The concept of a criminal case in the jurisprudence of the Polish Constitutional Tribunal against the background of the case-law of the ECtHR (iThenticate Similarity Report)

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The concept of a criminal case in the jurisprudence of the Polish Constitutional Tribunal against the background of the case-law of the ECtHR

Pojęcie sprawy karnej w orzecznictwie polskiego Trybunału Konstytucyjnego na tle orzecznictwa ETPC

1. Introduction

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

2. The problem of locating repressive regulations outside penal law

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

[1] As D. Szumiło-Kulczycka puts it:"the development in technology, economy and market have given rise to 'new forms of crime' with which the existing system of criminal repression has not been able to keep up" and "the need to regulate the use of the achievements of civilisation, and an effective regulation enabling it to be enforced, has collided with the tendency to abandon the traditional path of criminal law, namely the depenalisation tendency", D. Szumiło-Kulczycka, Prawo administracyjno-karne, Zakamycze 2004, p. 68.

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

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

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

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[2] D. Szumiło-Kulczycka, Prawo…, pp. 68, 70-71.
[3] M. Mozgawa, M. Kulik, Wybrane zagadnienia z zakresu wzajemnego stosunku odpowiedzialności karnej i administracyjnej, Ius Novum 3/2016, p. 40.See also A. Wróblewski, Wina w odpowiedzialności administracyjnej w aspekcie prawa do sądu w rozumieniu art. 6 EKPCz na przykładzie administracyjnych kar pieniężnych, PWPM 2022, No. 20, p. 116.
[4] M. Mozgawa, M. Kulik, Wybrane…, p. 44.
[5] See D. Szumiło-Kulczycka, Prawo…, pp. 30-31.
[6] D. Szumiło-Kulczycka, Prawo…, p. 70.
[7] See. M. Mozgawa, M. Kulik, Wybrane…, p. 47.
[8] D. Szumiło-Kulczycka, Prawo…, p. 71.See M. Kulik, Kilka uwag o potencjalnym wpływie regulacji w zakresie prawnokarnej ochrony środowiska na polskie prawo karne (na przykładzie Dyrektywy Parlamentu Europejskiego 2008/99/WE z 19 XI 2008 r.) (in:)E. Guzik – Makaruk, K. Laskowska, W. Filipkowski (eds.)Człowiek, Społeczeństwo i państwo z pespektywy nauk kryminologicznych. Księga jubileuszowa Profesora Emila W. Pływaczewskiego, Warszawa 2023; p. 659.
[9] See M. Mozgawa, M. Kulik, Wybrane…, p. 52.

From the offender's point of view, the advantage of placing the regulation outside criminal law is the absence of the element of moral condemnation and that the offence is not registered in the criminal record. This may give rise to the statement that classical criminal repression should apply only to behaviours that entail social condemnation, negative moral evaluation, while administrative repression is to regulate new spheres of human activity which do not yet contain an element of social condemnation for wrong behaviour.[10]

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

Some researchers argue that the considerations of pragmatism change gradually the philosophy underlying criminal justice. This results in departing from the fundamental principles of criminal law[14] and leads to a blurring of the boundaries between administrative law and criminal law. The same areas of social activity may be governed by both branches of law. The same conduct may constitute a criminal offence or administrative delict, depending on the

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

[11] According to the resolution of the 14th International Congress of the AIDP, decriminalization of transgressions is in accord with the principle of subsidiarity of penal law, D. Szumiło-Kulczycka, Prawo…, p. 73.

[12] See S. Żółtek, Prawo karne gospodarcze w aspekcie zasady subsydiarności, Warszawa 2009, p. 208-216.

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

[14] A. Weyembergh. Introduction, (in:) Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU, ed. F. Galli, A. Weyembergh, Bruxelles 2014, p. 9.

decision of the legislature. Similar sanctions may exist in both systems, and under the influence of the ECtHR case law similar rights and guarantees for citizens are gradually implemented in different liability regimes.[15].

3. ECtHR case-law

3.1.Terminological issues

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

The criteria for determining whether a charge is criminal and Article 6 is applicable to it also apply to Article 7 of the Convention.[16]In case Žajav v. Croatia, the ECtHR stated: "Even though these criteria were initially developed for the purposes of determining the applicability of Article 6 of the Convention under its 'criminal head', they are equally pertinent to the issue of the applicability of Article 7"[17].The condition for the application of Article 4 of Protocol No 7 (providing for the principle *ne bis in idem*) is, inter alia, that both cases are criminal in nature. In order to examine whether a case is criminal under Article 4 of Protocol No 7, the criteria

[15] P. Caeiro, The influence of the EU on the "blurring" between administrative and criminal law, (w:)Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU, ed.F. Galli, A. Weyembergh, Bruxelles 2014, p. 177.
[16] See Brown v. the United Kingdom (dec.), no.38644/97, 24 November 1998; Société Oxygène Plus v. France (dec.), no.76959/11, 17 May 2016, § 43; Zaja v. Croatia, no.37462/09, 4 October 2016, § 86.
[17] Žaja v. Croatia, no.37462/09, 4 October 2016, § 86.

