

THE NEW POLISH CRIMINAL LAW CODIFICATION IN THE LIGHT OF THE CONSTITUTION

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One year ago, I had the opportunity to express my opinions on the principles of criminal law contained in the Polish draft Constitution.¹ Today, that Constitution is in force and a new codification of criminal law will soon be effected.² Therefore, there reappears a need to examine, on the one hand, to what extent the Constitution provides for the protection of fundamental rights and freedoms in the area of the application of criminal law, both from the point of view of the protection of the values threatened by the perpetrator and the good of the citizens endangered by activities of the State. On the other hand, there exists an equal need to examine the constitutionality of that codification. In view of my interests and scope of expertise, I will focus my comments on some aspects of our substantive criminal law.

The starting point of any analysis of Polish criminal law codification in the light of the Constitution is the definition of the hierarchy of the sources of law in the Constitution and the precedence of the Constitution over any other legal norms. It is also of significance for criminal law that the Constitution gives precedence to international agreements (ratified by the consent of the Parliament) over laws. In the case of a conflict between a law concerning legal responsibility and international standards for the protection of human rights, the latter take precedence and are applied directly (Article 91(1) and (2)). Thus, on the basis of the existing constitutional order, a judge cannot confine himself to the use of the Criminal Code when determining the scope of the responsibility of a defendant: he should also refer to the text of the Constitution and relevant instruments of international law.

The Constitution and international agreements binding in Poland provide an adequate standard of the protection of human rights in domestic criminal law. The Constitution has strengthened the existing, whilst introducing new, mechanisms aimed at ensuring the conformity of laws to the Constitution. This is achieved through extended powers granted to the Constitutional Tribunal and the introduction of the mechanism of the constitutional complaint. In practice, before the Constitution came into force, the

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¹ A. Zoll: "Zasady prawa karnego w projekcie Konstytucji" [Principles of Criminal Law in the Draft Constitution], *Państwo i Prawo* 1997, no. 3, p. 72 and following.

² The Criminal Code, the Act of 6 June 1997 (*Dziennik Ustaw* [Journal of Laws], no. 88, item 553).

Constitutional Tribunal, due to limitations on its jurisdiction, had no occasion to adjudicate on the conformity of laws to the then-existing constitutional provisions. This situation deserved radical changes. Let me, however, concentrate on the issue of the constitutional complaint, since it has raised high hopes for the protection of the constitutional rights and freedoms of the individual and their observance in the field of criminal law.

It should be understood, however, that the only effect of a successful constitutional complaint is the repeal of a normative act found by the Constitutional Tribunal not to conform to the Constitution. Any court judgment or administrative decision previously issued on the basis of such a normative act is not thereby quashed by the adjudication of the Constitutional Tribunal. A court judgment or administrative decision based on such a normative act only forms the basis for an application - in accordance with the procedure operative in a given branch of law - to revive an action. Hence, constitutional complaints, functioning as abstract reviews of norms, serve to eliminate from the legal system provisions inconsistent with the Constitution. The individual interests of the applicants play a subordinate role and lie beyond the cognizance of the Constitutional Tribunal. Surprisingly, provisions introducing the constitutional complaint are contained in the chapter entitled "Means for the defence of freedoms and rights". Such protection, however, is effected indirectly. An effective constitutional complaint forms only its first stage. A constitutional complaint does not protect citizens from a wrongful (i.e. inconsistent with the Constitution) application of the law by adjudicating courts. This fact considerably limits the application of this procedure as an instrument of the protection of the fundamental freedoms and rights of the individual in the sphere of criminal law.³

Article 30 of the Constitution has a paramount meaning for criminal law. It states that "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". In criminal law this constitutional norm plays the role of a fundamental "interpretational key", which discharges a protective function and sets limits to the scope of the intervention of criminal law. Article 30 of the Constitution imposes an obligation on State bodies, and on the legislator, to protect the dignity of a person not only against threats posed by State bodies but also by other persons. The legislator is obliged to protect that dignity against any transgressions. This obligation was fulfilled not only by the inclusion of relevant types of offences in chapter XXVII. Many types of prohibited acts, specified in the Criminal Code, relate to the dignity of the person as a subject of criminal law protection. Article 3 of the Criminal Code extends the provisions of Article 30 of the Constitution to the imposition of punishment and punitive sanctions by criminal law. The imposition of punishment should take into account the obligation of respect for the

