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Dr Marta Mozgawa-Saj,
Department of Criminal Procedure
Faculty of Law and Administration

PUNISHABLE FAILURE TO REPORT A CRIME IN THE POLISH PENAL LAW

Maria Curie-Skłodowska University
Marii Curie-Skłodowskiej Square, 5, 20-031, Lublin, Poland
E-mail: marta.mozgawa-saj@mail.umcs.pl

Purpose: *conducting an analysis of statutory elements of the crime described in art. 240 of the Polish Penal Code (punishable failure to report a crime).* ***Methods:*** *the basic method employed in the analysis is the legal dogmatic method.* ***Results:*** *the analysis indicates that in the event of art. 240 of the Penal Code, the protected object is the judiciary in criminal matters. The duty to report criminal offences (those enumerated in the provision under consideration and terrorist offences) is imposed on anyone who has credible knowledge of the criminal preparation or attempt or commission of such a criminal act. Such a report, addressed to the authority appointed to prosecute criminal offences, must be made promptly. It is a formal offence (not characterized by its effects), individual as to the act, which can be committed in both forms of intent (dolus directus and dolus eventualis). The criminal legislation provides for three cases of exclusion of criminal liability for an offence under art. 240 (specified in art. 240 § 2, 2a and 3).* ***Discussion:*** *there are doubts whether the catalogue of crimes covered by the denunciation obligation is too broad or not. Differences in interpretation arise in the context of a conflict between the need to keep professional secrecy and the obligation to denounce under art. 240 of the Penal Code.*

Key words: *credible news; crime; denunciation; promptness; body appointed to prosecute.*

Problem statement and its topicality. *Historical background.* The Criminal Code of 1932 did not provide for failure to report a crime. During works on preparing that Code, the concept of penalizing such behavior was approached with some skepticism. As W. Makowski pointed out, "the entire construction of these factual states can at all be regarded as remnants of the period of the state's struggle against crime, when the penalizing authority had to resort to the help of citizens enforced by the threat of punishment" [1, p. 132]. Contrary to the intentions of the authors of the Criminal Code of 1932, this crime was introduced in art. 21 of the Decree of the President of the Republic of Poland of 24.10.1934 on certain crimes against state security (Journal of laws No 94, item 851). In fact, however, it was limited to the disclosure of state secrets and espionage [2, p. 232]. After World War II, the crime of not reporting a crime appeared in the so-called Little Criminal Code, i.e., the Decree of 13.06.1946 on particularly dangerous crimes during the period of reconstruction of the state – Journal of Laws No 30, item 192, as amended (art. 18). Pursuant to art. 18 § 1, it was punishable not to notify (immediately) the authority appointed to prosecute the offences by the person who had credible knowledge of the offence referred to in art. 1, 3, 4, 7, 13 or 14 of the Decree or in art. 85 to 88 of the Polish Military Criminal Code. The Decree of 13.06.1946 concerned the offence of a violent attack on a unit of the Polish or allied forces or persons listed in the provision (e.g. a member of the State National Council , member of another national council, central or local government official) – art. 1, acts of sabotage (art. 3), manufacturing, collecting or storing firearms, ammunition, explosive materials or devices or other objects that may pose danger to the public (art. 4), collecting or transmitting messages, documents or other objects constituting State or military secrecy (art. 7), preparing to

commit the offences referred to in art. 1, 3 or 7 (art. 13), participating in a group aimed at committing a felony, or aiding or abetting in this, or establishing such a group or managing its activities (art. 17). On the other hand, the Polish Military Criminal Code penalized military action against the Polish State, during wartime, by a person not belonging to the enemy army (art. 85), an attack on the life or health of a person who is a representative of the State or the Polish Army or Allied States or Armies (art. 86 (1)) or insulting such a person (art. 86 § 2), failure to report offences under art. 78, 79, 80, 81 and 86 at a time when the intended acts could still have been prevented (art. 87), public incitement to overthrow, infringe or undermine the Polish state authority or to commit the offences referred to in art. 78, 79, 83, 85, 86 or to approve them, and the drawing up, dissemination and storage of written documents, prints or images inciting to commit such a crime or containing approval of such a crime (art. 88).