developed in the case-law under Article 6 of the Convention apply[18]. Thus, the criteria determining the existence of an accusation under Article 6 ("criminal charge") can be applied to the interpretation of the concept of „criminal punishment" under Article 4 of Protocol No 7.However, it should be pointed out that the Court has held in several judgments that the concept of "criminal charge" under Article 4 of Protocol No 7 is narrower than under Article 6 of the Convention[19]. However, in the case Zolotukhin v. Russia[20], and subsequently A and B v. Norway[21], which are milestones in the development of ECtHR case-law on *ne bis in idem*[22], this approach was rejected. In Zolotukhin, the Court applying only the Engel criteria pointed out: "The notion of 'penal procedure' in the text of Article 4 of Protocol No.7 must be interpreted in the light of the general principles concerning the corresponding words 'criminal charge' and 'penalty' in Articles 6 and 7 of the Convention respectively"[23].

In the case A and B v. Norway, the applicants were accused of having failed to disclose their income in the tax statement, which resulted in failure to pay the tax. The perpetrators were held criminally liable for tax fraud and concurrently punished with administrative penalties in tax proceedings. When sentencing, the courts invoked and took into account the fact that the applicants had already been severely punished with the tax penalties imposed. The applicants alleged that, contrary to Article 4 of Protocol No 7, two proceedings had been conducted against them for which they were convicted twice for the same offence. The Court held, based on the Engel criteria, that the procedure in which the applicants were subject to a tax-law sanction concerned a "criminal" matter within the meaning of Article 4 of Protocol No 7.[24] However, according to the Court, there was no infringement of Article 4 of Protocol No 7, since "there was

[18] See e.g. M. Kierska, T. Marek, Zasada ne bis in idem w kontekście orzecznictwa ETPC, MOP 2015, Nr 21, s. 1145, Autorzy wskazują m. in. wyrok ECtHR 20.5.2014 in Case Glantz v. Finland, Application no. 37394/11.
[19] See e.g. Haarvig v Norway App no 11187/ [illegible] Storbråten v. Norway (dec.), no.12277/04, 11.02.2007, where ECtHR, determining the autonomous meaning of the concept "criminal" in Article of the Protocol No 7 of the Convention invoked more criteria in a catalogue open in relation to the Engel criteria. See also G. Coffey, An interpretative analysis of the European ne bis in idem principle through the lens of ECHR, CFR and CISA Provisions:Are three streams flowing in the same channel?, New Journal of European Criminal Law 2023, Vol.0 (0), p. [illegible].
[20] Sergey Zolotukhin v. Russia [GC], no.14939/03, ECHR 2009.
[21] A and B v. Norway [GC], nos.24130/11 and 29758/11, 15 November 2016.
[22] M. Szwarc, Łączne zastosowanie sankcji administracyjnych I karnych w świetle zasady ne bis in idem (Uwagi na tle orzecznictwa ETPC), PiP 2017, no. 12, p. 52.
[23] Sergey Zolotukhin v. Russia [GC], no.14939/03, ECHR 2009, § 52.
[24] A and B v. Norway [GC], nos.24130/11 and 29758/11, 15 November 2016, §139.

a sufficiently close connection, both in substance and in time, between the decision on the tax penalties and the subsequent criminal conviction for

them to be regarded as forming part of an integral scheme of sanctions"[25]. The conditions for a sufficiently close connection in substance are: the complementary nature of the two proceedings, their predictability, the evidence taking aspects, the existence of offsetting mechanisms to ensure that the

overall quantum of any penalties imposed is proportionate[26].It can therefore be concluded that the very concept of criminal case under Article 4 of Protocol No 7 is similar to that in Articles 6 and 7 of the ECHR (based solely on the Engel criteria), but other criteria are also pointed to for the application of the *ne bis in idem* principle. The weakest point of the decision in the case A. and B. v. Norway is that it has slurred over the circumstances in which the two proceedings had been conducted and the imposition of two penalties. That circumstance leads us to deny the consider that decision incorrect. It should be added that the ruling in the case A. and B. v. Norway shows some similarity to the ruling of the Polish Constitutional Tribunal in relation to Article 10(1) of the Code of Infractions, which creates an ideal concurrence of a criminal offence with an infraction.

