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PENAL POLICY ON COMBATTING THE OFFENSE OF CONTACTING A MINOR VIA ICT SYSTEMS AND TELECOMMUNICATIONS NETWORKS IN POLAND

 <https://doi.org/10.2478/ppsr-2023-0017>

► Received: 18 April 2023 ► Accepted: 24 October 2023

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Abstract

The material scope of the research problem in the text encompasses selected issues concerning the content and sense of the elements characterizing the offense of establishing contact with a minor via ICT systems and telecommunications networks (also referred to as “grooming”) under Polish criminal law. In the legislation currently in force the offense of grooming is criminalized under Art. 200a §1–2 of the Criminal Code. The main purpose of the analysis is to perform a substantive criminal examination of the offense of grooming under Polish law, taking into account a practical case study. The analysis contained in the text is chiefly an overview, and includes mainly an institutional and legal analysis performed with the aid of textual, functional and doctrinal interpretations, which have been supplemented with the author’s own conclusions and opinions concerning *de lege lata* and *de lege ferenda* solutions. The institutional and legal analysis has been supplemented with an abstract case study of grooming. The presented abstract case study is helpful in considering selected legal problems, and ultimately in presenting example legal classifications of the described acts referred to as grooming.

Keywords

law policy, penal policy, criminal policy, sexual offenses, child sexual abuse, grooming offenses, grooming

Introduction

The material scope of the research problem in the text encompasses selected issues concerning the content and sense of the elements characterizing the offense of establishing contact with a minor via ICT systems and telecommunications networks (also referred to as “grooming”) under Polish criminal law. In the legislation currently in force the offense

of grooming is criminalized under Art. 200a §1–2 of the Criminal Code (*Criminal Code*, Journal of Laws 1997, no. 88 item 553, as amended). The main purpose of the text is to perform a substantive criminal examination of the offense of establishing contact with a minor via ICT systems and telecommunications networks under Polish law, taking into account a practical case study as well as an assessment of the legal provisions with regard to both public and individual security in the context of the influence of penal populism and rapid technological development.

It is noteworthy that the offense of grooming itself is most often merely a stage in the perpetrator's further actions, oriented towards the abuse of a minor. Therefore, the deliberate initiation of contact with a minor with a view to committing such offenses as paedophiliac rape, paedophilia and producing or recording pornographic content involving minors has become criminalized in many countries, including Poland. Greater exposition and victimological susceptibility of minors connected with constant presence in cyberspace have given rise to new forms of paedophiliac crime, creating favourable conditions for the anonymity of perpetrators. The anonymity that criminals have gained enables them to abuse minors by misleading them, exploiting the fact that they have been misled, or with all manner of threats and extortion (cf. Dombrowski, 2004, pp. 65–73; Kierkegaard, 2008, pp. 41–55; Seto, 2008; Elliott et al., 2009, pp. 76–92; Urbas, 2010, pp. 410–425; Seto, 2013; Whittle et al., 2013, pp. 135–146; Quayle, 2014, pp. 368–375; Whittle et al., 2014, pp. 1185–1196; Williams et al., 2013, pp. 135–152; al-Khateeb, Epiphaniou, 2016, pp. 14–18; Lorenzo-Dus et al., 2016, pp. 40–50; Kloess et al., 2017, pp. 73–96; Seto, 2017, pp. 104–106).

In order to elaborate the objective scope of the research problem, the following research questions have been included in the text: (1) *To what extent are the de lege lata legal solutions in Poland effective in counteracting grooming offenses?* (2) *What de lege ferenda solutions ought to be proposed with a view to improving effective counteraction of grooming offenses?*

The analysis contained in the text is chiefly an overview, and includes mainly an institutional and legal analysis performed with the aid of textual, functional and doctrinal interpretations, which have been supplemented with the author's own conclusions and opinions concerning *de lege lata* and *de lege ferenda* solutions. The institutional and legal analysis has been supplemented with an abstract case study of grooming. Thus, the case study covers the potential application of Article 200a §1–2, and the interpretation of the other articles containing the indicia of grooming, i.e. Articles 197 and 200 of the Criminal Code, as well as the indicia of producing or recording pornographic material. The presented abstract case study is helpful in considering selected legal problems and example legal classifications of the described acts associated with actions against minors. The case study includes issues, in addition to grooming, concerned with the activity of the so-called paedophile hunters who as private persons search for paedophiles in cyberspace, acting within the limits of public interest or potentially outside them, as well as within the limits of the law or potentially outside them. This issue is considered in the context of Article 24 of the Criminal Code (i.e. punishable incitement) and the negative consequences for paedophiles themselves, e.g. attempting suicide (Article 151 of the Criminal Code) or being a potential victim of the offense of stalking (Article 190a of the Criminal Code) in connection with the activity of paedophile hunters.

