Teka Kom. Praw. – OL PAN, t. XI, 2018, nr 1, 301–319

THE CONCEPT AND MEANING OF LEGAL SECURITY IN CRIMINAL LAW

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Summary. The article emphasizes the importance of legal security in criminal law. The proposed definition of legal security – according to which legal security is a state achieved by law established in general, and in particular by means of criminal law, in which human life's goods and interests are protected in the most comprehensive and effective possible manner – harmonizes properly with the most important functions of criminal law, namely with a protective function and a guarantee function. The proposed understanding of legal security may be helpful for clarifying numerous issues related to the implementation of both the protective function and the guarantee function of criminal law. Although legal security is a particularly important value in criminal law, in the hitherto achievements of the doctrine and in the jurisprudence of criminal law, this value is sparsely the subject of considerations. The article indicates the necessity and possibility of further detailed research in the field of implementing the idea of legal security in criminal law.

Key words: criminal law, protective function of criminal law, guarantee function of criminal law, legal good, legal security, legal certainty

INTRODUCTION

The aim of this article is to draw attention to the fact that, although legal security is a particularly important value in criminal law, in the hitherto achievements of doctrine and in criminal law jurisprudence this value is uncommonly invoked directly. There is an absence of a broader elaboration of the issues related to the concept and meaning of legal security in criminal law. This article will fill this absence only partially by indicating possible further directions of detailed research in the field of implementation of the idea of legal security in criminal law.

Undoubtedly, criminal law reflects the multifaceted concept of legal security properly, which was proposed in this study. On the one hand, criminal law provides protection to the basic human life's goods and interests (a pro-

tective function of criminal law) exerting – by defining the threat of a sanction for a violation of a legally protected right – psychological pressure on potential criminals in order to deter them from violating these goods and interests. On the other hand, it contains a number of guarantees of a procedural nature that are intended to protect a person from an unjustified conviction, and also to secure legitimate claims of the injured party (a guarantee function of criminal law). The article will attempt to outline both of these areas of the impact of legal security on criminal law.

1. THE CONCEPT OF LEGAL SECURITY

The concept of legal security and the concept of legal certainty since the popularization of Gustav Radbruch's views in Poland (i.e. from the end of the 1930s. when the first translations of Radbruch's works by Czesław Znamierowski appeared), are constantly present in the legal discourse. The concepts gained a special importance after the introduction of the democratic state of law into the Polish legal system. The Polish Constitutional Tribunal derives from the principle of a democratic state of law many principles, including, among others, the principle of legal security with which other rules are related to varying degrees, also derived from art. 2 of the Constitution[1] – namely: the principle of legal certainty, the principle of protection of citizens' trust in the state and its law, the principle of protection of acquired rights, the principle of protection of interests in progress, the principle of non-retroactivity, the principle of appropriate *vacatio legis*, or more generally – the principle of correct legislation. The semantic scopes of these principles partly overlap and cross each other, and their mutual relations are not clearly defined. According to me, defining the concept of legal security will allow to clarify and organize many issues related to the mutual relationship of these principles.

By making a critical analysis of the content of these principles I distinguish the concept of legal security and the concept of legal certainty[2]. From my point of view, distinguishing and precisely defining the meaning of these terms is very important because it enables, among others, more precise defi-

[1] The Constitution of the Republic of Poland of April 2, 1997, Dz. U. Nr 78, poz. 483, as amended [hereinafter referred: the Constitution].

[2] In this article, in the scope of defining the concept of legal security and its relation to the notion of legal certainty, I refer to the findings presented in the monograph: J. Potrzeszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa*, Wydawnictwo KUL, Lublin 2013, *passim*.

nition of the values relevant to the protection of human rights related to the functioning of positive law in general, and especially criminal law. The necessity to ensure legal security is the right purpose and justification for the existence of positive law. The legal order is supposed to provide people with the possibility of peaceful coexistence and to create conditions for development. In particular, in a democratic state of law the expectance of individual recipients that the law will protect their life's goods and interests is justifiable.

I understand legal security in the most basic sense as a state achieved by means of a positive law, in which human life's goods and interests are protected (guarded) in a way that is as complete and effective as possible.

In order to define legal security more precisely, it is worth distinguishing between: firstly, the very idea of legal security which, according to me, stems from the law of reason, in this sense legal security is a regulative idea; secondly, legal security as an attempt to realize this idea by legal means.

However, because the very nature of the ideal results only in the possibility of striving for it, also in this case the realization of the idea of legal security by means of positive law is possible only to a lesser or greater degree. The degree of implementation of the idea of legal security depends, among other conditions, on the nature and degree of stabilization of the socio-political and economic environment. By analogy, we may speak of the ideal of a democratic state of law and the degree of realization of this ideal in a concrete reality.

