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UDC 343(043.2)

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THE CRIME OF UNLAWFUL DEPRIVATION OF LIBERTY IN THE POLISH PENAL CODE (ARTICLE 189)

In the Penal Code of 1932, unlawful deprivation of liberty was included in Article 248, which, in its basic type, coincided with the current wording of Article 189 §1 of the currently applicable Polish Penal Code of 1997 ("Whoever deprives a person of liberty shall be punished by imprisonment for up to 5 years"). Article 248 §2 provided for four aggravating circumstances: a/ length of unlawful deprivation of liberty (exceeding 14 days); b/ special torment; c/ other particularly grave cases; d/ surrender of a person to the power of a foreign state. It should also be noted that Article 288 of the Penal Code of 1932 penalised the conduct of an official who, through negligence in office, deprived a person of liberty (for which a sentence of imprisonment for up to 3 years was provided). The Penal Code of 1969 regulated unlawful deprivation of liberty in Article 165. The basic type (whoever deprives a person of his liberty is punishable by imprisonment from 6 months to 5 years) was left unchanged (compared to the Penal Code of 1932), while the aggravated type (punishable by imprisonment from one year to 10 years) defined three aggravating circumstances: a/ length of imprisonment (longer than 14 days); b/ special torment; c/ other particularly grave cases. It should also be kept in mind that the provisions introducing the Code (Article VIII) provided for the type of crime consisting in enslaving another person or engaging in the slave trade

(punishable by imprisonment for a period not shorter than 3 years). Under the Penal Code of 1997 currently in force, the original version of the provision (Article 189) contains two paragraphs: the basic type (Article 189 § 1) and the aggravated type (if the deprivation of liberty lasted more than 7 days or was accompanied by special torment). Act of 17 December 2009 (Journal of Laws of 2010, No. 7, item 46) amended § 2, resulting in the following wording: "If the deprivation of liberty lasted more than 7 days, the perpetrator shall be punished by imprisonment from one year to 10 years", and creating a new aggravated type in § 3 ("If the deprivation of liberty referred to in § 1 or § 2 was accompanied by particular torment, the perpetrator shall be punished by imprisonment for a period not shorter than 3 years"). Another amendment involved adding the provision of Article 189 §2a (by Article 1(3)(a) of the Act of 23.03.2017 amending the Penal Code, the Act on proceeding in juvenile matters and the Code of Criminal Procedure (Journal of Laws, item 773), penalising deprivation of liberty of over 7 days, concerning a a vulnerable person because of his or her age, mental or physical condition. The last amendment was provided for by the Act of 7 July 2022 amending the Penal Code and certain other laws (Journal of Laws No. 2600) which was limited to raising the penalty (in § 1 from 12 to 15 years, and in § 3 the whole range was raised: both the lower threshold - from 3 years to 5 years and the upper limit - from 15 years to 25 years). Nor can the provisions introducing the Penal Code (of 6 June 1997), which penalises the slave trade ("Whoever causes the putting of a person in slavery or keeps the person in that state or engages in the slave trade, is punishable by imprisonment for a period not shorter than 3 years").

It is commonly accepted by scholars in the field that the good protected under Article 189 of the Penal Code is the personal freedom of a person, in the physical sense (freedom of locomotion, movement), and therefore in the sense of the possibility of free movement and travel according to one's own will [1]. This view was also expressed by the Supreme Court in its judgement of 5 December 2018, V KK 508/17 (OSNKW 2019/2/10), stressing that the potential will to change one's whereabouts is also a protected good. As noted by scholars in the field, "a potential will is one that resides in a person and can be manifested under certain conditions (e.g. after awakening). To some extent, therefore, it is a will which we can guess, if not clearly expressed by the victim, based on the assumption that a given person under certain conditions would like to protect a given good" [2].

