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THE REIGN OF CRIMINAL LAW OVER BUSINESS ACTIVITY – THE PROBLEM OF OVERREGULATION AND INCONSISTENCY

Abstract

The present work is devoted to selected issues concerning respect for the rule of law in the sphere of regulation of economic activity through substantive and procedural criminal law and the increasing level of interference of penal solutions in this field. Remarks of a general nature concerning the requirements of systemic coherence and non-contradiction with fundamental guarantee requirements, primarily relating to the principle of the right to defence and its derivatives, are combined with a presentation of the issue of using the results of internal investigations for the purposes of criminal cases. This relatively new construction which is gaining international popularity provides vivid examples of how new instruments used for the purpose of combating economic crime can undermine the fundamental protective rules of the criminal process.

KEYWORDS

rule of law, criminal law, criminal proceedings, corporate criminal liability, internal investigations

SŁOWA KLUCZOWE

praworządność, prawo karne, postępowanie karne, odpowiedzialność podmiotów zbiorowych, wewnętrzne postępowania wyjaśniające

Among the numerous dogmatic and jurisprudential concepts of the principle of the rule of law, one can certainly pay attention to those that indicate its functions in protecting against anarchy and incorporating such qualities as: equality before the law, limitations and frameworks for the functioning of public authorities, efficient and impartial justice, and upholding human rights.[1] Despite differences in the detailed approach and emphasis on individual spheres of the concept of the rule of law, it can be considered a foundation and an essential element of the functioning of a modern State. Its significant importance undoubtedly presents itself in situations in which individuals are confronted with the power of the State and all its emanations.

Even a synthetic approximation of the history of the concepts of the principle of the rule of law and various methods of defining it over the centuries could more than fill the framework of this article. In contemporary legislation, it is expressed in many legal acts that are fundamental to the functioning of given countries and international (or supranational) legal systems.[2] For the purposes of this work, it was decided to focus not directly on the meaning of the rule of law itself, so richly and variously defined in many legal systems, but on the consequences of that concept as observed when criminal law faces business activity. A starting point for this brief analysis may be a very basic question: if we are discussing the rule of law, then the rule of what law should we be talking about?

The first, common sense, answer to this question could be: when talking about the rule of law, apart from the initial indication that compliance with a certain ordered system of rules protecting people from lawlessness and the abuse of power is a value in itself, one can implicitly think about law of good formal quality. Therefore, it can be probably assumed that it is the rule of law that, above all, achieves its goals resulting from the overriding systemic and axiological

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[1] Compare, among others, Zbigniew Kmieciak, *O pojęciu rządów prawa*, Państwo i Prawo 2016, No 9, 21–35; Richard H Fallon Jr., *The Rule of Law as a Concept in International Discourse,* Columbia Law Review, No 1, Vol 97, January 1997, 1-56; James Crawford, *International Law and the Rule of Law*, Adelaide Law Review Vol 24, 2003, 3–12; Jeremy Waldron, *The Rule of Law*, *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N Zalta, Uri Nodelman (eds), <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/> accessed 20 November 2023.

[2] Examples include Article 2 of the Treaty on European Union, the preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 3 of the preamble of the Statute of the Council of Europe, and in the context of Polish legislation traditionally combines it with the wording of Art. 7 and 2 of the Constitution of the Republic of Poland.

requirements in the most effective manner possible, without falling into internal contradictions, without excessive repression and without an excess of disproportionate interference in the conditions of resolving conflicts of various goods. This perspective may be combined with L. Fuller's eight formal principles of the 'inner morality of law', which include: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence.[3]

But beyond the initial problem of connecting the rule of law with the quality of law and a guaranty of certain safeguards, one can take a certain technical, structural look at this issue and ask: if it is the law that is to govern the functioning of States and societies, do we pay equal and sufficient attention to the problem of respecting the rule of law in every branch of law and every area that it regulates? That question may become even more significant if one takes into account that lawmakers not only regulate our present reality and try to keep up in that regulating with its development, but by doing so they sometimes change the pressure point of regulating a given sphere of life from one branch of law to another. Bearing in mind the requirements arising from the systemic hierarchy of the sources of law, one can consider which branch of law has a particularly prominent – or perhaps deliberately subsidiary and secondary – place in the regulation of socio-economic relations according to the general principle of the rule of law.