Furthermore, I distinguish two aspects of the notion of legal security, namely: 1) legal security in an objective sense, by which I understand a legal state in which the positive law effectively secures human life's goods and interests. Legal security in the objective sense may occur independently of the awareness of entities protected by law. 2) In the second aspect, I distinguish legal security in a subjective sense that integral element is the awareness of a given subject. Legal security in the subjective sense is, in other words, a sense of legal security.

In my viewpoint, a sense of legal security may occur not only when it is rationally grounded. Thus, in the situation – as the Polish Constitutional Tribunal determines – a full knowledge of the premises of state bodies' activities and legal consequences that activities of individual entities may en-

tail[3]. From my perspective, such a comprehensive knowledge of the premises and legal consequences of an action, reliable knowledge of the content of the law, the methods of its interpretation and application, occurs in the social reality rather sporadically, if it occurs at all. I consider this a kind of idealization.

It befalls more frequently that a sense of legal security does not have such a rational basis, yet it depends on the individual attitude of individual recipients towards the products of the law-making activity of the state. Thus, the sense of legal security is in this case conditioned by the degree of trust of individual entities to the state and to the constituted law. The confidence appears precisely in the case of uncertainty concerning the manner a subject endowed with trust will behave, however, because of its credibility there are good reasons to hope that this behavior will be in relation to the trusting entity, e.g. honest, fair or even non-violent. If we interpret a state that is oriented towards the realization of the ideal of a democratic state of law, due to the clearly positive connotations of this concept, the situation of citizens' trust in the state on the one hand and the protection of that trust by the state on the other hand appears to be something obvious and legitimate. A state in which there would be a totalitarian regime, no reasonable person would trust. A state that intends to be a democratic state of law must be trustworthy, it must constantly take actions to maintain its credibility.

If individual entities are not convince of the content of the law, the ways of its interpretation and usage, it is a reliance (trust) that allows the recipients of the law to reduce uncertainty concerning their situation and allow them to expect that their affairs will be successful. In an extreme case, a sense of legal security may also arise if a certain entity bestows the authorities a large loan of trust, and at the same time is unaware of the threats at times generated by the law itself. However, such a situation is pathological, it ought not to take place in the rule of law under any circumstances.

Moreover, I distinguish the concept of legal security from the concept of legal certainty. I define the relation of both concepts as a relation of purpose and measure, while legal security is a goal and legal certainty is a means. The concept of legal certainty is collectively defined by a number of different features that a positive law should be characterized by in order to be an adequate means to realize the idea of legal security. The catalogue of these

[3] Cf. the verdict of the Constitutional Tribunal of June 14, 2000, Ref. P 3/00, OTK ZU Nr 5/2000, poz. 138.

features is not closed and it may be extended. However, it is not an arbitrary selection, an important role in its creation is performed by the ability of perception resulting from the human nature.

In order for a positive law to be an adequate means to realize the idea of legal security, it has to provide knowledge of the manner a given entity should behave and what behavior it may expect from its social interaction partners. This knowledge is closely related to securing human life's goods and interests. Nowadays, to the most common features of the legal certainty related to positive law belong such features as: clarity, transparency, specificity, recognizability, accessibility (including the availability of legal assistance), computability, predictability, continuity, stability, sustainability, concentration, codification, positivity, promulgation, social effectiveness, reliability, practicality, consistency, systemic transparency, lack of excessive complexity of legal acts and their excessive quantity, uniformity of law enforcement, or non-retroactivity.

Although the aforementioned features, associated with the concept of legal certainty, are of the great importance in the process of realizing the idea of legal security, the existence of these features and the achievement of legal security are not equal.

The understanding of legal security proposed by me is not opposed to justice, nor it is equated with it. Both of these values are found in the relation of mutual cooperation and consolidation. Although alike the idea of legal security and the idea of justice may be treated as a kind of regulative ideas, they may be implemented in positive law only to a lesser or greater degree. However, beyond a certain limit of evident injustice of law, it ceases to be an adequate means to realize the idea of legal security, although it may continue to implement the idea of legal certainty.

In a situation of extreme injustice, the positive law does not perform its proper role, which the protection of life's goods and human interests is, but itself becomes a source of danger. The threat of positive law may have two causes: 1) material causes, when certain goods and human interests do not find legal protection in the very content of the law, although they ought to be protected, or when the positive law directly threatens those life's goods and interests; 2) the causes of threats may have a formal nature, in the case when, for instance, the degree of ambiguity of legal provisions or their changing interpretation, exposes the recipients to material losses or maintaining the recipient's uncertainty as to its right that causes disorientation and psychological discomfort. Of course, the occurrence of a situation in which the positive law not only does not guarantee the recipients of legal security, but on

the contrary – it is itself a source of threats – is a vivid opposite of the values associated with a democratic state of law. Unfortunately, this also happens in our legal system.

