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Optimizing Criminal Liability. Post-Factum Impunity Clauses – Useful Criminal Policy Tool or Substantive Law Hesitancy?

Optymalizowanie odpowiedzialności karnej. Postdeliktualne klauzule bezkarności – przydatne narzędzie kryminalnopolityczne czy wyraz niezdecydowania prawa materialnego?

1. Introductory remarks

When one thinks about criminal law, the main or only thing they perceive is crimes. In the eyes of a layman, a criminal code contains a set of crimes encompassing the most intuitive like murder, larceny, causing bodily harm, or fraud. A lawyer knows a little bit more – they also see general principles of criminal liability embedded in the statute itself or developed by judiciary and doctrine. However, a criminal lawyer understands the code as a comprehensive and complex concept encompassing all of the above and a set of circumstances that preclude an individual's liability for their behavior, technically meeting all the elements of a crime. As Victor Tadros wrote in his book Criminal Responsibility:

> When a prohibition is created, it is to be hoped that it will not be breached. However, hopes are often dashed. When individuals breach the criminal law, they sometimes think that they have done so for a good reason. Moreover, sometimes they are right. For criminal prohibitions are often not perfect. A complete prohibition would be a prohibition which there would never be a good reason to

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> breach. Perfect prohibitions are quite rare (…) Most prohibitions, on the other hand, can sometimes be breached with good reason. Where a prohibition is breached for a good reason, the criminal law ought to provide the defendant with a justification defense[2].

Probably everywhere larceny, murder, or bribery are penalized. However, if we look deeper into the system of liability, mainly at different grounds of its preclusion, we may better understand the principles, axiology, and philosophy of a particular system[3]. What are the reasons why a legislature would, on the one hand, enact crimes that indicate how strongly particular values shall be respected and thus protected in the most intrusive way, yet on the other hand simultaneously provide either general or particular circumstances excluding the criminal liability? I purposefully use the term „exclusion of liability" here, as the most general description of the effect of their practical operation. As always, the devil is in the details, which are crucial to understanding a legal system. As I will try to show below, these circumstances represent a variety of substantiations in modern criminal law. Some are somewhat common for western legal systems while others are more connected to a particular state's legal tradition or theory. However, they all have one common thread – to communicate the negation of criminality.

2. Justifications and excuses

Without any doubt, the most recognizable circumstances excluding criminal liability may be divided into two groups – justifications and excuses[4]. An act is justified because of its character and evaluation from various perspectives (moral, economic, etc.). The perpetrator raising a justification defense questions the (moral, social, economic) wrongfulness or harmfulness of the act, which prima facie meets the elements

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[2] V. Tadros, *Criminal*..., p. 265.

[3] M.D. Dubber, *Comparative*..., p. 436. As to general comparative methodology see B. Markesinis, *Rechtsvergleichung*... and R. Michaels, *The Functional*..., p. 340–381; R. Cotterrell, *Comparative*..., p. 710–735.

[4] Most useful publications on that topic covering the phenomenon from the Anglo-American perspectives in my opinion are the following: G.P. Fletcher, *Rethinking*..., p. 759–877; K. Greenwalt, *The Perplexing*..., p. 1897–1927; J. Horder, *Excusing*..., p. 7–99; P. Robinson, *Criminal*..., p. 199–291; J.C. Smith, *Justification*..., p. 1–99.

of a particular crime. The following justifications seem to be (almost) universally accepted in western legal systems:[5]

a) necessary (self) defense – repelling a direct, unlawful attack on a legally protected interest,
b) state of necessity (emergency) – acting with the purpose of averting an immediate danger to a legally protected interest if the danger cannot be otherwise avoided, and ifthe sacrificed interest represents a lower value than the interest that is being salvaged,
c) collision of duties – when all duties vested on an individual are unable to be fulfilled simultaneously.

Excuses are generally described as circumstances in which the act is not justified but the perpetrator is excused because of their features, like the lack of an adequate capacity to act according to the law. The most commonly recognized are the following[6]:

a) duress – acting under coercion (that is not a justified necessity), in cases when the sacrificed interest does not represent a value manifestly more considerable than the interest that is being salvaged,
b) insanity – when one is incapable of either recognizing the significance of their act or controlling their conduct due to mental illness, mental impairment, or other disturbance of mental functions,
c) mistake – as to criminally relevant facts (such as the existence of a justification or excuse, unlawfulness, or one of the elements of a crime).

