]. It would constitute a limitation of liability – not everyone from among those, whose behaviour results in the state provided for in the special part of CC or other statutory act, would be perpetrators but only those who are listed in Article 18 § 1 CC. Thus, they would include those who have instructed another person to perform a prohibited act, those who directed the execution of the act by another person, as well as those who committed the act jointly and in concert with another person. The statement that the perpetrator is the one who fulfilled the criteria of the offence acting alone means not only that he committed the act alone, but also that he carried out the act himself. *A contrario*, the person who has committed indirect perpetration which cannot be described as directing or soliciting to commit a crime is not the perpetrator[7].

This interpretation has the advantage that the provision of Article 18 § 1 CC is not treated as a redundancy in statutory regulation[8]. The interpretation is relevant for the title problem as it implies that none of the embodiments of complicity of a prohibited act is fully described in the provision of the special part. The scope of criminalization has always been determined in connection with Article 18 CC, and this applies not only to incitement, aiding/abetting, directing and soliciting to commit a crime, but also to complicity[9] and perpetration by a single individual[10]. Having assumed this, it cannot be considered that the stipulation in Article 10 § 2 CC of the Special Part means that it only refers to direct perpetration. In order to respect the assumption about the rationality of the legislature[11], it should

[6] See the brilliant observation by P. Kardas ([in:] *Kodeks karny. Część ogólna. Komentarz do art. 1–52*, red. W. Wróbel, A. Zoll, Warszawa 2016, p. 379), that perpetration by a single person was defined according to the requirements of the formal-objective concept. It seems that the term is derived just from the content of Article 18 § CC.

[7] This assumption does not contravene with a circumstance that in some (many!) cases of indirect perpetration the deed can be categorised as inciting.

[8] As R. Dębski rightly writes, it is not appropriate to assume that Article 18 § 1 does not define perpetration but the size of the offender's liability. The legislature's intention was to make this provision define perpetration. See R. Dębski, *Recenzja monografii Łukasza Pohla, Struktura normy sankcjonowanej w prawie karnym. Zagadnienia ogólne, Wydawnictwo UAM, Poznań 2007, ss. 293*, „Prokuratura i Prawo" 2010, nr 12, p. 157.

[9] Having regard to the last finding – not only direct perpetration but also parallel perpetration.

[10] In adopting such an interpretation, it must be considered that the reservation raised by Pohl, identified by himself as crucial for the resolution of the problem under analysis, concerning "a specific direction of the complementation, which is based on a skilful delimitation of the provision which is central for the norm and a complementary provision" (Ł. Pohl, *Zakres odpowiedzialności…*, p. 15). Regardless of what the direction is, we accept by adopting the interpretation accepted herein, a view that this direction is identical for all embodiments of complicity.

[11] I consider Pohl's (*ibidem*, p. 14) refutation of this assumption unfounded. Cf. M. Kulik, *Liability of Juveniles…*

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be recognised that the Special Part refers not only to direct perpetration, but to any type of perpetration, including indirect ones[12], and the provision of Article 18 § 1 CC limits the classification of types of perpetration, in particular by eliminating indirect perpetration understood in a general sense. In this sense, the formula "shall be liable for perpetration" contained in Article 18 § 1 CC means that out of all conceivable (construable from the Special Part of CC) forms of perpetration, only those are subject to penal liability which are mentioned in Article 18 § 1 CC. Of course, this concept is based on the assumption that the act is performed by the one who causes the fulfilment of the offence criteria. If we strictly adhere to the assumption that the perpetration activity needs to be performed directly by the perpetrator, the interpretation presented here must be rejected. However, as it was shown above, such strict adherence to the assumption entails consequences that are hardly acceptable from the point of view of the rationality of the legislature[13]. Moreover, it is not the only possible option, which means that adopting a different concept of perpetration and, therefore, a convergent view of presented here.