A democratic state of law, protecting the trust of its citizens, should guarantee them the highest level of legal security, both in a subjective sense and in an objective sense. Only then may we speak of respecting the freedom of man and his dignity through – as the Constitutional Tribunal called it – "the respect of the legal order for the individual, as an autonomous, rational being"[4].

Unfortunately, even in the conditions of a democratic state of law, the degree to which the idea of legal security is implemented in certain cases leaves much to be desired. An example may be the resolution of the Supreme Court of December 20, 2007, reference number I KZP 37/2007 (entered in the book of legal principles), concerning the question of the liability of martial law judges[5].

2. CHARACTERISTICS OF CRIMINAL LAW FROM THE PERSPECTIVE OF LEGAL SECURITY

At the statutory level, in particular in the criminal law that interests us here, legal security is of paramount importance in the implementation of the ideals of the rule of law. In order to determine the concept of legal security in relation to criminal law, certain assumptions have to be made at the outset. The first of them is well expressed by the Latin sentence *Ubi societas, ibi ius* (Where society, there is a law). Human social life would not be possible without law. Thus, the very existence of positive law is a very important value from the point of view of social life. The second assumption is well expressed by the thought *Hominum causa omne ius constitutum est* (All law is established for a man). The statement of assumptions demonstrates that a positive law in general, and especially criminal law is a very important value, however, not a value in itself, but an instrumental value, serving the realization of another value, which is an aim in itself, namely a man and his personal dignity.

[4] Cf. ibidem.

[5] See J. Zajadło, *Prawo a idea pewności: sędziowskie pięć minut antyfilozofii antyprawa*, in: Idem, *Po co prawnikom filozofia prawa?*, Woltres Kluwer, Warszawa 2008, pp. 169–194.

A particular feature of criminal law, emphasized by Alicja Grześkowiak, is that "criminal law is a human-related law – it is a man who is the author of a crime, punishment affects a man and most often a man is a victim of a crime. Criminal law serves a man, because on the one hand it protects him, but on the other hand – by punishment it strikes a man – the perpetrator of a crime. This feature of criminal law means that it ought to respect the inherent human dignity and have a humanitarian dimension"[6]. The principle of humanism expressed here, according to the opinion of Andrzej Marek, "means that criminal law ought to place a man in the centre of its tasks, protecting the most important human values such as life, health, human dignity and personal safety. According to the justification of the Penal Code project[7] «the guiding principle of the new criminal law must be to protect human dignity as both a victim and a perpetrator of a crime»"[8]. The principle of humanism has a significant meaning in criminal law due to the fact that "criminal law operates with the strictest means of coercion in protecting these values, and therefore it must adhere to the principle that criminal repression should be proportional to the fault of the perpetrator of the crime and did not violate his dignity and responsibility"[9].

An important feature – from the point of view of the concept of legal security – is that "criminal law is an evaluative and imperative law. Criminal law, while taking protection of certain legal goods, indicates that these values are important to the state community and the man living in it. By criminal law, the valuation of goods and interests and the indication of such values which protection requires recourse to this law is made. Criminal law also has a mandatory, imperative character, it creates norms of obligation – orders and prohibitions of behaviour, which are the imperatives of a particular conduct. By the norms contained in the criminal law regulations, it indicates patterns of human behaviour desirable by the state"[10].

Another important feature of criminal law from the point of view of legal security is that "criminal law is the law of limits. Criminal law, prohibiting

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[6] A. Grześkowiak, *Wprowadzenie do nauki prawa karnego*, in: *Prawo karne*, eds. A. Grześkowiak, K. Wiak, ed. 5, Wydawnictwo C.H. Beck, Warszawa 2015, p. 5.

[7] The Act of June 6, 1997 – the Penal Code, Dz. U. z 2017 r., poz. 2204 as amended [hereinafter referred: p.c. – own remark].

[8] A. Marek, *Pojęcie prawa karnego, jego funkcje i podział*, in: *System prawa karnego*, vol. 1: *Zagadnienia ogólne*, ed. A. Marek, Wydawnictwo C.H. Beck, Instytut Nauk Prawnych PAN, Warszawa 2010, p. 7.

[9] Ibidem, pp. 7–8.