The penalty range for the basic type was increased (up to 5 years in prison), and in the aggravated type, when the perpetrator was a person holding a position of authority in the field of central or local government administration – up to 10 years. Pursuant to art. 18 (3), in minor cases, the court could apply extraordinary leniency or even release the offender from punishment. A person who failed to report a crime did not commit a crime if, he had sufficient grounds, based on the circumstances, to believe that the authorities knew about the crime (art. 18 § 3). The court could apply extraordinary leniency or even release from punishment a person who failed to notify for fear of criminal liability for themselves or their spouse, relatives in the straight line or siblings. The extraordinary leniency or release from punishment did not apply to perpetrators of the aggravated type under § 2 (art. 18 § 3).

The Penal Code of 1969 based the construction of the analyzed crime (described in art. 254) on the solution applied in the Decree of 13.06.1946, but with certain modifications: participation in a group aimed at committing a felony and possession and manufacture of firearms, ammunition, explosive materials or devices was abandoned, while the crime of homicide was added.

According to I. Andrejew, W. Świda, W. Wolter, "art. 254 corresponds to art. 18 of the Little Criminal Code, but it was considered that the obligation to report a crime should be specified in more detail, and it seems particularly important to emphasis the need to notify about the circumstances of the crime, which should be understood as the circumstances necessary to disclose the crime and hold the perpetrator criminally liable. The Code has disregarded the aggravated type of offence provided for in art. 18 § 2 concerning an official. Such a provision was justified in the immediate post-war years during the period of the fight against the political underground" [3, p. 794].

The Penal Code of 1997 (in art. 240) expanded the catalogue of offences to which the legal duty to report applied. As we read in the explanatory memorandum, the Code "has changed their nature and stage of commission (criminal preparation, attempt and accomplishment). Starting from the assumption that the basic task of criminal law is to protect a good that has social value, it excludes the criminality of failure to denounce by art. 240 § 2 in cases where the person having knowledge of the planned crime himself/herself prevented its commission" [4, p. 201]. The penalty range was also reduced (from 5 to 3 years' imprisonment). The provisions of v 240 of the Penal Code of 1997 were amended five times (in 2009, 2010, 2011, 2017 and in 2022), and the modifications mostly involved expanding the catalogue of offences listed in the provision. The last of these amendments was made by art. 1 item 92 of the Act of 7.07.2022 amending the Act – Penal Code and some other acts (Journal of Laws 2022.2600) and it will enter into force on 1.10.2023.

The purpose. The purpose of this study is to comprehensively analyze of statutory elements of the crime described in art. 240 of the Polish Penal Code (punishable failure to report a crime).

Main material. *Protected object.* The protected object is the judiciary in criminal matters, and more precisely, its interest expressed in the fact that the attack on legal goods protected by the provisions listed in art. 240 § 1 be revealed, its perpetrator apprehended, and where possible, the crimes indicated therein be prevented [5, pp. 363-364]. Scholars in the field sometimes point out that the legal goods

of the victims (life, health, honor, inviolability, sexual freedom, etc.) are also an auxiliary protected object [2, p. 233].