As mentioned above, this work focuses on the criminal law regulations over business activity. That choice was made on the basis of observations that criminal law currently plays a very prominent role in the functioning of this sphere of human activity – a role that traditionally seemed to be more limited and more separated from the daily business routine of enterprises and concentrated on formal proceedings conducted by the prosecutorial agencies and criminal courts. A common construction today is the ability to easily hold not only individuals but also entire corporate structures liable for economic offences. In some legal systems – as in the United States – this is based directly on the structure of corporate criminal liability.[4] In others – as in Poland – there is a special construction of 'repressive liability', which derives from criminal liability but is formally a different type of liability and is slightly separated from the traditional regime of criminal liability of natural persons.[5] A similarly common construction, next to

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[3] Compare Lon Fuller, *The Morality of Law*, New Haven 1964; that list commented also, among others, by John Finnis, *Natural Law and Natural Rights*, Oxford 1980; John Rawls, *A Theory of Justice*, Cambridge 1999; Jeremy Waldron, *The Rule of Law...*, Edwin W Tucker, *The Morality of Law, by Lon L Fuller*, Indiana Law Journal 1965, Vol 40, Issue 2, 273ff.

[4] Among the extensive literature devoted to the nature of corporate criminal liability in the United States compare, among others, Richard S Gruner, *Corporate Criminal Liability and Prevention*, New York 2004; James Gobert, Maurice Punch, *Rethinking Corporate Crime*, Midsomer Norton 2003.

[5] For further analysis of various models of corporate criminal liability and new mechanisms projected in Poland in 2019, compare, among others, Szymon Pawelec, *Corporate criminal liability in Polish law – new rules of proceedings, new prosecutorial powers* in Sławomir Żółtek, Valeri

the wide range of corporate criminal liability, is the ease and speed of implementing coercive measures against business entities which have attracted the attention of criminal law authorities.[6] Bearing that in mind, the title of this paper shows its additional meaning. It drives attention not only to the problem of respecting the rule of law in situations where criminal law deals with business. The intention of choosing such a title of this work was also to signalize that in modern days we may often wonder whether it is not the criminal law that actually rules business.

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To give a general example of the practical importance of criminal law in the contemporary business activity one can consider the following scenario: it will seem quite obvious and intuitive to most people that when thinking about concluding a contract between two companies, the first and most important thing to consider is how to structure such a contract in terms of the requirements and permissible solutions provided for by civil law and company law. However, this fundamentally correct feeling does not necessarily have, and many times will not apply with equal strength. In the practice of corporate legal services, especially where large contracts are being considered, many lawyers will probably say: no, we will not start with civil law construction, which would be the most obvious and most suitable for the nature of the contract. First, we need to consider the tax side of the planned contract and it is the tax law regulations that we will have to look at first. Only then will civil law solutions be carefully selected, the type of contract specified, so that any planned new legal relationship will be profitable from the tax perspective.[7] The author of this paper would like to expand this practical observation into the following form: in addition to the requirements of tax law, before starting or developing any business venture, one should take into account the threats arising from criminal law regulations (both substantive and procedural). This reservation does not result from the assumption that what the hypothetical addressee of such recommendation is planning to initiate is a business that will be nothing more than a traditional criminal activity – trading in stolen car parts, collecting protection money from the owners of restaurants or

Vachev (eds), *Theory and Practice of Criminal Law*, Warsaw 2019, 61–78, including literature and judgments presented there.

