

Anna Dziergawka¹

**KRYTYCZNE UWAGI ODNOŚNIE DO WYŁĄCZENIA
ZATARCIA SKAZANIA NA PODSTAWIE ART. 106A K.K.
GŁOSA DO WYROKU TRYBUNAŁU
KONSTYTUCYJNEGO Z 16 GRUDNIA 2020 R. W
SPRAWIE SK 26/16**

**CRITICAL REMARKS REGARDING THE EXCLUSION OF
SEIZURE OF A CONVICTION PURSUANT TO ART. 106A
OF THE PENAL CODE GLOSS TO THE JUDGMENT OF
THE CONSTITUTIONAL TRIBUNAL OF DECEMBER 16,
2020 IN THE CASE SK 26/16**

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Streszczenie

Wyrokiem z 16.12.2020 r., SK 26/16, Trybunał Konstytucyjny orzekł o zgodności art. 106a k.k. z Konstytucją Rzeczypospolitej Polskiej. Jednocześnie skład orzekający dostrzegł mankamenty tego przepisu i zwrócił się do Sejmu z sygnalizacją w sprawie konieczności rozważenia jego stosownej modyfikacji. Autorka dokonuje analizy wydanego orzeczenia oraz treści ocenianego przepisu, kładąc szczególny nacisk na niespójność systemu prawnego oraz skutki w zakresie stygmatyzacji sprawcy i przeszkód w jego resocjalizacji. W głosie zawarto postulat, aby cele polityczno-kryminalne związane z ochroną praw dziecka zostały osiągnięte innymi środkami, przy zachowaniu zasady proporcjonalności i indywidualizacji skutków skazania.

Anna Dziergawka, PhD, judge and Vice-President of the Regional Court in Bydgoszcz, correspondence address, e-mail: aniadzierga@wp.pl, ORCID: 0000-0002-6833-6462.

Słowa kluczowe: wyłączenie zatarcia skazania, dobro dziecka, stygmatyzacja sprawcy, spójność prawa, resocjalizacja.

Abstract

By the judgment of December 16, 2020 in the case file ref. act SK 26/16 Te Constitutional Tribunal ruled on the compliance of Art. 106a of the Penal Code with the Constitution of the Republic of Poland. At the same time, the adjudication panel noticed the shortcomings of Art. 106a of the Penal Code and addressed the Sejm with a signal that it was necessary to consider an appropriate modification of the aforementioned provision. The author analyzes the issued judgment and the content of the provision under evaluation, placing particular emphasis on the inconsistency of the legal system and the effects of stigmatizing the perpetrator and obstacles to his rehabilitation. The postulate that the political and criminal goals related to the protection of children's rights should be achieved by other means, while observing the principle of proportionality and individualisation of the consequences of a conviction.

Key words: exclusion of the obliteration of the sentence, the best interest of the child, stigmatization of the perpetrator, legal consistency, rehabilitation.

I

In its judgment of 16/12/2020, SK 26/16,² the Constitutional Court decided that Article 106a of the Polish Penal Code³ was compatible with Article 30, Article 40 sentence 1, Article 41(1), Article 47 and Article 65(1) in conjunction with Article 31(3) of the Constitution.⁴

The constitutional complaint to the Constitutional Court was filed by a convict who was unable to obtain a certificate of clean criminal record

² Judgment of the Constitutional Court of 16/12/2020, SK 26/16 (Journal of Laws of 05 January 2021, item 20; hereinafter: judgment of the Constitutional Court).

³ Polish Penal Code of 6 June 1997 (Journal of Laws of 2018, item 1600; hereinafter the "Penal Code").

⁴ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended; hereinafter: the Constitution).

in order to start a job. This was because he had received a non-suspended prison sentence for a crime against sexual freedom and the mores where a minor under the age of 15 was the victim. The case is related to Article 106a of the Polish Penal Code, which is worded as follows: “A non-suspended prison sentence given for a crime against sexual freedom and the mores shall not be erased from the record if the victim was a minor under the age of 15.”