Objective aspects. The legal obligation to notify law enforcement authorities has been connected not with the concept of crime, but with a "criminal act" (within the meaning of art. 115 § 1 of the Penal Code), in stages of commission that meet the criteria of types listed in an enumerative manner (in principle, the so-called art.-based method, except for acts of a terrorist nature defined in art. 115 § 20 of the Penal Code. [6, p. 952]. This means that there is also an obligation to notify if the offender referred to in art. 240 is not at fault [7, p. 35]. The provision under consideration provides that the basis for the obligation of denunciation is to have "reliable knowledge" of the criminal preparation, attempt or accomplishment of any of the offences listed in that provision (cf. Resolution of the Supreme Court of 1.07.2022, I KZP 5/22, OSNK 2022/9, item 32). It is therefore not a question of any knowledge of a crime, but kind of knowledge that meets a given qualitative condition. Thus, it must be information that is worthy of trust, certain, but it is not a question of absolute certainty whether the criminal act actually took place, but merely the existence of a high degree of probability that such an act occurred [8, p. 842]. As A. Marek rightly points out, the person concerned is not obliged to verify the facts, nor is he liable when the alleged offence is found not to have been committed, although the circumstances indicated so [9, pp. 526-527]. S. Cora concludes that a credible piece of news is one that can be proved as probable, and that the probability proof requires the fulfilment of both the objective condition (objective demonstrability of the evidence) and the subjective condition (internal belief of the reporting person) [10, p. 265; 7, p. 35]. A contrary, there is no obligation to denounce on the basis of unreliable news [6, p. 952]. The report must not only indicate the specific criminal act as such, but also the relevant circumstances and the person of the offender, which also applies to a situation where the law enforcement authority is aware of the crime committed but has no knowledge of the offender [11, p. 33 et seq.].

The report must be made promptly, that is within the shortest possible time, once the person concerned became aware from a reliable source of the fact that the criminal act had occurred [12, p. 54]. As pointed out by scholars in the field, the determination of the precise temporal scope of the term "promptly" depends on the very situation in which the person happened to be [13, pp. 1373-1374].

The conduct of the offender consists in failure to notify (promptly) the body responsible for prosecuting crimes by a person having credible information about the punishable preparation, attempt or accomplishment of the prohibited acts referred to in § 1; failure to notify about any prohibited act not listed in art. 240 § 1 of the Penal Code is not a crime [14, p. 181; 6, p. 934]. The obligation to promptly notify the authority appointed to prosecute crimes (in the wording of the provision applicable since 1.10.2023) applies to the following prohibited acts: art. 118 (genocide), art. 118a (mass attack against a group of population), art. 120 (use of means of mass destruction), art. 121 (production or accumulation of means of mass destruction or trade in them), art. 122 (use of impermissible ways or means of combat), art. 123 (attack on the life or health of prisoners of war or civilians), art. 124 (criminal violations of international law), art. 127 (coup d'état), art. 128 (attack on a constitutional body of the Republic of Poland), art. 130 (espionage), art. 134 (attack on the life of the President of the Republic of Poland), art. 140 (attack on a unit of the Polish armed forces), art. 148 (homicide), art. 148a (acceptance of an order to kill a person), art. 156 (grave bodily injury), art. 163 (causing a generally dangerous event), art. 166 (capture of a ship or aircraft), art. 189 (deprivation of liberty), art. 197 § 3-5 (rape, aggravated types), art. 198 (sexual abuse of helplessness or insanity), art. 200 (§ 1, 3, 4, 5 – pedophilia, presenting pornographic content to a minor under the age of 15, presenting the performance of a sexual act to such a minor, advertising or promoting the dissemination of pornographic content), art. 252 (hostage-taking), as well as any crime of terrorist nature (within the meaning of art. 115 § 20). Pursuant to the provisions of the general part of the Penal Code, an attempt is punishable in any case (art. 13 and 14), and preparation only when the law so provides (art. 16 § 2). Of the group of prohibited acts listed in art. 240 § 1, preparation is punishable in the event

of unreported crimes under art. 118 § 1 and § 2 (pursuant to art. 126c § 1), art. 118a (art. 126c § 2), art. 120 (art. 126c § 1), art. 122 (art. 126c § 2), art. 123 (art. 126c § 2), art. 124 § 1 (art. 126c § 3), art. 127 § 1 (art. 127 § 2), art. 128 § 1 (art. 128 § 2), art. 140 § 1 (art. 140 § 3), art. 148 § 1-3 (art. 148 § 5), art. 163 § 1 (art. 168), art. 166 § 1 (art. 168), art. 252 § 1 (art. 252 § 3). In other cases, preparation is not punishable.

