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Aggravated murder and proposed changes to the Penal Code

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Aggravated murder within the Polish system of criminal law, despite being in existence for well over twenty years, has within the minds of native penal society the unchanged status of unacceptable final *novum*. One may have the impression that it is treated as a temporary regulation, episodic, which sooner or later will be removed from the Penal Code, in fact benefiting the system if removed. Within the legal profession, severe murder became widely acknowledged, analysed and commented on at the beginning of the 1990s, initially as an answer proposed by the next project of the Penal Code until 1997. However, from 1998 as a mandatory regulation, which almost became part of the authority, it has found itself as an area of academic interest. Symptomatic of this is that the majority of the practices of administration of justice rather quickly accepted this offence as the principle. It is worth reminding ourselves that already at this stage of work on the Code from 1997, in terms of changing the model of type of murder offence, this position, far from being enthusiastic — which is a typical and understandable reaction to the attempt, especially that a radical transformation of the deeply fixed model of the protection of life — it was possible to notice a form of calm awaiting which would result from the effort of reformers of the law. Empirical studies conducted at the time showed that the indicator of acceptance of the new type of murder was surprisingly high, not confirming the com-

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monly known conviction of the aversion of this group towards most new legal solutions[1]. Bearing this in mind, what is a little bit surprising is that right from the beginning, the group on the theory of criminal law was less enthusiastic towards aggravated murder and the majority, even at the highest scientific level, was against this change. Some kind of phenomenon is the fact, that despite a long period of functioning of this offence in practice, the model of protecting life adopted by the code in 1997 is still not an accepted solution by the majority of Criminal Law Science. The type of aggravated murder is perceived in the science of law as a typical *enfant terrible*. From the perspective of the moderate supporter of this "troublesome child" of criminal law reform in the 1990s, it is apparent that it is accused of, not only for what type it is, but also whether it exists. Aggravated murder constantly attracts criticism of law groups and as a consequence of this, its elimination is constantly one of the basic aims of corrective action included in proposed projects of amendments to the regulations of the particulars of the Penal Code. Restitution of the model known in previous legal acts of criminal law is constantly one of the basic aims of corrective action, rationalising the state of legal regulations protecting life. Returning to the Polish tradition of creating the type of murder and the reconstruction of the native national, the synthetic model of protecting life is becoming to be a *lait motiv* of the work on the regulations that protect life and health and support subsequent attempts to remove aggravated murder from the normative area. The aim of this is additionally justified by the accusation of different types of unwanted murder, interpreting difficulties and the evidence that it leads to inconsistent judgments, especially when it comes to the risk of multiplications of the aggravated type in different amendments, raising the fear of "augmenting Frankenstein". These considerations were also the reasons why the Codification Committee at the Ministry of Justice was trying to cancel aggravated murder and present it in the project of changes of the

[1] Research of judges' opinion has shown full support for the new solution in almost 50% of respondents. If we add the 7% group of moderate supporters of aggravated murder, it turns out that for the vast majority of that group, a decade-long experience in applying a synthetically reflected formula defining the crime of murder and decisions made and practices in that time did not constitute a reason for challenging the planned solution. R. Kokot, *Zabójstwo kwalifikowane*, Wrocław 2001, p. 286.

Criminal Law as of the 5th of November 2013[2]. This proposal concentrated on saving life and health, especially on increasing the protection of the unborn child[3], by returning to a traditional, dichotomous formula of murder divided into a basic type and a few other privileged varieties. The change that was proposed in the last project is a classic example of "return modifications" coming, we assume, from the disappointment with the "new" regulations and at the same time the longing for something that was hastily and unfairly changed in the Code in 1997. To a relatively laconic justification of the proposed change it is difficult to precisely point out *ratio legis*. Generally this change of thought of the project planners was supposed to help to simplify the regulation and remove any doubt in the interpretations that can accompany the meaning of Article 148 § 2 and 3 of the Penal Code.

It is important to notice that the proposed design of the regulations protecting the unborn child is meeting the science of criminal law with some resonance, however the proposed change regarding the type of crime of murder has not caused such a stir. The noticeable lack of significant interest in this attempt at a systematic change of Polish criminal law, became a direct inspiration among most members of the criminal science fraternity and legal practices to express some general comments and reflections about the aura that surrounds aggravated murder from the beginning of its existence, and also its causes and merit. It attempts to test as to what degree the tendency to restitution of the previous murder model finds its substantive justification and to what degree it connects itself with a more nostalgic longing for the "traditional" construction of the crime of murder.

