

CRIMINAL LIABILITY FOR ACTS LEADING TO THE SPREAD OF INFECTIOUS DISEASES IN THE REGULATIONS OF THE PENAL CODES OF SELECTED EUROPEAN COUNTRIES

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Abstract. Counteracting the spread of infectious diseases poses a challenge for the efficient running of a state. The most common aspect of this issue concerns the establishment of appropriate legal regulations aimed at protecting human life and health against the spread of biological pathogens causing infectious diseases. In recent years, this issue has taken on a particular importance with the SARS-CoV-2 pandemic. National legislators have taken a number of legislative initiatives as a response to the emerging threat. However, in some cases, the existing regulations were considered sufficient. Legal scholars consider these issues primarily from the perspective of general administrative law. These include administrative law sanctions for non-compliance with prohibitions established within this field of law. However, the problem addressed in the title may also be considered from the perspective of criminal law, in particular in relation to the protection of human life and health. The central point of consideration is the protection of these values (individually and collectively) against the transmission of infectious diseases due to human negligence.

Keywords: infectious diseases; criminal law; health; life

INTRODUCTION

The proliferation of biological pathogens that cause certain infectious diseases is a worldwide phenomenon. For centuries, populations have contracted a variety of diseases, particularly infectious diseases, which have often decimated entire populations [Nelson and Master-Williams 2014, 3-18; Berger 2001, 11-17; Dobson and Carper 1996, 115-26; Anderson, May 1991, 1-26]. Developments in medical science have significantly reduced mortality from many known infectious diseases, primarily through the introduction

of widespread immunization as well as effective drugs. This has significantly reduced the risks to human life and health arising in particular from measles, rubella, polio and tuberculosis. However, HIV and other new varieties of infectious diseases still remain a challenge. It is worth mentioning that biological pathogens are constantly mutating, thus posing a constant threat to the population [Antia, Regoes, Koella, et al 2003, 658-61; Giesecke 2017, 1-30, 205-20].

In addition to medical science, a significant contribution to the reduction in epidemic threats has been made by a number of regulations of a general sanitary and anti-epidemic law, and above all by national legislation of an administrative and legal nature. One example of such a regulation in the Polish legal order is the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans¹ together with numerous implementing acts.² In addition to national regulations, a significant part of the anti-epidemic legislation can be seen in supranational regulations. In particular, one should note the numerous acts issued by the World Health Organisation (WHO) as well as the European Union (EU). Among those that have been selected, the eradication programmes for certain infectious diseases such as polio, rubella and measles are among the most important. These documents constitute specific *soft law* directives. They can be described as strategic plans for the containment of certain infectious diseases.³ In EU law there are also soft law regulations constituting recommendations to the Member States to counter the spread of infectious diseases.⁴

The development of the current anti-epidemic regulations was largely influenced by the SARS-CoV-2 pandemic, which prompted legislators to modify them [Coglianese and Mahboubi 2021, 1-18; Kubiak, Serwach, and Wrona 2020, 153-62; Urbanovics, Sasvári, and Teleki 2021, 645-57]. National regulations are mainly secured by sanctions of an administrative and legal nature (administrative fines, as well as direct and indirect coercion sanctions

¹ Journal of Laws of 2022, item 1657 as amended.

² See e.g.: Ordinance of the Minister of Health of 23 February 2023 on respiratory syncytial virus (RSV) infections (Journal of Laws item 354); Decree of the Council of Ministers of 25 March 2022 on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic emergency (Journal of Laws item 679 as amended).

³ See e.g.: https://www.euro.who.int/_data/assets/pdf_file/0009/247356/Eliminating-measles-and-rubella-Framework-for-the-verification-process-in-the-WHO-European-Region.pdf [accessed: 10.02.2023]; https://polioeradication.org/wp-content/uploads/2016/07/PEESP_EN_A4.pdf [accessed: 10.02.2023].

⁴ See e.g.: Recommendations for a common EU approach regarding vaccination policies for monkeypox outbreak response), as well as binding legal acts that are directly applicable or have to be implemented in national law (Regulation (EU) 2022/2371 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU).

applied on the basis of the Act of 17 June 1966 on enforcement proceedings in administration⁵). National legislation should be consistent with EU law and aim to implement the objectives of WHO. It is important that national laws form a certain whole in a certain region. This can effectively counteract the spread of infectious diseases across borders.

Compared to administrative law, criminal law regulations constitute only a small fraction of the system of anti-epidemic regulations. However, they are of fundamental importance, as sometimes, through human actions, there is at least a threat to the most important legal goods, which are life and health, both at the individual and supra-individual levels. These regulations should meet the current and future needs for the criminalisation of behaviour which may cause or causes the spread of infectious diseases. They should therefore cover such behaviour, such as: exposing people to an infection, causing damage to health through infection with a biological pathogen causing a specific infectious disease and exposing the life or health of many people to such an infection through an act or omission resulting in the spread of an infectious disease or causing an epidemiological threat.