[6] For further remarks concerning that issue, presented on the ground of tax related criminal proceedings in Poland, please compare, among others, Szymon Pawelec, *Karuzele VAT – wybrane zagadnienia prawa karnego materialnego i procesowego. Wprowadzenie do problematyki* in Szymon Pawelec (ed), *Karuzele VAT – wybrane regulacje prawa karnego materialnego i procesowego*, Warsaw 2020, 27–29.

[7] In order not to expand this example too excessively, let us leave aside the problem of how to avoid the risk that such reasoning will be treated as an unacceptable tax avoidance: under Polish law, the reference in this respect will be primarily to the tax law circumvention clause, which was introduced by the amendment of 15 July 2016 to the Act of 29 August 1997 – Tax Ordinance (Section IIIa, Article 119aff of the Tax Ordinance).

another similarly creative idea. This reservation and recommendation comes from the observation that never before in modern history has criminal law been so intensely and constantly present in business activity. Moreover, never before in modern history, in the corporate world, have there been as many obligations as there are now, which impose obligations on the corporations themselves, as if these corporations themselves were bodies of criminal proceedings. We live in times of an unprecedented proliferation of criminal regulations in the business world. The field of law itself, which by its nature should remain subsidiary in regulating the sphere of economic activity, in practice sometimes takes precedence over the source solutions of private law.[8] Moreover, the seriousness of these circumstances is not determined solely by the final criminal law consequences, which may materialize by conviction of a certain natural persons, and in relation to the corporations – depending on the structures allowed in a given legal system – by a final and binding judgment issued under the mechanism of corporate criminal liability. In many situations, the mere fact that criminal proceedings are ongoing and that certain procedural coercive measures have been applied, results in a more or less sudden fall of a given corporation.[9]

Bearing in mind these remarks, two basic problems arise: have we not reached a state of overregulation of business by criminal law? And in consequence of that: is what we regulate through criminal law consistent with other areas of law? Or even more: is what we regulate by criminal law instruments internally consistent within that branch of law?

Overregulation of the sphere of business by criminal law not only makes it difficult to exercise the freedom of establishment and freedom to provide services.[10] Overregulation may lead to contradictions and inconsistencies in the legal system. And in the worst scenario those inconsistencies not only present themselves on the uneven borderline of different branches of law, but they may occur within one sphere of law, which should be ruled by uniform standards. In such a scenario, new solutions introduced into the criminal law are not only not harmonized with the original solutions of civil or commercial law which are the basis of a given contract or the entire investment, but they may also contradict the standards of protection of individuals set in different spheres of criminal law. It seems quite clear that the development of criminal law regulations in the economic sphere is related to the development of the economy as such. It would be at least irresponsible to claim that despite changes in the economic world and the subsequent emergence of new forms of economic wrongdoing, criminal law should remain insensitive to these changes. The essence of the problem is not

[8] For extensive analysis of that problem compare Sławomir Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności*, Warsaw 2009, 94–135, 163–180.

[9] Compare Szymon Pawelec, *Karuzele VAT...,* 27–29.

[10] As for the legal foundation of those two freedoms in the European Union, compare Articles 26, 49 to 55 and 56 to 62 of the Treaty on the Functioning of the European Union.

to exaggerate the scale of those changes and updates. Both the substantive law grounds of criminal responsibility and the procedural mechanisms of combating such type of criminal activity should be adequate and proportionate to the purposes they are intended to serve. And the new instruments should respect the basic guarantee rules applicable to criminal law. As has already been mentioned, since often not the final judgement itself – but the way the criminal proceedings leading to that judgment are carried out – may determine the fate of a business entity, it seems that great attention should be paid to the analysis of the new procedural mechanisms developed by the lawmakers for the purposes of combating corporate crimes.

A focused presentation of the abovementioned problems may be achieved through brief presentation of how mechanisms of corporate internal investigations may be introduced into criminal proceedings. That issue shows quite well not only how extensive the criminal law regulation of the functioning of corporate entities may be but also how traditional standards of protection of individuals in criminal proceedings may be violated. What may be especially disturbing are those situations, where for the purposes of criminal proceedings, on the one hand, the State grants individuals certain protective solutions in cases where the State itself directly conducts the formal proceedings, but in cases where it outsources certain elements of that proceeding to corporations, such standards may no longer apply.