The controversy found in criminal literature surrounding aggravated murder has different characteristics. One can firstly distinguish those which are connected to its existence, as one can say, the idea of the type of aggravated murder, secondly, those that refer to the structure of its statutory signs and thirdly, those that concern the level of punishment through the Act. It is important to pay attention to some of them. The

[2] B. Wiraszka-Bereza, *Racjonalnie o zbrodniach i przestępstwach gospodarczych*, Na Wokandzie 2013, No. 4 (18), p. 8.

[3] Cf. R. Kokot, J. Jasińska, *Kilka uwag o ochronie życia poczętego w kontekście projektowanych zmian kodeksu karnego*, NKPK 2014, No. XXXII.

simplest way of judging the rationality of all the legal solutions can be perceived in the light of their teleological assumption. One has to answer the question of the principle and purpose of introducing the aggravated murder into Polish criminal law. Primarily we should note that the negation of aggravated murder hits into the idea of formation of aggravated types at all. However, the main principle of the classification technique does not raise any doubts and opposition in the science of the law. This principle is generally accepted and its qualities are indisputable. It already allows differentiation at the level of legal qualification of the alleged actions — and not only when it reaches the stage of sentencing by the court — the behavior of the unprecedented degree of social danger from those which are within the area of basic type of behavior. At the same time you do not need to extend it to the regulations covering the actions of the varied indicators of injustice. This law qualification allows a more precise expression of what has happened in reality, giving the whole "post-primary" strength of blameworthiness of the actual behavior. Of course, it is important in this specific casuistry to keep moderation. It seems that the structure of the features of aggravated murder in Article 148 § 2 and 3 of the Penal Code, does not step outside of the permissible and justified, so the rational casuistic, only enriching numerous catalogues of the unquestionable, in the science of criminal law, types of aggravated murder, which are exactly the expression of the all aspects of creating a type, and often pursue it in a more expressive way. From this perspective it is certainly difficult to prove why aggravated murder actually faces such considerable opposition. In practice, in intentional attacks on life, occur facts of an unmatched degree of seriousness. Disposition and sanction are orientated towards typical situations, so if the diversity of such attacks is of such significance, it is reasonable to create aggravated types predicting more severe sanctions[4].

It is impossible not to notice that the argument that maintains aggravated murder is an element of criminal politics implemented within general prevention, and it is both with its statutory declared positive aspect and its statutory silenced negative recognition, which in social practice

[4] Cf. T. Bojarski, *Rozwarstwienie typów przestępstw w projekcie polskiego kodeksu karnego z grudnia 1990 roku*, [in:] *Problemy reformy prawa karnego*, edited by T. Bojarski, E. Skrętowicz, Lublin 1993, p. 213.

still functions as a form of deterring potential offenders from the intention of committing crime. Accompanying the differentiation of qualified type with the stricter threat of punishment can successfully activate the mechanism of restraining some categories of potential offenders, thus implementing the basic objective of penal policy. Social intuitions regarding the division of attempts on life into killings and murders are traditionally present and very strong. There is no doubt that in this perspective within the sphere of social interest of the administration of justice there is not only the fact of "how long the offender is sentenced for" but also "what he is sentenced for". It is about the phenomenon of the specific normative stigma of the most dangerous offences by using not only sanctions but also by using the disposition of legal provision.

Taking into account all of these observations, as a more general reflection, one ought to note that the model based on the full dissection of murder is most commonly used in current European regulations. It does not matter too much how old that regulation is, nor whether it is in a system with centuries of democratic tradition or a totalitarian system or one coming out of these systems. Institutional extracting of serious murder neither constitutes the characteristic of continental law nor the system of common law. Different conditions, the social, cultural and historical or political of the individual systems seem to be irrelevant. Agreeing to the full triad of murder needs to be seen as a sign of automatic will, with rational legislators who notice the need and reason for this type of distinction. The problem of course, is not to treat the statistic as an important argument, which refers to the collective wisdom of foreign legislators, in favour of keeping aggravated murder within the native system — having in mind the well known adage of the geese — but not to lose this circumstance from view and not to omit it in discussions about this type of offence.