1. Legal policy and penal policy (the normative and legal context)

Crafting criminal law provisions is the domain of legal policy, but the kind of effect that is to be achieved by way of such teleological legislative processes remains an open issue. Delving into the deliberation engaged in by Aristotle, one may assume that one of the goals of politics is to ensure the good of the community. However, one should bear in mind that apart from the commonly invoked definition of politics, Aristotle understood it as, *inter alia*, a science of human action, the art of legislation, but also as prudence. Also, politics itself is the proper formation of man through institutions and in such a manner that he becomes a good citizen, which is supposed to translate into the good of the community (see Aristotle, 2000; Voegelin, 2011, pp. 53–85; Aristotle, 2019). The same direction was followed by L. Petrażycki, who saw legal policy as scientific prediction of effects of the implemented legal solutions. Apart from this function, the author also pointed to the function of moulding proper civic attitudes (Petrażycki, 1959; Petrażycki, 1968). Following A. Krukowski and S. Pikulski, one should posit that criminal policy *sensu largo* is a set of actions taken by the state towards combating crime and eliminating negative social phenomena that often carry the features of criminal offense. Penal policy, as part of the above policies, is seen as encompassing the following issues: (1) laying down the penal law, (2) applying the penal law, (3) assessing the effects of the laid-down and applied law and (4) assessing the effectiveness of the laid-down and applied law (Lande, 1958, pp. 229–265; Podgórecki, 1962, pp. 122–190; Ziemiński, 1975, pp. 123–141; Pikulski, 2009, pp. 13–21; Stańdo-Kawecka, 2020, pp. 11–43).

The penal policy developed with regard to offenses against sexual liberty and decency is aimed at elimination of, *inter alia*, threats connected with the development of new technologies. The increasing significance of communication technologies and cyberspace has enhanced minors' exposition to threats from sexual offenders seeking to sexually abuse minor victims. Hence, one can recognize that the young age of victims, the absence of reflection on potential dangers, and the illusion of anonymity on the Internet give rise to the increased victimological susceptibility of minors. It is also noteworthy that the crime that falls within an extensive catalogue of paedophilic offenses is treated by society as particularly repulsive and deserving of a broad range of criminalization and penalization, which is diligently exploited by politicians (cf. Góralski, 2011, pp. 37–77; Kloess, et al., 2014, pp. 126–140; Kozak, 2014; Ratajczak, 2014, pp. 47–64; Bębas, 2017; Burdziak, Banaszak, 2017; Górka, 2017; Sikorski, 2018, pp. 175–185; Pajdała, 2021, pp. 10–13).

It may be assumed that penal policy with regard to paedophilic offenses is determined by internal and external factors. The internal ones include rational penal policy on the part of the legislator, the executive, public opinion and the crimes that draw significant media and public attention. The external ones include international campaigns and the activity of international organizations, which may result in international agreements aimed at criminalization of the new kinds and forms of paedophilic offenses.

International-law regulations have undoubtedly given rise to changes to the penal policy concerned with the prevention and combating of paedophilic crime in Poland. The criminalization of the act of establishing contact with a minor via ICT systems and telecommunications networks by the Polish legislator in 2009 was the result of the necessity of aligning the national regulations with international requirements. These requirements resulted from the Council of Europe Convention on the Protection of Children Against

Sexual Exploitation and Sexual Abuse, which Poland signed in Lanzarote in 2007 (see Journal of Laws 2015, item 608). Apart from the main goals encompassing, *inter alia*, prevention and combating of sexual exploitation and sexual abuse of children, the Convention obliges the signatory states to implement legal solutions aimed at the criminalization and penalization of specific kinds and forms of this type of offense. Article 23 of the Convention sets out the necessity for criminalization and penalization of intentional solicitation of children (the lower age limit below which sexual activity is outlawed is set by the state itself) by an adult via ICT technologies for a meeting in order to commit any one of the offenses specified in the Convention (i.e. participation in sexual activity involving a child who under national law has not attained the age of consent allowing him or her to engage in sexual activity or produce child pornography) in a situation where the proposal is in fact connected with actions aimed at making the meeting happen.