[10] A. Grześkowiak, *Wprowadzenie do nauki prawa karnego*, pp. 7–8.

behaviour violating protected goods and constituting criminal sanctions for exceeding them, sets the limits between what is permitted by this law and what is prohibited and punished. Only what is expressly prohibited by criminal law is prohibited. Criminal law sets the limits for the punitive action of the state, but also for the freedom of a man, unwilling to bear the criminal law consequences of his actions. It gives a sense of legal security to those who do not violate the limits"[11]. The most important functions of criminal law are connected with the discussed feature of setting the limits, namely the protective function (protection of legal rights against violation) and the guarantee function of criminal law – "the task of securing a person's legal security so that he would be punished only for an offense committed during the period of validity of the given penal law, within the limits of properly constituted criminal law. It is even assumed that the protective function of criminal law should be balanced with a guarantee function, in the sense that the scope and intensity of protection by criminal law of protected goods should be balanced with the guarantees of legal security, even considered a fundamental human right"[12]. "The consequences of the application of criminal law are serious, and often even irreversible, so there is the necessity of legal guarantees to protect a person against unlawful application of criminal law to him"[13]. In criminal law, the guarantee function is expressed by the following guarantee rule: *nullum crimen, nulla poena sine lege anteriori*. "The component of this principle is three rules: *nullum crimen sine lege* (no crime without law), *nulla poena sine lege* (no penalty without law) and *lex retro non agit* (law is not retroactive)"[14].

3. PROTECTION OF LEGAL GOODS AS AN EXPRESSION OF HUMAN LEGAL SECURITY IN CRIMINAL LAW

The definition of legal security adopted in relation to criminal law should be clarified as follows: human legal security in criminal law is a state achieved by means of criminal law, in which human life's goods and interests are protected in the most complete and effective possible manner. The legal security understood in this way focuses our attention primarily on the human

[11] Ibidem, p. 9.
[12] Ibidem, p. 12.
[13] Ibidem, p. 19.
[14] Ibidem.

life's goods and interests protected by criminal law. The concept of human life's goods should be understood as all those values that are necessary for the physical survival of a human being at a level appropriate to his dignity. Whereas the concept of interests should be understood here as all those values that serve the realization of a man as a person who strives to develop and achieve a proper social position in society, related to the necessity of prestige and respect from others.

The aim of criminal law is to protect the values and assets essential to people's everyday lives, their aspirations and the development of society[15]. The primary role of substantive criminal law is to protect goods, to administer justice for their violation and to properly influence on the perpetrator, in order to persuade him not to violate protected goods in the future[16].

Legal goods[17] constitute a protected by law social value. In view of their importance to society, it requires them to be protected by law. The concept of a legal good is understood in the context of values that are or are to be protected by criminal law. We may argue that the legal good is a concept that embodies certain value[18]. As Marian Cieślak emphasizes, criminal law protects certain values "which the society organized in the state recognizes as the most important for its existence, and therefore it deems it necessary to guard them with such harsh and exceptional means of coercion. These fundamental social values, protected by criminal law – therefore such values as, for instance, human life, health, freedom, invulnerability, as well as collective values, such as state independence, its integrity, security, etc. – are defined in criminal law as «legal goods». It is, therefore, almost universally accepted that the primary task of criminal law is to protect legal goods against anti-social acts"[19]. The particular role of criminal law is well illustrated by the words of John Rawls: "The purpose of criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life

[15] A. Zoll, *Konstytucyjne aspekty prawa karnego*, in: *System Prawa Karnego*, vol. 2: *Źródła prawa karnego*, ed. T. Bojarski, Wydawnictwo C.H. Beck, Warszawa 2011, p. 221.
[16] K. Szczucki, *Wykładnia prokonstytucyjna prawa karnego*, Wydawnictwo Sejmowe, Warszawa 2015, p. 355.
[17] See D. Gruszecka, *Ochrona dobra prawnego na przedpolu jego naruszenia. Analiza karnistyczna*, Wolters Kluwer, Warszawa 2012, *passim*.
[18] M. Filipczak, *Nauka o dobru prawnym i jej rola w badaniu konstytucyjności regulacji prawa karnego*, "Studia Prawno-Ekonomiczne" 102 (2017), p. 24.
[19] M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Wydawnictwa Prawnicze PWN, Warszawa 1995, p. 14.

and limb, or to deprive them of their liberty and property, and punishments are to serve this end"[20].