The second group of doubt that accompanies the functionality of aggravated murder, and which ultimately leads towards its elimination, focuses on the individual features of the offence. The most controversial among them is the use of firearms. Assuming that the universally contested form of aggravated murder is aimed at organised crime and was supposed to prevent and seriously fight against it, it soon transpired, as was pointed out in the literature before the regulation came into force, that this

form of aggravated murder affected not only cases intended by legislators but "backfired" also quite clearly outside its specified aim in proving the project of the legislation, when it is used on all the other types of attempts against life with the use of firearms, which do not need such severe and drastic reaction from criminal law. This argument was updated in relation to murders committed with the use of firearms, in particular by offenders acting in the state of largely limited sanity, under emotional distress, however, under no justified circumstances, and murders committed by crossing the border of self-defence. The good intentions of legislators in these cases were put under severe scrutiny in the literature, but without finding the answers to the questions of what actually determines who decides that killing with firearms is more reprehensible and punishable than causing death by using for example an axe. As a consequence, a legislator in 2010 revised the catalogue of features of aggravated murder by deleting this form from the alternatively described features of Article 148 § 2 point 4. Without an answer, the question remains, why, with such overwhelming criticism from the community of criminal lawyers, this was delayed for so long? At the same time one of the basic arguments of criticism of aggravated murder loses its validity.

The criticism of the legal community, although not to a significant extent, also referred to other accused aspects of the crime, which were excessively evaluated and analysed, but it is important to accept that this was not without good reason. The community of lawyers particularly criticised the classification of the degree of cruelty, which, in order to be of a qualifying type, needed to have been "particular" — however, the cruelty itself needs a very complicated process of interpretation, and "special condemnation" of the motive by the offender, which is also a very difficult task in which to remain objective. In the science of law there were also divided opinions as to the borderline that qualifies the "connection" of murder with a different offence, its causal or functional character, as well as the catalogue of offences covered by this compound. It is difficult to argue with these allegations. You cannot lose sight of the fact that the code of regulations provides a large group of extracted types, which are based on equally, or maybe even more evaluative criteria, whose existence in the context of the amendment procedures are unthreatened. The practice of using the evaluative features of law is written into the very

core of the procedure of creating the types of law, and it is impossible to reduce or omit it and wholly rely on the objective elements of the descriptive feature of law. The risk of distinguishing legal assessments in similar actual facts comes from the nature of legal language which is not free from making valuations. Above all, it is important to point out that the relevance of this argument has systematically diminished, in proportion to the elapsed time it takes for the legal features to have been in the justice system. This, as has been shown by the process of jurisdiction, has coped very well with all the complications of too much evaluation and too much vagueness, by using common sense and the experience of the court system.

We need to pay attention to another, specific problem of interpretation which comes out of understanding Article 148 § 3 of the Penal Code, which gives the opposition of aggravated murder another reason to conclude that in the light of so much controversy surrounding this regulation, it would be better if it did not exist at all. The regulation of Article 148 § 3 verse 2 of the Penal Code creates doubt, whether committing the murder after the offender received a valid sentence for committing murder is supposed to be as the next aggravated form of this crime, or as a particular type of recidivism of murder, which would mean increasing the penalty, strictly speaking, taking into account the regulations, and the extraordinary tightening of these regulations. As a consequence, if legislators regulated returned murder or return to murder[5], the consequences of adopting one of these positions are very serious, both within legal classification and administration of justice. We ought to clearly say that we have to look at the return to murder in the light of the institution of criminal jurisdiction. To treat the specific circumstances as a type of offence, it has to be connected with it and it has to be decided *in abstracto*

[5] The literature does not agree on that subject. It seems that the source of this polarity is a different understanding of circumstances that may be a characteristic (static) qualifying a type of a prohibited act. Thus, the answer to the question of the nature of legal provision of Article 148 § 3 sentence 2 of the Penal Code depends on the views on the issue of whether qualifying characteristics should be understood broadly in such a way that they are nothing but aggravating circumstances defined in the Article, or in the more narrow sense, assuming there are only those among them which are related to the act or the perpetrator in relation to the committed act.