To verify this view, it still requires referring to the very concept of indirect perpetration. It is a situation when a given person undertakes action not personally, but *via* another person using him/her as a tool. This includes e.g. inciting a mentally deranged, a juvenile person, or a person acting in good faith to commit a prohibited act[14]. The initial assumption of J. Makarewicz's concept is to understand perpe-

[12] This view is shared by L. Kubicki, K. Buchała, *Sprawstwo pośrednie w polskiej nauce prawa karnego i orzecznictwie sądowym*, „Studia Prawnicze" 1988, nr 1–2, p. 178. The position expressed by these authors, admittedly, does not apply to everyone, but to certain acts, and, moreover, the authors do not consider, unlike here, that the statutory determination of perpetration by a single individual limited the possibility of adopting indirect perpetration. The author hereof fully shares the objection raised by A. Liszewska, who notes that, for example, considering a person who incited another person to commit suicide as a killer in not compliant with the definition of perpetration by a single individual set out in the Code (A. Liszewska, *Współdziałanie przestępne w polskim prawie karnym. Analiza dogmatyczna*, Łódź 2004, p. 36). This limitation is just what I would like to see as functions of Article 18 § 1 CC *in principio*. If this limitation is absent, it would be possible to assign liability in the situation referred to by Liszewska. That is why I am in the position that, also in the case of perpetration by a single individual, in the Special Part of the Criminal Code we deal with a type which is not completely described and recreated based on the Special Part and the provision on perpetration by a single individual.

[13] The example of different treatment of parallel perpetrators and proper accomplices inherent in one and the same deed seems to be difficult to rationally resolve when adopting the concept that the criteria of offence are fulfilled by the offender himself.

[14] S. Śliwiński (*Polskie prawo karne materialne. Część ogólna*, Warszawa 1946, p. 325) uses a suggestive case of sending poisoned sweets to another person *via* a messenger. This is a noteworthy example that can be used to verify the concepts analysed herein. If we accept a strictly formal understanding of perpetration, as proposed by Pohl, one can have serious doubts if a sender who has sent poisonous sweets can be considered to be the one who performed the act of homicide. Under a broader definition of perpetration, the perpetrator could be the one who caused the fulfilment of the criteria of an offence. Another issue is how such a perpetrator needs to be defined under the legislation as it

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tration in a restrictive manner. This assumption is respected in the Criminal Code of 1997, as it was also respected (despite a somewhat different approach to the complicity in the verbal version) in the Criminal Code of 1969, while this could be doubtful – paradoxically – under the Criminal Code of 1932, which did not refer to perpetration. Makarewicz considered it unnecessary, because the perpetrator is the one who performs the act with his own act or omission[15]. This author claimed, therefore, that a perpetrator *sensu stricto*[16] strives to fulfil the criteria of offence by his own act or omission. According to Makarewicz, such an approach, under the Criminal Code of 1932, left no room for indirect perpetration, as it was clear that the indirect perpetrator was an instigator[17]. However, the perspective under the Criminal Code of 1932 did not explicitly rule out the construct of indirect perpetration. Only when sticking to the assumption that it is necessary to fulfil by oneself the statutory criteria of a prohibited act as a constitutive feature of perpetration can we maintain the assumption that there is no definition of perpetration with separate definition of incitement and aiding (and thus the formal-objective approach, in its extreme form, as requires the fulfilment by the perpetrator of all the criteria of a prohibited act, otherwise his behaviour does not correspond to the statutory description)[18] excludes the indirect perpetration. It is, however, difficult to classify proper complicity as perpetration, although this has never been questioned in the literature on the subject and probably should not be questioned. If we assume that actual complicity is perpetration[19], it would be difficult to conclude that the perpetrator is only the one

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is (*de lege lata*). It seems that to apply the formula of inciting an inadvertent crime would be of little use here because there would be a problem with assigning inadvertence to a direct perpetrator (the messenger). Interestingly, this formula would correspond well with what is called by D. Tokarczyk (*Podżeganie w polskim prawie karnym. Studium z zakresu teorii i praktyki prawa karnego*, Warszawa 2017, p. 342) indirect perpetration (though not exactly strictly), it would not be possible, however, to apply to it the construct intended by Tokarczyk (deliberate incitement to commit an inadvertent criminal offence). If the construct of incitement applied here, it would cover inciting of something that is not a criminal offence due to a lack of a subjective part. So, perhaps it would be appropriate to apply the construct of perpetration? On the other hand, there is a question of the nature of that perpetration. It is impossible to recognise that the offender himself fulfilled the statutory criteria of perpetration. See Liszewska's right remarks in *Współdziałanie przestępne…*, pp. 35–36.

