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Remigiusz Rosicki

Information security as exemplified by the crime of espionage in the Polish and Swedish criminal law

KEY WORDS:
state security, information security, espionage, crime of espionage, spying activity

Introduction

The object of analysis in the present text is the legal solutions concerned with the penalisation of the crime of espionage within the context of information security. The main objective of the text is to perform a substantive penal analysis of the crime of espionage in the Polish legislation, while taking into consideration a comparative analysis of corresponding provisions in the Swedish penal code. The problem of espionage has not been approached from a broader historical perspective, nor with more systemic interpretations, which in turn position espionage in relation to other crimes concerned with the violation of the legal interest of state, its defence capability, etc. The very lack of a systematic approach to the issues concerned with the crime of espionage, if only in the context of information security and the regulations concerned with secret information, does not exclude references to the issues, for instance with relation to the protected interest of information itself[1].

[1] Cf. Ustawa z dnia 5 sierpnia 2010 r. *o ochronie informacji niejawnych* (Dz.U. z 2010 r. Nr 182, poz. 1228 ze zm.) [Act of 5 August 2010 on Protection of Classified Information (Journal of Laws 2010, no. 182, item 1228)].

Information security can be examined within the context of social sciences, as well as a legal category (as an element of a crime), that is as an object of a crime[2]. In the first case, information security is an objective approach to the wide-ranging issues of security, that is one of the objective scopes of security issues, while in the second case information security should be regarded as a legal interest that is harmed by the perpetrator[3]. That which is naturally connected with information security, e.g. espionage, is not necessarily related to information as the main legal interest systematising a division of crimes. In the Polish Criminal Code, an interest protected in the case of a crime of espionage is exemplified by defence capability, security and economic welfare of Poland, while "information" as a protected interest features in the chapter of the Criminal Code penalising, inter alia, acts against "restricted information" and acts involving "cyberterrorism".

In regard to research questions, more analytical emphasis has been laid on legal solutions pursuant to the Polish Criminal Code. The text addresses the following research questions: (1) *To what degree do the legal solutions concerned with the penalisation of the crime of espionage provide effective prosecution and combating of this type of crime?* (2) *What changes in the scope of legal solutions penalising the acts of espionage can be proposed?* In order to answer the questions posed in the text, a dogmatic-doctrinal approach has been adopted, and a legal interpretation has been applied with regard to the method, that is a comparative interpretation (within the compass of substantive penal regulations penalising the crime of espionage in Poland and Sweden), a teleological and functional interpretation (with a view to re-interpreting a selection of established or debated doctrinal approaches)[4].

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[2] L. Gardocki, *Prawo karne*, Warszawa 2002, p. 83–88.

[3] R. Rosicki, *O pojęciu i istocie bezpieczeństwa*, "Przegląd Politologiczny" 2010, no. 3, p. 24–32.

[4] Cf. S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, p. 76–91; J. Stelmach, B. Brożek, *Metody prawnicze*, Kraków 2006, p. 32–35; A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warszawa 2015, p. 150–165; J. Nowacki, Z. Tabor, *Wstęp do prawoznawstwa*, Warszawa 2016, p. 293–312.

General characteristics of the crime of espionage

The Polish Criminal Code

The crime of espionage is penalised in Art. 130 § 1–4 of the Polish Criminal Code. Article 130 § 1 points to a causative act of "taking part in the activities of a foreign intelligence service," Article 130 § 2 points to a causative act of "providing a foreign intelligence service with information" with relation to taking part in the activities of a foreign intelligence service or acting for the benefit thereof (an aggravated form of a crime specified in § 1), Art. 130 § 3 points to a set of causative acts: (1) collecting or storing information, (2) connecting to a computer network, (3) declaring a readiness to work for the benefit of a foreign intelligence service (a privileged form of a crime specified in § 1), while Art. 130 § 4 points to causative acts of: (1) organising the activities of a foreign intelligence service, (2) leading the activities of a foreign intelligence service (an autonomous form of a crime). The wording *in extenso*:

> Art. 130. § 1. Anyone who takes part in the activities of a foreign intelligence service against the Republic of Poland is liable to imprisonment for between one and 10 years.
> § 2. Anyone who, while taking part in the activities of a foreign intelligence service, or acting for the benefit of thereof, provides it with information, the transfer of which may be detrimental to the Republic of Poland, is liable to imprisonment for a minimum term of three years.
> § 3. Anyone who, in order to provide a foreign intelligence service with the information specified under § 2, collects or stores information, connects to a computer network in order to obtain it, or declares a readiness to work for the benefit of a foreign intelligence service against the Republic of Poland, is liable to imprisonment for between six months and eight years.
> § 4. Anyone who organises or leads the activities of a foreign intelligence service is liable to imprisonment for a minimum term of five years, or imprisonment for 25 years[5].

The issues of espionage have been categorised among the "offences against the Republic of Poland" within a separate chapter of the criminal code. The object of the offence specified in Art. 130 is "defence capability,

[5] Ustawa z dnia 6 czerwca 1997 r. – *Kodeks karny* (Dz.U. z 1997 r. Nr 88, poz. 553 ze zm.) [Act of 6 June 1997 – *Criminal Code* (Journal of Laws 1997, no. 88, item 553)].

security and economic well-being of the Republic of Poland"[6]. Besides, the object of protection includes security of third countries in the event of espionage to the detriment of allied states (Art. 130 with relation to Art. 138 § 2). However, the legal act does not feature a legal definition of the term "espionage," which may result from various forms of causative acts, as well as from the specificity of spying activities and action for the benefit of a foreign intelligence service. The lack of a legal definition of the term "espionage," as well as the term "intelligence service" results in a lack of differentiation of the objective scope of "information" transferred to a foreign intelligence service, and by extension of spheres relevant to state security. In accordance with the principle of "lege non distinguente nec nostrum est distinguere," there is no need to introduce conceptual differentiation in this scope. Of much greater relevance is an analysis of the significance of the "detriment" that the information that is transferred, collected, stored or obtained by connecting to a computer network may effect to the Republic of Poland[7].