1. LIFE AND HEALTH AS PROTECTED GOODS UNDER CRIMINAL LAW – INDIVIDUAL AND SUPRA-INDIVIDUAL LEVELS

Life and health are the most important values protected by various branches of law. These goods are in particular protected by criminal law. The necessity of their protection at every level of law stems from the regulations of international law and the provisions of national constitutions.⁶ First of all, reference should be made to Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁷ which states that everyone's right to life shall be protected by law. A similar message is echoed in Article 2 of the Charter of Fundamental Rights of the European Union,⁸ according to which everyone has the right to life.

The right to health, alongside the right to life, is a universally recognised human right, belonging to everyone due to their dignity [Riedel 2009,

⁵ Journal of Laws of 2022, item 479 as amended.

⁶ In Polish law, the protection of these values has also been elevated to constitutional status. Indeed, according to Article 38 of the Polish Constitution, the Republic of Poland provides everyone with the legal protection of life. In turn, Article 68(1) of the Polish Constitution stipulates that everyone has the right to health protection.

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).

⁸ OJ EU C 326/391.

21-23]. Article 14 of the Universal Declaration on Bioethics and Human Rights⁹ explicitly normalizes that health is essential to life itself and should be regarded as a social and human good. The relationship between the right to life and the right to health [Garlicki 2018, 211-20] is also justifiably identified. These two legal goods form a coherent correlate. It can thus be considered that without life there is no health, and that the loss of health can lead to the loss of life [Tyszkiewicz 2021, 210]. This also has significance in criminal law. It is not without reason that the Polish legislator combines these two legal goods in the title of Chapter XIX of the Penal Code. In this context, life and health should be seen as a set of the most important goods of an individual and of the society organised into a state [Zoll 2017, 255].

The criminal law protection of life does not raise any interpretative doubts. Criminal law doctrine identifies that it is a good of the highest rank, and that the level of its protection is a measure of “culture and humanity of a given society” [Pikulski 2012, 8]. It is further argued that “without life there is no man, and without man everything that is human loses its meaning on the principle of *contradicto in adiecto*. Human life is therefore an overriding value in the humanistic sense and the same rank must be given to it in the hierarchy of goods as objects of protection in the sphere of criminal law” [Cieślak 1989, 288]. On the other hand, as far as the protection of health in criminal law is concerned, it can be understood as a state of normal functioning of the body, which is characterised by the proper course of physiological processes ensuring a person’s ability to live actively and perform social functions [Kokot 2020, 1002; Michalski 2012, 203].

Under Polish criminal law, health and life appear in two configurations. Firstly, as generic goods, protected by criminal law (Chapter XIX of the Penal Code), and secondly, as individual goods, occurring alongside the generic good (certain provisions of Chapter XIX of the Penal Code, e.g. Article 163 of the Penal Code and Article 165 of the Penal Code). The indicated legal goods also exist on two levels: individual (health and life of a person) and supra-individual (health and life of many persons). Also on the basis of criminal law, these goods in most cases remain in close correlation.

From the individual point of view, health is protected in most provisions of Chapter XIX of the Penal Code; e.g.: causing grievous bodily harm (Article 156 of the Penal Code) and exposure to infection with an infectious disease (Article 161(1-2) of the Penal Code). On the other hand, in supra-individual terms, it is mainly contained in Chapter XX of the Penal Code; e.g. causing danger to the health of many persons (Article 165(1) of the Penal Code), but also in Chapter XIX of the Penal Code in the case of the qualified type of offence of exposing many persons to infection with

⁹ See https://unesdoc.unesco.org/ark:/48223/pf0000146180_pol [accessed: 10.02.2023].

an infectious disease (Article 161(3) of the Penal Code). Meanwhile, life as a legal good is protected primarily in Chapter XIX of the Penal Code (e.g. the offence of murder, the offence of infanticide). Life as a legal good also appears in Chapter XX of the Penal Code, alongside health, for example in Article 163 of the Penal Code and Article 165 of the Penal Code. However, it is worth noting that both Articles 163 of the Penal Code and 165 of the Penal Code treat health supra-individually (the health of many persons), and life both supra-individually (Articles 163(1) of the Penal Code and 165(1) of the Penal Code) and individually (Articles 163(3) of the Penal Code and 165(3) of the Penal Code, in which the qualifying feature is the death of a human being, and therefore of a single person).