[15] J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1938, p. 129.

[16] In contrast to perpetrator in the broad sense, which covers also inciter and aider/abettor, as a perpetrator of inciting and aiding/abetting. See *ibidem*, p. 129; R. Dębski, *Recenzja monografii…*, p. 157.

[17] J. Makarewicz, *op. cit.*, pp. 129–130.

[18] For details, see L. Tyszkiewicz, *Współdziałanie przestępne i główne pojęcia z nim związane w polskim prawie karnym*, Poznań 1964, p. 97.

[19] If it were not, a highly problematic question would emerge about what it would have been like. It is, of course, perpetration, but this status is not due to fulfilment of offence criteria by individual perpetrators themselves, but due to the fact that their fulfilment occurs as a result of joint action of all the accomplices acting in concert.

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who fulfils all the statutory criteria of a prohibited act. It is sufficient that he fulfils by himself only one criterion[20]. Makarewicz based his concept on the assumption that the perpetrator is the one who personally fulfilled the statutory criteria of the act, but he allowed also the possibility that the fulfilment of the statutory definition of prohibited act is performed by combining the behaviour of individual accomplices. On the one hand, according to Makarewicz, a behaviour can be considered as perpetration only where it is taken by an offender directly executing the prohibited conduct (he recognised a perpetrator the one who causes "directly a change in the outside world")[21], while, on the other hand, he did not consider it troublesome to deem actual complicity as perpetration. It presumably derived from the fact that the act of causing a direct change in the external world, mentioned by Makarewicz, did not necessarily consist in accurate fulfilment of the statutory criteria of the offence as described in the statute. This just was about a conduct that caused the fulfilment of the criteria of an offence, while the perpetration activity could be carried out either by a single perpetrator or by accomplices. It was irrelevant what particular perpetrators did if they fulfilled statutory criteria of a prohibited act acting jointly. It was important for Makarewicz that only a behaviour directly implementing the state prohibited by the statute[22]. The author seemed to take the issue of acting in concert as a certainty[23].

However, this assumption may be contested. If we look at the statement of Makarewicz, that the perpetrator in the strict sense is the one who causes a change in the external world, the additional condition introduced by him that the change must be caused directly by this perpetrator seems to be arbitrary, to some extent at least. From the author's point of view, it is easy to justify it with the need to eliminate indirect perpetration, but it cannot be justified either by the provision on perpetration, as it is non-existent, or the provisions of the Special Part[24]. Pursuant to the latter, it is possible to justify a different position from that presented by Makarewicz, namely the statement that the perpetrator is the one who causes the

[20] My reservation is that this will be valid on the basis of the formal-objective concept in a less extreme form. In such a case, individual accomplices themselves do not commit the conduct prohibited in a provision of the Special Part, but they fulfil the statutory criteria of an offence if their actions are considered together.

[21] J. Makarewicz, *op. cit.*, p. 129.

[22] *Ibidem*, pp. 129–130.

[23] Moreover, he points out that even when the legislature decided to introduce the definition of complicity into the Criminal Code of 1969 it failed to include the element of acting in concert (see Article 16 of the Criminal Code of 1969), it appears that even then the element of acting in concert was considered to be obvious.

[24] A provision defining perpetration by a single individual was introduced in the Criminal Code of 1969. It seems that its function is first and foremost to eliminate indirect perpetration. This function of the Code-based definition of perpetration by a single individual is aptly discussed by Liszewska (*Współdziałanie przestępne…*, p. 37).

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state of affairs described in the provision, regardless of how he does it. One could think that this includes also indirect perpetration.