The Swedish Criminal Code

The crime of espionage (*spioneri*) and grievous espionage (*grovt spioneri*), as an aggravated form of the crime, are penalised in § 5 and § 6 respectively, of the Swedish Criminal Code, Chapter 19 entitled "*Offences against the security of Sweden*" ("*Om brott mot Sveriges säkerhet*"). The wording *in extenso* [own translation from Swedish]:

> 5 § Anyone who, for the benefit of a foreign power and in an unauthorised manner, obtains, transfers or divulges information on the country's defence capability, armament, supplies, import, export, a manner of production, negotiations, decisions or any other circumstances the knowledge of which acquired by foreign authorities may be detrimental to the security of Sweden, even if the information is untrue, shall be found guilty of espionage, which is punishable by a maximum term of 6 years imprisonment.
>
> The above provisions shall also apply to a person who, for the same purpose, prepares a written or drawing account of such information.
>
> 6 § If the offence described above in § 5 is of a grievous form, the perpetrator shall be found guilty of espionage classified as aggravated, and is liable to imprisonment for between 4 and 18 years, or life imprisonment.

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6 M. Budyn-Kulik, *Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] M. Mozgowa, et al., *Kodeks karny. Komentarz*, Warszawa 2014, p. 348.

7 P. Starzyński, M. Nawacki, *Prawo karne materialne w nauce o bezpieczeństwie*, Warszawa, 2013, p. 128.

> While classifying the act, consideration should be given to a particularly dangerous character of the act in view of warfare being waged or circumstances of great importance, as well as a situation whereby the perpetrator has divulged the information entrusted to him or her on account of his or her exercise of a public function[8].

The Swedish criminal code has preserved its structural continuity since the 1960s, but it must be pointed out that it has been amended many times. The year 1962 brought the first general review of the 1864 Penal Code[9]. With regard to a general idea of the penalisation scope of acts against state, chapter 19 of the Swedish criminal code shows concurrence with the chapter on offences against state in the Polish criminal code. However, it must be borne in mind that the legal culture and penal policy in Sweden differ from the ones in Poland. For instance, chapter 19 of the Swedish criminal code penalises: the offence of high treason (§ 1), the offence of influencing specific state authorities (§ 2), the offence of engaging the state in warfare (§ 2), the offence of warmongering (§ 2), the offence of diplomatic treason (treason while at negotiation) (§ 3), the offence of negotiating lawlessness (§ 4), the offence of confidentiality breach (§ 7), the offence of confidentiality breach in the aggravated form (§ 8), the offence of confidentiality breach by negligence (§ 9), the offence of illegal intelligence activity (§ 10), the offence of illegal intelligence activity aimed against third states (§ 10a), the offence of illegal intelligence activity aimed against persons (§ 10b), the offence of conscripting into foreign armies (§ 12), the offence of exerting influence on public opinion with regard to matters of fundamental significance for the system and security in exchange for foreign financial support (§ 13), criminal liability for attempting, preparing and urging, among others, espionage and grievous espionage (§ 14), liability for aiding and abetting in, among others, espionage and grievous espionage in regard to the knowledge a person has or notification of impending danger (§ 15)[10].

One characteristic of the crime of espionage (*spioneri*) and grievous espionage (*grovt spioneri*) is action undertaken for the benefit of foreign

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8 *Brottsbalk* (1962:700; Ändrad: 2017:497).

9 Cf. O. Kinberg, *Criminal Policy in Sweden During the Last Fifty Years*, „Journal of Criminal Law and Criminology" 1933, vol. 24, p. 313–322; Straffrättskommittén, *Förslag till brottsbalk*, Stockholm 1953; J. Chomętowski, S. Miszewski, *Szpiegostwo i ochrona tajemnicy w prawie karnym państw obcych*, Warszawa 1965, p. 203–210; S. Hoc, *Zagadnienia odpowiedzialności karnej za szpiegostwo*, Warszawa 1985, p. 291–292.

10 Cf. *Brottsbalk* (1962:700; Ändrad: 2017:497).

authorities. In the first case, verbal attributes should be pointed out; these include obtaining, transferring and divulging a special kind of information. The Swedish legislator uses a more case-law definition of the material object involved in the crime of espionage, that is a special kind of information – the legislator points to information on defence capability, armament, supplies, import, export, a manner of production, negotiations, the cognizance of which taken by foreign authorities may be detrimental to the security of the State of Sweden. A person who, for the same purpose, prepares an account of such information shall also be held liable for espionage. The aggravated form of the crime of espionage differs from the basic type in that the particularly dangerous character of the act is also recognised with regard to specified circumstances (e.g. warfare, exercise of a public function).

In a situation whereby the specific intent is not to serve a foreign authority, and the act bears the attributes specified in § 5, and the stated type of information is confidential, the perpetrator shall be held liable for unlawful use of confidential information (§ 7). In the case of glaring negligence concerned with transfer or disclosure of confidential information, the perpetrator shall be held liable for an offence of negligence concerned with confidential information (§ 9). The case of the afore-mentioned negligence also involves an aggravated form which is conditional upon the circumstances (a state of war).

