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ODPOWIEDZIALNOŚĆ KARNA ZA ZACHOWANIA POLEGAJĄCE NA UCHYLANIU SIĘ OD WYKONYWANIA DOZORU ELEKTRONICZNEGO

CRIMINAL LIABILITY RELATED TO THE SYSTEM OF ELECTRONIC SURVEILLANCE AND CIRCUMSTANCES IN WHICH SENTENCED PERSON AVOIDS PERFORMING DUTIES ORDERED BY THE COURT

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Streszczenie

Zasadniczym celem artykułu jest wskazanie podstawy odpowiedzialności karnej za zachowania, polegające na naruszeniu przez skazanego, wobec którego orzeczono karę, środek karny albo środek zabezpieczający w systemie dozoru elektronicznego, obowiązków związanych z tym dozorem. Prowadzone w tym zakresie rozważania poprzedzone są analizą istoty dozoru elektronicznego, powodów jego wprowadzenia do obowiązującego systemu prawa oraz sposób wykorzystania na gruncie instrumentów prawnokarnej reakcji na zachowanie sprawcy. Autorka dokonuje ponadto analizy charakteru prawnego kary pozbawienia wolności z wykorzystaniem dozoru elektronicznego, co stanowi punkt wyjścia do odpowiedzi na doniosłe dla praktyki pytanie o możliwość zakwalifikowania zachowania skazanego, polegającego na oddaleniu się z miejsca odbywania kary pozbawienia wolności w systemie dozoru elektronicznego, w płaszczyźnie znamion

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określających czynność sprawczą przestępstwa samouwolnienia się określonego w art. 242 § 1 k.k. Opracowanie kończy przedstawienie postulatów *de lege ferenda* zawierających propozycję rozwiązania normatywnego, stanowiącego podstawę prawną kwalifikacji zachowań, polegających na uchylaniu się od dozoru elektronicznego.

Słowa kluczowe: dozór elektroniczny, przestępstwo samouwolnienia, kara pozbawienia wolności.

Abstract

The crucial aim of this article is to indicate grounds of legal liability connected with situations in which person sentenced to penalty, punitive measure or safeguard measure, within the system of electronic surveillance, violates certain duties. Considerations concerning the aforementioned issues are preceded by the analysis on the essence of the electronic surveillance, reasons for its implementation into the applicable legal system and means of its usage related to legal instruments of penal reaction to perpetrator's behavior. Moreover, author of the article analyses legal character of the prison sentence performed with the usage of electronic surveillance. This constitutes starting point for answering practically important question: whether leaving the place of performing prison sentence within the system of electronic surveillance can be qualified as the offence of self-release, determined in art. 242 § 1 of the Criminal Code. At the end of the article, author presents *de lege ferenda* postulates concerning normative solution related to the legal ground of qualifying behaviors consisting in avoiding electronic surveillance.

Key words: electronic surveillance, the offence of self-release, prison sentence

Introduction

Electronic surveillance is a general term that refers to all forms of surveillance, using radio and satellite technology, by which a person can be controlled for the purposes of a criminal trial by marking his or her geographic location, activity, specific behaviour, or biometric data[2]. The use of new technologies as an element of supervision of convicts, although it has a relatively short tradition[3], is an integral part of modern penitentiary policy, fitting into the model presented by M. Foucault of panoptic power, monitoring activity according to *quasi*-prison rules, which aims to create a disciplined individual[4].

Negative connotations associated with surveillance mechanisms, however, do not obscure the fundamental virtues associated with the possibilities of electronic control, affecting the universality of its use for the purposes of measures of a penal nature[5]. Growing out of the collapse of the idea of rehabilitation, the new penal policy, dominated by the managerial-supervisory trend, rooted in the economic analysis of law[6],

[2] M. Nellis, D. Lehner, *Scope and definitions. Electronic monitoring. Council for Penological Co-operation* 7/2, Strasburg 2012, p. 1.

[3] The very concept of electronic monitoring of offenders emerged in 1964, when the concept of American psychologist Ralph Schwitzgebel about the possibility of using "technological advances" to control the behaviour of convicted persons was published - cf. M. Black, R.G. Smith, *Electronic Monitoring in the Criminal Justice System*, "Australian Institute of Criminology" 2003, No. 5, p. 1. Electronic supervision was first used in practice in the United States in 1983, and the first pilot programs for electronic monitoring of offenders in Europe were implemented in England and Wales in 1989. - see more C. Nee, *Surviving electronic monitoring in England and Wales: Lessons learnt from the first trials*, "Legal and Criminological Psychology" 1999, vol. 4, p. 33 i n.; G. Mair, *Electronic Monitoring in England and Wales*, in: *Intermediates Sanctions in Overcrowded Times*, ed. M. Torny, K. Hamilton, Boston 1995, p. 116 et seq.

[4] M. Foucault, *Nadzorować i karać. Narodziny więzienia*, Warsaw 1998.

[5] Electronic surveillance can be used as: a preventive measure used in the course of a criminal trial to secure its proper course, a punishment in its own right, an independent means of executing a custodial sentence or a penal measure, a means of supplementing probation mechanisms, an element associated with early release from prison, a means of controlling and supervising a specific category of perpetrators or perpetrators of particular offences after completion of their sentence in prison, a means of monitoring the movements of persons inside prison or to the extent that it includes open prison and a means of protecting victims of crime from individual suspects or perpetrators.

[6] G.S. Becker, *Crime and Punishment: An Economic Approach*, in: *Essays in the Economics of Crime and Punishment*, ed. G.S. Becker, W.M. Landes, New York 1974; M. Cohen, *Balancing the Costs and Benefits*, in: *Odpowiedzialność karna w systemach demokracji liberalnej*, ed. M.

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sees new technologies as an important factor affecting the efficiency of the penitentiary system. Their particular importance in this regard manifests itself in the reduction of the prison population by creating, less costly in execution, an alternative to short-term imprisonment, while ensuring the protection of society from crime, subjecting the offender to a system of supervision and creating opportunities for individualized influence on him through time and space restrictions, shaping his attitude of self-control, responsibility and compliance with norms and adaptation to them.

The Polish legal system has also recognized the benefits of including electronic surveillance in a number of penitentiary measures[7]. The commonly expressed belief in the necessity of implementing certain electronic solutions as an element of control over the offender was at the same time accompanied by the lack of a uniform concept of their application[8]. Since the beginning of the introduction of electronic

Królikowski, J. Czabański, T. Krawczyk, M. Romanowski, B. Kasprzycka, Warsaw 2002; B. Stańdo-Kawecka, *Polityka karna i penitencjarna między punitywizmem i menedżeryzmem*, Warsaw 2020.

[7] P. Bogacki, M. Olężałek, *Dozór elektroniczny jako środek ograniczenia przeludnienia w polskich zakładach karnych*, "Wiedza Prawnicza" 2014, No. 4, p. 105; K. Dyl, G. Janicki, *Dozór elektroniczny*, "Zeszyty Prawnicze UKSW" 2005, No. 2, p. 198; V. Konarska-Wrzosek, *Propozycje zmian katalogu kar w Kodeksie karnym z 1997 r. w zakresie kar pozbawienia wolności oraz dolegliwości związanych z niektórymi rodzajami kar wolnościowych*, in: *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, vol. II, ed. P. Kardas, T. Sroka, W. Wróbel, Warsaw 2012, p. 857 i n; K. Mamak, *Funkcjonowanie dozoru elektronicznego w świetle badań aktowych*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2014, No. 2, p. 140-141; M. Nowakowski, *Rozważania na tle instytucji dozoru elektronicznego w polskim prawie karnym*, "Monitor Prawniczy" 2009, No. 14, p. 770; G. Szczygieł, *Wykonywanie kary pozbawienia wolności poza zakładem karnym w systemie dozoru elektronicznego a przeludnienie zakładów karnych*, in: *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, ed. Ł. Pohl, Poznań 2009, p. 576; see also justification to the bills: on amending the Act on Execution of Punishment of Imprisonment Outside Penitentiary Institutions in Electronic Dispensation System, 7th Sejm, print No. 179; on amending the Act - the Executive Penal Code, the Act - the Misdemeanours Code and the Act - the Penal Code, 5th Sejm, print No. 1352.

[8] V. Konarska-Wrzosek, *W kwestii nowego kształtu kary ograniczenia wolności*, in: *Zagadnienia teorii i nauczania prawa karnego. Kara łączna. Księga Jubileuszowa Profesor Marii Szewczyk*, ed. W. Górowski, Warsaw 2013, p. 180; S. Lelental, *Dozór elektroniczny w świetle rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z 4 kwietnia 2014 r.*, "Przegląd Więziennictwa Polskiego" 2014, No. 83, p. 9; M. Rusinek, *Krytycznie o przyjętym kształcie dozoru elektronicznego*, "Przegląd Więziennictwa Polskiego" 2008, No. 47-48, p. 18 i n.; I. Zgoliński, *Dozór elektroniczny jako instrument polityki karnej. Wybrane uwagi na kanwie nowelizacji Kodeksu karnego i Kodeksu karnego wykonawczego*, "Studia Prawnicze KUL" 2015, journal 4, p. 90 et seq.

surveillance to the national legal order under the Act of 7 September 2007 on the Execution of Prison Sentences Outside Prison in the Electronic Surveillance System[9], it has undergone numerous transformations. These changes concerned not only the chosen legislative technique, related to the position of electronic surveillance in the system of law, but also its substantive layer. Eventually, the regulations concerning electronic surveillance were included in the Executive Penal Code, and the surveillance itself was envisaged as a form of serving prison sentences, penal measures and security measures.