The action element defining the behaviour of the perpetrator has been taken into account in a very synthetic, yet extremely spacious manner, and includes any manner in which a person may be deprived of liberty [3]. The offence consists in the deprivation of physical liberty, and therefore involves detention in a closed room, as well as the use of any other means that may constitute a significant obstacle to the exercise of that (physical) freedom; and also physical

violence (e.g. binding), deception (e.g. leading to a place where the victim cannot get out), threat or other means may be involved [4]. Whereas it is not necessary for the release of the deprived of liberty to be impossible objectively; it is sufficient if it is reasonably perceived as such by the victim (e.g. the victim is locked in a room from which one could get out through an exit that was unknown to him) [5]. The commission of a crime occurs when the victim is deprived of liberty for a short period, that is to say, a situation has been created in which he/she was unable to freely exercise his/her physical freedom. It is not decisive for the crime how long that state lasted (however, in accordance with Article 189(2), where the deprivation of liberty has lasted more than 7 days, the offender carries out the elements of that aggravated type).

As emphasized in the scholarly opinion, the subject of an act of perpetration may be any person, regardless of age and mental state, who is able to formulate a wish related to a change of whereabouts and has a natural ability to leave the place of his/her current residence, even using technical means or a third party. The will to change one's place of stay must be understood in a natural sense; an infant cannot have such a will, therefore it cannot be the subject of an act under Article 189 of the Penal Code [6] A person already legally imprisoned (e.g. serving a prison sentence) may also be deprived of liberty; in such a case, the prohibited act will be expressed in further restricting of the remnants of freedom of movement (e.g. handcuffing, locking in a basement) [7].

The condition for criminal liability for unlawful deprivation of liberty is its contradiction to the law, and therefore a behaviour constituting the implementation of generally applicable law (e.g. in the case of detention, custody, penalty of imprisonment) does not constitute the crime of deprivation of liberty. In order to be lawful, deprivation of liberty requires a legal basis and may only last for the period necessary to clarify the case or to achieve the objectives set out by the law due to which the deprivation of liberty was applied [8].

Unlawful deprivation of liberty is a generally-defined perpetrator offence characterised by its result (wherein the result is the creation of a state of impossibility to fulfil the will of the victim to leave his or her current place of stay), which can be committed both by action and omission (e.g. in the case of officer's failure to release a detained person after 48 hours of detention – Article 248 § 1 of the Code of Criminal Procedure [9]). It can only be committed intentionally (in both forms of intent) [10]. It is a lasting offence.

There are three aggravated types of deprivation of liberty: a/ when deprivation of liberty lasted longer than 7 days (Article 189 §2); b/ when it affected a person who was vulnerable due to their age, mental or physical condition (Article 189 § 2a); c/ when it was accompanied by particular torment (Article 189 § 3). The aggravated type specified in § 3 applies to both § 1 and

§ 2 and § 2a, while the aggravated type specified in § 2a applies only to the deprivation of liberty referred to in § 2 (and thus deprivation of liberty for more than 7 days). Vulnerable are people who, due to their physical characteristics: old age, disability, bedridden illness, or mental characteristics (e.g. mental retardation), are unable to independently decide about their fate or change their situation [11]. Particular torment (which may be physical or psychological) creates an additional, much greater affliction for the victim than that resulting from the mere fact of deprivation of liberty [12]. As the Supreme Court pointed out in the decision of 11 June 2002, II KKN 258/00 [13], the recognition the victim as particularly tormented "is not determined by the degree of the resulting health derangement in the victim, but by the assessment of the method of action undertaken towards a specific person in specific factual circumstances, consisting in inflicting additional physical or mental suffering on the victim, exceeding the degree resulting from the mere fact of deprivation of liberty". All the aggravated types are of a generally-defined offender nature, are characterized by their results and may be committed intentionally (both with *dolus directus* and *dolus eventualis*).