The author of the constitutional complaint of 13/05/2016 claimed that the wording of Article 106a of the Polish Penal Code was in breach of the Constitution because it violated, without limitation: the right to respect for human dignity, the right to legal protection of one’s private and family life, of one’s honour and good name, and the right to decide about one’s own personal life, the right to choose one’s place of work and learning, the right to work and learn, and the principle of equality before the law. The statement of grounds mentioned the stigmatising nature of the conviction, which makes it hard for the convict to integrate with the society, as well as the purely legal consequences connected with the inability to find a job which requires a clean criminal record. The complaining party also addressed the objectives of the erasure of record, emphasising its humanitarian nature because otherwise the convict would have to carry the stigma of the conviction and the sentence their whole life. According to the complaining party, the fact that the challenged regulation renders it impossible to erase the record violates human dignity by stigmatising the offender for lifetime, causing them to lose their self-esteem and eliminating them from the social and public life.

In support of the claim that the regulation violates the right to personal inviolability and freedom, the claim states that the strict regulation deprives a convict of the ability to make decisions in accordance with their own free will. Furthermore, the principle of equality was addressed because absence of the possibility to erase the conviction applies to all offenders convicted for crimes against sexual freedom and the mores, regardless of the gravity of the crime. The position of the complaining party was supported by the Polish Ombudsman.

In its analysis of the case, the Constitutional Court first established the scope of the complaint and the reference provisions, which included the following regulations:

- Article 2 of the Constitution: “The Republic of Poland is a democratic state of law bringing to life the principles of social justice.”
- Article 30 of the Constitution: “The innate and inalienable human dignity is a source of freedom and rights of people and citizens. It is inviolable and it is the obligation of public authorities to respect and protect it.”
- Article 40 of the Constitution: “No one can be tortured or subjected to cruel, inhumane or humiliating treatment and punishment. Corporal punishments are prohibited.”
- Article 41(1) of the Constitution: “Everyone is guaranteed personal inviolability and personal freedom. A person may only be deprived of their freedom or have their freedom limited on the terms and pursuant to a procedure laid down in a statute.”
- Article 47 of the Constitution: “Everyone is entitled to the legal protection of their private and family life, honour and good name and to make their own decisions about their personal life.”
- Article 65(1) of the Constitution: “Everyone is guaranteed the freedom of choosing and pursuing an occupation and of choosing the place of work. Exceptions are defined by way of statute.”
- Article 31(3) of the Constitution: “Restrictions on the exercise of Constitutional freedoms and rights may be established only by way of statute and only if they are necessary in a democratic state for national security or for public order or to protect the environment, health and public morality, or the freedoms and rights of their people. Such restrictions must not violate the essence of the freedoms and rights.”

In its conclusion, after a thorough analysis, the Constitutional Court decided that the wording of Article 106a of the Polish Penal Code was compatible with the above-stated reference provisions.

II

As far as the Court’s recapitulation is concerned, there is no need to discuss the argumentation in detail as it must be deemed correct in its essence. However, it should be emphasised that the Court has identified a collision of values in connection with the regulation in question: “on the one hand, there is the personal freedom and privacy of convicts (and indirectly their right to choose an occupation), on the other hand there is

the welfare of children (minors). Those are rooted in the Constitution and they are related to the sphere of personal rights so they differ in terms of importance: there is no doubt that the welfare of a child (especially when it comes to the protection of its life and health) has, in principle, priority in the constitutional axiology over the right to privacy and personal freedom (page 26 of the statement of grounds).

The Constitutional Court adds that the exclusion of the possibility to erase the conviction in the case specified in Article 106a of the Polish Penal Code is justified by the constitutional principle of the welfare of a child and its primary purpose is to prevent anyone who has committed crimes against sexual freedom and the mores against children (who are particularly vulnerable) from finding employment in places where children learn or spend their time. In the opinion of the Constitutional Court, the purpose of the regulation is to effectively isolate offenders of crimes against sexual freedom and the mores committed against minors after they have served their prison sentence. So its direct function is to protect the health and lives of minors (page 25 of the statement of grounds).