Despite the positive aspects of the electronic surveillance system, related to its rehabilitation and reintegration dimension, one cannot overlook some risks that its use entails. The very nature of control and disciplinary measures implies a natural inclination on the part of the persons to whom they are applied to protect their own freedom by taking steps to annihilate the restrictions applied. In order to prevent situations in which, due to the insubordination of the supervised person, electronic monitoring of their whereabouts would prove to be an ineffective way of carrying out sentences and other means of influencing the offender, the legislator provided for a response to this type of behaviour using instruments from the realm of *ius puniendi.* The legal solutions adopted in this regard have been scattered in various provisions and, moreover, are characterized by a diverse subject and object scope, thus creating a complex system of penal liability for behaviour that results in thwarting or hindering the execution of sentences, punishment measures and security measures under the electronic surveillance system. This normative state is compounded by the multiplicity of ways in which the above effect may be realized. This study therefore aims to determine the penal law qualification of a specific behaviour of the convict, consisting in the evasion of electronic supervision, which should be understood as an intentional violation of obligations related to the use of electronic supervision, the scope of which varies depending on the decision of the court, the type of supervision as imposed on the convict and the technical means used. For this reason, considerations should begin with general issues, which form the background to the relevant considerations, concerning the ways in which

[9] Journal of Laws of 2010 No. 142 item 960.

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the electronic surveillance system is used in the current law and the essence of imprisonment under this system.

1. Use of the electronic surveillance system in the light of current law

The provisions of the Executive Penal Code[10] make a clear distinction between electronic supervision and the electronic supervision system, stipulating that electronic supervision means control of the convicted person's behaviour by technical means. The system of electronic supervision consists of all methods of procedure and technical means used to carry out electronic supervision (Article 43b § 1 and 2 of the EPC). According to the current regulations, three types of electronic supervision can be distinguished: stationary supervision - which is used to control whether the convict is at a certain time in a place indicated by the court, mobile supervision - which consists in controlling the current place of the convict's stay and proximity supervision - which makes it possible to control whether the convict keeps a certain minimum distance from a person indicated by the court (Article 43b § 3 of the EPC).

Under stationary supervision, a sentence of imprisonment imposed for a term not exceeding one year may be carried out (with a negative premise being the existence of the circumstance of multiple special recidivism as defined in Article 64 § 2 of the PC), as well as a sentence of restriction of liberty in respect of persons who served it before 15 April 2016 or against whom it was imposed even if not final under the terms of Article 4 of the Act of 11 March 2016 amending the Act - Penal Code and the Act - Executive Penal Code[11]. In the case of stationary supervision, under which a sentence of imprisonment is executed, the court shall each time determine the rules for serving this sentence by specifying the time during which the convict must remain at his place of residence within the range of devices controlling his position and setting a detailed schedule of the convict's day, taking into account his work and family situation. Thus, the actual position of the convicted person is not monitored, but only the fact of whether the convicted person is in the place designated by the court at

[10] Act of 6 June 1997 - Executive Penal Code (Journal of Laws of 2021, item 53, as amended) hereinafter: the EPC).

[11] Journal of Laws item 428.

a certain time is determined.

Mobile supervision is applied when the convicted person is obliged to stay at his/her permanent place of residence or at another designated place during certain mass events covered by the stadium ban. The protective measure, in the form of electronic control of the convicted person's whereabouts, may also be carried out only as mobile supervision (Articles 93e, 93d § 1 and 6 of the PC). Mobile supervision, as opposed to stationary supervision, relies on the fact that a convict's whereabouts are recorded in real time, making it possible to know exactly where the convict is.

Under proximity supervision, a punitive measure is executed which includes a prohibition on approaching certain persons, referred to in Article 41a § 1 and 2 of the PC. The functioning of proximity surveillance is similar to stationary surveillance and relies on the interaction of a transmitter worn by the supervised person and a recorder equipped with a protected person. In the case of proximity supervision, the protected person may use both a stationary recorder (then it is controlled whether the convicted person approaches the victim's place of residence at a distance shorter than the distance specified by the court) and a portable recorder (then, however, it is necessary for the protected person to have the recorder in his or her possession at all times, no matter where he or she happens to be).

Pursuant to Article 43f of the EPC, the technical means for carrying out electronic surveillance are:

a) monitoring headquarters, which is a facility that exercises remote and continuous control of Monitored Persons, where immediate action is taken upon detection of violations, as well as remote and continuous control of Covered Persons to ensure safety from a prohibited person, and control of the Monitoring System and handling of all recorded events and violations;
b) the ICT system by means of which the monitoring centre operator, the probationer, court probation officers and other authorised entities process information related to organising and controlling the execution of sentences under the electronic probation system (the so-called communication and monitoring system);
c) transmitters, i.e. radio devices in the form of bracelets worn on the leg or arm, which send signals received by the monitoring centre and recorders. There are two types of transmitters: Radio Frequency Tag

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(RFT) devices designed to monitor the Monitored Person and One P-Part Tracking (OPT) devices equipped with a GPS locator and designed to determine the location of the Monitored Person;

d) recorders, i.e. devices used for receiving the signal sent by the transmitter and transmitting it to the monitoring centre. There are two types of recorders: stationary (HOME UNIT HU), which are installed at the prisoner's residence and are used to control RFT and OPT devices within their range, and portable (TWO PPART TRACKING TPT). The latter are worn by the person against whom the convicted person has a restraining order and allow the location of the Covered Person or the Monitored Person to be determined[12].

2. Legal nature of imprisonment executed under the electronic surveillance system

Among the many theoretically and practically important issues arising from the use of the infrastructure of electronic surveillance, as part of the various instruments of criminal response, the most controversial is the issue related to the generic assignment of imprisonment under this system, which basically boils down to a choice between two qualifying concepts, one of which treats it as a variant (modality) of imprisonment[13], and the other orders to assume that the decision of the legislator to place electronic surveillance within the framework of imprisonment means the

[12] M. Sopiński, *Zakres przedmiotowy SDE i środki techniczne służące do jego wykonywania*, in: *Analiza i oceny funkcjonowania systemu dozoru elektronicznego w Polsce w latach 2013-2017*, ed. T. Przesławski, Warsaw 2020, p. 25 et seq.

[13] Tak m.in. P. Artymionek, *System dozoru elektronicznego jako nowa forma wykonywania kary pozbawienia wolności*, "Wrocławskie Studia Erazmiańskie" 2010, No. 5, p. 105; G. Hochmayr, M. Małolepszy, *System dozoru elektronicznego – możliwości i granice. Spojrzenie prawnoporównawcze w obliczu polskiej nowelizacji*, in: *Current problems of the penal law and criminology*, ed. E. Pływaczewski, https://www.rewi.europa-uni. de/pl/lehrstuhl/pr/pol-strafrecht/professurinhaber/schriftenverzeichnis/System-dozoru-elektronicznego.pdf; G. Łabuda, in: *Kodeks karny. Część ogólna. Komentarz*, ed. J. Giezek, Warsaw 2017, p. 435; T. Kalisz, *Samouwolnienie się skazanego z wykonywania kary pozbawienia wolności w systemie dozoru elektronicznego*, in: *Współczesne wyzwania kurateli sądowej w Polsce*, ed. A. Kwieciński, Wrocław 2019, p. 108; J. Róg, *Wykonywanie kary w systemie dozoru elektronicznego a prawo do zabezpieczenia społecznego*, "Państwo i Prawo" 2012, No. 2, p. 85; K. Zawiślan, *Dozór elektroniczny: izolacja czy iluzja?* "Państwo i Społeczeństwo" 2014, No. 4, p. 12; I. Zgoliński, *Nowe sposoby wykonywania kary pozbawienia wolności*, "Jurysta" 2008, No. 5, p. 105.

introduction of a new measure of influence on the convicted person[14]. The arguments of the adherents of both positions revolve around the view, rooted in the doctrine of penal law, that it is necessary to distinguish two aspects of the penalty of deprivation of liberty: the factual, concerning the immanent, ontological features that make up the essence of this penalty, and the legal (formal), referring to the normative assessment expressed by the legislator[15].