At this point, it is worth noting that such a perspective on the problem in question may justify the concept presented by A. Zoll. Personally, I have a different view, but it should be noted that the statement that the perpetrator is the one who causes the fulfilment of the criteria of a prohibited act may provide grounds for the position that Article 10 § 2 CC, by pointing to provisions of the Special Part just refers to perpetrations[25]. It is so because in the case of directing and soliciting to commit a crime we deal with a behaviour that determines the fulfilment of the statutory features of a prohibited act. Only strict adherence to the principles of formal-objective concept of perpetration enforces the position that perpetration consists in direct fulfilment of the criteria of the act by the perpetrator himself. Even if we stick to the restrictive approach to perpetration[26], one can think that the perpetrator is not only the one who directly implements the executive activity, but everyone whose conduct causes this execution. Such a case would even allow us to classify so-called indirect perpetration as perpetration. This cannot be done under the current applicable legislation due to the wording of the provision of Article 18 § 1 CC[27]. However, upon embracing the material-objective concept of perpetration, the perpetrator may be considered not only the one who personally fulfils the criteria of an executive action, but also whose behaviour leads to this fulfilment, even if it not by one's own action. With this assumption, one could defend Zoll's idea that Article 10 § 2 CC refers to all forms of perpetration. This concept would not be falsified by stating that there is no mention about directing and soliciting to commit a crime in the provisions of the Special Part. Indeed, the claim that a special provision cannot be deemed a central provision of a norm regarding directing and soliciting to commit a crime, and that Article 18 § 1 CC does not suggest that the fulfilment of the criteria of a prohibited act specified in the Special Part of the Criminal Code can also take place by directing the execution of this act by another person or by instructing another person to do this[28], is possible only when sticking to the assumption that the fulfilment of the criteria can only be done directly by the perpetrator himself. This assumption, however, as it has been shown above, is not only possible one, and what is more, it generates, as far as actual complicity is concerned, the difficulties referred to above, and whose existence undermines the assumption that the Special Part of the Criminal Code refers only to the conduct described as the execution of a prohibited act. The example according to which it is

[25] A. Zoll, [in:] *Kodeks karny. Część ogólna…*, p. 181.

[26] Certain circumstances related to the broader or narrower view on perpetration are discussed further on herein.

[27] This is a circumstance relevant to the subject matter of this work and will be examined below.

[28] Ł. Pohl, *Zakres odpowiedzialności…*, p. 11.

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impossible to kill a man by only instructing to kill or managing the execution of the homicide is not convincing either[29]. If we reject the assumption that the perpetrator is only the one who fulfils the criteria of an offence by himself[30], while adopting that the perpetrator is the one who causes their fulfilment, one can conclude that human death may be caused by ordering or directing homicide murder. It should be added that this approach falls within the linguistic meaning of the verb "to kill"[31]. This, in turn, undermines the assumption that an interpretation abstracting from a strictly formal-objective understanding of perpetration is a broadening interpretation to the disadvantage of the perpetrator[32]. There is no obligation in the process of interpretation to adopt the meaning that is most favourable to the perpetrator. If the result of the interpretation carried out with the use of teleological rules leads to the selection of a meaning less favourable for the perpetrator, but it remains within the limits of the possible linguistic meanings of the interpreted phrase, it is not a broadening interpretation but adequate interpretation[33]. Furthermore, the literature presents even a view that even a complete departure from the results of a linguistic interpretation is acceptable, provided that maintaining its results would

[29] *Ibidem*, p. 12.

[30] What is possible on the basis of the concept of prohibited act presented, following W. Patryas, by Pohl, and assuming that the perpetrator is the one who caused the situation concerned. See *ibidem*.

[31] The verb "to kill" has a number of meanings in Polish. One of them is "to take life in a violent manner" which indicates the execution activity of killing, but the other is "to become the cause of death", which allows any behaviour that causes death, not just in the form of direct perpetration. This approach covers directing the commission of an offence, solicitation to commit an offence, indirect perpetration and even incitement, and maybe come types of aiding and abetting. See https://sjp.pwn.pl/szukaj/zabijać.html [sccess: 29.01.2018].