In § 10 the Swedish legislator distinguishes the crime of intelligence activity for the benefit of a foreign state with regard to the perpetrator's employment of deceptive measures or clandestine operations. The case of this crime must involve "double specificity," that is the perpetrator must act with a view to serving a foreign power and obtaining information. Hence, there is some form of action, whereby there is no – in the capacity of an attribute – transfer of information. Contribution to this type of activity is also penalised.

In 2014 the Swedish code was amended by adding, among others, more provisions penalising intelligence activity – the crime of illegal intelligence activity aimed against third states (§ 10a), the crime of illegal intelligence activity aimed against persons (§ 10b)[11]. An interesting solution is the content of § 10b, which provides that anyone who, with the intention of serving foreign authorities, conducts, in Sweden, clandestine activity or activity involving deceptive or inappropriate measures, and whose aim

[11] *Lag om ändring i brottsbalken* (SFS 2014:383), http://rkrattsdb.gov.se/SFSdoc/14/140383.PDF, 14.07.2017.

is to obtain information about a personal situation of another person, is liable to imprisonment for a maximum term of one year. However, it must be pointed out that a similar solution featured in the Swedish criminal code before the amendments, in the 1960s[12]. Penalising the conduct aimed at collecting information about private persons should be related to increased intelligence activity by representatives of foreign states in Sweden; they keep under surveillance their own citizens who have come to settle in Sweden[13].

The objective side of the crime of espionage

Attributes of the objective side of the crime of espionage in Art. 130 of the Polish criminal code

The objective side embraces the perpetrator's conduct, the effect of the crime, the time and place of commission, the situation, as well as the manner of the commission of the crime and the material object. The conduct (perpetrator's act) is literally presented in section 1.1. of the text, and so it only suffices refer to the verbal attributes of the crime of espionage in Art. 130 § 1–4: (1) taking part in the activities of a foreign intelligence service, (2) acting for the benefit of a foreign intelligence service, (3) providing a foreign intelligence service with information in connection with taking part in a foreign intelligence service or acting for the benefit thereof (4) collecting or storing information, (5) connecting to a computer network, (6) declaring a readiness to work for the benefit of a foreign intelligence service, (7) organising the activities of a foreign intelligence service, (8) leading the activities of a foreign intelligence service[14].

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[12] Cf. J. Chomętowski, S. Miszewski, *Szpiegostwo i ochrona tajemnicy w prawie karnym państw obcych*, Warszawa 1965, p. 203–210; M. Brush, *The Swedish Penal Code of 1965*, "Duke Law Journal" 1968, no. 1, p. 67–93.

[13] Cf. *Swedish Security Service 2013: Report*, Stockholm 2014, p. 23–28; *Man arrested for 'refugee espionage' in Sweden*, https://www.thelocal.se/20170227/man-arrested-for-refugee-espionage-in-sweden, 16.07.2016; *Spies have been identified in Sweden: Intelligence agency*, https://www.thelocal.se/20170224/spies-have-been-identified-in-sweden-intelligence-agency, 16.07.2016; *Spies in Sweden mostly from China, Russia, Iran*, https://www.thelocal.se/20121208/44930, 16.07.2016; *Sweden set for tougher laws against spying*, https://www.thelocal.se/20131010/50704, 14.07.2017.

[14] Ustawa z dnia 6 czerwca 1997 r. – *Kodeks karny* (Dz.U. z 1997 r. Nr 88, poz. 553 ze zm.) [Act of 6 June 1997 – *Criminal Code* (Journal of Laws 1997, no. 88, item 553)].

"Taking part," that is participating as a verbal attribute is not a frequent reference in the Polish criminal code. For instance, it is to be found in the provisions penalising some particular acts: participating in a fight or a beating (Art. 158), participating in a fight or a beating using a dangerous object (Art. 159), participating in a riot (Art. 254), participating in an organised crime group or association (Art. 258). It must then be pointed out that espionage is a crime involving multiple acts. Hence, "taking part" as an actual and legal state is not considered in the context of the particular fragments[15]. While considering the state of actual "participation," it must be assumed that it is about each kind of collaboration with services of a foreign state, even the very participation in their structures or particular operations[16]. Thus, this implies an extensive interpretation of the attribute of "participating," with the proviso that it applies to active participation, which affects the way the subjective side of a crime is defined[17]. The examples of such action may be: recruitment for the benefit of a foreign intelligence service, supplying specialist equipment. I. Zgoliński differs and so he points out that in Art. 130 § 1 facilitating spying activities for members of foreign services by making meeting places, means of transport and spy equipment available, and by supervising contact points is not subject to penalisation[18].

Besides, in § 2, apart from the attribute of **"taking part,"** the legislator uses the verbal attribute of **"acting for the benefit"** of a foreign intelligence service. This indicates any conscious activity consisting in collaboration, even if it is of a non-regulated character and does not involve belonging to any specific organisational structures. According to I. Zgoliński's interpretation, the attribute of **"taking part"** relates to formal participation in organisational structures of a foreign intelligence service, while the attribute of **"acting for the benefit"** signifies collaboration without belonging to specific intelligence structures[19].

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15 L. Gardocki, *Prawo karne*, Warszawa 2002, p. 66.

