Faculty of Law and Administration
University of Szczecin

Court of Appeal in Szczecin
Voivodeship Administrative Court in Szczecin

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30)

Wydawnictwo Naukowe Uniwersytetu Szczecińskiego

Enhancing the academic level and internationalization of the journal Acta Iuris Stetinensis – a task financed under agreement 638/P-DUN/2019 from the funds of the Minister of Science and Higher Education allocated for activity popularizing science.

Publication of the journal co-financed from the funds of the Ministry of Science and Higher Education under agreement no. 384/WCN/2019/1 of 16 July 2019 which constitute aid granted under the programme "Support for academic journals".

The journal was published thanks to the financial support of the Court of Appeal in Szczecin and the Voivodeship Administrative Court in Szczecin

The paper version is the original version

Full version of the publication available at: https://wnus.edu.pl/ais/en/

Summaries of published papers are available online in the international database: Central European Journal of Social Sciences and Humanities, cejsh.icm.edu.pl | Central and Eastern European Online Library (CEEOL), www.ceeol.com | BazHum, bazhum.muzhp.pl | Directory of Open Access Journals (DOAJ), doaj.org | European Reference Index for the Humanities and Social Sciences (ERIH PLUS)

ISSN 2083-4373 | e-ISSN 2545-3181

WYDAWNICTWO NAUKOWE UNIWERSYTETU SZCZECIŃSKIEGO

Wydanie I. Ark. wyd. 7,5. Ark. druk. 7,4. Format B5. Nakład 172 egz.

Contents

ARTICLES

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 5–20
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-01

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Limitation of constitutional guarantees of cultural rights in a time of pandemic

Abstract

The presented paper of a contributory character is aimed at examining the extent to which the constitutional guarantees of cultural rights were limited in a time of pandemic. Furthermore, the paper aims to answer the question of whether the introduced limitations in cultural rights were compliant with the principle of proportionality, if they were adequate to the actual state of affairs and whether the implemented legal measures ensured the effectiveness of law implementation. The legal sources analysed herein provide an answer to the question of whether the state has ensured alternative forms of enjoyment of products of culture and if it was obliged to do so. The paper focuses on a detailed analysis of the scope of the constitutional guarantees of cultural rights and the legal acts regulating the current state of the COVID-19 pandemic. Methods typical for legal sciences have been used herein, primarily the methodology of examining applicable laws. The legal norms analysed in the paper are included in the Constitution of the Republic of Poland, specific statutes and implementing regulations.

Keywords: cultural rights, right to participate in cultural life, limitation of human rights, pandemic, COVID-19

Introduction

In the 21st century, in European democratic states, the general belief in the existence of strong protection of human rights, including so-called cultural rights, seems to be so high that the situations of limiting these rights could be considered as non-existent in the awareness of the general public. Constitutional provisions allowing for limitation of these rights in special situations often seem hypothetical, and the norms stipulating states of emergency can only remind one of the martial law introduced in the years 1981–83 and the era of the Polish People's Republic and thus seem to be more archaic. Meanwhile, on 11 March 2020, due to the new type of coronavirus, SARS-CoV-2, and cases of COVID-19 disease quickly spreading throughout the world, the World Health Organization (WHO) announced a state of pandemic.1 On 20 March 2020, pursuant to the Regulation of the Minister of Health, a state of epidemic was announced in the territory of the Republic of Poland, which gave the possibility to introduce restrictions provided by the law.2

This paper, which is of a contributory character, is aimed at examining the extent to which the constitutional guarantees of cultural rights were limited in a time of pandemic. Furthermore, the paper aims to answer the question of whether the introduced limitations in cultural life were compliant with the principle of proportionality, if they were adequate to the actual state of affairs and whether the implemented legal measures ensured the effectiveness of law implementation. Finally, the legal sources analysed herein provide the answer to the question if the state has ensured alternative forms of enjoyment of products of culture and if it was obliged to do so.

Methods typical for legal sciences have been used herein, primarily the methodology of examining existing laws. The legal analysis covered the legal norms included in the provisions of the Constitution of the Republic of Poland, specific statutes and regulations concerning the state of epidemic, as well as local law acts concerning the functioning of cultural institutions.

1 World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19,* 11.03.2020, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remaraks-at-the-media-briefing-on-covid-19---11-march-2020 (accessed 13.06.2020).

2 Regulation of the Minister of Health of 20 March 2020 on the announcement of the state of epidemic in the territory of the Republic of Poland – Dz.U. (Journal of Laws) 2020 item 491.

Constitutional guarantees of cultural rights

In the doctrine of human rights, apart from economic and social rights, cultural rights are, in principle, included in the concept of second generation rights; they primarily include the right to access products of culture and participate in cultural life.[3] Contrary to first generation rights (civil and political rights), which have a character of rights with immediate effect, second generation rights are of a progressive nature, i.e. execution of these rights depends on the level of the state's development, including economic condition.[4]

Cultural rights belong to the group of the so-called derogable rights. It is possible to revoke their validity in exceptional situations.[5] In the doctrine of human rights, the ban on slavery, the ban on torture, the ban on inhumane treatment and

3 Drzewicki, K., *Prawa człowieka,* in: Przyborowska-Klimczak, A. and Pyć, D. (eds.), *Leksykon prawa międzynarodowego publicznego. 100 podstawowych pojęć*, Warszawa 2012, p. 350. Cultural rights are not limited only to second generation rights. Rights included in this group can be found among the rights of all generations – the right to freedom of artistic expression and creation (first generation), the right to access products of culture and participate in cultural life (second generation), the right to mutual heritage of humanity (third generation), the right of minorities to preserve their culture (fourth generation). See: Kosińska, A., *Horyzontalne stosowanie praw kulturalnych,* in: Młynarska-Sobaczewska, A. and Radziewicz, P. (eds.), *Horyzontalne oddziaływanie konstytucji Rzeczypospolitej Polskiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności,* Warszawa 2015, p. 176. In the established scholarship, apart from classical cultural rights of the second generation, other cultural rights are also discussed. The source of distinguishing these rights consists in the so-called Fribourg Declaration on Cultural Rights of 2007. It is not a legally binding act; however, it enumerates rights such as: the right to respect individual's cultural identity, the right to learn about and respect own culture, the right to access cultural heritage, the freedom of cultural expression in a public or private space and the right to education and information, as rights related to participation in cultural life and the right to cultural cooperation – see: Kosińska, A., *Prawa kulturalne obywateli państw trzecich w prawie Unii Europejskiej*, Lublin 2018, p. 24.

4 The issues related to the uniform classification of cultural rights are also commented on sceptically by A. Młynarska–Sobaczewska, who notices that "(…) such a classification of the right to participate in culture is slightly misleading"; Młynarska–Sobaczewska, A., *Prawo do kultury*, Warszawa 2018, p. 63.

5 In compliance with Article 233 of the Constitution of the Republic of Poland, "1. The statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41 para. 4 (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children). 2. Limitation of the freedoms and rights of persons and citizens only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be prohibited."

the right to life are considered to be non-derogable rights.[6] Apart from revocation, it is also possible to limit human rights via so-called limitation clauses. In principle, human rights do not have a character of absolute rights, thus, it is possible to limit them in a justified situation, e.g. in order to protect the rights of other persons.[7]

In the Constitution of the Republic of Poland, cultural rights were regulated in an incomplete manner; this results from the fact that the right to access products of culture and participate in cultural life was included in Chapter I "The Republic of Poland" in Articles 5 and 6, which include so-called general rules, and thus, subjective rights cannot be deduced therefrom.[8] The only regulated and constitutionally guaranteed (in Chapter II of the Constitution) right of a cultural character or, in fact, cultural freedom *in se* is the freedom of artistic creation and the freedom to enjoy products of culture guaranteed in Article 73 of the Constitution of the Republic of Poland.[9] This provision is the only one that includes guarantees of the so-called broadly understood cultural rights in Chapter II of the Constitution of the Republic of Poland.[10] Whereas it should be noted that Chapter II does not stipu-

6 Gronowska, B. et al., *Prawa człowieka i ich ochrona*, Toruń 2010, p. 221.

7 Wiśniewski, A., *Klauzula limitacyjna,* in: Balcerzak, M. and Sykuna, S. (eds.), *Leksykon ochrony praw człowieka. 100 podstawowych pojęć*, Warszawa 2010, p. 189.

8 Thus, in compliance with Article 5, "The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development." Whereas in compliance with Article 6 par. 1, "1. The Republic of Poland shall provide conditions for the people's equal access to products of culture which are the source of the Nation's identity, continuity and development." The Constitution of the Republic of Poland of 2 April 1997, adopted by the National Assembly on 2 April 1997, approved by the Nation in the Constitutional Referendum on 25 May 1997, signed by the President of the Republic of Poland on 16 July 1997 (Dz.U. (Journal of Laws) of 1997 No. 78 item 483 as amended). As underlined by P. Tuleja, "Article 5 of the Constitution stipulates the basic aims of the Republic of Poland. They were expressed in the form of programme principles. They indicate the directions of the state's activities; however, they do not stipulate the means and manners of execution thereof. In Article 5, the legislator imposes on all public authorities the obligation to execute indicated aims." Tuleja, P., *Komentarz do art. 5 Konstytucji*, in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, www.lex.sip.pl (accessed 10.05.2020).

9 In compliance with Article 73 of the Constitution of the Republic of Poland, "The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy products of culture, shall be ensured to everyone." For more on the subject matter of the concept of "products of culture" not identified in the Constitution of the Republic of Poland, see: Frankiewicz, A., *Znaczenie prawne regulacji dziedzictwa narodowego i dóbr kultury w Rozdziale I Konstytucji RP*, "Przegląd Prawa i Administracji" 2012, No. 88, pp. 9–22.

10 Kosińska, A., *Szczególny charakter praw kulturalnych i ich miejsce w Konstytucji RP – próba charakterystyki i kwalifikacji*, "Przegląd Prawa Konstytucyjnego" 2013, No. 3, p. 22.

late any cultural right of a restitutionary nature (second generation right), apart from Article 35 guaranteeing the rights of national minorities. Thus, guarantees of cultural rights in the Polish Constitution should be considered as incomplete and insufficient.

As underlined by Paweł Sarnecki, "Article 6 is formulated in a much more definite manner than Article 5; therefore, it should be classified as one of the more specific principles of the state policy"[11] – principles of implementation of state policies in the area of ensuring access to products of culture are regulated by legal norms included in specific statutes, such as e.g. the Act on museums, the Act on libraries or the Act on cinematography.

For comparison, the sphere of cultural rights was regulated in a different manner guaranteeing execution thereof to a fuller extent in the Constitution of the Czech Republic. Reference to culture and national heritage was included in the Preamble,[12] whereas Article 3 introduces the Charter of Fundamental Rights and Freedoms as an integral part of the constitutional order of the Czech Republic.[13] Such a solution unburdens the fundamental law, and with regard to the access to products of culture, it references in Article 34 par. 2 specific statutes. A similar solution, providing for attaching the Charter of Fundamental Rights and Freedoms to the Constitution of the Republic of Poland, as well as detailed regulations on access to products of culture, was included in the draft of the Constitution submitted by President Lech Wałęsa.[14]

Standards of cultural rights' guarantees are also stipulated on the grounds of international agreements binding the Republic of Poland. In the universal system for the protection of human rights, these are the International Covenant on Civil and Political Rights[15] and the International Covenant on Economic, Social and Cultural Rights.[16] States Parties to the International Covenant on Economic, Social

11 Sarnecki, P., *Komentarz do art. 6 Konstytucji RP,* in: Garlicki, L. and Zubik, M. (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I, wyd. II*, Wydawnictwo Sejmowe 2016, www.sip.lex.pl (accessed 11.05.2020).

12 Constitution of the Czech Republic of 16 December 1992, constitutional act no. 1/1993 Coll., Sb. English version of the Constitution available at – http://www.servat.unibe.ch/icl/ez00000_.html (accessed 11.05.2020).

13 Charter of Fundamental Rights of the European Union, OJ C 202, 7.06.2016, pp. 391–407, p. 389.

14 Kosińska, A., *Szczególny charakter praw*…, p. 23.

15 International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, pp. 171–346.

16 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, pp. 3–106.

and Cultural Rights were given the freedom of creating own policy in order to implement the provisions of the Covenant, and in compliance with the progressive character of second generation rights, "(…) achieving progressively the full realisation of the rights (…)"[17] was permitted. Particular focus was placed on the ban on discrimination due to sex. Apart from Article 2 par. 2, in which the obligation not to discriminate on the basis of sex was enumerated among factors such as race, colour, language, religion, political opinion, national or social origin, property status or birth, Article 3 was devoted to the issue of guaranteeing equal access of women and men to exercising economic, social and cultural rights. Article 15 includes guarantees of such cultural rights as the right of everyone: "to take part in cultural life; to enjoy the benefits of scientific progress and its applications; to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". In order to reinforce the mechanism of controlling adherence to the rights enumerated in the Covenant, the Optional Protocol was adopted,[18] in which States Parties recognise the competence of the Committee on Economic, Social and Cultural Rights to consider cases concerning infringement of second generation rights. Poland ratified both Covenants; however, it has not yet decided to join the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.[19] However, three mechanisms of control included in the protocol: an individual complaint, so-called complaint between States Parties to the Protocol, as well as initiation of proceedings by the Committee on its own initiative (whereas, in the case of two last mechanisms, on the condition of a consent of the State Party whom the proceedings concern), do not include sanctions *per se*. Proceedings before the Committee are completed with a report including conclusions and recommendations for the State Party to the Covenant.

The European (regional) system for the protection of human rights with acts binding the Republic of Poland includes the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as: ECHR).[20] The ban on discrimination is guaranteed by Article 14 of the ECHR, in compliance with which "the enjoyment of the rights and freedoms set forth in this Convention

17 Ibidem, Article 2(1).

18 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution adopted by the General Assembly, 5 March 2009, A/RES/63/117.

19 Current States Parties to the Protocol, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en (accessed 19.05.2020).

20 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The ECHR itself does not provide for the protection of second generation rights, and thus, the protection of cultural rights has not been guaranteed (the Convention does not even guarantee the freedom of artistic creativity despite the fact that this freedom is included in the first generation of human rights). Cultural rights *sensu largo* are included in optional protocols (e.g. in Protocol 1 – Article 2 guarantees the right to education). Despite the above, the European Court of Human Rights, which guarantees adherence to the ECHR, by reinterpretation of Convention's Articles, distinguished cultural rights *sensu largo.* The reinterpretation primarily covered Article 8 (the right to respect for private and family life), Article 9 (the right to freedom of thought, conscience and religion) and Article 10 (the right to freedom of expression),[21] from which the right to freedom of artistic creativity, as well as the right to participate in cultural life, as e.g. in the case of Mustafa and Tarzibachi,[22] were distinguished.

Moreover, guarantees of the protection of fundamental rights in the EU legal system do not provide for full protection of cultural rights. The Charter of Fundamental Rights[23] was adopted by Poland and the United Kingdom with reservations expressed in the so-called British Protocol,[24] in compliance with which guarantees of rights expressed in the Charter cannot exceed those binding in national law. Article 22 of the Charter of Fundamental Rights, included in Chapter III "Equality", stipulates that "The Union shall respect cultural, religious and linguistic diversity." The genesis of establishing the European Union consisted in the need of regulating economic relations; therefore, competences of the Union have a supportive character (pursuant to Article 6 of the TFEU),[25] and thus, cultural rights are protected primarily at the national level.

21 ECtHR, *Cultural rights in the case-law of the European Court of Human Rights*, Council of Europe/ European Court of Human Rights, January 2011, p. 4.

22 Case 23883/06 *Khurshid Mustafa and Tarzibachi v. Sweden*, ECLI:CE:ECHR:2008:1216JUD-002388306.

23 Charter of Fundamental Rights of the European Union, OJ C 202, 7.06.2016, pp. 389–405.

24 Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom to the Treaty on the Functioning of the European Union, OJ C 326, 12.10.2012, pp. 313–314.

25 Treaty on the Functioning of the European Union, consolidated version, OJ C 202, 7.06.2016, pp. 47–390.

Legal regulations concerning the state of epidemic and the state of epidemic threat in the context of realisation of guarantees of cultural rights and implementation thereof

Article 31 par. 3 of the Constitution of the Republic of Poland, included in Chapter II "The freedoms, rights and obligations of persons and citizens", formulates a general limitation clause of the following wording: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights." This clause opens, upon fulfilment of conditions included therein, the possibility to stipulate, under a statute, limitations on benefiting from constitutionally guaranteed freedoms and rights, as well as those included in Article 73 and concerning the freedom of artistic creativity and the freedom to benefit from products of culture. Furthermore, an important condition consists in these limitations not infringing upon the essence of freedoms and rights. Therefore, a question arises regarding the essence of the freedom of artistic creativity and the freedom to benefit from products of culture. The catalogue of rights constituting particular guarantees of fundamental rights is wide. This causes difficulties in specifying the essence of these freedoms. One may attempt to describe this essence negatively. An infringement of the essence of the freedom of artistic creativity would consist in a ban on all forms of realisation thereof, whereas, in the case of the freedom of benefiting from products of culture, preventing access thereto in any form. Undoubtedly, the essence of these freedoms will not be infringed upon solely by a ban on organising artistic events or closing a museum for visitors. These are only some of many manifestations of realising the guarantee of a specific cultural right.

In the discussed period of the SARS-CoV-2 pandemic, the basic legal act allowing limitation of cultural rights was the Act of 5 December 2008 on preventing and combating infections and infectious diseases among people.[26] In compliance with Article 46 par. 2 of the Act, "If an epidemic threat or epidemic is present in the area of more than one voivodeship, the state of epidemic threat or the state of epidemic

26 Act of 5 December 2008 on preventing and combating infections and infectious diseases among people, Dz.U. (Journal of Laws) 2008 No. 234, item 1570 as amended. Pursuant to Article 3 par. 2 of this Act, under the Regulation of the Minister of Health of 27 February 2020 on infection by SARS-CoV-2, Dz.U. (Journal of Laws) 2020 item 325, infection by SARS-CoV-2 was covered with provisions thereof.

is announced and recalled, under a regulation, by the Minister of Health in agreement with the Minister of Interior and Administration, upon the request of the Chief Sanitary Inspector." Whereas par. 4 of Article 46 specifies what limitations, bans, orders and obligations can be stipulated in the regulation. These are the following: "(…) 1) temporary limitation of a specific way of movement, 2) temporary limitation of or a ban on the turnover and use of specific objects or foodstuff, 3) temporary limitation of operations of specific institutions or places of employment, 4) a ban on organising shows and other gatherings, 5) an obligation to perform specific sanitary treatments, if performance thereof is related to the operations of specific production, service provision, commercial or other facilities, 6) an order to provide access to property, premises, terrains and to provide means of transport for anti-epidemiological activities specified in anti-epidemiological plans, 7) an obligation to perform preventive vaccinations (…)".[27]

Another act providing wide competences to voivodes (and, upon the request of the voivode, to the Prime Minister) was the Act of 2 March 2020 on specific solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them.[28] Pursuant to this Act, with regard to the prevention of COVID-19, it became possible for voivodes to issue orders subject to immediate execution in relation to all government administration authorities operating in the voivodeship and state legal persons, local government authorities, self-government legal persons and unincorporated local government units. Such orders, upon the voivode's request, can also be issued by the Prime Minister with regard to legal persons and unincorporated organisations, as well as entrepreneurs. The above orders can be issued "orally, by phone, by means of electronic communication or other means of communication".[29]

With regard to the limitation of cultural rights, the Act of 25 October 1991 on organising and running cultural activity should also be mentioned.[30] This Act

27 "(…) considering the channels of spreading infections and infectious diseases, as well as the epidemic situation in the area where the state of epidemic threat or the state of epidemic has been announced" – see full text of Article 46 par. 2.

28 Act of 2 March 2020 on specific solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them, Dz.U. (Journal of Laws) 2020 item 374, Article 11(1), (2), (7).

29 Act on specific solutions…, op. cit., Article 11(10).

30 Act of 25 October 1991 on organising and running cultural activity, Dz.U. (Journal of Laws) 2020 item 194.

includes the voivode's authorisation to order suspension of organisation of artistic events in the territory of the voivodeship or a part thereof to prevent an epidemic.[31]

On 11 March 2020, a week after disclosing the first case of COVID-19 in Poland, during the meeting of the Government Crisis Management Team[32] with the participation of the Minister of Culture and National Heritage, it was decided to temporarily close, as of 12 March 2020, cultural institutions, philharmonics, operas, operettas, theatres, museums, cinemas, community centres, libraries, art galleries and schools, universities and artistic education facilities.[33] Simultaneously, by orders of voivodes in all voivodeships, as of 12 March 2020, organisation of artistic and entertainment events, in particular in: theatres, operas, operettas, philharmonics, cinemas, museums, community centres and art galleries, was suspended. Furthermore, all planned events were cancelled, about which the society was also informed via institutions' social media profiles. Thus, at this stage, both the freedom of artistic creativity and the freedom to benefit from products of culture were indirectly limited. What is interesting is that there was no consistent narration of various cultural institutions with regard to the grounds for closing them. In the case of the Lublin Museum, it was stated that it had been the decision of the Minister of Culture and National Heritage, the Historical Museum in Sanok informed it was the government's decision, whereas the National Museum in Warsaw stated the decision made by the crisis management centre with the participation of the Minister of Culture and National Heritage.[34] This can be explained with, on the one hand, the parallel actions of voivodes, whose competences pursuant to the Act of 2 March 2020 on specific solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them

31 Ibidem, Article 37(2) in conjunction with Article 2.

32 The Government Crisis Management Team is an opinion-forming and advisory authority, relevant in initiation and coordination of measures undertaken in the scope of crisis management (Act of 26 April 2007 on crisis management, Dz.U. (Journal of Laws) 2019, item 1398, Articles 8 and 9).

33 *#Koronawirus: Zawieszenie działalności instytucji kultury i placówek szkolnictwa artystycznego*, 11.03.2020, Ministry of Culture and National Heritage, https://www.gov.pl/web/kultura/zawieszenie-dzialalnosci-instytucji-kultury-i-placowek-szkolnictwa-artystycznego (accessed 18.06.2020).

34 Example of information from the Facebook profile of the Lublin Museum https://www.facebook.com/MuzeumLubelskie/posts/2879188922138228, the Historical Museum in Sanok https://www.facebook.com/muzeumhistoryczne.wsanoku/posts/1800 142033454799, or the National Museum in Warsaw https://www.mnw.art.pl/aktualnosci/muzeum-narodowe-w-warszawie-wraz-z-oddzialami-zamkniete-od-1203,590.html (accessed 18.06.2020).

included issuing orders (among others, verbally, by phone, via email).[35] Undoubtedly, by closing cultural facilities, access to products of culture was significantly limited, since the state patronage over culture and cultural policy executed by the state plays a significant role in developing Poles' cultural participation. When considering e.g. the issue of access to books, they were available at bookstores; however, as a result of closing libraries, cultural participation depended to a certain extent on financial resources. In 2018, in Poland, there were 7,925 public libraries, of which 65.4% operated in rural areas, and there were 6 million persons actively using the resources thereof.[36] Moreover, closure of cultural facilities limited collective forms of cultural participation. "In 2019, cultural centres, community centres, cultural institutions, clubs and clubrooms in total organised 243.8 thousand events, which were participated in by 37.5 million persons".[37] Due to the fact that culture is a collective phenomenon, collective participation is extremely important.

On 20 March 2020, due to the growing number of COVID-19 cases, the Regulation of the Minister of Health on the announcement of the state of epidemic in the territory of the Republic of Poland entered into force on the day of its announcement.[38] The possibility to restrict cultural rights and freedoms provided for by the Act on preventing and combating infections and infectious diseases among people was used in the construction of legal norms included in the Regulation. In Chapter 4 of the Regulation, entitled "Restrictions of the functioning of specific institutions or places of employment", par. 6 subpar. 1 point 1, activity conducted by entrepreneurs and other entities was subject to temporary limitation – in letter c) creative activity related to any collective forms of culture and entertainment; in letter d) activity related to sport, entertainment and recreation, in particular consisting in running meeting places, clubs, including dance clubs and nightclubs, as well as swimming pools, gyms, fitness clubs; in letter e) activity related to screenings of films or video recordings in cinemas, in the open air or in other places, as well as the activity of film clubs. In point 2, the activity of libraries, archives, museums and other activ-

35 Act on specific solutions…, op. cit., Article 11(7).

36 GUS, *Kultura w 2018 roku*, 30.09.2020, Warszawa, Kraków 2019, pp. 40–41, https://stat.gov.pl/obszary-tematyczne/kultura-turystyka-sport/kultura/kultura-w-2018-roku,2,16.html (accessed 24.06.2020).

37 GUS, *Działalność centrów kultury, domów kultury, ośrodków kultury, klubów i świetlic w 2019 roku*, 08.06.2020, p. 1, https://stat.gov.pl/obszary-tematyczne/kultura-turystyka-sport/kultura/dzialalnosc-centrow-kultury-domow-kultury-osrodkow-kultury-klubow-i-swietlic-w-2019-roku,9,3.html (accessed 24.06.2020).

38 Regulation of the Minister of Health of 20 March 2020, op. cit.

ity related to culture was temporarily limited, whereas in point 4, presiding over religious worship in public places, including buildings and other facilities of religious cult, was also temporarily limited.

Moreover, it was specified that the limitations referred to in par. 6 subpar. 1 points 1 and 2 consist in a complete ban on conducting activity. With regard to point 4 (exercising religious worship), it was also specified that this limitation consists in "(…) the necessity to ensure that in the course of exercising religious worship in a given area or at a given facility, there are no more than 50 persons in total, both inside and outside premises, including participants and persons presiding over religious worship." This means that while restrictions regarding point 4 actually have a limitative nature (activity consisting in exercising religious worship can still be conducted with certain restrictions), the absolute ban covered the activity of libraries, archives, museums and other activities related to culture, which, in compliance with the statutory delegation, can be covered not with a ban but a temporary restriction. It should be remembered that in the Act on preventing and combating infections and infectious diseases among people, the legislator uses, among others, the concepts of a limitation and a ban, and it seems that these concepts are not equivalent. Furthermore, it seems legitimate to formulate a conclusion *de lege ferenda*, in compliance with which, in the case of libraries, archives, museums and other institutions, it would be valid to restrict *per analogiam* exercising religious worship, the more so since benefiting from both forms of access to culture contributes to the development of cultural identity and thus execution of cultural rights.