In the case of a terrorist offence, it is a criminal act punishable by a custodial sentence of at least 5 years, the Republic of Poland or another State or body of an international organization to take or refrain from certain acts; causing serious disturbances to the system or economy of the Republic of Poland, another country or international organization, as well as the threat of such an act. A terrorist offence is a criminal offence punishable by a maximum term of imprisonment of at least 5 years committed in order to cause serious intimidation of many people, force a public authority of the Republic of Poland or another state or body of an international organization to take or refrain from certain actions, cause serious disturbances in the system or economy of the Republic of Poland, another state or international organization, as well as the threat of such an act (art. 115 § 20 of the Penal Code).

It should be borne in mind that in addition to the obligation laid down in art. 240 of the Penal Code, there is also a social duty to report a crime, as laid down in art. 304 § 1 of the Code of Criminal Procedure, which provides that anyone who becomes aware of a criminal offence prosecuted ex officio has a social duty to inform the prosecutor or the police. In accordance with art. 304 § 2 of the Code of Criminal Procedure, state and local authorities which, due to their activities, have become aware of the commission of a crime prosecuted ex officio are required to immediately notify the public prosecutor or the police and take the necessary measures until the arrival of an authority appointed to prosecute the offence or until such authority issues an appropriate order to prevent concealment of the traces and evidence of the offence. Sometimes the failure to abide by the provision referred to in art. 304 § 2 of the Code of Criminal Procedure may constitute an offence under art. 231 § 1 or 2 of the Penal Code, i.e., the so-called abuse of position (judgement of the Supreme Court of 12.02.2008, WA 1/08, OSNKW 2008/4, item 31).

Art. 240 § 1 concerns the notification of the authority appointed to prosecute crimes. This includes the public prosecutor's office, the police, the Internal Security Agency (Agencja Bezpieczeństwa Wewnętrznego), the Customs Service (Służba Celna), the Central Anti-Corruption Bureau (Centralne Biuro Antykorupcyjne), the Military Gendarmerie (Żandarmeria Wojskowa) and other bodies referred to in special provisions (art. 311 and 312 of the Code of Criminal Procedure) and no specific form is required (may be oral, written, telephone or by e-mail). It is sufficient that any prosecution authority is notified, there is no need to notify the specific body competent to prosecute a particular offence (e.g., the police are notified instead of the Internal Security Agency or vice versa) [15, p. 249].

This is a formal crime (not characterized by effects) which can only be committed by omission.

Subject and subjective aspects. The perpetrator of the offence under art. 240 § 1 may be anyone who has reliable knowledge about the prohibited act listed in the provision, of course apart from the original perpetrator of the crimes listed in this provision – cf. e.g., judgement of the Court of Appeal in Białystok of 20.01.2005, II AKa 345/04, OSAB 2005/3, item 43 (the so-called crime that is individual in terms of act). A different view is presented by M.Szewczyk, W.Zontek, A.Wojtaszczyk claiming that this is a generally-defined perpetrator offence [5, p.364]. Opinions on the subjective aspects vary. Some authors argue that it can only be committed with direct intent [16, p. 1594; 15, p. 253; 17, p. 317], while others rightly accept both dolus directus and dolus eventualis [13, p. 1374; 8, p. 843; 9, p. 527; 18, p. 309; 5, p. 372].

Exclusion of criminal liability. Under art. 240, whoever has failed to report, being convinced (or more precisely, having sufficient grounds to suppose so) that the law enforcement authority is already aware of the crime (either at the stage of preparation, attempt or accomplishment), does not commit the crime referred to in § 1. This conviction in the person who fails to report must be assessed according to objective criteria, and it is not sufficient to rely on subjective belief (which is not based

on any rational arguments or circumstances). This conviction may result, for example, from the fact that the act was committed in a public place and in the presence of many people, or that the person saw police officers on the scene of the event, [9, p. 526]. The law also provides for the non-criminality of an act where the person failing to report a crime has prevented its commission. On the other hand, art. 3 provides for non-punishability (and not, as in § 2, non-criminality) where the person concerned failed to report for fear of criminal liability against the very person or his/her immediate family. The immediate family members include the spouse, ascendant, descendant, sibling, affiliate in the same line or degree, the person in an adoption relationship and his/her spouse, as well as a cohabiting person (art. 115 § 11 of the Civil Code).