16 A. Marek, *Kodeks karny. Komentarz*, Warszawa 2010, p. 346; M. Budyn-Kulik, *Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] M. Mozgowa, et al., *Kodeks karny. Komentarz*, Warszawa 2015, p. 381.

17 Cf. A. Nowosad, *Bójka i pobicie*, Warszawa 2014, p. 55.

18 I. Zgoliński, *Rozdział XVII. Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] V. Konarska-Wrzosek, et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 660–661.

19 I. Zgoliński, *Rozdział XVII. Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] V. Konarska-Wrzosek, et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 661.

Apart from the verbal attributes, attention should be given to the descriptive attribute qualified by the term **"intelligence."** Unlike the Swedish, Serb and Croatian legislation, the Polish legislator does not indicate that the activity is to be conducted "for the benefit of a foreign state," but for the benefit of a foreign intelligence service. Such a provision involves interpretative problems, because there is no exhaustive definition of the term **"intelligence"** in common usage, e.g. in dictionaries of foreign words, popular science literature, nor in source literature[20]. Besides, it is noteworthy that the legislator did not decide to introduce a legal definition or to expand this descriptive attribute in any other way. In interpretations it is accepted that the term of a **"foreign intelligence service"** encompasses foreign state services which specialise in obtaining, collecting and processing secret information which may have political, economic and military relevance[21]. A similar interpretation is indicated by S. Hoc, who assumes that **"intelligence"** is a "foreign state's secret, special service which, with the aid of peculiar forms and methods, performs tasks concerned with obtaining information about other states and processing it for the bodies of one's own state"[22]. L. Gardocki indicates that the term "a foreign service" should be understood as a foreign state's institution specialised in "secretly collecting information concerned with other states," however "a foreign press agency, whose purpose of activity is of a different character, or foreign diplomatic mission information services which openly collect information, or a scientific institution which collects information for research purposes"[23] is not an intelligence service.

In the case of the aggravated form of the crime of espionage specified in § 2, of great significance is **"taking part in the activities of a foreign intelligence service"** or **"acting for the benefit thereof"** while providing

[20] L. Ciecholewski, *Szpiegostwo w świetle przepisów K.K. oraz badań postępowań przygotowawczych prowadzonych przez Biuro Śledcze MSW w latach 1979–1982* (diploma thesis), Legionowo 1984, p. 23–29; M. Minkina, *Sztuka wywiadu w państwie współczesnym*, Warszawa 2014, pp. 27–92; M. Górka, *Otwarte źródła informacji – nowa czy klasyczna formuła wywiadu?*, [in:] M. Górka (ed.), *Służby wywiadowcze jako element polskiej polityki bezpieczeństwa*, Toruń 2016, p. 19–47; W. Suworow, *Szpieg czyli podstawy szpiegowskiego fachu*, Poznań 2016.

[21] M. Budyn-Kulik, *Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] M. Mozgowa, et al., *Kodeks karny. Komentarz*, Warszawa 2015, p. 381. See more: S. Pikulski, *Przestępstwo szpiegostwa w teorii i praktyce*, Warszawa 1987, p. 49–57.

[22] S. Hoc, *Szpiegostwo w nowym kodeksie karnym*, „Wojskowy Przegląd Prawniczy" 1998, no. 1–2, p. 25.

[23] L. Gardocki, *Prawo karne*, Warszawa 2002, p. 209.

a foreign intelligence service with **"information the transfer of which may be detrimental to the Republic of Poland."** The content of this clause does not indicate any form of information transfer, and so it may be either physical or electronic. I. Zgoliński indicates that whether the information is successfully passed from the sender to the recipient is of no significance[24]. However, M. Budyn-Kulik is of a different opinion, as she rightly writes that this type of the crime is of a material character, and so "its attributes include an effect in the form of transferred information that may be harmful"[25]. It follows from the linguistic interpretation that for this crime to arise it is not enough to transfer any information, but only such information that may be detrimental to the Republic of Poland. Besides, following L. Gardocki, it must be observed that the information detrimental to the state does not have to bear any of the four secrecy clauses applicable in the Polish law (top secret, secret, confidential, classified)[26]. The lack of the manner by which to define and assess the damage results in the evaluation of the perpetrator's conduct being quite subjective. At any rate, the category of such information surely does not include popularly known, unimportant, untrue or outdated information[27].

According to some older judicature developed on the basis of different legislation, acting to the detriment of the state was defined as damage in the area of major, current as well as future common interest of state citizens. Political and economic damage may be recognised as such damage[28]. According to S. Hoc, damage to political interest may consist in undermining state's credibility or making it difficult for the state to achieve strategic goals in its foreign policy. Damage to economic interest may involve a notable financial, material (technological, development-

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[24] I. Zgoliński, *Rozdział XVII. Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] V. Konarska-Wrzosek, et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 661.

[25] M. Budyn-Kulik, *Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] M. Mozgowa, et al., *Kodeks karny. Komentarz*, Warszawa 2015, p. 382.

[26] See: L. Gardocki, *Prawo karne*, Warszawa 2002, p. 210; Ustawa z dnia 5 sierpnia 2010 roku *o ochronie informacji niejawnych* (Dz.U. z 2010 r. Nr 182, poz. 1228 ze zm.) [Act of 5 August 2010 *on Protection of Classified Information* (Journal of Laws 2010, no. 182, item 1228)].

[27] Cf. I. Zgoliński, *Rozdział XVII. Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] V. Konarska-Wrzosek, et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 661.