In the Polish legal order, human life's goods and basic interests find their expression in constitutional norms. Of particular importance from this point of view is art. 30 of the Constitution, according to which: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities". The principle expressed in this provision states that every man has a special value for which he is protected and respected, is crucial from the point of view of creating a catalogue of values legally protected by criminal law. In close relationship with the protection of human dignity there is the protection of human life (Article 38 of the Constitution: "The Republic of Poland shall ensure the legal protection of the life of every human being") and health (Article 68 par. 1 of the Constitution: "Everyone shall have the right to have his health protected"). Other human rights and freedoms likewise derive from the recognition that every human being has an innate and inalienable dignity.

In the process of making a pro-constitutional interpretation of legal goods[21], we should be guided by striving for ensuring the fullest protection of legally protected goods. The introduction of a prohibition of infringement of legal goods with a criminal sanction in the legal order may only be justified by the objective of a protective criminal law norm. "Only the real necessity of securing legal goods may justify the limitation of individual rights and freedoms through criminalization. This goal is, moreover, reflected in the concept of coupled norms adopted in criminal law. As the hallmark of the sanctioned norm on the basis of the prohibition of criminal law, the attack on the legal good and the violation of the rules of conduct with this good are indicated"[22].

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[20] J. Rawls, *Teoria sprawiedliwości*, transl. M. Panufnik, J. Pasek, A. Romaniuk, Wydawnictwo Naukowe PWN, Warszawa 1994, p. 432; see also M. Peno, *Aspekty moralne odpowiedzialności w prawie karnym*, "Acta Universitatis Lodziensis. Folia Iuridica" 75 (2015), 75, p. 147.

[21] See K. Szczucki, *Wykładnia prokonstytucyjna prawa karnego*, *passim*.

[22] A. Rychlewska, *O gwarancyjnym modelu wykładni prokonstytucyjnej przepisów typizujących czyny zabronione pod groźbą kary*, "Czasopismo Prawa Karnego i Nauk Penalnych" 3 (2016), p. 135; see also K. Wojtyczek, *Zasada proporcjonalności jako granica prawa karania*, in: *Racjonalna reforma prawa karnego*, ed. A. Zoll, Instytut Spraw Publicznych, Warszawa 2001, p. 304.

In the criminal law doctrine we may find numerous statements concerning the catalogue of legally protected goods and its justification. However, this issue is not associated with the concept of legal security, but rather with the concept of personal security. For instance, in the views of Andrzej Gaberle, the notion of legal security is contrasted with the concept of personal security: "The law guaranteed security against unauthorized interference by the state (legal security), granting individuals civil rights, but then social relations did not ensure the vast majority of them personal security (protection against becoming a victim of crime)"[23]. The quoted author attempts to diagnose what the crisis of broadly understood criminal law consists of, he proposes to distinguish between a guarantee function and a protective function of criminal law. In his opinion, there was a "shift of the accent from the guarantee function to the protective function of criminal law and giving the latter a different meaning […]. Criminal law is no longer expected to regulate potentially capable of protecting legal rights, but requires a real protection. It is not the most important matter for the state to provide the individual with a «space of freedom» to which he is not allowed to enter, at present it is expected to secure this space so that it may be used without fear of becoming a victim of crime or other harmful activities. The protective function, and not as once the guaranteed one, becomes the primary reason for the existence of criminal law, and if it does not provide the individual with personal security, then in the social sense it does not perform its functions"[24].

Contrary to the author's opinion, however, it should be emphasized that effective protection of human life's goods and interests is an integral element of the concept of legal security, proposed in this article. The notion of personal security and the concept of legal security should not therefore be opposed. Personal security is included in the range of the concept of legal security.

It is worth accepting that the primary function of criminal law is the protective function. However, neither this function may be reasonably defined at the theoretical level, nor the more so in a permissible manner in a democratic state of law, to realize in practice without specifying what and why exactly the criminal law norms are to protect[25]. In my own point of view, the

[23] A. Gaberle, *Od bezpieczeństwa prawnego do bezpieczeństwa osobistego (O kryzysie prawa karnego)*, "Państwo i Prawo" 5 (2001), p. 19.
[24] Ibidem, p. 26.
[25] D. Gruszecka, *Pojęcie dobra prawnego w prawie karnym*, "Wrocławskie Studia Erazmiańskie. Zeszyty Studenckie" 2008, p. 135.

protection of legal goods is an expression of human legal security in criminal law. The concept of legal security proposed in this article is a helpful instrument to explain and justify what and why criminal law norms should protect.

4. THE GUARANTEE FUNCTION OF CRIMINAL LAW AS AN EXPRESSION OF THE HUMAN RIGHT TO LEGAL SECURITY

In the legal literature in the field of criminal law, the principle of legal security arises in the context of procedural guarantees of procedural parties and respect for the principle of equality of parties in the scope of their rights. "In the criminal trial, the sense of this principle is reflected in the rule of fairness of the trial. It provides a guarantee that each party is entitled to all legal means that it may use during the proceedings to protect its interests"[26].