3.2.Autonomous meaning of the concept of criminal case

As stated above, the rights guaranteed by the ECHR (including those under Article 6 in criminal matters, Article 7 of the Convention, Article 4 of Protocol No 7) apply only if the case is of a criminal nature. The Convention does not define a "criminal case". A case not designated as "criminal" in a national legal system may be considered criminal within the meaning of the Convention and be subject to the guarantees contained therein if the Engel standard is met. It is worth recalling that in this case the applicants were soldiers punished with disciplinary measures,

[25] Ibidem, §153.
[26] See ibidem, §132.

including by a few days of minor-gravity detention. A disciplinary case was not classified as criminal in the relevant national law. The Court nevertheless deemed it criminal.[27]It emphasised that if States could, at their discretion, classify an offence as disciplinary rather than criminal, the application of the guarantees provided for in Articles 6 and 7 would be subject to their sovereign will, which could lead to results incompatible with the purpose and subject-matter of the Convention.[28]Let us add that the autonomous understanding of the concept of criminal case operates unidirectionally. The classification of an act as a criminal offence in the national legal system is binding on the Court and entails the application of Articles 6 and 7 of the Convention. If the act is an administrative wrong, the issue of assessment under the ECHR remains open – the criteria for basing the responsibility on the principle of fault and severity of the penalty are then applied. The Court argued that: "The prominent place held in a democratic society by the right to a fair trial favours a "substantive", rather than a "formal", conception of the "charge" referred to by Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6 (…)."[29]

The autonomous interpretation of the concept of "criminal case" viewed through the Engel criteria has contributed to the gradual widening of the scope of criminal case-law to include matters outside traditional criminal law, e.g. disciplinary, administrative, tax, customs, competition, environmental and juvenile cases.[30]

3.3.Criteria of a criminal case

The Engel criteria are: the classification of the act under national law, the nature of the act and the nature and severity of the penalty that may be imposed[31].The first of these is of relative

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[27] Engel and Others v. the Netherlands, 8 June 1976, Series A no.22.
[28] This idea has been put even clearer in Campbell and Fell v. the United Kingdom, 28 June 1984, Series A no.80, § 68, where the Court stated as follows:"If the Contracting States were able at their discretion, by classifying an offence as disciplinary instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will.A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention".
[29] Adolf v. Austria, 26 March 1982, series A no.49, § 30.
[30] See Jussila v. Finland [GC], no.73053/01, ECHR 2006-XIV, § 43.
[31] Engel and Others v. the Netherlands, 8 June 1976, Series A no.22, § 82.

importance and is the starting point for assessing the case as criminal one.[32]If the act is criminalised under national law, the case is considered criminal. This is usually easy to determine, although the location of the provision can sometimes be misleading.[33]An examination of the subsequent criteria takes place when the case is not considered as criminal under national law[34].

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

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

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

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[32] Gestur Jónsson and Ragnar Halldór Hall v. Iceland [GC], 2020, §§ 85; J. T. Theilen, European consensus between strategy and principle.The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication, Nomos 2021, pp. 288-289, https://www.echr.coe.int/documents/d/echr/THEILEN-2020-European_consensus_between_strategy_and_principle

[33] See Gestur Jónsson and Ragnar Halldór Hall v. Iceland [GC], 2020, § 80.

[34] M. Guran, Short Considerations on the Scope of the Right to a Fair Trial Provided by Art. 6 of the ECHR - The Concept of "Criminal Charge", 9 LAW REV.157 (2019), p. 163.

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

[36] L. Ansems, C. Loeve, Targeted Financial Sanctions: Criminal in Nature?, EuCLR Vol.6, 1/2016, p. 65; P. Caeiro, The influence…, p. 176; Bendenoun v. France, 24 February 1994, Series A no.284, § 47.

[37] Lauko v. Slovakia, 2 September 1998, § 58; Bendenoun v. France, 24 February 1994, Series A no.284, § 47.

[38] M. Kłopocka-Jaśińska, op. cit., p. 318, Autorka powołuje P. van Dijk, , [in:]Theory and Practice of the European Convention on Human Rights, eds.P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, Antwerpia–Oxford 2006, p. 546.

[39] See Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, 2018, § 42

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

[41] P. Hofmański, A. Wróbel, Komentarz…, nb 78.The authors state, however, that the fact that the offence is punishable with an isolation-type penalty does not constitute an absolutely firm criterion for identifying the case as

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

3.4.“Criministrative law”?

It is important to note the slightly different approach of the Court to the problem of the application of guarantees when a case is considered criminal in the case Jussila v Finland. The case concerned tax penalties imposed for accounting errors, which amounted to 10% of the relevant tax liability (in the case at issue, this was approximately EUR 300). Applying the Engel criteria, the Court held that the case was criminal in nature. However, it suggested that a distinction should be made between criminal cases belonging to the “core” criminal law and

criminal, but nonetheless provides a strong presumption. See Engel and Others v. the Netherlands, 8 June 1976, § 82; S. Zolotukhin v. Russia, § 56, Engel and Others v. the Netherlands, 8 June 1976, § 82, Escoubet v. Belgium, no.26780/95, § 36; Campbell and Fell v. the United Kingdom, 1984, § 72.

[42] M. Guran, Short Considerations on the Scope of the Right to a Fair Trial Provided by Art. 6 of the ECHR - The Concept of "Criminal Charge", 9 LAW REV.157 (2019), see Öztürk v. Germany, 1984, § 53; Escoubet v. Belgium, no.26780/95, § 36, as well as Weber v. Switzerland,1990, §34.