[32] Such an objection was raised by Pohl (*Zakres odpowiedzialności…*, p. 12). In an earlier study, this author went further to conclude that an interpretation different from that presented by him violates a very strong interpretative directive requiring the resolution of interpretative doubts in favour of the offender (see Ł. Pohl, *O (nie)możliwości pociągnięcia osoby nieletniej do odpowiedzialności karnej za tzw. niewykonawcze formy współdziałania przestępnego na gruncie kodeksu karnego z 1997 r.*, [in:] *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi*, red. V. Konarska-Wrzosek, J. Lachowski, J. Wójcikiewicz, Warszawa 2010, p. 176). As to the latter argument, it is worth noting that the room for the application of the *in dubio pro reo* principle would exist only where the doubts were not removed in the process of interpretation. In the process of interpretation, certain rules of preference are adopted, which ultimately leads to a situation which leaves no doubt. This was rightly pointed out by S. Tkacz and Z. Tobor, noting that this ultimately results in that the *in dubio pro reo* directive will never be used. See S. Tkacz, Z. Tobor, *Interpretacja „na korzyść oskarżonego"*, [in:] *Studia z wykładni prawa*, red. C. Martysz, Z. Tobor, Bydgoszcz–Katowice 2008, p. 138. See also M. Kulik, *Czy reguła in dubio pro reo jest dyrektywą wykładni*, [in:] *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2013–2015. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, red. T. Grzegorczyk, R. Olszewski, Warszawa 2017, p. 235 ff.

[33] A. Choduń, M. Zieliński, *Aspekty językowych granic wykładni*, [in:] *Stanowienie i stosowanie prawa podatkowego. Księga jubileuszowa Profesora Ryszarda Mastalskiego*, red. W. Miemiec, Wrocław 2009, p. 93 ff.

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negate one of the basic features attributed to the legislature[34]. In the analysed case, such an option is not possible. We are dealing with an interpretation which – with assumptions proposed by Zoll, which can be defended – is adequate, not broadening.

It should be added, however, that the fundamental argument used in this regard by Zoll is strictly formal – the author assumes that in the case of incitement and aiding, the qualification is combined (the relevant provision of the Special Part of the Criminal Code in conjunction with Article 18 § 2 or § 3 CC), when the qualification is only based on the provision of the Special Part, hence Article 10 § 2 CC refers only to perpetration[35]. I do not share this view, as I am of the opinion that qualification is in fact always combined, not only in the case of incitement and aiding/abetting, but also for all forms of perpetration.

It is worth noting that the Criminal Code of 1932, where neither perpetration by a single individual nor complicity was defined, and even perpetration as such, did not contain normative bases to support the restrictive concept of perpetration. One could argue that this includes also indirect perpetration. The statement that the Criminal Code of 1932 was in favour of a restrictive concept of perpetration is accurate only in part and boils down to the statement that excluded incitement and aiding/abetting from the scope of the notion of perpetration. However, it did not exclude all conceivable forms of perpetration. Assuming that the perpetrator is the one who causes the fulfilment of the statutory criteria of a prohibited act, and understanding this assumption in such a way that the perpetrator does not have to carry out the executive action himself, one could find in that regulation the basis for distinguishing indirect perpetration. This distinguishing was opposed by the author of the Code of 1932 himself[36], but the views of the author of the regulation are something different than possibilities of interpretation. Therefore, the case law was referring to concepts introducing indirect perpetration[37].

Article 18 § 1 of the currently applicable Criminal Code defines various forms of perpetration. There is no doubt that for directing the commission of an offence and solicitation to commit an offence, the determination of the executive activity takes place precisely in this provision. However, it is not the case that, in relation to complicity, it is done merely by a provision of the Special Part. As to perpetration by a single individual, one can indeed take the position that the description contained in a provision of the Special Part corresponds directly to it. But would such a view

[34] See Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa 2012, pp. 77–78; M. Zieliński, *Koncepcja derywacyjna wykładni prawa w orzecznictwie Izby Karnej i Izby Wojskowej Sądu Najwyższego*, [in:] *Zagadnienia prawa dowodowego*, red. J. Godyń, M. Hudzik, L.K. Paprzycki, Warszawa 2011, p. 117; resolution of the Supreme Court of 29 October 2012, IKZP 15/12, OSNKW 2012, No. 11, item 111.

[35] A. Zoll, *op. cit.*, p. 181. See also P. Kardas, *Teoretyczne podstawy odpowiedzialności…*, p. 466 ff.

[36] J. Makarewicz, *op. cit.*, pp. 129–130.

[37] Critically about this case law see *ibidem*, p. 130.

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be fully accurate? Well, it can be challenged. Assuming that the perpetrator is the one who caused the state of affairs concerned, and accepting the material-objective concept of perpetration, one would argue that the special provision refers not to perpetration by the offender himself, but all the conceivable forms of perpetration, including those not referred to in the Code of 1997, such as indirect perpetration in the broad sense[38].