As regards the concept of conviction in Polish law, the Constitutional Court is right to point out that erasure of conviction was a mechanism known to all subsequent Polish Penal Codes, from the one adopted in 1932 (Article 90) through the one dated 1969 (Articles 110 through 112) to the one currently in effect (Articles 106–108). So it can be agreed that the mechanism of erasure of conviction has a certain tradition in the Polish law.⁵ All the Penal Codes rely on the correct assumption that the criminal record should be erased at some point but the form of the erasure differed. Although erasure in the Penal Code 1932 required a decision of the court, it was emphasised that a convict should be denied this right “only for particularly justified reasons.”⁶ The Penal Codes dated 1969 and 1997 adopted a rule that every conviction is erased by the operation of law (*ipso iure*). They also permitted erasing convictions for certain crimes based on court rulings, which could be given before the expiry of the time limits required for erasure by the operation of law.

⁵ Cf. M. Błaszczyk, *Instytucja zatarcia skazania w polskim prawie karnym*, “*Studia Iuridica*” 2006, Vol. XLVI, p. 9.

⁶ In: Judgment of the Supreme Court of 3 April 1965, II KZ 36/65, OSNPG 1965, No. 5, item 44.

Erasure of conviction by the operation of law does not require any constitutive decision but only compliance with the formal requirement and the removal of the criminal file from the record of convicts.⁷ So the action is declaratory in nature as it only confirms the existing legal status. As a result, failure to remove the criminal file from the criminal record despite the legal erasure of the conviction is not an exclusive and irrefutable proof of having a criminal record or of having a clean criminal record.⁸ In contrast, erasure of conviction based on a ruling of the court given at the request of the convict can take place after 5 years if the convict has observed the legal order and the prison sentence did not exceed 3 years (Article 107(2) of the Polish Penal Code), as well as after 3 years for fines or community service (Article 107(4) of the Polish Penal Code). However, a prerequisite for erasure of a prison sentence is that the offender must observe the legal order, which the legislator does not require when it comes to fine or community service.

It must be emphasised that a conviction cannot be erased before the sentence is served, waived or time-barred (Article 107(6) of the Polish Penal Code). So the Constitutional Court was right to state that there were three cases in Polish law where adjudication of a penal measure “forever” meant that the conviction could not be erased (page 14 of the statement of grounds). This applies to the following penal measures related to lifetime:

- ban on driving⁹ (Article 42(3) and Article 42(4) of the Polish Penal Code),
- ban on taking up any or specific positions, pursuing any or specific occupations or activities, connected with upbringing, educating, treating or looking after minors (Article 41(1a) and Article 41(1b) of the Polish Penal Code)
- visiting specific environments or places, contacting specific people, approaching specific people or leaving a specific place of stay (Article 41a(3) of the Polish Penal Code).

The introduction of the penal measures specified in Article 41(1a), Article 41(1b) and Article 41a of the Polish Penal Code to the system by

⁷ M. Bojarski, M. Filar, W. Filipkowski, O. Górniok, P. Hofmański, M. Kalitowski, A. Kamiński, L.K. Paprzycki, E. Pływaczewski, W. Radecki, Z. Sienkiewicz, Z. Siwik, R.A. Stefański, L. Tyszkiewicz, A. Wąsek, L. Wilk, *Kodeks karny. Komentarz*, Warsaw 2006, p. 397.

⁸ S. Zimoch, *Istota i znaczenie instytucji zatarcia skazania*, Warsaw 1979, p. 7.

⁹ The provision of Article 42(3) of the Polish Penal Code was deemed compatible with the Constitution by judgment of the Constitutional Court of 16/12/2020, SK 26/19.