about its social danger (Article 115 § 2 of the Penal Code). However, the grounds of the previous conviction are outside the nature of the act and it can't as such decide the qualification of the offender's behaviour. This fact we are talking about does not affect the increase in the level of injustice, but only modifies the boundaries of the seriousness of the imposed *in concreto* penalty, as an effect which is taken into account during the setting of directives of individual prevention, which boundaries are only similar to the boundaries of the aggravated types[6]. Provisions of this directive also contain the aggravated features of an attempt on life and the element which is the basis for enhancement of a penalty. However, the referrer sanction, in its peculiar dual nature, on the one hand is a "clean" form of the threat of punishment for the type of aggravated murder, only in the way that it relates to the killing of more than one person in one action or killing of a public official. On the other hand, it contains the mandatory modification of the threat within the process of the enhancement of the penalty, when the offender was finally convicted of the murder. This form of murder recidivism needs to be treated similarly as the return after the offence, which is specified in Article 64 of the Penal Code. This is not a new or unique example of the current penal regulations, when the sanction has not a homogeneous nature. The same criticism refers to the eclectic character of the circumstances and their diversity, which are mentioned in Article 178 of the Penal Code. It is partly, in the opinion of some representative of this doctrine, closely connected with the offender's action and is a part of the qualifying features of the law (drunkenness or intoxication). It also, however, relates to behaviours which are indirectly connected to the act, but stating automatic behaviour (failure to stop after a road accident), can be the grounds for enhancement

[6] Cf. M. Królikowski, R. Zawłocki, *Kodeks karny. Część szczególna*, vol. I, *Komentarz do artykułów 117–221*, Warszawa 2013, chapter. X, thesis 4; J. Kasprzycki, *Zabójstwo kwalifikowane*, CzPKiNP 1999, No. 2, p. 140; Z. Ćwiąkalski, *Nadzwyczajny wymiar kary w kodeksie karnym z 1997 roku po nowelizacjach — próba oceny*, [in:] *Zmiany w polskim prawie karnym po wejściu w życie kodeksu karnego 1997*, Lublin 2006, pp. 120–121; A. Zoll, [in:] A. Barczak-Oplustil et al. (ed.), *Kodeks karny. Część szczególna. Komentarz*, vol. II, Kraków 2006, p. 270; the same position may be interpreted from the reasoning of the resolution of the Supreme Court of 22.11.2002, I KZP 41/02, OSNKW 2003, No. 1–2, item 4.

of the penalty[7]. This interpretation creates the specific consequences in the field of legal qualification. Exhausting the features of one type of aggravated murder in recurring conditions, which are specified in Article 148 § 3 verse 2 of the Penal Code, excludes the possibility of using the grouping of cumulative legislations, if Article 11 § 2 of the Penal Code is about the same act that has exploited features of parts of the legislation, which are common for the prohibited act, however not about the simultaneous exploitation of features of the prohibited act type and fulfilment of extraordinary sentencing. In legal qualifications of this type of behaviour we need to appoint two types of regulations, which are connected, but without recalling the construction of the recurring conditions, which is the result of Article 11 § 2 of the Penal Code. However, if the offender again commits murder, which meets the characteristics of the basic type, the act needs to be qualified, based on features in Article 148 § 1 with regard with article 148 § 3 verse 2 of the Penal Code and based on legal qualifications of the actions committed in the circumstances of Article 64 of the Penal Code, which describes the connection between those regulations. The sentencing, taking into account the regulations of tightening the sentence, must in this case be based on and within the referred sanctions, which is described in Article 148 § 3 of the Penal Code. We need to pay attention to the consequences which this situation creates within extraordinary sentencing, but strictly speaking to the example of meeting the opposite polarity of the base of the sentencing. Assuming that the previous, final conviction of the murder is the reason for the extraordinary tightening of the punishment, that if the offender used the condition mentioned in Article 148 § 3 verse 2 of the Penal Code and again abused the features of murder — in the basic and aggravated type — when there was simultaneous recurrence of the reasons to the extraordinary mitigation of punishment, the court basing its decision on Article 57 § 2 of the Penal Code can simply reduce or increase the penalty, according to its free choice. Simply to extraordinarily reduce the penalty, the starting point should be the previous boundaries of the statutory, punishable threat for committing the murder, whose criteria the offender has met. In this