[43] Matyjek v. Poland, no.38184/03, 24 April 2007, § 53; M. Guran, Short Considerations on the Scope of the Right to a Fair Trial Provided by Art. 6 of the ECHR - The Concept of "Criminal Charge", 9 LAW REV.157 (2019)

[44] Malige v. France, 23 September 1998, Reports of Judgments and Decisions 1998-VII, § 37; P. Hofmański, A. Wróbel, Komentarz…, nb 80.

[45] Grande Stevens v. Italy, § 122; A. Andrijauskaitė, Exploring the penumbra of punishment under the ECHR, New Journal of European Criminal Law XX([illegible]), p. 11.

[46] Blokhin v. Russia [GC], 2016, § 17[illegible], Gestur Jónsson and Ragnar Halldór Hall v. Iceland [GC], 2020, § 76; Jussila v. Finland [GC], 2006, § 38, seeAlso Lutz v. Germany, 1987, § 55, Öztürk v. Germany, 1984, § 54

[47] Kasparov and Others v. Russia, § 40.We can find an example of the cumulative approach in Bendenoun v. France, 1994, § 47

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

4. Soft law

The problem of placing repressive regulations outside criminal law and the need to establish certain guarantees for individuals have also been recognised in documents of the Committee of Ministers of the Council of Europe. Recommendation R (91) 1 of 13 February 1991 on administrative sanctions[50] recommended that Member States' governments comply with minimum common standards. The Recommendation sets out several substantive and formal legal rules, such as the specificity of sanctions and the conditions for imposing them, the prohibition of double punishment for the same acts, leaving the case unresolved or the imperative of undertaking activities involving administrative penalties within a reasonable period of time. Furthermore, in accordance with the principles laid down in Resolution (77) 31 of the Committee of Ministers of the Council of Europe on the on protection of the individual in relation to the acts of administrative authorities adopted on 28 September 1977, requirements relating to the procedure for imposing an administrative sanction are as follows: the right of a party to be informed of the allegations made against the party, of the evidence against the party, the right to

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[48] Jussila vs.Finland, § 43.

[49] R. Roth, Concluding remarks (in:)(in:)Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU, ed.F. Galli, A. Weyembergh, Bruxelles 2014, p. 249.

[50] Recommendation No.R (91) 1 of The Committee of Ministers to Member States on Administrative Sanctions

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

5. Character of the criminal case under Polish legal order

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

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

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

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[51] R. Kozioł, Administrative pecuniary penalty in the light of amendments to the administrative procedure, Toruń Business Review 15(4) 2016, pp. 41-50, E. Kruk, Sankcja.., pp. 297-298.

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

[53] Ustawa z 11.7.1932 r. (Dz.U. z 1932 r. Nr 60, poz. 572 ze zm.).

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

[55] Zob. M. Kulik (in:) P. Daniluk (ed.)Reforma 2020, p. 163. M. Kulik, M. Botnicki, op. cit., p. 462.See G. Heine, Unterschiedung zwischen Straftaten und Ordnungswidrigkeiten, Jurisprudencija 1999, vol.12, p. 19.

[56] Dekret 28.1.1953 r. o zabezpieczeniu racjonalnego i oszczędnego użytkowania energii elektrycznej i cieplnej.

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

While, from the point of view of the Engel standard, the responsibility for an infraction was and still is a criminal responsibility[58], the responsibility for an administrative delict in this respect seems at first sight to be ambiguous. Formally, neither an infraction nor an administrative delict is considered a criminal offence under Polish law. The responsibility for an infractions is based on the principle of fault. The responsibility for an administrative delict involves the very infringement of law and is therefore objective in nature. Within the law on infractions, there are a number of mechanisms that provide an adequate level of responsibility, typical of criminal law, including in particular mechanisms concerning determination of the penalty.[59]Until recently, such mechanisms did not exist under administrative delict law, but in 2017 they appeared, albeit in a form that is not very complex and operable. However, in 2017, the Code of Administrative Procedure was amended to introduce quite scarce regulations regarding the rules for the imposing of administrative fines. Article 189b of the Code of Administrative Procedure provides that an administrative fine is a statutorily specified penalty of a financial nature imposed by a public administration authority by way of decision as a consequence of a breach of law consisting in failure to comply with an obligation or breach of a prohibition imposed on a natural

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[57] D. Szumiło-Kulczycka, Prawo administracyjno-karne, Kraków 2004, p. 29; W. Radecki, in: P. Daniluk (ed.)Reforma prawa wykroczeń, vol.1, Warszawa 2019, p. 30; M. Kulik (in:)P. Daniluk (ed.)Reforma 2020, p. 165

[58] M. Cieślak, Polskie prawo karne, 1990, p. 15, W. Radecki, Kilka uwag o zastępowaniu odpowiedzialności karnej odpowiedzialnością administracyjną, in:M. Bojarski (ed.), Współczesne problemy nauk penalnych. Zagadnienia wybrane, Wrocław 1994, p. 13; idem. Normatywne ujęcie wykroczenia, Prokuratura i Prawo2003, No. 2, p. 64; idem: Dezintegracja polskiego prawa penalnego, Prokuratura i Prawo2014, No. 9, pp. 5–6, M. Górski Odpowiedzialność administracyjna w ochronie środowiska – zagadnienia podstawowe, Poznań 2007, p. 12, D. Danecka, Konwersja odpowiedzialności karnej w administracyjną w prawie polskim, Warszawa 2018,, pp. 37–38), A. Marek, Prawo wykroczeń, (materialne i procesowe), Warszawa 2002, p. 6, J. Skupiński, J. Szumski, Problemy kodyfikacji prawa wykroczeń, PiP 1998, No. 9–10, p. 189), A. Błachnio-Parzych, (Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej, Warszawa 2016, p. 32; M. Kulik (in:)P. Daniluk (ed.)Reforma 2020, p.169.