way of the Act of 27 July 2005¹⁰ must be seen as a positive step.¹¹ They may indeed be repressive but they are primarily preventive. The purpose of those measures is to protect underage victims of crimes to sexual freedom and any victims from crimes involving violence.¹² What raises objections is the fact that those measures can be adjudicated forever and cannot be deemed fulfilled after the expiry of a certain period. After all, pursuant to Article 84(2) of the Polish Penal Code, the possibility of deeming a penal measure fulfilled was excluded in respect of the lifetime ban on taking any or specific positions, pursuing any or specific occupations or activities, connected with upbringing, educating, treating or looking after minors (Article 41(1a)). The doctrine rightfully emphasises that the solution is irrational and fails to account for the changing life situations.¹³ If we accept that the imposition of bans forever is not humanitarian and assumes *a priori* that the offender will not improve, it must be postulated that penal measures not be imposed forever, which would also make it possible to erase convictions. In the current legal background, conviction can be erased in such situations only by way of amnesty or individual pardon, similarly as in the case of the crimes specified in Article 106a of the Polish Penal Code.¹⁴

III

Consequently, it must be in principle assumed that erasure of conviction is general, i.e. it applies to all convictions. There is one exception provided for in Article 106a of the Polish Penal Code, which was added by the

¹⁰ Polish Act Amending the Penal Code, the Criminal Procedure Code and the Executive Penal Code of 27 July 2005 (Journal of Laws No. 163, item 1363; hereinafter: the Amending Act of 27 July 2005).

¹¹ See K. Banasik, *Zatarcie skazania za przestępstwa o charakterze seksualnym*, "Państwo i Prawo" 2013, Sheet 9, p. 103.

¹² See A. Dziergawka, *Prawna ochrona dziecka przed wykorzystaniem seksualnym*, in: *Prawo karne w ochronie praw dziecka*, ed. A. Grześkowiak, I. Zgoliński, Bydgoszcz 2018, p. 87.

¹³ W. Wróbel, *Krytycznie o zaostreniu odpowiedzialności za przestępstwa komunikacyjne*, "Państwo i Prawo" 2001, Sheet 7, p. 60; M. Kulik, *Dotychczasowe nowelizacje kodeksu karnego z 1997 r.*, "Prokuratura i Prawo" 2002, No. 12, p. 47; B.J. Stefańska, *Zatarcie skazania*, Warsaw 2014, s. 46; A. Zientara, *Sporne problemy dotyczące wyłączenia możliwości zatarcia skazania na podstawie art. 106a k.k.*, "Przegląd Sądowy" 2010, No. 3, p. 96.

¹⁴ B. J. Stefańska, *Zatarcie skazania w formie aktu łaski*, "Prokuratura i Prawo" 2009, No. 1, p. 46; M. Błaszczyk, *op.cit.*, pp. 23-24.

Amending Act of 27 July 2005. According to that regulation, a non-suspended prison sentence for a crime against sexual freedom and the mores cannot be erased if the victim was a minor under the age of 15. The regulation is clear and it leaves no doubt as to the scope of the crimes excluded from the conviction erasure mechanism.¹⁵ The objective of the legislator is obvious too, although it was firmly opposed by certain criminal law scholars.¹⁶ This is because the regulation was said to be violating “all rules.”¹⁷ The common objection is that absence of erasure of conviction violates the principle of humanitarianism expressed in Article 3 of the Polish Penal Code.¹⁸ Lifetime stigmatisation of the offenders may kill any motivation on their part to start treatment and may be not only ineffective but even harmless from the point of view of the criminal policy. This mechanism would impede improvement and thus increase the number of recidivists.¹⁹

It must be agreed that erasure of conviction is a sign of humanitarianism; it is intended to rebuild the social order disrupted by the crime, it motivates the offender to abandon a life of crime and it is designed to eliminate stigmatisation. It is unreasonable to maintain the sentence-related stigmatisation for one’s whole life or for an indefinite period as this does not foster the rehabilitation of the offender. The solutions in this respect should protect the society, especially underage children but also should not violate the dignity of the offender and should

¹⁵ It must be noted that the crimes pertain to Chapter XXV of the Polish Penal Code, despite the mistake the legislator made in the description of the crimes by using “or” instead of “and” in respect of a “crime against sexual freedom or the mores,” as stated in: B.J. Stefańska, *Zatarcie skazania, rozdział IV Istota i skutki zatarcia skazania, pkt 5. Wylączenie zatarcia skazania w Polsce*, LEX 2014.