[7] G. Bogdan, [in:] A. Barczak-Oplustil et al. (ed.), *Kodeks karny. Część szczególna. Komentarz*, vol. II, Kraków 2006, pp. 477–480. Such a situation was expressively represented in Article 145 of the Penal Code of 1969.

regard, the different types are penalised by the penalty in the same way that comes out of tightening Article 148 § 3 verse 2 of the Penal Code. It is especially important, when the return murder fulfils the features of the basic type, Article 148 § 1 of the Penal Code. So if the offender was fulfilling the features of the murder of the basic type, according to Article 148 § 3 verse 2 of the Penal Code, and the court, in accordance with the existence of one of the parts of Article 57 § 2 of the Penal Code decides on the extraordinary reduction of the penalty, it can sentence the offender between 2 years and 8 months to 7 years and 11 months, rather than from 4 years to 11 years and 11 months.

As previously mentioned, the third area which raises opposition to aggravated murder is its sanction. Right from the beginning of its legal existence, the weakness of this crime, as was underlined in the literature, is its insufficient differentiation of the limits of punishment which are predicted for this crime, in relation to the threat predicted for the basic type. In relation to the criticism of this crime we have to mention the confusion in the criminal law community, equally among the representatives of theory as well as the practical side, which was initially caused by the legislators, by changing the statutory limits of the punishment for aggravated murder, in the amendment of 27th July, 2005[8], and then by Constitutional Tribunal recognizing this modification as not in accordance with the Constitution. Without going into detail, it has to be mentioned that this amendment replaced the previous original sanction covering the threat of punishment from 12 years up to a life sentence inclusive, by the alternative sanction of 25 years or life. This change has caused a huge discussion among the science of law. The new sanction for aggravated murder has attracted a lot of criticism. As a backfire, the criticism was about the type of this murder. Attention was paid not only to the penal or criminological aspect, but also to the constitutional one[9]. Modification of

[8] Act of 27 July 2005 amending the Act — the Penal Code, Act — The Code of Criminal Procedure, Act — The Executive Penal Code (Journal of Laws No. 163, item 1363 — the amendment was effective on 26.09.2005).

[9] Cf. E. Łętowska, *Kara za zabójstwo kwalifikowane — problematyka konstytucyjna*, PiP 2006, No. 10; A. Zoll, *Znaczenie konstytucyjnej zasady podziału władzy dla prawa karnego materialnego*, RPEiS 2006, No. 2, pp. 334–335; A. Sakowicz, *Sankcja bezwzględnie oznaczona (uwagi krytyczne na tle art. 148 § 2 KK)*, PiP 2006, No. 5.

the boundaries of criminal responsibility, which according to the intentions of the legislature were supposed to show the differences between the basic type and the aggravated type, was accused mainly of violation of the principle of the free judges' appraisal, Article 53 § 1 of the Penal Code and the court's powers regarding the individual penalty (Article 55 of the Penal Code) and aims at the Constitutional principal division of power (Article 10 regarding Article 175 of the Act of the 1st Constitution of Poland) for the fact that the legislator encroached on the discretionary authority of the judge. We can't keep the appearance of the relatively determined sanction in the way that criminal responsibility is structured, especially in situations where the offender at the time of committing the murder was not 18 years old. In this case it is constituted to use the sanction *stricte* strictly determined, which violated the systematic model of relatively determined sanction[10]. The court could only sentence this type of aggravated murder offenders *de facto* to only 25 years of imprisonment (Article 54 § 2 of the Penal Code)[11]. New doubts were created regarding the interpretation as well as some controversy about the possibility of the use of extraordinary mitigation of punishment. It was pointed out that there is a lack of understanding between the revised statutory threat of punishment for aggravated murder, and the rules of its modification described in the Code. Once again this crime has divided the doctrine of criminal law. Supporters of the formal form excluded the possibility of extraordinary mitigation of punishment for the aggravated murder offender, explaining it through the rules of grammatical interpretation. This institution, according to Article 60 § 6 point 1 in the verse from Articles 32 and 37 of the Penal Code could have been used only for the timely punishment of imprisonment. Because the Act doesn't mention the rules of reduction of 25 years punishment and life imprisonment, extraordinary mitigation of punishment, despite the mandatory or optional fact being

[10] Cf. T. Gardocka, *Kwalifikowane typy zabójstwa w kodeksie karnym of 1997. Próba stopniowania zła*, Myśl Ekonomiczna i Prawna 2006, No. 1, p. 20.