According to such a perspective[39], the provision of the Special Part would concern all forms of perpetration, including indirect. On the other hand, Article 18 § 1 CC would reduce the liability for them to those forms of perpetration that are explicitly mentioned in this provision. The provision in its first part stating that the perpetrator is, among others, whoever performs a prohibited act, would not only state that the act is committed by one perpetrator, but also, and perhaps first of all, that the perpetrator fulfils the criteria of an offence by himself and in person. This is indicated by the dictionary meaning of the Polish pronoun *sam* ('alone, oneself'). Among many meanings of this pronoun, two are the most prominent: "1. a pronoun indicating that a person performs an activity independently or voluntarily, or that he or she has no company or assistance, e.g. *Sam posprzątał* (*He cleaned it up himself*). *Zawsze podróżuje sam* (*He always travels alone*). 2. pronoun referred to a person who performs a certain activity and indicating that it is important that this individual person performs it, e.g. *Nie uwierzy, póki sam nie zobaczy* (*He will not believe until he sees himself*)"[40]. Thus the beginning of Article 18 § 1 CC indicates that from among various possibilities of causing the fulfilment of the criteria of an offence, conceivable under a provision of the Special Part, this includes, apart from the directing of the commission of an offence, solicitation to commit an offence and complicity, only perpetration consisting in the independent and personal fulfilment of the criteria of the offence. It is Article 18 § 1 CC in its initial part which results in that irrespective of the adopted concept of perpetration, indirect perpetration cannot be accepted under the currently applicable Criminal Code[41].

Such an approach means adopting a view different from that pursued by P. Kardas that the statutory definition of individual perpetration contained in Article 18 § 1 CC does not seem to play a greater role at the level of defining a prohibition or

[38] After all, directing the commission of an offence, solicitation to commit an offence or some forms of incitement (e.g. inciting to commit an inadvertent offence) did not "fill" the entire space, which was occupied in the law theory by indirect perpetration for some time.

[39] Which I assume on a provisional basis, as finally I support a concept that goes even further, stating that under provisions of the special part it is also about inciting and aiding/abetting.

[40] https://sjp.pwn.pl/szukaj/sam.html [access: 23.01.2018].

[41] At the same time, it should be concluded that it is Article 18 § 1 CC which decides that the Polish Criminal Code actually supports the restrictive definition of perpetration. Having adopted the optics acceptable here, it should be stated that this provision does not expand but rather narrows the scope of perpetration.

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order, because this prohibition is expressed in an identical form by the provision of the Special Part[42]. In the interpretation presented here, this definition plays an important role limiting the scope of the notion of perpetration and delimiting the criminal liability of the perpetrator[43]. It is worth noting that this is the role of Article 18 § 1 CC in its part referring to complicity as regards delimitation between complicity and aiding, based on the construction of the significance of the role.

It should be stressed that the above-mentioned reasoning on perpetration seems to negatively verify the concept presented by Pohl, but by no means undermines the validity of the concept presented by Zoll and Kardas, who assume that Article 10 § 2 CC refers to all forms of perpetration, both direct and non-direct, but does not refer to incitement and aiding/abetting. This is the consequence of the assumption adopted by these authors that the provision of the Special Part simply defines types of perpetration[44]. In the light of this assumption, the position presented by them is right. However, can anyone have a different assumption? Yes, it seems so.

In the light of the findings above, the provision of the Special Part by itself does not typify any form of perpetration. Zoll and Kardas believe that it classifies types all the forms of perpetration. Perhaps, however, one can go a step further out of purely formal and dogmatic assumptions. If we assume that the provision of the Special Part does not describe by itself any of the perpetration forms, and if we keep in mind that it does not describe non-perpetration forms[45], it can be concluded that none of the complicity embodiments, whether perpetration or non-perpetration ones, is not independently described in the provision of the Special Part. Consequently, when Article 10 § 2 CC refers to specific provisions of the Particular Part of the Criminal Code, it does not refer solely to the perpetration of prohibited acts in these provisions, but all types constructed based on the norms expressed therein[46]. Such

[42] P. Kardas, *Teoretyczne podstawy odpowiedzialności*..., pp. 428–430. This view was cited in an appreciative manner by Pohl (*Zakres odpowiedzialności*..., pp. 15–16). This author states that Article 18 § 1 CC contains the characteristics of actual perpetration which is considerably poorer than in the provision of the Special Part (*ibidem*, p. 15). However, the fact is that this position is acceptable only with the assumption that as a rule, perpetration can only be done by the offender himself, any introduction of other than perpetrations than that committed by the offender himself is an extension of the scope of perpetration. As indicated above, this position shows weakness as opposed to the construct of actual complicity, considered by Pohl a form of direct perpetration, in the case of which the perpetrator is someone who has not fulfilled all the criteria of an offence.