2. MODEL OF CRIMINAL LAW GUARANTEES THE PROTECTION OF HUMAN LIFE AND HEALTH AGAINST THE SPREAD OF INFECTIOUS DISEASES IN POLAND

When reconstructing the model of criminal law protection of human life and health against the spread of infectious diseases in Polish criminal law, it is necessary to focus on Chapter XIX and Chapter XX of the Penal Code. In this respect, the acts stipulated in Article 156 of the Penal Code, Article 157 of the Penal Code, Article 161 of the Penal Code and Article 165 of the Penal Code would be of interest. In addition, Article 168 of the Penal Code and Article 169 of the Penal Code should be taken into account.

From the analysis of the indicated provisions of the Penal Code in terms of criminal liability for prohibited acts related to the spread of infectious diseases, it follows that the Polish legislator has provided for the punishability of both intentional acts (Article 156(1)(2) of the Penal Code, Article 157(1-2) of the Penal Code, Article 161(1-3) of the Penal Code, Article 163(1) of the Penal Code and Article 165(1)(1) of the Penal Code), as well as unintentional ones (Article 156(2) of the Penal Code, Article 157(3) of the Penal Code, Article 163(2) of the Penal Code and Article 165(2) of the Penal Code). In addition, the behaviours together with possible additional consequences resulting from intentional-unintentional acts (Article 156(3) of the Penal Code, Article 163(3) of the Penal Code and Article 165(3) of the Penal Code) as well as unintentional-unintentional acts (Article 163(4) of the Penal Code and Article 165(4) of the Penal Code) are punishable. Therefore, it can be considered that these regulations express the intention of the national legislator to guarantee the possibility of imposing criminal liability on a wide group of potential perpetrators of acts causing damage to the health or exposing to possible health hazards as a result of behaviour related to the spread of infectious diseases.

In the Polish legal order, behaviours causing grievous bodily harm in the form of causing a serious incurable or long-term disease or a real life-threatening disease, as well as causing other bodily harm, including that lasting up to 7 days, are punishable. It may thus be the causing of an infectious disease that will cause an injury to the health in a particular person other than that specified in Article 156 of the Penal Code. It is also worth noting that incurability of a disease is determined according to current medical knowledge. The feature is fulfilled when, according to this knowledge and medical experience, there are no methods which would allow for a cure. Infection with an infectious disease can also result in a serious long-term disease. In such a case, although the patient is likely to improve or even be cured, the condition persists for a relatively long time. In Polish jurisprudence, one can encounter the view that this is a period of at least 6 months.¹⁰ There is also a more flexible view, which does not refer to a specific time limit, but leaves it to the discretion of the court. Therefore, periods of a few weeks¹¹ or even a few days are considered possible (if during that time “there was a real threat to life, i.e. there was a serious disturbance of the basic functions of the organs essential for the maintenance of life, due to which death may occur at any moment”¹²). Long-term therefore means that the life-threatening condition must persist over an extended period of time, rather than be fleeting. The duration of the disease and its ‘term’ are therefore related to the period of dysfunction of the human body [Jurek 2010, 50-56]. In this view, the causing of an infectious disease in the victim may, in certain situations, correspond to the feature in question. On the other hand, the feature “real life-threatening disease” is fulfilled if death is imminent, although such a disease does not necessarily have to be serious or long-term. Such a view is shared in the judicature. The Supreme Court noted that “the reality of the threat of losing life does not depend in any simple way on the time of occurrence of such a condition – but it is always characterised by a significant degree of harm caused by the perpetrator causing a disease, the course of which may lead to the death of the victim at any time.” He also added that “a real life-threatening disease is a consequence of a bodily harm or a health disorder which, even in the event of prompt and intensive medical treatment, may as a rule and at any time lead to death.”¹³ The judicature emphasises the element of the “reality” of the threat. It must

¹⁰ Judgement of the Court of Appeal in Kraków of 21 June 2005, ref. no. II AKa 91/05, KZS 2005, No. 7-8, item 81.

¹¹ Judgement of the Court of Appeal in Lublin of 31 May 2004, ref. no. II AKa 98/04, “Prokuratura i Prawo” – wkł. 2005/3/17.

¹² Judgement of the Court of Appeal in Kraków of 16 September 2003, ref. no. II AKa 151/03, OSA 2004, No. 11, item 81.

¹³ Court Order of 21 April 2005, ref. no. IV KO 19/05, “Orzecznictwo Sądu Najwyższego w Sprawach Karnych” 2005, No. 1, item 824.

be referred to a specific person and their condition, and not to some abstract statistic (as was the case under Article 155 of the Penal Code of 1969, in which the legislator used the term “usually” life-threatening disease). It is therefore necessary to assess *in concreto* whether the injury or disorder in question constitutes a real threat to the patient’s life. It is therefore possible to fulfil this feature by contracting an infectious disease, the course of which is so dynamic as to result in a real threat to the life of the victim within a short period of time.