In the Polish penal law grooming is criminalized and penalized under Art. 200a §1–2. The first of the two clauses criminalizes intentional establishment of contact with a minor (the Polish legislator posits that the minor is a person under the age of 15), while the second criminalizes the very act of proposing a sexual act to a minor (in this case the legislator assumes that the minor is a person under the age of 15). Art. 200a §1 indicates that liable to punishment is he who via an ICT system or a telecommunications network establishes contact with a minor under the age of 15 with the intent to – by misleading him, exploiting the fact that he or she has been misled, the minor’s incapacity to judge the situation correctly or by resorting to an illegal threat – meet him or her with a view to committing the offense of paedophiliac rape (Art. 197 §4 of the Criminal Code), an intercourse with a minor under the age of 15 or various forms of presentation of pornographic content (Art. 200 §1–6 of the Criminal Code). Art. 200a §2 indicates that liable to punishment is he who via an ICT system or a telecommunications network proposes to a minor under the age of 15 sexual intercourse, subjection to or performance of another sexual act, or participation in the production or recording of pornographic content and aims to further his proposal (see Art. 200a §1–2, Journal of Laws 1997, no. 88, item 553, as amended; Grześkowiak, Wiak, 2019, pp. 1069–1071; Giezek, 2021, pp. 648–656).

One may assume that the content of Art. 200a §2, when compared to the content of Art. 200a §1, criminalizes electronic solicitation of a minor coupled with a simultaneous exposition of a sexual aim. In addition, the act criminalized under Art. 200a §2 does not require that the perpetrator follow a special mode of action, unlike under Art. 200a §1. This means that the perpetrator’s action does not need to take the form of taking advantage of the mistake, incapacity to understand the situation correctly or an illegal threat against a minor. That which constitutes a prohibited act is an indicium of making a proposal indicated in the content of the provision. Therefore, in his proposal the perpetrator directly exposes his specific intentions of a sexual character, while aiming to further them (for more see Decision of the Supreme Court of 23.11.2017, V KK 227/17). However, it is noteworthy that both with regard to the indicium of aiming to realize the proposal to engage in a sexual intercourse, subjection to or performance of another sexual act (Article 200a §2) and aiming at an encounter by misleading, exploiting the fact that the other party has been misled or that they are incapable of grasping the situation or by using an illegal threat, the issue lies with capturing the factual actions serving to exemplify such aiming.

The doctrine and dogmatics of the Polish penal law are open to debate as to the stage of activity at which the Polish legislator criminalizes the perpetrator’s actions in two types

of grooming. Partially, the doctrine recognizes that in both types the legislator criminalizes secret preparations for offenses, i.e. concealed types of preparation. According to a different position the acts criminalized under Art. 200a §1 and 2 are preparation *sui generis*, but of the type where the actions need to be treated as independent types of prohibited acts characterized by their own inchoate forms. Not only are both the positions of significance for theoretical deliberation, but they really affect various judgments while evaluating identical factual states as acts committed by perpetrators of grooming. This comes to be reflected in both case law, as well as legal commentaries and academic texts (for more see Decision of the Supreme Court of 1.09.2011, V KK 43/11; Decision of the Supreme Court 17.03.2016, IV KK 380/15; Judgment of the District Court in Bydgoszcz of 10.07.2018, IV K 172/17; Judgment of the District Court in Puławy of 16.07.2020, II K 968/18; Małecki, 2011a, pp. 50–63; Małecki, 2011b, pp. 89–101; Małecki, 2012, pp. 196–205; Małecki, 2016, pp. 275–279; Mozgawa, 2017, pp. 621–624; Grześkowiak, Wiak, 2019, pp. 1069–1071; Giezek, 2021, pp. 648–656).