Moreover, it should also be noticed that on the occasion of drawing up the Regulation, the guidelines given in the Regulation of the Prime Minister of 20 June 2002 on "Principles of legislative technique", which introduces the concept of episodic provisions which "(…) stipulate regulations, which introduce deviations from specific provisions and the binding period of which is explicitly specified", were not adhered to. In compliance with par. 29b, "(…) the binding period of the regulation is specified in episodic provisions in particular by: 1) specifying the calendar year or calendar years; 2) determining the start and end point of the regulation's validity, expressed with calendar days; 3) indicating the number of days, weeks, months or years that pass from the day of entering into force of the Act or specific provisions thereof." Despite the fact that this catalogue is not closed (by using the expression "in particular"), it seems that it indicates the need to provide the end date or the binding period of the episodic provision. The Act includes a delegation to stipulate in the Regulation specific restrictions or bans of a temporary nature. One should consider the character of the Regulation's provisions, for which no end date of

validity thereof was given. The Regulation only includes the binding period of the state of epidemic, whereas this period is closed with an expression "until further notice".

Chapter 5 of the discussed Regulation introduced, in compliance with the title, a ban on organising shows and other gatherings, whereas an exception to applying this ban was introduced "(…) in case the number of gathering's participants does not exceed 50 persons, including the organiser and persons acting on his behalf."

In the next stages of epidemic, the Regulation of 20 March was amended with the Regulation of 24 March by introducing, among others, a temporary ban on movement.[39] Moreover, exceptions from the ban regarding movement, among others, in order to meet necessary everyday needs and exercising or participating in religious worship, including religious activities or rituals, were stipulated. Incidentally, one can note that the introduced temporary ban on movement also influenced the freedom of benefiting from products of culture (guaranteed *nota bene* in Article 73 of the Constitution), especially with regard to access to broadly understood products of culture (such as churches and other historic backdrop in the development of e.g. cities/towns) in public space.

Conclusions

On the grounds of the source materials analysed herein, the following answers can be provided to the research theses. The first research question concerned the issue of the extent to which constitutionally guaranteed cultural rights were limited during the pandemic. It should be noted that during the pandemic, both the freedom of artistic creativity and the freedom to benefit from products of culture were limited, but only indirectly, since statutorily, on the grounds of Article 31 par. 3 of the Constitution, they were not limited. The introduced limitations did not concern constitutional freedoms and rights but particular powers being the components thereof. However, activities such as closing cultural institutions had an indirect impact on the possibilities of benefiting from products of culture.

One should then answer the question of whether the introduced limitations in cultural life were compliant with the principle of proportionality, if they were adequate to the actual state of affairs and whether the implemented legal measures

39 On the lack of legal grounds for establishing a ban on movement without the introduction of a state of emergency, see: Wilk, J., *Prawo do przemieszczania się w stanie epidemii – brak podstaw prawnych dla wprowadzania zakazu przemieszczania się*, www.lex.sip.pl (accessed 24.06.2020).

ensured the effectiveness of law implementation. Taking into account the answer to the first question regarding the level of limitation of constitutionally guaranteed cultural rights and the fact of the lack of introduction of statutory limitations on the grounds of Article 31 par. 3 of the Constitution, in principle, it is not necessary to answer this question. Incidentally, it can be noted that the legal measures applied in order to limit cultural activity for the period of a pandemic raise certain doubts with the author with regard to the introduced total ban on visiting museums in comparison with the possibility of exercising religious worship, which was not completely banned. This issue raises certain doubts as to the proportionality of measures proposed by the legislator.

Finally, the legal sources analysed herein provide the answer to the question of whether the state has ensured alternative forms of the enjoyment of products of culture and if it was obliged to do so. None of the pandemic legal acts directly obliged cultural institutions to undertake remote activities (it is worth mentioning that the system of education and higher education was directly obliged to undertake such activities under legal norms). Despite the lack of such obligations, undertaking actual and effective activities by cultural institutions in the area of promotion and access to products of culture, primarily online, can be considered good practice.

Despite limitations in moving and organising events of an artistic and cultural nature, as well as the closing of museums, galleries and other cultural facilities, employees of these institutions, as well as the society, created and actively joined the #stayathome action.[40] In 2019, 86.7% of households had access to online resources and thus the potential possibility to have online contact with products of culture, among others, from museum collections.[41] Nevertheless, it should be remembered that together with the blessings of the Internet, that is, undoubtedly, the universality, speed and ease of access to collections the user is interested in, we also experience negative aspects of using the web – the so-called access to products of mediated culture due to the fact that "(…) poor quality of reproductions does not provide the idea of original copies. On occasion, it should be reminded that a painting – oil on canvas, fresco, watercolour – is a genuine thing, an exceptional

40 Events of a broadly understood cultural character, as well as museum collections transmitted and shared online, in particular, on the social platform Facebook, were marked with the hashtag #stayathome in order to make them easier to find and promote access to culture in a time of pandemic. See e.g. marked with #stayathome and shared online collections of KUL Museum, https://www.facebook.com/PZM.KUL/posts/2864719753611359 (accessed 22.06.2020).

41 GUS, *Społeczeństwo informacyjne w Polsce w 2019 roku,* 21.10.2019, https://stat.gov.pl/obszary-tematyczne/nauka-i-technika-spoleczenstwo-informacyjne/spoleczenstwo-informacyjne/spoleczenstwo-informacyjne-w-polsce-w-2019-roku,2,9.html (accessed 22.06.2020).

object, the surface and depth of which can be assessed only while in contact therewith, when the viewer's location with regard to the work is the same as the creator's (…). Photographs of paintings are only their pale shadows; just as scores including notes, which are only a record of something else. Contemporary painting is much too often experienced second hand. Digital files back-highlighted on screens and reproductions in books and magazines are poor substitutes of a dialogue with an original work".[42]

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42 Karpeles, E., *Prawie nic. Józef Czapski. Biografia malarza,* Warszawa 2019, p. 18.

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CITATION

Beer, M., *Limitation of constitutional guarantees of cultural rights in a time of pandemic*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 5–20, DOI: 10.18276/ais.2020.30-01.

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 21–33
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-02

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Refusal to adjourn a hearing due to the defender's being ill vs. execution of the right of defence – comments on Article 378a § 1 of the Polish Code of Criminal Procedure

Abstract

The object of this paper constitutes the issue regarding the principle of the right of defence in Polish criminal proceedings in the context of the new regulation included in Article 378a par. 1 of the Code of Criminal Procedure, which came into effect on 5 October 2019 (as a result of the entry into force of the Act of 19 July 2019 amending the Act on the Code of Criminal Procedure and certain other acts, Dz.U. (Journal of Laws) of 2019 item 1694). To be precise, the court's refusal to take into consideration the defender's motion for adjournment of the term of a hearing due to his or her illness confirmed with a sick leave issued by a pathologist.

The aim of this study was to draw attention to the questionable character of the aforementioned Article in terms of the procedural safeguards of the accused. The paper presents the circumstances, as well as the state of proceedings, indicating the evidence of violation of the principle of the right of defence in criminal proceedings by improper application of Article 378a par. 1 of the Code of Criminal Procedure. A formal-dogmatic method has been used.

Furthermore, the author's intention was to present the irrationality of the Polish legislator introducing solutions contrary to the model of criminal procedure, including, in particular, violation of the constitutionally guaranteed rights of the accused.

Keywords: principle of the right of defence, procedural safeguards, adjournment of the term of a hearing

Introduction

This paper concerns the issue related to the violation of the accused's right of defence in a criminal procedure and, to be more precise, the state of proceedings consisting in the court's refusal to take into consideration the defender's motion for adjournment of the term of a hearing due to his or her illness confirmed with a sick leave issued by a pathologist. This is an issue which, in terms of the accused's procedural safeguards, as well as the practical aspect of the profession of an advocate or attorney-at-law acting as a defender in criminal proceedings, deserves attention. The above issue seems to be valid, since, in practice, it occurred as a result of entry into force of the Act of 19 July 2019 on the amendment to the Act – the Code of Criminal Procedure and certain other acts (Dz.U. (Journal of Laws of 2019 item 1694), since, as of 5 October 2019, the new Article 378a of the Code of Criminal Procedure introduced extremely unfavourable solutions in the scope concerning the actual right of defence in criminal proceedings. The aforementioned provision allows for conducting by the court the hearing of evidence in the absence of the accused or his or her defender, which has been duly justified. Such a solution in a democratic rule of law, taking into account the constitutionally guaranteed right of defence of the accused in criminal proceedings, seems to be inadmissible although – as shown in the practice of law-making in Poland – possible. The above solution of the legislator is equally unjust, as well as inconsiderate with regard to advocates or attorney-at-laws (acting as defenders in criminal cases) who are currently, in a way, expected not to permit the occurrence on their part of the inability to perform their duties due to reasons not attributed to them, such as e.g. serious illness, breakdown of communication means or death of a close relative. Incidentally, the issue concerning the rationality of the Polish legislator in the scope of broadly understood legal solutions which have been adopted in recent years should be put aside, since this issue significantly exceeds the technical possibilities of the form of a scientific paper.

The principle of the right of defence

To begin with, it should be noted that the right of defence is one of the guiding principles of criminal proceedings.[1] Among others, respecting this principle in practice decides upon whether given criminal proceedings deserve to be described as a fair trial, i.e. proceedings respecting procedural principles and safeguards vested in the

1 Misztal, P., in: Świecki, D. (ed.), *Meritum. Postępowanie karne,* Warszawa 2019, p. 136.

participants of a criminal procedure. P. Wiliński rightly notes that such procedure involves compliance with numerous directives regarded to be the main principles of criminal procedure.[2] In other words, the theoretical guarantee of certain procedural standards providing for the protection of the interests and rights of specific subjects to criminal proceedings is not sufficient to state that the proceedings are reliable (fair). It is, in fact, necessary to observe them in practice. The significance of the right of defence in criminal proceedings is aptly illustrated by the thesis of the Supreme Court in its judgement of 2 December 2015, III KK 309/15, in compliance with which the accused's right to assistance provided by a professional constitutes one of the fundamental standards of contemporary criminal proceedings, whereas the defender's participation in the hearing – covering participation both before the first instance court and the court of appeal – is of a safeguarding character.[3] In other words, the principle of the right of defence in criminal proceedings is of fundamental significance and should be respected. F. Prusak notes that execution of the right of defence is of utmost significance in a fair criminal procedure.[4] It should be noticed that the new solution adopted by the legislator in the scope concerning conducting the hearing of evidence in the absence of a defender (which has been duly justified) poses a real threat to respecting the principle of the right of defence. Another consequence of the above is the fact that in the case of violating the aforementioned principle constituting one of the bases of fair criminal proceedings, the issue whether these proceedings (both *in concreto* and *in abstracto)* will be reliable remains doubtful. Moreover, it should be noticed that the principle of the right of defence vested in the accused was, in a way, restricted by the legislator to the benefit of the principle of concentration of the procedural material, which, according to the author, should not take place due to the significance in the criminal proceedings of the possibility of enjoying assistance provided by a defender being a professional. M. Siewierski rightly notes that the principle of concentration in criminal cases is of major social significance; however, thorough examination of all the circumstances of a case and ensuring that the accused is not wrongly convicted, even though it prolongs proceedings, constitutes a fundamental guarantee for the accused that the ruling is just.[5] It is obvious that in the hierarchy of the principles of the criminal procedure, the principle of the right of defence is more important than the principle of concentration. The former belongs, in fact, to the so-called guiding

2 Cf. Wiliński, P., *Pojęcie rzetelnego procesu karnego*, in: Wiliński, P. (ed.), *Rzetelny proces karny,* LEX.

3 See: Judgement of the Supreme Court of 2 December 2015, LEX no. 1943849.

4 Cf. Prusak, F., *Kodeks postępowania karnego. Komentarz*, LEX.

5 Cf. Siewierski, M., in: Siewierski, M. et al., *Postępowanie karne w zarysie*, Warszawa 1971, p. 50.

procedural principles, i.e. principles that indicate the main and most important features of criminal proceedings of the greatest significance in the criminal procedure.[6] However, one should take into account the fact that, in practice, the proper application of the possibility provided by Article 378a of the Code of Criminal Procedure will depend on the rational approach to this issue of the court before which the proceedings are pending. Provided that conducting the hearing of evidence in the absence of the defender in the state of proceedings in which the case is multithreaded, and there are at least a few accused persons, and the given thread being the object of the hearing of evidence on a given term of the hearing does not concern the accused whose defender did not appear, this new provision is a valid solution. In such a case, conducting the hearing will be justified and appropriate, and the proceedings will not be groundlessly prolonged. Nevertheless, in other cases when there is only one accused, conducting the proceedings in the absence of the defender applying for adjournment of the term of the hearing is inappropriate and should not take place. In such a state of proceedings, actual and constitutional safeguarding of the accused's right of defence in criminal proceedings becomes only a written declaration of the legislator, which is not respected in legal practice.

"Duly justified cases" within the meaning of Article 378a § 1 of the Code of Criminal Procedure

In compliance of the wording of the new provision of Article 378a par. 1 of the Code of Criminal Procedure, in the case of the duly justified absence of the accused or his or her defender, the court has the right to conduct the hearing of evidence in particularly justified cases. Nonetheless, the legislator does not specify what should be understood by the phrase "especially justified cases", whereas the meaning of the phrase concerning a duly justified absence is known. This catalogue does, in fact, include a sick leave issued by a pathologist, which directly results from the contents of the provision of Article 117 par. 2a of the Code of Criminal Procedure. It should also be noted that, in accordance with a judgment of the Supreme Court,[7] it is possible to present a relevant certificate issued by a court physician at a later date. Thus, it is not necessary to present the court with a certificate before or in the course of a hearing that cannot be attended by the accused or their defender. However, the phrase "in especially justified cases" is blurred to the extent that it

6 See: Tylman, J., in: Grzegorczyk, T. and Tylman, J., *Polskie postępowanie karne*, Warszawa 2014, p. 76.

7 Cf. Judgment of the Supreme Court of 9 August 2017, II KK 237/17, LEX no. 2337348.

allows for possible abuse by the procedural authority, resulting in the violation of the accused's right of defence. In fact, there are no obstacles to consider the absence of witnesses summoned on the term of the main hearing as an "especially justified case". However, it should be underlined that the fact of conducting the hearing of evidence despite the justified absence of the defender demanding adjournment of a hearing constitutes a violation of the right of defence in the majority of states of proceedings. In compliance with the provision of Article 6 of the Code of Criminal Procedure, the accused has the right to assistance provided by a defender who, in criminal proceedings, may be both an advocate and attorney-at-law. The right of defence is also provided for in the Constitution of the Republic of Poland, in Article 42 par. 2, in compliance with which anyone against whom criminal proceedings have been brought has the right of defence. Furthermore, the provision of Article 6 of the European Convention on Human Rights implies that the accused has the right to assistance provided by a defender, as well as to defend himself or herself in person or through the assistance of a defender who has been appointed. This should be understood as, among others, the right of the accused consisting in active participation in the examination of witnesses, expert witnesses or other co-accused individuals at the main hearing.[8] The opinion of the Supreme Court, according to which it is inadmissible to limit the accused's personal recourse to right of defence, is relevant and important.[9] Concerning execution of that right by the accused, A. Murzynowski rightly noted that it is necessary to enable the accused to take an active part in a hearing by submitting motions or expressing their opinion on all the issues reviewed by the court, regardless of the activity of their defender.[10] However, it should be noticed that whereas the issue regarding the discussed Article seems to be invalid in the state of proceedings where the accused enjoys the assistance of more than one defendant (see the provision of Article 77 of the Code of Criminal Procedure), and one of them cannot participate in court proceedings, as well as in the case of the obligatory defence (provision of Article 79 and 80 of the Code of Criminal Procedure), in practice, the proceedings in which the accused is represented by one professional are prevailing. Therefore, in such a situation, not taking into consideration the motion submitted by the only defender, including the sick leave issued by an authorised pathologist (confirming the unavailability due to being ill – in compliance with Article 117 par. 2a of the Code of Criminal Procedure), for the adjournment of the term of the hearing and,

8 See Kosonoga, J., in: Stefański, R. and Zabłocki, S., (eds.), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, LEX.

9 Judgment of the Supreme Court of 18 September 1973, V KRN 355/73, LEX no. 18695.

10 Cf. Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa 1994, p. 276.

in consequence, conducting by the court the hearing of evidence, this constitutes a violation of the actual, as well as the constitutionally guaranteed right of defence of the accused in criminal proceedings. Incidentally, it should be underlined that such a violation will not apply to the situation when the defender solely presents the sick leave issued by a pathologist without an explicit motion for the adjournment of the term of the hearing.[11]

Procedural activities of the court

A further part of the provision of Article 378a par. 1 of the Code of Criminal Procedure indicates that the court can "especially" conduct procedural activities consisting in examining witnesses who appeared at the term of the hearing, i.e. the court *de facto* has the right to conduct the relevant hearing of evidence. However, the issue of whether, after the conducted proceedings and exhausting evidentiary proceedings, the court may close the court proceedings and give the floor to the parties to the proceedings remains doubtful. It should be assumed that this is inadmissible, since the provision of Article 378a par. 1 of the Code of Criminal Procedure solely stipulates conducting a hearing of evidence, which certainly does not include submitting final statements. Furthermore, it should be indicated that court proceedings consisting in conducting the hearing of evidence in compliance with Article 378a par. 1 of the Code of Criminal Procedure are admissible even in the state of proceedings in which the accused has not yet made a statement. At this point, another doubt arises with regard to whether the necessity (in the court's opinion) consisting in receiving the statement from the accused at the first term of the hearing, at which his or her defender, who has duly justified their absence and submitted the motion for the adjournment of the term of the hearing, is absent, should be considered as an especially justified case pursuant to the provision of Article 378a of the Code of Criminal Procedure. The state of proceedings in which the accused states that he or she submits a motion for conducting the hearing in the absence of his or her defender and, as a result, his or her explanations are received, and for conducting the hearing of evidence, at first glance seems to be an appropriate solution for not violating the right of defence of the accused. However, such a conclusion may be premature and incorrect. One should not omit procedural solutions such as those provided for e.g. in Article 387 of the Code of Criminal Procedure, i.e. the right of the accused to voluntarily submit oneself to penalty. In compliance with the aforementioned provision, the accused is vested with such

11 See: Judgement of the Supreme Court of 11 January 2007, V KK 330/06, LEX no. 459583.

a right, which is limited in time. This means that the accused can exercise the right until the end of the first examination of all accused persons at the main hearing. If, at the stage preceding the hearing, the issue concerning e.g. the conditions of the accused's voluntary submission to penalty and the penalty, means of punishment, forfeiture or compensation measure have not been specified, then, in the case of a lack of assistance provided by a professional – advocate or attorney-at-law, it seems to be inadmissible. However, incidentally, it should be indicated that the provision of Article 387 par. 1 of the Code of Criminal Procedure stipulates admissibility of a court-appointed defender in the state of proceedings in which the accused is not represented by a defender of his or her own choosing. Thus, it remains to be clarified whether the accused's right of defence is violated in the aforementioned situation, i.e. the justified absence at the hearing of the defender submitting a motion for the adjournment thereof, as well as the lack of the accused's consent to conduct the hearing in the absence of his or her defender (willing to voluntarily submit oneself to penalty pursuant to Article 387 of the Code of Criminal Procedure) by non-adjournment of the term of the hearing and conducting the hearing of evidence by the court. It seems that in a thus described state of proceedings, the accused's right of defence is violated irrespective of whether or not he or she exercises the right of voluntary submission to penalty. It is also indirectly indicated by the regulation included in the provision of Article 387 par. 1 last sentence of the Code of Criminal Procedure, in compliance with which in a situation when the accused does not have a chosen defender, the court has the possibility to appoint such a defender if the accused submits a relevant motion. Irrespective of the above, even in the state of proceedings in which the defender duly justifies his or her absence, submits a motion for the adjournment of the term of the hearing, and the accused present on the specified term (declaring the will of voluntary submission to penalty) gives consent to conduct the proceedings in the absence of the defender, the court should adjourn the hearing irrespectively of such circumstances. In a case when the court fails to do so, the defender will be able to raise in the remedy at law an objection regarding the violation of the accused's right of offence, i.e. Article 6 of the Code of Criminal Procedure in conjunction with Article 387 of the Code of Criminal Procedure in conjunction with Article 378a of the Code of Criminal Procedure, which should be considered in such a state of proceedings as valid.

Another issue which is doubtful in terms of the provision of Article 378a of the Code of Criminal Procedure and respecting the guiding principle of the criminal proceedings, i.e. the right of defence of the accused, comprises the proper conduct of the hearing of evidence at the stage of jurisdiction proceedings. It should be, in fact, noticed that the hearing of evidence in criminal proceedings undoubtedly

requires the assistance of a professional so that it could be stated that the right of defence is a genuine right. The right of defence vested in the accused in the criminal proceedings is of a formal character, which is understood as the right to have a defender, as well as being of a substantive character, i.e. the possibility of a substantial defence against charge[12]. Nevertheless, in order to consider these as real, the aforementioned aspects, i.e. formal and substantive, should co-exist at each stage of the criminal proceedings. Despite the fact that it is obvious that all proceedings differ, even if due to the complexity of the case, the number of charges, as well as the number of the accused, it seems unquestionable that certain issues concerning the hearing of evidence in procedural understanding require at least a minimal knowledge of the criminal procedure. It is true that the accused is instructed by the court with regard to the right to ask witnesses and expert witnesses questions, as well as to address all evidence taken. Nonetheless, due to the complexity of criminal proceedings, as well as e.g. the emotionally engaged accused due to the fact that the case concerns his or her criminal liability, the assistance provided by a professional seems to be indispensable. In the scope of the proceedings, for instance, the provisions of Article 171 par. 4 and par. 6 of the Code of Criminal Procedure, in compliance with which it is inadmissible to ask questions suggesting answers, should also be remembered, since this results in dismissal thereof by the court, i.e. as in the case of questions that are insignificant from the point of view of specific proceedings. This issue seems to be crucial, since how should the accused know which of the asked questions *in concreto* are significant and which are not? Another important issue consists in which of the questions asked of witnesses can be harmful to his or her procedural situation and which are compliant with the function performed by his or her representatives in the proceedings – the function of defence. These aspects *prima facie* seem to be insignificant, since the court instructs the accused of the rights vested in him or her. However, in practice, and in particular with regard to the issue related to the role of a defender in criminal proceedings, these aspects are of fundamental significance, even if due to the adopted procedural strategy and line of defence. Another issue (*stricte* related to criminal proceedings) concerning the hearing of evidence is the proper submission of evidence motions, including formulation of the evidence thesis. A lack of basic knowledge in this scope can, in fact, result in dismissing evidence motions by the court and thus hinder the defence in substantive understanding. Another aspect raising doubts as to the rationality of conducting the hearing of evidence in

12 See: Judgement of the Constitutional Tribunal of 17 February 2004, SK 39/02, LEX no. 84271; Daszkiewicz, W., *Proces karny. Część ogólna,* Poznań 1995, p. 75; Steinborn, S., in: Steinborn, S. (ed.), *Kodeks postępowania karnego. Komentarz do wybranych przepisów,* LEX 2016.

the absence of the defender and concerning the proper course of the proceedings constitutes reacting to the questions asked by the other party – questions suggesting to the witness the answer or questions insignificant from the point of view of the specific criminal proceedings. Due to all of the aforementioned reasons, the defender's participation in the jurisdiction proceedings is necessary. Irrespective of whether the specific case is simple or complex, whether the accused has been presented with one or more charges – due to the procedural issues concerning the principles of conducting the hearing of evidence at the stage of jurisdiction proceedings, whether the accused uses assistance provided by a defender who is not able to participate in the hearing and who has duly justified such absence, the court should interrupt or adjourn the hearing, thus respecting the principle of the right of defence.

Motion for supplementary hearing of evidence

In the further part of the new provision, the legislator indirectly confirms that conducting the hearing of evidence in the absence of the defender is a wrong solution; wrong in the meaning of the potential possibility of fully conducting the hearing of evidence in the absence of the defender. In compliance with the contents of the provision of Article 378a par. 3 of the Code of Criminal Procedure, there is a possibility of submitting a motion by the accused or the defender aimed at the supplementary hearing of evidence which has been conducted in his or her absence. Therefore, it indicates that the solution consisting in the possibility of conducting the hearing of evidence in compliance with Article 378a par. 1 of the Code of Criminal Procedure actually prevents the conducting of the hearing of evidence reliably. In other words, in criminal proceedings, each of the appearing individuals performs specific functions. The prosecutor – the function of prosecuting, the defender – the function of defending, and the court – the function of adjudicating. Thus, participation of all of the aforementioned entities (and performance by them of their procedural roles) is necessary. For instance, examination of an expert witness in order to issue a supplementary oral opinion can be indicated. In the case of any defects of the opinion (which is unfavourable for the accused), the role of the defender will be to indicate them in the pending proceedings and to possibly submit a motion for giving an opinion by another expert witness. In the absence of the defender during pending proceedings, one cannot be certain whether the court will notice such a necessity and will, *ex officio*, admit the evidence from the opinion given by another expert witness.