¹⁶ See M. Bojarski, M. Filar, W. Filipkowski, O. Górniok, P. Hofmański, M. Kalitowski, A. Kamiński, L.K. Paprzycki, E. Pływaczewski, W. Radecki, Z. Sienkiewicz, Z. Siwik, R.A. Stefański, L. Tyszkiewicz, A. Wąsek, L. Wilk, *Kodeks karny. Komentarz*, Warsaw 2006, p. 396.

¹⁷ A. Marek, *Nieprzemyślane zaostrzenie kar za pedofilię*, “Rzeczpospolita” of 14 August 2005, Prawo co dnia, p. C3.

¹⁸ See M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i szczególna*, Warsaw 2006, p. 375; A. Marek, *Kodeks karny. Komentarz*, Warsaw 2006, pp. 238-239; M. Mozgawa, in: M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa, *Kodeks karny. Praktyczny komentarz*, Warsaw 2007, p. 212.

¹⁹ S. Glaser, *Polskie prawo karne w zarysie*, Kraków 1933, p. 285.

not deprive them of a chance to change their life.²⁰ The stigmatisation should not be lasting and the de-stigmatisation process should be free of any undesirable, punitive, restrictive, non-humanitarian and vengeful acts.²¹ Erasure of conviction entails positive special prevention, re-education, rehabilitation or re-inclusion of the convict in the society. It is intended to restore a good opinion about the convict in the society and make it easier for the offender to return to normal life and build a new image.

As the Constitutional Court has noted, the consequences of Article 106a of the Polish Penal Code extend much further than just to the limits of Chapter XXV (p. 14 of the statement of grounds and the literature referenced therein). The foregoing arises from the regulation of Article 108 of the Polish Penal Code, whereunder if an offender convicted for two or more unrelated crimes commits a crime after the commencement but before the expiry of the time limit required for the erasure of conviction, then the time limit for the erasure is extended because the only permissible option is concurrent erasure of all convictions.²² So the principle of concurrent erasure of convictions has the consequence that if the offender commits another crime before the expiry of the time limit required for the erasure, the only possibility is the erasure of all convictions.²³

As has already been stated earlier in the paper, erasure of conviction is a standard in Polish criminal law. It must be emphasised that erasure of conviction is not directly linked to the type of crime and it depends only on the type and length of the sentence. So tying erasure or exclusion thereof to the type of crime may be considered as a gross and unjustified violation by the system.²⁴ Such an action is also inappropriate from the perspective of the criminal policy because there may be various forms of conduct that violate sexual freedom and the mores, and the most serious

²⁰ See A. Dziergawka, *Zasady stosowania środków zabezpieczających*, in: *Środki zabezpieczające w prawie karnym. Zagadnienia prawnomaterialne i procesowe*, ed. I. Zgoliński, W. Juchacz, Inowrocław 2020, pp. 72-73.

²¹ See S. Sobczak, *Światopogląd i pedagogika*, "Opieka – Wychowanie – Terapia" 2007, No. 3-4, pp. 71-72.

²² L. Gardocki, *Prawo karne*, Warsaw 2005, p. 207.

²³ Contrary: A. Zientara, *op. cit.*, p. 106, who states that: "a conviction in the circumstances specified in Article 106a of the Polish Penal Code will not be an obstacle to erasure of convictions for other crimes."

²⁴ See A. Zientara, *op. cit.*, p. 98.

doubt is raised by the broad catalogue of crimes for which there can be no erasure of conviction. They may range from brutal rape to presentation of pornographic content. The equal gravity of crimes against sexual freedom and the mores is not always adjusted by the requirement to give the offender a non-suspended prison sentence. After all, it is possible to give a non-suspended prison sentence for a crime punishable relatively lightly if the offender has already received a final and binding sentence for another (not necessarily similar) crime. It is also important that the consistency of the law is compromised if even the most severe felonies can be erased,²⁵ including ones which are not time-barred, which applies to crimes against peace, humanity or war crimes.