A direct connection with the principle of legal security in criminal law (from the perspective of procedural guarantees) has the principle of legalism, being a general law (article 7 of the Constitution: "The organs of public authority shall function on the basis of, and within the limits of, the law", and also expressed in art. 42 par. 1 of the Constitution: "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law", or expressed in art. 1 § 1 of the p.c., according to which: "Penal liability shall be incurred only by a person who commits an act prohibited under penalty, by a law in force at the time of its commission"). This principle is based on the principle of guarantee *nullum crimen, nulla poena sine lege anteriori*. "This principle, which creates the inviolable foundations of legal security and human freedom, ensures that a man, without fear of being subject to criminal liability, has the right to do everything that does not violate criminal law norms, which is not prohibited by law at the time of his behaviour"[27]. "The principle of *nullum crimen, nulla poena sine lege anteriori* is the international standard of human rights to legal security"[28].

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[26] M. Porwisz, *Bezpieczeństwo stron w procesie karnym w świetle projektowanych zmian kodyfikacyjnych*, in: *Prawne gwarancje bezpieczeństwa*, ed. M. Sitek, Wyższa Szkoła Gospodarki Euroregionalnej im. Alcide De Gasperi w Józefowie, Józefów 2013, pp. 88–89.
[27] A. Grześkowiak, *Wprowadzenie do nauki prawa karnego*, p. 21.
[28] Ibidem, p. 25.

With reference to the content of art. 42 of the Constitution, in the doctrine there is expressed the view that this article establishes certain rules of proceedings before the courts: "The first is the right of the suspect to defend at all stages of the proceedings. […] The second principle is the presumption of innocence of a detainee. […] The rules mentioned in this provision concern the interests of the individual related to criminal law, such as legal security and certainty of the procedural situation, simultaneously providing the individual with the power to influence that situation"[29].

One of the procedural guarantees associated with the principle of legal certainty and legal security is the principle of *ne bis in idem*, in which the doctrine states that the principle of legal certainty justifies the *ne bis in idem* principle. "The principle of legal certainty creates for a person whose act has become the object of criminal-law valuation, a state of legal security (der Rechtssicherheit der Person), in which an individual may enjoy rights and freedoms and develop personality. The state of legal security expresses a guarantee function of the principle *ne bis in idem* in which the person against whom the proceedings for a specific act (acts) have been validly concluded cannot be held criminally liable. The guarantee function is coupled with the recognition that the original final judgment is not a worthless judgment (Unwerurteil), as well as the protection of trust in court decisions (Vertrauenschutz)"[30].

The quoted view is confirmed by the jurisprudence of the Polish Constitutional Tribunal. In one of the most recent judgments, the Tribunal stated that: "A significant limitation of the misuse of *ius puniendi* by the state is the *ne bis in idem* principle, the content of which is the prohibition of double (repeated) punishment of the same person for committing the same offense. The prohibition of double (repeated) punishment was not explicitly expressed in the provisions of the Constitution, however, according to the Tribunal, there is no doubt that it constitutes the primary guarantee of a democratic state ruled by law, so it must be associated with the content of art. 2 of the Constitution (see the latest verdict of 11 October 2016, reference number K 24/15, OTK ZU A / 2016, poz. 77, cz. III, pkt 2.3). *Ne bis in idem* provides protection of the elemental value of legal security for citizens. In case-

[29] B. Przybyszewska–Szter, *Wolności i prawa osobiste*, in: *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, ed. M. Chmaj, Wolters Kluwer, Warszawa 2008, p. 104.

[30] A. Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim*, Wydawnictwo Temida 2, Białystok 2011, p. 50.

law, the basis for derivation of this principle is also recognized in art. 42 par. 1 of the Constitution, which defines constitutional standards of incurring criminal liability, and art. 45 par. 1 of the Constitution, guaranteeing the right to a fair and just trial"[31].