[11] Irrespective of charges of legal and material character, legal proceedings of introducing that amendment were also questioned, which violated legislative procedure based on the principle of three readings of the bill (Article 119 of the Constitution of the Republic of Poland).

used, will be excluded[12]. Meanwhile, this part of the doctrine which is concentrated on the functional interpretation and agreeing with the teleological arguments, allowed the possibility of extraordinary mitigation. Simply justifying it by the need to prevent "gross disproportion" and "gross unfairness" of judgments, which were forced by this Act, but were the reason for their change and repeal (Article 438 point 4 and Article 440 of the Code of Criminal Procedure). This point of view was also rationalized by the additional argument, that this type of interpretation does not violate material law, because there is no provision in the Act, which expressis verbis would prohibit the extraordinary mitigation of punishment in such a situation. Above all, this direction of interpretation was dictated by the need to use the analogy for the benefit, as a permissible method of logical inference, of the situation, when the grammatical interpretation leads to absurd conclusions, allowing mitigation of the penalty of a milder kind, but not allowing the mitigation of severe punishment. As a consequence, the lower limit of the punishment, which was extraordinarily mitigated for aggravated murder, would be based on Article 60 § 6 point 1 of the Penal Code, one third of 25 years, which would be eight years and four months, whereas the upper limit would be appointed by the limit of the timely punishment of imprisonment, so 15 years[13]. That was the interpretation adopted by the Supreme Court[14].

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[12] Cf. Z. Ćwiąkalski, [in:] G. Bogdan et al. (ed.), *Kodeks karny. Część ogólna. Komentarz*, vol. I, 2007, p. 779; Z. Ćwiąkalski, *Nadzwyczajny wymiar kary w kodeksie karnym z 1997 roku po nowelizacji — próba oceny*, [in:] *Zmiany w polskim prawie karnym po wejściu w życie kodeksu karnego of 1997*, Lublin 2006, pp. 114–116; A. Marek, *Kodeks karny. Komentarz*, Warszawa 2007, p. 315; A. Zoll, [in:] A. Barczak-Oplustil et al. (ed.), *Kodeks karny. Część szczególna. Komentarz*, vol. II, Kraków 2006, pp. 269–270; J. Kulesza, *Niektóre problemy stosowania sankcji bezwzględnie oznaczonej*, Prok. i Pr. 2007, No. 11, pp. 82–83.

[13] A.J. Błachnio, *Zaostrzenie sankcji karnej w art. 148 § 2 KK*, Prok. i Pr. 2007, No. 3, pp. 118–119; T. Pieniężny, *Nadzwyczajne złagodzenie kary za zabójstwo kwalifikowane w polskim prawie karnym*, Prok. i Pr. 2008, No. 10, p. 28.

[14] Decision of 12 December 2007, III Penal Code 245/07, OSN(K) 2008, No. 2, item 16. A similar position was taken by the Court of Appeal in Wrocław, adopting the priority of systematic and functional interpretation over the linguistic one. In its justification the Court simultaneously expressed its opinion that "if you want to properly interpret the law, such action cannot be limited only to one specific regulation, but it is necessary to consider the fact that the law should be harmonized to make up a coherent whole, where

Finally, the Constitutional Tribunal in the judgment of 16th April says that Article 1 point 15, of 27th July, 2005 Act, amending the Act — Penal Code, Act — Code of Criminal Procedure and Act — Executive Penal Code, which was the reason for changing the sanction for aggravated murder, is inconsistent with the Constitution, because it was passed by Parliament without respecting the required procedures. At the same time, by not addressing the issue of procedural regulations, which were unconstitutional, the Tribunal did not address the problem of the main meaning regarding the character of the sanctions in Article 148 § 2 of the Penal Code and decided to discontinue it[15]. The result of this judgment by the Constitutional Tribunal was the limit of legal power of Article 148 § 2 and 3 of the Penal Code. The judgment was referred directly to Article 148 § 2 of the Penal Code, but just because § 3 about the referred sanction was pointing to the Act, it lost its legal power, and also lost its authority. The situation therefore excluded the possibility of reconstruction of the sanctioning rule which came out of it. By depriving both regulations of the sanctions, according to the rule nullum crimen sine lege poenali, it excluded the possibility of using this regulation as