The offence of deprivation of liberty is a misdemeanour prosecuted *ex officio* through public prosecution in the basic type (Article 189 § 1 – is punishable by imprisonment from 3 months to 5 years) and in aggravated types – i.e. Article 189 § 2 PC – is punishable by imprisonment from one year to 10 years (when deprivation of liberty lasted longer than 7 days) and Article 189 § 2a PC – (since 14 March 2023) is punishable by imprisonment from 2 years to 15 years (where the deprivation of liberty freedom concerned a vulnerable person). However, the third aggravated type is a felony (also prosecuted *ex officio*, naturally), punishable by the penalty of imprisonment of not less than 3 years. According to Article 72 of the Law of 12.03.2022 on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of Ukraine (Journal of Laws, item 583), when convicting a perpetrator who, during the armed conflict on the territory of Ukraine, committed a crime referred to in Art. 189, the court shall impose a term of imprisonment of not less than one year, and in the case of an offense referred to in Article 189 § 3, of not less than five years, up to the upper limit of the statutory penalty range provided for the offense attributed to the offender increased by half.

In recent years, around 200 cases of unlawful deprivation of liberty are recorded each year in Poland (in 2015 – 216, 2016 – 233, 2017 – 211) and the detection rate is approximately 90% (2015 – 88.9%, 2016 – 91.0%, 2017 – 92.9%) [14]. In 2020, a total of 59 people were sentenced in Poland under Article 189 PC (119 under Article 189 § 1, four under Article 189 § 2, one under Article 189 § 2a and 36 under Article 189 § 3). As far as basic type convictions are concerned (Article 189§ 1 PC - 119 convictions), the courts used to sentence the perpetrators mainly to imprisonment (82 cases – 68.9%),

including 46 without a suspended sentence and 36 with a suspended sentence, while the second place was a fine (20 convictions - 16.8%), and the third was a restriction of liberty (10 convictions - 8.4%). In 7 cases (5.9%) the so-called mixed penalty was imposed (a custodial sentence plus restriction of liberty – Article 37b PC). As regards the aggravated type (Article 189 § 3 PC), 35 perpetrators were sentenced to an immediate custodial sentence (and in one case an independent penal measure was imposed) [15].

The current construct of the crime of unlawful deprivation of liberty (in its main core based on the previous Polish penal codes) seems to be correct and does not raise any fundamental doubts as to its interpretation. It seems unnecessary to raise the penalty range (in § 3), as there were no rational grounds for doing so.

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UDC 343(043.2)

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THE CRIME OF HUMAN TRAFFICKING (ARTICLE 189A OF THE POLISH PENAL CODE)

In the Penal Code of 1932 (in order to fulfil Polish international obligations under ratified conventions), its Article 249 penalised putting another person into slavery and the practice of slave trade or participation in a "related business" (under the penalty of imprisonment for a term of not less than 5 years). The relevant regulations in the Penal Code of 1969 were included in Articles VIII and IX of the provisions introducing the Penal Code of 19.04.1969 (Journal of Laws No. 13, item 95). Article VIII provides for imprisonment for a period of not less than 3 years for anyone who causes another person to be put into slavery or engages in the slave trade. Article IX penalised the delivery, luring or abduction for the purpose of prostitution of another person, even with that person's consent (providing for that conduct a penalty of imprisonment for a period of not less than 3 years). According to § 2 of Article IX, the same penalty was to be imposed on anyone who trafficked women, even with their consent, or children.

The Penal Code of 1997 introduced a separate type of crime of human trafficking in Article 253 § 1 ("Whoever engages in trafficking in human beings even with their consent"), included in Chapter XXXII ("Crimes against public order"). A detailed definition of human trafficking is set out in Article 115 § 22 ("Human trafficking is the recruitment, transportation, delivery, transfer, accommodation or receipt of a person, by using: 1) violence or unlawful threat, 2) abduction, 3) deception, 4) misguidance or exploitation of a mistake or incapacity to understand the action in question, 5) abuse of a relationship of dependence, exploitation of a critical situation or a state of helplessness, 6) giving or accepting a pecuniary or personal benefit or the promise thereof to a person exercising the care or supervision of another person - for the purpose of exploitation, even with his/her consent, in particular in prostitution, pornography or other forms of sexual exploitation, forced labour or service, begging, slavery or other forms of exploitation degrading human dignity or in order to unlawfully obtain human cells, tissues or organs. If the perpetrator's conduct involves a minor, it shall constitute human trafficking even if the methods or means listed in paragraphs 1 to 6 have not been used"). In addition, Article VIII of the Penal Code Introductory Provisions includes a provision that