However, the above right can be executed not later than at the next term of the hearing, of which the accused/his or her defendant has been duly notified and, furthermore, if there are no procedural obstacles preventing their appearance. Nevertheless, the legislator reserves in the last sentence of the provision of Article 378a par. 3 of the Code of Criminal Procedure that the right to submit a motion for supplementary taking of evidence is not vested if the absence of the defender/accused at the last term of the hearing was not duly justified. In the case of a failure to submit such a motion with preservation of the indicated period of time, the right to submit it expires, which results from the contents of Article 378a par. 4 of the Code of Criminal Procedure. In the further part of the provision, the legislator then specifies that, in the course of further proceedings, as a result of taking specific evidence in the absence of the accused or his or her defender, there is no possibility to raise a plea that would indicate that procedural safeguards have been violated (including, in particular, the right of defence expressed in Article 6 of the Code of Criminal Procedure).

In compliance with the wording of the provision of Article 378a par. 5 of the Code of Criminal Procedure, in the case of submitting the motion referred to in par. 3, the accused or his or her defender is obliged to prove that the accused's procedural safeguards have been violated (in particular the right of defence) by "the manner of taking evidence" during the hearing at which the accused or his or her defender was absent. The above solution adopted by the legislator seems to be irrational even if due to the fact that the court, as the authority adjudicating such a motion, would have to state that it has violated the procedural provisions in the scope concerning the accused's right of defence. Such a regulation is paradoxical. On the one hand, the issue concerning the indication that the accused's right of defence has been violated should, in principle, boil down to showing that during the hearing of evidence, witnesses or expert witnesses were not asked any questions significant in terms of the accused's criminal liability. On the other hand, in the case of taking into consideration such a motion, the court would undermine the correctness of taking evidence at the hearing at which the accused or his or her defendant was absent. In the case of taking into consideration the motion submitted by the accused or his or her defendant, the court takes evidence in a manner aimed solely at supplementing the evidence, whereas the legislator indicated that it can take place only in the scope in which it has been proved that the accused's procedural safeguards have been violated (in particular, the right of defence vested in him or her). The above results from the contents of Article 378a par. 6 of the Code of Criminal Procedure. In the scope concerning the motion for supplementary taking of evidence, the opinion that stating by the defender or the accused that they

did not have the opportunity, due to their absence, to make direct observations with regard to taken evidence should be considered just.[13]

From the point of view of the constitutionally equivocal solution included in Article 378a of the Code of Criminal Procedure, par. 7 thereof should be indicated as the safeguarding element. In compliance with the said provisions, in the case of the absence of a defender or the accused, the court is obliged to instruct that there is a possibility of submitting a motion (by the accused or his or her defender) aimed at supplementary taking of evidence (which has been taken in their absence).

Relationship between Articles 378a and 390 § 2 of the Code of Criminal Procedure

In the scope concerning the issue of the paper, it is also worth noticing the provision of Article 390 par. 2 of the Code of Criminal Procedure, in compliance with which it is possible to temporarily remove the accused from the courtroom. It should be noticed that, in principle, he or she has the right to participate in all activities related to taking evidence. However, the exception provided for in par. 2 of the aforementioned provision prevents him or her from exercising the right of defence in the state of proceedings in which his or her defender would not participate in the hearing. In fact, in compliance with the wording of the invoked Article, in special circumstances, due to the fear that the presence of the accused would impede explanations given by the co-accused or the testimony given by a witness or an expert witness, the president can then issue an order that for the time of examining such a person, the accused must be absent from the courtroom. However, the issue seems to be outdated in the situation provided for in par. 3 of Article 390 of the Code of Criminal Procedure – allowing for examining the aforementioned category of persons remotely with the use of technical devices, in the case of the state of proceedings, in which the accused leaves the courtroom due to the order issued by the president, and his or her right of actual defence becomes a fictional right. Therefore, it should be assumed that in such a state of proceedings, it should be deemed inadmissible to conduct the hearing in the absence of the defender. The above compilation of provisions of Article 378a of the Code of Criminal Procedure with the provision of Article 390 par. 2 of the Code of Criminal Procedure illustrates this issue well. In such a case, in light of the binding provisions of the Code of Criminal Procedure, the court has the possibility to continue taking evidence.

13 See: Zagrodnik, J. et al., in: Zagrodnik, J. (ed.), *Kodeks postępowania karnego. Komentarz praktyczny do nowelizacji 2019*, LEX.

However, such a solution shows the defectiveness of the new Article 378a of the Code of Criminal Procedure from the point of view of the accused's safeguards in criminal proceedings.

Conclusion

To sum up the above reflections regarding the court's refusal to take into consideration the defender's motion for adjournment of the term of a hearing due to his or her illness confirmed with a sick leave issued by a pathologist, in the first place, it should be noticed that the new regulation is an equivocal solution in terms of the rights vested in the accused. This remains, in fact, in contrast with one of the guiding principles of the criminal procedure, i.e. the constitutionally guaranteed principle of the right of defence. Thus, it is difficult to agree with the fact that due to the entry into force of Article 378a of the Code of Criminal Procedure, Polish criminal proceedings still deserve the quality of a fair trial. Doubtlessly, the judges are currently responsible for whether the constitutional rights of the accused are respected at the stage of the jurisdiction proceedings. It should be noticed that a specific state of proceedings not taking into consideration the defender's motion for adjournment of the term of the hearing (justifying his or her absence with a sick leave issued by a pathologist) will constitute a violation of the accused's right of defence. Nevertheless, the new Article 378a of the Code of Criminal Procedure has positive aspects. It should be indicated that in cases where there are at least several accused, and the case is multithreaded, and specific evidence will be taken at the term of the hearing in which the defender will not be able to participate, application of the aforementioned provision (and, as a result, not taking into consideration the defender's motion for adjournment of the term of the hearing) will certainly not constitute a violation of the accused's right of defence. A situation similar to the aforementioned will take place when the accused is represented by several defenders, then not taking into consideration the motion submitted by one of them (in the absence of another defender at the hearing) also does not constitute a violation of the right of defence of the accused. Nonetheless, the solution adopted by the legislator should be assessed negatively, as it provides the possibility to infringe upon the fundamental principle of Polish criminal proceedings, i.e. the right of defence vested in the defendant. As a result, it will not be possible to state that Polish criminal proceedings (as a result of the improper application of the provision of Article 378a par. 1 of the Code of Criminal Procedure in jurisdiction proceedings) deserve to be defined as a fair trial.

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CITATION

Ignasiak, M., *Refusal to adjourn a hearing due to the defender's being ill vs. execution of the right of defence – comments on Article 378a § 1 of the Polish Code of Criminal Procedure*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 21–33, DOI: 10.18276/ais.2020.30-02.

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 35–45
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-03

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Controversy regarding statutory circumstances that affect judicial sentencing either in a principally aggravating or mitigating manner. Reflections against the background of the regulation of Article 53 § 2 of the Polish Criminal Code

Abstract

The purpose of this article is to determine whether the circumstances referred to in Article 53 § 2 of the Criminal Code, which affect the amount of the penalty, may be seen as clearly aggravating or mitigating circumstances by way of interpretation. The undertaken analyses were based on the recognition of the code essence circumstances, referring to: committing an offence to the detriment of a person due to their age or state of health, committing an offence together with a minor and circumstances exposing the value of compensation by the perpetrator for the damage or compensation by the perpetrator in another form to the social sense of justice. As resulted from the analysis – irrespective of the absence of a catalogue of mitigating and penalising circumstances – some of the factors specified in Article 53 § 2 of the Criminal Code, in principle, have a clearly unidirectional character of impact, in fact affecting the mitigation or strengthening of the sanctions of criminal law applied. The analyses were based on the formal-dogmatic method.

Keywords: redressing the damage or satisfying the public sense of justice in any way, committing an offence to the detriment of a person due to their age or state of health, committing an offence together with a minor

Introduction to the issues at hand

Statutory indications of judicial sentencing are of a markedly non-uniform nature. The process at issue is statutorily determined not only by general and particular directives and by the principles that shape the sentence, but also illustratively indicated circumstances, which – supplementing the tenets of general directives of sentencing – may directly influence the level of severity exacted upon the perpetrator. Even on the basis of these remarks, one may in fact imply that judicial sentencing is co-shaped by a number of factors which should be assessed with regard to their interconnectedness. As a result, one should then add that a particular criminal law response applied against the perpetrator should not constitute the result of the personal beliefs of the adjudicating court, or of the expectations of respective parties to the proceedings,[1] but should be an outcome of statutory indications that determine its type and its extent.[2]

Aggravating and mitigating nature of the circumstances resulting from Article 53 § 2 of the Polish Criminal Code

Due to the issues highlighted in the title, the following deliberations shall concentrate on select circumstances from Article 53 § 2 of the Code that influence judicial sentencing.[3] While approaching the essence of the codified solution at issue (i.e. Article 53 § 2 of the Code), one should at first stress[4] that it exhibits, above all, a "supplementary" nature vis-à-vis the general directives of sentencing that flow from Article 53 § 1 of the Code.[5] It is also worth noting that the regulation commented on refers to the most typical and, at the same time, repeatable factors, which – as stressed in academia – "manifest almost in their entirety in all criminal cases".[6] At the same time, it must be said here that there is no *expressis*

1 Gubiński, A., *Dyrektywy wymiaru kary*, "Zagadnienia Wykroczeń" 1978, No. 4–5, pp. 21–30, p. 29, cf. also Judgment of the Appellate Court in Szczecin of 21 December 2006, II AKa 168/06, LEX No. 283405.

2 Judgment of the Appellate Court in Warszawa of 8 June 2016, II AKa 75/16, Legalis No. 1564414.

3 As to its scope, an amendment effected on the basis of the amending act of 23 March 2017 shall be taken into account, Dz.U. (Journal of Laws) 2017, item. 773.

4 Cf. Maksymowicz, K. and Szewioła, T., *Okoliczności obciążające w ujęciu teorii i orzecznictwa Sądu Najwyższego*, "Nowe Prawo" 1982, No. 3–4, pp. 52–66.

5 Marek, A., *Kodeks karny. Komentarz*, Warszawa 2007, p. 143.

6 Konarska-Wrzosek, V., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, pp. 421–422.

verbis typology of the circumstances referred to that would allow us – per the example of the Code of Contraventions – to distinguish a separate list of aggravating and mitigating circumstances. Omission of the chapter thus mentioned, true to the tradition of former criminal codifications,[7] was caused – as one might surmise – not only by trust in judicial faculties,[8] but also by the conviction that it would be impossible – barring certain exceptions – to consider a given circumstance *a priori* as unconditionally aggravating or mitigating.[9] In turn, the absence of an exhaustive list of these circumstances constituted, without any reasonable doubt, a consequence of factual impossibility and substantive inaccuracy of containing them in a catalogue that would be "*numerus clausus*".[10] The phrase "above all", used in the wording of the act, unequivocally evidences the fact that the court may also take account of other extraneous factors that would remain complementary to the normatively indicated set of factors.[11] As such, an extraneous circumstance that is markedly mitigating in its nature is said to be found in e.g. a guilty plea,[12] repentance or apology to the

7 "The Bill does not contain the so-called catalogue of aggravating and mitigating circumstances, a catalogue that is normally non-exhaustive (illustrative), drawn up for the convenience of the court. Such a catalogue, as it is known, is contained only by a few criminal codes of socialist states (…). Omitting a catalogue of aggravating and mitigating circumstances also follows from another premise. Such a catalogue very strongly accentuates "balancing" a sentence as a retribution. While the Bill does not negate this nature of a sentence, it strives to modify the idea of retribution with teleological considerations, pointing to other directives in regard to sentencing" – *Projekt kodeksu karnego oraz przepisów wprowadzających*, Warszawa 1968, p. 113. It must, however, be posited that the bill of 1963 nonetheless foresaw, under Articles 59 and 60, respectively, a catalogue of aggravating and mitigating circumstances for the purposes of sentencing.

8 The reason given for abandoning the creation of a catalogue of mitigating and aggravating circumstances was also the need to take greater account of the purposefulness of a sentence in the process of meting out thereof. Andejew, I. et al., *Kodeks karny z komentarzem*, Warszawa 1973, p. 230.

9 Wolter, W., *Zasady wymiaru kary w kodeksie karnym z 1969 r.*, "Państwo i Prawo" 1969, No. 10, pp. 515–516.

10 Ibidem, p. 515.

11 Bafia, J. et al., *Kodeks karny. Komentarz*. Warszawa 1977, p. 176.

12 "The Appellate Court considers a guilty plea as the most important factor – second only to genuine remorse (lit. "active remorse", "*czynny żal*") and forgiveness on part of the victim – a circumstance mitigating the sentence. A guilty plea causes the objectives of criminal proceedings be met even before making a judgment on the issue, for when the defendant enters a guilty plea, he or she has already condemned him- or -herself and repented his or her actions, which is a symptom of striving to better oneself, which is one of the preventive objectives of proceedings". It might be added that the nature of a mitigating circumstance was accorded to the "abruptness of intent" that governed the perpetrator's actions" – Judgment of the Appellate Court in Kraków of 17 September 2008, II AKa 119/08, Legalis No. 130563; cf. also Judgment of the Appellate Court in Wrocław of 7 November 2019, II AKa 317/19, LEX No. 2761629.

aggrieved,[13] whereas repetitive commission of a certain type of act prohibited by punishment is said to be an aggravating circumstance.[14]

It therefore follows from the findings above that circumstances indicated under Article 53 § 2 of the Code have not been exhaustively listed thereunder and that they have – *in genere*[15] – a neutral tenor, which would imply that, only *in concreto*, they may function to the advantage or to the detriment of the perpetrator.

Irrespective of the verity of the above statement, it should be indicated here that – in particular – the results of a teleological interpretation may corroborate a finding that some of the circumstances referred to under the provision commented on would directly affect the perpetrator to his detriment. Keeping in mind the intention of the drafters of the bill, such a nature applies to the circumstance of committing an offence to the detriment of a person who is helpless due to age or their health, recently introduced under Article 53 § 2 of the Code. It is worth noting that the statutory wording of the indicated circumstance was subjected to certain modifications at the stage of drafting the bill.[16] In its original version, it was supposed to express the need of a *de facto* more severe punishment of perpetrators as to crimes committed "to the detriment of a minor". As advocated in the statement of reasons for the amending bill: "The introduction of an additional circumstance to the directives of sentencing would cause the courts to be obliged, in all criminal cases, to check whether the crime was not committed to the detriment of a minor.

13 It is also added thereto that: "(…) an apology made only for the sake of appearances may not be found to be an aggravating circumstance" – Judgment of the Appellate Court in Kraków of 25 September 2012, II Aka 133/12, Legalis No. 589080; Judgment of the Appellate Court in Kraków of 17 May 2000, II AKa 74/00, Legalis No. 70523; Judgment of the Appellate Court in Lublin of 30 August 2016, II AKa 190/16, Legalis No. 1509174.

14 Cf. in that regard: Judgment of the Appellate Court in Lublin of 16 February 2010, II AKa 7/10, Legalis No. 284938.

15 Giezek, J., in: Giezek, J. (ed.), *Kodeks karny. Część ogólna. Komentarz*. Warszawa 2007, p. 404. On the other hand, one should take into account the position of the Supreme Court of the Republic of Poland, which opined that "the aggravating circumstance is found in the co-commission of a crime by a perpetrator who came of 17 years of age, with a minor, yet the importance of that circumstance wanes if the difference in ages between that perpetrator and the minor was insignificant" – Judgment of the Supreme Court of 27 August 1980, V KRN 189/80, OSNKW 1980, No. 10–11, item. 81.

16 *Uzasadnienie przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o zmianie ustawy – Kodeks karny oraz ustawy o postępowaniu w sprawach nieletnich*, Sejm Paper No. 846, pp. 4–5, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=846 (accessed 5.09.2020); cf. Kania, A., *Popełnienie przestępstwa na szkodę osoby nieporadnej ze względu na wiek lub stan zdrowia jako okoliczność wpływająca na wymiar kary. Rozważania na tle regulacji art. 53§2 k.k.*, in: Paluszkiewicz, H. (ed.), *Zmiany w prawie karnym materialnym i procesowym w latach 2013–2017. Zagadnienia wybrane*, Zielona Góra 2019, p. 21 ff.

In the event of a finding that it was indeed so, the court would have to mete out a more severe sentence in comparison to an analogous crime, but not committed to the detriment of a minor. The amendment of Article 53 § 2 of the Code results in a bill that offers comprehensive protection of the rights and interests of minors. That protection is offered not only through provisions under which the statutory condition of being a minor was introduced, but also through the duty to take into account the rights and interests of a minor in each and every criminal case".[17] This statement was compatible with other solutions of that very bill, with which it was hoped to bolster the level of protection offered for minors.[18] Such a guarantee was, in particular, envisaged in the exacerbation of the statutory sentencing thresholds in the event of committing crimes to the detriment of the indicated category of aggrieved parties.

However, having in mind the final wording of the provision commented upon, one would have to concede that the circumstance relevant for sentencing turns out to be the commission of an offence not only to the detriment of a minor, but also to the detriment of an adult person whose age or state of health should *de facto* incline anyone to offer help or show care, rather than engage in illegal exploitation of their helplessness. The adopted version of the regulation commented upon, while undoubtedly more rational, does not, however, dispel a number of doubts in its interpretation. One plainly cannot deny, *exempli gratia*, a position expressed in the academia that the amended wording of Article 53 § 2 of the Code displays certain deficiencies even from a purely linguistic point of view.[19] It follows from the wording of the provision at issue that "where the court metes out a sentence, it shall, above all, take account of the motivation and the manner in which the perpetrator behaved, in particular where the offence was committed to the detriment of a person helpless due to age or the state of their health (…)", which in turn would imply that taking account of the motivation and the manner in which the perpetrator behaved refers – especially – to a situation where an offence was committed to the

17 *Uzasadnienie …,* op. cit.

18 As advocated in the statement of reasons for the bill at issue: "Minor persons are highly susceptible to exploitation by other persons, with said persons having the objective of direct or indirect restriction of the personhood and autonomy of minors. Infringement of the rights and interests of a minor exhibits very large social harmfulness assessed *in abstracto*. A child finds it much more difficult to defend him- or herself, and harm inflicted on him or her affect his or her development and the entirety of his or her future life very negatively" – *Uzasadnienie …,* op. cit.

19 Romańczuk-Grącka, M., *Osoba nieporadna jako przedmiot czynności wykonawczej po nowelizacji z 23 marca 2017 r.*, in: Cieślak, W. and Romańczuk-Grącka, M. (eds.), *Między stabilnością a zmiennością prawa karnego. Dylematy ustawodawcy*, Olsztyn 2017, p. 499.

detriment of a person helpless due to age or the state of their health. Against this background, a controversy emerges – is this kind of preponderance, mandating the court to take account of the circumstance at issue "in particular" in the event of committing an offence to the detriment of a person helpless due to age or the state of their health, substantially accurate and genuinely intended by the legislator?[20]

The demonstration of dependencies between the motivation and the manner of behaviour of the perpetrator and the offence committed to the detriment of a person helpless due to age or the state of their health, emphasised in the above-mentioned statutory formula, is equally problematic.[21] Recognising in this respect some *de facto* inevitable difficulties of interpretation in literature, it is argued that it would be much less controversial (which, however, would not diminish any other objections raised to the commented amendment) to just establish that the crime was committed to the detriment of a helpless person rather than proving: "(…) beyond any doubt that the perpetrator was aware of it, and its intention encompasses the age or state of health, or in the most general sense, helplessness of the aggrieved party".[22]

Some doubts also arise as to the issue of the understanding of the notion of a helpless person,[23] as well as in an attempt to concretise the essence of a "crime committed to the detriment" of a person who is helpless due to their age or state of health. In the context of the latter wording, it seems that the indicated factor is taken into account both in the situation where the helpless person has suffered damage to any legal interests, both of a non-pecuniary (e.g. health, freedom, honour) or pecuniary nature.

However, it would be more disputable to determine whether the damage may be of both a direct and indirect nature, for example related to the mental trauma suffered in cases where the helpless person specified in Article 53 § 2 of the Criminal Code is a witness to a crime committed by the perpetrator.[24] Therefore, in light of the given example, the position assuming that the phrase "to the detriment of a helpless person" should be viewed from the perspective of treating a helpless per-

20 Ibidem.

21 Ibidem.

22 Ibidem.

23 Hałas, R., in: Grześkowiak, A. and Wiak, K. (eds.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 470 ff.; Konarska-Wrzosek, V., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*. Warszawa 2016, p. 904; Hofmański, P. et al., in: Hofmański, P. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–296*, Warszawa 2011, p. 394.

24 Kłączyńska, N., in: Giezek, J. (ed.), *Kodeks karny. Część ogólna*. *Komentarz*, Warszawa 2007, p. 368.

son as a victim of a given crime is much more convincing.[25] The proposed course of interpretation would require demonstrating that there is a direct link between the crime committed and the violation or threat to the legal right of the person referred to in Article 53 § 2 of the Criminal Code.[26]

Furthermore, one could also consider whether the discussed solution, in its current wording, will in fact turn out to be a "determinant" for strengthening of the punishment as assumed by project promoters. It seems that such an automatisation would actually hurt in its absurdity, especially if, for example, the age difference between the victim and the perpetrator is negligible.[27]

Challenging the accuracy of the amendment, it is worth noting once again that the list of circumstances set out in Article 53 § 2 of the Criminal Code is of an open nature, which means that it may also be supplemented by other factors. It seems that apart from *the common nature*[28] exposed in this respect by textbooks, the essence of the discussed category of factors would undoubtedly include an offence committed to the detriment of a helpless person due to their age or state of health.[29]

A category of circumstances which – in principle – affects the punishment in a one-way manner includes a crime committed "together with minors". The proper construction of the circumstance should not focus only on the indicated *verba legis* accessorial liability as far as meeting the definition of the crime is concerned, but

25 Golonka, A., *Nowe oblicze walki z pedofilią w świetle nowelizacji Kodeksu karnego*, "Palestra" 2008, No. 3–4, pp. 32–33; Melezini, M. and Sakowicz, A., *Zakaz prowadzenia działalności związanej z wychowaniem, leczeniem, edukacją lub z opieką nad nimi jako nowy środek karny*, "Archiwum Kryminologii" 2007–2008, No. XXIX-XXX, p. 575.

26 Siwek, M., *Glosa do post. SN z 23.4.2002 r., I KZP 10/02*, "Prokuratura i Prawo" 2004, No. 3, p. 113; Dudka, K., *Skuteczność instrumentów ochrony praw pokrzywdzonego w postępowaniu przygotowawczym w świetle badań empirycznych*, Lublin 2006, p. 20.

27 Judgment of the Supreme Court of 27 August 1980, op. cit.; cf. also Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*. Warszawa 2012, p. 145 ff.

28 Bafia, J. et al., op. cit., p. 176.

29 It is worth noting, however, that the open nature of the catalogue contained in Article 53(2) of the Criminal Code does not allow us to draw the conclusion that the same catalogue of circumstances affecting the assessment of the degree of social harmfulness of an act may be arbitrarily supplemented by the adjudicating authority. *Prima facie*, such a conclusion could arise from the fact that a number of circumstances set out in Article 53 § 2 of the Criminal Code coincide with those which the court takes into account when determining the degree of social harmfulness of the act under Article 115 § 2 of the Criminal Code. Cf. Judgment of the Supreme Court of 20 September 2002, WA 50/02, OSNKW 2003, No. 1–2, item 9, in which it was stated that: "Due to the inadmissibility of the expanded interpretation of Article 115 § 2 of the Criminal Code, it should be assumed that the commonness of the crime is not to be classified as a determinant of the degree of social harmfulness of the act".

should also include within its scope such crimes as: fencing or accessory.[30] A negative assessment of the behaviour specified in the content of this premise results primarily from the fact that in its consequences, it adversely affects the proper development of the minor, especially as far as the process of shaping their system of values is concerned, acting as a *de facto* anti-educational event, and thus being a scandalous example for a young person.[31] Regardless of the above observation, it seems that in the context of the discussed circumstances, its significance also decreases if the difference in age between the perpetrator and the minor turns out to be insignificant.[32]

The circumstance that emphasises the efforts made by the perpetrator "to remedy damage or to satisfy the social sense of justice in another manner" remains in a clear antinomy – at least *prima facie* – in relation to statutory circumstances substantially affecting the punishment. Although it is stressed in jurisprudence that: "Any action to remedy the damage or injury suffered as a result of the crime deserves positive evaluation, regardless of whether it results from the sincere regret of the perpetrator or the process strategy adopted by him, because each of them reduces the unfavourable effects of the crime committed"[33]. However, the accompanying motives of the perpetrator (sometimes very easily recognisable) are not without significance from the perspective of a more in-depth assessment of such a perpetrator's gesture.

30 As pointed out by V. Konarska-Wrzosek, narrowing the interpretation of this premise to the forms of accessory liability for the crime specified in the Criminal Code is not justified by both normative and teleological considerations. Cf. Konarska–Wrzosek, V., in Melezini, M. (ed.), *System Prawa Karnego. Tom 6. Kary i inne środki reakcji prawnokarnej. System Prawa Karnego*, Warszawa 2016, p. 760. It is worth mentioning that the analysis of instances of inciting a "juvenile" (adequate to the terminology contained in Article 49 of the Criminal Code of 1932) to commit a crime allowed Zakrzewski to distinguish the following types: 1) incitement *sui generis*, consisting in the multiple purchase of stolen goods from the juvenile (distinguishing this type of incitement, the author proposed to differentiate *sui generis* incitement from occasional fencing, stating that in the latter case, there is no element of prior acquaintanceship of a minor with an adult perpetrator, 2) classical incitement, including typical instances of incitement, for example to theft, 3) extended incitement, consisting in the fact that additional elements are added to classical incitement, which extend them to complicity and aiding, 4) involving the juvenile in the offence related to the engagement of a minor to assist in a crime committed by a criminal person – cf. Zakrzewski, P., *Współdziałanie w przestępstwie młodocianych i dorosłych z nieletnimi*, Kraków 1960, pp. 107–112 and 135–138.

31 Resolution of the Supreme Court of 9 June 1976, VI KZP 13/75, OSNKW 1976, No. 7–8, item. 86. Cf. also *Uzasadnienie …,* op. cit.