It is notable that the legislator uses the unfortunate indicium of aiming, which is not the same as “directly aiming,” i.e. the main element defining an attempt in the Polish criminal law. This creates doubt on whether we are dealing with preparations or independent types of crime. According to one of the Decisions of the Supreme Court, even urging a minor to respond to a proposal made earlier by the perpetrator can be seen as the aiming specified in Art. 200a §2 (see Decision of the Supreme Court of 17.03.2016, IV KK 380/15). However, a part of the doctrine is negative about this position taken by the court, pointing out that in the latter type of grooming, it should go beyond virtual reality. Still, it should be recognized that contrary to the propositions by M. Małecki and K. Lipiński, the linguistic interpretation is that aiming under Art. 200a §2 is of a broader character. It is not necessary to go beyond the virtual reality, and so this type of action may remain in the communication sphere, e.g. through Messenger, Instagram, Facebook, Signal, WhatsApp, messengers embedded in games, etc. (Małecki, 2011a, pp. 50–63; Małecki, 2011b, pp. 89–101; Mozgawa, 2017, pp. 621–624; Konarska-Wrzosek, 2020, pp. 1009–1014; Giezek, 2021, pp. 648–656). This results from the very development of computer technologies, and the possibility of recording or broadcasting content concerned with sexual activity. It is noteworthy that the proposal specified in Art. 200a §2 does not only cover a sexual intercourse with a minor engaged in by the person making the proposal, but also provides for subjection to or execution of another sexual act, or participation in production or recording of pornographic content. Especially in the latter case, the perpetrator of a crime can only realise the crime in cyberspace. Therefore, a physical encounter between the perpetrator and the victim is not necessary, but of course it is possible.

The natural consequence of referring to other criminal sexual acts, in the two types of grooming, and the functioning of a broader range of criminalization of other acts falling within offenses against sexual liberty and decency is a variety of concurrences potentially emerging in the practice of application of provisions. For instance, in a situation where an adult perpetrator establishes contact with a minor, winning his or her trust so that he or she shares with the perpetrator a video of his or her own act of masturbation via instant messenger, the legal classification of this act will be based on the so-called real concurrence of provisions with regard to the offense of grooming of the second type (Art. 200a §2), in the concurrence with the offense of a sexual intercourse with a minor (Art. 200 §1 – in the form of leading a minor to another sexual act, that is an act of masturbation)

and in the concurrence with the offense of obtaining pornographic material involving the minor (Art. 202 §4a).

2. Abstract case study

To highlight the sense of the criminal policy on combating the offense of grooming, and to evaluate the legal solutions in this respect, an abstract case study is used. It considers the potential use of legal classifications related to Article 200a §1–2 of the Criminal Code. Given the intention to include in the analysis an assessment of the consequences of paedophile hunters' activity, the case study also includes the issues pertaining to the potential application of Article 24 of the Criminal Code (i.e. one of the forms of criminal participation referred to as "incitement"). Also, of crucial importance in this context are the potential negative effects on the perpetrators of grooming themselves, which are linked to the activity undertaken by paedophile hunters, and therefore criminalizing provisions have been included in the legal assessment in order to analyse them. These include (1) a suicide attempt (Article 151 of the Criminal Code) and (2) persistent harassment (Article 190a of the Criminal Code).

The presented story, which concerns a variety of acts by a number of individuals engaging in what might fulfill the criteria for various kinds of offenses, is elaborate, and so the individual events here require establishment of the actual states, legal problems, legal grounds, legal interpretation and eventually legal classification (association of the facts with legal norms). The content of the case under analysis is as follows:

On an Internet website, via a theme chat, forty-year old Karol B. meets a thirteen-year old girl. Taking advantage of the girl's trust, Karol B. aims to meet with her, and as the conversation continues, he proposes sexual intercourse and then sends her a short video presenting sexual acts. Seeing her positive reaction, he decides to arrange a meeting with her for a specific sexual act, to which the girl responds positively via one of the messaging services. Karol B. and the girl choose to meet in a car park in front of a local railway station. Karol B. arrives at the meeting place, but in the car park instead of the girl he sees a group of men who turn out to be self-proclaimed paedophile hunters. The men record the meeting with a camera, streaming the video on their website and Facebook profile. During the meeting with Karol B. his face is not obscured, and he is asked questions that incriminate him as a paedophilia perpetrator. While recording and streaming, the paedophile hunters expose the paedophile's guilt and explain the ploy he has fallen for. It turns out that the men pretended to be the thirteen-year old girl to secure the capture of Karol B. Only some time later is the police called; Karol B. is arrested and taken to the prosecutor's office where criminal charges are brought against him. After the charges have been presented Karol B. is released, but in the evening as a result of the shock he has experienced, he commits suicide.