[28] K. Daszkiewicz, *Glosa do wyroku Sądu Najwyższego z dnia 21 września 1981 r. I KR 171/81*, "Państwo i Prawo" 1983, no. 1, p. 144; H. Popławski, *Działanie na szkodę interesów PRL przez nadużycie zaufania w stosunkach z zagranicą*, "Palestra" 1985, no. 29/6(330), p. 31–46; Wyrok Sądu Najwyższego z dnia 21 września 1981 roku, I KR 171/81 [Supreme Court Verdict of 21 September 1981, I KR 171/81].

related) loss or a sales turnover loss[29]. Earlier on, H. Popławski indicated that political damage is "*damage of a non-material character, taking the form of the enfeeblement of state prestige, its chief bodies, principal state administration authorities, the lowering of authority and credibility of state activity in the international arena as well as in economic and trade relations between the Polish People's Republic and other foreign states or organisations, etc.*"[30]. As regards the economic damage, H. Popławski assumed that "*the damage will be of a material character as a loss incurred by the State Treasury or any other state or social institution*"[31]. Still, invoking these interpretations, with the existing legislation in force and current judicial glosses, seems at least dubious, since glosses in this scope concerned the content of a provision penalising the offence of diplomatic treason, whereby the legislator simply distinguished causing damage to political or economic interest[32]. The present regulation that relates to the content of the then regulation penalising diplomatic treason uses only a descriptive and vague attribute of acting to the **"detriment"** of a state.

§ 3 penalises particular action undertaken with a view to providing information that may be to the detriment of the Republic of Poland. The action includes the following verbal attributes: (1) **collecting** or **storing**, (2) **connecting to a computer network in order to obtain such information**, (3) **declaring a readiness to work for the benefit of a foreign intelligence service against the Republic of Poland**. The legislator indicated that the action is to be intentional, that is action with specific intent, which causes considerable problems for investigative bodies, as they need to demonstrate such a type of action and specific intent in their evidence.

§ 3 should be regarded as a peculiar form of preparing for a crime of espionage, which comes to be expressed by the above-mentioned individual verbal attributes. Thus, the provision specifies the attributes of criminal preparation in relation to the model definition of preparation defined in the general section of the Polish criminal code.[33] Hence, it

[29] S. Hoc, *O przestępstwach zdrady dyplomatycznej*, "Przegląd Prawa Karnego" 2004, no. 23, p. 27.

[30] H. Popławski, *Działanie na szkodę interesów PRL przez nadużycie zaufania w stosunkach z zagranicą*, "Palestra" 1985, no. 29/6(330), p. 35.

[31] Ibidem, p. 35.

[32] Cf. I. Andrejew, *Kodeks karny. Krótki komentarz*, Warszawa 1978, p. 101–102.

[33] M. Małecki, *Przygotowanie do przestępstwa. Analiza dogmatyczna*, Warszawa 2016, p. 262–264.

must be pointed out that the acts specified in the stages of preparation cannot be committed as an attempt.

"**Collecting**" or "**storing**" is an equivalent of preparing for the crime defined as "collecting information" – in this case, information of particular features[34]. Pursuant to legislation of the 1940s, as regards espionage, the Polish legislator used the term "collecting"[35]. Still, even back then the doctrine was plagued with the question whether "collecting" meant obtaining and storing, or just obtaining[36]. Collecting means gathering information in any way, while storing means keeping information carriers[37]. In his writing, I. Zgoliński adopts a broader approach, pointing out that collecting information is about coming into possession irrespective of the outer form of information, while storing – in his opinion – is about keeping data (information)[38]. According to S. Hoc, collecting and storing is to be understood as *"every action engaged with a view to obtaining information that may be useful to a foreign intelligence service, and the transfer of which may be detrimental to the Republic of Poland (a document theft, taking photographs, making photocopies, singling out persons or wiretapping conversations, buying appropriate material or documents, etc.), or storing them with a view to passing them on to a foreign intelligence service"*[39]. Noteworthily, between collecting and storing the legislator used an inclusive disjunction, so the storing person does not have to be the person who earlier collected the information.

Another attribute, that is **connecting to a computer network** with a view to obtaining the stated information does not specify the form it should take, and so it is to be assumed that it applies to both lawful and unlawful act of connecting to an IT system. I. Zgoliński adds that

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[34] Cf. E. Kunze, *Karalne postacie przygotowania przestępstwa w polskim prawie karnym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1990, no. 3–4, p. 89–97.

[35] Dekret z 13 VI 1946 roku *o przestępstwach szczególnie niebezpiecznych w okresie odbudowy Państwa* (tzw. mały Kodeks Karny) (Dz.U. z 1946 r. Nr 30, poz. 192 ze zm.) [Decree of 13 June 1946 on *Particularly Dangerous Crimes in the Period of State Reconstruction* (the so-called Small Penal Code) (Journal of Laws 1946, no. 30, item 192)].

[36] Cf. I. Andrejew, S. Pławski, *Prawo karne, Część szczególna*, Warszawa 1953, p. 38–39; J. Bafia, L. Hochberg, M. Siewierski, *Ustawy karne PRL. Komentarz*, Warszawa 1965, p. 23–27.

[37] M. Budyn-Kulik, *Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] M. Mozgowa, et al., *Kodeks karny. Komentarz*, Warszawa 2015, p. 382.

[38] I. Zgoliński, *Rozdział XVII. Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] V. Konarska-Wrzosek, et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 662.