addressees of legal norms benefit from an actual guarantee and constitutional rights. It means that every time a linguistic sense of the regulation is abandoned, it should not be considered anunlawful interpretation. The law allows one to abandon the linguistic sense not only when linguistic interpretation leads to absurd results, but also when it would mean accepting grossly unjust decisions" (decision of the Court of Appeal in Wrocław of 17 October 2007, II AKa 277/07, OSA 2008, No. 10, item 46; otherwise: The Court of Appeal in Lodz and Cracow (decision of the Court of Appeal in Lodz of 18.9.2007, II AKa 159/07, Prok. i Pr. 2008, No. 5, item. 26; decision of the Court of Appeal in Cracow of 11.9.2008, II AKa 124/08, KZS 2008, no. 10, item. 35). This recognized loophole eventually led to amendments to the criminal act of 5 November 2009 to the operational rule of extraordinary mitigation of punishment, whereas the sanction carries the penalty of 25 years of imprisonment (article 60 § 6 point 1 of the Penal Code). A peculiar situation has been created regarding the amendment to the sanction where first there was a sanction without an operational regulation, and now there is an operational code regulation without a sanction in the code that might be applied in the extraordinary mitigation of punishment. Its introduction, though somewhat alongside, emphasized the position of the legislator that this structure of the sanction to which the rule above applies they do not consider contrary to the assumptions of the rule of applying a relatively determined sanction.

[15] Decision of the Constitutional Tribunal of 16 April 2009, P 11/08, Journal of Laws of 2009, No. 63, item 533.

grounds for a conviction. There was also not enough reason to accept the effect of the situation, in the form of the "revived" regulation, as it was before the change[16]. So the procedural mistakes in the unfortunate amendments regarding the boundaries of the threat of punishment in the aggravated type, led *de facto* to eliminating this crime from the legal order and returning to the traditional, dichotomous structure of this crime[17]. Absence of the aggravated type in the Polish Criminal Law system was just a short-lived episode. On 22nd March 2011 under the amendment of the Penal Code on 25th November 2010[18], this crime with a different form of the modified group of features[19] and with the previous form of sanctions — from 12 years imprisonment, 25 years or life sentence — found its way back into the Penal Code. At the same time the legislature didn't leave any doubt that aggravated murder remains in Polish Criminal Law.

Summarising the described situation, we can state that the requirement to remove aggravated murder from Polish Criminal Law is not the requirement of a necessary and urgent type. It is undoubtedly a solution, which raises controversy on different levels. However, it is not a bad solution. It's difficult not to notice that even moderate supporters of this crime definition cannot be convinced, by motivating the direction of the amendment mainly through the excess of casuistry in the current regulation and the fear of progressing this state, especially where it breaks with the traditional model of protecting life in Polish Law. It has to be pointed

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[16] Decision of the Supreme Court of September 2010, III KK39/10, Biuletyn Prawa Karnego 2010, No. 6, pp. 6–8. A. Nowak, *Nowe ujęcie zabójstwa kwalifikowanego*, Prok. i Pr. 2012, No. 5, p. 74.

[17] W. Wróbel, S. Zabłocki, *Glosa do wyroku TK of 16 April 2009*, Palestra 2009, No. 7–8, p. 290.

[18] Act amending the Act of 26th November 2010 — Penal Code and the Police Act, Journal of Laws 2010, No. 240, item 1602.

[19] Pursuant to the above amendment, murder with a firearm was deleted, and a new qualified type was introduced — a murder of a public officer on duty or in relation to duties regarding the safety of people and public order. It is also worth mentioning that the bill provided for an introduction of one more type which is murder to prevent or obstruct criminal proceedings, proceedings under the Fiscal Offences Act, civil, administrative proceedings or proceedings under act, Bill on amending the act — Penal Code and the Police Act, Form No. 2986, Sejm of the RP VI term.