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

person, juridical person or organizational unit without legal personality. Further provisions cover temporal conflicts between statutory provisions, the rules on imposing penalties, exclusion of responsibility due to force majeure, cases of withdrawal from punishment, including due to negligible gravity of the infringement and res judicata. Subsequent provisions regulate limitation and reduction of penalties. Worth noting is Article 189a § 2 of the Code of Administrative Procedure, which provides that the provisions of Chapter IVa of the Code of Administrative Procedure are not applicable to the extent provided for in special legislation. All this did not make the repressive administrative responsibility a responsibility based on fault, but introduced elements that brought elements aligning the level of responsibility with the degree of gravity of the deed.[60]

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

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

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

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[60] R. Stankiewicz, Regulacja administracyjnych kar pieniężnych w Kodeksie postępowania administracyjnego po nowelizacji. Radca Prawny. Zeszyty Naukowe 2017, No. 2, p. 9 et seq.

[61] Ustawa z 24.08.2001 Kodeks postępowania w sprawach o wykroczenia. T.j. Dz.U. z 2022, poz. 1124 ze zm.

[62] E.g. under the Act amending the Act on the protection of monuments and care of monuments and certain other acts (ustawa z22.06.2017 r. o zmianie ustawy o ochronie zabytków i opiece nad zabytkami oraz niektórych innych ustaw Dz.U. z 2017 r. poz.1595) all infractions listed in the Act on the protection of monuments and care of monuments were transformed into administrative delicts.

Therefore, in substantive terms, there is no doubt that both categories of these acts are criminal matters[63], which means that the lack of statutory guarantee in administrative sanction proceedings at the level typical of criminal law and criminal procedure must raise an objection[64], particularly in a situation where the law does not resolve the concurrence between the two forms of responsibility.[65] How, then, does the jurisprudence of the Polish Constitutional Tribunal treat them?

[63] To be fair, it must be acknowledged that there is a view, still prevailing among administrative law scholars, that an administrative sanction, including a repressive sanction, does not have the characteristics of a criminal sanction, which would necessarily mean that the Engel standard does not apply to them. It is argued that attempts to transfer criminal-law constructs to administrative law. Responsibility under administrative law begins to operate in the event of a breach of administrative obligations by obliged entities. It is imposed under administrative law in an administrative procedure by public administration authorities. Sanctions depend on the type of norm infringed and are administrative sanctions. The apparent intensity, especially of financial penalties, is generally a reflection of the threat posed by infringements of the relevant provisions of administrative law. They are a manifestation of the specific protection of the public interest and their amount is, in principle, adapted to the material situation of the addressees of the norms and the intensity of the infringement of the public interest. .M. Błachucki, Wstęp, in:M. Błachucki (ed.), Administracyjne kary pieniężne w demokratycznym państwie prawa, Warszawa 2015, p. 6.Similar approach is presented by M. Stahl, Sankcje administracyjne – problemy węzłowe, in:M. Stahl, R. Lewicka, M. Lewicki (eds.), Sankcje administracyjne – blaski i cienie, Warszawa 2011, p. 25.This view cannot be accepted, as administrative delicts operate with sanctions of such a high degree of severity that it is difficult to imagine the possibility of imposing them in a state ruled by law in a way other than in a trial which ensures the citizen that his/her case is subject to impartial examination by the court and that he/she is held liable based on the principle of fault (M. Kulik (in:) P. Daniluk (ed.)Reforma 2020, p. 164).This is the case of the process of “administrativisation” of criminal law, mentioned above with regard to international regulations, which in Polish circumstances is characterised by the existence of not two but three categories of prohibited acts.J. Skupiński, Odpowiedzialność podmiotów zbiorowych na tle polskiej ustawy z dnia 28 października 2002 r. (próba zarysu problematyki), in:M. Płachta (ed.), Aktualne problemy prawa i procesu karnego.Księga ofiarowana profesorowi Janowi Grajewskiemu, Gdańsk 2003, p. 368; Z.Kmieciak, Charakter prawny orzeczeń w sprawach o naruszenie dyscypliny budżetowej a koncepcja sankcji administracyjnej, Glosa 1997, No. 11, p. 56; W. Wróbel, Zakaz podwójnej karalności i zasada ne bis in idem w obszarze przestępstw, wykroczeń oraz deliktów administracyjnych – wybrane zagadnienia, in: J. Godyń, M. Hudzik, L.K.Paprzycki (eds.), Zagadnienia prawa dowodowego, Warszawa 2011, p. 149; M. Mozgawa, M. Kulik, Wybrane…p.32.