This latter group seems to be understood as an effect of legislative protection of human dignity, which amounts to the elimination of liability when a person lacks the capacity to conform to the law. In other words, one may not be held criminally liable for acts that were beyond their effective control. However, the most controversial in modern criminal law is determining the prerequisites of excusing one's behavior. For example, which objective and subjective features should be deemed sufficient to exclude liability in a case of transparent criminal behavior?

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[5] They may differ in their judicial or legislative form, however they all seem to be based around common theoretical concepts. As a general description I use their wording stemming from Polish Criminal Code – Act of 6 June 1997 – Criminal Code, Journal of Laws 2020, item 1444, consolidated text as amended, hereinafter: PCC. Text available at < https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970900557/U/D19970557Lj.pdf >.

[6] W. Zontek, *Modele*..., p. 22.

Depending on which excuse defense we are interested in, the reasons behind its formula may differ. Excuse based on mental illness, mental impairment, or other disturbances of mental functions is based on the disability of an individual to either effectively control their conduct or recognize its legal/moral meaning. An individual suffering from severe mental retardation may not be able to understand legal norms and thus is not capable of proper (legally binding) evaluation of their own actions. A mentally ill individual may not control their conduct because of the specificity of the condition (i.a., they hear voices in their head telling them what to do, or they picture other humans as monsters). It is impossible to charge them fairly with contravening the law in those cases.

The mistake defenses, on the other hand, are based on a different notion. A person who is mistaken does not recognize reality accurately. Thus, they may undertake activities they would otherwise refrain from. Nevertheless, not every erroneous belief deserves forgiveness. The law stipulates additional requirements regarding the nature of the mistake. In some cases, for example, the mistake must be justified (objectively explicable), which means that a reasonable person sharing the specific features of this individual would perceive the reality in the same way. Only then does society lose its right to condemn and consequently to punish. Mistakes are firmly connected with a set of legal duties mainly focused on one's obligations to get more updated knowledge, double-check the surroundings (legal or factual) before acting, and be careful to a certain extent. Those duties vary and are naturally satisfied in manifold ways for different persons. Unjustified erroneous beliefs may be proven by showing that one has not met the normative expectations.

Other kinds of excuses may be based on an individual's designated level of capacity to withstand pressure or fear. „No fair choice" or „overpowered will" are the phrases used in the doctrine to describe this phenomenon. Duress seems to be an apt example of this approach. Society may not demand bravery or firmness exceeding some degree that is commonly accepted as the threshold for human durability[7]. Beyond that point, one acts in a so-called state of extraordinary motivation. This is in most cases caused by fear of some sort. One is not mistaken, nor disabled to perceive reality, but one's particular conduct may not be

[7] See general A. Ashworth, *Principles*..., p. 210; J. Horder, *Excusing*..., p. 108–139.

blameworthy considering all factors and alternatives. Duress is a form of necessity, and it may even be of such magnitude that it is, in fact, a justification rather than an excuse. If someone at gunpoint is told to destroy property, balancing values (life vs. property) convinces us that the destruction should be justified. However, if the balance of values is not that obvious, it may raise the question whether the person had a fair opportunity to contradict the peril. Nevertheless, similarly to mistakes, the law usually provides a set of objectified conditions for the acceptance of such an excuse. For instance, there must be a strict proportion of salvaged and sacrificed values, the fear or agitation must be justified considering the nature and intensity of the peril, there must be no other reasonable way to avoid the danger, etc.[8]

When we look at excuses, we see that the notion of human dignity is at the core of their distinction, and the soundness of the penalty may be easily questioned. If we approach punishment from the deterrence point of view, it is evident that it would be futile to count on any deterring effect in the case of a genuinely and justifiably mistaken person. The utilitarian approach also provides us with little to no reason to punish, for example, a mentally disordered person. What goal would the imposed penalty bring about? They should be treated rather than punished. What is more, this category of individuals may not even understand the penalty itself.

3. Social harmfulness – a halfway solution (?)

The above categories of circumstances reducing criminal liability are not the only „safety valves" that guarantee that, in an atypical case, the perpetrator will be appropriately subject to criminal liability in general or to the full extent provided for by the law. Their character is heterogeneous, as these categories include various factual states and contexts. Moreover, although in the case of justifications and excuses, the features of an act or its socio-normative context must be contemporaneous to the act itself (i.e., must concur with the realization of its statutory elements), the legal system is not limited to such a configuration only.