[39] S. Hoc, *Szpiegostwo w nowym kodeksie karnym*, „Wojskowy Przegląd Prawniczy" 1998, no. 1–2, p. 25.

such an act is associated with copying the data containing information that may be useful to a foreign intelligence service[40] – apparently, it is not necessary to copy this type of information, because the linguistic interpretation only points to the necessity of connecting to a system with a specific intention, but does not point to the necessity of recording information.

The last essential verbal attribute in § 3 is **declaring a readiness to work for the benefit of a foreign intelligence service** against the Republic of Poland. According to S. Hoc, while allowing for the fact that the clause specifies the attributes of criminal preparation defined in the regulations in the general section of the criminal regulations, an analogy must be drawn to one of the elements indicated there, that is "establishing communication." The problem with this interpretative device lies in the fact that S. Hoc ascribed "declaring a readiness" to one of the exemplary elements, the most typical and enumerated, that is "establishing communication," and not the general concept of "creating conditions for oneself." The effect is that making "*a proposal to act for the benefit of a foreign intelligence service may engender responsibility only in the case of making contact with a future recipient of the spying service and gaining their acceptance, or having the perpetrator trained by an operative of a foreign intelligence service for the purpose of future espionage activity in Poland. If this condition is not met, then the will to commit a crime has not been agreed between at least two persons*"[41]. For instance, given this interpretation, it will not be possible to convict a person who has sent a letter to a foreign embassy, or even to the head office of a foreign intelligence service, containing an offer of cooperation if he or she has not received any positive reply, that is an acceptance of the offer (which would constitute "establishment of communication").

The adopted analogy between "declaring a readiness" and "establishing communication" might be challenged with regard to the systemic and functional interpretation. If we assume that pursuant to the constitutional regulations, the Polish citizen owes allegiance to the Republic of Poland (Art. 82 of the *Constitution of the Republic of Poland*), then the action geared towards treason should be assessed more harshly. Consequently, the function of § 3 should be to eliminate acts that can be defined as the

[40] I. Zgoliński, *Rozdział XVII. Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] V. Konarska-Wrzosek, et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 662.

[41] S. Pawela, *Recenzja publikacji S. Hoca* pt. *»Przestępstwa przeciwko Rzeczypospolitej Polskiej«*, "Państwo i Prawo", no. 2, p. 105–106. See more: S. Hoc, *Zagadnienia odpowiedzialności karnej za szpiegostwo*, Warszawa 1985, p. 100–108.

most severe ones, as regards the citizen's offences against the state. Such an interpretation would also be of significance given the fact that with the previous legislation in force, the attribute of "undertaking activity for the benefit of a foreign intelligence service" was the equivalent of the attribute of "declaring a readiness." With the previous legislation in force, while it was necessary to point to the acceptance of the offer as well, the missing confirmation of such an acceptance resulted in liability for an attempt, which is not possible with the current legislation[42].

In § 4, Art. 130 the Polish legislator penalises the autonomous type of the crime, whereby its commission is represented by two verbal attributes, that is "**organising**" the activities of foreign intelligence and "**leading**" the activities of foreign intelligence. The former involves a formal crime without a specific result, where – given this attribute – the effect of organising a specific organisational structure of intelligence, that is creating such an organisation, is not required. The latter case involves a material crime with a specific result, where – given this attribute – the effect of setting tasks, assigning functions, giving orders, performing governing functions, etc. within a given organisational structure of intelligence activity is required[43]. With the previous legislation, the lack of an appropriate provision resulted in the organising and leading of intelligence activities being directly related to the attribute of "taking part" in a foreign intelligence service[44].

Attributes of the objective side of the crime of espionage in § 5 and 6, Chapter 19 of the Swedish criminal code

The main verbal attributes indicated in the basic type of the crime of espionage (*spioneri*) include (1) **obtaining**, (2) **transferring** and (3) **divulging**. However, it must be noted that for this type of crime to arise, the indicated activities should be performed in an unlawful

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[42] Cf. I. Andrejew, *Kodeks karny. Krótki komentarz*, Warszawa 1978, p. 98–99; L. Ciecholewski, *Szpiegostwo w świetle przepisów K.K. oraz badań postępowań przygotowawczych prowadzonych przez Biuro Śledcze MSW w latach 1979–1982* (diploma thesis), Legionowo 1984, p. 59–62; Uchwała Sądu Najwyższego 7 sędziów z dnia 12 grudnia 1973 roku, U 2/73 [Supreme Court Resolution of 7 Judges of 12 December 1973, U 2/73]; Wyrok Sądu Najwyższego z dnia 17 sierpnia 1979 roku, Rs 4/79 [Supreme Court Verdict of 17 August 1979, Rs 4/79].

[43] Cf. M. Budyn-Kulik, *Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] M. Mozgowa, et al., *Kodeks karny. Komentarz*, Warszawa 2015, p. 382.

[44] I. Andrejew, *Kodeks karny. Krótki komentarz*, Warszawa 1978, p. 98.

manner. The material object in the crime of espionage is a special kind of information the content of which concerns: (1) **defence capability of the country**, (2) **armament**, (3) **supplies**, (4) **import**, (5) **export**, (6) **a manner of production**, (7) **negotiation**, (8) **decisions**, (9) **circumstances the cognizance of which taken by foreign authorities may be to the detriment of Sweden's security**. It is noteworthy that information may put Sweden in harm's way, but the harm itself does not have to arise; furthermore, the information does not have to be true.