3. Results of the applied abstract case study

3.1. *Legal assessment of the actions taken by the grooming perpetrator*

In the first place, one should refer to the presented case study of Karol B., who established contact with a minor under the age of 15 via online chat on a theme website. Karol B.'s further actions consisted in (1) proposing a sexual intercourse to a minor, (2) sending a video of sexual acts, (3) arranging a meeting with a minor in order to engage in a specific sexual act, and (4) aiming to meet with a minor. Additionally, one should note that Karol B. was not in contact with a minor, but with individuals passing themselves off as

the minor. Therefore, his actions should be considered in the context of Art. 200a of the Criminal Code, and possibly other provisions coming into concurrence with it. However, one should first consider the application of Art. 200a §2, because Karol B. proposed a sexual act via ICT systems and telecommunications networks.

The analysis of the normative and legal context indicates that because of the hardly transparent content of Art. 200a of the Criminal Code, there are doctrinal discrepancies regarding whether the acts criminalized under the article should be treated as punishable crypto preparations (concealed types of preparation) or as independent types of prohibited acts with their own inchoate forms. In the former case the presented event cannot be treated as an offense committed by Karol B., because under Polish law the inchoate form of criminalized preparation does not provide for ineffectuality in the form of unawareness with regard to the lack of an object on which the offense might be committed. In this case we are dealing with Karol B.'s unawareness as to whom he has in fact established contact with. In the latter case, the occurrence in question should be treated as an independent type of offense in the inchoate form of ineffectual attempt. In sum, it is to be noted that the Polish law does not criminalize ineffectual preparation, but it criminalizes an ineffectual attempt. Hence, in the former case we would have to recognize that Karol B. is not guilty, while in the latter case we would have to apply the legal classification under Art. 13 §2 (an ineffectual attempt) in conjunction with Art. 200a §2 (see Małecki, 2011a, pp. 50–63; Małecki, 2011b, pp. 89–101; Mozgawa, 2017, pp. 621–624; Grześkowiak, 2019, pp. 1069–1072).

At the same time it bears recalling that while in contact with the minor under the age of 15, Karol B. sent her, via ICT systems and telecommunications networks, a video containing pornographic material. Such an act is criminalized under Art. 200 §3 of the Criminal Code. It provides that a perpetrator who presents a minor under the age of 15 with pornographic content, or who provides him or her with objects of a pornographic character, or who disseminates content that allows a given minor to be exposed to it, is criminally liable. In a case like this we can speak about two scenarios which are conditional upon previous decisions with regard to the doctrinal discrepancies in the application of Art. 200a of the Criminal Code. As regards the application of Art. 200a as crypto preparation, Karol B. would be liable according to the following legal classification: Art. 13 §2 (an ineffectual attempt) in conjunction with Art. 200a §3. However, as regards the application of Art. 200a as allowing for independent types of prohibited acts, with their own inchoate forms, Karol B. would be liable according to the following legal classification: Art. 13 §2 (an ineffectual attempt) in conjunction with Art. 200a §2 in conjunction with Art. 200 §3. As regards Art. 200 §3 there is no doubt that it is an independent type of offense, which can allow for both effectual and ineffectual attempts. If Karol B. did not know that at the other end there was no minor under the age of 15, he remained unaware that there was no possibility of committing an offense of presentation or sharing of pornography, because there was no object of the offense (see Grześkowiak, 2019, pp. 1063–1069; Giezek, 2021, pp. 641–648).

3.2. Legal assessment of paedophilia hunters' activity

The activity undertaken by the self-proclaimed paedophile hunters is a different legal problem. Theoretically, in the case in question there may be a problem of their activity

within or outside the limits of public interest, as well as within or outside the limits of the law. The main problems concerned with infringement of the law by the paedophile hunters include: (1) commission of the offense of incitement; (2) making available of the image of the perpetrator and questioning him while streaming the whole event on the Internet, which might fulfill the criteria for the following offenses: (a) insult, (b) slander, (c) harassment; (3) leading the perpetrator to suicide as a result of the actions described in (2).