We may recognize that, in the event of excessive criminalization, it is likely that the organization of the judiciary and law enforcement

[8] See general J. Lachowski, *Stan*..., p. 120–134; W. Zontek, *Modele*..., p. 330–342.

agencies cannot handle a large number of cases efficiently. Then it is possible to naturally modify the features of prohibited acts so that the penalisation covers only the most serious variants of unlawful behavior, or to introduce other mechanisms allowing for the „relief" of the justice system (e.g., plea bargaining). However, the first approach is not always possible or advisable, because altering the elements of a crime may preclude maintaining transparency and lead to too much casuistry. The second approach is only a partial solution to the problem, as each case (even if it involves a small matter) must still be processed, at least to a minimum extent, in the course of the preparatory proceedings and then approved by the court.

The situation becomes even more complex when we contemplate whether or not to consider the perpetrator's behavior after the commission of the crime (e.g., restitution of damage or harm). Then the reformulation of the statutory elements of the crime seems useless (after all, the elements must refer to the behavior „here and now" at the time of its commission). In the case of plea bargaining, all forms of compensation to the victim as well as the social sense of justice are important in terms of determining the eventual penalty, and do not change much when it comes to the usefulness of this procedural instrument in the overall reduction of caseloads.

Different legal systems have evolved alternative ways of dealing with this problem. We have a spectrum of procedural liberty, the basic variant of which, in a way, is the substantial discretion of law enforcement agencies with respect to prosecution. In some legal systems, constitutional regulations related to the model of separation of powers or an explicit authorization at the statutory level may guarantee these agencies an exclusive competence to decide which cases should be prosecuted. In light of more or less formalized criteria, the agencies will then evaluate whether any factors against prosecution appear in a specific case[9].

On the other hand, in legal systems that adhere to the principle of mandatory prosecution, there are, as a rule, no general exceptions – the

[9] A particular mutation of this opportunistic approach appears in countries where nominally, due to, e.g., the constitutionally guaranteed principle of equality, this quasi-opportunistic safety valve provides for the court's participation in the decision to refuse to initiate proceedings or to discontinue them. However, the premises for this are formalized (although often vague and leaving a large sphere of discretion) and provided for in the act. German and Austrian examples will be discussed below.

„burden" of creating these safety valves is therefore shifted to substantive law. Their iteration is the concept of the social harmfulness of the act, which is present, among others, in the Polish penal code.

This is a sort of a safety anchor when prima facie someone meets the objective and subjective elements of a crime and cannot offer a justification nor an excuse, but the context of the perpetration (the infringed legal interest, the extent of inflicted and anticipated damage, the manner and the circumstances of the commission of the act, the importance of the duties violated by the perpetrator, as well as the form of the intent, the perpetrator's motivation, the type of violated safeguard rules, and the degree of such violation[10]) indicates that the act does not bear the sufficient level of harmfulness that deserves treating it as a crime. This solution may be profitable in systems that are not based on discretionary prosecution. The main difference is that these prerequisites (subjective, objective, or mixed) are codified and belong to substantive criminal law. Thus, the decision not to prosecute needs to be based solely on the closed list of factors and must be the result of their totality. Only then do we receive a comprehensive evaluation of the act. It must be stressed that this operates *in concreto*. If the legislature decides that a particular type of behavior should be treated as a crime, they evaluate the general category of acts as harmful *in abstracto*[11].

Nevertheless, this does not eliminate the possibility that, all things considered, for example, a particular theft (even though theft is generally wrong) may not contain a sufficient degree of harmfulness. The wording of the elements of evaluation of this aspect of a crime may lead to mixed results. For example, it may be claimed that an act undertaken with justification is always harmful to a negligible degree. But this may depend upon the perspective of particular statutory solutions. For example, in Polish law, this factor seems to be independent of justifications (the conditions for which may overlap with harmfulness factors, but are not the same). The degree of harmfulness is often typical or even relatively high, but meeting the other objective requirements of the necessity defense, for example, leads to an acquittal based on a different rationale.

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10 See art. 115 § 2 PCC.

11 See general R. Zawłocki, *Pojęcie*..., p. 125–172.

4. *Post-factum* impunity clauses

This approach has a limited application, however, compared to the constructs present in opportunistic or quasi-opportunistic systems in the sense that – like traditional excuses and justifications – it only considers circumstances contemporaneous to the act itself. So, is there a place for optimization mechanisms based on the perpetrator's behavior that he undertakes after committing a prohibited act? Traditionally, if a criminal provision provides for consequences depending on such post-factum behavior, it should be treated as relevant for penalty assessment. Moreover, in many cases, the Polish Criminal Code provides for the possibility (or, in exceptional cases, even an obligation) of extraordinary mitigation of the penalty or withdrawal from its imposition at all. In such cases, there is a conviction and the formal breach of the presumption of innocence, but the conviction is either wholly or predominantly devoid of conventional criminal consequences. In essence, the very fact of the conviction plays the role of that symbolic stigma that is supposed to affect the perpetrator.