32 Judgment of the Supreme Court of 27 August 1980, op. cit.

33 Judgment of the Appellate Court in Kraków of 5 February 2008, II AKa 6/08, LEX No. 392917.

It is not raised without reason that only the voluntary redress of the damage and the actual willingness to compensate for harm suffered may actually affect the punishment.[34] Therefore, it would be difficult to consider attempts to remedy the damage, as a mitigating circumstance, and reconcile them with individual and general-prevention objectives in the situation where such attempts would result from the sole manifestation of a rational calculation of the perpetrator, a self-serving behaviour, rather than critical self-reflection on *de facto* reprehensible behaviour.

Concluding remarks

The above-presented arguments prove that the process of judicial punishment inevitably involves an element of evaluation, and therefore the need to carefully balance a number of circumstances integrally relating to the perpetrator, as well as the act committed by the perpetrator. As follows from the analysis of the provisions contained in the Criminal Code – irrespective of the absence of a catalogue of mitigating and penalising circumstances – some of the factors specified in Article 53 § 2 of the Criminal Code, in principle, have a clearly unidirectional character of impact, in fact affecting the mitigation or strengthening of the sanctions of criminal law applied.

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34 Judgment of the Appellate Court in Szczecin of 26 September 2013, II AKa 168/13, Legalis No. 744321; Judgment of the Appellate Court in Wrocław of 4 April 2013, II AKa 81/13, Legalis No. 999518; Judgment of the Appellate Court in Kraków of 11 October 2007, II AKa 191/07, Legalis No. 96359; Decision of the Supreme Court of January 16, 2007, V KK 390/06, Legalis No. 120987.

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CITATION

Kania-Chramęga, A., *Controversy regarding statutory circumstances that affect judicial sentencing either in a principally aggravating or mitigating manner. Reflections against the background of the regulation of Article 53 § 2 of the Polish Criminal Code*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 35–45, DOI: 10.18276/ais.2020.30-03.

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 47–59
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-04

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Defeating automotive security systems and exploiting rules of law as the modi operandi of car thieves

Abstract

Electronic anti-theft security systems have been installed in cars for more than 20 years. Despite technological development and ever newer anti-theft car security devices, criminals continue their efforts to defeat all kinds of obstacles with the intention to unlawfully take possession of property. If they want to steal modern cars, thieves must demonstrate proficiency in electronics rather than mechanics, for unlocking and starting motor vehicles is today controlled by electronic systems. This paper presents the main methods of car theft, as well as measures to prevent it. Further in this paper, the author presents how thieves exploit rules of law and discusses a *de lege ferenda* proposal to improve Article 289 of the Penal Code by clarifying the length of time for which property may be possessed by an unauthorised person for that act to be considered as property taking and not a theft or burglary.

Keywords: theft, car, burglary

Introduction

Car thieves use various methods to commit prohibited acts they are specialised in while either not being held criminally liable or risking a relatively small penalty

at worst, such as e.g. three months of imprisonment, after which they can continue their criminal activity or involvement in it, in the event they are members of criminal groups. Special circumstances of car theft are created by poor security mechanisms, which *de facto* allow thieves to steal any car, even the most prestigious and expensive ones. Important factors exploited by car thieves also include legal loopholes, such as the notion of taking a motor vehicle with the purpose of using it for a short period of time or a penalty only for removing, falsifying or altering car identification marks compared to zero punishment for the possession of such marks, in addition to the marks of cars owned by the person concerned. Defeating automotive security systems and exploitation of rules of law by car thieves are possibly the most serious factors which influence the threat of automotive crime, in addition to such other factors as the desire to make significant profits and the thief's ability to use the victim's carelessness.

Defeat of automotive security systems by car thieves

Even motor vehicles as old as 20 years are fitted with security systems in the form of immobilisers, which are electronic safeguards against starting a car by an unauthorised person. Immobilisers are electronic codes embedded in the memory of a specific device, e.g. a modern car key. Their more recent versions do not even require any physical interaction between the transponder and the electronic system, thus allowing remote start of the vehicle (for this purpose, they have the form of proximity devices). Activation of the code in the key or another device initiates an interaction – either a physical or proximity contact (as with bank cards during so-called "contactless payments") – with the transponder, leading to a flow of data which allows the holder to start the car. The car can be started if the information read by the control device is verified as matching the code. The immobiliser then sends appropriate feedback information to the key or another device, depending on how the security system works, thereby initiating the computation process in the transponder.[1] If the code (signal) is the same in the control device and the transponder, the vehicle is started. If the automatic verification process identifies that the key is sending a different signal, not only will the car not be started, but it will also be effectively immobilised, e.g. by ignition shutdown or closure of fuel supply to the engine. Despite such safeguards, increasingly more modern immobiliser generators fail to prevent car theft.

1 Radkowski, S. and Biskup, K., *Systemy antywłamaniowe w pojazdach*, "Studies & Proceedings of Polish Association for Knowledge Management" 2011, No. 47, p. 257.

Contemporary buyers tend to engage in transactions which lead to the purchase of goods which are most often both aesthetic and functional. Modern-day consumers are guided by visual impressions and assessment of the usefulness of specific solutions, even when making the decision to buy a car, and, also in Poland, are ready to spend significant sums of money for this purpose. More and more often, they purchase aesthetic cars fitted with functional solutions and state-of-the-art technology, even smart systems which support car performance and increase driving comfort. Despite this, they normally cannot buy a car fitted with anti-theft security systems which cannot be defeated by car thieves. Among the examples of the risk of faulty performance of security mechanisms which overly rely on technology – compared to what car thieves are able to do – are systems which unlock cars without the need to actually use a key, known as keyless systems.[2] A car thief who wants to get inside a car fitted with such a system does not have to have any mechanical devices to unlock or start it. A specially designed hacking system is enough. In the lingo of Polish police, this method is called "a briefcase job" (*na walizkę*), because the thieves bring with them a briefcase-like device which contains all the tools they might need to unlock the car, including hacking software allowing the user to intercept, read, record and then replicate the signal sent by the car key to the car's computer system in order to unlock the door. Approaching the target car, criminals equipped with such a device are able to use the software to emit the correct signal in order to unlock the vehicle. They can also start the engine. The only effective defence against this type of offence is for the car owner to secure the key or any other device which normally sends the unlock signal to the car's computer system. If the device is stored at the car owner's home in a way that shields the signal, e.g. in a metal box or wrapped in aluminium foil, the thieves might not be able to identify the right code (signal) required to unlock the car. The key (device) will then be protected against any attempts at retrieving the signal from it. However, relatively few drivers and users of motor vehicles realise that such security measures are advisable.

The aforementioned method keeps evolving. At present, automotive criminals more often rarely need briefcase-size devices to defeat the security system of a vehicle selected as a target of theft, and they increasingly more often use small portable amplifiers of signals transmitted between the car's software and the key. A system of this type amplifies and extends the range of the signal, thus allowing the user

2 Wróbel, P., *Testujemy system KeylessGo – czyli, jak łatwo stracić samochód*, 24.11.2016, Auto Świat, https://www.auto-swiat.pl/porady/eksploatacja/testujemy-system-keylessgo-czyli-jak-latwo-stracic-samochod/r6clfbq (accessed 9.09.2019).

to extract, intercept, record and replicate it in order to unlock the vehicle.[3] Such signal amplification makes it possible to even unlock a car with the key located far away. Using this method, car thieves do not have to use any cryptographic keys or have any advanced IT knowledge. To perform their criminal activities, they use devices available on the so-called "black market" or, in many cases, software systems available outside Poland. This same method allows them to start the car, as the warning that there is no key in the ignition does not normally entail shutting down the engine. The popularity of keyless security systems – they are fitted in, among others, different models of Audi, BMW, Citroen, Ford, Hyundai, Kia, Land Rover, Mazda, Mercedes, Mitsubishi, Nissan, Opel, Peugeot, Renault, Skoda, Suzuki, Toyota, Volvo, Volkswagen, as well as in Alfa Romeo Giulia, Fiat 124 Spider, Honda HR-V, Infiniti Q30, Jaguar F-Pace, Lexus RX450h, Seat Ateca, Subaru Levorg and Tesla S P85 – enables car thieves to steal virtually any make of car with the use of universal methods.

The availability of low-cost systems which amplify the signal between the car key and the software installed in the vehicle has become a major problem for car owners and law enforcement agencies. While the first systems of this type required significant financial investments, the ones available on the market at present can be purchased at a low price. Such systems can also amplify signals at increasingly longer distances. In the past, defeating keyless safeguards required placing a hacking system within up to 100 metres from the key and the car selected for theft, whereas now these systems are effective at much longer distances. One factor which can prevent thieves from attempting to steal a vehicle fitted with a keyless system is for the owner to deactivate it upon request at the car dealership. Persons who know how the system works can do it themselves by switching off the right fuse. The most provident car owners hire car garages to create extra safeguards, e.g. ignition shutdown systems. Such measures are likely to be effective, as car thieves normally try to start their chosen car as fast as possible and drive away, and they consider extended engine start time as a major obstacle which generates excessive risks. In this light, even if they start stealing a car, they will resign if they consider that the whole operation is taking too long.

Automotive criminals can also defeat safeguards in cars which do not have any keyless systems. In cars which are unlocked by key-activated central locks, they use so-called "repetition attacks" to defeat car security systems. In this case, signal amplification is irrelevant. What is important is to register and recreate the

3 Szypulski, P., *Dlaczego nowe auta tak łatwo ukraść?*, 20.05.2015, Auto Świat, https://www.autoswiat.pl/porady/eksploatacja/dlaczego-nowe-auta-tak-latwo-ukrasc-zrob-to-sam-sprzet-do-kradziezy-aut/3pmce8f (accessed 9.09.2019).

unlocking code. These codes change, and the hacking software relies on a system which records the code transmitted by the key to unlock the vehicle and simultaneously jams it so that it cannot reach the car's door control software on the first attempt. When the owner tries to unlock the door with the key the second time, the code is jammed again, but the previous code is transmitted as a result of the hacking system's operations. This gives the thieves an advantage in that they have the next door unlocking code.[4] The car owner is unable to realise this; the more so as the car door opens whenever activated by the key.

Using a special device, automotive criminals can also conduct so-called "key computation attacks". These consist in recording the car door unlock signal and analysing it in order to extract the key which determines consecutive unlock codes. This type of attack is similar to the repetition attack mechanism and can also be employed to unlock vehicles without a keyless system. For such an attack to be successful, a criminal might need to record several attempts to unlock the car by its owner. Therefore, the thief tries to jam the signal several times in order to record its different variants.

There are increasingly more refined hacking devices appearing on the market which allow, in fact, the stealing of any car. Among the greatest threats to car owners is one which contains software able to unlock a car's central lock and disable its anti-theft safeguards. After disabling the safeguards, criminals define a new door unlock signal themselves. Advanced and quick decoding systems used by automotive criminals are available, in particular, in Russia, Bulgaria and China. Systems of this type can cost as much as EUR 10,000, but there are also decoding platforms which require much lower investments.[5] The functioning of such systems, and their usefulness to car thieves, most often consists in the ability to record and use electronic key information from the memory of the devices which protect the car against unauthorised start (immobiliser).

The ability of car thieves to defeat car security systems leads to the situation where car theft accounts for a large part of prohibited acts and where law enforcement agencies have difficulties in preventing them, combating automotive crime and recovering stolen vehicles. Combined with other car theft methods used by criminals, particularly ones that allow them to use drivers' inattention, and also in combination with the exploitation of the existing rules of law, the process of

4 Żuczek, M., *Tego lepiej nie kupuj! Najczęściej kradzione samochody w Polsce*, 16.03.2017, Automotor, https://automator.pl/blog/najczesciej-kradzione-samochody-polska/ (accessed 9.09.2019).

5 Zieliński, R., *W stolicy kradną głównie auta japońskie. W reszcie kraju niemieckie*, 25.07.2019, TVN24, https://www.tvn24.pl/wiadomosci-z-kraju,3/kradzieze-samochodow-2019-warszawa-i-inne-miasta-polski-statystyki-i-marki-kradzionych-aut,955660.html (accessed 9.09.2019).

defeating car security systems forms the core of a major social problem posed by automotive crime.

Exploitation of rules of law by car thieves

Organised criminal groups, as well as individuals who steal cars, try to exploit the existing rules of law. The reasons for such behaviour arise mainly from the fact that the criminal legislation lacks penalties for possession of identification marks of cars which belong to someone else, as well as from opportunities granted to automotive criminals by the regulation on taking someone else's car with the purpose of using it for a short period of time (which is independent of the offence of stealing a car).

Law enforcement agencies and justice institutions are considering new perspectives of combating automotive crime by *inter alia* eliminating vulnerabilities of the car registration system. This reduces the risk of car theft, the more so as automotive criminals draw the greatest profits from selling stolen cars, which must first be legalised to be put on the market again, which in turn requires registering them. The applicable rules of law regulate that every vehicle should be registered and have an owner. However, criminals exploit loopholes to obtain registration certificates by e.g. arranging with a person who intends to scrap his or her car to give them the car's registration certificate in return for cash. The detection rate of offences of this type is low, and a penalty for a person who is willing to cooperate with car thieves is not inevitable.

However, legalisation of stolen vehicles more often requires forging documents or committing other prohibited acts than just exploiting loopholes. Greater opportunities of exploiting rules of law are available to automotive thieves when they steal cars to sell their parts. Most importantly, they are able to exploit the lack of regulations that would oblige car manufacturers to put nameplates, serial numbers and unique VIN numbers on most or all car parts. In this context, most stolen low-cost cars and a great number of stolen non-luxury vehicles are disassembled and sold in parts. Criminals disassemble stolen cars and advertise their parts, even in public – in automotive press and on Internet portals. Stolen cars are most often disassembled in so-called "chop shops" – secret bases of automotive criminals which allow them to keep a low profile. Efficient automotive criminals are able to completely disassemble a stolen car in a matter of hours. In their efforts to combat such activities, law enforcement agencies are trying to convince car manufacturers to put marks on various car parts which are unique to only one specific car. This allows law enforcement agencies – e.g. after a specific chop shop is discovered – to more easily establish whether the disassembled cars were stolen. However, even if law

enforcement agencies find a chop shop together with disassembled vehicles, they must prove that individual car parts come from theft, and if experts in mechanoscopic examination are unable to establish the removed car part numbers, then such parts are returned to the chop shop's owner. In order to hold fences criminally liable, law enforcement agencies must prove that they removed marks from the individual parts of a stolen car.[6] Otherwise, the fence escapes criminal liability, even if his or her accomplices may be charged with e.g. car theft. A particular loophole is created by Article 306 of the Penal Code, which regulates that whoever removes, alters or falsifies identification marks, date of manufacture or date to which a product or equipment is fit to use shall be subject to penalty.[7] However, the provision ignores the matter of criminal liability of persons who possess e.g. significant amounts of parts of different cars, with or without identification marks, even if they are unable to demonstrate the sources of origin of those parts. Law enforcement agencies are making efforts to bring about an amendment to the provisions of law and are appealing to the legislator accordingly.

Car thieves also exploit other rules of law. The fact that criminals invoke the taking of a motor vehicle with the purpose of using it for a short period of time, i.e. Article 289 of the Penal Code,[8] is a special case of such exploitation. After stealing a car, the thief can park it in a public place which is frequented by other people and, most importantly, easy for criminals to monitor. The crime group thus gains some time, e.g. several days, to verify whether anyone would try to recover the stolen vehicle. If no one appears to recover the car over that time, the criminals take it to their chop shop and disassemble it there. This allows automotive criminals to *inter alia* avoid the risk associated with positioning systems which might be installed in stolen cars. They can also use GPS detectors to disable such systems. Leaving a car for a short time in a public place allows criminals to escape criminal liability for stealing the car. This is possible because they can invoke Article 289 of the Penal Code, which regulates that taking someone else's motor vehicle with the purpose to use it for a short period of time is subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.[9] Taking into account that this prohibited act is considered less serious than car theft, and considering the relatively lenient approach to sentencing on the part of courts, one should conclude that automotive criminals – thanks to this regulation and the ability to behave in a way that directs

6 Ibidem.

7 Act of 6 June 1997 – Penal Code, Dz.U. (Journal of Laws) 1997, No. 88, item 553 as amended, Article 306.

8 Ibidem, Article 289.

9 Ibidem, Article 289 § 1.

interpretations made by law enforcement agencies and courts at that regulation – are in fact able to escape criminal liability for car theft.

Taking someone else's motor vehicle with the purpose of using it for a short period of time may, however, entail the risk of a higher penalty than normally provided for this type of prohibited act. This is the case if the perpetrator uses any technique to defeat the car's safeguards protecting it against unauthorised use, if the perpetrator takes a car representing property of considerable value or when or if the perpetrator subsequently abandons the vehicle in a damaged condition or in such circumstances that there is a danger that the vehicle, its parts or contents will be lost or damaged. In such situations, the perpetrator is subject to the penalty of deprivation of liberty for a term of between 6 months up to 8 years.[10] The penalty may be even higher if the person who committed the offence of taking a motor vehicle with the purpose of using it for a short period of time committed that offence with the use of violence or threatened the immediate use thereof, or by causing a person to become unconscious or helpless. In such situations, the perpetrator is subject to the penalty of deprivation of liberty for a minimum 1 year and a maximum 10 years.[11] Regardless of the circumstances of taking the vehicle, the perpetrator may additionally be subject to a fine.[12] However, if the act of taking a motor vehicle is committed to the detriment of the next of kin, the prosecution shall occur on a motion of the injured person.[13]

Although aggravated types of taking a motor vehicle, i.e. burglary, taking a vehicle representing a property of considerable value, abandoning the vehicle in a damaged condition or in such circumstances that there is a danger that the vehicle, its parts or contents will be lost or damaged, and robbery, provide for increasing the penalty for the act, this does not mean that criminals have limited possibilities of intentional invoking of the offence of car taking in order to escape the criminal liability for car theft. Since car thieves, especially members of organised criminal groups, have good knowledge of the regulations regarding penalties for car taking and car theft, they are able to simulate the prohibited act of car taking, and in its standard form for that matter, in order to escape the penalties which could effectively discourage them from offending. To this end, criminals use their knowledge of key criminal regulations, as well as courts' sentencing practices. Since taking a motor vehicle is categorised as "a misdemeanour" (as is car theft), it is

10 Ibidem, Article 289 § 2.

11 Ibidem, Article 289 § 3.

12 Ibidem, Article 289 § 4.

13 Ibidem, Article 289 § 5.

a prohibited act of a lesser calibre than "a crime". At the same time, car taking – as a misdemeanour – is a prohibited act which is more serious than a petty offence, which is merely a socially harmful act but not an offence. A non-aggravated type of taking is subject to the same penalty as theft, regulated under Article 278 of the Penal Code, in accordance with which: "Whoever, with the purpose of appropriating, wilfully takes someone else's movable property shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years".[14] Therefore, simply through comparison of the penalties for car taking and car theft, it is clear that automotive criminals cannot use any legal loophole to their advantage in order to create a belief that they deserve a lower penalty. However, the fact that they do try to invoke car taking, not car theft, is based on different premises. The first one is the social perception of these acts. Car taking is perceived by the public as an act which is clearly less harmful than car theft. Car taking leaves the owner able to recover the car relatively quickly. Car theft does not provide such possibilities, as it is normally related to the intention to gain profits by the perpetrator and often also by the commissioners of the theft, if the thief commits offences e.g. for an organised criminal group. The perception of the scale of harmfulness of the two prohibited acts, i.e. car taking and car theft, translates into the sentencing practice, which is another premise which allows car thieves to escape criminal liability for theft. Courts are guided by the public harmfulness of acts committed by their perpetrators and how individual acts are perceived by the public. In this light, perpetrators of car taking most often receive lower penalties than perpetrators of car theft. The third premise behind the loophole exploited by car thieves is that the Penal Code provides a lower penalty for car taking than for burglary. Many offences of car theft involve burglary, and the penalty for burglary is minimum 1 year and maximum 10 years of deprivation of liberty. This penalty is stated in Article 279 of the Penal Code.[15] The penalty for theft with the use of violence, with the threat of immediate use of violence or for theft involving causing a person to become unconscious or helpless is even higher. Under Article 280 of the Penal Code, such acts are subject to the penalty of deprivation of liberty for a period of minimum 2 years and maximum 12 years.[16] Faced with these penalties, criminals clearly prefer to invoke car taking with the purpose of using it for a short period of time, even if they should be sentenced for car theft.

Although the aforementioned loophole is not unknown, it is difficult to eliminate. A prohibited act in the form of taking a car with the purpose of using it for

14 Ibidem, Article 278 § 1.

15 Ibidem, Article 279 § 1.

16 Ibidem, Article 280 § 1.

a short period of time can be committed only with intent. This arises from the nature of this type of offence. However, this circumstance does not increase the penalty which may be imposed for committing it. Courts – even if the perpetrator of a prohibited act has defeated the car's safeguards and has driven away or used the car for a period of time which is in fact not defined precisely (although it must be short, for only this word is used in the provision regulating the offence of car taking) – may interpret the offence as car taking. In determining the severity of the penalty for car taking, it is irrelevant that the perpetrator did intend to commit the act of taking, i.e. intended to commit an offence or alternatively predicted committing a prohibited act, but despite this, he or she decided to take the car anyway. The intent for the prohibited act of car taking has been taken into account by the legislator, who – providing the penalty of up to 5 years of deprivation of liberty for car taking (for non-aggravated types of car taking) – determined that this act may be committed only with intent. Criminals often intentionally try to demonstrate the intent behind their actions. However, they try to induce the court to interpret the event in a different way than what actually happened. The main tool used by criminals to this end is to leave a stolen car in a public place for a short time with the intention to return to it if law enforcement agencies do not react. Any reaction of law enforcement agencies resulting in the prompt return of the vehicle to its owner (which is their responsibility) in fact entails the necessity to interpret the prohibited act as car taking. However, as argued by representatives of law enforcement agencies, criminals would in many cases return to the cars they left in public places in order to drive away and then sell the cars or otherwise profit on the theft (which often involved burglary). In this way, automotive criminals simulate that they did not intend to permanently appropriate property, but only use it for ad hoc purposes over a short period of time.

Taking a motor vehicle with the purpose of using it for a short period of time is also a challenge, because aligning the penalty for this prohibited act with burglary – i.e. increasing the minimum penalty for non-aggravated taking (which could solve and disable the loophole problem) – would result in a situation where the minimum legally possible penalty for taking would be higher than the penalty for theft. The legislator cannot allow itself to make such an error, as this would inevitably lead to increasing the feeling of social injustice, thus undermining the public trust in law. Introducing such an amendment could bring results opposite to the expected and make it even more difficult for courts to impose objective penalties on criminals for their prohibited acts. This solution would also entail the creation of another legal loophole, probably even more serious in terms of consequences. This is why the legislator is obliged to seek other methods of improving the applicable law.

The problem of automotive crime, which is a major nuisance and disruption to the public, requires that various solutions should be taken into consideration. In the debate between representatives of the justice system, law enforcement agencies and the legal community, the issue of taking a motor vehicle with the purpose of using it for a short period of time was considered as *inter alia* the heritage of the previous system, in which the Act of 20 May 1971 on the Code of Petty Offences included the notion of "wilful use of someone else's movable property".[17] Wilful use of someone else's movable property, regulated under Article 127 § 1 of the Code of Petty Offences, was a petty offence in which the perpetrator used someone else's movable property for his or her own purposes without any permission from that person or from a person holding a legal title to manage that property (or any other title e.g. arising from social norms). As it was regulated, the perpetrator of wilful use of someone else's movable property did not intend to permanently appropriate that property but wanted to use it temporarily. The perpetrator was allowed to take or manage the property which he or she had gained, even legally, but was not allowed to use that property. An example of a situation, which – as long as the 1971 Code of Petty Offences remained in force – involved wilful use of someone else's movable property, was driving a car by an employee of a car garage to which that car was delivered for repair, where the owner of the car had not given his or her consent for the garage's workers to drive his or her car for purposes other than repair of the car. Most often, it was assumed that wilful use of someone else's movable property could take up to several hours. If the perpetrator used someone else's property for longer than several hours, he or she ran the risk of being charged with appropriation of property, not wilful use movable property. Appropriation of property was penalised in connection with the prohibited act of appropriation, which was subject to more severe penalties than wilful use of someone else's movable property; it also had a completely different status – it was an offence, not a misdemeanour. Wilful use of someone else's movable property concerned all goods, regardless of their value, provided that the perpetrator used them, albeit without any consent from the owner or another person entitled to manage the property. Wilful use of someone else's movable property was subject to the penalty of a fine or reprimand, and the prosecution occurred upon the motion of the injured person.

Although the penalties for taking a motor vehicle with the purpose of using it for a short period of time are clearly more severe than the penalties which used to apply to wilful use of someone else's movable property, the problem of automotive

17 Act of 20 May 1971 – Code of Petty Offences, Dz.U. (Journal of Laws) 1971, No. 12, item 114 as amended, Article 127 § 1.

crime is much more serious today. This is due to intensive economic transformations which, in addition to bringing mainly social advantages, also create new types of risks. There are many more cars today than there were in the past, and automotive criminals are far better organised. There is also the temptation to easily make larger profits where there is a possibility to escape criminal liability for offences through which such profits can be made. This is why even clearly more severe penalties do not deter criminals from committing and offence.

Representatives of the justice system and law enforcement agencies, as well as representatives of the legal community, are discussing the advisability of maintaining the independent status of the prohibited act of taking a motor vehicle with the purpose of using it for a short period of time. This offence could be merged with another offence, e.g. theft or burglary. However, such a solution could prevent or significantly hinder penalising persons with respect to whom car appropriation could not be proven and could also, depending on the content of the regulation, produce the assumption that every act of taking should be treated as appropriation, which could in fact align penalties for acts of differing public harmfulness. One must certainly take into account that taking a motor vehicle with the purpose of using it for a short period of time is not only a factor which addresses past criminal law practices, such as wilful use of someone else's movable property, but it is also a form of so-called "substitute penalisation", which provides for differentiating between prohibited acts based on their social harmfulness and differentiating between specific circumstances of prohibited acts, and for penalising perpetrators with respect to whom it cannot be proven that they appropriated cars with the intent to draw financial benefits. Thanks to this, the Polish criminal law is able to minimise the risk of car theft, as it provides for deprivation of liberty even for taking a vehicle.