There is little doubt that electronic surveillance is formally an institution of executive penal law and one of the ways of executing a sentence of imprisonment, but it does not create a punishment of a different kind, not provided for in the catalogue of Article 32 of the PC. Such a conclusion follows directly from the regulations of the Penal Code and the Executive Penal Code, which distinguish a uniform form of deprivation of liberty. In this context, it is important to distinguish between the final judgement itself containing a prohibition or injunction with a specific content, which makes up the essence of the punishment imposed, and the manner of its enforcement, which is a secondary issue. The state of deprivation of liberty is created by the prohibition contained in the court decision, while based on a different procedural decision, issued by a different authority - i.e. the penitentiary court, a decision is made to grant permission to serve the sentence of deprivation of liberty under the electronic surveillance system. Arguments of a systemic nature also support the conclusion that the legislator treats imprisonment under the

[14] M. Budyn-Kulik, *Kary i środki karne alternatywne wobec kary pozbawienia wolności,* "Studia Iuridica Lublinensia" 2011, No. 16, p. 144; A. Litwinowicz, *Dozór elektroniczny a wymiar sprawiedliwości karnej w Polsce – próba oceny z perspektywy celów kary kryminalnej*, "Edukacja Prawnicza" 2006, No. 5, p. 40; Ł. Malinowski, *Wykonywanie kary pozbawienia wolności poza zakładem karnym w systemie dozoru elektronicznego. Komentarz*, Warsaw 2013, p. 35 i n.; K. Mamak, *Dozór elektroniczny – rozważania na tle kary pozbawienia wolności, kary ograniczenia wolności oraz przestępstwa samouwolnienia*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2017, journal 17, p. 29 i 36; M. Rusinek, *Ustawa o dozorze elektronicznym. Komentarz,* Warsaw 2010, p. 19 i n.; T. Sroka, *Kara ograniczenia wolności*, in: *Nowelizacja prawa karnego* 2015. *Komentarz*, ed. W. Wróbel, Kraków 2015, p. 85; R.A. Stefański, *Kara pozbawienia wolności w systemie dozoru elektronicznego*, "Wojskowy Przegląd Prawniczy" 2007, No. 4, p. 30; M. Szewczyk, *Jaka alternatywa dla krótkoterminowej kary pozbawienia wolności*, in: *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. Rocznicy urodzin Profesora Andrzeja Gaberle*, ed. K. Krajewski, Warsaw 2007, p. 109-110.

[15] W. Dadak, *Pozbawienie wolności jako znamię przestępstwa samouwolnienia (Uwagi na tle kryminalizacji samouwolnień)*, "Państwo i Prawo" 1995, No. 9-10, p. 88.

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electronic surveillance system on an equal footing with imprisonment. Article 43ln of the EPC provides for the possibility of conditional, early release of a convict serving a sentence of imprisonment under the electronic supervision system. Imprisonment under the e-supervision system is equated by the legislator with a "traditional" imprisonment also in terms of such institutions as crediting the period of actual imprisonment (Article 63 of the PC, erasing convictions (Article 107 of the PC) and the statute of limitations on the execution of punishment (Article 101 of the PC).

The question of whether electronic surveillance can be considered a prison sentence in the factual sense appears to be somewhat more complicated. Electronic supervision makes it possible for the state apparatus to control the convicted person's behaviour remotely, with the use of technical means, and thus makes it possible to replace the penal law reaction of an isolating nature with a reaction of a much lower degree of severity, which is devoid of the negative consequences of penitentiary isolation, such as demoralization, weakening of family and social ties, change of environment, loss of autonomy, economic degradation or stigmatization[16].

In accordance with the position presented by J. Śliwowski ratio essendi of each penal punishment is the annoyance. In his view, ailment "is a specific criterion of punishment that gives its content all its force. Punishment must be inflicted if it is to be punishment: there is no punishment that is not inflicted. Of course, there are various degrees of ailments"[17]. Paraphrasing this statement a bit, the question is: can a sanction that has been digested from the element of annoyance typical of a prison sentence be treated as its equivalent? The answer to the question thus formulated must specify some minimum characteristics constituting the content of a sentence of imprisonment. The lack of a statutory definition of imprisonment makes it necessary to take into account the views expressed in the penological literature, which tends to focus not so much on the realistic content of the concept of "imprisonment", and thus on the question of what it is in the light of actual social facts, as on the

[16] I. Jankowska-Prochot, *Możliwość odbywania kary w systemie dozoru elektronicznego jako przykład sankcji pozytywnej*, "Przegląd Prawa Publicznego" 2019, No. 4, p. 25 et seq.
[17] J. Śliwowski, *Prawo karne*, Warsaw 1975, p. 266; cf. also L. Lernell, *Refleksje o istocie kary pozbawienia wolności*, "Przegląd Penitencjarny" 1969, No. 1, p. 42

teleology of punishment[18]. These considerations are accompanied by an observation about the evolution in penal policy that took place in the last century under the influence of the development of new trends of punishment referring to the idea of retributivism and the accompanying phenomenon of an expanded system of penal sanctions, departing from the traditional division into free and isolation punishments[19]. More than half a century ago, J. Śliwowski articulated that the new penal codifications are characterized by a blurring of the boundaries between penalties that involve deprivation of liberty and those that entail only its restriction. In fact, the basic criterion for demarcation is based not so much on qualitative difference as on the degree of restriction imposed on the convict. Consequently, there is a smooth transition of one measure into another: measures that restrict freedom into measures that deprive freedom[20]. Deprivation of liberty, it is emphasized, is a conventional name, since this

[18] J. Braithwaite, P. Pettit, *Not Just Deserts: a Republican Theory of Criminal Justice*, Oxford 1990; M. Cieślak, *O węzłowych pojęciach związanych z sensem kary*, "Nowe Prawo" 1969, No. 2; A. Duff, *Restoration and Retribution*, in: *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, ed. A. Von Hirsch, J.V. Roberts, A.E. Bottoms, K. Roach, M. Schiff, Oxford-Portland 2003; B. Janiszewski, *Dolegliwość jako element współczesnej kary*, in: *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i stosowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, ed. J. Giezek, Kraków 2006; L. Lernell, *Zagadnienie zadań kary na tle kodyfikacji prawa karnego*, Wojskowy Przegląd Prawniczy 1955, No. 2; D. Janicka, J. Utrat-Milecki, *Podstawy penologii. Teoria kary*, Warsaw 2006.

[19] A. N. Doob, V. Marinos, *Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Punishments*, "University of Chicago Law School Roundtable" 1995, vol. 2, p. 413-433; N. Morris, M. Tonry, *Between Prison and Probation. Intermediate Punishments in A Rational Sentencing System*, New York 1990, p. 37 et seq.

[20] J. Śliwowski, *Ośrodek przystosowania społecznego i ocena jego funkcji*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1972, No. 1, p. 240. Similar difficulties in distinguishing between imprisonment and "non-custodial" sentences, especially in view of the new technologies used to supervise the convicted, are pointed out in contemporary Polish and foreign literature - cf. N. Allen, *Restricting Movement or Depriving Liberty*, "International Journal of Mental Health and Capacity Law" 2014, No. 9, p. 19; Albrecht H.J., van Kalmthout A.M., *Intermediate penalties. European developments in conceptions and use of non-custodial criminal sanctions*, in: *Community Sanctions and Measures in Europe and North America*, ed. H.J. Albrecht, A.M. van Kalmthout, Freiburg im Breisgau 2002; Beyens K., *The new generation of community penalties in Belgium. More is less...*, in: *Community Punishment. European Perspectives*, ed. G. Robinson, F. McNeill, London-New York 2016; F. Dunkel, D. Van Zyl Mit, N. Padfield, *Concluding thoughts*, in: *Release from Prison. European Policy and Practice*, ed. F. Dunkel, D. Van Zyl Mit, N. Padfield, Collumpton/Devon 2010, p. 396 i n.;

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punishment only restricts freedom to a greater or lesser degree[21].

This heterogeneity of imprisonment, manifested in varying degrees of severity and the extent of control over the convicted person, constitutes a fundamental difficulty in defining its content and identifying its typical structural components. Despite the internal differentiation of imprisonment, which uses different isolation mechanisms in terms of intensification, some common features can be distinguished, which boil down to the forced integration into the community, the actual isolation and thus severance of ties with the existing social environment (family, work, friends), the imposed discipline and the associated regulated time of day and limited possibilities of managing free time, as well as the total dependence of the convicted person on other people[22]. These factors, in K. Mamak's opinion, determine the fact that imprisonment under electronic surveillance cannot be treated as actual deprivation of liberty, but only as formal. According to the author, electronic supervision does not result in a change of environment and placement where the convict is forced to interact with other convicts. There is also no negative consequence of isolation in the form of separation from family and society. An electronically supervised person is also free from coercion for specific behaviour, the performance of which is subject to direct control by prison officials and the administration of the penitentiary units[23].

One can't quite agree with the above statements. Undoubtedly, when imprisonment is carried out in this system, there is no need for the convict to submit to the regime of the prison, modification and control of the organization of leisure activities in the place of residence, as well as there is no forced integration with others[24]. Electronic supervision, however, is a form of limitation of the prisoner's freedom, which deprives him of his freedom of locomotion, and excludes the possibility of free and unfettered decision-making about his place of residence or his daily schedule. These

[21] G. Szczygieł, in: *System Prawa Karnego. Kary i środki karne. Poddanie sprawcy próbie*, ed. M. Melezini, Warsaw 2010, p. 155; cf. also L. Lernell, *Rozważania o przestępstwie i karze na tle zagadnień współczesności: eseje*, Warsaw 1975, p. 186.

[22] J. Śliwowski, *Kara pozbawienia wolności we współczesnym świecie: rozważania penitencjarne i peneologiczne*, Warsaw 1981, p. 11 et seq.

[23] *K. Mamak, Dozór elektroniczny...*, p. 21 et seq.