With regard to the paedophile hunters' activity, an interesting issue is their potential commission of a prohibited act specified in Art. 24 of the Criminal Code, i.e. incitement. Anyone who incites another person to commit a prohibited act in order to direct criminal proceedings towards that person will be held liable for incitement (see Pohl, 2019, pp. 443–446; Mozgawa, 2020, pp. 406–407). For the paedophile hunters' responsibility for the incitement to be proven, their incitement must be active, which means that they need to show initiative in instigating the offense—in this case under Art. 200a of the Criminal Code. Therefore, if the paedophile hunters had, while passing themselves off as a minor, proposed to Karol B. a meeting and a sexual intercourse, then they might be held liable to prosecution. If they acted in a group and fulfilled a number of conditions of organized action, then it would be possible to apply the provisions concerned with organized crime (an organized group or association aiming to commit offenses of incitement to selected paedophiliac acts). So in order to avoid the charges the paedophile hunters would have to be passive, e.g. by waiting for Karol B. to make a proposal via an instant messaging service or phone. Of course, one should bear in mind that communication between people via instant messengers and without them has its own dynamics, where the perpetrator's intention arises over time, which in turn means that even in passive communication outside the criminalization under Art. 24 the paedophile hunters would have to be active to keep the conversation going.

When considering the application of Art. 24 with regard to the paedophile hunters one should take into account the doctrinal dispute in the context of Art. 200a of the Criminal Code. Incitement concerns instigating a prohibited act. Hence, when treating grooming as crypto preparation, the paedophile hunters' active incitement of Karol B. could not be classed under Art. 24 of the Criminal Code. This is because the absence of criminality removes the responsibility on both sides, i.e. on the part of Karol B. and the paedophile hunters. However, when treating grooming as an independent type of offense, the paedophile hunters' active incitement of Karol B. can be classed under Art. 24 of the Criminal Code.

3.3. Legal assessment of the negative effects of the activity of paedophilia hunters

Another issue concerned with the case in question is Karol B.'s suicide. In Polish law, under Art. 151 of the Criminal Code, the perpetrator who incites a person to commit suicide or assists them in the act of suicide is liable to prosecution (see Burdziak, 2019; Giezek, 2021, pp. 251–256). In the presented case although the paedophile hunters do not engage in any action that would fulfil the criteria for incitement of or assistance in Karol B.'s suicide, it is worth considering a potential application of another provision including an indicium of suicide. For instance, the offense of stalking criminalized under Art. 190a stipulates that anyone who, through persistent harassment of another person or another person's next

of kin, creates a justified sense of danger, humiliation or anguish, or significantly violates the person's privacy, is criminally liable (Art. 190a §1). If these actions result in a suicide attempt of the person, the offender is liable to imprisonment from 2 to 12 years (Art. 190a §3). The problem that needs solving in the case in question is whether the exposition of Karol B., consisting in live streaming of his image and the questions asked of him, fulfills the condition of persistent harassment. There is no knowing whether persistence is to be about the intensity of action in a short period of time, or whether the intensity needs to go hand in hand with a broader time frame. However, there is no doubt that harassment is to be understood as multiple instances of behavior causing distress, hurt or discomfort, as well as anxiety. Still, putting together the word "persistent" and "harassment" may give rise to doubt concerned with semantics (see Judgment of the Supreme Court z 5.01.2001, V KKN 504/00; Grześkowiak, Wiak, 2019, pp. 1012–1016; Giezek, 2021, pp. 551–557). One might also consider the application of the provision criminalizing harassment, i.e. Art. 207 of the Criminal Code, but in a case like this the aggrieved party would have to be a person who is vulnerable because of his or her age, or mental or physical condition. Similarly to Art. 190a, as regards Art. 207 of the Criminal Code the aggravated type of the act is a situation where harassment results in the aggrieved party's suicide attempt (Giezek, 2021, pp. 695–704).

4. The offense of grooming in the context of penal policy

It is to be posited that technology has always been a major factor in the changes taking place in the social sphere, including the legal sphere that regulates social intercourse. Undoubtedly, there is a noticeable regularity whereby the law often cannot keep up with technological changes, which may result in its incongruity or, on the contrary, the introduction of *ad hoc* and often ill-considered changes. Legal solutions concerned with offenses against the protection of information, including the so-called cybercrime, can serve here as illustration of legislation that fails to keep up with changes, or is introduced without any serious reflection on the system. A rapid increase in this type of offenses and the severity of their effects compels the legislator to take quick actions that are not always a manifestation of rational penal policy.