With regard to procedural guarantees, from the perspective of legal security, considerations are also made regarding more specific issues, e.g. the principle of openness of the process in the aspect of external disclosure, in connection with the amended art. 357 of the Act of June 6, 1997 – the Code of Criminal Procedure[32]. The author critically evaluates the degree of implementation of legal security in the Polish legal order on the example of the amendment of art. 357 of c.c.p. introduced on 10 June 2016. She states that: "The actions of the legislator aiming at strengthening the principle of transparency should be assessed positively. Increasing the scope of rights guaranteed to media representatives is an expression of the legislator's openness to ensuring by law better conditions for public access to information about pending criminal proceedings. However, serious doubts in the context of legal security arise from the content of legal provisions included in art. 357 § 5 of c.c.p. The legislator makes the presence of media representatives conditional upon the hearing of a witness only from the judge's arbitrary decision. However, the content of the provisions may only implicitly mean that the witness has the right to request removal of the media representatives from the courtroom during the hearing. Interpreting this provision literally, we come to the conclusion that the judge of his own inspiration, based on a subjective assessment, even without the witness's permission, may restrict the access of those representatives to record the course of the trial whenever he comes to the conviction that the situation might act in an uncomfortable manner on a witness. The legislator constructing the content of the provision in this manner counts on the judges' reliability and the ability to objectively and judiciously assess the situation by the representatives of the judiciary. However, the hazards arising from the wording of the provision in the discussed manner may put into question the main meaning of the reform. In an extreme case, on the basis of judicial practice, it may turn out that judges, from various, also subjective, grounds, unfavourable to the presence of me-

[31] Cf. the verdict of the Constitutional Tribunal of June 20, 2017, Ref. P 124/15.

[32] The Act of June 6, 1997 – the Code of Criminal Procedure, Dz. U. z 2017 r., poz. 1904 as amended [hereinafter referred: c.c.p.]. See K. Kwarciana, *Jawność postępowania karnego z perspektywy bezpieczeństwa prawnego w świetle nowelizacji art. 357 k.p.k. z dnia 10 czerwca 2016 roku*, "Roczniki Nauk Prawnych" 27 (2017), No 2, pp. 61–75.

dia representatives at the hearings, interpreting the legal provisions contained in art. 357 § 5 of c.c.p. in a literal manner, will *de facto* retain in their own practice the solutions from before the amendment in the scope regarding the transparency of witness hearings"[33].

5. UNDERSTANDING OF LEGAL SECURITY IN THE JURISDICTION OF THE CRIMINAL CHAMBER OF THE SUPREME COURT

The concept of legal security appears uncommonly in the jurisdiction of the Criminal Chamber of the Supreme Court. In cases it is explicitly referred to, it generally occurs in the context of the guarantee function of a written justification of court judgments. The Supreme Court commented extensively on this subject, stating that "it is necessary to recall that the correctness of the appeal court procedure reflects the justification of its judgment, in which it should state why the allegations and motions of the appeal were considered legitimate or groundless (art. 457 § 3 of c.c.p.). It is worth adding that besides the reporting nature of the motivational part of the judgment, it also has a significant guarantee importance. The obligation to prepare a reliable justification of the judgment is a supplement to the regulation contained in art. 433 § 2 of c.c.p., ordering the court of second instance to consider all charges and motions contained in the appeal, and where the level of detail of the argument depends naturally on the content of the appeal and the content of the justification of the judgment of the court of first instance […] The regulations of the articles 433 § 2 and 457 § 3 of c.c.p. may be violated not only when the court omits in its considerations the allegations contained in the appeal, but also when it analyses them in a manner that deviates from the requirement of a reliable assessment of them […] Aforementioned regulations of procedural law corresponds with each other in the sense that an incorrect preparation of the justification of a judgment by a court *ad quem* generally proves that the court did not recognize the appeal properly […]. The problem is that in the cassation proceedings the justification of the appeal court judgment is the only method to verify whether all allegations formulated in the appeal have been reliably considered. It is impossible as well to omit the fact that the justification not only has a procedural function, but also builds the authority of the judiciary, shaping the external conviction of justice of the ruling, hence the legal tolerance of judgments motivated in

[33] Ibidem, p. 73.

a manner grossly deviating from the above rules is not possible […]. The court's *ad quem* justifying the judgment in a manner that deviates from the statutory requirements, therefore, demonstrates the absence of a substantive reference to appeal allegations and causes the fictitious right of the accused to appeal against the decision of the court of first instance […]. This final observation is inextricably linked with procedural justice, which belongs to the essence of the right to a court, contained in art. 45 par. 1 of the Constitution. This procedural justice is preserved when the court clearly discloses the motives of its resolution, to the extent enabling the verification of the accepted reasoning. The justification of a judicial decision, which is a decisive component of the right to a fair trial as a constitutionally protected individual right, also enforces self-review of the court, which has to prove that the decision is materially and formally correct and meets the requirements of justice, documents the arguments for the resolution adopted, is the basis for control by higher instance organs, serves individual acceptance of the ruling, strengthens the sense of social trust and democratic control over the justice, strengthens legal security and allows to assess whether there was arbitrariness in the court's action […]"[34].