out that the proposed change also does not find strong support in the general argument of all the amendment effort, which was mentioned in the same Objectives of the bill[20]. The need for this change results neither from the development of criminal law doctrine which, from the criminal law point of view, came out with new, more effective, criminal law institutions, which function much better, nor from the state or the needs of the current administration of justice, which long ago accepted the applied model of protecting life, nor finally from the need to adjust Polish Criminal Legislation to the norm resulting from international commitments. This especially regards the norm which applies through our membership of the European Union, where the majority of countries adopt the model of the full triad of murder. It doesn't seem that the content of the proposed amendment could be linked to the decrease in criminal offences which is shown by the statistics. However, this proposal of modification refers only to the form, but not to the criminal protection of legal interests. This is also not the required correction of "ambiguous" solutions, because doubts about interpretation were minimised to an acceptable level, through subsequent amendments and dogmatic and judicial interpretations. It is worth adding that it is difficult to agree with the argument which appears in the literature that subsequent amendments in the structure of aggravated murder prove a lack of decisiveness regarding reasons for singling out this type by the legislator. It seems almost the opposite. These efforts show that the legislator is striving to keep it and at the same time to create it in the way which will be free from the defects of the former, normative form. In this state of affairs, we can only be pleased with the reason for removing aggravated murder, declared as a need by the drafters to simplify legal solutions and the restitution of the norms originating from Polish legislative tradition. This argument is both subjective and uncertain, however.

The characteristic of aggravated murder, the attitude of the majority of the community of criminal lawyers towards this crime, and the reasons for this situation, lead to the general conclusion that the prevailing mood about this crime is not a good or desirable phenomenon. There are not many crimes in the Penal Code that divide the criminal law community in

[20] Objectives of the bill, pp. 1–2.

Poland to such an extent. It is alarming that there is such a low acceptance by the legal community and such a sense of suspense especially over such a long period of time and regarding such a sensitive and important point of criminal law that is the field of legal protection of life. This means that we can't talk about permanently placing it in the Criminal Law System. Immeasurable opposition towards this crime in connection with unsuccessful attempts of removing it during the past 15 years can lead to reduction of trust in the legal system as a whole, its specific regulations undermine the sense of security of the legal system, andcreate the feeling that the legal norms are temporary and create the feeling of waiting for something better. It is very disturbing that this kind of change in the terms of murder, together with the introduction of the aggravated type belongs to a category which is very difficult to remove from the legal system. It was an attempt to tighten criminal responsibilities. This direction of improvement of Criminal Law, especially when it regards the most serious attempts on life, is always keenly awaited and desired by society, making it from the legislative point of view, something that is called a one-way ticket. This situation could be explained by the views of opponents of aggravated murder, which is the requirement from a different area — however, relating to the protection of life and health — *morbum evitare quam curare facilius est*. It is much easier to introduce changes in relation to repression than to give them up. This regularity of procedures of creating and modifying criminal law derives its justification from penal populism. This, however, is quite often the main motivation of the politicians who decide about the final form of the law. For these reasons, it is difficult to imagine that it will be possible to remove aggravated murder from the Polish criminal system in the near future, without being accused of "favouring the bandits" and without the risk of losing the trust of society, and the popularity of the electorate, which is the main desire of this profession. At the same time, *summa summarum* — even if this observation might not please the supporters of aggravated murder — the pragmatism of the political groups currently seems to be the basic, sufficient and adequate warranty of the existence of this crime in Polish Criminal Law.

Summary

The elaboration looks into the problems of aggravated murder in the context of the latest project of changes within the Penal Code. In view of the content of the expected amendment, which aims at eliminating such a kind of crime from the domestic legal order and at returning to a "traditional" model of criminal law protection of life, this is not, however, the analysis or judgment of the proposed, "new" legal solutions, but rather an attempt to settle accounts with those currently in force and remonstrated the legal state, its advantages and disadvantages which have revealed themselves for several years of its functioning within the legal area. The article focuses on searching for the answer to the question about the justification and the purposefulness of the proposed direction of modification. It is interesting and because of this — apart from the significance of the matter which the change concerns — that the attempt to "return to the past" is not being taken for the first time. The distance towards this crime of the major part of the Polish criminal law scientific environment is commonly known. It is worthwhile to refer to the causes of such a state of affairs, recapitulating the argumentation of the opponents of this form of crime. In order to objectify the judgments, the arguments of the opponent side were also presented, the side which notices rational reasons for maintaining the *status quo*.

Keywords: murder, penalty, amendment, protection of life, sanction, criminal responsibility, statutory signs, aggravating circumstances, criminal politics.