[24] On the negative aspects of the aforementioned features of imprisonment under the electronic surveillance system - see M. de Michelle, *Electronic Monitoring: It is a Tool not a Silver Bullet*, "Criminology & Public Policy" 2014, vol. 13, p. 367 et seq.

elements must not be depreciated by pointing out that every punishment and almost all penal measures contain some degree of annoyance related to the existing restrictions on the disposal of manifestations of personal freedom and are equipped with mechanisms to ensure that convicted persons obey them. Suffice it to say that the electronic surveillance system operates much more far-reaching restrictions on a convicted person's freedom of movement, time management, or choice of activities than any other penological measure. The order to stay in a certain room with certain concessions in favour of the possibility to leave it within a certain period of time only for a strictly defined purpose and subjecting the convicted person's functioning to control with the use of monitoring equipment is a form of deprivation of liberty, only that it is carried out in free conditions, and not a restriction of liberty, the essence of which is - apart from the obligation to work - only the prohibition to change the permanent place of residence, understood as the place where the convicted person actually stays[25]. Therefore, it can be assumed that electronic surveillance only corresponds to what is understood by the term restriction of liberty punishment in the semantic sense, meaning the prohibition of the use of certain possibilities that make up personal liberty or the imposition of certain actions that an individual would not undertake on his own, while leaving at his disposal other possibilities included in personal liberty, while in the juridical sense, resulting from the way its content is shaped by the legislator, it differs significantly from it.

When considering the question of the limits to the recognition of a given penal measure as equivalent to a deprivation of liberty, account must be taken of the ECtHR case law developed under Article 5 ECHR, which defines the distinctive elements of deprivation of liberty. The Court has repeatedly emphasized that deprivation of liberty is a measure falling within the sphere of competence of public authorities, the essence of which boils down to confining a person, on the basis of State coercion, to a specific and spatially limited place for a certain period of time. Deprivation of liberty within the meaning of Article 5 ECHR is determined by a number of factors, including the nature, duration, effects

[25] E. Murphy, *Paradigms of Restraint*, "Duke Law Journal" 2008, vol. 57, p. 1329.

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and manner of execution of such a measure[26], in particular the ability to leave a restricted area, the intensity of surveillance and control of a person's movements, the extent of isolation and the availability of social contact[27]. No less important is the subjective element, understood as the lack of consent to seclusion[28]. According to the Court's jurisprudence, house arrest, because of the degree and intensity of the measures used under it, including the predominance of the obligation to stay in a closed room over detention, can be treated in the category of deprivation of liberty[29].

Similar conclusions on the legal nature of electronic surveillance were expressed in the position of the Committee of Ministers of the Council of Europe in Recommendation Rec(2000)22 on Improving the Implementation of the European Rules on Sanctions and Alternative Measures, which was replaced by Recommendation CM/Rec(2017)3 on the European Rules on Sanctions and Measures of Liberty and Special Recommendation CM/Rec(2014)4, adopted on 19 February 2014, on electronic surveillance. The latter document formulates a number of principles relating to the use of electronic surveillance as an instrument to be used as part of a range of measures of penal law response to crime. The commentary to rule 4 of the recommendation, concerning the principle of proportionality, points out the variation in the intensity of the disadvantages associated with the use of electronic surveillance. The degree of restriction of liberty, which determines the inconvenience and punitiveness of supervision and influences the subjective feelings of the offender against whom it is applied, is influenced not only by the period of time under supervision but also by the way it is implemented on a daily basis[30]. Round-the-clock electronic surveillance is far more intrusive than

[26] See judgements of the ECtHR: 6.11.1980, *Guzzardi v. Italy*, application No. 7367/76, paragraph 92; 29.03.2010, *Medvedyev and Others v. France*, application No. 3394/03, item 73; 23.02.2012, *Creangă v. Romania*, application No. 29226/03, item 9.

[27] See judgements of the ECtHR: of 26.02.2002, *H.M. v. Switzerland*, application No. 39187/98, item 45; of 5.10.2004, *H.L. v. United Kingdom*, application No. 45508/99, item 91.

[28] See judgements of the ECtHR: of 16.06.2005, *Storck v. Germany*, application No. 61603/00, item 74; of 17.01.2012, *Stanev v. Bulgaria*, application No. 36760/06, item 117.

[29] See judgements of the ECtHR: of 12.12.2001, Mancini v. Italy, application No. 44955/98, item 19; of 2.11.2006, Dacosta Silva v. Spain, application No. 69966/01, item 42.

[30] Similarly, Administrative Court in Kraków in the order of 4.01.2018, II AKz 857/17, LEX No. 2518081; cf. also the order of Administrative Court in Katowice of 3.08.2016, II AKz 397/16, LEX No. 2139323.

surveillance used for up to 12 hours a day to control nighttime bans. Thus, despite some jurisdictions treating an electronically monitored prisoner as a person deprived of liberty, depending on the restrictions applied, his or her daily experience may be closer to that of those supervised in a custodial setting. The flexibility of electronic surveillance and the wide possibilities it offers as a means of influencing the convicted person allow it to be used as a "virtual prison", assuming a high level of interference and bringing it closer to imprisonment within a prison. However, the preferred use of electronic supervision in the penal justice system is to view it as a restrictive form of offender supervision that requires attendance at specific locations and times and intervals (e.g., probation offices, employment offices, or community service facilities) and that leaves the offender - if necessary - free to engage in work, education, or therapy as appropriate. Electronic supervision should not be seen only as a means to achieve individual-preventive goals (understood as preventing the offender from committing further crimes), but should be shaped in such a way that it allows for the readaptation of convicts by developing a sense of responsibility and respect for the law.

Thus, as can be seen from the above, the Council of Europe bodies have not ruled out that in the case of electronic surveillance, treated as a "virtual prison", the duration and intensity of the obligations imposed on the convicted person may determine that it constitutes a deprivation of liberty. At the same time, however, they have favoured an integrative rather than an isolationist model of electronic surveillance, qualifying it as a form of restriction of the offender's freedom[31].

As a summary of the considerations presented above regarding electronic surveillance, it can therefore be said that a sentence of imprisonment carried out under this system departs in its essence from what in the ontic sense is commonly regarded as deprivation of liberty. On the assumption that the *differentia specifica* of this state manifests itself in the degree of restrictions limiting the freedom of the convicted person, the current arrangement of the obligations connected with a sentence of imprisonment executed under the electronic surveillance system does not

[31] The issue of compliance of the use of electronic supervision in Poland with the standards formulated in the documents of the Council of Europe is widely discussed by B. Stańdo-Kawecka, *Dozór elektroniczny w Polsce – uwagi w świetle Rekomendacji Rady Europy*, "Przegląd Więziennictwa Polskiego" 2015, journal 86, p. 5 et seq.

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represent such a degree of severity that would prejudge the possibility of qualifying the probation system as an additional level in the gradation of the forms of imprisonment, situated just after the open prison. Given a certain unique content that is associated with the restrictions applied under electronic surveillance, it would be appropriate to postulate the introduction of a new type of punishment, representing an intermediate sanction between imprisonment and restriction of liberty.

3. legal classification of acts undermining the proper functioning of the electronic surveillance system

The essence of electronic surveillance involves imposing a number of obligations on the offender, listed in Articles 43n and 43na of the EPC, the fulfilment of which is secured by certain sanctions of varying legal nature. In addition to the consequences in the form of a change in the method of execution of the sentence (Article 43zaa § 1 item 2) and sanctions of a financial nature (in the form of a fee for damage to the transmitter or recorder - Article 43s), penological measures are also provided for. Under the current legal order, in principle, we can talk about a specific triad of legal norms that make up the system constituting the penal liability of a convicted person under electronic supervision for breach of the obligations associated with this supervision.

The basic provision criminalizing behaviour against electronic surveillance devices, applicable to both imprisonment and penal and security measures, is Article 66a of the Petty Offences Code, introduced by the Act of 20 February 2015 amending the Penal Code Act and certain other acts[32]. The motives behind the introduction of the new type of offence are not articulated in the explanatory memorandum to the bill, which is limited to a descriptive presentation of its elements only. It can be inferred that this purpose is to guarantee the undisturbed functioning of the equipment of the technical supervision infrastructure, which is, consequently, to ensure the execution of court rulings that imply the obligation to electronically control the location of the convicted person. It should be noted that in the previous state of the law, i.e. during the period when the Act on Execution of Prison Sentences Outside Prison in the Electronic Supervision System was in force, there was no equivalent of Article 66a of the POC. Behaviour leading to the destruction of electronic recording devices was

[32] Journal of Laws item 396.

qualified on the basis of Article 288 of the PC or Article 124 of the POC, such qualification did not adequately reflect the essence of the act and the entirety of criminal wrongfulness by disregarding the specific character and function of the equipment which was the object of the attack. Hence, the introduction of a specific type of a prohibited act was necessary in order to ensure adequate protection of a legal good in the form of proper functioning of the administration of justice in its aspect, which refers to the respect for validly imposed injunctions/proceedings prohibitions[33].

The analysed type of a prohibited act is an individual misdemeanor, which means that its perpetrator is exclusively the person subject to a penalty, penal measure or a protective measure in the system of electronic supervision, or a protected person, i.e. the wronged party against whom a restraining order has been imposed on the perpetrator pursuant to Article 41a of the PC.