[43] This differs from the Pohl's opinion (*ibidem*), who considers the provision of Article 18 § 1 CC redundant, not only within for perpetration by a single individual, but direct perpetration in general and therefore also complicity.

[44] For details, see M. Kulik, *Liability of Juveniles*...

[45] It is evident that incitement and aiding/abetting are – and this is beyond any controversy – regulated in Article 18 §§ 2 and 3 CC separately in the form – and that is already disputable – in the form of distinct types or complicity forms.

[46] As said above, the dispute may regard the question which provision in a given arrangement has the central character. Without going deep into this theoretical issue it is worth noting that Pohl

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types will include various forms of perpetration, incitement and aiding/abetting[47]. This allows us to recognise that Article 10 § 2 CC refers to all the embodiments of complicity of a prohibited act, as this provision does not describe the prohibition completely, but indicates which provision of the Special Part of the Criminal Code shall be used to reconstruct it, without limiting what elements of this prohibition are reconstructed based on the provisions of the General Part, e.g. creating embodiments of complicity[48]. In other words, Article 10 § 2 CC points to the provisions of the Special Part, both as to the extent to which they relate to perpetration, such as incitement and aiding/abetting, which, using the optics presented here, would not infringe the assumption that embodiments of complicity are not forms but types of prohibited acts.

The interpretation presented here does not seem to have the broadening character, although the opposite position is strongly proposed by Pohl[49]. The matter is whether it is possible in a given case to say conclusively if an inciter and helper for a prohibited act in one of the provisions indicated in Article 10 § 2 CC commits an offence under one of these provisions. It seems that a linguistic reading of Article 10 § 2 CC also allows this understanding. It all depends on how to read the con-

(*Zakres odpowiedzialności…*, p. 15) is of the opinion that as regards incitement and aiding/abetting the central provision is Article 18 § 2 or 3 CC accordingly, for indirect perpetration Article 18 § 1 CC, while for perpetration by a single individual or for complicity, the relevant provision of the Special Part of the Criminal Code. Even adopting strictly formal-objective assumptions underlying this view (considered by the author to be irrefutable [*ibidem*], though, as indicated above, different views are also proposed by scholars) it can be seen that without reference to Article 18 § 1 CC it is impossible to regard actual perpetration as direct perpetration in the sense adopted by that theorist. Hence, it seems that it is possible to defend the position that Article 18 § 1 CC is a central provision or, which is even most justified, that the provision of the Special Part is an incomplete central provision. See M. Kulik, *Czy nieletni może odpowiadać karnie za niesprawcze formy współdziałania przestępnego oraz formy stadialne poprzedzające dokonanie?*, „Studia Prawnicze" 2016, nr 4, p. 139. For the very notion of incomplete central provision, see M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012, p. 111, while the provisions of Article 18 §§ 1–3 CC may be treated as complementing it. Of course, it is a matter of angle of view, it can be argued just opposite and still true under certain assumptions. See e.g. P. Kardas, *Teoretyczne podstawy odpowiedzialności…*, p. 560; *idem*, *Sprawstwo kierownicze i polecające – wykonawcze czy niewykonawcze postaci sprawstwa?*, „Przegląd Sądowy" 2006, nr 5, p. 93; R. Dębski, *O teoretycznych podstawach regulacji współdziałania przestępnego w kodeksie karnym z 1997 r.*, „Studia Prawno-Ekonomiczne" 1998, t. 58, p. 121; *idem*, *Jeszcze o tzw. sprawstwie niewykonawczym (kierowniczym i polecającym) w kodeksie karnym z 1997 r.*, [in:] *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. urodzin Profesora Tomasza Kaczmarka*, red. J. Giezek, Kraków 2006, p. 121. Regardless of the perspective adopted, the acceptance of the presented assumptions means that the description of the forbidden behaviour is reproduced each time on the basis of the relevant provision of the Special Part and Article 18 CC.