Although the author substantially agrees with the argumentation of the Constitutional Court and the need to protect the welfare of children,²⁶ it does not seem reasonable to claim that the objective pursued by Article 106a of the Polish Penal Code cannot be achieved with other means. It is hard to approve the position of the Constitutional Court that the Polish Act on Prevention of Sexual Crime Threats of 13 May 2016²⁷ and the Record of Sexual Offenders it created complement the challenged regulation.

The Constitutional Court is right in stating that excluding erasure of conviction under Article 106a of the Polish Penal Code may help fight sexual abuse of minors under the age of 15. However, it must be agreed that this objective can be achieved otherwise, using alternative solutions provided for in the Polish Penal Code.²⁸ The criteria for ineligibility for erasure of conviction which are laid down in Article 106a of the Polish Penal Code are analogical to the criteria for a mandatory ruling imposing a ban on staying in specific environments or places, contacting specific people, approaching specific people or leaving a specific place (Article 41a(2) of the Polish Penal Code). This measure is adjudicated for one to

²⁵ See A. Marek, *op .cit.*

²⁶ See A. Dziergawka, *Dobro dziecka versus prawo oskarżonego do obrony. Imperatyw ponownego przesłuchania pokrzywdzonego w trybie art. 185a k.p.k. Glosa do postanowienia Sądu Najwyższego z 4 kwietnia 2018 r., III KK 362/17*, "Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury" 2021, No. 1, pp. 127-128.

²⁷ Polish Act on Prevention of Sexual Crime Threats of 13 May 2016 (Journal of Laws of 2020, item 152).

²⁸ See S. Szyrmer, *Nowelizacja prawa karnego w świetle ustawy z dnia 27 lipca 2005 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego i ustawy – Kodeks karny wykonawczy (Dz. U. nr 163, poz. 1363)*, "Czasopismo Prawa karnego i Nauk Penalnych" 2006, No. 1, pp. 64-65.

fifteen years, which time limit does not run while the offender is serving a prison sentence. This means that the offender would be isolated from environments where minors are present for a very long time.²⁹

Additionally, it seems necessary to address the statement of the Constitutional Court that the wording of Article 106a of the Polish Penal Code is consistent with the Polish Act on Prevention of Sexual Crime Threats of 13 May 2016. There is a certain inconsistency or even contradiction between the wording of the analysed regulation and the act. First of all, it must be noted that the act applies to a narrower catalogue of crimes against sexual freedom and the mores, as evidenced by Article 2 of the act, which excludes crimes contrary to Article 201 of the Polish Penal Code, unless they were committed against a minor, Article 202(1), 202(3) of the Polish Penal Code involving the presentation of pornographic content connected with presentation of violence or using an animal, Article 202(4a), Article 202(4b) of the Polish Penal Code, involving storage or possession of pornographic content featuring a produced or processed image of a minor participating in a sexual act, Article 202(4a) and Article 204(1) and 204(2) of the Polish Penal Code, unless they were committed against a minor. Furthermore, in special cases the act allows a ruling to prevent the inclusion of personal data in the Record due to protect the private life or another important private interest of the victim or their loved ones, especially the welfare of an underage victim, or where the inclusion of such data would have incommensurately strict consequences for the convicts (see Article 9(2) and Article 9(3) of the act). After all, the act – in contradiction of Article 106a of the Polish Penal Code – states in Article 18 that data included in the Record are deleted from it if the conviction is erased by the operation of law. So act is not compatible with the wording of Article 106a of the Polish Penal Code in the aspect in question as Article 106a renders it impossible to erase a conviction in the situations specified in the act.

Literature notes that the public Record serves a preventive and justice function but it also has another role, one going beyond criminal law, namely to cause social stigmatisation.³⁰ There are doubts connected with the government's interference in the rights and freedoms of an individual

²⁹ See A. Zientara, *op. cit.*, p. 103.