The causative action was defined as allowing certain effects to occur in the form of destruction, damage, making unusable technical means of electronic surveillance. The phrase "allowing" should be understood as "allowing something, agreeing to something, not disturbing something, accepting something" [34]. Such formulation of the characteristic of forbidden conduct means that penal liability under this type of forbidden act may be incurred by the perpetrator who does not himself carry out the characteristic of the forbidden act, does not actively participate in damaging, destroying or rendering unusable the electronic surveillance infrastructure, but only allows other persons or adverse external factors to

[33] Representatives of the doctrine of penal law also identify the object of protection of the type of offence under Article 66a of POC with a collective legal good, with differences concerning the degree of concretisation of this good: M. Budyn-Kulik points out that "the legal good is the authority of the organs of justice and public order in the form of ensuring compliance with the restrictions and prohibitions imposed in a lawful manner", in: *Kodeks wykroczeń. Komentarz*, ed. P. Daniluk, Warsaw 2019, p. 454; In turn, T. Bojarski perceives as a legal good the correct execution of punishments and other measures in the system of electronic supervision, in: *Kodeks wykroczeń. Komentarz*, ed. T. Bojarski, Warsaw 2019, p. 291. In turn, M. Bojarski believes that the subject of protection are technical devices used to carry out electronic surveillance, in: *Kodeks wykroczeń. Komentarz*, ed. M. Bojarski, W. Radecki, Warsaw 2019, p. 580. However, we cannot agree with such an approach to the subject of protection of the offence under Article 66a of the POC. This is because the commented Author equated the object of the executive action with the object of protection. Protection of technical surveillance equipment is not an end in itself, but only a means to achieve a desired state in the form of proper (undisturbed) functioning of justice.

[34] See M. Szymczak, *Słownik języka polskiego*, vol. 1, p. 431.

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affect such equipment [35]. The above understanding of the analysed normative phrase is also supported by the reference to the paradigm of the legislator's rationality, generally accepted in legal theory. One of the elements of this construction is the assumption of terminological consistency of the legislator, which is closely related to the systemic interpretation directive of the prohibition of synonymous interpretation, in light of which "within a given legal act, different phrases should not be given the same meanings". Thus, if the legislator had sought to introduce penal liability of the supervised person for "own" behaviour he would have used the phrase "allowing", as in the case of Article 51 § 2, Article 75 § 2 and Article 77 § 2 of the POC. Additionally, the above interpretation is also supported by the application of the rules of systemic interpretation in its variant referring to the entire system of law. For example, in Article 288 of the PC, the legislator explicitly uses the phrase "damages", "destroys", which indicates the necessity for an independent implementation of the causative action, while in Article 200 § 1 of the PC, he uses a semantically capacious phrase "leads", which indicates the so-called crime committed not by one's hand.

The specific definition of the prohibited element of the behaviour of the offence under Article 66a of the POC seems to suggest that it may only be committed by omission. Closer examination, however, leads to the conclusion that action cannot be excluded either. It is therefore a misdemeanor of omission. It is an action when the perpetrator induces another person to undertake actions resulting in absolute or relative destruction of the object of the executive act, or uses the negative influence of natural forces, weather conditions for this purpose (e.g. exposes the transmitter to rain, high or low temperature). On the other hand, abandonment will occur in the event of events leading to the occurrence of consequences that were met by the lack of reaction of the person obliged to take care of the technical means used to carry out electronic surveillance (e.g. the supervised person does not react when another person manipulates the transmitter or recorder).

[35] One can guess that the main purpose of this formulation of the elements of the criminal activity was to include in the scope of criminalization situations in which the transmitter or recorder is intentionally damaged, e.g. by a family member or friend, in order to thwart the execution of the measure.

The term "allowing" should therefore be understood as any conduct of the perpetrator that has the effect of destroying, damaging or rendering unusable electronic surveillance devices. There is a difference between destroying and damaging things that is quantitative in nature, not qualitative[36]. Destruction represents a higher degree of damage. For while destruction leads to the complete annihilation of the thing which is the object of the direct impact, damage consists in such a change in the matter of the thing as to make it impossible to use that thing for the purposes for which it was originally intended. Making unusable, on the other hand, denotes conduct which, without constituting either destruction or damage to the thing, prevents its use in accordance with its properties and purpose. In other words, rendering unusable occurs when the structure (substance) of a thing is preserved, but only when it is wholly or partially unfit for its intended use[37]. In relation to Article 288 of the PC, the doctrine expresses the view that a thing should be considered unusable both when there is no possibility of restoring its original properties and when such possibilities exist but require certain treatments and financial outlays[38]. Making a thing unusable can therefore be either permanent or temporary. Therefore, an offence under Article 66a of the Penal Code is committed by a perpetrator who allows for the actual destruction of a transmitter, recorder or portable recorder by physically smashing, reaming, breaking, etc., as well as by one who allows for such damage or interference in its functioning that the device does not send or receive signals, which makes it impossible to identify the current location of the convicted person[39]. We cannot fully agree with M. Budyn-Kulik, who claims that "behaviour consisting in allowing another person to remove or switch off a device does not fulfil the elements of an offence"[40]. While disabling the device causes a

[36] M. Dąbrowska-Kardas, P. Kardas, in: *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278-363 k.k.*, Warsaw 2016, ed. A. Zoll, p. 194; J. Piskorski, in: *System Prawa Karnego. Tom 9. Przestępstwa przeciwko mieniu i gospodarcze*, ed. R. Zawłocki, Warsaw 2011, p. 356.

[37] M. Dąbrowska-Kardas, P. Kardas, *op. cit.*, p. 194-195; M. Kulik, *Przestępstwo i wykroczenie uszkodzenia rzeczy*, Lublin 2005, p. 64; same, *Z prawnokarnej problematyki graffiti*, "Prokuratura i Prawo" 2001, No. 2, p. 82.

[38] I. Andrejew, *Kodeks karny – krótki komentarz*, Warsaw 1978, p. 174.

[39] It would not, however, be within the meaning of "renders inoperable" to fail to connect a recorder to a power source because of the possibility of restoring its properties and functions. Moreover, the legislature itself predetermines that the two acts are different in kind by listing in the text of Article 43n § 1 item 1 alongside "making unusable" "powered with electricity".

[40] M. Budyn-Kulik, *Wykroczenia przeciwko…*, p. 456.

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temporary and easily removable hindrance to its operation, it is impossible to remove the transmitter without simultaneously damaging or destroying it.

Generally, the perpetrator who realizes the elements of an offence under Article 66a of the POC simultaneously commits a prohibited act under Article 288 of the PC or Article 124 of the POC (depending on the value of the device) in the form of accessory liability for the act of incitement or aiding. This is because, in practice, it will be far more common for the integrity of technical surveillance equipment to be compromised as a result of the supervised person's persuasion and for "their benefit" than against their will. At the same time, it is impossible to destroy, damage, make unusable the transmitter or recorder without the actions of the supervised person himself, consisting in making these devices available to the executive perpetrator. Liability only on the basis of Article 288 of the PC or Article 124 of the POC occurs when the supervised person by his/her own conduct leads to the destruction, damage, or rendering unusable of the technical means used to carry out electronic supervision. On the basis of the same provisions we should qualify the act of the direct executor, i.e. the person who caused the above-mentioned effects, which in the form of "allowing" was consented to by the person against whom electronic surveillance is applied or the protected person[41].

It should be noted that in addition to typical behaviours, which come down to mechanical interference in the structure of technical supervision devices leading to their total or partial destruction or deprivation of functionality allowing for control of the convicted person's behaviour, the offender who is subjected to a penalty, a punishment or a security measure with the use of electronic supervision tools, can take advantage of the specific properties and mode of operation of the infrastructure of this system, acquiescing in activities that involve interfering with the transmission of data on events to be recorded in the central monitoring. Indeed, it is conceivable that a convict allows the use of a special computer program designed to manipulate computer data (malware type) by uploading it into the memory of the recording device and changing the settings in the functioning of the recorder in such a way that it transmits to the monitoring centre false information regarding the current whereabouts

[41] R. Krajewski, *Odpowiedzialność karna za uszkodzenie urządzeń służących do wykonywania dozoru elektronicznego*, "Prokuratura i Prawo" 2020, No. 2, p. 10.

of the convict. The penal assessment of such behaviour should take into account, in addition to Article 66a of the POC - also the relevant provisions of Chapter XXXIII of the PC. - containing offences against information protection, consisting in gaining access to and influencing computer data, i.e. Article 267 § 2, Article 268 § 2 and Article 268a § 1 of the PC. Article 267 § 2 of the PC penalizes an act which results in gaining unauthorized access to an IT system or a part thereof, even without breaking any protection installed in the user's device or system security[42]. In the case under consideration, such an act consists in introducing software into the ICT system that allows taking remote control over the recorder in order to perform, with its use, the modification of IT data. Thus, the perpetrator does not act with the purpose of obtaining or accessing the information contained in the resources of the seized system, but his conduct is directed toward obtaining control of the device as a means of unlawfully influencing the recorded data containing electronically stored information pertaining to the control of the obligations imposed on the convict. By modifying the memory and settings of the recorder, the perpetrator undoubtedly commits an attack on the integrity of the information record, i.e. computer data. Such action is penalized under Article 268 § 2 of the PC, which provides for destroying, damaging, deleting or altering a record of material information contained in a computer data carrier. As emphasized in the literature, the act specified in Article 268 § 2 of the PC is a substantive crime, committed at the moment when the perpetrator prevented or significantly impeded an authorized person from learning about the recording of important information[43]. The primary purpose of the perpetrator's action, however, is not to obstruct access to information, as this could only alert entities with access to the terminal in the communication and monitoring system and make the attack unsuccessful; nevertheless, the consequence of altering the memory of the recorder is undoubtedly to obstruct access to the record of vital information, which is

[42] F. Radoniewicz, *Odpowiedzialność karna za przestępstwo hackingu*, "Prawo w Działaniu" 2013, No. 13, p. 132.