³ The purpose of such a narrow approach to a constitutional complaint was to separate the jurisdiction of the Constitutional Tribunal and the general judiciary. The Constitutional Tribunal has to be a court over the law, but not an agency of the administration of justice. For more on this problem, see B. Wierzbowski: "Skarga konstytucyjna - oczekiwania i problemy" [Constitutional Complaint - Expectations and Problems], *Przegląd Sądowy* 1997, no. 4, p. 3 and following.

dignity of the person. There is a close relation between Article 3 of the Criminal Code and Article 40 of the Constitution: the latter prohibits subjecting anyone to torture or cruel or inhuman treatment. Specific sections of the Criminal Code introduce new types of acts prohibited under penalty (Articles 246 and 247(3)). Those provisions provide a basis for bringing to justice [before a criminal court] those public functionaries who have applied unlawful methods of investigation or tolerated cruelty towards persons deprived of liberty.

The key issue from the point of view of the guarantee function of criminal law is the definition of the prerequisites of criminal liability. Since those prerequisites bear on the possible restriction of the fundamental freedoms and rights of the person, it is necessary to draw limits to criminal liability at the constitutional level in order to impose constraints on the ordinary legislator, and thus preventing any possible influence exerted on the scope of criminal liability by any given political composition of Parliament.

The limits of criminal liability are specified by the first sentence of Article 42(1) of the Constitution which states that “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.” Hence, the Constitution contains the classic formula *nullum crimen sine lege poenali anteriori*, replicated in Article 1 of the Criminal Code, and which has been a foundation of criminal law for more than 200 years. The inclusion of the *nullum crimen ... anteriori principle*, both in the Constitution and the Code, is fully justified. In fact, it is primarily the legislator to whom this constitutional norm is addressed. Therefore, the first sentence of Article 42(1) should be understood as an obligation imposed on the legislator to define, in any statute, those features of behaviour that are prohibited under penalty. The legislator has to establish a catalogue of punishable behaviours. The norm of the code is primarily addressed to the judge and it forbids him to hold responsible any person who has not committed an act prohibited by a law in force at the moment of the commission thereof.

The constitutional principle of *nullum ... anteriori* results in an obligation to determine the features of any act prohibited by a normative act in the nature of a statute. The legislator cannot delegate this power to the Executive or local government. This means that any provisions of the criminal law of a “blank” character, which do not specify the characteristics of an act attracting criminal liability, would have to be considered inconsistent with the Constitution. The provisions of an act lower in the hierarchy than a law may only supplement such characteristics, but are quite unable to extend the foundations of liability specified in the law. The *nullum ... anteriori* principle - by virtue of the first sentence of Article 42(1) of the Constitution - is addressed to the legislator. It also forbids the application of general clauses in order to describe an act as a prohibited act: this imposes on a judge an obligation to answer the question as to which types of acts are deemed prohibited under penalty.

The first sentence of Article 42(1) states the principle expressing the prohibition of any retroactive operation of a provision introducing the principle of legal liability (*lex retro non agit*) and which is also a constitutive canon of the guarantee function of criminal law. Due to some specific questions - relating primarily to the prescription of

penal liability - the application of this principle on a constitutional basis will be discussed in detail below.

An exception to the first sentence of Article 42(1) of the Constitution is specified in the second sentence of that constitutional clause. Despite the lack of statutory penal liability for an act of a given category at the time of its commission, the actor can be held criminally responsible if such act constituted a criminal offence under international law. The norm specified in the second sentence of Article 42(2), reflects the constitutional status given to the regulation contained in Article 7(2) of the European Convention for Protection of Human Rights and Fundamental Freedoms. Amongst the most important issues is the interpretation of the notion of "criminal offence under international law", since it is also a matter of importance to define the limits - allowed by the Constitution - of admissible exceptions from the principle of *nullum crimen sine lege*. The case law of the International Court of Human Rights involving the interpretation of that provision is minimal. One may claim with absolute certainty that only under international law does the notion of criminal offence include crimes against humanity and war crimes.⁴ It seems that the extension of this exception to further categories of offences would require an explicit basis in international law. The issue of the exception resulting from the second sentence of Article 42(1) will be discussed below, together with the problems of prescription.