[64] B. Wierzbowski, Problem kar administracyjnych w demokratycznym państwie prawnym, in:P. Kardas, T. Sroka.W. Wróbel (ed.), Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla, vol.I, Warszawa 2012, pp. 961–962; M. Król-Bogomilska, Kary pieniężne w prawie antymonopolowym, Warszawa 2001, p. 37; L. Staniszewska, Materialne i proceduralne zasady stosowane przy wymierzaniu administracyjnych kar pieniężnych, in:M. Błachucki (ed.), Administracyjne kary pieniężne w demokratycznym państwie prawa, Warszawa 2015, p. 30; M. Kulik (in:)P. Daniluk (ed.)Reforma 2020, p. 167.

[65] P. Nowak, Zbieg sankcji penalnej z sankcją administracyjną – de lege lata i postulaty de lege ferenda, CzPKiNP 2012, No. 2, p. 137 et seq.; B. Nita, Zakaz podwójnego karania w ujęciu konstytucyjnym, Zagadnienia Sądownictwa Konstytucyjnego 2011, No. 2, p. 14 p.7 i n.; E. Kruk, Zbieg odpowiedzialności administracyjnej i karnej, Zeszyty Naukowe Sądownictwa Administracyjnego 2011, No. 4, p. 53; P. Kardas, M. Sławiński, Przenikanie się odpowiedzialności wykroczeniowej i administracyjnej – problem podwójnego karania, in: M. Kolendowska-Matejczuk, V. Vachev (eds.), Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?, Warszawa 2016, p. 32

It does not come as a surprise that the Constitutional Tribunal, without hesitation and quite quickly, recognised an infraction case as a criminal case[66] and met in this regard strong support from scholars in the field.[67]The problem was not whether it was a criminal case, but resolving the concurrence of criminal responsibility for a criminal offence with responsibility for an infraction. The point is that the Code of Infractions provides for a situation in which the perpetrator by committing one act meets the criteria of a criminal offence and infraction at the same time. Moreover, the Code of Infractions solves this in a way that violates the *ne bis in idem* standard. It adopts, in Article 10(1), the construction of an ideal concurrence of criminal offence with infraction which leads to a multiplication of punishing for one and the same act, on the ground that one act is treated as if it were two different prohibited acts, one of which being a criminal offence and the other being an infraction.[68]

The solution has a number of consequences, both substantive-law and procedural. The most striking of these is the procedural effect, involving the possibility of conducting two

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[66]Wyrok TK z:29.4.1998 r., K 17/97, OTK 1998, Nr 3, poz. 30; 4.9.2007 r., P 43/06, OTK-A 2007, Nr 8, poz. 95; wyrok TK z:15.4.2008 r., P 26/06, OTK-A 2008, Nr 3, poz. 42; wyrok TK z 18.11.2010 r., P 29/09, OTK-A 2010, Nr 9, poz. 104.

[67]A. Błachnio-Parzych, The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of „Criminal Charge" in the Jurisprudence of the European Court of Human Rights, YARS 2012, Nro. 5, s. 49; P. Daniluk, Zbieg odpowiedzialności represyjnej za nieopłacenie składek na ubezpieczenia społeczne, in:P. Daniluk, P. Radziewicz (eds.), Aktualne problemy konstytucyjne w świetle wniosków, pytań prawnych i skarg konstytucyjnych do Trybunału Konstytucyjnego, Warszawa 2010, p. 551 et seq.; B. Nita, Zakaz podwójnego karania w ujęciu konstytucyjnym, Zagadnienia Sądownictwa Konstytucyjnego 2011, No. 2, p. 14; T. Oczkowski, Delikty administracyjne jako szczególna forma represji publicznej. Próba określenia coraz większego znaczenia sankcji administracyjnych, in: T. Bojarski, A. Michalska-Warias, I. Nowikowski, K. Nazar-Gutowska, J. Piórkowska-Fliege, D. Firkowski (eds.), Teoretyczne i praktyczne problemy współczesnego prawa karnego, Lublin 2011, p. 176; M. Król-Bogomilska, Z problematyki zbiegu odpowiedzialności karnej i administracyjnej – w świetle orzecznictwa Trybunału Konstytucyjnego, in:M. Płatek, M. Dziewanowska (eds.), Wina i kara. Księga pamięci Profesor Genowefy Rejman, Warszawa 2012, p. 69 et al.; A. Zientara, Odpowiedzialność karna i administracyjna za udział w zmowie przetargowej – możliwość podwójnego ukarania, in: M. Błachucki (ed.), Administracyjne kary pieniężne w demokratycznym państwie prawa, Warszawa 2015, p. 106; M. Kulik (in:) P. Daniluk (ed.) Reforma 2020, p. 167.