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As part of general considerations on the rule of law, an exposed element of this principle is the problem of equality before the law. Regardless of the detailed map of rights and obligations imposed on individual persons in a given sphere in a given legal system, the point is that entities that find themselves in a similar legal situation should be protected in a similar way. The idea being that there should be a uniform standard of their protection, free from arbitrariness, discretion and exceptions that are incomprehensible from the axiological point of view. In this context, the issue of introducing into the criminal proceedings of the results of corporate internal investigations and the accepted standard of conducting them in a given legal system remains open from the point of view of respect for the rule of law. Due to the constant spread of this method of specific penetration of the criminal procedural law regime into the internal sphere of corporate activity, the problem of respecting the adequate level of protection of participants in criminal proceedings (with particular emphasis on the suspect and the accused) has been intensified. That shows the problem of maintaining an appropriate level of protection of these individual rights not only in criminal proceedings in the strict sense (i.e., preliminary proceedings and the trial), but also of ensuring that this standard is not violated in the foreground of the actual criminal process, as part of those activities that the State requires or encourages the corporations to carry out by themselves.

For the sake of presenting a brief characteristic of the internal investigation mechanisms, it may be mentioned that they are not an entirely new phenomenon, although their popularity systematically increases among various jurisdictions. Internal investigations already have a relatively long-established history in the legal system of the United States. Traditionally, the increase in their importance is associated with the effects of the Enron case and the adoption by the United States Congress of one of the most important pieces of corporate compliance legislation, i.e., the Sarbanes-Oxley Act of 2002. That legal act – supported by additional regulations, including, among others, the Thompson Memorandum[11] – made internal investigations an integral part of public companies' corporate governance systems.[12] Not unpredictably, putting a corporation in such a dual position and confronting it with the obvious dilemma of choosing between its own interests and the protection of their officers and employees may lead to a lot of abuses. Only a few years after the Enron case (which put an end not only to Enron itself, but also to one of the five largest accounting firms at the time, Arthur Andersen), negative side effects of this method of combating corporate crimes could be observed during one of the largest criminal tax cases in the United States' history, involving another giant accounting firm (KPMG) – the 2006 *Stein v the United States* case.[13] In that case, it was stated that the actions of the government – through the hands of the corporation conducting internal investigations – had led to the violation of the fundamental rights of individuals in criminal proceedings. The main basis of that ruling was that under government influence, KPMG limited in various ways the accessibility of legal assistance for their personnel (including former partners). As stated in the case's opinion: 'The government brandished a big stick – it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the USAO [i.e., United States Attorney's office – Sz. P.] employees who

[11] The Thompson Memorandum was issued in 2003 by then Deputy Attorney General (Larry Thompson) to provide guidance within the Department of Justice for determining whether to charge a corporation with a crime where misconduct has occurred. One of its key elements stated that in determining whether to charge a corporation a timely and voluntary disclosure of wrongdoing and willingness to cooperate with the government's investigation through disclosing the complete results of its internal investigation will be taken into account. For further comments see: Brendan J Keefe, *Revisions of the Thompson Memorandum and Avoiding the Stein Problems: A Review of the Federal Policy on the Prosecution of Business Organizations Note,* Connecticut: Connecticut Law Review, 2009, 273–318, <https://opencommons.uconn.edu/law_review/48> accessed 25 November 2023.

[12] Compare Robert S Bennet and others, *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, Chicago: The Business Lawyer, 2006, 55–88, <https://www.jstor.org/stable/40688411> accessed 21 November 2023.