It should be noted that the Constitution omits the principle of *lex severior retro non agit* contained in the norms of international law.⁵ This principle has been expressed in Article 4(1) of the Criminal Code. Due to the specification of that principle in international law instruments binding in Poland, any failure by the legislator to satisfy the requirements resulting from that principle would have no practical meaning in the light of Article 91 of the Constitution.

The constitutional principle of *nullum crimen sine lege* obliges the legislator to specify those acts which he considers punishable. From the point of view of guarantees, such duty is insufficient because it does not protect a person against the arbitrary practices of the legislative power. Only on the basis of the provisions of the first sentence of Article 42(2) is the legislator not obliged to justify the introduction of prohibition under penalty for particular behaviour, and thus does not have to justify his restrictions - through the use of criminal law - of the fundamental freedoms and rights of the person. Accordingly, the Constitution should contain a norm expressing the principle of *nullum crimen sine periculo sociali*. This principle has a long tradition as a constitutional principle addressed to the legislator: it appeared in the Declaration of Human Rights of 1789. The principle should not be confused with the condition for criminalization of an act, specified in Article 1(2) of the Criminal Code, namely one possessing a higher than minimal level of social harm. The command - addressed to the legislator - not to penally prohibit behaviours which are not socially harmful concerns very particular types of behaviour (e.g. the legislator cannot penalise public criticism of the authorities). The condition of criminalization con-

⁴ Cf. J. A. Frowein, W. Peukert: *Europäische Menschenrechtskonvention. Kommentar*, 1996.

⁵ See Article 7(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms.

tained in Article 1(2) of the Criminal Code relates to a particular behaviour possessing the features of a type of penally prohibited act. This does not imply a correction of the legislator's mistake in specifying the features of a type of the prohibited act, since even a properly specified type is always an abstract thing, incapable of taking into account the individual features of a particular behaviour and which can have decisive impact on the assessment of the social harm of such an act.⁶ We have no norms in the Constitution which would explicitly forbid the legislator from penally prohibiting a category of acts which are not characterized as socially harmful. The omission of the *nullum crimen sine periculo sociali* principle in the Constitution should be considered a defect, particularly as there appear interpretative difficulties in indirectly deriving that principle from the text of the Constitution. On the basis of the constitutional provisions existing before 1997, the principle of *nullum crimen sine periculo sociali* was derived from the principle of a democratic state ruled by law,⁷ and particularly the principle of proportionality. According to the former principle, the intervention of the state in the sphere of the freedoms and rights of citizens cannot be reconciled with the principle of a democratic state ruled by law without appropriate justification.⁸ The application of criminal law sanctions in respect of behaviour which produces no social harm would be a classical example of a violation of the principle of proportionality.⁹ Due to the lack of specific rules in the previously existing constitutional provisions, it was admissible to derive guarantee rules relating, *inter alia*, to criminal law from the principle of a democratic state ruled by law. The Constitution of 2nd. April 1997, however, enunciates specific rules applicable to the criminal law as well: Article 42(1) is evidence of this. Thus, there arises the question: if the principle of *nullum crimen sine periculo sociali* is not explicitly formulated in the Constitution, can it be derived from Article 2 of the Constitution?¹⁰ The principle of proportionality, in relation to the criminal law, may be derived also from Article 31(3) of the Constitution. Therefore, in my opinion, even if not specified in the Constitution, the principle of *nullum crimen sine periculo sociali* can be derived - indirectly from constitutional principles - as a principle limiting the legislator's discretion in the area of criminal law.