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

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

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

However, a penal measure which has already been enforced may be credited towards a more severe measure only if it is of the same type. That circumstance alone means that the

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[69] P. Daniluk, Idealny zbieg wykroczenia z przestępstwem (in:)P. Daniluk, M. Laskowska (eds.)Aktualne problemy konstytucyjne w świetle wniosków, pytań prawnych i skarg konstytucyjnych do trybunału Konstytucyjnego 2010 – 2012, Warszawa 2013, p. 564, K. Witkowska, Idealny zbieg czynów karalnych w Kodeksie wykroczeń a zasada ne bis in idem CzPKiNP 2012, vol.2 p. 110

[70] A. Gubiński, W kwestii rozgraniczenia niektórych kategorii wykroczeń i przestępstw, PiP 1972, vol.2, p. 43; J. Raglewski, Kilka uwag o specyficznych mechanizmach redukcyjnych kar w prawie karnym skarbowym i prawie wykroczeń (in:)W. Górowski, P. Kardas, T. Sroka, W. Wróbel (eds.)Zagadnienia teorii i nauczania prawa karnego.Kara łączna.Księga jubileuszowa Profesor Marii Szewczyk, Warszawa 2013, p. 670.The very mechanism is discussed below.

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

reduction mechanism in question does not cover all the consequences of the conviction. Furthermore, it does not cover the possibility of conduction two separate proceedings for the same act and of a double conviction, which means that the standard *ne bis in idem* as such is indeed breached in a purely procedural sense,[72] which is relevant for the general severity of punishment suffered by the offender. Nevertheless, the Constitutional Tribunal found that Article 10 § 1 of the Code of Infractions does not violate the prohibition of double punishment, claiming that the construct of the ideal concurrence of criminal offence and infraction is characterized by the fact that one criminal act is divided into a criminal offence and an infraction. The principle of *ne bis in idem* prohibits running a case and punishing the same person twice for the same act. According to the Constitutional Tribunal, this prohibition is not breached by the submission of a separate indictment and application for punishment for an infraction, adjudication and punishment for various parts of an act contrary to criminal law, as is the case with the ideal concurrence of criminal offence and infraction.[73]This view is not convincing. A separate legal assessment of different parts of criminal conduct does not alter the fact that it is a single act and that two separate proceedings are being conducted for this single act. The approach presented by the Constitutional Tribunal shows some similarity to the subsequent ECtHR judgment in the case A. and B. v. Norway[74], but with both courts using slightly different techniques to arrive at the flawed final conclusion. The ECtHR considers that two proceedings conducted with regard to one act constitute one proceeding. The Polish Constitutional Tribunal, in a less risky way, but also wrongly, assumes that for the purposes of the proceedings one act can be divided into two.

However, a breach of the *ne bis in idem* rule is a fact. Admittedly, the responsibility reduction mechanism as such is effective as regards the imposing of penalties and penal measures. It has been pointed out in the literature that it does not cover, for example, exemplary

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[72] M. Rogalski, Przesłanka powagi rzeczy osądzonej w procesie karnym, Kraków 2005, p. 435; P. Daniluk, Zbieg odpowiedzialności represyjnej za ten sam czyn wypełniający znamiona wykroczenia i przestępstwa (in:) P. Daniluk, M. Laskowska (eds.) Aktualne problemy konstytucyjne w świetle wniosków, pytań prawnych i skarg konstytucyjnych do Trybunału Konstytucyjnego 2010 – 2012, Warszawa 2013, pp. 568 – 569; K. Witkowska, Idealny, p. 130, S. Waltoś, Kolizja postępowania karnego i karno-administracyjnego, Palestra 1961, no. 12, p. 27; M. Kulik (in:)P. Daniluk (ed.)Reforma 2019, p. 158.

[73] Wyrok TK z 1.12.2016 r., K 45/14; Dz.U. 2016, poz. 220.See also: wyrok TK z 21.10.2015 r., P 32/12,Dz.U. 2015, poz. 1742.

[74] See above

damages, where these have been adjudicated in favour of equal parties for the criminal offence and the infraction, and the obligation to rectify the damage, where different types of compensation have been adjudicated for the criminal offence and the infraction.[75] In our opinion, this reservation is not correct with regard to the obligation to rectify damage. The reparation obligation is currently shaped in a civil-law fashion. It would not be reasonable to repeal the effects of a double conviction in this respect. The same is true with regard to exemplary damages. Although they are largely penal in nature, the legitimate interest of the victim also comes into play here.

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

As regards administrative delict, it is worth noting that there is no statutory basis for resolving conflicts between repressive disciplinary responsibility and criminal responsibility (for a criminal offence or infraction). However, as mentioned above, the Constitutional Tribunal considers it to be a form of criminal responsibility, at least in some cases. These issues are not resolved *en bloc* by the Constitutional Tribunal, but it resolves them in detail in relation to individual cases of repressive administrative responsibility. In doing so, the Constitutional Tribunal has repeatedly applied the Engel criteria in its jurisprudence, referring directly not only to the Constitution of the Republic of Poland, but also to the ECtHR case-law. Therefore, it examines the compatibility of a specific provision providing for repressive responsibility not only with Article 2 of the Constitution of the Republic of Poland, but also with Article 4 (1) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up on 22 November 1984 in Strasbourg and Article 14 paragraph 7 of the

[75] P. Daniluk:Zbieg…, p. 569.