With regard to causing damage to health, it should be noted that each individual is characterised by a different level of health. It is therefore difficult to assume abstractly that any infectious disease is always going to be a serious long-term disease¹⁴ or a real threat to life. This thesis is relevant to the determination of the subject of the offence in question, and in particular to the determination of the intellectual element of intention. It may happen that the victim is not vaccinated against tuberculosis for medical reasons, but is infected by it through the intentional action of the perpetrator. Compared to a potential victim who would have been vaccinated against the disease, the unvaccinated victim would have experienced more severe clinical symptoms of tuberculosis than the vaccinated victim. However, the perpetrator may not plead a lack of knowledge of the victim’s potential inoculation, which could lead to exemption from liability for an intentional act on the grounds of a mistake regarding the circumstance constituting the feature of a prohibited act (Article 28(1) of the Penal Code). This implies that from the perspective of a criminal law valuation, it is sufficient to assume the general intention of the perpetrator connected by a causal link to the criminal effect, which would be the induction of a specific disease in the victim.

When analysing the statutory threat of punishment, it should be noted that the individually defined effect of contracting a specific disease, as well as the duration of this effect, determine the possibility of incurring criminal liability for both a misdemeanour and a crime. If the perpetrator’s behaviour results in meeting the legal definition of a crime described in Article 156(1) (2) of the Penal Code, the statutory sentence ranges from 3 to 20 years’ imprisonment. If an additional consequence of causing a specific disease is the victim’s death, the perpetrator may be sentenced from 5 to 30 years’ imprisonment or life imprisonment. On the other hand, if the perpetrator caused the disease unintentionally, then the statutory sentence ranges from 1 month to 3 years’ imprisonment. If the effect in the form of a specific disease does not correspond to the features of Article 156 of the Penal Code,

¹⁴ Judgment of the District Court in Sieradz of 16 December 2013, ref. no. II K 35/12, Lex no. 1716843.

the perpetrator may be liable under Article 157(1) of the Penal Code. In this situation, they face a penalty of imprisonment lasting 3 months to 5 years. If the effect in the form of a disease lasts for less than 7 days, they may be liable for the misdemeanour stipulated in Article 157(2) of the Penal Code, punishable by a fine, restriction of personal liberty or imprisonment for up to 2 years. It may thus be noted that the scope of criminalisation for causing damage to the health in the form of causing a specific infectious disease is very broad. Depending on the facts, the perpetrator may even face life imprisonment.

The Polish Penal Code also provides for the possibility of criminal liability for a perpetrator who, knowing that they are infected with a specific infectious disease, exposes another person to such infection. The legislator in the features of the criminal act stipulated in Article 161 of the Penal Code points to: HIV, an infectious disease, a venereal disease, a serious incurable disease and a life-threatening disease. The analysed type of prohibited act provides for the criminalisation of behaviour leading to the exposure to infection of one person (Article 161(1-2) of the Penal Code) and many people (Article 161(3) of the Penal Code), if the perpetrator is a transmitter of a venereal or infectious disease, or the HIV virus. The modified type, described in Article 161(3) of the Penal Code, was introduced during the SARS-CoV-2 pandemic [Kubiak 2020, 113-33]. The typification of this prohibited act is considered overly casuistic, and the protection of health prior to its violation in this aspect makes this provision of low practical utility [Daszkiewicz 2000, 399; Banasik 2009, 56-58; Derlatka 2013, 165-66; Łukuć 2018, 76-87; Kubiak, Serwach, and Wrona 2020, 153-62]. Particularly controversial is the addition of the mentioned qualified type to the provision in question. Firstly, the legislator used the evaluative feature “many” people in the description of this act. In the doctrine and judicature there is no consensus as to its interpretation. You may encounter a position indicating specific numerical values (e.g. 6 people [Buchała 1997, 50-51], 10 people [Stefański 2020, 1062-1063]), or suggesting making an evaluation *in concreto*. Such a view was expressed by the Supreme Court in its ruling of 11 January 2017,¹⁵ in which it stated that “it is impossible [...] to indicate *in abstracto* one, invariable, minimum number of objects fulfilling *in genere* the feature «many» in the Polish criminal legislation” and further “since the term «many» has not been specified in criminal law, it should not be specified in terms of interpretation, leaving the evaluation of meeting the given feature to the discretionary decision of the judicial authority in the practice of issuing rulings.” This issue is of major importance not only for the attribution of the features in terms of the object, but also the subject. Given that

¹⁵ Ref. no. III KK 196/16, OSP 2018, No. 3, item 26.

this misdemeanour is intentional and that the legislator has not provided for its unintentional counterpart, an error as to the quantitative feature may lead to a lack of liability in general. Therefore, it seems that the understanding of the analysed feature should be sought not so much in grammatical interpretation, but in the context of the object of protection and teleological interpretation. Considering that the presented regulation safeguards life and health, it can be assumed that the feature is fulfilled if the perpetrator causes a state of danger to an unspecified number of people, a wider group.¹⁶ In practice, however, this regulation may present difficulties. Secondly, the introduction of the discussed qualified type has caused problems in determining the relationship with the offence criminalised under Article 165(1)(1) of the Penal Code, which will be discussed later.