In criminal law, the principle of proportionality is reflected in the selection of penalties and legal measures applied to a particular type of offence. The extent of statutory sanctions should be proportional to the abstractly assessed level of the social harm of a given type of prohibited act.

Article 38 of the Constitution, ensuring the protection of everyone's life, results in the prohibition against the introduction of the death penalty into ordinary legislation.

⁶ For more on this subject, see A. Zoll: "Materialne określenie przestępstwa" [Material Definition of an Offence], *Prokuratura i Prawo* 1997, no. 2, p. 7 and following.

⁷ Article 1 of the Constitutional Provisions Continued in Force by the Constitutional Act of 17 October 1992.

⁸ See Judgment of the Constitutional Tribunal, U 10/92, OTK 1993, item 2.

⁹ The Constitutional Tribunal derived the constitutional principle of the adequate specification of acts penally prohibited from the principle of a democratic state ruled by law, see Judgment S 6/91, OTK 1991, item 34.

¹⁰ See M. Dąbrowska-Kardas: "O dwóch znaczeniach pojęcia społecznego niebezpieczeństwa czynu" [On the Two Meanings of the Concept of a Socially Harmful Act], *Czasopismo Prawa Karnego i Nauk Penalnych* 1997, no. 1, p. 27 and following.

This assertion is reinforced by the essence of the second sentence of Article 40. The former norm forbids the application of corporal punishment. The death penalty can undoubtedly be included in that type of punishment. Bearing in mind the political disputes associated with the adoption of the Constitution, and its subsequent confirmation in a referendum, we can understand why the prohibition of the death penalty is not explicitly stated in the Constitution. Nevertheless, I think that the combined provisions of Articles 38 and 40 leave little room for the restoration of the death penalty in Poland. Unfortunately, some politicians - in particular, the authors of a recent bill attempting to introduce severer penalties for criminal offences - are attempting to exploit a confused public opinion to obtain political support.¹¹ The bill in question is extremely harmful to the legal culture of Polish society, but not only because it proposes the restoration of the death penalty. Our legal culture is not improved by a discussion as to whether an appeal against the verdict imposing a death sentence should be reviewed at a trial, or sitting *in camera*, with only the possibility of the presence of defence counsel, or only such defence counsel included in a list at the disposal of the Minister of Justice - or whether the Public Prosecutor-General should, according to the bill, be admitted to cases to which that bill relates. Politicians who try to muster public opinion in support of such a bill commit an unforgivable sin against legal culture.

As I mentioned in my initial remarks, one consequence of granting precedence over laws to international agreements ratified prior to the consent of the Parliament, is that Polish criminal law legislation inconsistent with such agreements cannot be applied and should be eliminated from the legal system (see: Article 188 (2) of the Constitution). Ratified international agreements also dictate the mode of the interpretation of domestic legal provisions. A good example of such mandatory interpretation is provided by Article 25(1) of the Criminal Code in the context of Article 2(2)(a) of the ECHR. The prevalent view in Polish doctrine, rejecting the subsidiary character of self-defence and adopting the principle according to which the law should not yield to anarchy,¹² must now be restricted in the light of Article 2(2)(a) of the Convention. The intentional taking of somebody's life is permitted only if absolutely necessary to repel an assault against a person. In such cases, with so limited a scope, self-defence should be interpreted as a subsidiary institution.¹³ For example, it is forbidden to deliberately kill an attacker who is trying to steal a car radio.

A very important role in determining the scope of criminal liability, of medical doctors in particular, is played by Article 39 of the Constitution which prohibits scientific experimentation, including medical experimentation, without the voluntary consent of the person being subjected to it. This constitutional norm has found its expression

¹¹The draft prepared by the politicians connected with Porozumienie Centrum [Centre Alliance] (Jarosław Kaczyński), initially treated as a citizens' initiative, submitted to the Sejm as a Deputy's Bill due to the lack of a law on citizens' initiative (see Article 118(2) of the Constitution).

¹²Cf. A. Marek: *Prawo karne. Zagadnienia teorii i praktyki* [Criminal Law. Theory and Practice], Warszawa 1997, p. 238.