In the very same clause the Swedish legislator points out that anyone who acts with direct intent, i.e. acts for the benefit of a foreign authority by making a written or graphic account of the afore-mentioned kinds of information is liable for espionage. Thus, the legislator extends the scope of verbal attributes and points to a special kind of material object, that is "a written or drawing account" of information[45].

In § 6 the Swedish legislator defines the aggravated form of espionage (*grovt spioneri*). The qualification of the crime of espionage as grievous results from regarding a feature of the perpetrator's act, which is the act's particular hazard. Therefore, the situation involves elaborate descriptive and evaluative attributes including terms the interpretation of which depends on the entity applying the law. Still, the Swedish legislator points out that an act is deemed particularly dangerous on account of not the material object of the prohibited act, but the circumstance of the act. The circumstances that should be considered while qualifying espionage activities include: (1) ongoing warfare, (2) circumstances of great magnitude, (3) divulging information entrusted on account of the exercise of a public function[46].

The subjective side and the subject of the crime

The subjective side and the subject of the crime of espionage in Art. 130 of the Polish criminal code

As regards § 1 and § 2, Art. 130 the crime of espionage is an intentional offence in both cases of the intent, that is direct intent (*dolus directus*) and conceivable intent (*dolus eventualis*). This implies that providing information detrimental to the Republic of Poland without declaring a readiness to take part in the activities of a foreign intelligence service,

[45] *Brottsbalk* (1962:700; Ändrad: 2017:497).

[46] Ibidem.

awareness of all the attributes of the act is impossible. As indicated, espionage is a crime committed with both direct and conceivable intent. In the former case it is to be demonstrated that the perpetrator wanted to commit the act with all its attributes. It does not matter whether the situation involves a sudden intent (*dolus directus repentinus*), or a premeditated intent (*dolus praemeditatus*)[47]. In the case of the conceivable intent it is assumed that the perpetrator did not want to commit the act, but conceived of a real possibility of committing it and consented to it. In the case of espionage, recognising the conceivable intent as the attribute of the subjective side may give rise to problems related to evidence, because it is not easy to prove such action, and "consenting" may not be presumed or established.

As regards § 3 and § 4, Art. 130 it is assumed that the conceivable intent does not constitute an attribute of a crime, because both cases involve a direct intent, and § 3 only presents a specific intent (*dolus directus coloratus*), which comes to be expressed in the formulation "anyone who, in order to provide a foreign intelligence service with the information." Additionally, in the case of the attribute indicated in §3, that is "connecting to a computer network", P. Kardas points out that the so-called "double specificity" must arise[48]. This means that the perpetrator must act with a view to providing a foreign intelligence service with information of a specified character, and for the purpose of obtaining such information, he or she connects to a computer network.

It is assumed that the crimes specified in § 1 and § 4 are common crimes, while the crimes specified in § 2 and § 3 are individual crimes[49]. It is assumed that both cases involve an individual crime as regards the act. This interpretation follows from the fact that the crime can be committed only by a person who takes part in the activities of a foreign intelligence service, and not any other person. A different stance is taken by I. Zgoliński, who points out that the crime of espionage in all its types is a common offence, which in his opinion means that the crime does not depend on whether the perpetrator is a Polish citizen or not[50]. The very

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47 Cf. L. Gardocki, *Prawo karne*, Warszawa 2002, p. 74–76; V. Konarska-Wrzosek, A. Marek, T. Oczkowski, *Podstawy prawa karnego i prawa wykroczeń*, Toruń 2013, p. 54–71.

48 P. Kardas, *Komentarz do art.130 Kodeksu karnego*, [in:] A. Zoll, et al. (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, Warszawa 2013 [LEX 8948].

49 M. Budyn-Kulik, *Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] M. Mozgowa, et al., *Kodeks karny. Komentarz*, Warszawa 2015, p. 381–383.

50 I. Zgoliński, *Rozdział XVII. Przestępstwa przeciwko Rzeczpospolitej Polskiej*, [in:] V. Konarska-Wrzosek, et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 663.

fact of being a citizen or not does not determine the ultimate division into common and individual crimes. Probably, such an interpretation of the subject of the crime has been adopted by I. Zgoliński from the previous legislation, where the legislator distinguished two types of crimes with regard to the attribute of citizenship – treason against one's native country and espionage[51].

The subjective side and the subject of the crime of espionage in § 5 and § 6, Chapter 19 of the Swedish criminal code

The crime of espionage in its basic type is a common offence. However, it must be noted that the aggravated form of the crime of espionage, specified in § 6, may take a modified form with regard to a public function exercised by the perpetrator (and a special kind of information in his or her possession on this account)[52].

Both the basic (*spioneri*) and the aggravated type (*grovt spioneri*) of the crime of espionage may be committed intentionally. An interesting solution, as regards the approach to the specific forms of an unintentional commission of the crime of espionage, is included in § 15. In this clause the Swedish legislator penalises conduct whereby anyone who (1) having knowledge, (2) has received a warning or (3) who should have realised that there was a direct threat of, among others, the crime of espionage and grievous espionage, is liable on account of aiding in a crime[53]. The prerequisite for the liability for the unintentional crime is violation of the caution principle under given circumstances. It must be assumed that this type of crime may be committed on account of recklessness (*luxuria*) or negligence (*negligentia*). This means that on the one hand the perpetrator anticipates the commission of the act, but supposes he or she might avoid it, and on the other hand the perpetrator can anticipate the commission of the act.