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

The Constitutional Tribunal has defended this view in a number of rulings. This applies both to judgments in which it recognised certain cases of formally administrative responsibility as cases of criminal responsibility and to those in which it refused to identify such nature. It takes the view that combining pecuniary penalty for stating factually inaccurate data and information in a bill of lading or other documents [78] with the responsibility for the offence of attestation of untruth (Article 271 of the Criminal Code) constitutes an infringement of *ne bis in idem*, given, in essence, the criminal nature of responsibility under the Act on road transport[79], that the provisions of administrative law may be repressive[80], since there is no penal sanction with a relatively low degree of severity[81]; that the administrative surcharges provided for in the social system legislation may serve as criminal penalties,[82] that the reimbursement of unpaid tax does not have a penal nature[83], but that is the nature of the additional tax liability imposed in addition

[76] Establishing the principle of democratic state ruled by law..
[77] Wyrok TK z 29.04.1998 r. K 17/97, OTK z 1998 Nr 3, poz. 30; wyrok TK z 4.09.2007 r., P 43/06, OTK-A 2007 r. Nr 8, poz. 95; wyrok TK z 18.11.2010 r., P 29/09, OTK-A Nr 9 z 2010 r., poz. 104; wyrok TK z 21.10.2015 r., P 32/12, Dz. U. z 2015 poz. 1742.
[78] Article 92 a of the Act on road transport (Ustawa z 1.09.2001 r. o transporcie drogowym, Dz.U. 2001 Nr 125 poz. 1371)
[79] Wyrok TK z 20.06.2017 r., P 124/15, Dz.U. 2017, poz. 1214
[80] Uzasadnienie wyroku TK z 15.04.2008 r., P 26/06, Dz.U. 2008 nr 66 poz. 410.
[81] Interestingly, the Constitutional Tribunal analysed the issue of the concurrence of an administrative sanction consisting in the withdrawal of a driving licence with a fine for an infraction, and assumed that none of them was of a criminal nature in a given case. Wyrok TK z 11.10.2016 r., K 24/15, OTK-A 2016, poz. 77.
[82] Wyrok TK z 18.11.2010 r., P 29/09, OTK - A 2010, nr 9, poz. 104
[83] Wyrok 9.04.1998 r., K 17/97, OTK z 1998 Nr 3, poz. 30.

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

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

6. Instead of conclusions:

The aforementioned inconsistency in the treatment of administrative delicts and infraction slightly obscures the view of the criminal case under Polish law. When comparing the application of the Engel criterion in the case-law of the ECtHR and of the Polish Constitutional Tribunal, the specificity of the Polish solution should be taken into account. However, this specificity – as can be seen when analysing the provisions of the Code of Infractions on the concurrence of criminal offence and infraction compared to the provisions on administrative pecuniary penalties against the background of the case law of the Constitutional Tribunal – does not concern the very criteria, but the way of resolving the concurrence of various forms of repressive responsibility. In this respect, it can be noted that the Polish Constitutional Tribunal applies criteria similar to the Engel standard. The answer to the question posed at the outset whether the Constitutional Tribunal applies criteria similar to those developed in the case-law of

[84] Wyrok TK z 4.09.2007 r., P 43/06, OTK-A z 2007 r. Nr 8, poz. 95.
[85] M. Kulik (in:) P. Daniluk (ed.) Reforma…, p. 178.

the ECtHR is therefore affirmative, which means that the standard developed in this respect in the case-law of both courts is similar. Both courts apply exceptions to the *ne bis in idem* rule, although in the case-law of the ECtHR the exception introduced by the judgment in the case A. and B. v. Norway is not regarded as an exception, but it is assumed (which cannot be accepted) that it is not *a ne bis in idem* case. The Polish Constitutional Court, on the other hand, accepts the violation of the *ne bis in idem* principle in the case of infractions, considering the reduction mechanism at the level of enforcement of the sentence, provided for in the Code of Infraction, to be effective. Both solutions may raise doubts from the point of view of the *ne bis in idem* principle. The exception existing in the Polish system may raise serious doubts from the point of view of the internal coherence of the system, as the possibility of violating the *ne bis in idem* rule concerns infractions, i.e. cases of responsibility based on the principle of fault, and not administrative delicts, i.e. cases of objective responsibility. Finally, it is quite clear from the analysis of the case-law of the Polish Constitutional Court that the Constitutional Tribunal eagerly refers to the jurisprudence of the ECtHR, and the arguments contained therein is often adopted as an important validating factor in the rulings of the Polish constitutional court. Interestingly – it did not refer, either approvingly or critically, to the view contained in the controversial ECtHR decision in the case A. and B. v. Norway. This may be due to the crisis of the Polish Constitutional Court in recent years and its associated low activity, but as of today, this latter view expressed by the ECtHR has not been accepted by the Polish Constitutional Tribunal.

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