According to the wording of the provision of § 2a, the aggrieved party that fell victim to the act listed in art. 240 § 1 who has failed to report the crime shall not be punished. It is sometimes stated in scholarly opinion that the provision of § 2a is redundant [8, p. 843]. It is to be assumed that the victim of a particular offence cannot be the perpetrator of failure to report that offence, and therefore the introduction of a non-punishment clause is superfluous. However, some authors consider that a perpetrator of that crime may also be the aggrieved party, although they admit that it is difficult to accept such a view from an axiological perspective [19, p. 110; 6, p. 951].

Professional secrecy and the obligation to denounce under art. 240 of the Penal Code. The obligation of denunciation laid down in art. 240 PC does not constitute a standalone condition for waiving the statutory obligation to maintain certain secrecy (e.g., the medical, journalistic secrecy, the seal of confession). According to the scholarly opinion, the obligation of denunciation thus described is universal, whereas the rules relating to the obligation of secrecy are not universal, but are always addressed to a particular category of persons. In this perspective, art. 240 is therefore a provision that is general in relation to the rules on the secrecy obligation which, in such a context, have the status of special provisions. This means that the obligation set out in art. 240 may only abrogate statutorily the obligation of secrecy to the extent to which special provisions allow such a possibility [5, p. 371]. Under the currently applicable legislation, of the absolute nature seems to be, for example, the defense counsel secrecy obligation or the seal of confession [20, p. 156 et seq.] (as there are no specific provisions which would constitute grounds for its abrogation as regards the information referred to in art. 240 of the Penal Code). This is not the case for journalistic secrecy, for which art. 16(1) of the Act of 26.01.1984 The Press Law (consolidated text Journal of Laws 2018.1914) explicitly stipulates that a journalist is exempt from professional secrecy in a situation where the information, press material, letter to the editorial board or other material of that nature concerns an offence defined in art. 240 (1) of the Penal Code. However, some divergences in the doctrine concern medical secrecy. In this case, art. 40 (2) of the Act of 5.12.1996 on the professions of medical and dental practitioners provides, inter alia, that a medical practitioner is exempted from the obligation to keep confidentiality where statutory provisions so provide. It is correct to take the view that such a general reference to "other laws" does not exempt a medical practitioner from the obligation of secrecy in the context of art. 240 of the Penal Code, since the latter provision contains no proviso regarding medical secrecy [5, p. 372]. A different interpretation in this matter is provided by L. Wilk [11, p. 39] and L. Gardocki [21, p. 306]. However, attention should be paid to art. 11 (8) of the Act of 31 January 1959 on cemeteries and burial of the deceased (consolidated text Journal of Laws 2020.1947) stating that in the event of a reasonable suspicion that the cause of death was a crime, the medical practitioner (as well as other persons appointed to inspect the corpse) should immediately notify the competent prosecutor or the nearest police station. This means that in such a case the doctor is exempted from the obligation of professional secrecy and is subject to the mandatory requirement of art. 240 of the Penal Code.

Penal sanction. The offence under analysis is punishable with the penalty of imprisonment of up to 3 years. If the penalty of imprisonment imposed does not exceed one year, then it is possible to conditionally suspend its execution (art. 69 of the Penal Code). Pursuant to art. 37a of the Penal Code, if the

penalty imposed for the offence would not be more severe than one year, then the court may instead impose a penalty of restriction of liberty for at least 3 months or a fine of at least 100 day-fine units, if it simultaneously imposes a penal measure, compensatory measure or forfeiture. It should be noted that starting from 1.20.2023, the court will be able to impose in such a case a penalty of restriction of liberty of at least 4 months or a fine of at least 150 day-fine units. The so-called mixed penalty (defined in art. 37b) may also be applied. It is possible to waive the imposition of a penalty (art. 59 of the Penal Code) or to use the institution of conditional discontinuation of criminal proceedings (art. 66 of the Penal Code).