Conclusion

Defeating automotive car security systems and exploitation of the rules of law are employed by car thieves, because they are effective and difficult to prevent. The problem can be solved only through significant upgrades to safeguards used in cars, promotion of knowledge about automotive crime and improvements in the law aimed at reducing the loopholes exploited by perpetrators of criminal offences. The law prevents penalising people on the basis of a presumption of guilt. On the contrary, there is a presumption of innocence until the defendant's guilt is proven and the final sentence is passed. This is one of the greatest premises of progress in the field of law, for it reduces the risk of penalising defendants who are not guilty.

Criminals, in particular car thieves, are able to exploit the existing legal solutions. For example, they invoke taking some else's car with the purpose of using it for a short period of time, whereas, in fact, the car was stolen (or, alternatively, burgled). This is why it seems justifiable to amend Article 289 of the Penal Code by clarifying the current definition of the premises of this criminal act and, most importantly, by clarifying the length of time for which a vehicle may be taken by an unauthorised person for that act to be considered as taking and not theft or burglary. This will provide for enhancing public safety and potentially curb automotive crime.

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CITATION

Konieczny, M.K., *Defeating automotive security systems and exploiting rules of law as the modi operandi of car thieves*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 47–59,
DOI: 10.18276/ais.2020.30-04.

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 61–72
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-05

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Relation between the injured party being under the influence of alcohol and the liability of the perpetrator due to the crimes under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code

Abstract

The paper constitutes an attempt at presenting the views of legal scholars and commentators and the judicature on the possibility of attributing criminal liability under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code to the perpetrator in the case of alcohol consumption by the injured party. This issue is the basis of a crucial dogmatic problem, extremely up-to-date from the point of view of the study of criminal law, since the solution thereof determines the criminal liability of the alleged perpetrator.

Therefore, the analysed issue raises the question of the limits of impunity for violations in the sphere of sexual life of the injured party in comparison with the features and circumstances directly related to the victim. Thus, the paper attempts to answer the question whether actions belonging to so-called sexual offences should be predominantly assessed with the use of a literal interpretation or taking into account the formal-dogmatic interpretation.

Keywords: rape, sexual abuse, sexual offences

Introduction

The issue of consuming alcohol by injured parties with regard to the liability for committing a crime under Article 197 of the Criminal Code and Article 198 of the Polish Criminal Code is the basis for major discussions among legal commentators and in court decisions. It is related to the legislator's use of ambiguous, fuzzy concepts with a possibility of over-interpretation.

In the case of the crime of rape stipulated in Article 197 of the Polish Criminal Code, one of the alternative premises is subjecting the injured party to sexual intercourse or to perform/submit to other sexual act by deceit, which is an extremely broad concept that causes many interpretative difficulties. Issues regarding deceit are also subject to assessment with regard to intoxication of the injured party by the perpetrator. Whereas, with regard to the crime of sexual abuse under Article 198 of the Polish Criminal Code, one of the premises is the injured party's state of helplessness. The thus formulated attribute of the aforementioned type of crime poses a range of questions, among others, on the legal-criminal assessment of exploiting the fact of the injured party's intoxication in order to subject this person to sexual intercourse or to perform/submit to other sexual acts. This discussion is multithreaded due to the multitude of opinions represented in this scope by criminal law representatives. Primarily, the up-to-dateness and importance of these issues outlined herein cannot be dismissed from the point of view of both a lawyer-practitioner and a lawyer-theorist.

Even at this stage, one could ask a controversial question challenging the purposefulness of studying the issue at hand. In fact, while analysing some ideas, especially those presented in the past, it may be concluded that a person consuming alcohol, irrespectively of whether such consumption is done on one's own initiative or the person is persuaded to do so by a companion who later commits a sexual act with such a person, is not put in a position of an injured party, and thus no crime is committed in this aspect by the alleged perpetrator.

It would seem that such a comment, completely groundless, could be justified by legal scholars and in court decisions taking into consideration some of the notes specified above. The rationality of such assessments would be predominantly advocated by considering as appropriate conclusions in the scope of Article 197 of the Criminal Code, which concentrate on accepting as appropriate the opinion on the impossibility of showing the attributes specified in the aforementioned provision in the case of intoxicating the *quasi*-injured party, an adult, who knows how his or her body reacts to an alcoholic drink. In such a case, any alcohol consumption at social meetings, at which sexual intercourse or other sexual act would be performed on

a person who has been previously deliberately persuaded by the perpetrator to consume alcohol and who was influenced by the *quasi*-perpetrator, would be left outside the interest of the judicature.

A similar conclusion should be drawn from the analysis of the contents of Article 198 of the Criminal Code in the context of committing a sexual act with a person who is unconscious as a result of previous alcohol consumption who, however, put himself or herself in this state independently and which was not related to pathological drinking or alcoholism.

Arguments supporting this presented opinion should be based on the interpretation of the contents of Article 1 § 2 of the Polish Criminal Code and Article 115 § 2 of the Polish Criminal Code. In light of the analysis of the invoked provisions, the aforementioned hypothetical facts of a case could not be subjected to legal-criminal assessment at all due to being acts of a low degree of damage to society, which excludes liability on the grounds of the principles expressed in the Polish Criminal Code. Therefore, the crime should have an attribute of damage to society at a degree higher than low, while the determination of the degree of damage to society is influenced by a series of factors indicated by the legislator in the contents of Article 115 § 2 of the Polish Criminal Code, such as, among others, the type and character of violated goods, the form of the intent and the type and degree of violated prudential rules. Attributes comprising the concept of the degree of damage to society stipulated in Article 115 § 2 of the Polish Criminal Code are divided into objective, which include, for instance, the type of the good violated by the act, and subjective, which include, among others, the issue of the assessment of the form of the intent and the perpetrator's motivation.[1] Additionally, it is necessary to indicate that the assessment of the degree of damage to society must be based on the analysis of all circumstances enumerated in Article 115 § 2 of the Polish Criminal Code.[2]

Therefore, it is necessary to ask the question whether, in the aforementioned cases, the degree of damage to society is higher than low due to the attitude and behaviour of the injured party. It is, in fact, a rule, which was confirmed by the Supreme Court in its judgment of 20 March 2019, that the aim of the institution described in Article 115 § 2 of the Polish Criminal Code is that the authorities enforcing the law are vested with tools to classify acts committed by perpetrators to insignificant and significant categories, which deserves to be analysed.[3] Furthermore, it should be considered if, in the context of the aforementioned situation,

1 Budyn-Kulik, M., *Komentarz do art. 115 Kodeksu karnego*, in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2014, p. 283.

2 Resolution of the Supreme Court of 25 June 2019, I DO 21/19, LEX No. 2696823.

3 Judgment of the Supreme Court of 20 March 2019, VI KA 3/19, LEX No. 2643291.

attributes of the acts specified in Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code were shown.

Thus the formulated question was deliberate, as the author intended to raise the reader's scepticism. Whereas, the intention accompanying this concept was to emphasise the validity of interpreting the aforementioned provisions with a consideration of the injured party's interests and separating the injured party's attitude from the possibility of attributing commission of the discussed sexual offences to the perpetrator. Therefore, it is necessary to underline that this paper focuses on the position supporting a wide interpretation of the provisions of Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code in the spirit of providing victims with as broad legal-criminal protection against instances of sexual aggression as possible.

Alcohol vs. the crime of rape

In the scope of the crime classified by the legislator pursuant to Article 197 of the Criminal Code, discussion in the scope in question has its starting point at locating the issue of the victim's alcohol consumption to the prohibited act with reference to the set of statutory premises.

As has been indicated above, the issue of alcohol in the context of the injured party is related to one of the premises of the act under Article 197 of the Polish Criminal Code, i.e. deceit. In legal scholarship, deceit is classically stipulated as using the mistake made by the injured party by maintaining his or her conviction as to the validity of the circumstances causing such a mistake.[4] J. Wojciechowska specifies the concept of deceit by linking deceit with the behaviours of a person who is misleading another person in order to lead the injured party to be unable to resist.[5] Therefore, the mistake leads to excluding the injured party's decision-making ability or to the perpetrator influencing the victim to make a specific decision as a result of being misled, i.e. assurance regarding a state of reality which is not compliant with the truth.

In the context of this paper, it is crucial to underline that the issue of deceit is extremely complex, whereas the assessment of consuming alcohol by the victim and the impact thereof on the legal-criminal assessment of the perpetrator's act has been changing with time. In the period when the Criminal Code of 1969

4 Marek, A., *Kodeks karny. Komentarz*, Warszawa 2010, p. 450.

5 Wojciechowska, J. and Kunicka-Michalska, B., *Przestępstwa przeciwko wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Rozdziały XXIII, XXIV, XXV i XXVII Kodeksu karnego. Komentarz,* Warszawa 2001, p. 95.

was binding, both the judicature and legal scholars and commentators had a rather coherent position on the discussed scope. It was believed that when an indecent assault was committed by the alleged perpetrator on an intoxicated victim, it did not constitute grounds for bringing prosecution against such a perpetrator. Such a thesis was supported with the arguments that focused on the statement that an adult who knows the character and effects of alcohol consumption should control it, especially while being aware of their body's reaction to this substance. In this context, it was irrelevant for representatives of science and judicature whether the offender persuaded the injured party to consume alcohol, was indifferent in this scope or, while seeing the bad condition of the intoxicated person, did not advise against further consumption of alcoholic drinks. Such a position was expressed in 1974 by the Supreme Court in one of its rulings and which stipulated the clarity of the above statement for many years.[6]

The judgement of the Supreme Court of 1983, which allowed the possibility of prosecuting a perpetrator persuading a minor to consume alcohol in order to exclude his or her ability to make a conscious decision and then committing an indecent assault with such a person, constituted a certain breach in the discussed issue. However, this exception included only minors, who do not know the impact of alcohol on their bodies and who are not aware of the possibilities of excluding the decision-making ability due to alcohol consumption.[7]

Such a conception should be assessed, in the context of current social relations, as being univocally unfavourable, especially taking into consideration the legislator's pursuit of increasing the legal-criminal protection of victims of sexual offences.

Therefore, according to the currently binding conception, as a rule, the party injured with a sexual offence is not burdened in any manner with the liability for the occurrence thereof. Such a conclusion constitutes a starting point for accepting as proper a position according to which intoxicating an injured party in order to exclude his or her state of awareness and then, leading to performing a sexual intercourse or other sexual act constitutes a crime pursuant to Article 197 of the Criminal Code.[8] However, what should also be considered, according to representatives of legal scholarship and according to court decisions, is the behaviour of the perpetrator who persuades the victim to consume alcohol in order for the injured party to break his/her moral principles in the sphere of sexual life does not consti-

6 Judgement of the Supreme Court of 26 September 1974, III KR 105/74, OSNKW 1974/12, item 229.

7 Judgement of the Supreme Court of 8 July 1983, IV KR 124/83, OSNKW 1984/1-2, item 13.

8 Mozgawa, M., *Komentarz do art. 197 kk*, in: Mozgawa, M. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2015, p. 538.

tute showing premises defined by the legislator in Article 197 of the Polish Criminal Code.[9] Such a conclusion constitutes a natural consequence of assuming that in the case of the crime of rape, it is required for the perpetrator to have a direct specific intent strictly oriented to the aim of leading to sexual intercourse or performing/submitting by the victim to other sexual act.[10] The issue in question leads the discussion to a new path where the attention to the insightful and critical and thus, devoid of unnecessary in this scope emotional character, subsumption of Article 197 of the Polish Criminal Code to the specific facts of a case, is reinforced.

Alcohol vs. sexual offence of exploiting helplessness

With reference to the issue of the sexual offence of exploiting helplessness, it is necessary to first shortly outline this issue in the context of Article 198 of the Polish Criminal Code, pursuant to which the aforementioned prohibited act has been penalised.

Above all, the act described at this point can be classified as one of the manners of committing by the perpetrator the crime classified under Article 198 of the Polish Criminal Code. This provision stipulates the liability of a person who exploits the helplessness, mental illness of the victim or his or her mental impairment in order to lead them to sexual intercourse or to perform/submit the injured party to other sexual acts in the situation when the victim is not able to recognise the significance of his or her acts or control his or her behaviours.

Therefore, with reference to this issue, it should be indicated that the person consuming alcohol, which resulted in excluding the ability to recognise the significance of his or her acts or control his or her behaviours, is characterised with helplessness. This state is, in fact, defined in court decisions as causing a disorder in the scope of understanding one's own acts by a helpless person irrespectively of the reason of such helplessness.[11] Moreover, it is underlined that helplessness can have attributes of permanent or temporary circumstances.[12] Thus, consuming alcohol by a person who, as result of his or her behaviour, becomes a person unable to recognise the significance of his or her acts or to control their behaviours and who is then sexually abused by a third party should be unconditionally recognised as showing

9 Hypś, S., *Komentarz do art. 197 kk*, in: Grześkowiak, A. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2019, pp. 1049–1050; Judgement of the Supreme Court of 26 September 1974, op. cit.

10 Judgement of the Supreme Court of 4 December 2018, II KK 114/18, LEX No. 2603598.

11 Judgement of the Supreme Court of 2 July 2002, IV KKN 266/00, LEX No. 54406.

12 Hypś, S., op. cit., p. 1057.

attributes of a prohibited act classified under Article 198 of the Criminal Code. The rationality of this position is also supported by judicature that, on the grounds of one of the issued court decisions, concluded that the criminal liability of the perpetration of the act under Article 198 of the Polish Criminal Code is related to the circumstances strictly related to the injured party and his or her subjective features. In fact, these features prevent the victim from making a conscious decision in the sphere of the individual's sexual freedom at a specific moment.[13] Nevertheless, there are discrepancies in this scope among legal commentators, which is problematic in the scope of the possibility to establish a uniform position.

For instance, in order to illustrate the above issue, the beliefs of M. Rodzynkiewicz regarding this matter should undoubtedly be indicated. The author explicitly questions the possibility of attributing criminal liability to the perpetrator due to committing a crime under Article 198 of the Polish Criminal Code in the case of alcohol consumption by the alleged victim in a situation when it is not related to e.g. alcoholism or other pathological conditions.[14] Thus, the author promotes ideas constituting a breach in the general rule based on separating the reason of intoxication, i.e. helplessness to a level causing disruptions in the sphere of recognising by the injured party the significance of his or her behaviour and excluding the possibility of controlling it.[15] It may, therefore, seem that the aforementioned author is in favour of the strict interpretation of the concept of "helplessness" and thus professes relating it solely to the injured party's helplessness caused by strictly physiological conditions, such as: paralysis, disability or a state of pathological alcohol or drug intoxication related to the victim's addiction. This position cannot be supported due to the literal interpretation of the provision of Article 198 of the Polish Criminal Code, which stipulates not only the helplessness, but primarily includes the formulated result of the helplessness, i.e. exclusion of the ability of making a conscious, free decision in the scope of sexual activity. Therefore, it should be indicated that the inability of formulating free and conscious consent or expressing verbal or non-verbal resistance does not occur in the case of physiological conditions related to, among others, disability, for instance, in the aforementioned forms. Thus, while summarising this part of deliberations, it should be stated that only

13 Decision of the Supreme Court of 20 April 2016, III KK 489/15, http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20KK%20489-15.pdf (accessed 27.02.2020).

14 Rodzynkiewicz, M., *Komentarz do art. 198 kk*, in: Zoll, A. et al. (eds.), *Kodeks karny. Część szczególna. Komentarz*, Zakamycze 2006, pp. 632–633.

15 See e.g. Konarska-Wrzosek, V., *Komentarz do art. 198 kk,* in: Konarska-Wrzosek, V. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 952; Piórkowska-Flieger, J., *Komentarz do art. 198 kk*, in: Bojarski, T. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 570.

meeting the aforementioned factors jointly can one be led to the statement that the perpetrator commits an act prohibited by the legislator pursuant to Article 198 of the Polish Criminal Code and not the crime of rape pursuant to Article 197 of the Polish Criminal Code.

Moreover, it seems that the above issue does not leave any misunderstandings on the grounds of the court decisions. Thus, the Supreme Court in one of its ruling rightly indicated that the attribute of helplessness is, in the context of Article 198 of the Polish Criminal Code, met if the injured party is in a condition excluding any ability of expressing [important and flawless – author's note] will. Furthermore, the Supreme Court underlined that from the point of view of the analysed issue, only the fact that the circumstance of leading the victim to the state of helplessness occurred without the participation of the perpetrator, who "solely" exploits the existing circumstance of the victim's state of helplessness due to alcohol consumption, is important.[16]

Acts under Article 197 of the Criminal Code and Article 198 of the Criminal Code vs. secondary victimisation

Additionally, in the discussed scope, the conviction prevailing in society regarding the even partial fault of the injured party due to the crime of rape committed against him or her should also be underlined. This phenomenon is called secondary victimisation on the grounds of victimology. This term refers to a set of behaviours of persons met by the victim of the crime and which come down to blaming the injured party and attributing to him or her contribution to the crime committed by the perpetrator. Thus, the injured party experiences negative results in a form of reliving the intense stress, fear and other psychosomatic reactions related to the specific event. It can also have an effect on the intensification of any post-traumatic stress disorder (PTSD).[17] The sources of secondary victimisation include both, representatives of justice with whom the victim not often contacts first after the committed crime, as well as persons from the closest environment of the injured party: family or friends.[18]

16 Judgement of the Supreme Court of 25 November 2009, V KK 271/09, LEX No. 553764.

17 Łaszkiewicz, K., *Powinności Policji wobec ofiary przestępstwa-zarys problem*, in: Mazowiecka, L. (ed.), *Wiktymizacja wtórna. Geneza, istota i rola w przekształcaniu polityki traktowania ofiar przestępstw*, Warszawa 2012, p. 38.

18 Hryniewicz-Lach, E., *Ofiara w polskim prawie karnym. Interesy ofiary przestępstwa i karno-materialne instrumenty służące ich zabezpieczeniu*, Warszawa 2017, pp. 82–83.

Therefore, considering the proper adoption of the conception of indirect liability of the victim for the crime of rape or the crime of sexual exploitation of helplessness in the case of consuming alcohol by the injured party is inadmissible due to the character of the aforementioned prohibited acts. Indeed, in victimology, there is a branch focusing on the impact injured parties have on the committed crimes. For example, one of the fathers of victimology, B. Mendhelsohn, classified the types of victims and distinguished: completely innocent victims, victims less guilty than the perpetrator, victims equally guilty to the perpetrator, victims more guilty than the perpetrator, completely guilty victims.[19] This conception constitutes a basis for other ideas in this scope, which have been developed by many representatives of victimology. Modifications of these conceptions consisted in, among others, describing victims as e.g. lewd, depressive or promiscuous.[20] Such epithets only reinforced the negative reception of victims of crimes *in generale*, while they are especially dangerous with reference to so-called sexual offences, since they allow for decreasing the liability of the actual perpetrator to the benefit of sharing it with the injured party. This, in turn, results in the stigmatisation and shame of the victim of sexual abuse of his or her sexual freedom and, in consequence, actual impunity of perpetrators, decreasing the number of reported crimes of this type or deepening traumas of victims and unconscious transfer thereof to the persons from the injured party's environment.

In the context of this issue, it should be indicated that the analysis of the impact of alcohol on the committed crime is often an element of victimological research. The research conducted by R.B. Felson and K.B. Burchfield proved a dependence between the injured party's alcohol consumption and a committed crime with the use of violence. In cases of such types of prohibited acts, the percentage of intoxicated victims was significantly higher than in the case of crimes committed without the use of violence.[21] The contents of this type of formulated research can constitute a carrier of approval of the occurrence of a phenomenon of secondary victimisation with reference to sexual offences committed with the use of violence. Therefore, with reference to the issue of alcohol consumption by the party injured

19 Mendelsohn, B., *The origin of the doctrine of victimology*, in: Drapkin, I., et al. (eds.), *Victimology*, Toronto-London 1974, pp. 25–26.

20 Henting, H., *The criminal and his victim*, *studies in sociobiology of crime*, New Haven 1948, pp. 383–450; as quoted in: Chodorowska, A., *Ofiary zgwałcenia*, in: Chodorowska, A., *Przestępstwo zgwałcenia. Studium prawnokarne i kryminologiczne*, Olsztyn 2015, pp. 305–306.

21 Felson, R.B. and Burchfield, K.B., *Alcohol and the risk of physical and sexual assault victimization*, "Criminology" 2004, vol. 42, No. 4, p. 837, as quoted in: Bocheński, M., *Krytyczne spojrzenie na koncepcję przyczynienia się ofiary do zaistnienia przestępstwa zgwałcenia*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2010, Vol. 3, pp. 61–62.

as a result of crimes under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code, it is necessary to refer to the assessment formulated by J. Piórkowska-Flieger, who supported the interpretation increasing the protection of the injured party's rights against violations in the sphere of sexual life and who indicated the significance of each committed sexual offence irrespectively of the accompanying circumstances.[22] Such circumstances include, among others: clothes worn by the injured party, the place of the event or the fact of consuming alcohol by the victim due to the persuasion of the perpetrator or without external impulse. A thus defined position is characterised with up-to-dateness, taking into account contemporary social conditions and increasing the feeling of urgency of changes in the sphere of human awareness in the scope of the lack of negative assessment concerning injured parties. M. Bocheński also supports this position and, noticing the interdependence between committing a sexual offence by the perpetrator and the injured party's alcohol consumption that sometimes occurs, challenges the passing of definite judgements in this regard.[23]

Conclusion

Sexual offences constitute a specific type of prohibited acts due to their deep understory of extremely explicit social repercussions. Public opinion loudly and univocally passes judgments aimed at persons injured with sexual offences, burdening them with co-liability and often sole liability for the committed crime. Thus, it would be right to univocally assume that interpretation of provisions regarding crimes stipulated in Chapter XXV of the Polish Criminal Code, due to the aforementioned context, should especially cover a purposeful interpretation which allows for reinforcing the protection of injured parties and developing desirable social attitudes. It should be indicated that thus applied interpretative rules constitute not only performance of the justice function and protection function of the criminal law, but they also constitute implementation of a criminal policy aimed at minimising commission of sexual offences.[24] It is also important for commentators and judicature to maintain discipline in the scope of the interpretation of the aforementioned provisions due to the fact of their apparent thematic overlap. Many times, the differences between analysed types of prohibited acts are extremely delicate; however, proper assessment thereof allows one to conduct a reliable sub-

22 Piórkowska-Flieger, J., op. cit., p. 570.

23 Bocheński, M., op. cit., pp. 62–63.

24 Gardocki, L., *Prawo karne*, Warszawa 2019, p. 7.

sumption process of the specific facts of a case to the relevant provision of the Polish Criminal Code which influences the effectiveness of the criminal law. Additionally, to conclude, it is worth referring to the words of M. Filar, who noticed some room in sexual offences for legislative abuse related to providing an overly emotional tone to the legislation in this scope, especially the postulate of a rational approach to developing regulations in this scope, without detriment to the protection of the individual's rights in the scope of the freedom to decide on his or her sexual life and with a consideration of the rights of other persons.[25]

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25 Filar, M., *Współczesne kultury penalne,* in: Filar, M. and Utrat-Milecki, J. (eds.), *Kulturowe uwarunkowania polityki kryminalnej,* Warszawa 2014, pp. 47–48.

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CITATION

Matynia-Kłos, J., *Relation between the injured party being under the influence of alcohol and the liability of the perpetrator due to the crimes under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 61–72, DOI: 10.18276/ais.2020.30-05.

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 73–87
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-06

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Plans of protection tasks for Natura 2000 areas and local spatial policy

Abstract

The aim of the paper is to define the key spatial conflicts regarding planning relations between the plans of protection tasks for Natura 2000 areas and local tools of spatial policy. The contents of all administrative court's decisions related directly to the plans of protection tasks for Natura 2000 areas are analysed. The judgements issued in 2010 – 2019 are taken into account. Sixteen of such judgements have been distinguished in the Central Database of Judicial Decisions of the Supreme Administrative Court (in principle, grouping all of such rulings). They are classified, and the allegations made in the cases, as well as the contents of specific plans of protection tasks, are analysed. A quantitative and qualitative analysis of the contents of the judicial decisions is conducted. Based on the analyses carried out, two main conclusions can be drawn up:

– on the occasion of spatial conflicts pending before administrative courts, related to the contents of plans of protection tasks for Natura 2000 areas, space users, as a rule, submit very similar objections to those concerning the direct tools of spatial policy;
– the contents of plans of protection tasks directly related to the contents of spatial policy tools are very often underdefined both in subjective and formal terms.

Keywords: plans of protection tasks, Natura 2000 areas, land management system

Introduction

Conducting spatial policy, especially at the local level, requires interdisciplinary depiction, definition of problems and proper implementation of solutions. A lack of understanding at the intersection of selected disciplines may prove to be a very frequent barrier. This also concerns legal, planning and environmental relations in the land management system. Furthermore, it is noticeable in the implementation of the aims and directions of nature protection in spatial policy tools. On the one hand, it concerns such forms of nature protection as e.g. national parks or nature reserves, yet, on the other hand, it concerns such a specific and important form of nature protection as Natura 2000 areas. The aim of the paper is to define the key spatial conflicts regarding the planning relations between the plans of protection tasks for Natura 2000 areas and local tools of spatial policy.