The misdemeanour described in Article 161 is punishable by imprisonment from 3 months to 5 years with regard to the basic type, while in the qualified type by imprisonment from 1 to 10 years.

The Polish Penal Code also provides for criminal liability arising from the exposure of health to the threat of its loss, as a result of behaviour manifested by causing an epidemiological threat or the spread of an infectious disease or an animal or plant disease (Article 165(1)(1) of the Penal Code). It is a misdemeanour against public safety, and the individually protected legal goods are life, health of many people and property of great magnitude. The resulting danger should be real and not abstract¹⁷ [Stefański 2013, 205]. It is worth noting, however, that this danger does not have to be immediate [Marek 2000, 464]. The perpetrator should by their conduct cause the spread of an infectious disease or an animal or plant disease. Among the features, there is also a criminalised causing of an epidemiological threat, which may be defined as a state of increased and relatively permanent threat to public safety, in the form of epidemic outbreaks or epidemics, caused by at least an unintentional human act or omission [Czechowicz 2023, 44].

The regulations in force in the Polish Penal Code relating to the protection of human life and health against the spread of infectious diseases cover a broad spectrum of criminalisation. However, it may be noted that when constructing the provisions of the Penal Code related to the title issue, the Polish legislator did not fully think through the substance of Article 161 of the Penal Code with the amendments that were introduced in 2020.

¹⁶ Such views in the context of bringing about a catastrophe in communications were already presented under the 1969 Criminal Code. Indeed, in its judgment of 20 June 1972 (ref. no. V KRN 209/72, OSNKW 1972, No. 10, item 158), the Supreme Court explained that “it must therefore be an event of this kind, which [...] causes damage that has the characteristics of universality, that is, in size and scope unforeseeable.”

¹⁷ See e.g.: judgement of the Court of Appeal in Szczecin of 11 October 2012, ref. no. II AKa 165/12, Lex no. 1237928.

In fact, one may notice many common features of the type from Article 165(1)(1) of the Penal Code with Article 161(3) of the Penal Code. Above all, both provisions refer to the exposure of a large number of people to the loss of health by creating a situation related to exposure to infection. Therefore, doubts may arise in legal practice regarding the legal classification of the act in question due to the unclear distinction between the two offences. The distinction between the two can be found in the feature “spreading”. Linguistically, it means “to spread, to extend more widely and further, to increase in size, to expand, to increase, to intensify, to escalate” [Dubisz 2018, 684]. The literature explains that this term should be understood as “the uncontrolled spread of a disease entity.” At the same time, it is argued that in order for this feature to be fulfilled, the mere threat of such a disease is not sufficient, but it must have already occurred (even if only in a few cases) for it to then “spread”. It is therefore a certain process that can lead to the damage to people’s health [Stefański 2004, 444]. It is added that “the threat to some extent must already have been updated” [Bogdan 2013, 453]. The issue is viewed similarly in case law. For example, the Court of Appeal in its judgment of 23 May 2014¹⁸ considered that “spread” is the occurrence of a significant number of cases in short intervals’. Therefore, it can be concluded from these statements that the act described in Article 161(3) of the Penal Code would in a way precede the occurrence of the condition referred to in Article 165(1)(1) of the Penal Code. This is because the perpetrator first exposes a number of people to infection and then, when such an infection occurs, may further distribute the disease by spreading it. It would be possible to therefore resolve the concurrence of these offences by means of the rule of prior joint conviction (apparent concurrence). In this way the perpetrator would be punished for the offence stipulated in Article 165(1)(1) of the Penal Code. However, the application of this rule is based on the assumption that the act committed jointly by several people is characterised by a lower degree of social harmfulness in relation to the act for which the perpetrator is convicted on their own. The measure of this degree is to a certain extent the statutory penalty for these acts (in the case of an act committed jointly by several people, the penalty should be lighter). In the analysed relationship of offences, this rule is disturbed. The act specified in Article 161(3) of the Penal Code is punishable from one to 10 years, while the misdemeanour described in Article 165(1)(1) of the Penal Code is threatened with imprisonment from 6 months to 8 years – a lighter penalty. From a dogmatic point of view, the reduction in criminal-law assessments by means of the rule in question would be questionable. The incoherence between these provisions and the problems occurring against this background result from the lack of reflection of the drafters with regard to the coherence

¹⁸ Ref. no. I ACa 1531/13, Lex no. 1477192.