Statistics on initiated cases and crimes under art. 240 of the Criminal Code of the Republic of Poland for the years 1999-2020 can be found on the website "Statystyka" [22].

As can be seen from the above statistical data, the number of found offences under art. 240 § 1 of the Penal Code is small, but it can be assumed that the so-called dark number concerning this category of crimes is significant. In the period under analysis (1999-2020), the most crimes were identified in 2003 and 2004 (43 each), and the least in 2014 and 2017 – 5 each. Naturally, the number of convictions is even smaller: in 2008 – 10, in 2009 – 12, w 2010 – 12, in 2011 – 7, in 2012 – 4, in 2013 – 6, in 2014 – 2, in 2015 – 6, in 2016 – 3, in 2017 – 2, in 2018 – 5, in 2019 – 6, in 2020 – 5 [23].

Conclusions. It must be concluded that the statutorily defined elements of the offence of failure to report a crime are, as a rule, formulated correctly. Some doubts arise as to whether the catalogue of offences listed in that provision is not too broad. As previously noted, interpretive differences arise in the context of a conflict between the requirement of professional secrecy and the obligation to denounce under art. 240 of the Penal Code.

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Марта Мозгава-Сай

ПОКАРАННЯ ЗА НЕПОВІДОМЛЕННЯ ПРО ЗЛОЧИН У ПОЛЬСЬКОМУ КРИМІНАЛЬНОМУ ЗАКОНОДАВСТВІ

Університет Марії Кюрі-Склодовської
площа Марії Кюрі-Склодовської, 5, 20-031, Люблін, Польща
E-mail: marta.mozgawa-saj@poczta.umcs.lublin.pl

Мета: *проведення аналізу статутних елементів злочину, описаного у ст. 240 Кримінального кодексу Польщі (карне неповідомлення про злочин).* ***Методи:*** *основним методом, що використовується при аналізі, є юридичний догматичний метод.* ***Результати:*** *аналіз вказує на те, що у випадку дії ст. 240 Кримінального кодексу об'єктом, що охороняється, є судова влада у кримінальних справах. Обов'язок повідомляти про кримінальні злочини (ті, що перераховані в розглянутому положенні і терористичні злочини) покладається на всіх, хто достовірно знає про кримінальну підготовку або спробу або вчинення такого злочинного діяння. Такий звіт, адресований органу, призначеному для переслідування кримінальних правопорушень, повинен бути зроблений негайно. Це формальне правопорушення (не характеризується його наслідками), індивідуальне щодо діяння, яке може бути вчинене в обох формах умислу (dolus directus і dolus eventualis). Кримінальне законодавство передбачає три випадки виключення кримінальної відповідальності за злочин, передбачений ст. 240 (зазначений у ч.ч. 2, 2а і 3 ст. 240).* ***Обговорення:*** *є сумніви, чи є каталог злочинів, на які поширюється зобов'язання денонсації, занадто широким чи ні. Розбіжності в тлумаченні виникають у контексті конфлікту між необхідністю збереження професійної таємниці та обов'язком денонсувати ст. 240 Кримінального кодексу. Необхідно дійти висновку, що законодавчо визначені елементи складу злочину неповідомлення про злочин, як правило, сформульовані правильно. Виникають певні сумніви щодо того, чи каталог правопорушень, перелічених у цьому положенні, не є надто широким. Як зазначалося раніше, інтерпретаційні розбіжності виникають у контексті конфлікту між вимогою професійної таємниці та обов'язком денонсувати ст. 240 Кримінального кодексу РП.*

Ключові слова: *достовірні новини; кримінал; донос; оперативність; орган, призначений для притягнення до відповідальності.*

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