¹³See A. Zoll [in:] K. Buchała, A. Zoll: *Kodeks karny. Część ogólna, Komentarz* [Criminal Code. General Part, A Commentary], Kraków 1998, p. 223.

in Article 27 of the Criminal Code, though to a very limited extent. Article 27(1) specifies the basic requirements for cognitive, medical, technical and economic experimentation. However, under paragraph 3 of that Article - added by a Sejm Committee - the specification of rules and conditions for carrying out medical experimentation is referred to a specific law. Such rules and conditions are laid down by the Act on the Doctor's Profession, of 5 December 1996 (Journal of Laws of 1997, No 28, item 152). There is a substantial misunderstanding over the definition of the legal character of medical experimentation. One must appreciate the difference in the scope of the constitutional norm and the provisions of Chapter 4 of the Act on the Doctor's Profession on the one hand, and that of Article 27(1) of the Criminal Code (supplemented by the norms contained in some provisions of the Act on Doctor's Profession) on the other. The Criminal Code, and the provisions supplementing it, are applied only to situations where behaviour constituting medical experimentation exemplifies the features of a type of a prohibited act. This is, as the norm of the Criminal Code specifies, a counter-type, i.e. the exclusion of the illegality of behaviour normally prohibited under penalty. The constitutional norm and the provisions of Chapter 4 of the Act on the Doctor's Profession also relate to behaviours which do not exhibit the features of a prohibited act and are primarily irrelevant to criminal law. One should also bear in mind that in the new Criminal Code the list of such behaviour is limited to the extent that Article 192(1) defines as penally liable any act in the performance of a medical operation committed without the consent of the patient. This provision also concerns surgical intervention of an experimental character.

The Act on the Doctor's Profession establishes in an extremely complex, and internally incoherent, fashion the conditions for the admissibility of medical experimentation, in particular the requirement of consent given by the person subjected to experimentation. Some solutions adopted in that Act are inconsistent with Article 39 of the Constitution, since it can enable experimentation based on the consent given by a guardianship court where the statutory guardian of the person to be subjected to experimentation refuses to give such consent (see: Article 25(6)-(8): this could be regarded as fulfilling the requirement of consent to medical experimentation. In my opinion a guardianship court, having received such an application, should apply - in accordance with Article 193 of the Constitution - for an examination of the conformity of those statutes to the Constitution.

I now turn to problem of limitation. The Constitution dedicates two provisions to this issue. In Article 43, the Constitution states that there shall be no limitation in relation to war crimes and crimes against humanity. Article 44 formulates a rule suspending the period prescribed of limitation for offences committed by, or by the order of, public officials, and that have not been prosecuted for political reasons. The provisions of the new Criminal Code contain different regulations in this respect. Article 105(1) states that there shall be no limitation as regards liability and the imposition of penalty, in relation to crimes against peace and humanity and war offences. The application of this norm of the Code, as compared to Article 43 of the Constitution, should not cause any substantial problems of interpretation, since one could defend the view that war