[43] A. Adamski, *Cyberprzestępczość – aspekty prawne i kryminologiczne*, "Studia Prawnicze" 2005, No. 4, p. 56; P. Kardas, *Prawnokarna ochrona informacji w polskim prawie karnym z perspektywy przestępstw komputerowych. Analiza dogmatyczna i strukturalna w świetle aktualnie obowiązującego stanu prawnego*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2000, journal 1, p. 96; M. Sowa, *Ogólna charakterystyka przestępczości* internetowej, "Palestra" 2001, No. 5-6, p. 30.

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the correct location of the prisoner's whereabouts. In the analysed case, legal assessment of the perpetrator's conduct will require that Article 268a § 1 of the PC is also invoked in the legal qualification, one of the elements of which is interference in automatic processing of computer data. Modifying the memory and settings of the recorder does not cause the data processing to stop, but it does proceed in a different way than intended and is therefore disrupted[44].

Apart from Article 66a of the POC, Article 224a § 2 and Article 244b of the PC serve to protect under penal law the correctness of electronic surveillance. The first of the cited regulations provides for penal liability of a person against whom an obligation connected with a penal measure in the form of a ban on entry to a mass event, referred to in Article 41b § 3 of the PC, has been ordered - i.e., the obligation to remain at a fixed location or other specified place during certain prohibited mass events, using electronic surveillance. It is therefore an individuated crime proper. The causative act consists of any conduct which has the effect of hindering or frustrating the control of the performance of the above duty, even if the duty itself is effectively performed. This may include actions leading to the creation of an obstacle to the effective tracking of the location and whereabouts of the supervised person or making it impossible to track them at all, as well as failure to comply with the obligations imposed on the offender in connection with the electronic supervision applied to him. The realization of the elements of the analysed type will therefore involve any behaviour consisting in removing, damaging or otherwise rendering unusable for their intended use the technical devices of electronic surveillance, or not making such devices available for inspection, repair, replacement, at the request of the supervising entity[45]. The scope of penalized acts has not been narrowed only to those committed directly by a person who has been ordered to stay in a certain place, which means that he or she can be held criminally responsible on the basis of the discussed regulation also in those cases in which his or her behaviour will be limited only to "putting up with" the actions of others, leading to the effects specified in Article 244a § 2 of the PC. In such a case, there will be a one-factor confluence of provisions of Article 244a § 2 of the PC and Article

[44] R. Radoniewicz, *Odpowiedzialność karna za hacking i inne przestępstwa przeciwko danym komputerowym i systemom informatycznym*, Warsaw 2016, p. 317.
[45] K. Wiak, in: *Kodeks karny. Komentarz*, ed. A. Grześkowiak, K. Wiak, Warsaw 2019, p. 1249.

66a of the POC, which is an apparent confluence. By *lex specialis*, Article 66a of the POC will be excluded by Article 224a § 2 of the PC[46].

The second provision mentioned above, Article 244b of the PC. - contains two types of prohibited acts, relating to behaviours that undermine the proper implementation of a court-ordered security measure, including electronic monitoring of the place of residence (Article 93a § 1 item 1 of the PC). Its § 1 provides for penal liability for failure to comply with the statutory obligations of an ordered protective measure. To the extent that this measure is electronic monitoring of the place of residence, these obligations are specified in Article 43n of the EPC, already mentioned in the previous part of the discussion. In addition to the "typical" behaviours associated with impacting the probation infrastructure, prohibited acts may include refusing to provide equipment to a probation entity, as well as failing to provide explanations to relevant entities related to the course of the measure[47]. § 2, on the other hand, relates to unlawfully frustrating the execution of a protective measure ordered against another person in the form of electronic monitoring of whereabouts. Under this provision, all factual acts leading to the nullification of the technical elements of the equipment used to carry out this type of security measure are prohibited, as well as behaviours that prevent the perpetrator from fulfilling his other obligations related to electronic surveillance (e.g. creating obstacles to check the technical condition of the equipment or to answer an incoming call to a portable recorder). Since the provision uses the term "thwarts" it is not sufficient merely to create a situation in which electronic monitoring of another person's whereabouts is temporarily impeded. The legislator explicitly indicates that it concerns only unlawful cases, which leaves out of the scope situations when the nullification of control was caused by objective reasons. The motivation of the perpetrator of the analysed offense is indifferent. M. Mozgawa rightly points out that the perpetrator does not have to act in the interest of the person against whom the measure was applied; it may be that the perpetrator acts out of hooliganism or malice,

[46] M. Budyn-Kulik, *Wykroczenia przeciwko…*, p. 459.

[47] M. Szewczyk, A. Wojtaszczyk, W. Zontek, in: *Kodeks karny. Część szczególna. Tom II. Część druga. Komentarz do art. 212-277d,* ed. W. Wróbel, Warsaw 2017, p. 348.

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wanting to cause negative consequences for the person subject to the measure[48].

It follows from the normative situation presented above that while the legislator has provided a special basis for penal liability in the strict sense for the conduct directed against electronic monitoring devices used in institutions such as the obligation to stay in certain places in connection with the so-called stadium ban, or electronic monitoring of the place of residence ordered as a protective measure, he has left outside the scope of criminalization those acts that violate the conditions for imprisonment under electronic monitoring. Looking for a solution that could effectively fill the gap in the normative framework in a way that would be compatible with the principle of *nullum crimen sine lege certa*, it is necessary to refer to the above considerations on the essence of imprisonment under the electronic surveillance system, to the issue, which is of considerable importance in the practice of the judiciary and which concerns the admissibility of legal qualification of behaviour consisting in breaking the security of the electronic surveillance system used in relation to the above mentioned isolation measure, on the basis of the offence of self-release specified in Article 242 § 1 of the PC. In other words: a fundamental question arises as to whether the evasion of serving a sentence of imprisonment in the system of electronic supervision can constitute a basis for holding him criminally liable due to the realization of the elements defining the causative action of the type of criminal act defined in Article 242 § 1 of the PC. The question thus posed requires consideration of specific issues related to determining whether a person serving a sentence under the electronic surveillance system exhausts the elements defining the subject of the offence, and thus whether he or she is a person deprived of liberty within the meaning of Article 242 § 1 of the PC, and whether a violation of the basic obligation incumbent on the supervised person in the form of staying in the designated place[49] can be classified as the realization of the element of the causative action of this type of a prohibited act.

[48] M. Mozgawa, *Przestępstwa przeciwko wymiarowi sprawiedliwości*, in: *Kodeks karny. Komentarz*, ed. M. Mozgawa, Warsaw 2017, p. 757-758.

[49] It is only the insubordination of the convicted person with respect to the obligation to stay in the designated place at a certain time that can be subject to penal law assessment under the prism of Article 242 § 1 of the PC. If the convict merely destroys the technical surveillance infrastructure and does not leave the designated place, penal liability for the crime of "self-release" is excluded.

The offence under Article 242 § 1 of the PC can only be committed by a person "deprived of liberty by virtue of a court decision or a legal order issued by another state authority". According to the prevailing position presented in the case law and literature on the subject, the phrase "deprived of liberty" can be considered in factual categories related to objective characteristics, the material substrate of the situation in which a person finds himself, and legal categories referring to the source of deprivation of liberty, which can only be a decision of a public authority. The factual aspect means the actual deprivation of a person's freedom of locomotion, i.e. the freedom to change his or her place of residence according to his or her will. However, the offender can then "break free". Deprivation of liberty should not be equated solely with confinement in a room especially designed for this purpose. This is because it is a state in which a person is either in an appropriate place of confinement or under supervision. These two elements, i.e., factual and legal, must therefore intertwine in the sense that it is not sufficient for the mere existence of a deprivation of liberty order and the awareness of this state of affairs by the person against whom such an order has been made, but it is necessary at the same time to create a specific physical barrier restricting the liberty of that person. Such a barrier may be confinement in a room or guarding or supervision by custodial supervisors.

Consequently, the crime of self-liberation will be committed as soon as the person has escaped from the confines of the place of confinement or from under the supervision or control of the guards, that is, when there has been a "breaking of the bonds of guarding," that is, causing a state in which the guards must undertake pursuit of the perpetrator because they have lost direct contact with him, even if immediately after the pursuit he is apprehended and again deprived of his liberty[50].