Undoubtedly, proper penal policy should be characterized by transparency, precision and rationality with regard to making and application of law. It should also reflect on the effects of the made and applied law. Despite the abstract presupposition as to the legislator's rationality, this quality cannot always be attributed to the legislator's particular legal solutions. Even though the penal law itself performs different functions, the unchanging elements still include protection of legal interests, prevention, providing a sense of social justice and compensation (see Warylewski, 2017, pp. 81–90; Bojarski, 2020, pp. 29–34; Mozgawa, 2020, pp. 28–31). Next to the protection of interests, the punishment itself is supposed to be an offender's payment to the society whose rules he has infringed. As the state fulfills the above-mentioned functions of the penal law, it has adopted the obligation to serve them. In the historical process the state has nationalized punishments.

Hence, one can conclude that the penal law is supposed to protect the interests of value to the political community. Thus, it becomes one of the mechanisms ensuring both public and individual security. Therefore, the penal law is to provide a sense of security for the community and its individuals. Often, within legal populism emphasis is laid on guaran-

tees for the entire community as threatened with offender's acts that do not infrequently scandalize the public opinion. However, it bears recalling that for the law to perform its function it needs to be clear and reliable to everyone – including the offender. In the latter case, on account of the doctrinal ambiguity with regard to the contents of the indicia in Art. 200a of the Criminal Code, one can be dubious whether the principles that are supposed to serve as guidance for the law are adhered to – e.g. the principle of *nullum crimen sine lege* (see Warylewski, 2017, pp. 115–133; Pohl, 2019, pp. 30–40).

The analysis performed lead to the conclusion that the form of the provision criminalizing grooming in the Polish Criminal Code has been influenced by both external and internal factors. The justified willingness to protect interests, such as sexuality of minors, sometimes yields to legal populism, which demands that legal solutions of dubious quality be overlooked. It appears that to increase the efficiency and quality of Art. 200a of the Criminal Code, which criminalizes the offense of establishing contact with a minor via ICT systems and telecommunications networks, the discrepancies in its comprehension and application should be eliminated. At the same time, the very fact that there are groups of “paedophile hunters” shows that the law does not guarantee public or individual security in a situation where state institutions do not have capacity for effective prosecution of offenses, thereby giving ground to private initiative. Hence, given the development of communication technologies and the growing significance of social intercourse in cyberspace, the establishment of a special police unit for combating cybercrime, i.e. the Central Cybercrime Bureau, in Poland in 2022 is the right move (see Journal of Laws 2021, item 2447).

Considering the typical characteristics of the main indicia of the offense of grooming under analysis, and the legal problems that are the subject of the abstract case study, the following *de lege ferenda* proposals can be made. (1) Given the interpretative discrepancies regarding the indicia of grooming, it is advisable for the legislator to intervene in the content of Article 200a of the Criminal Code, if only to simplify the construction of the provision and to appropriately emphasize the inchoate form of the offense. (2) Given the discrepancy between the protection of the child's welfare, with regard to its infringement by means of ICT systems and communications networks, and the protection of the same welfare without the use of such systems, i.e. by making certain proposals directly, it is appropriate to criminalize a new type of act, i.e. direct grooming. (3) Given the intention to protect a minor's sexuality, by analogy with the solution found in Article 199 §3 (the so-called *sexual corruption of a minor*), one may consider the legitimacy of raising the age of protection for victims of grooming.

Summary and conclusions

The object of analysis in the text is the issue concerned with the content and sense of the statutory criteria for the offense of grooming criminalized under Art. 200a §1–2 of the Polish Criminal Code. The institutional and legal analysis uses textual, functional and doctrinal interpretations, which are supplemented with the author's own conclusions and opinions. The institutional and legal analysis has been enriched with an abstract case study, the purpose of which is to present the essence of the indicia of the offense of grooming in the Polish criminal law, and the demonstration of the main problems concerned with the application of the provision criminalizing the offense.

There is no doubt that the offense of grooming constitutes a threat to the security of minors. The rationale behind the criminalization of the act of establishing contact with a minor via ICT systems and telecommunications networks is to extend the boundary of criminalization, i.e. increasing the protection of minors in the foreground leading to commission of even more grievous sexual offenses. The social sense of justice corresponds to the actions taken by the legislative authority in Poland, the effect being affirmation of penal policy towards paedophiliac offenses. However, this type of affirmation does not often go hand in hand with the effectiveness of the enforcement authorities whose role is to prosecute this kind of offenses.