crimes, within the meaning of Article 43 of the Constitution, also include crimes against peace. It is, however, not desirable to resort to such interpretational contortions. A more difficult problem arises in connection with Article 44 of the Constitution. Article 105(2) excludes from general limitation the offences specified therein and committed by a public functionary in connection with the performance of his official duties. Hence, Article 105(2) goes much beyond the constitutional norm, by excluding limitation and not only suspending the periods prescribed by them. (At this point, I shall not delve into the problem of how the substantive scope of the constitutional and criminal code norms may overlap, but remain incongruent with each other, a source of further problems.) Is, therefore, Article 105(2) in conformity with the Constitution, or should it be eliminated from the legal order? To answer this question we shall have to ascertain the legal nature of limitation. An issue of particular importance is whether the limitation on penal liability or the execution of the penalty is a right of the perpetrator. The Constitution places Articles 43 and 44 within Chapter II, in the subchapter entitled „Personal freedoms and rights”. This might indicate a positive answer. If so, Articles 43 and 44 should be understood as constitutional exceptions to the exclusion or restriction of the right to limitation, and any departure from the scope of such exceptions in ordinary legislation would be inadmissible. Such an understanding of the limitation would also mean that Article 44 should be comprehended as possessing sense only for the future, and providing the ordinary legislator with a basis for the introduction of a suspension of the period of limitation in relation to the offences specified in the Constitution. If the limitation is treated as a personal right, then Article 44 - lacking any explicit expression tending in this direction - cannot have a retroactive effect, depriving thereby a perpetrator of his rightful expectation concerning the limitation. This presumption also inevitably leads to doubt the conformity to the Constitution of Article 9(1) of the Act of 6 June 1997 - The Regulations Introducing the Criminal Code (*Journal of Laws*, No. 88, item 554). However, it seems to me that the institution of limitation deserves a different approach, one which concludes that a systemic interpretation is not conclusive. There is no personal right to limitation and, in this connection, there is no expectancy of limitation due to the perpetrator. None of the provisions of the Constitution provide such a right. The ordinary legislator enjoys discretion in shaping the institution of limitation as it relates to penal policy (advisability of punishment), but not to the personal right of the perpetrator. Theoretically, the legislator could generally exclude limitation, without constitutional authorisation, in relation to, e.g. all felonies. Articles 43 and 44 of the Constitution contain norms which introduce minimum solutions. The legislator has to exclude limitation in relation to war crimes and crimes against humanity (Article 43) and, at least, suspend limitation periods to the extent specified in Article 44. Such an understanding of the institution of limitation and the meaning of Articles 43 and 44 of the Constitution allows us to treat Article 105 (1) and (2) of the Criminal Code as consistent with the Constitution. The placing of Articles 43 and 44 in Chapter II should be understood as expressing the legislator's will to strengthen personal freedoms and rights and to protect them against the assaults specified in those two constitutional provisions.

The assessment of conformity to the Constitution of Article 9(1) of the Regulations Introducing the Criminal Code deserves a separate analysis. This provision has a retroactive effect, since it applies to acts committed between 1 January 1944 and 31 December 1989. It covers two fundamentally different situations. The first occurs when the limitation period has not expired before the day the introductory regulations come into force. At the moment the regulations come into force, the perpetrator is subject to penalty and - according to the above provisions - has no expectation of limitation. Any extension of penal liability is, therefore, a legitimate decision of the legislator, based on Article 44 of the Constitution. The second situation arises when the limitation period has expired before the regulations introducing the Criminal Code have come into force. At the moment those regulations come into force, the perpetrator is not subject to criminal liability. Such liability is based on introductory provisions.¹⁴ Hence, from the point of view of the guarantee function of criminal law, the situation is similar to that which we would meet if the retroactive effect of penal liability of a specified act was introduced. The prohibition against penal liability functioning with retroactive effect on a particular act results directly from the first sentence of Article 42(1). The restoration of the penal liability of acts, in relation to which the limitation periods have already expired, is obviously inconsistent with Article 7(1) of the ECHR. This also relates to those cases where penal liability expired as a result of the application of an amnesty or the abolition (Article 9(2) of the regulations introducing the Criminal Code. At this point, there arises the question whether the principle of justice could justify a departure from the principles of a democratic state ruled by law. It seems to me that it could not. The guarantee principles of criminal law set up a barrier for the satisfaction of the sense of justice. Such a departure to satisfy a sense of justice might have been justifiable in a period immediately following the expiry of a period engendering an obstacle to the conduct of proceedings. However, a long time has passed since 31 December 1989, and from today's perspective such a departure could not be justified.