Leaving aside the subject and the subjective side of the crime, it should be noted that the Swedish legislator penalises individual stages of the crime of espionage and grievous espionage (preparing and attempting the crime), but also penalises one of the accessorial forms of the crime, that is incitement to the crime of espionage and grievous espionage[54].

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[51] Cf. J. Jański, *Szpiegostwo w czasie pokoju* (diploma thesis), Warszawa, 1975, p. 31–36; I. Andrejew, *Kodeks karny. Krótki komentarz*, Warszawa 1978, p. 97–99.

[52] *Brottsbalk* (1962:700; Ändrad: 2017:497).

[53] Ibidem.

[54] Ibidem.

Conclusion

The objective scope of the analysis presented in the text concerns a selection of legal regulations penalising the crime of espionage. The main objective of the text is to present selected substantive penal aspects of the crime of espionage in accordance with the legal regulations in Poland and Sweden. The comparative analysis places greater emphasis on the Polish legal solutions. The text poses the following research questions, which have been associated with specific conclusions:

To what degree do the legal solutions concerned with the penalisation of the crime of espionage provide effective prosecution and combating of this type of crime?

It should be noted that the content of Art. 130, which penalises the crime of espionage in the Polish Criminal Code, raises doubts on account of interpretation and effective combating of espionage incidents directed against the Republic of Poland. The main interpretative problems include: (1) the Polish legislator's use of the term "intelligence," which narrows the acts of espionage down to activity for the benefit of a specified subject, (2) the Polish legislator's use of the wording "against the Republic of Poland," which makes it difficult to prosecute spying activity not displaying any action aimed directly against the Republic of Poland or third states, (3) the Polish legislator's use of the wording qualifying information "the transfer of which may be detrimental to the Republic of Poland," which gives rise to a high degree of subjectivity while assessing damage, (4) the adoption in the interpretative doctrine of the attribute of "declaring a readiness to work for the benefit of a foreign intelligence service" as specification of the attributes of criminal preparation – "establishing communication," which results in the necessity to prove the response/acceptance of the proposal on the part of a foreign intelligence service. All these descriptive and evaluative attributes may hamper effective prosecution and combating of espionage.

What changes in the scope of legal solutions penalising the acts of espionage can be proposed?

With regard to the performed analysis of the main attributes of the crime of espionage in its basic, autonomous and privileged forms in the Polish criminal regulations, and with regard to the comparative analysis of the Swedish criminal regulations, it should be concluded that:

(1) the regulations penalising acts of espionage and acts directed against information protection (including acts termed "cyberterrorism") need to be amended, (2) there is a need for systemic solutions as regards acts aimed against the state and information protection, (3) it is necessary to replace the attribute of "a foreign intelligence service" with the attribute of "a foreign state" or "a foreign authority," i.e. it is necessary to introduce a solution that features in the Swedish, Serb and Croatian regulations, (4) it is necessary to change the privileged form as regards the extension of criminal liability to cover various forms of preparation for the crime of espionage, (5) it is necessary to change the privileged form of the crime of espionage as regards the attribute of "declaring a readiness to work for the benefit of a foreign intelligence service" so as to eliminate the doctrinal interpretation of the current legal solution, (6) it is necessary to introduce regulations penalising the very fact of declaring a readiness to act for the benefit of a foreign state against the Republic of Poland, (7) it is worth considering minimizing the significance of the term 'damage' in favour of case-law definition of a kind of information as the object of a crime, (8) following the solutions in the Swedish regulations, it is worth considering introducing specified forms of the crime of espionage in view of the violation of caution principles, although this might result in too high a degree of legislative restrictiveness, (9) following the solutions included in the Swedish regulations, it is worth considering introducing penalisation of various forms of intelligence activity as opposed to the crime of capital espionage, (10) following the solutions included in the Swedish regulations, it is worth introducing penalisation of various forms of foreign support, whereby acts which might be termed illegal financial assistance, illegal support for agents of influence, or illegal activities concerned with exerting influence on public opinion as regards matters of major relevance for the state.

Remigiusz Rosicki

Information Security as Exemplified by the Crime of Espionage in the Polish and Swedish Criminal Law

Zakres przedmiotowy analizy zawartej w tekście dotyczy rozwiązań prawnych w zakresie penalizacji przestępstwa szpiegostwa w kontekście bezpieczeństwa informacji. W tekście za główny cel przyjęto dokonanie analizy przestępstwa

szpiegostwa w polskich regulacjach karnomaterialnych z uwzględnieniem analizy porównawczej z adekwatnymi szwedzkimi regulacjami karnomaterialnymi.
W celu uszczegółowienia problemu badawczego w pracy przedstawiono następujące pytania badawcze: (1) *W jakim zakresie rozwiązania prawne dotyczące penalizacji przestępstwa szpiegostwa są skuteczne w ściąganiu i zwalczaniu tego rodzaju przestępstw?* (2) *Jakie zmiany w zakresie rozwiązań prawnych penalizujących akty szpiegostwa można zaproponować?*
Analiza zawarta w tekście jest głównie ujęciem dogmatyczno-doktrynalnym, jednakowoż zastosowano również wykładnię porównawczą (w zakresie karnomaterialnych regulacji penalizujących przestępstwo szpiegostwa w Polsce i Szwecji) oraz wykładnię teleologiczną i funkcjonalną (w celu reinterpretacji wybranych ustalonych lub dyskutowanych doktrynalnych ujęć).

Słowa kluczowe: *bezpieczeństwo państwa, bezpieczeństwo informacji, szpiegostwo, przestępstwo szpiegostwa, działalność wywiadowcza*

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