To elaborate the material scope of the analysis, and to present the conclusions in the text, the following research questions have been formulated:

- **(1) To what extent are the *de lege lata* legal solutions in Poland effective in counteracting grooming offenses?**

The idea of the criminalization of the foreground leading to more serious sexual offenses against minors is a good move, which anyway follows from international practice. The criminalization of establishing contact with a minor via ICT systems and telecommunications networks protects minors from increased victimological susceptibility regarding sexual exploitation. Still, it is notable that the rather unfortunate implementation of selected contents of the Lanzarote Convention caused ambiguity in the interpretation concerning the scope of criminalization under Art. 200a §1 and 2. The dispute in the doctrine of the Polish criminal law concerns the treatment of the two types of grooming in Art. 200a either as crypto preparation or as independent types of prohibited acts characterized by their own inchoate forms. These two different types of interpretation in the doctrine may be of significance, e.g. in the event of the act of incitement on the part of “paedophile hunters” directed at a perpetrator of grooming. In the former case, in the absence of a real object of offense, i.e. a minor, the perpetrator engaging in ineffectual preparation cannot be held criminally liable. This results from the fact that under the Polish criminal law there is no such a construct as ineffectual preparation. In the latter case, however, legal classification of the act is possible when based on an ineffectual attempt at the offense of grooming.

- **(2) What *de lege ferenda* solutions ought to be proposed with a view to improving effective counteraction of grooming offenses?**

The *de lege ferenda* proposals to be made regarding improved effectiveness of combating grooming offenses are in the first place related to the elimination of the doctrinal difference in the interpretation of Art. 200a of the Criminal Code. Hence, reconsidering the indicia specified in Art. 200a should be seen as necessary. One of the solutions might consist in the criminalization of the two types of grooming by way of the construct of attempting, i.e. with the aid of the indicia of “directly aiming” to commit prohibited acts. However, if one were to consider it expedient to criminalize the offense of grooming in its inchoate form, the indicia contained in Article 200a would have to be improved so that they take the following form, more or less: whoever, making preparations for paedophilic rape (197 § 4), sexual intercourse with a minor or leading him/her to submit to sexual acts (Art. 200), as well as producing or recording pornographic material, by means of an ITC system or a telecommunications network, establishes contact with a minor below 15 years of age, with the aim of meeting him/her by means of misleading him/her, exploiting his/her mistake or incapacity to grasp the situation or using illegal threats. Theoretically, one

might also consider criminalizing grooming directly as perpetration, and then to adequately attribute punishable preparation to it, which would take the following form: whoever makes preparations to commit the offense specified in Article 200a §1 or 2. However, it would be problematic in this case to linguistically present criminalization with regard to the perpetration of grooming itself.

Given the intention to provide broader protection for minors, two other directions of criminalization can be considered. The first direction is to broaden the protection of the minor by shifting the age limit (currently, grooming refers to establishing contact with a minor under the age of 15). The rationale behind this solution would be to maintain consistency with the already existing offense of sexual corruption of a minor in Article 199 § 3 of the Criminal Code, which criminalizes sexual intercourse with a minor, or performing another sexual act with a minor, or leading a minor to submit to such acts or to perform them, by means of the abuse of trust or the granting of material or personal gains, or the promise thereof in return. However, this may in some situations, especially in the context of Article 200a §2, interfere significantly with the sexual freedom of persons who can freely dispose of their sexuality at a certain age. The second direction concerned with the broadening of protection of the minor is related to going beyond the context in which the criminalization of grooming was created, i.e. beyond the use of ICT systems and telecommunications networks by the perpetrator. The effect of this perspective would be to criminalize the intentional establishment of contact, or proposal of a sexual intercourse or another sexual act made to a minor without the use of the aforementioned systems, but, for example, in direct communication with him or her.

Apart from the changes to penal provisions, it is also necessary to enhance the organizational potential of the authorities responsible for prosecuting this type of offense. However, this proposal does not concern criminal law as such, but proper organizational solutions under administrative law and within the framework of public finance. A general proposal would be to develop mechanisms for more effective fight against offenses committed via ICT systems and telecommunications networks, including sexual offenses. The establishment of a special police unit (the Central Cybercrime Bureau) in 2022 must be regarded as a good move.

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