³⁰ See E. Michałkiewicz, *Rejestr Sprawców Przestępstw na tle seksualnym w aspekcie praw człowieka i obywatela*, "PME" 2016, No. 2, p. 1 Legalis (access: 09/03/2018).

with the usefulness and effectiveness of such solutions. There is an issue of how the inhabitants can respond to a fact that a person convicted of a sexual offence lives in their neighbourhood. Identification of such a person may lead to harassment and aggressive behaviour towards them or to a sense of threat on the part of the local people. The state has in a way assigned the obligation to protect children from paedophilic crimes to the citizens, while at the same time depriving the offender of the right to return to the society. It can be assumed that this will not reduce the number of crimes but will only lead to mob action and impede the rehabilitation of the sexual offender.³¹ Similar comments can be made about Article 106a of the Polish Penal Code and its negative consequences.

IV

As far as Article 106a of the Polish Penal Code is concerned, it must be emphasised that the wording of the regulation is highly unsatisfactory because it may lead to unfair and irrational solutions. This assessment has been in a way confirmed by the Constitutional Court, who signalled the need to properly modify Article 106a of the Polish Penal Code based on Article 35(1) of the Polish Act on Organisation and Procedure before the Constitutional Court.³² The mechanism applied by the Constitutional Court points to the existence of legal gaps and shortcomings which must be removed in order to ensure the consistency of the Polish legal system. The dissenting opinion to the judgment of the Constitutional Court in question raises the issue of inconsistency on the part of the legislator, who creates “holes” in the mechanism of erasure of conviction by the operation of law for all types of crimes, which violates the general principles of consistency of a legal system.

In search of a solution that would account for the need to protect children from sexual abuse and for the fact that many paedophiles re-offend even after serving long prison sentences, the exclusion of erasure of convictions should be accepted only for certain offenders. It is undoubtedly reasonable to eradicate the automatism introduced by Article

³¹ See A. Dziergawka, *Prawna ochrona dziecka...*, p. 89.

³² Polish Act on Organisation and Procedure before the Constitutional Court of 30 November 2016 (Journal of Laws of 2019, item 2393).

106a of the Polish Penal Code, which precludes erasure of conviction for all the crimes listed therein, regardless of their gravity, the age of the offender, the offender's mode of action, motivation, relation with the minor or rehabilitation process. Considering the foregoing, two alternative solutions are suggested:³³

- the first one is to introduce, just as in Article 77(2) of the Polish Penal Code, a general rule for erasure of convictions for crimes against sexual freedom and the mores committed against minors up to the age of 15 and authorise the sentencing court to establish longer periods required for erasure of conviction or to exclude a possibility of erasing a specific conviction. While extending the period required for erasure of the conviction, the court would consider the specific offender, their criminal record, their mode of action, the gravity of the crime, the extent of the harm caused to the minor, as well as the issues of general and specific prevention;
- the other one is to maintain the principle of no erasure of convictions for crimes against sexual freedom and the mores committed against minors up to the age of 15 but with an additional provision that the convict would be able to request the court for an order erasing the conviction after a specific amount of time has passed since the sentence was served or the offender was pardoned or the execution of the sentence became time-barred. However, before granting or denying the erasure, the court would assess, without limitation, the gravity of the crime, the specific offender and the offender's conduct before and after committing the crime.

An assessment of the proposed changes leans towards the general principle of erasure of convictions with the option for the sentencing court to set longer time limits for erasure of the conviction. The proposal will make it possible to eliminate the negative consequences of Article 106a of the Polish Penal Code, which assumes that the offender is incorrigible and should be stigmatised for life. Both of the above solutions eliminate the obvious injustices which are connected with applying Article 106a of the Polish Penal Code in its current wording. They leave the burden of the decision-making regarding the grounds for either applying or excluding the mechanism of erasure of conviction to the discretion of the court. This

³³ A. Zientara, *op. cit.*, pp. 107-108.

allows the courts to deliver justice in accordance with Article 175(1) of the Constitution. From the perspective of a reasonable criminal policy and from the perspective of justice, it does not seem appropriate for the legislature to deprive the court of any possibility of considering every case individually in order to assess whether or not the conviction may be erased. By introducing Article 106a of the Polish Penal Code, the legislator tied the court judgment to the obligatory consequence provided for in the Penal Code. Such a solution may pose a major threat in the aspect of violation of the separation of powers and the legislator's interference in matters which should fall under the responsibility of the justice system. The courts are the ones that may apply the individual prevention directive. This is the essence of judicial application of the law, where the court must make evaluative choices which are only partially determined by the law in force.³⁴ In the ban in question, the law regarding restricting the freedoms of convicts should be shaped by discretionary judicial power.