[50] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warsaw 1973, p. 432-433; B. Boch, *kwalifikacja prawna czynu, polegającego na samowolnym oddaleniu się skazanego z miejsca pracy poza zakładem karnym w systemie bez konwojenta*, "Przegląd Sądowy" 2017, journal 11-12, p. 83; W. Makowski, *Kodeks karny z 1932 r. Komentarz. Część szczególna*, Warsaw 1932, p. 392; K. Mamak, *Dozór elektroniczny…*, p. 21; P. Poniatowski, *Przestępstwa uwolnienia osoby prawnie pozbawionej wolności*, Warsaw 2019, p. 291; A. Wojtaszczyk, W. Wróbel, W. Zontek, in: *System Prawa Karnego. Przestępstwa przeciwko państwu i dobrom zbiorowym. Tom 8*, ed. L. Gardocki, Warsaw 2010, p. 336-337; Resolution of a panel of 7 Supreme Court judges of 20.06.1987 r., WZP 1/87, OSNKW 1987, journal 9-10, item 76; judgements of the Supreme Court: of 4.02.1935, 3 K. 1850/34, Collection of Decisions of the Supreme Court 1935, journal 9, item 379; of 23.09.1992, III KRN 129/92, OSNKW 1993,

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Juxtaposing the above with the realities of imprisonment under the electronic supervision system, some representatives of the doctrine of penal law and the judicature[51] come to the conclusion that a convict serving such a sentence may be treated as deprived of liberty within the meaning of Article 242 § 1 of the PC, which manifests itself in the fact that he cannot change his place of residence according to his will. At the same time, the convict remains under supervision, in the sense that his activity is monitored by technical means that continuously record his whereabouts and create a kind of barrier in his psyche. The statements of the protagonists of the view on the possibility of exhaustion of the substantive elements of the crime under Article 242 § 1 of the PC by a convicted person moving away from the place of supervision, are the result of taking into account the dynamic aspect in the process of interpretation, referring to the current socio-legal context of a given regulation, which forces a revision of the classical understanding of the crime of self-release by recognizing that the condition sine qua non for the existence of a crime under Article 242 § 1 of the PC in the form of "breaking the bonds of guard" is replaced by the condition in the form of "breaking the bonds of electronic supervision".

The arguments of the opponents of the above position[52] result from the failure to adapt the interpretative concepts formulated in the jurisprudence and literature concerning the individual elements constituting the crime of

journal 1-2, item 6; of 9.12.1997, V KKN 26/97, LEX no 33275 and verdict of District Court in Kraków of 18.09.2003, II AKa 230/03, KZS 2003, journal 10, item 13.

[51] A. Górski, *Wykonywanie kary w systemie dozoru elektronicznego a przestępstwo samouwolnienia (uwagi na marginesie wyroku SN I KZP 3/17)*, "Państwo i Prawo" 2019, No. 4, p. 79-87; T. Kalisz, *op. cit.*, p. 110. As far as the case law is concerned, the Supreme Court in the judgement of 21.06.2017, I KZP 3/17, LEX No. 2334899, admittedly avoided to explicitly indicate whether the normative phrase: "being deprived of liberty" also applies to a person serving a sentence of imprisonment under the electronic surveillance system, however, the acquittal of the accused who did not comply with the regime of serving a sentence under this system by reference to the intertemporal rule prejudges the recognition of such conduct as fulfilling the elements of Article 242 § 1 of the PC.

[52] J. Kluza, *Przestępstwo samouwolnienia się. Uwagi na tle orzeczeń Sądu Najwyższego o sygn. I KZP 11/16 oraz I KZP 3/17*, "Zeszyty Prawnicze" 2018, No. 2, p. 141; M. Małecki, *Samouwolnienie się od dozoru*, "Dogmaty Karnisty", https://www.dogmatykarnisty.pl/2016/12/samouwolnienie-sie-od-dozoru/; K. Mamak, *Dozór elektroniczny…*, p. 21 i n.; P. Poniatowski, *Gloss on the Supreme Court ruling of 19 January 2017, I KZP 11/16 (with reference to the Supreme Court judgement of 21 June 2017, I KZP 3/17*), "Ius Novum" 2018, No. 4, p. 160 i n.; B. Stańdo-Kawecka, *Elektroniczne monitorowanie*…, p. 152 et seq.

self-release to the changing legal realities, as well as the technological realities in which deprivation of liberty is currently implemented. It is true that in accordance with the directives of linguistic interpretation, it is assumed that in the absence of a legal definition[53] of a particular term, it should be interpreted in accordance with its established and uniformly understood meaning in the legal language, but the application of the above rule must be preceded by an in-depth reflection on whether the meaning of the phrase "frees himself when deprived of liberty" developed in the case law and accepted by the doctrine - because it was formed in different factual and legal circumstances - can be directly applied in the case under consideration.

As already mentioned, the crime of self-sovereignty can be committed only by a person who cannot freely and unconstrainedly decide his place of residence or the way he organizes his time, and whose intention is to leave the place where he is, without the consent or against the consent of the authorized authority, in order to regain the freedom taken away from him. What else but a prohibition on freely changing the place of residence is an order, characteristic of electronic surveillance, to stay in a certain place with certain exceptions, however limited in time and place, according to the court's decision? The state of deprivation of liberty referred to in the provision under consideration should not be equated with actual confinement in conditions of solitary confinement in a prison or in similar conditions and, consequently, should be interpreted by comparing it with the degree of discomfort associated with a sentence of imprisonment served in penal institutions[54]. The legislature uses the phrase "being deprived of liberty" rather than "serving a term of imprisonment in correctional facility". The analogous phrase used in Article 64 of the PC i.e. "serving a sentence liberty deprivation" is uniformly understood in the case law to include also imprisonment under the electronic surveillance system. The Supreme Court explicitly states that "serving a sentence under

[53] M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warsaw 2002, p. 314-315.

[54] J. Kluza inter alia, *op. cit.*, p. 148-149; P. Poniatowski, "*Taking into account the above-mentioned PEC regulations, one should state that if a convict has the right to leave the place of permanent residence or another indicated place for a period of 12 hours per day (in the periods determined by a penitentiary court), one cannot say that he or she is deprived of liberty, i.e. he or she cannot freely change the place of stay. It is true that the movement freedom is limited to indicated periods but, in fact, the deprivation of liberty that is connected with serving the penalty of deprivation of liberty in a traditional way means that a convict does not use the movement freedom (of course, in a certain range, i.e. he or she cannot leave a cell, prison or a place of stay outside prison, e.g. a workplace) without permission*", *op. cit.*, p. 162.

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electronic supervision does not change its essence, which is the deprivation of absolute liberty"[55]. Therefore, according to the principle of *lege non distiguente*, identical-sounding normative phrases should not be given a different meaning within a single normative act.

The reference to the factual criterion, already developed in the 1932 codification, serves the opponents of the thesis of the possibility to recognise the sentence served in the system of electronic monitoring as deprivation of liberty within the meaning of Article 242 § 1 of the PC - the reference to the factual criterion, as already developed in the 1932 code, ignores the fact that the formulation of the above condition was intended to prevent situations in which penal responsibility, on the basis of Article 242 § 1 of the PC, would be imposed on a perpetrator who has been validly sentenced to a term of imprisonment, the execution of which has not yet begun (i.e. in a situation of evading appearance in prison) or a perpetrator who has attempted to escape from officers, but has not yet been caught and "placed under guard"[56]. At the same time, it should be pointed out that the emphasis placed by the interpretation of the term "deprivation of liberty" on the necessity to remain under guard or supervision was the result of the lack of an equivalent to the current crime of non-return referred to in Article 242 § 2 of the PC and was aimed at excluding from the scope of criminalisation the crime of self-release in a situation of unlawful extension by the convicted person of the period of enjoyment of the legally obtained liberty under the temporary permission to leave the penal institution or detention facility[57].

The fundamental issue formulated at the outset should therefore revolve around whether the phrase "frees himself while being deprived of his liberty" should be interpreted, in accordance with its hitherto established meaning, as freeing himself from confinement, confinement or supervision by "breaking the bonds of the guard", or as any action that constitutes an unlawful violation of the regime of deprivation of liberty. This is important in the context that "guard" or "supervision" does not

[55] Judgement of the Supreme Court of 5.02.2020 r., V KK 665/19, LEX No. 3122793; cf. also judgement of the Supreme Court of 23.05.2014 r., III KK 16/14, LEX No.1469141.

[56] See Judgement of the Supreme Court of 1.02.1977, VI KRN 428/76, OSNKW 1977 No. 4-5, item 43; Judgement of the Distritc Court in Łódź of 9.03.1995, II AKz 48/95, LEX No. 1681255; Judgement of the Supreme Court of 9.12.1997, V KKN 26/97, LEX No. 33275.

[57] See Resolution of the Supreme Court of 21.03.1975, VI KZP 57/74, OSNKW 1975, No. 5, item 49; Judgment of the Supreme Court of 12.01.1995, II KRN 250/94, LEX No. 1673683.

always equate with direct and actual control. The term "guard" is sometimes interpreted much more broadly as "the disciplinary subordination of the convicted person to the administration of the prison, obliging him, regardless of the type of supervision, to stay in a strictly defined place"[58]. According to the literal interpretation of the analysed regulation, the essence of "deprivation of liberty", on the basis of Article 242 § 1 of the PC, is the adjudicated prohibition with the content specified by the applicable legal regulations, and it is this that creates the state of deprivation of liberty at the beginning of the execution of the sentence. This is directly indicated by the phrase: "being deprived of liberty by court order". The provision that typifies the crime of self-liberation does not use the wording of "liberation from an officer's guard or supervision," which could suggest that self-liberation occurs when a certain physical obstacle, which is the essence of the actual deprivation of liberty, is overcome.

Also the other observations of the antagonists of the position on the inadmissibility of the application of Article 242 § 1 to situations of violation of obligations related to the execution of a sentence of imprisonment in the system of electronic surveillance, taking into account the teleological and systemic context of the regulation in question, are not convincing.