[47] M. Kulik, *Czy nieletni…*, pp. 139–140.

[48] *Ibidem*, p. 139.

[49] Ł. Pohl, *Zakres odpowiedzialności…*, p. 13.

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tent concerned. If we support the position, presented here, that always in the case of a provision of the Special Part one should take into account the content of the provision of the General Part that makes up the given embodiment of complicity, it is possible to defend the standpoint that this regards not only perpetration, but also incitement and aiding/abetting. When verifying this statement in linguistic terms, one should answer the question whether an inciter, for example to the basic type of homicide, infringes the provisions of Article 148 § 1 CC, and therefore, whether he commits the act and whether it is an act "falling under this provision". Such an interpretation will remain within the linguistic meanings of the wording "commits the prohibited act defined in Article […]"[50]. Not only direct perpetration, but also non-direct perpetrations, incitement and aiding/abetting are acts defined in the provisions listed in Article 10 § 2 CC.

This makes it impossible to consider it a broadening interpretation. Admittedly, the teleological directives are used here are referred to below, but in a situation where the results of linguistic interpretation have been modified using other methods, there is no broadening interpretation if the final result falls within the limits of the linguistic meaning of the interpreted phrase. This is an adequate interpretation[51]. In a given case, the modification is justified by teleological reasons, and the cases where the regulation "goes off target" are mitigated by the optional nature of its application[52]. Therefore, I think that Pohl's argument that criminal liability of a juvenile is an exception, and exceptions cannot be interpreted extensively, is poor[53]. This is not a broadening interpretation, but an adequate one.

These teleological reasons seem to be unambiguous. There is no reason to exclude from the scope of liability incitement and aiding, and especially directing of the commission of an offence and solicitation to commit an offence. It can even be observed that these reasons contravene a different view. It is difficult to recognize what would be in favour of excluding the act of directing of the commission of an offence and solicitation to commit an offence, as well as those forms of incitement that correspond to indirect perpetration. Finally, there is no point in favour of different treatment of various forms of complicity, which is an inevitable consequence of an interpretation different from that presented. Moreover, the interpretation proposed by Pohl requires, on the one hand, an amendment to Article 10 § 2 CC, and on the other hand it is based on the assumption that part of Article 18 § 1 CC is a statutory *superfluum*, while the interpretation proposed herein neither requires any amendments

[50] As Dębski (*Recenzja monografii…*, p. 157) aptly observes, an inciter and aider/abettor are perpetrators of their respective deeds.

[51] Cf. *ibidem*.

[52] A. Marek (*Kodeks karny. Komentarz*, Warszawa 2010, p. 46) rightly points out, the non-perpetrator forms most often will not justify the application of criminal liability to a juvenile, as it is optional.

[53] Ł. Pohl, *Zakres odpowiedzialności…*, p. 13.

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to any provisions, nor does it consider any of them as devoid of the validation value. It seems that if there is a choice between situations in which a provision can be sensibly interpreted without having to postulate its amendment, one should choose the first variant of interpretation, and it should also be assumed that no provision can be deemed redundant[54]. Having said that, one should support the above interpretation.

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[54] See e.g. judgement of the Supreme Court of 22 September 1999, III KKN 195/99, OSP 1999, No. 5, item 73 (with a positive commentary by A. Zoll).

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STRESZCZENIE

Całość opracowania poświęcona jest kwestii możliwości przypisania odpowiedzialności karnej nieletniemu działającemu w warunkach określonych w art. 10 § 2 Kodeksu karnego za czyny popełnione w różnych postaciach zjawiskowych. W niniejszej części autor uzasadnia własną koncepcję, odnosząc ją do konstrukcji jednosprawstwa, w szczególności wykorzystując problematykę tzw. sprawstwa pośredniego, a także podżegania i pomocnictwa. Pracę zamyka zwięzła konkluzja z odniesieniem do ogólnych zasad wykładni.

Słowa kluczowe: odpowiedzialność karna nieletnich; jednosprawstwo; sprawstwo pośrednie; podżeganie; pomocnictwo