The local spatial policy in Polish reality should be understood as measures undertaken by municipal authorities aimed indirectly or directly at a specific spatial condition (specific manner of management thereof). Key local spatial policy tools include land management conditions and a directions study and local land management plans. The local spatial policy is significantly related to the issues of environment and nature protection. Terrains which are valuable in terms of environment and nature are subject to numerous restrictions in management (also determining the manner of managing neighbouring terrains). Moreover, nature protection tools (including plans of protection tasks), from their own (from the point of view of the sectoral land management system) perspective, influence both the actual management and the local spatial policy tools. The actual scope of this impact (despite statutory regulations) continues to be the object of doubts, and thus, spatial conflicts.

The sphere of interdependencies between Natura 2000 area management and the spatial policy is very broad. In this paper, the authors focus primarily on one subject matter related with the above issue: relations of plans of protective tasks

for Natura 2000 areas and local spatial policy tools. In this context, in fact, bigger problems regarding the environment and nature protection in the land management system can be noticed in the broadest and clearest manner. Simultaneously, the authors concentrate on cases which, from the institutional perspective, have also been triggering the broadest spatial dilemmas and conflicts. This is, in fact, the manner of solving spatial conflicts that can constitute the factor determining improvement of the land management system in the future.

Literature review

The issues regarding the relation between the environment and nature protection[1] and the spatial policy has constituted the object of numerous analyses. There is no doubt that proper depiction of these issues in the land management system causes a series of dilemmas primarily related to the coordination of aims and conditions depicted slightly differently in particular disciplines.

It concerns determining the general relation between the environment and nature protection and the spatial policy. There are no doubts that development of the environment should favour establishing spatial order.[2] On the other hand, the spatial planning instruments should have a significant potential as environment protection tools.[3] In this context, B. Szulczewska underlines that in the spatial planning process, the protection of areas of high natural values is provided by identification of the values and analysis of conditions of preservation thereof, as well as by formulating planning findings taking into account the aims of the protection (especially in the scope of admissible/excluded functions and principles, including restrictions in land development and management).[4] Against this background, the role of environmental conflicts in land management, understood as conflicts

1 In literature on the subject, diverse terminology is used. Tomczak, A. and Sowa, D., *Ochrona przyrody jako wyznacznik kształtowania przestrzeni*, in: Górski, M. (ed.) *Prawo ochrony przyrody a wolność gospodarcza*, Łódź-Poznań 2011, pp. 423–424; Szulczewska, B., *Planowanie przestrzenne jako instrument ochrony środowiska – wczoraj, dziś i jutro,* in: Fetkowski, A. (ed.), *W trosce o Ziemię. Księga ku czci Profesora Stefana Kozłowskiego*, Lublin 2001, pp. 139–156; Szulczewska, B. et. al., *How much green is needed for a vital neighborhood – in search for empirical evidence*, "Land Use Policy" 2014, pp. 330–345.

2 Macias, A. and Bródka, S., *Przyrodnicze podstawy gospodarowania przestrzenią*, Warszawa 2014, p. 12.

3 Otawski, P., *Ochrona środowiska jako wartość i cel planowania przestrzennego*, in: Cieślak, Z. and Fogel, A. (eds.) *Wartości w planowaniu przestrzennym*, Warszawa 2010, p. 68.

4 Szulczewska, B., *Planowanie przestrzenne jako instrument realizacji sieci ekologicznych: między teorią a praktyką,* in: Cieszewska, A. (ed.) Płaty i korytarze jako elementy struktury krajobrazu – możliwości i ograniczenia koncepcji: *Problemy ekologii krajobrazu – tom XIV*, Warszawa 2004,

regarding the condition, resources and availability of the environment, as well as threats thereto and forms of protection thereof, should be stressed.[5] Environmental conflicts are one of the key conditions hindering taking the aims of environment protection into account in planning findings.

It is significantly contributed to by the current and, in many aspects, institutionally faulty land management system.[6] The above causes spatial chaos, which also translates into concrete (countable) ecological losses.[7] Therefore, there is a significant need for optimal care for environmental values from the perspective of public policy. From the perspective related to protection of the environment, local planning does not secure the environment, which can be manifested by, among others, an insufficient scope of the environmental part of local plans[8] and insufficient consideration of environmental conditions in issuing decisions on the terms and conditions of development (while ignoring the issue of specific provisions). In the monograph providing a complex analysis of the aforementioned issues, I. Derucka indicates that in the context of current conditions, the role of planning tools can only be perceived as limiting threats to the environment.[9] Nevertheless, even with such a point of view, the environment and nature scope of the spatial policy tools seems to be underspecified, the best example of which is the underspecified contents of the obligatory element of local land management plans, i.e. the principles of environment, nature and landscape protection.[10]

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p. 55; Szulczewska, B., *Planowanie przestrzenne a ochrona przyrody*, "Studia Biura Analiz Sejmowych Kancelarii Sejmu" 2008, No. 10, pp. 57–79.

5 Przewoźniak, M. and Czochański, J., *Przyrodnicze podstawy gospodarki przestrzennej. Ujęcie proekologiczne*, Gdańsk-Poznań 2020, p. 21.

6 Nowak, M., *Niesprawność władz publicznych a system gospodarki przestrzennej*, "Polska Akademia Nauk. Komitet Przestrzennego Zagospodarowania Kraju. Studia" 2017, vol. CLXXV, pp. 214–225.

7 Chmielewski, T. et al., *Ekologiczne i fizjonomiczne koszty bezładu przestrzennego*, Warszawa 2018, pp. 103–107.

8 Baran-Zgłobicka, B., Środowisko przyrodnicze w zarządzaniu przestrzenią i rozwojem lokalnym na obszarach wiejskich, Lublin 2017, p. 394.

9 Derucka, I., *Prawne gwarancje realizacji zadań ochrony środowiska w procedurze planowania przestrzennego w gminach*, Wrocław 2013, p. 243.

10 Aszkiełowicz, P., *Uwzględnianie wymogów związanych z ochroną środowiska na przykładzie miejscowych planów zagospodarowania przestrzennego Olsztyna,* "Metropolitan" 2018, No. 2 (10), p. 84; Ociepa-Kubicka, A., *Rola planowania przestrzennego w zarządzaniu ochroną środowiska,* "Inżynieria i Ochrona Środowiska" 2014, No. 1, pp. 139–142; Nowak, M. and Kiepas-Kokot, A., *Ograniczenia środowiskowe w instrumentach zarządzania przestrzenią na szczeblu gminnym w województwie zachodniopomorskim*, "Studia Regionalne i Lokalne" 2014, No. 2, pp. 144–163; Nowak, M., *Ochrona środowiska jako jeden z celów zarządzania przestrzenią na szczeblu lokalnym i regionalnym,* "Ekonomia i Środowisko" 2013, No. 1, pp. 193–205; Nowak, M., *Postanowienia*

In the context directly referring to nature protection, it is worth indicating, in accordance with R. Giedych, that binding legal regulations do not allow a full, individualised scope of stipulating provisions regarding the forms of nature and, as a consequence, gradual disintegration of spatial planning and nature protection is observed. The majority of forms of nature protection have no aims guaranteeing implementation of nature protection aims in the spatial aspect. In the detailed dimension, premises for protected land management, to a great extent, are limited to bans.[11] In this context, the plans of protection tasks for Natura 2000 areas should be analysed.[12] From the perspective of this paper, the relation between these acts and spatial policy tools is crucial. The plan of protection tasks is established by the regional environment protection director in the form of an order (an act of local law). A premise for adopting this act is the necessity to maintain and restore the proper conservation status of natural habitats and species of plants and animals. In compliance with Article 28 par. 10 point 5 of the Act on the protection of nature, this plan must include: recommendation for changes in existing studies of conditions and directions of the land management of municipalities, local land management plans, voivodeship land management plans and land management plans for inland maritime waters, territorial waters and the exclusive economic zone regarding the elimination or limitation of internal or external threats, if they are necessary to maintain or restore the proper conservation status of natural habitats and species of plants and animals, for which the Natura 2000 area was indicated. According to A. Fogel, in the case of these types of areas, the issue of the significant negative impact on this area (analysed in a separate procedure) also plays a key role at the implementation stage.[13] However, there are no doubts that in the dimension regarding the discussed issues, it seems crucial to assess the relation between plans of protection tasks for Natura 2000 areas (universally binding acts) and local spatial

planów miejscowych a ochrona środowiska w gminach cennych przyrodniczo, "Samorząd Terytorialny" 2015, No. 11, pp. 35–44.

11 Giedych, R., *Ochrona przyrody w polityce przestrzennej miast*, "Polska Akademia Nauk. Komitet Przestrzennego Zagospodarowania Kraju. Studia" 2018, vol. CXC, pp. 70–109.

12 Objectives related to Natura 2000 areas do not raise serious doubts and were clearly expressed in the scope related to the subject matter discussed herein, among others in the following publications: Habuda, A., *Obszary Natura 2000 w prawie polskim,* Warszawa 2013, pp. 27–38; Radecki, W., *Ustawa o ochronie przyrody. Komentarz*, Warszawa 2012, pp. 204–207; Federczyk, W. et al., *Prawo ochrony środowiska w procesie inwestycyjno – budowlanym,* Warszawa 2015, pp. 223–232.

13 Fogel, A., *Prawna ochrona przyrody w lokalnym planowaniu przestrzennym,* Warszawa 2011, p. 147.

policy tools. It is especially necessary to determine how the aforementioned "indications" are formulated. The hitherto analyses[14] imply that:

- in some plans, indications are not specified precisely enough; not to a specific spatial policy tool, but generally;
- sometimes the statutory scope is exceeded in formulating indications (by addressing them to other acts);
- the possible scope of spatial policy tools is exceeded;
- some indications have been formulated too generally.

The scope of spatial conflicts directly related with contesting this part of protection plans before administrative courts is not too broad (especially if compared with the scope of analogous spatial conflicts concerning e.g. local land management plans).[15] Nonetheless, important conclusions can also be drawn up on these grounds.

One of the possibilities of preventing such situations seems to be participation (socialisation) within the framework of drawing up and implementing plans of protection tasks for Natura 2000 areas. Stakeholders who should be included in the process are, above all: local government units, the voivodeship office (often including the Voivodeship Conservator of Monuments), the forest inspectorate and entities supervising private forests, non-governmental organisations (including ecological), local associations and action groups, land owners and users, scientists conducting research on a given terrain, local leaders (formal and informal) and other persons interested in the area. As underlined by A. Haładyj, socialisation of the process of drawing up and adopting plans of protection tasks results in positive effects provided that it is properly planned, i.e. the boundary conditions concerning the actual inclusion of stakeholders are met. It is crucial for the result of the process that participating stakeholders have knowledge on the consequences of undertaken findings and ensure inclusion of commonly established positions and solutions in the adopted plan.[16] Good practices in this scope concern appointment of the Local Cooperation Team (it is important to select the team members who should reflect the characteristics of the Natura 2000 area) or operation of an information and

14 Nowak, M., *Plany zadań ochronnych dla obszarów Natura 2000 jako instrument zarządzania środowiskiem – kluczowe problemy,* "Budownictwo i Architektura" 2014, No. 13 (1), pp. 7–14.

15 See: e.g. Nowak, M. et. al., *Orzeczenia sądów administracyjnych w systemie gospodarki przestrzennej – perspektywa funkcjonalna i realizacyjna. Studium przypadku województwa mazowieckiego,* "Samorząd Terytorialny" 2020, No. 7–8, pp. 109–128.

16 Haładyj, A., *Działania faktyczne w prawie ochrony środowiska na przykładzie uspołeczniania planów zadań ochronnych dla obszaru Natura 2000,* "Roczniki Nauk Prawnych" 2012, No. 10, pp. 156–157.

communication platform.[17] Benefits that can result from participation and then translate into minimising spatial conflicts are related to: an increase in knowledge on the possibilities of development based on Natura 2000 areas, change in perceiving protective measures and perception thereof as a catalyst of local activity and development and, finally, changing attitudes to institutions such as RDEP. It should be mentioned that participation, related to the establishment and adoption of plans of protection tasks for Natura 2000 areas, fits into the wider context of participatory management of nature protection, i.e. a process which is rarely fully implemented in Poland, which results from poor social awareness in this scope and little faith in including commonly established positions in the final documents (and in broader terms – in agency).[18]

Simultaneously, it should be noticed that one of the main barriers in active inclusion of stakeholders in decision-making processes concerning management of Natura 2000 areas and then translating implementation thereof into planning acts consists in the weakness of the participation processes and low level of social capital in Poland.[19] All of these factors have a direct impact on causing spatial conflicts and the course thereof.

Plans of protection tasks for Natura 2000 areas challenged before administrative courts in the years 2010 – 2019

Another research stage consisted in analysing the contents of all administrative courts' decisions related directly to the plans of protection tasks for Natura 2000 areas. It was decided that cases concerning the contents of indicated plans which ended before administrative courts can be considered as those on occasion of which spatial conflicts were disclosed to the broadest extent (irrespective of the final ruling). The judgements issued in 2010 – 2019 were taken into account. Sixteen of such judgements were distinguished in the Central Database of Judicial Decisions of the Supreme Administrative Court (in principle, grouping all such rulings). Judicial decisions (only valid) were searched by "plans of protection tasks" (referring only to the sentence of a judicial decision). Sixteen judicial decisions of administrative courts were separated (one judgement of the Supreme Administrative Court was

17 RDOŚ, *Plany zadań ochronnych w pigułce na przykładzie 11 obszarów Natura 2000 w województwie śląs*kim, Katowice 2014, pp. 6–7.

18 Luzar-Błaż, K., et al., *Partycypacja społeczna w zarządzaniu terenami chronionymi na przykładzie obszaru Natura 2000 – Dolinki Jurajskie*, "Wieś i Rolnictwo" 2017, No. 2, p. 50.

19 Cf. e.g. Nowakowska, A. et al., *Od rehabilitacji do włączenia społecznego – współczesne ujęcie procesów rewitalizacji*, Warszawa 2019, pp. 50–52.

included separately). The verification period (2010 – 2019) was dictated by, on the one hand, the need to collect data for a longer period of time (especially with a small number of cases concerning plans of protection tasks). On the other hand, a longer period was not selected due to the risk of diverse legal regulations and ruling practices. Due to the implementation of the paper's objective, there are no doubts that the data in question, subject to analysis, can refer to the current state. Judgments stating the invalidity of a given act or rejecting a complaint are undoubtedly especially important. These allow verification of the role of administrative courts both in the context of nature protection issues and the land management system to the broadest extent.

Table 1. Classification of judgments of administrative courts concerning plans of protection tasks from the perspective of directions of rulings

Ruling	Number
Declaration of invalidity	1
Dismissal	4
Rejection	7
Annulment	4

Source: author's own study.

Table 1 implies that there are relatively few litigations pending at administrative courts with regard to the contents of plans of protection tasks for Natura 2000 areas.[20] This conclusion is especially confirmed when the indicated results are compared to the number of cases before courts concerning local land management plans or studies of conditions and directions of land management. Spatial conflicts are disclosed primarily at the stage of applying spatial policy tools. The above does not change the fact that plans of protection tasks for Natura 2000 areas also generate certain problems. Some of these are reflected at a later stage. However, it is worth analysing certain regularities related to these tools.

Usually, the complaints were brought by owners of specific properties. In two cases, the plaintiffs were municipalities, and in another two cases – State Forests (i.e. stakeholders should gain knowledge on the provisions of plans and consequences thereof at the stage of drawing up documents). It should also be underlined that the

20 File numbers of judicial decisions are the following: II SA/Ol 486/19, II SA/Gd 522/18, II SA/Gd 517/18, II SA/Bk 315/18, II SA/Bk 7/18, II SA/Op 23/17, II SA/Ol 1323/16, II SA/Ol 756/15, II SA/Lu 408/15, II SA/Lu 409/15, II SA/Rz 684/15, II SA/Rz 689/15, II SA/Lu 164/15 II SAB/Ol 168/12, II OSK 1924/12, IV SA/Wa 1772/11.

minority of cases ended with a ruling directly related to the verification of provisions of a specific plan. The complaints were predominantly rejected or annulled (which does not change the fact that there were also spatial conflicts on this occasion).

Table 2. Main charges raised against plans of protection tasks for Natura 2000 areas addressed in cases that ended with a declaration of invalidity of those acts or dismissing the complaints

Direction of the judicial decision	Key charges
Declaration of invalidity	– excessive limitations in development possibilities; – exceeding the statutory scope (and the scope stipulated in regulations) for plans of protection of Natura 2000 areas.
Dismissal	– unjustified bans and restrictions in development/conducting economic activity; – a lack of analysis of the terrain before introducing restrictions (including a lack of examination of the purposefulness and proportionality of restrictions); – introduction of "secret bans" of a universally binding character.

Source: author's own study.

In many aspects, the charges concerning plans of protection tasks for Natura 2000 areas remind dominant charges concerning local land management plans in analogous cases. Above all, the complaints of owners of properties indicated the exceeding of possible boundaries of interference and unjustified restriction of the right of ownership (Table 2). In such cases, the discussion concerning the actual scope of the right of ownership, as well as the manner of justifying interference (including the quality of used analyses) is open. In cases where the plaintiffs presented the above arguments, they also connected them with exceeding the statutory scope of protection plans. It should be simultaneously underlined that these charges were of very limited use in the analysed case.

The contents of indications to planning acts included in the plans of protection tasks for Natura 2000 areas, which (in compliance with Tables 1–2) caused the largest spatial conflicts, were also analysed. Table 3 implies that the subject indications copy previously diagnosed errors. Above all, they are very often not sufficiently precise. This hinders effective challenging thereof; however, at the same time, this contributes to easier challenging of local land management plans adopted on the grounds thereof.

Table 3. Selected indications for changes in planning acts included in the plans of protection tasks for Natura 2000 areas causing spatial conflicts

Natura 2000 area which the indications concern	Contents of selected indications
Masurian Refuge of the Baranowo Turtle	– introduction of the decision regarding key areas for the protection of breeding sites of the European pond turtle – 500 m around places of permanent residence of European pond turtles – protecting these places against new residential buildings at a distance from existing buildings that can have a negative impact on the objects of protection in the Natura 2000 area.
Białowieża Forest	– allowing various types of transformations of functions of the terrains and supplementing them where it does not cause an inconvenience for surrounding residential buildings and the environment.
Sandomierz Forest	– to introduce on the lands with the recognised habitat of birds the provision on maintenance in the hitherto manner of land management. Development only in places not colliding with the birds' protection.
Uroczyska Roztocza Wschodniego	– ban on location of a new building at a distance less than 30 m from breeding sites; – maintenance of wildlife corridors allowing preservation of the coherence of the Natura 2000 network – structures such as afforestation, avenues and rows of trees should be maintained during update.
Kamień	– principles of development and infrastructure of the grounds – recreational and leisure buildings and devices should have small capacity and refer with its architectonic form and detail to traditional forms and should fit the environment.
Ostoja Warmińska	– issuance of permits for location of wind farms in the area of Ostoja should be withheld; – promotion of generating other forms of energy: solar, biogas works; – annual and multi-annual energy crops (e.g. willow, birch, poplar) are not recommended.

Source: author's own study.

Issues concerning the referred indications (including the manner of expressing them) illustrate in more detail the dilemmas occurring in the land management system very well. One of the key issues is the lack of sufficient integration of the spatial policy with other areas of activity (undertaken on a local, regional and central

level).[21] As a consequence, it is also manifested with the fact that the postulates concerning the spatial policy (included in other policies' tools) are sometimes, from the perspective of the land management system, quite chaotic and imprecise both in subjective and formal terms.

Furthermore, the cases pending before administrative courts regarding agreements on local projects of land management plans by regional environment protection directors were verified in the scope of compliance with the aims of forms of nature protection (Natura 2000 area, landscape parks and protected landscape areas). They should be treated as a supplement to previous analyses allowing one to more broadly analyse the context of relations between the land management system and nature protection.

Table 4. Characteristics of administrative court cases concerning refusals to agree on projects of local plans for forms of nature protection in the years 2010–2019

Criterion	Characteristics
The number of cases in which the refusal to agree on projects was upheld by courts	11
Limitations constituting the object of the conflict	– ban on the liquidation of afforestation – contrary to the service purpose of the terrain specified in the plan (and elements of management thereof); – housing development provided for in the plan will infringe upon the ban on locating buildings included in the acts for forms of nature protection; – admission under the plan of the possibility to perform fencing below 2.20 m is related to the significant negative impact for Natura 2000 areas; – admission of a detrimental exploitation of aggregate; – replacing agricultural use with service use will have a negative impact on the specific forms of nature protection; – agreements regarding active protection of ecosystems and related collision in the scope of development provided for in the local plan – a large hotel complex; – ban on locating buildings in a 100 metre-wide patch of land from the coastline of rivers, lakes and other water reservoirs, with the exception of water devices and buildings, with the purpose of conducting rational agricultural, forestry or fishery management.

21 Markowski, T., *Zintegrowane planowanie rozwoju,* in: Kukliński, A. and Woźniak, J. (eds.), *Przyszłość wolności, wymiar krajowy – regionalny – międzynarodowy*, Kraków 2014, pp. 335–367.

Criterion	Characteristics
The number of cases in which courts questioned the refusal of agreement on projects	7
Limitations constituting the object of the conflict	– too broad a ban on development (unjustified with the needs related to nature protection); – improper qualification by the approving authorities of the negative impact of investment on the forms of nature protection.

Source: author's own study.

On the basis of Table 4, it can be indicated how spatial conflicts between the environmental and nature area (represented by the approving authority) and the investment area (represented in this case by municipal authorities responsible for drawing up a local plan) looked like. Nevertheless, this perspective is different from the one included in Tables 1–3. In Table 4 (in the summary), the key directions of specific, expressed positions were presented; therefore, they should be considered representative for the subject matter discussed therein. It can be assumed that the key dilemma again comes down to the scope of possible limitations in development. The circumstances related to the admissible scope of development (despite environmental and nature limitations) constitute the basis of disputes and doubts, not only in cases concerning plans of protection tasks. This is a broader list of barriers and dilemmas in the land management system. Apart from the determination of proportionality of admissible planning interference, the concurrence of bans included in projects of local plans is also verified in the indicated judicial decisions with bans included in acts concerning particular forms of nature protection. It should be underlined that local plans which are not precisely expressed also constitute an object of conflicts.

Conclusions

The assessment of plans of protection tasks requires underlining the characteristics thereof. In the construction of these acts, it is required to take into consideration both conditions related to the nature protection and planning conditions, as well as allowing participation. There is a problem with transferring the above into the legal sphere. On the basis of the conducted analyses, two main conclusions can be drawn:

– on the occasion of spatial conflicts related to the contents of plans of protection tasks for Natura 2000 areas pending before administrative courts, space users, as a rule, raise objections very similar to those concerning the direct tools of spatial policy (e.g. local land management plans);
– the contents of plans of protection tasks directly referring to the contents of spatial policy tools are very often underdefined both in subjective and formal terms. This is an expression of a broader issue of the land management system, especially its lack of sufficient integration with other policies.

With regard to the second conclusion, it is worth indicating that (as has been indicated in the literature review) the postulated direction of activities comprises the integration of the policy of development that is currently missing. Obviously, there are relations between diversified development spheres (which can be treated as origins of such an integration), and they constitute the object of research. Nevertheless, the contents of plans of protection tasks indicated in the underdefined results (from the perspective of the land management system) confirm the theses and the lack of sufficient integration of policies of development.

From the point of view of spatial conflicts, in the scope analysed herein, there is a decidedly stronger relation between the environment and nature protection sphere than that guaranteed by the currently binding legal regulations. Nevertheless, the particular wording of selected regulations will not be the only problem. The lack of integration of policies of development generates, and will continue to generate to a greater extent, similar situations (also deepening spatial chaos, as well as limiting the flexibility of planning). It will also involve negative consequences for the environment and nature protection sphere, resulting in the lack of the possibility of comprehensive protection of the environmental and natural values of terrains adequate to their needs.

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CITATION

Nowak, M.J., and Legutko-Kobus, P., *Plans of protection tasks for Natura 2000 areas and local spatial policy*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 73–87,
DOI: 10.18276/ais.2020.30-06.

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 89–106
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-07

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Scope of application of the general rule in the Rome II Regulation

Abstract

The purpose of the paper is to determine the scope of application of Article 4(1), which constitutes the general rule of the Rome II Regulation concerning the law applicable to non-contractual obligations. Article 4(1) says that: unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs. However, this rule is subject to numerous exceptions, which the author divided into three groups: 1) exceptions resulting from the structure of Article 4 (Article 4(2) – common habitual residence in the same country, and Article 4(3) – escape clause), 2) exceptions resulting from the whole Regulation (Articles 5 to 9 – separate regulations for different types of tort, Articles 10 to 12 – separate regulations for non-contractual obligations, Article 14 – freedom of choice, Article 16 – overriding mandatory provisions, Article 17 – rules of safety and conduct), 3) restrictions resulting from other acts of EU and international law (the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents). The analysis resulted is the thesis that Article 4(1) of the Regulation applies to a few types of cases (mainly traffic accidents), which, however, happen quite frequently. The author of the paper refers to the provisions of law (analysis of existing legal regulations), as well as to literature based on these provisions, and therefore uses the dogmatic and legal methods of scientific research.

Keywords: tort/delict, Rome II Regulation, general rule, traffic accident, escape clause

Introduction

In association with the fact that more than ten years have elapsed since the entry into force of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the Rome II Regulation),[1] the general purpose of this paper is to verify the scope of application of the general rule of this Regulation expressed in Article 4 (1) (*lex loci damni* – the law of the place where the damage occurs). There were many doubts, even at the stage of legislative work on the Regulation, whether, given the numerous exceptions to the general principle, also in the Regulation itself, it would indeed be generally applicable and, if yes, then to what extent.

In particular, it was claimed in literature that exceptions to the *lex loci damni* principle may be divided into those that are applicable in all cases and those that are applicable to certain kinds of tort/delict. Accordingly, general exceptions include:

- Application of the law of the common place of habitual residence of parties, pursuant to Article 4(2);
- Application of the law of the State that is "manifestly more closely connected", according to the "escape clause" of Article 4(3).
- Application of overriding mandatory provisions of the law of the State of forum (Article 16);
- "taking account" (and possible application) of the rules of "safety and conduct" (Article 17).