The need, or even requirement, to give an offender a possibility of returning to normal life and adapting to the society requires respecting their subjectivity, value and dignity and taking individualised correctional measures. In this respect, the legislator must complement rehabilitation activities with appropriate legislative measures.³⁵ In the meantime, the wording of Article 106a of the Polish Penal Code, instead of giving the convict an opportunity to change their life and undergo rehabilitation, creates non-removable obstacles in rehabilitation and discourages the offender from engaging in activities which are beneficial and desired not only for the offender but also for the whole society. Considering the foregoing, it should be postulated that Article 106a of the Polish Penal Code be deleted.³⁶

To conclude the deliberations, it is reasonable to state with reference to the argumentation of the Constitutional Court that the status of a person with a criminal record does not arise from exclusion of erasure of conviction but from the fact that the individual has been found guilty of a specific crime against sexual freedom and the mores committed against a minor. The issue in question is about choosing between the classic option,

³⁴ See J. Wróblewski, *Wartości a decyzja sądowa*, Wrocław, Warsaw, Kraków, Gdańsk 1973, p. 18.

³⁵ See S. Woronowicz, *Resocjalizacja – zarys problematyki*, Warsaw 2015, p. 15.

³⁶ See e.g. K. Banasik, *op. cit.*, p. 103.

with punishment seen as retribution (revenge), and the positivist option, where punishment has a purpose and supports rehabilitation.³⁷ In accordance with a justice-driven approach, punishment is a payback for certain wrongs.³⁸ On the other hand, there is a purpose-driven approach, where, as Plato claims: “He will be punished not because he sinned (...) but to make him hate the sin.”³⁹ It seems appropriate to conclude that a convincing justification of punishing exclusively in accordance with the retributive or the utilitarian approach is incredibly problematic and it is currently hard to find the supporters of either “pure” retributivism or “pure” utilitarianism.⁴⁰ The preferable solution is one that individualises the punishment and where the rehabilitative objective permits showing leniency to socially corrigible offenders,⁴¹ while the preventive objective permits severely punishing dangerous offenders. Since the criminal has a right to choose between good and evil,⁴² the rehabilitation option depends on their consent and collaboration in this respect. The convict must be given motivation and must have a possibility of developing socially desired attitudes. Filip Cieplý⁴³ should be mentioned here as he claimed that “retributivism and rehabilitation may be reconciled; rehabilitation programmes may respect the moral subjectivity of a person, which is a matter of major concern for supporters of retributive and traditional vision of punishment. If not contradictory to but integrated with the principle of fair punishment, and thus being a manifestation of prudent love for a human being, rehabilitation may serve as authentic support for the community, the victims of crimes and the offender.”

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³⁷ See J. Błachut, A. Gaberle, K. Krajewski, *Kryminologia*, Gdańsk 1999, pp. 170-171.

³⁸ I. Kant, *Metafizyczne elementy teorii prawa*, translated by W. Galewicz, Kęty 2006, p. 86.

³⁹ Platon, *Prawa*, Warsaw 1960, p. 934.

⁴⁰ See Ł. Kurek, *Obraz człowieka w prawie karnym a nauki kognitywne*, in: *Prawo i nauki kognitywne*, ed. B. Brożek, Ł. Kurek, J. Stelmach, Warsaw 2018, p. 131.

⁴¹ See S. Górski, *Metodyka resocjalizacji*, Warsaw 1985, p. 217.

⁴² See K. Krajewski, *Teorie kryminologiczne a prawo karne*, Warsaw 1995, p. 98.

⁴³ F. Cieplý, *Idea resocjalizacji w prawie karnym*, in: *Profilaktyka, resocjalizacja, rewalidacja pomocą rodzinie*, ed. B. Kołdon, Sandomierz – Stalowa Wola 2007, pp. 460-473.

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