The concept of legal security appeared in the case law of the Supreme Court, examining cassations regarding the criminal liability of a notary public for violation of art. 231 § 1 and 2 of p.c. in connection with art. 80 and art. 94 § 1 of the Act of February 14, 1991 – the Law on notarial services[35]. The appellants argued that the notary public cannot be held criminally liable for not informing the parties about the consequences of the concluded contract and for drawing up a contract incompatible with the will of one of the parties. The Supreme Court disagreed with this view, dismissing the cassation as obviously unjustifiably. In this justification, the Court expressed the view that "a notary public performs preventive jurisdiction, affecting interested parties in order to shape their legal relations in accordance with the law and principles of social coexistence. In this aspect, the notary's position is also emphasized as an element of the justice system, who, although is not in its structure, acts as a preventive jurisdiction due to the fact that performing activities in his presence is to prevent disputes, evidence difficulties and,

[34] See the verdict of the Supreme Court of June 30, 2016, Ref. II KK 47/16, similarly the decision of the Supreme Court of November 25, 2015, Ref. II KK 176/15; the Supreme Court's decision of May 22, 2014, Ref. III KZ 15/14; the Supreme Court verdict of May 28, 2013, Ref. II KK 308/12.

[35] The Act of February 14, 1991 – the Law on notarial services, Dz. U. z 2017 r., poz. 2291.

most importantly, ensure legal security in the sphere of broadly understood legal circulation. The special position of a notary public is connected with the necessity of maintaining impartiality when preparing a specific legal action. In contrast to other entities of out-of-court legal protection (attorneys, legal advisors), a notary public cannot act as a mandate of a specific party. […] A notary public shapes a legal form to the property interests of individual entities, deciding the fate of economic relations for the future, guarantees compliance of civil law transactions with legal provisions, is the «guardian» of the current legal order. Notarial actions have to ensure legal security for all their participants. The notarial deed, of which the notary public is the author, is a public act (act of public interest), and its content is to result from the impartial action of a notary public. A notary public is not a representative of any of the parties – he represents only the law. […] The notary public, performing the preventive jurisdiction within the purview, affects contractors to shape their legal relations both in accordance with the law and with the principles of social coexistence. He does so both in the public interest and in the interest of the parties. He protects civil law transactions against defective legal activities, thereby strengthening the security of trading. Notaries public, on behalf of the State whose seal they use, pursue the mission of editing contracts that is in the general interest, while ensuring the legal security of the parties to the proceedings"[36].

CONCLUSION

In the doctrine and jurisprudence in the field of criminal law, the notion of legal security is not the subject to in-depth investigation. It is most often referred to in the context of the guarantee function of criminal law and related procedural guarantees. However, in the context of the criminal defence function neither doctrine nor the case-law refers to legal security as an important value, defining the direction and justifying the scope of criminalization of certain behaviours.

The understanding of legal security proposed in this article as a state being achieved by law, and in particular criminal law, in which human life's interests are protected in the most complex and effective manner, may be helpful for the explanation of numerous issues related to the implementation of both protective function, as well as the guarantee function of criminal law.

[36] See the ruling of the Supreme Court of December 20, 2016, Ref. V KK 316/16.

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POJĘCIE I ZNACZENIE BEZPIECZEŃSTWA PRAWNEGO W PRAWIE KARNYM

Streszczenie. W niniejszym artykule podkreśla się wagę bezpieczeństwa prawnego w prawie karnym. Zaproponowana definicja bezpieczeństwa prawnego – zgodnie z którą bezpieczeństwo prawne jest to stan osiągany za pomocą prawa stanowionego w ogólności, a szczególności za pomocą prawa karnego, w którym dobra życiowe człowieka i jego interesy są chronione w sposób możliwie całkowity i skuteczny – bardzo dobrze harmonizuje z najważniejszymi funkcjami prawa karnego, a mianowicie z funkcją ochronną i funkcja gwarancyjną. Zaproponowane rozumienie bezpieczeństwa prawnego może być pożyteczne dla wyjaśnienia wielu problemów związanych z realizacją zarówno funkcji ochronnej, jak i funkcji gwarancyjnej prawa karnego. Chociaż bezpieczeństwo prawne jest wartością szczególnie istotną w prawie karnym, w dotychczasowym dorobku doktryny i w orzecznictwie z zakresu prawa karnego zbyt rzadko wartość ta jest przedmiotem rozważań. W niniejszym artykule wskazuje się na potrzebę i możliwości dalszych szczegółowych badań w zakresie realizacji idei bezpieczeństwa prawnego w prawie karnym.

Słowa kluczowe: prawo karne, funkcja ochronna prawa karnego, funkcja gwarancyjna prawa karnego, dobro prawne, bezpieczeństwo prawne, pewność prawa