Meanwhile, specific exceptions include:

- Application, in the event of product liability, of the law of the common place of habitual residence of the party committing a tort/delict and the party sustaining the damage, the place where the product was acquired or the place of "manifestly closer connection" (Article 5);
- Application of the law of the State of forum in certain cases associated with restriction of competition (Article 6(3)(b));
- Application of the law of the State of an event at the request of the party sustaining the damage, in the event of environmental damage (Article 7);
- Possible application of the law of the place of habitual residence of the party sustaining the damage, when quantifying damages for traffic accidents (recital (33)).[2]

1 OJ L 199, 31.7.2007, pp. 40–49.

2 Symeonides, S.C., *Rome II and tort conflict: a missed opportunity,* "American Journal of Comparative Law" 2008, Vol. 56, pp. 192–193.

Moreover, it should be noted that the parties may effectively choose a law that will eliminate the general rule.[3]

In my opinion, it is possible to formulate a thesis, which will be the subject of reflections in this paper, that exceptions to the scope of the application of Article 4(1) may be divided into three groups. The first group are exceptions contained in the wording of Article 4, e.g. the mandatory application of the place of habitual residence of the parties (Article 4(2)) and the possibility to apply the clause of the closest connection (Article 4(3)). The second group are exceptions contained in the Rome II Regulation, namely the possibility to choose the law, provided for in Article 14, application of overriding mandatory provisions (Article 16) and taking account of the rules of safety and conduct (Article 27), as well as provisions, other than Article 4(1), governing specific types of tort/delict (Articles 5 to 9) and non-contractual obligations (Articles 10 to 12), which, however, due to the limited length of this paper, will not be discussed here. Finally, the *lex loci damni* rule is limited by legal regulations external to the Rome II Regulation, namely EU and international legal regulations, of which only the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents[4] is discussed in this paper. Thus, the research goal of this paper is, in particular, to verify the thesis of whether the above exceptions to the general rule of the Rome II Regulation limit the scope of application of that rule to the extent that it no longer has any practical application. In order to verify the above thesis, I used the legal doctrine method based on an analysis of the case-law of Polish courts, as well as the courts of other EU Member States and of the European Court of Justice.

3 As a result of elimination of tort/delict concerning product liability (Article 5), arising from the law on competition (Article 6), environmental damage (Article 7), infringement of intellectual property rights (Article 8) and industrial action (Article 9), Article 4 is only applicable to traffic accidents to which the Hague Convention of 1971 on the Law Applicable to Traffic Accidents also applies, as well as delict committed via the Internet or other means of electronic communication, in the case of which it seems very difficult to apply the *lex loci damni* due to their specificity. Most other torts/delicts will predominantly be committed as so-called Point – or Platzdelikte ("point" or "location" delict). This means they will be completely realised within a single jurisdiction and, therefore, will normally not involve a border crossing during their perpetration (Hohloch, G., *The Rome II Regulation: an overview. Place of injury, habitual residence, closer connection and substantive scope: the basic principles,* "Yearbook of Private International Law" 2007, Vol. 9, p. 9).

4 Dz.U. (Journal of Laws) 2003 No. 63 item 585.

Limitations to the lex loci damni principle arising from the wording of Article 4 of the Rome II Regulation

Application of the law of the place where the damage occurs

The general rule of the Rome II Regulation is expressed in Article 4(1), according to which: unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. This regulation also applies to non-contractual obligations that are likely to arise (Article 2.2). Any reference in this Regulation to: (a) an event giving rise to damage shall include events giving rise to damage that is likely to occur; and (b) damage shall include damage that is likely to occur.

The wording of Article 4(1) of the Rome II Regulation is not problematic only when there is one event giving rise to one case of damage. Scattered delict (in German legal language: *Streudelikte*) is a delict where the victim suffers damage in more than one State, i.e. in multiple jurisdictions.[5] Article 4(1) of the Rome II Regulation does not provide for any special solutions in the case of such delicts, even though this problem is quite substantial in the case of delicts perpetrated over the Internet. The literature proposes two solutions to this problem.

One of these is a "mosaic" (*Mosaikbeurteilung*) accumulation of individual injuries found in different places of direct damage. This approach, referred to as a distributive approach, obliges the Member State court where a dispute is pending to apply the law of that State only to damage that occurred in the territory of that State and then to combine the results of the application of the laws of all the States where damage occurred in order to settle the pending case. In such cases, the court (assuming that it has jurisdiction over the entire case) must act as if there were as many liabilities as there are States whose laws will be applicable and must combine compensations provided for by the laws of the different States into a single compensation.[6]

5 Hohloch, G., op. cit., p. 11.

6 Dickinson, A., *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford 2009, pp. 330–331. Cf. also Sonnentag, M., *Zur Europäisierung des Internationalen ausservertraglichen Schuldrechts durch die geplante Rom II-Verordnung,* "Zeitschrift für Vergleichende Rechtswissenschaft" 2006, No. 105, p. 269. In my opinion, the problem with this solution is that it is particularly unfavourable to the perpetrators of the damage, especially if, despite the above approach, the perpetrator is not able to predict in any way the size of the damage or the scope of liability. This

The second solution proposes that every court adjudicate only on damage that was perpetrated in the State where that court is established, as this would eliminate a situation in which one court is obliged to apply many foreign laws. Such a solution, however, seems to be very unfavourable for the injured party, who will have to incur high costs associated with court proceedings in a number of States.[7]

A careful analysis of both domestic and international case-law suggests that the above problem should rather be examined in the category of theoretical problems. EU Member State courts primarily focus on establishing whether the rule of Article 4(1) of the Rome II Regulation is at all applicable, rather than Article 4(2) or Article 4(3). For example, in the judgment of 13 June 2013, the German District Court in Heinsberg applied, pursuant to Article 4 (1), the Dutch law, having first verified whether the parties had common habitual residence and whether it was possible to apply the escape clause. The dispute concerned a traffic accident that happened in the Netherlands. The complainant, who was a German national, requested compensation from the insurance company of the perpetrator of the accident.[8] Then, in the judgment of 5 December 2012, the District Court in München applied Italian law, having first verified the possibility to apply Article 4(2) and 4(3), concerning an accident that occurred in Italy.[9] As a further step, EU Member State courts verify whether the damage in question is direct damage, because the Rome II Regulation only applies to direct damage. In the judgment in the Spanish case of Fiatc Mutua de Seguros y Reaseguros v. Axa Winterthur Seg of 28 October 2010, the Belgian law was applied, because the accident, involving a Spanish truck, occurred in Belgium, and in the statement of reasons, the court emphasised the fact that the place of the event resulting in damage and the place where indirect consequences of the event occurred (in Spain) were irrelevant in determining the applicable law.[10] The European Court of Justice also commented on the directness of damage in its judgment of 10 December 2015 in Case C-350/14, Florin Lazar

happens, for example, in the case of tort committed via the Internet, which was discussed during consultations with social partners. The application of this solution results in higher court costs, because it requires, for example, more opinions concerning foreign laws. It seems, however, that given the current wording of the general rule in the Rome II Regulation, this solution is the only one to have any legal justification whatsoever.

7 Hohloch, G., op. cit., pp. 10–11.

8 Judgement of the District Court in Heinsberg, 19 C 151/12, openJur 2014, 7622, as quoted in Pazdan, M., *Rozporządzenie (WE) Nr 864/2007 Parlamentu Europejskiego i Rady dotyczące prawa właściwego dla zobowiązań pozaumownych (Rzym II). Komentarz. Wyd I,* 2018, commentary on Article 4, Chapter I, SIP Legalis.

9 Judgement of the District Court in München 322 C 2045/12, as quoted in: ibidem.

10 Judgement of the Provincial Court, 554/2010, Ref. JUR/2010/382612, as quoted in: ibidem.

p-ko Allianz SpA, concluding that damage related to the death of a person in an accident that took place in the Member State of the court and sustained by the close relatives of that person who reside in another Member State must be classified as "indirect consequences" of that accident. A review of the case-law of Polish courts reveals that the *lex loci damni* rule expressed in Article 4(1)[11] of the Regulation was applied in the case concerning compensation for a flooded apartment in Austria (judgment of the Regional Court in Wrocław of 22 February 2013, II Ca 1367/12) and in the case of an aviation accident that took place in Poland (judgment of the Regional Court in Kraków of 27 October 2016, I C 1694/13).

Application of the law of common place of habitual residence

According to Article 4(2), where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Legal scholars and commentators claim that it will be difficult to apply the rule of habitual residence in practice,[12] because it is narrowed to parties that have their habitual residence in the same country and does not include a situation when parties have their habitual residence in different countries that have the same laws. The latter case is functionally analogous to the case of a common place of habitual residence, and as such, it should be treated analogously.[13]

11 The Polish courts also commented on the inability to apply the rule of Article 4(1) in the following judgments: judgment of the Regional Court in Olsztyn, I C 726/13 – concerning personal rights protection to which the Rome II Regulation does not apply, judgment of the Appellate Court in Szczecin of 4 December 2013, I ACa 690/13 and judgment of the Appellate Court in Kraków of 2 July 2014, I ACa 548/14 – inability to apply the regulation due to the fact that the damage occurred before its entry into force.

12 The Rome II Regulation does not include a definition of the "place of habitual residence" of a natural person. An autonomous definition of the term with respect to companies and other bodies, corporate or unincorporated, as well as natural persons acting in the course of their business activity is provided in Article 23 of the Regulation. It seems, however, that, the same as in the case of other EU laws, as well as in the Rome II Regulation, it should be assumed that a "common place of habitual residence" means that parties participating in a situation involving tort/delict have the factual centre of gravity of their lives (*faktische Lebensmittelpunkte*) in the same country (Von Ofner, H., *Die Rom II-Verordnung-Neues Internationales Privatrecht für ausservertragliche Schuldverhältnisse in der Europäischen Union,* "Zeitschrift für Rechtsvergleichung" 2008, No. 3, p. 16). Article 4(2) of the Rome II Regulation refers to "habitual residence" as the factual centre of gravity of life, supported by the will of the interested parties (Hohloch, G., op. cit., p. 12).

13 In order to illustrate the problem, S.C. Symonides gives the example of a hunting expedition in Kenya, during which a French hunter wounded a Belgian hunter, with whom he had no pre-existing relationship. If the French and Belgian laws offer the same compensation, which is much higher than the Kenyan ceiling, it is a typical example of a "false conflict", in which Kenya has no

Another problem with applying the provision of Article 4 (2) is that it seems to be "all or nothing". The general rule is automatically superseded if there is a common place of habitual residence, even if it is entirely random and is not in the interest of the parties. Application of the law of habitual residence as if it was "all or nothing" may also result in the application of different laws depending on the configuration of parties, even if their claims concern the same event. In general, preference for the law of the common place of habitual residence may be contrary to the interests of parties if they do not expect the application of the law of their shared place of habitual residence, especially in the case of strict liability that corresponds to risk insurance.[14] In the case-law of the Polish courts, the problem of applying Article 4(2) of the Rome II Regulation was analysed in association with the judgment of the Appellate Court in Katowice of 3 November 2016, case No. III APa 32/16. The case concerned an accident at work that happened in the Czech Republic and involved a Polish national. The party sustaining the damage was an employee of a company registered in Poland. The Appellate Court justified the application of Article 4(2) by the fact that the complainant was a Polish national and had his habitual residence in Poland, and the company he sued was also registered and established in Poland.

The clause of the closest connection

The rule of Article 4(3) of the Rome II Regulation enables so-called *Gleichlauf* (parallel application) of the law applicable to a contract and a tort/delict, since the law the most closely connected with a given tort/delict may be the law chosen or identified for the contractual relationship between parties. In this case, the Rome I Regulation, which governs the applicability of law to contractual obligations, also indirectly governs the law applicable to tort/delict. From a practical perspective, it is preferable to apply the same law to a tort/delict and a contract. It should be noted, however, that paragraph 3 functions as an exception within the structure of Article 4, and the accessory affiliation must not be treated as the general rule.[15] Moreover, it is claimed in the literature that the Rome II Regulation lacks internal cohesion due to the fact that a pre-existing relationship between parties is only a presumption

interest in applying its law, whereas there is a good reason to apply French or Belgian law (Symeonides S.C., op. cit., p. 196).

14 Fröhlich, C.W., *The private international law of non-contractual obligations according to the Rome II Regulation,* Hamburg 2008, pp. 53–54.

15 Kramer, X.E., *The Rome II Regulation on the law applicable to non-contractual obligations: the European private international law tradition continued. Introductory observations and general rules,* "Nederlands Internationaal Privaatrecht" 2008, p. 421.

in the escape clause, while habitual residence automatically overrides the *lex loci delicti commissi*.[16]

There is also the question of the nature of a relationship between parties that can be considered pursuant to Article 4(3). Literal interpretation of this paragraph suggests that a relationship may also be factual, as Article 4(3) uses the term "relationship" rather than "contractual relationship", and a contract is only mentioned as an example of a relationship between parties, which may be relevant to this paper. This is associated with the abovementioned concept that an invalid contract should be treated as an element of a matter of fact.[17]

A detailed analysis of problems that may arise in association with limited application of Article 4(3) was performed by R. Fentiman. In the first place, he presented the limitations on the application of that article caused by its association with Article 4(1) and (2). He believes it likely that the escape clause of Article 4(3), rather than serve the purpose of making a distinction between the rule of Article 4(1) and that of Article 4(2), introduces a third law. The wording of Article 4(2) suggests that this paragraph should always apply whenever there is a common place of habitual residence. Moreover, an alternative law, identified pursuant to Article 4(3), must be different than the law identified pursuant to paragraph 1 or 2, which means that it must be different than *lex loci damni* and the law of the common place of habitual residence. Thus, it is assumed that whenever a choice is to be made between *lex loci damni* and the law of the common place of habitual residence, the latter is always applicable. Article 4(3) may serve as a mediation tool between Article 4(1) and 4(2) if there are factors other than the place where the damage occurred or a common place of habitual residence that relate a tort/delict to one of those States. However, if a State is, at the same, time the place where the damage occurred and the place where indirect consequences of the damage occurred, Article 4(3) may be applicable.[18]

16 Alférez, F.J.G, *The Rome II Regulation: on the way towards a European private international law code*, "European Legal Forum" 2007, No. 3, p. 83.

17 This is also expressed by X.E. Kramer, who believes that it is not relevant here that the proposal of the European Parliament to include both legal and factual relationships in the provision was not accepted at the stage of legislative work. The existence of a factual relationship in general will have less significance than a legal relationship, and most of these situations will already be caught by either the exception of Article 4(2) or Article 12 on *culpa in contrahendo* (Kramer, X.E., op. cit., p. 421).

18 Fentiman, R., *The significance of closer connection,* in: Ahern, J. and Binchy, W. (eds.), *The Rome II Regulation on the law applicable to non-contractual obligations: a new international litigation regime,* Leiden 2009, p. 89.

The above hypotheses concerning limited application of the escape clause are in practice reflected in the limited case-law concerning Article 4(3). In the case-law of Polish courts, the clause of the closet connection of Article 4(3) of the Rome II Regulation was used in case No. I ACa 212/14, reviewed by the Appellate Court in Szczecin, where, in their appeal, the complainant accused the district court of ignoring the escape clause of Article 4(3) of the Rome II Regulation, claiming that there existed a close connection between the tort and the pre-existing contract between the parties.[19]

Limitations to the *lex loci* damni principle arising from the Rome II Regulation

Freedom of choice

Pursuant to Article 14 (1) of the Rome II Regulation, parties may agree to submit non-contractual obligations to the law of their choice: a) by an agreement entered into after the event giving rise to the damage occurred; or b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

The above suggests that tacit choice of law according to Article 14(1) sentence 2 is generally admissible. The only requirement is that the choice of law be "expressed or demonstrated with reasonable certainty". Thus, tacit choice of law based on the parties' behaviour in proceedings is admissible (*Prozessverhalten*).[20] It is also possible to withdraw or change the law chosen by the parties.[21] In the opinion of some of the representatives of the scholarship, a choice of law to the advantage of a third party should also be admissible.[22]

19 As quoted in: Pazdan, M., op. cit. In this case, however, the Appellate Court dismissed the appeal, concluding that the damage was caused by the bailiff in Poland, and the contract that the complainant mentioned was only an item of evidence in the case for payment before a German court.

20 Fuchs, A., *Zum Kommissionvorschlag einer "Rom II"-Verordnung,* "Zeitschrift für Gemeinschaftsprivatrecht" 2003–2004, Vol. 2, p. 104.

21 Pazdan, J., *Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych,* "Problemy Prawa Prywatnego Międzynarodowego", Vol. 4, 2009, p. 28.

22 Heiss, H. and Loacker, L.D., *Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II,* "Juristische Blätter" 2007, Vol. 129, p. 623.

Article 14(2)(b) requires that all parties pursue a commercial activity. This requirement must be fulfilled at the time of contract execution and with respect to the subject of the contract. To this end, according to A. Dickinson, "commercial activity" should be understood as inclusive of any activity with commercial or professional profit. Moreover, when a person acts partly for commercial or professional profit and partly for their personal profit, the commercial profit should be dominant, unless the scope is so limited that it is irrelevant in the general context of a contract.[23]

Another condition that must be met to make a pre-existing choice of law effective is that an agreement must be freely negotiated – it is not enough that an agreement is only negotiated; it must be "freely negotiated", which is a more stringent criterion. It seems that this provision was supposed to eliminate a situation in which the choice of law is imposed by one party on another, depriving the other party of a reasonable chance to negotiate the terms of an agreement.[24] Accordingly, the fact that an agreement containing a provision on the law applicable to non-contractual obligations has the form of a model contract[25] (e.g. market standards for a given type of a market instrument) does not automatically exclude the application of Article 14(1)(b) if every party is able to determine the contractual provisions, in particular the choice of law clause.[26]

Another issue that was not sufficiently clarified by Article 14 of the Rome II Regulation is what kind of law parties may choose. It seems that Article 14(1) allows one only to choose the law of a given State and not, for example, the general principles of Sharia law.[27] There is also an opposite opinion expressed by legal scholars and commentators, namely that Article 14 concerns only the choice of "law", without any limitations, whereas it should be, for example, "State law".[28] It seems then that, with respect to non-contractual obligations, the first choice is Principles of

23 Dickinson, A., op. cit., p. 561.

24 Ibidem, p. 562.

25 It should be noted, however, that there was some criticism in the literature concerning the possibility to verify whether the general terms of a contract were indeed "freely negotiated". Such criticism was expressed, among others, by H. Heiss and L.D. Loacker, (Heiss, H. and Loacker, L.D., op. cit., p. 623).

26 Dickinson, A., op. cit., p. 563.

27 Ibidem, p. 553. On the admissibility of the choice of a regulation other than effective law as the applicable law, cf. also Pazdan, M. (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20 B,* Warszawa 2015, p. 23.

28 Von Graziano, T.K., *Das auf ausservertragliche Schuldverhaeltnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung,* "Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht" 2009, No. 1(73), p. 9.

European Tort Law, presented by the European Group on Tort Law. It is worth noting here how this issue is treated in the Rome Convention and Rome I Regulation. Article 3 of the 1980 Rome Convention on the law applicable to contractual obligations[29] stipulates the "choice of law", the same as Article 3 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).[30] Meanwhile, recital (13) of the Regulation explains that it does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Although such an explanation is missing from the Rome II Regulation, it should be noted that all the three legal acts use the term "choice of law", which seems to eliminate all non-law principles.

In the Polish case-law, the issue of the choice of law pursuant to the Rome II Regulation was mentioned in the judgment of the Appellate Court of 27 March 2019, I ACa 94/18. The case concerned a claim for compensation for pain and suffering inflicted as a result of an accident that happened while skiing in Austria. In these proceedings, the parties referred to Polish law, and the court requested them to specify whether they chose that law as the applicable law. The parties confirmed their choice.

The general rule vs. application of overriding mandatory provisions of the law of the State of forum

The measure of overriding mandatory provision of law is provided for in Article 16 of the Rome II Regulation, according to which: nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. This means that the Rome II Regulation does not have its own definition of overriding mandatory provision of law, and it is up to a court to decide which of the provisions of the State of forum will apply, notwithstanding the law that applies to a non-contractual obligation.[31] Moreover, an inevitable problem in this case is with interpreting which of the provisions of the State of forum should be considered to be overriding. It seems that the EU legislator noticed this problem, because recital (32) says that: considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.

29 OJ C 169, 8.7.2005, pp. 10–22.

30 OJ L 177, 4.7.2008, pp. 6–16.

31 Ibidem, p. 632.

Nonetheless, it must be noted that this explanation introduces two additional unspecified terms, that of "public interest" and "exceptional circumstances". Still, the wording of recital (32) suggests that it is the intention of the EU legislator to prevent overuse of this institution by Member States.

Thus, an autonomous definition of overriding mandatory provisions is needed, taking into account the definition of the term contained in Article 9 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), to ensure coherence of interpretation and conceptual coherence of the two Regulations.[32]

Paragraph 1 of that Article says that: overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. The difference between Article 9 of the Rome I Regulation and Article 16 of the Rome II Regulation is that the latter only concerns overriding mandatory provisions of the State of forum. This seems to exclude the application of provisions other than overriding mandatory provisions of the State of forum, e.g. the provisions of a third State in the event of tort/delict. Meanwhile, the EU legislator recognises overriding mandatory provisions included in EU directives or national laws implementing those directives as the law of the State of forum.[33]

The European Court of Justice commented on the interpretation of overriding mandatory provisions based on the Rome II Regulation in its judgment of 31 January 2019 in case C-149/18, stating that Article 16 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) must be interpreted as meaning that a national provision, such as that at issue in the main proceedings, which provides that the limitation period for actions seeking compensation for damage resulting from an accident is three years, cannot be considered to be an overriding mandatory provision, within the meaning of that article, unless the court hearing the case finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted, that it is of such importance in the national legal order that it justifies a departure from the law applicable, designated pursuant to Article 4 of that regulation. The above judgment is casuistic, and

32 Pazdan, M. (ed.), op. cit.

33 Ibidem.

it does not offer general guidance on the interpretation of the concept of "overriding mandatory provisions" pursuant to the Rome II Regulation.

Article 4.1 vs. the requirement to observe the rules of safety and conduct

Article 17 of the Rome II Regulation sets limits to the application of *lex loci actus*.[34] Out of the limitations to the application of Article 4(1), it is worth looking at the requirement to observe the rules of safety and conduct provided for in Article 17. According to Article 17 of the Rome II Regulation, in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

It seems that this Article suggests "observance", rather than application of the rules of safety. This means that those rules should be regarded as a matter of fact and only in so far as appropriate.[35]

It is controversial, however, whether Article 17 of the Regulation applies only to such rules of conduct that are specified in legislation or also to the criterion of diligence. The goal of Article 17 suggests that the concept of local standards of conduct should also include general standards of diligence, given the fact that the conduct of the perpetrator of damage will be assessed on the basis of a criterion that is more stringent than the one in force at the place of an act, the application of which could not have been foreseen by the perpetrator, even despite due diligence,[36] and yet the wording of the provision suggests a restrictive interpretation, and the preamble to the Regulation makes it clear that the term "rules of safety and conduct" should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident (recital (34)). The preamble clearly mentions "regulations", giving the example of road safety rules. It seems that the possibility to claim the general criteria of diligence effective in a given State, although advantageous for a defendant, could violate the principle of certainty, as those criteria are highly discretional, and their application often raises many doubts as to their interpretation in the countries where they are in force.

34 Fentiman, R., op. cit., pp. 99–100.

35 Leible, S. and Lehmann, M., *Die neue EG-Verordnung über das auf ausservertragliche Schuldverhältnisse anzuwendende Recht ("Rom II")*, "Recht der Internationalen Wirtschaft" 2007, p. 725.

36 Ibidem, p. 6.

So far, the application of Article 17 of the Rome II Regulation has not been reviewed by Polish courts.[37]

Relationship between the Rome II Regulation and the Hague Convention on the Law Applicable to Traffic Accidents

The purpose of Article 28 of the Rome II Regulation was to define the relationship between the Regulation and international conventions. Pursuant to this Article: this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.[38] Thus, Article 28 suggests that the Regulation makes it possible that in countries that have not ratified the Convention (the United Kingdom, Germany, Scandinavian countries, Iceland, Hungary, Romania, Italy, Portugal and Greece), the law applicable to non-contractual obligations arising from traffic accidents will be determined in accordance with the Rome II Regulation, whereas in the countries that have ratified the Convention (Spain, Poland,[39] France, Belgium, Luxembourg, the Netherlands, Austria, Latvia, the Czech Republic, Slovakia, Slovenia and, outside the EU, also Switzerland), the law will be determined in accordance with the Convention.

The scope of the discussed legal instruments is the same, but they use different connectors, i.e. the Rome II Regulation uses l*ex loci damni*, while the Convention – *lex loci delicti commissi.* At first glance, however, it seems that, despite application of different connectors, the Rome II Regulation and the Hague Convention lead to the same results as, in the case of traffic accidents, the location of an event giving rise to damage is the same as the location of the occurrence of damage. However, the two legal instruments lead to different results if the tort status loosens: Article 4(2)

37 Article 17 of the Rome II Regulation was the basis of judgments issued by German courts in cases concerning the application of local construction rules and standards, as well as safety rules in cases where both the injured party and the travel agency reside and are established in the same country (Germany). Cf. e.g. judgment of the German Federal Court of Justice of VII ZR 348/86, NJW 1998, No. 22, p. 380, or judgment of the German Federal Court of Justice VI ZR 257/06, NJW 2008, No. 40, p. 2918, as quoted in: Pazdan, M., op. cit.

38 Jagielska, M., *Prawo właściwe dla wypadków drogowych – rozporządzenie Rzym II a konwencja haska o prawie właściwym dla wypadków drogowych,* in: Dańko-Roesler, A. et al., *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana profesorowi Maksymilianowi Pazdanowi,* Warszawa 2014, p. 136.