Another fundamental problem of a constitutional nature arises in connection with the regulations introducing the Criminal Code. Article 14(4) states that „The provisions of the Criminal Code relating to parole apply, as appropriate, to persons conditionally released and to those serving a term of imprisonment”. Regulations on parole are, in general, more stringent in the new Criminal Code as compared with the old legal system. May, e.g. persons who satisfy the requirements of the former legal order for parole (i.e. they have served one-third of their sentence) be released after the new Criminal Code comes into force if the prerequisite of serving a specified part of a sentence has not been satisfied? Article 14(4) prevents this. Again, there appears the question whether any provision inflicting greater punishment may have retroactive effect. When we reject the principle of a democratic state ruled by law, then we

¹⁴ Strictly speaking, the decisive moment is the coming into force of the Act of 22 July 1995 on the Amendment of the Criminal Code, the Executory Criminal Code and on the increase in minimum and maximum levels of fines and penalties in criminal law (*Dziennik Ustaw*, no. 95, item 475), which introduced to the Criminal Code of 1969 Article 108 (2) the same wording as in Article 9(1) of the Regulations Introducing the Criminal Code of 1997.

cannot find any clear answer to this question in the Constitution. It seems that the issue should be resolved as follows: If a decision on conditional release from serving the full sentence has been based on the old regulations and the convicted criminal offender is on probation, then, even if under the new regulations the conditions for conventional release have not been met, such conventional release cannot be withdrawn only for that reason. However, when the convicted person has not begun a probation period, it should be presumed that conditional release will require satisfying all the conditions specified in the new regulations.

An analysis of the conformity of criminal law with the Constitution cannot be limited to the new Criminal Code. Due to an evident mistake of the authors of the Constitution, special problems occur in the area of tax criminal law. Article 175(1) of the Constitution establishes the jurisdiction of the courts over the whole administration of justice, including obviously all criminal cases. Consequently, Article 42(3) states that: "Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court". The exclusive jurisdiction of the courts will also cover decisions in cases prosecuted as misdemeanours, while Article 237(1) of the Constitution establishes a 4-year period following the coming into force of the Constitution, for the implementation of this principle. Unfortunately, the authors of the Constitution overlooked the fact that in Poland extrajudicial adjudicating agencies decide not only in cases prosecuted as misdemeanours. According to Article 123(1) of the Tax Criminal Act, financial adjudicating agencies have jurisdiction over tax offences for which only punishment of a fine may be inflicted, and over tax misdemeanours. Hence, as regards tax offences, the above mentioned Article is inconsistent with Article 175(1) and Article 42(3) of the Constitution. At this point, we must explicitly note that this provision allows, within the two year period of the date the Constitution comes into force, for the application - and even adoption - of provisions inconsistent with the Constitution. This Article should be understood literally, and it expresses only the obligation of the Council of Ministers to submit bills indispensable for the application of the Constitution. Hence, it refers to situations where a constitutional norm cannot be applied directly without the adoption of an appropriate law, prescribed by the Constitution. However, Article 236(1) of the Constitution does not provide for any peculiar *vacatio legis* for constitutional norms. It seems, however, that the simplest way to bring tax criminal law into conformity with the Constitution, before the implementation of a fundamental reform in this field of law, would be by changing the definition of a tax misdemeanour to cover those tax offences falling within the jurisdiction of financial adjudicating agencies. I am aware of all the imperfections attendant on such a solution. Nevertheless, in my opinion, there is no other way to avoid the consequences of the mistake made by the authors of the Constitution.

Conflicts between the provisions of the tax criminal law and the Constitution result not only from the problem of competence. Article 46 of the Constitution states that property may be forfeited only in cases specified by the law and only by virtue of a final judgment of a court. The Tax Criminal Act provides for an additional penalty of forfeiture of property for the commission of tax offences falling within the jurisdiction of

financial adjudicating agencies (e.g. Article 65(1) in conjunction with Article 48(1) or Article 49). The inconsistency of those provisions with the Constitution is so evident that it deserves the immediate intervention of the legislator. Pending such intervention, the financial adjudicating agencies should not - by reason of Article 8(2) - impose forfeiture of property even in those situations where such adjudication would be obligatory under the provisions of the Tax Criminal Act.

The enforcement of the adopted Codes will be vital for the completion of the reform of criminal law. Demands for further delay in the statutorily specified date of their coming into force are alarming. The Codes are not perfect. Nevertheless, we need to collect the experience of their application to enable their further amendment and deletion of errors. Any changes introduced today could lead to an inconsistency in such solutions. The postponement of codification coming into force provides an opportunity for irresponsible ventures of a populist nature, detrimental to our legal culture.