of the Penal Code and the introduction of ad hoc and selective modifications. Apart from these doubts, it seems that the Polish legislator should generally rethink the further existence of Article 161 in the Penal Code. All the more so as it has little use in practice.¹⁹

3. THE MODEL OF CRIMINAL LAW GUARANTEES THE PROTECTION OF HUMAN LIFE AND HEALTH AGAINST THE SPREAD OF INFECTIOUS DISEASES IN THE CZECH PENAL CODE

At the beginning of the analysis of the current Czech Penal Code,²⁰ a remark should be made about the changes occurring in Czech criminal law in recent years. The Penal Code in the Czech Republic underwent transformations much later than in Poland. Until the end of 2009, the Czechoslovak Penal Code of 29 November 1961 remained in force, which had been amended several times over the years. It was not until 2009 that a new Penal Code was enacted, which entered into force on 1 January 2010 [Radecki 2009, 186-89]. This is also where the differences in the systematics of the law should be seen, as compared to the Polish Penal Code, its Czech counterpart was enacted almost 12 years later. It was this way for 8 years after Poland and the Czech Republic had joined the European Union, and several years after Poland and the Czech Republic had acceded to a number of multilateral international agreements (including human rights agreements and conventions). The Czech Penal Code of 2009 is therefore characterised by a more contemporary approach.

The Czech Penal Code has a relatively different structure in the special part, which is divided into Chapters (*Hlava*). There are two divisions in Chapter I, which will be useful for the analysis of the title issue. These are: Division 2 – Criminal Offences against Health and Division 3 – Criminal Offences Endangering Life or Health. In addition, for the analysis of the model of criminal law regulations against the spread of infectious diseases, Chapter VII, entitled ‘Generally dangerous criminal acts,’ which is the Polish equivalent of crimes against public safety, remains relevant. It should also be noted that the structure of the Czech Penal Code is divided into paragraphs, as editorial units, where individual types of generic prohibited acts are described.

¹⁹ The number of crimes found between 1999 and 2020 ranges from 5 to 20 cases. Only in 2009 were 51 such crimes found. See more: <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko/63436,Narazenie-na-chorobe-wywolana-wirusem-HIV-zakazna-lub-weneryczna-art-161.html> [accessed: 20.05.2023].

²⁰ Zakon č. 40/2009 Sb., trestni zakonik.

The Czech Penal Code criminalises acts of bodily harm. These are: grievous bodily harm (§ 145 of the Czech Penal Code), bodily harm (§ 146 of the Czech Penal Code), grievous bodily harm out of negligence (§ 147 of the Czech Penal Code) and bodily harm through negligence (§ 148 of the Czech Penal Code). These are acts with criminal consequences. In order to be criminalised, the perpetrator's act of causing the victim to be infected with an infectious disease should result in the victim contracting a specific infectious disease. As a side note, it should be noted that the Czech Penal Code does not criminalise the *sui generis* offence of exposure to infection, as is the case in the Polish Penal Code (Article 161 of the Penal Code).

When analysing the indicated offences, it should be noted that the described types of prohibited acts are extensive and casuistic. In § 145 of the Czech Penal Code, the criminalised act consists in the intentional infliction of grievous bodily harm, as defined in § 122(2). It lists, for instance, mutilation, loss or substantial impairment of the ability to work, paralysis of a limb, loss or substantial impairment of sensory functions, damage to an important organ and long-term damage to health [Jelínek et al. 2016a, 548]. The basic type of offence in question in the Czech Penal Code is § 145(1), consisting of intentionally causing grievous bodily harm to another person, which is punishable by 3 to 10 years' imprisonment. It is worth noting that, in contrast to the Polish Penal Code, the Czech criminal law explicitly indicates the feature of intentionality in the types of prohibited acts with this subjective side. Also, in the Polish Penal Code, separate substantive types relating to a different subjective side are created by indicating the feature of unintentionality. The Czech Penal Code, on the other hand, contains the feature of negligence, which denotes an unintentional form of guilt (e.g. § 147 of the Czech Penal Code and § 148 of the Czech Penal Code).

The entire § 145 of the Czech Penal Code is one of those with elaborate features. Paragraph 2 indicates the various qualifying features, the fulfilment of which has the effect of aggravating the criminal law response. According to this provision, the perpetrator is liable to a term of imprisonment of between five and twelve years if they commit the act referred to in paragraph 1, including: on two or more individuals or out of a condemnable motive. These two circumstances may correspond to the title issue and the possibility of applying criminal liability to a perpetrator who intentionally causes infection by a biological pathogen to two or more people or to one person, but in connection with a condemnable motive, for example out of a desire for revenge. It is worth pointing out an interesting use of the feature, which is the counterpart of the Polish feature "many people", which has been formulated very precisely and therefore does not give rise to the same interpretative doubts as under national legislation. The measure under the Czech Penal Code should therefore be assessed positively. Another qualifying

feature is death. However, the number of injured people is not indicated. It can therefore be the death of one person, but also “two or more people”. This leads to a broad criminalisation of the additional consequence which is an intentional-unintentional type. Thanks to this formulation, it is not necessary to distinguish another type of prohibited act of causing the death of multiple people. According to the wording of § 145(3) of the Czech Penal Code, the perpetrator faces a penalty of 8 to 16 years’ imprisonment.