[13] United States v Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006). See also United States v Stein, 541 F.3d 130 (2d Cir. 2008).

would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves'.[14]

The problem of the standard of internal investigations can be observed even more clearly when one realizes that such procedures – formally imposed in certain situations on corporations and then used as a means of their cooperation with prosecutorial authorities for corporations' own benefit – are run by private firms and are largely uncovered by any direct criminal law protective mechanisms.[15] That means that the instrument, which can be later used in the criminal proceedings and may constitute a key evidence against a certain person, may be deprived of the protective instruments that create the foundations of every criminal law proceedings. Regardless of whether we are talking about the statutory legal system or the system of common law, in criminal proceedings, there are a number of fundamental guarantee principles that have to be respected. We may argue how the right to remain silent and to be protected against self-incrimination may vary in details depending on various jurisdictions and how it is recognized in details by certain courts.[16] We may identify it in the case law[17] or statutory provisions.[18] Nevertheless, we commonly accept its fundamental and universal recognition, at least at the level which is granted in Article 14 of the International Covenant on Civil and Political Rights. Bearing that in mind, it would be hard to accept that, on the one hand, internal investigations may be treated as mandatory by the State, that they are not only accepted but may even be promoted as an evidentiary source for the purposes of criminal proceeding and ,on the other hand, such investigations do not guarantee the safeguards ensuring respect for the fundamental procedural rights of the individuals.

There is no doubt that in the modern corporate world, in the era after Enron, World.com or Tyco cases, internal investigations are not only of great assistance to the accused company but also a valuable resource for prosecutorial agencies. The comments presented above concentrate on the United States. Nevertheless, equivalents of the US mechanisms of cooperation between the corporations con-

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[14] United States v Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

[15] Lisa K Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, New York: *New York University Law Review,* 2007, 311-382*,* <https://scholarship.law.duke.edu/faculty_scholarship/1919> accessed on 21 November 2023.

[16] Compare a detailed critical analysis under the US case law presented by Hannah Quirk in Hannah Quirk, *The Rise and Fall of the Right to Silence*, Abingdon-New York 2017. As for the changes in the approach to that principle in the case law of the European Court of Human Rights, compare, among others, Wojciech Jasiński, *Prawo do nieobciążania się w procesie karnym w świetle standardów strasburskich*, Prokuratura i Prawo, No 7–8, 2015, 7–34; Bożena Gronowska, *Prawo oskarżonego do milczenia oraz wolność od samooskarżania w ocenie Europejskiego Trybunału Praw Człowieka*, Prokuratura i Prawo 2009, No 7–8, 7–23.

[17] Compare – *Miranda v Arizona*, 384 U.S. 436 (1966) with the obvious remark that Miranda is strictly combined with the Fifth Amendment.

[18] Compare for instance Article 175 § 1 of the Polish Code of Criminal Procedure.

ducting internal investigations and prosecutorial agencies have been introduced in many legal systems, including Argentina, Brazil, Canada, France, Ireland, Singapore and the United Kingdom.[19] In the case of Poland, the introduction of such mechanisms is still in the drafting stage.[20] However, its popularity and usefulness for the purposes of the prosecution does not resolve the obvious conflict between the rights of individuals in the ongoing or planned criminal proceedings and the interests of corporations to avoid corporate criminal liability which may result in extreme financial losses. In a situation where the only way for a corporation to avoid the most serious repressive consequences will be to draw the prosecutorial authorities' attention to a group of individuals involved in certain unlawful activity within that corporation, there is an especially high risk that the corporation will try to do so. This means that accepting the existence of an internal procedure used for the purposes of criminal proceedings, where the organizer of that procedure can be at the same time the main party interested in a specific outcome of that procedure. Citing once more court's opinion in *Stein v the United States* case: 'It is no answer for the government to say that these aspects of the Thompson Memorandum are needed to fight corporate crime. Those responsible should be prosecuted and, if convicted, punished. But the end does not justify the means'.[21]