39 Article 34 of the Polish Private International Law Act of 4 February 2011, Dz.U. (Journal of Laws) of 2011 No. 80 item 432, stipulates that the law applicable to non-contractual civil obligations arising from traffic accidents is determined by the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, Dz.U. (Journal of Laws) of 2003 No. 63 item 585.

of the Hague Convention requires application of the law of the place of registration of all the vehicles involved in an accident, and Article 3(2) requires application of the law of the common place of habitual residence of the parties.[40] If two or more vehicles are involved in an accident, the rule of the law of the place of vehicle registration is only applied if all the vehicles are registered in the same State (Article 4). This also applies when the complainant or the defendant (e.g. passenger and driver of the same vehicle) have their habitual residence in the same State. Meanwhile, the Rome II Regulation requires application of the law of the common place of habitual residence.[41]

Accordingly, depending on the State, the court may apply: the Hague Convention, if the State is a party to the Convention, the Rome II Regulation, if the State is not a party to the Convention, or, in Denmark, Danish private international law.[42]

In Polish case-law, cases involving cross-border traffic accidents are the most frequent. In such cases, depending on whether or not the States whose law is to be applied are parties to the Hague Convention, either Article 4(1)[43] of the Rome II Regulation or relevant provisions of the 1971 Hague Convention are applied. For example, the judgment of the District Court in Kłodzko of 26 November 2012, No. I C 390/11 is based on Article 4(1) of the Rome II Regulation, due to the following facts: on 10 September 2009, at around 6 p.m., a traffic accident occurred in Germany, caused by a German national, who failed to observe due diligence and drove into the back of a car of a Polish national.[44] Meanwhile, in the case of an accident that took place in Austria, which, the same as Poland, is a party to the Hague Convention, and was caused by an Austrian national insured through an insurance company established in Austria, the Hague Convention was applied[45] (there is no bilateral convention regarding traffic accidents between Poland and Austria).

40 Fuchs, A., op. cit., p. 102.

41 Von Graziano, T.K., op. cit., p. 27.

42 Jagielska, M., op. cit., p. 137.

43 In some matters, Article 19 of the Rome II Regulation applies, e.g. in the judgment of the Appellate Court in Warsaw of 4 November 2016, VI ACa 826/15, concerning an accident that occurred in Romania, in which a car owned by a Romanian company drove into another car owned by a Polish company. Article 19 of the Rome II Regulation was also applied in the judgment of the District Court in Człuchów of 4 May 2017, I C 409/15. This case concerned an accident that occurred in Germany and involved a car registered in Germany.

44 This was also the case with the judgment of the Appellate Court in Białystok of 30 July 2018, I ACa 824/17 and the judgment of the Appellate Court in Szczecin of 13 April 2016, I ACa 091/16.

45 Judgment of the Appellate Court in Kraków of 23 May 2017, I ACa 178/17.

Conclusions

To conclude, in terms of the types of cases to which Article 4(1) of the Rome II Regulation applies, these are mostly road accidents, which indeed suggests that the application of the *lex loci damni* is limited, and additionally, it is shared with the Hague Convention of 4 May 1971 on road accidents. Moreover, analysis of the case-law of Polish and international courts suggests that road accidents represent the majority of cases in which the Regulation was applied. This is due to the specificity of the Regulation, which concerns the law applicable to non-contractual obligations, and relatively, the most frequent non-contractual obligations in cross-border relationships are those associated with traffic accidents. In the case of traffic accidents, application of the Rome II Regulation was partly eliminated by the 1971 Hague Convention on the Law Applicable to Traffic Accidents; however, it should be noted that some EU Member States, such as Germany, are not parties to the Convention. Meanwhile, because of their proximity and intensive cross-border exchange between the two States, for commercial, professional, family or leisure purposes, most traffic accidents involving Polish and German nationals will happen either in Poland or in Germany. Since Germany has not ratified the 1971 Hague Convention on the Law Applicable to Traffic Accidents, it cannot be applied in cross-border cases between Poland and Germany, and instead, Article 4(1) of the Rome II Regulation is applicable. To sum up, despite the hypotheses formulated by legal commentators, the actual case-law shows that the general rule of the Rome II Regulation is not a dead rule; to the contrary, statistically speaking, it is the legal basis of most judgments concerning the Rome II Regulation, not only in Polish courts, and it will remain so at least until conflict-of-law regulations on traffic accidents have been fully harmonised.

Analysis of the case-law presented in this paper leads to one more important conclusion, namely that the Rome II Regulation does not offer a final solution to road accidents, which constitute an important group of tort/delict. Member States such as Belgium, France, Austria, the Netherlands, Luxembourg, Spain and Poland will not apply the Rome II Regulation to traffic accidents. Instead, they will continue applying the Hague Convention in the future. This means that the Commission failed to achieve its goal concerning traffic accidents, which are at the core of international tort/delict, this goal being to reduce forum shopping cases by harmonising private international law and increasing legal certainty.

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CITATION

Wasylkowska-Michór, M., *Scope of application of the general rule in the Rome II Regulation*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 89–106, DOI: 10.18276/ais.2020.30-07.

Acta Iuris Stetinensis

2020, No. 2 (Vol. 30), 107–117
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-08

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Essay on the manner of understanding truth in criminal proceedings

Abstract

The subject matter of the article is a short reflection on the concept of truth in criminal proceedings. The author raises the question about the manner of understanding the truth in a criminal trial, as well as about the relation of truth to proof and probability – are such concepts compatible, mutually exclusive or differentiated in terms of categories? As a result of such contemplation, the author decided that the text of Article 2 § 2 of the Code of Criminal Procedure concerning material truth – in view of the today's criminal law scholars and commentators – is similar to the concept of ontological truth, i.e. the understanding of truth in a way that does not refer to the state of affairs only (ontic truth), but also to the statements and judgements made with respect thereto. Such an understanding of truth also allows one to acknowledge the fact that the truth and belief that a certain event (that needs to be proven or made plausible) occurred are two different epistemic categories.

Keywords: truth, principle of truth, material truth, ontic truth, ontological truth, substantiation/probability, paradox of truth

Introduction

Addressing general issues, especially those that refer to general terms and – one may say – that are indefinite by nature (e.g. "justice" or "loyalty"), and trying to put them in the context of legal studies (even if it is only an attempt to tackle a given issue not to create a milestone of science) may often be unaccepted or even severely criticised. Why should we "put the cat among the pigeons" if it is possible to stay with the status quo? The aforementioned general terms include the concept of truth, and thus the truth in penal proceedings. The purpose of this article is neither to define the truth[1] nor the truth in penal proceedings. The subject matter of the following, briefly outlined discussion shall be a reflection on the manner of understanding (perceiving) the truth in criminal proceedings in terms of contemporary legal dogmatic analyses. A reflection on the manner of understanding (perceiving) the truth in any context (e.g. in a criminal trial) does not have to be equivalent to the definition of truth. It is assumed that the contemplation on the understanding of a given concept may be in the form of describing it (or the way the concept is perceived), which is possible without a strict definition of such concept.[2] The reflections regarding the understanding of truth in penal proceedings are most often tackled under a legal issue, which is referred to as a "nodal issue" of particularly profound social significance, constituting grounds for distinguishing the principle of material truth in the criminal law scholarship. According to some Polish legal commentators, the principle of material truth is considered the main focus of the criminal proceedings,[3] which means that it represents meta-values with respect to the values forming a basis for other procedural rules. However, the truth in penal proceedings shall not be analysed in such a principled way (in view of the criteria for distinguishing the legal principles and rules of criminal proceedings). The concept of truth in penal proceedings may also be tackled from different perspectives,

1 Honestly, the author could not even imagine trying to define the concept of truth.

2 For instance, the author could describe her love for little, fluffy and purring pets with whiskers without actually explaining that such pets refer to the domesticated mammalian species of the order Carnivora, from the felid (cat) family.

3 To learn more about the subject, see Jodłowski, J., *Zasada prawdy materialnej w postępowaniu karnym. Analiza w perspektywie funkcji prawa karnego,* Warszawa 2015; Abdank-Kozubski, A., *Problem prawdy w wybranych koncepcjach rozwoju nauki*, "Studia Philosophiae Christianae" 1993, No. 1(29), pp. 171–178, including cited references.

for example, by trying to answer the question about the nature of the discussed truth. The author tries to solve this problem in the subsequent parts of her study.[4]

"Material truth" in a criminal trial

The idea of truth has been the subject of many philosophical treatises, which contributed to the creation of numerous concepts of truth.[5] J. Tischner wrote: "Apparently, the question arises as to what the concept of truth actually means. However, even in this case, there is no arbitrariness. Without going into the intricacies or details and remaining with the basic concepts only, we may state that the truth is the opposite of illusion".[6] Therefore, the concept of truth may be analysed in different ways – from the logical perspective (the truth as the opposite of untruth) or from the metaphysical perspective (including a religious point of view). The issue of truth in penal proceedings has become the subject matter of statutory regulations. By virtue of Article 2 § 2 of the Code of Criminal Procedure, true findings of facts should constitute grounds for all court decisions. Literature shows that the above-mentioned legal provision expresses the principle of material truth, which means that, first of all, it refers to certain events/facts, and second of all, it is opposed to formal truth (or court truth), which is established by procedural authorities on the basis of evidence, including the testimony of witnesses, regardless of the actual course of the event.[7] What is more, it is also possible to issue various decisions in penal proceedings which are based on different actual events. The above may refer to the procedural decisions of a substantive (e.g. conviction or acquittal) and formal nature, including incidental decisions (e.g. decision to present charges – Article 313 of the Code of Criminal Procedure, decision to discontinue proceedings – Article 322 of the Code of Criminal Procedure, decision to reinstate a final date – Article 126 of the Code of Criminal Procedure). The grounds for a particular procedural decision may be the proof or probability, and thus a different degree of the procedural cognisance of the case by an adjudicating authority. With the above in mind,

4 It should be noted that this essay is based on the author's reflections on the probable and true findings included in her book Żbikowska, M., *Ciężar dowodu w polskim procesie karnym,* Warszawa 2019, pp. 331–337.

5 To learn more about the subject, see Zajadło, J., *Teoretyczno – i filozoficzno-prawne pojęcie prawdy*, in: Kremens, K. and Skorupka, J. (eds.), *Pojęcie, miejsce i znaczenie prawdy w polskim procesie karnym,* Wrocław 2013, pp. 8–24.

6 Tischner, J., *Myślenie w* żywiole *piękna,* Kraków 2013, p. 7.

7 In the context of further discussion, staying satisfied with such a differentiation between material truth and formal truth seems insufficient, and therefore, the grounds are rather vague.

the question arises: what is the relation of truth to proof and probability – are such concepts compatible, mutually exclusive or differentiated in terms of categories? Simply put, the question is whether the findings that are only probable and probable to a different degree shall be considered true (accurate) in penal proceedings, and if so, what kind of model for understanding the truth should be adopted?

Truth and probability

Literature referring to the law of criminal procedure provides different answers to the aforesaid question. As an example, J. Nelken wrote: "Certitude should not be confused with truth, since these are two different terms. The truth is objective and exists independently of the knowing entity's awareness, whereas the certitude refers to a conviction about the truth learned in a specific case; thus, it constitutes a combination of objective and subjective factors and, hence, may sometimes be the result of an error".[8] On the other hand, Z. Papierkowski wrote that the proof shall be deemed to mean "such a degree of certainty created in the mind or generally in the psyche of the entity examining certain circumstances, which would enable the entity to consider the said circumstances true. The feeling of being certain, i.e. a strong inner conviction, is the product of logical operations, which consist in correlating certain phenomena and drawing appropriate conclusions on the basis of the logical reasoning and experience".[9] Moving on further, M. Cieślak indicated that the proof "may be treated as the grounds for perceiving a given assertion as true and the fact corresponding thereto as existing if it allows one to create a subjective absolute conviction about the truthfulness of the said assertion and an objective degree of probability which would be high enough to foster a strong conviction about the truthfulness of the proof in every person capable of reasonable judgement and comprehension".[10] All of the above-mentioned representatives of Polish science distinguished two concepts – the certitude or conviction (subjective element) and the truth (objective element). Undoubtedly, the concept of the subjective conviction (belief) about the occurrence of a given event does not have to be equivalent to this event. Therefore, the differentiation between the subjective element and objective element has profound meaning, but it does not provide any answer to the question about the concept of truth discussed herein.

8 Nelken, J., *Dowód poszlakowy w procesie karnym,* Warszawa 1970, p. 77.

9 Papierkowski, Z., *Dowód poszlakowy w postępowaniu karnym. Studium procesowo-prawne,* Lwów 1933, pp. 2–3.

10 Cieślak, M., *Zagadnienia dowodowe w procesie karnym,* Warszawa 1955, p. 65.

Ontic truth and ontological truth

When assuming that the truth is a somewhat objective feeling, it may be concluded that it does not reflect personal beliefs, presumptions or foreknowledge; hence, it must be presupposed that the truth exists independently of a person (ontic truth). It may also be theorised that the truth does not need a recipient or any confirmation that it is true (even though the question could be asked: does the truth need a recipient?).[11] On the other hand, the concept of certitude may be considered a conviction (belief), and thus a subjective perception of reality. Therefore, the certitude may not exist without the recipient of reality, i.e. the entity that expresses such certitude. All beliefs are created due to something, so they have their basis, which means that there has to be the subject of the conviction concerned. Convictions in the form of certitude occur in penal proceedings as a result of an objectively verifiable evidentiary basis (a conglomerate of evidence collected in the case). Therefore, the conviction about the occurrence of a given event (subjective element) may be in line with the actual occurrence of such event (objective element – ontic truth). However, it may also not be in line with the actual occurrence of the aforesaid event. Such incompatibility may be unconscious (if it were conscious, it would be a lie). The theory of law includes a comprehensive discussion of the intellectual processes, which may constitute an efficient mechanism for explaining the manner in which the judicial body may discover the truth in penal proceedings. On the basis of the above reflections, the following passus should be invoked: "(…) the most important factors of the thinking process are certain illustrative (…) or non-illustrative presentations. Such presentations may be complete if expressed by logical sentences, which potentially include conjunctions and quantifiers, and fragmentary if expressed by a different sequence of words, in particular a single word – name. The presentations may be divided into those correlated with the convictions and those that have no such correlations. The first, and particularly important, category refers to the presentations, which – according to their participants – accurately reflect the reality, since the participants are convinced that the affairs are exactly the way they have been presented. The second, and insignificant, category refers to the presentations that do not reflect the reality, because they are not associated

11 If, for example, there are two witnesses in the penal proceedings, one of whom testifies that the defendant was riding a motorbike at excess speed, whereas the other one claims that the speed was within the permissible limit, and both witnesses are convinced that they are right (the difference lies in the different perspective of the event), it may be stated that both of them are truthful, meaning that they have testified to the truth (their truth). However, it is impossible to have two different truths regarding the same event. Therefore, does the truth (always) need a recipient?

with any convictions that the reality is as it is".[12] It seems that the thinking process of the adjudicating authority with respect to the criminal liability of the defendant (judgement) consists of the illustrative and complete presentations, which are also correlated with the conviction that a specific person is guilty of the alleged crimes. What is more, the aforementioned presentation correlated with the conviction means that the entity which has such a conviction believes that it accurately reflects the reality, and thus it is true. Therefore, the presentations correlated with the convictions may not actually be connected with the objective reality. In summary, ontic truth may represent various epistemic categories in a criminal trial, i.e. the objective occurrence of a given event and conviction about the occurrence of such an event or the (specific) probability of its occurrence.

As stated above, different decisions are issued in penal proceedings – both substantive and formal decisions. The probability of occurrence of a given event (e.g. high probability of committing a crime – Article 249 § 1 of the Code of Criminal Procedure, sufficient proof of alleged or suspected crime – Article 313 § 1 of the Code of Criminal Procedure) is often the only requirement for issuing a formal decision. Nonetheless, this does not mean that the concept of probability is connected with a possibility of adjudication based on "uncertain" or not necessarily "true" findings and, as a consequence, with the assumption that the Code of Criminal Procedure does not require certitude to issue a specific decision in the proceedings on the grounds of such probability.[13] Literature shows that such a way of seeing the degree of the cognisance of the case by the adjudicating body leads to the conclusion that adjudication without "moral certitude" is possible.[14] However, such an assumption would be contrary to Article 2 § 2 of the Code of Criminal Procedure. In compliance therewith, all decisions should be based on true and accurate findings. The term "all decisions" refers not only to the decisions that must be proven, but also to those that must be made probable. It should also be mentioned that in the case of the authority issuing a specific decision in the proceedings, "the presentations correlated with the convictions of different degrees of certainty may occur. If the certainty is strong enough, the statements expressing the presentations correlated

12 Patryas, W., *Próba wyjaśnienia domniemań prawnych,* Poznań 2011, p. 17. See also: Patryas, W., *Uznawanie zdań,* Warszawa-Poznań 1987.

13 R. Kmiecik pointed to the risk of such understanding of the concept of substantiation in: *Uprawdopodobnienie w procesie karnym*, "Nowe Prawo" 1983, No. 5, pp. 45–46. A different position is adopted by Nelken, J. in: *Uprawdopodobnienie w procesie karnym*, "Nowe Prawo" 1970, No. 4, p. 519.

14 Kmiecik, R., *Uprawdopodobnienie…,* p. 46.

with such convictions constitute the beliefs of the authority, unlike the suppositions expressing the presentations correlated with weaker convictions".[15]

Nevertheless, special attention should be paid to the fact that it is possible to specify the above-mentioned assumptions and state that they concern the facts (occurrence of a given event). Such certainty allows one to form the grounds for issuing a certain decision in the proceedings (occurrence of other elements required for said decision). Therefore, a specific conviction may concern the fact of committing a crime or imply the issuance of the decision to the present charges (Article 313 of the Code of Criminal Procedure), which requires only the probability that a given person is guilty of the alleged crimes. On the other hand, the certitude shall refer to the grounds for issuing such a decision in the proceedings. The truth in penal proceedings shall also include the findings, in which case, it is enough that they are probable. It has often been stressed in the legal academia that the "principle of objective truth refers not only to the proceedings aimed at resolving the dispute, but also to many incidental proceedings that are initiated during the criminal trial".[16] With the above in mind, it is evident that both the proof and probability must be connected with the truth, but not the truth understood as complete compliance with the objective and unchanged state of affairs. If one expected "true findings" to include ontic truth, which is the truth of the "thing itself" or the "being itself", the adjudicating body would never be in a position where it is allowed to issue a specific decision in the proceedings, since such authority would never face the so-called ontic truth. The judicial bodies (court, prosecutor's office) may never be witnesses of illegal acts, with respect to which the proceedings are pending (Article 40 § 1 point 4 and Article 47 § 1 of the Code of Criminal Procedure). Therefore, it could seem that contrary to ontic truth, Article 2 § 2 of the Code of Criminal Procedure refers to ontological truth, which means that such methods of understanding the truth that do not concern the state of affairs (ontic truth) but the statements or judgements about such a state of affairs. The concept of ontological truth may be understood as proper recognition of the already known object. Such an interpretation is confirmed by Article 2 § 2 of the Code of Criminal Procedure by referring not to the facts (the facts are always true) but to the findings. However, even the aforesaid assumption is not that obvious.

15 Patryas, W., *Próba…*, p. 41.

16 Iżykowski, M., *Charakterystyka prawna uprawdopodobnienia w postępowaniu cywilnym*, "Nowe Prawo" 1980, No. 3, p. 75.

The paradox of truth

With the above in mind, the question about when the findings may be considered true or not in criminal proceedings could emerge during such proceedings. On the basis of this discussion, it is evident that the subjective conviction (belief) about the truthfulness of the findings and objective certitude, i.e. objectively verifiable evidentiary basis, shall constitute the prerequisite for stating that the findings are true. Furthermore, there might but does not have to be coherence between the subjective conviction and objective certitude and the actual course of a given event. It is possible that according to the evidence collected in the case, the court may be convinced that the defendant – to obtain material gains – caused another person to dispose of their property in an unfavourable manner by misleading such a person, whereas in reality this was not the case. On the basis of the above example and the previous findings, it may be stated that the court's decision (judgement of conviction) would be in line with ontological truth. At this point, either the paradox of truth occurs in the criminal proceedings or the concept of truth proposed herein is not in compliance with the findings reached in the criminal proceedings. Therefore, the paradox of truth would mean, in this case, that the court's findings (subjective conviction and objectively verifiable evidentiary basis) shall be considered true (ontological truth), whereas they do not actually refer to any real situation. In light of the above, is it possible to talk about the "truthfulness" of the findings (truth understood in any manner)? Additionally, it should also be mentioned that the "classical" concept of ontological truth means that judgements about the things which actually exist are true; hence, the concept of ontological truth comes down to the correct recognition of a specific object. Therefore, if incorrect recognition of the object does not constitute ontological truth, what kind of truth is there in the criminal proceedings, and what is actually the difference between the principles of material truth and formal truth distinguished in literature? A different approach may be followed. Even if the "philosophical" debate on the truth in criminal proceedings were abandoned, and the emphasis was put solely on the construction of Article 2 § 2 of the Code of Criminal Procedure[17] by creating an artificial and scholarly interpretation of the term "true findings", would it solve the problem?

17 The aforementioned concept would probably have to cover untrue findings as well – i.e. in the event when the court issues an untrue decision (e.g. the judgement of conviction according to which it is wrongly assumed that a given event occurred, whereas in reality it was not the case). It is normally assumed that the court's decision issued in penal proceedings is in line with material truth; however, this does not exclude the possibility of lodging appeal measures that may prove efficient.

Truth and certainty

When coming back to the previous issue, the findings that have been proven and substantiated shall be considered – in light of the understanding of the concept of truth established in the literature – true findings of fact. The juxtaposition of the probability of occurrence of a specific fact with the truth would not be justified pursuant to Article 2 § 2 of the Code of Criminal Procedure. The very concept of proof does not relate to the "objective certitude" about the facts, but refers to the highest degree of probability of their occurrence. The grounds for issuing the procedural decision, which needs to be proven, shall be the formation of the "subjective certitude",[18] expressed by the following formula: subject O is confident that a given fact has actually occurred, which means that such fact has been conceived by subject O and is deemed to be the actual fact.[19] A similar situation takes place in the case of the procedural decisions that must be substantiated subject to the fact that the lower probability of occurrence of a specific fact is required for their issuance. As far as the probability is concerned, "subjective certitude" is also required with respect to the grounds for the issuance of such decisions. However, it must be noted that even though "subjective certitude" is required for the issuance of a specific procedural decision, it is created on the basis of the objective evidentiary proceedings. "Since the objectivity of the evidentiary proceedings shall have the same impact not only on the knowledge of the authority, but also of other parties involved in the proceedings, it is better to talk about the intersubjectivity of the evidentiary proceedings understood as the recurring subjective reaction of various persons".[20]

In conclusion, it may be stated that the degree of the cognisance of the case by the adjudicating body, which constitutes the substantiation of the assertion on the existence of a specific fact, should not be opposed to the truth within the meaning of Article 2 § 2 of the Code of Criminal Procedure. The findings that are probable, in compliance with the provisions of the Code of Criminal Procedure, shall also be considered true (according to some way of understanding it). However, one issue needs to be emphasised. The "subjective certitude" about the grounds for the issuance of the procedural decision does not have to be shared by all entities from the collective body involved in the issuance of such a decision. For instance, proof

18 A. Gaberle wrote in more detail about the concept of the "subjective certitude" in: *Dowody w sądowym procesie karnym. Teoria i praktyka,* Warszawa 2010, pp. 25–26; Kmiecik, R., *Prawo dowodowe. Zarys wykładu,* Warszawa 2008, p. 223.

19 Zieliński, M., *Poznanie sądowe a poznanie naukowe,* Poznań 1979, p. 77.

20 Patryas, W., *Próba…,* p. 55.

of fault does not require all members of the adjudicating body to share the same conviction, but only the majority thereof, which shall reflect moderate epistemic individualism.[21] The above also results from the wording of the provision of Article 111 of the Code of Criminal Procedure, according to which the decisions are made by a majority of votes cast, and Article 112 of the Code of Criminal Procedure, according to which the judge who voted against finding the defendant guilty may abstain from voting on further issues; in such a case, the vote cast by the judge is "attached" to the opinion most favourable for the defendant. Therefore, the defendant may be found guilty of the alleged crimes even in the event when one of the members of the adjudicating body is convinced of the innocence of the defendant. Such a belief – in the case of the collective body of the court – shall not be deemed to mean that the issued decision (in this situation – the judgement of conviction) is at variance with the principle of material truth mentioned in literature (Article 2 § 2 of the Code of Criminal Procedure). The foregoing is prejudged by the previous assumption that – in connection with Article 2 § 2 of the Code of Criminal Procedure – it is possible to talk about the truth in the context of opinions and judgements about specific states of affairs, but not about the states of affairs as such. The text of the principle of material truth is related to all decisions, and thus not only the decision on finding the defendant guilty, as well as to formal decisions.

Conclusion

In conclusion, the principle of material truth in criminal proceedings does not express ontic truth, and thus the truth of the "thing itself" and the "being itself". What is more, it should also probably not be understood as the classical ontological truth,[22] which consists in the appropriate recognition of a specific object despite the fact that it is based on opinions and judgements. According to the author, there is still no answer to the question about the method of understanding the truth in a criminal trial and the potential solution of the paradox of truth pursuant to Article 2 § 2 of the Code of Criminal Procedure, which means that certain findings are considered true even if they are actually not.

21 See Patryas, W., *Próba*…, p. 46 and *Uznawanie*…, p. 209.

22 With the above in mind, the author decided to modify her approach presented in the book entitled *Ciężar dowodu…,* op. cit.

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CITATION

Żbikowska, M., *Essay on the manner of understanding truth in criminal proceedings*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 107–117, DOI: 10.18276/ais.2020.30-08.