It is worth noting that the Czech Penal Code criminalises preparation to cause grievous bodily harm (§ 145(4) of the Czech Penal Code). This significantly broadens the scope of criminalisation, but evidentially proving the fulfilment of these features under the conditions of the title issue is extremely difficult to achieve on practical grounds. There can be far-reaching doubts as to whether a person who is HIV-positive and plans to infect another person can be held responsible for preparation. Even the establishment of such an intention does not result in the fulfilment of the features of preparation, as it is not possible *in abstracto* to determine whether this virus is likely to cause a particular person grievous harm. A similar situation arises in the case of making preparations to infect another person through the possession of a biological pathogenic agent e.g. in a test tube.

The Czech criminal law also distinguishes the type of prohibited act consisting in grievous bodily harm done as a result of negligence. In Czech criminal law, negligence is understood as the perpetrator’s failure to exercise due care to cause an unintended criminal consequence, which is assessed through the prism of the culpability of the “average person” [Navotny, Vanduchova, Šámal, et. al. 2010, 234]. This is another difference from the Polish Penal Code, in which such a feature does not appear. In the Polish Penal Code, there is an unintentional form of causing grievous bodily harm (Article 156(2) of the Penal Code). In contrast, in the Czech Criminal Act of 2009, it is a feature that must be fulfilled in order for the perpetrator to incur criminal liability.

The Czech Penal Code also criminalises bodily harm (§ 146 of the Czech Penal Code). This act is punishable by 6 months to 3 years of imprisonment. Interestingly, this act has a qualified type, which consists in the additional consequence of grievous bodily harm. The perpetrator is then punishable by 2 to 8 years’ imprisonment. The Czech legislator uses the same terms referring to causing grievous bodily harm [Jelínek et al. 2016b, 179]. Hence, two situations must be distinguished. The first was pointed out when discussing § 145 of the Czech Penal Code – the perpetrator causing a specific infectious disease and causing grievous bodily harm. The second is more complex, as in order for the perpetrator to be liable under § 146 of the Czech Penal Code, the disease should first cause bodily harm and then cause a condition in a particular victim that qualifies for the higher punishment under

this provision, which is that the disease will lead to grievous bodily harm. If, on the other hand, the final effect is the death of the victim as a result of this disease, then the perpetrator would be subject to criminal liability under § 146(4) of the Czech Penal Code, which provides for criminal liability for causing death as a result of the fulfilment of the features stipulated in § 146(1) of the Czech Penal Code.

4. MODEL OF CRIMINAL LAW GUARANTEES FOR THE PROTECTION OF HUMAN LIFE AND HEALTH AGAINST THE SPREAD OF INFECTIOUS DISEASES IN THE ITALIAN PENAL CODE

The Italian Penal Code (*Codice Penale Italiano*²¹) has been in force – after numerous amendments – since 1930 and consists of three books [Lattanzi and Lupo 2015, 3-5]. In terms of analysing the regulations adopted in Italy with regard to incurring criminal liability for acts related to the spread of infectious diseases, two titles of Book II of the Italian Penal Code will be relevant: Title 6, which describes offences against public security, and Title 12, which contains types of offences against a person.

The discussed generic types of offences stipulated in the Italian Penal Code prima facie suggest an assessment that they more comprehensively address the issue of countering the spread of infectious diseases than in the Czech criminal law. In contrast to the Czech law, the Italian Penal Code criminalises causing an epidemic. It is a general offence with criminal consequences. The criminalised offence consists of the spread of biological pathogens (referred to as “pathogenic germs”), with the consequence of causing an epidemic. For this act, the Italian Penal Code provides for life imprisonment. The same penalty is imposed if at least one person dies as a result of the resulting epidemic. In addition, in the event of a conviction for an offence stipulated in Article 438 of the Italian Penal Code, the additional penalty provided for under Article 448 of the Italian Penal Code is publication of the judgment. Compared to Article 165(1)(1) of the Penal Code, the criminal sanction provided for in Italian criminal law must be assessed as severe.