One cannot agree with the statement that a person performing exactly the same action, i.e. walking away from the area monitored by the electronic surveillance system, would or would not exhaust the elements of the prohibited act under Article 242 § 1 of the PC, depending on whether the applicable regulations recognize the surveillance as a form of restriction of liberty or imprisonment, which violates the principle of equality before the law[59]. An important common feature determining whether a given category of conduct is subject to criminalisation is not the specificity of the situation in which a given person found themselves in connection with the issuance of a decision with specific content by a relevant authority, but above all the formal nature of such a decision[60]. It

[58] E. Hansen, *Samouwolnienie się skazanych pozbawionych wolności (art. 256 k.k.*), "Nowe Prawo" 1978, journal 4, p. 583.

[59] M. Małecki, *Samouwolnienie…*

[60] Równie dobrze można uznać, że naruszeniem zasady równości wobec prawa jest pozostawienie poza zakresem przedmiotowym typu czynu z art. 244 k.k. zakazów orzekanych w ramach środków zapobiegawczych, skoro ich materialny substrat pokrywa się z tym właściwym dla środków karnych.

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is not possible to place a mark of equality between a person who has been sentenced to imprisonment by a court and a person who has only been sentenced to a sentence of restriction of liberty, even if their substantive content would be the same. The legislature attaches particular importance to the protection of the interest of justice in that aspect of it which concerns the formal solemnity of the court's order or the legal injunction of the public authority from which the state of deprivation of liberty results.

It should be noted that the electronic surveillance system is one of the varieties of imprisonment, the application of which depends on the fulfilment of certain prerequisites of both subjective and objective nature, contained in Article 43la of the EPC. These circumstances contribute to the conviction of the penitentiary court that it is possible to realize the special-preventive and general-preventive purpose by restricting the freedom of the convict under conditions of controlled freedom. The specific privileging of an offender sentenced to absolute imprisonment by the court deciding the case on the merits should not lead to his impunity in a situation of non-compliance with restrictions on his freedom of movement, just because such imprisonment has a slightly different formula from the "classic" one, and this is due to its modification at the stage of executive proceedings.

It is irrelevant that the provisions governing the regime of electronic supervision provide for certain consequences of its violation in the form of withdrawal of the court's consent to serve the sentence in this system[61]. Assessment of the same act through the prism of several regimes of responsibility (or more broadly: multiplication of consequences connected with a given behaviour) is not inadmissible, as long as it does not exceed by its degree of severity the requirements stemming from the principle of proportionality referred to in Article 31 paragraph 3 of the Constitution. The PC itself allows several measures to be imposed on the offender. In addition to punishment, punitive, compensatory or forfeiture measures may be ordered. If the perpetrator has committed the act with the aim of achieving a pecuniary benefit or if he has achieved a pecuniary benefit, the court may impose a fine in addition to the imprisonment. Mere substitution of the mode of imprisonment is not a sufficient means of responding to the conduct of frustrating the execution of a sentence of imprisonment under

[61] Zob. A. Wojtaszczyk, W. Wróbel, W. Zontek, *Przestępstwa przeciwko…*, s. 675

the electronic surveillance system. When assessing its punishability from the point of view of the degree of social harm of a typical behaviour of self-liberation, entailing the necessity of pursuit and having a demoralising effect on the attitudes of other prisoners, it should be pointed out that the counterpart of these consequences, in the case of an unauthorised departure from the designated place of residence, is the repeated referral of the case to enforcement proceedings and a negative message, detrimental to the authority of the judiciary, sent to persons cohabiting with the convicted person, about the ineffectiveness of the penal sanctions applied. From the perspective of the legally protected good, under Article 242 of the PC, the act of the offender's self-liberation from electronic surveillance harms the good of justice to the same extent as in the case of escape from prison. The thesis put forward in this context that violation of probation obligations under a conditionally suspended prison sentence does not lead to penal liability, despite the fact that the offender also harms the dignity and authority of the judiciary by failing to comply with a final judgement, can be challenged on the grounds that this type of insubordination is distinctly different from violation of obligations under electronic surveillance as a form of imprisonment. While probation obligations are carried out in free conditions, their execution is not subject to strict control, their purpose is not to create a real nuisance for the offender, but only to rehabilitate him by showing a socially active attitude, educate him and prevent him from committing a crime again, in the case of electronic supervision we are dealing with a real nuisance by limiting the freedom of the convicted person, from which, however, certain exceptions are allowed. If the legislator included in Article 244a § 2 of the PC a special type of prohibited act, providing penal liability for conduct constituting frustrating or hindering the control of the obligation to stay in a designated place imposed in connection with a stadium ban, it would be contrary to the principle of equality in penal law to leave out of the scope of penal law reaction an act constituting a violation of obligations related to imprisonment under the electronic surveillance system. The fact that the sanctions of the types of offences defined in Article 244a § 2 and Article 242 § 1 of the PC are identical may suggest that the legislator deliberately omitted the introduction of a special type of offence penalizing the violation of the obligation to remain in a designated place connected with imprisonment served under the electronic surveillance system, believing

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that this type of behaviour falls within the material scope of the offence under Article 242 § 1 of the PC.

Finally, the argument suggesting that even if it were considered that Article 242 § 1 of the PC could be applied to a person who moves away from the place of supervision, he would still not be subject to penal liability under the above regulation, due to the fact that he could be presumed to be acting in an excusable error as to the element of the type of prohibited act in the form of "deprivation of liberty" is misplaced[62]. In a situation where there is information about the type of sanction imposed in the final decision deciding the offender's penal responsibility and subsequently in the order granting the convict to serve a sentence of imprisonment under the electronic surveillance system, it seems inappropriate to conclude that he may have remained in a justifiable mistaken belief as to whether he is deprived of his liberty.

To sum up, arbitrary departure from the designated place of residence by a convict serving a sentence of imprisonment under the electronic surveillance system may be qualified in terms of the elements defining the causative action of the crime of self-liberation.

4. Conclusion

The current legal status concerning penal liability for behaviour against the standards of electronic monitoring, which is an integral part of penalties, punishment and security measures, is based on a number of casuistic and dubious solutions, which raises questions about the usefulness of such measures to the primary goal of the legislator, which is to ensure the proper functioning of electronic monitoring. The subject and object scope of this liability varies depending on which measure electronic surveillance is associated with. It is most broadly covered in the case of a security measure in the form of electronic monitoring of the place of residence, where liability is envisaged both of the person against whom the measure has been ordered for breach of any obligations associated with it and of third parties for conduct resulting in thwarting the execution of the measure. The legislator has also treated in a special way the electronic

[62] Tak K. Mamak, *Dozór elektroniczny…*, s. 25; P. Poniatowski, *Gloss on the Supreme Court…*, s. 165.

surveillance which serves the purpose of carrying out the obligation to stay in a specific place connected with the so-called stadium ban. This is because the penal prohibition covers any conduct leading to the thwarting or hindering of the control of the performance of this duty. At the same time, in the absence of a specific regulation related to the sentence of imprisonment executed under the electronic supervision system, the convicted person will be held criminally liable under Article 242 § 1 of the PC only for arbitrary departure from the place where he is obliged to stay, and not for acts interfering with the monitoring of the offender's behaviour by technical means. In addition to these regulations, provided for in penal law *sensu stricto*, the supervised person is subject to misdemeanor liability under Article 66a of the POC for "condoning" behaviour leading to the destruction of technical means used to carry out electronic supervision.

Therefore, we can agree with J. Krajewski, who argues that the provisions serving the legal protection of electronic surveillance - due to their multiplicity and diversity of behaviours that are included in the scope of penalization - are illegible and, as a result, create "an incoherent system delineating blurred spaces of penal responsibility [63]. It is therefore necessary to postulate the creation of a uniform and coherent regulation aimed at ensuring effective, undisturbed by external interference, control of the convicted person's behaviour with the use of technical means. This requires that both persons subject to electronic surveillance and third parties who damage the transmitter or recorder or otherwise prevent or obstruct electronic surveillance be made equal in terms of penal liability. It is also necessary to extend the penal prohibition to all institutions where electronic surveillance is used. Third and finally, the scope of penal liability should not be limited only to the violation of the duty to protect technical means from being damaged, destroyed, rendered unusable.

As a result, a *de lege ferenda* postulate should be formulated, regarding the introduction to Chapter XXX of the PC, grouping "Offences against the Administration of Justice", of a separate type of offence, located in a separate article, which would criminalize behaviour of a person who would cause or allow obstruction or prevention of electronic surveillance. Such conduct should be punishable alternatively by a fine, restriction of

[63] R. Krajewski, *op. cit*., p. 14.

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liberty or imprisonment for up to 2 years. The provision could therefore read: "Whoever frustrates or hinders the execution of electronic surveillance connected with an imposed sentence of imprisonment, a penal measure or a security measure, or allows to frustrate or hinder its execution shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years." At the same time, it would be necessary to derogate Article 66a of the POC and Articles 244 § 2 and 244b § 2 of the PC.

The proposed provision would provide an appropriate basis for the legal qualification of behaviours that interfere with the proper functioning of electronic supervision, capturing their essence well in a general and broad formula that avoids excessive casuistry and the need for a complex legal qualification of the behaviours of those who violate electronic supervision obligations by referring to the institution of concurrence. It would ensure proper protection not only of the authority of the judiciary, associated with respect for final court decisions, but in a broader perspective, of all the goods whose violation is to be prevented by electronic surveillance.

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