Obviously, the case law and direct legal regulations used to improve the quality of internal investigations as a source of evidence for the purposes of criminal proceedings are being continuously developed. The issue of violations of individual rights as a result of an agreement between a corporation and prosecution was widely analyzed in the 2019 *United States v Connolly* case, where one of the defendants was forced, under the threat of dismissal, to submit to questioning by the lawyers who were interviewing employees on behalf of Deutsche Bank, acting on behalf of the Commodity Futures Trading Commission as part of the concluded deferred prosecution agreement.[22] In that case, the court criticized corporate practices of conducting internal corporate investigations under the direction of the government. That led to the conclusions – stemming from the Fifth Amendment's protection against self-incrimination – about a need for a clear distinction between conducting an internal investigation and becoming an agent of the federal government.[23]

[19] Frederick T Davis, *Judicial Review of Deferred Prosecution Agreements. A comparative study,* New York: Columbia Journal of Transnational Law, 2022, 752–828, <https://ssrn.com/abstract=4072985> accessed 25 November 2023.

[20] The Polish Government Legislation Centre, <https://legislacja.rcl.gov.pl/docs//2/12363700/12908952/12908953/dokument572980.pdf> accessed 20 November 2023.

[21] United States v Stein (Stein II), 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

[22] Decision of the United States District Court for the Southern District of New York in United States v Connolly, issued on 2 May 2019, No 16 CR. 0370, 2019 WL 2120523.

[23] For further analysis of the *Connolly* case and the signalized issues concerning the usage of the effect of internal investigations in criminal proceedings compare Szymon Pawelec, *Reporting of the results of internal investigations – main types of cooperation between companies and*

The problem of internal investigations and promotion of their usage for the purposes of criminal proceedings may be observed from the point of view of the conflicting interests – benefits and facilities both for the corporation and for the prosecutorial agencies versus protection of the rights of individuals, especially including possible future suspects. At the same time, it is a good example of a risk of overregulation in the sphere of criminal law, creating inconsistency within the legal system. Shifting the burden of evidentiary proceedings beyond the framework of formal criminal proceedings is fundamentally controversial. If we want to maintain strength of the guarantees provided to an individual by the provisions regulating criminal proceedings, including, in particular, the provisions regarding the accused's right to defense, we must remain consistent. It cannot be said that we do uniformly respect the right to defense in criminal proceedings, but at the same time, for the purposes of these proceedings, we allow corporations to create their own proceedings, the internal regime of which we do not care about. Rather, we should either abandon the admissibility in criminal cases of such specific and unclear forms of corporate 'pre-proceedings' or we should uniformize them according to the standards established for individual participants in a criminal process. And it would be a good start to solve the fundamental problem of ensuring the right to effective defense from the very beginning of the proceedings.

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Most probably we will not avoid further expansion of criminal law regulations in the sphere of business. The development of economic cooperation, its new areas, new forms and, at the same time, new manifestations of possible harmful and undesirable activities, entail the need for updating the mechanisms of penal reaction. The point is, however, that the new criminal law regulations, new mechanisms of conducting criminal proceedings and new instruments of obtaining evidence for the purposes of such proceedings should be consistent with the already existing legal system. In the first place, they should be consistent with the initial regulations that directly determine the nature and admissibility of a given economic activity – civil law permissibility of certain constructions or forms of business cooperations should not be left unidentified or simply denied in criminal proceedings. Secondly, what seems obvious, but – as the example of using the results of internal investigations shows – it does not have to be, those new mechanisms should also be consistent with the principles of criminal law and procedural safeguards for the individuals in criminal proceedings. Finally, they should be adequate and proportionate to the purposes that they are intended to serve. Failure to respect those basic requirements can hardly be considered meeting the requirements of the rule of law. Moreover – referring to the second meaning of the title

prosecutorial authorities in the light of the threats to individuals in criminal proceedings, Revista Brasileira de Direito Processual Penal, Vol 9, No 2, May–August 2023, 545–574, including the literature and case law presented there.

of this work – it will definitely make the problem of increasing rule over business by criminal law even more significant.

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