The regulation contained in Article 452 of the Italian Penal Code, which provides for the modification of the punishment for offences against public health, should also be considered interesting, from the perspective of the discussed issue. It should be noted that the Italian Penal Code distinguishes this collective legal good, which is not distinguished by the Polish and Czech Penal Codes. According to this provision, if the perpetrator of the act defined in Article 438 of the Italian Penal Code commits it

²¹ Hereafter: Italian Penal Code.

due to negligence, they shall be punished by 1 to 5 years of imprisonment. As in the analysis of the Czech criminal law regulations, it should be noted that in the Italian criminal law doctrine, negligence is understood in the same way as in the Czech doctrine or in the Polish normative comprehensive theory of guilt [Castronuovo 2009, 32-35].

The Italian Penal Code also criminalises behaviour resulting in bodily harm (Article 582 of the Italian Penal Code). This act is punishable by 3 months to 4 years' imprisonment. The penalty is aggravated as a result of the occurrence of the qualifying features set out in Article 583 of the Italian Penal Code. This provision allows for a sentence of 3 to 7 years' imprisonment if the consequence of the harm caused is the contracting of a life-threatening disease. The second situation envisaged by this provision allows for the imposition of a sentence of 6 to 12 years' imprisonment if the consequence of the act referred to in Article 582 of the Italian Penal Code is the contracting of an incurable or probably incurable disease, which is established by a respective expert medical opinion. If, on the other hand, the final consequence of contracting an infectious disease is the death of a human being, then, on the basis of Article 584 of the Italian Penal Code, the perpetrator faces a penalty of 10 to 18 years' imprisonment.

The Italian model of regulations is based on a smaller number of types of offences than in the Czech legislation. It can be pointed out that it is more similar to the Polish regulations, but with a higher statutory punishment. Of note is the criminalisation of acts *stricto* related to the spread of infectious diseases, such as causing an epidemic. In addition, Italian legislation provides for features defining the consequences of contracting a disease, which is largely ignored in Czech law.

5. CONCLUSIONS AND *DE LEGE FERENDA* PROPOSALS FOR CHANGES IN THE NATIONAL REGULATIONS OF THE PENAL CODE ON THE BASIS OF THE PRESENTED SOLUTIONS OF SELECTED EUROPEAN COUNTRIES

There is no doubt that human life and health are the most valuable legal goods, also protected by criminal law. They may be threatened or damaged as a result of infection with an infectious disease. Legislative actions are therefore taken at both international and national levels to prevent and combat such diseases. This is mainly achieved through administrative law regulations, but due to the importance of these goods, criminal law instruments are also used. The consequence of the perpetrator's conduct may be either to endanger the life or health of one person or a larger group of people, or to cause damage to these goods. Therefore, the laws of individual states criminalise separately acts of endangering and causing damage

to these goods. However, different ways of incriminating them are used. *Sui generis* types are introduced, or such acts are variants of the offence of damage to health. The degree of casuistry in the description of these acts also varies. The statutory penalties for these offences are also different. Under Polish criminal law, such acts are placed in the chapter of offences against life and health (Chapter XIX of the Penal Code) and in the chapter of offences against public safety (Chapter XX of the Penal Code). This distinction suggests separate protection of human health and life as an individual good and collectively. However, this distinction was disturbed by the introduction, following the 2020 amendment, of the qualified type of misdemeanour criminalised in Article 161 of the Penal Code, i.e. exposure to infection of multiple persons (§ 3). This has led to doubts as to the relationship of this provision with Article 165(1)(1) of the Penal Code, which provides for, among other things, causing an epidemiological threat or the spread of an infectious disease. Additionally, the mentioned Article 161 also raises other controversies, e.g. with regard to its excessive casuistry (e.g. isolating the HIV virus), as well as its subjective scope. It is therefore arguable that such an extensive regulation is necessary. It is worth considering the introduction of more synthetic provisions, e.g. an appropriate modification of Article 160 of the Penal Code, which criminalises the misdemeanour of exposing persons to a direct risk of losing their life or serious injury to health. Perhaps it would be sufficient to supplement this provision with an additional paragraph dedicated to causing such a danger (not necessarily direct and grave) through exposure of a person to an infectious disease. The effect of such a move would also be to eliminate the problems of establishing the relationship with Article 165(1)(1) of the Penal Code. This is because Article 161(3) of the Penal Code, which appears to be redundant and its introduction dictated by an immediate need related to the SarS-CoV-2 pandemic, would be deregulated. Protection of health in supra-individual terms would therefore follow by means of Article 165(1)(1) of the Penal Code, which, due to its placement in the chapter describing offences against public safety, seems more appropriate in this regard. The repeal of Article 161 of the Penal Code would also remove other doubts, e.g. concerning a subject who may be the perpetrator of this act and the relationship of this provision to Article 160 of the Penal Code. It also appears that such a move would not prejudice the protection of human health and life that would be provided under the other provisions mentioned.

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