However, there are echoes of opportunistic thinking about the need to assign criminal liability in the so-called impunity clauses, of which the post-delict ones have a specific rationalization. They operate when the elements of the type are met, but due to the precisely indicated behavior of the perpetrator, the proceedings must be discontinued, or – if this determination is made earlier – the proceedings are never initiated at all. What are these cases, then? In the Polish Criminal Code, we can identify the following groups:[12]

1. Breaking of the criminals' solidarity that provides a straightforward benefit for those who decide to disclose relevant information. The perpetrator of the crime of providing or promising to provide a material or personal benefit to a person performing a public function in relation to performing this function is not subject to a penalty if the material or personal benefit, or its promise, have been accepted by the person performing a public function and the perpetrator has reported this to

[12] See general Ł. Kielak, *Klauzule*…, p. 318–560, where the author identifies all impunity clauses in the Polish Criminal Code explaining their specificity.

a law enforcement authority responsible for prosecuting crimes and has disclosed all the substantive circumstances of the crime before this authority has learned about it (art. 228 § 5 PCC).

2. Encouragement to performance of private obligations. The perpetrator who evades carrying out of a duty of providing maintenance in the amount indicated in a court ruling, settlement concluded before a court or other authority, or other agreement, if the aggregate value of overdue installments is equal to at least 3 periodical installments or if a non-periodical installment is overdue by more than 3 months of the act referred to in § 1 who has paid the full amount of overdue maintenance within 30 days from being first questioned as a suspect, is not subject to a penalty (art. 209 § 4 PCC).

3. Limit the potential economic loss or risks in business. Whoever being obliged by a statutory provision, decision of a competent authority or a contract to manage the financial matters or business activity of a natural person, a juridical person or an organizational entity without a legal personality, inflicts substantial material damage upon such person or entity by abusing the granted authority or failing to fulfill the incumbent duties has voluntarily redressed the total inflicted damage before the criminal proceedings have been instituted, is not subject to a penalty (art. 296 § 5 PCC).

4. Encouraging to avert an immediate danger to another. The perpetrator who exposes a human to immediate danger of loss of life or a danger of sustaining grievous bodily harm is not subject to a penalty if he has voluntarily averted the existing danger (art. 160 § 4 PCC).

5. Encouraging to release hostages. Whoever takes or holds a hostage with the purpose of compelling a state authority, a local government or self-government authority, an institution, organization, natural person, juridical person, or a group of people to act in a specific manner and subsequently has abandoned the intent of extortion and released the hostage, is not subject to a penalty (art. 252 § 4 PCC).

6. Encouraging to abandon organized crime and report to the authorities. Whoever has voluntarily abandoned the group or association

having as its purpose the commission of crimes or fiscal crimes and has disclosed all the substantive circumstances of the committed act to a law enforcement authority responsible for prosecuting crimes or has prevented the commission of the intended crime or fiscal crime, is not subject to a penalty for the crime (art. 259 PCC).

7. Providing information effectively leading to the prevention of crimes. Whoever has voluntarily disclosed information concerning the individuals participating in the crime of money laundering and the circumstances of its perpetration to a law enforcement authority responsible for prosecuting crimes is not subject to a penalty for the crime provided if the provided information has prevented the commission of another crime; if the perpetrator has taken efforts aimed at disclosing such information and circumstances, the court applies extraordinary mitigation of the penalty (art. 299 § 8 PCC).

8. Nudge to withdraw from exploiting benefits of one's criminal endeavor. Whoever has voluntarily prevented the use of the financial support or payment instrument referred obtained by submitting a forged or altered document, a document certifying an untruth or a dishonest document, or a false written statement regarding the circumstances of substantive significance for its obtaining, renounced the subsidy or public procurement or satisfied the claims of the harmed party, before the criminal proceedings have been instituted, is not subject to a penalty (art. 297 § 3 PCC).

These are not the only examples of this type of clause, but they are representative of the theoretical concept that the legislature has seemingly adopted. However, it is characteristic that the rationale behind the indicated groups of solutions is not universal, and has not been extrapolated to all types of prohibited acts that share criminal policy justification. Compensation for the damage, compensation for the injured party's claims, waiver of the danger, payment of receivables, return of goods, etc., do not constitute impunity clauses in the event of causing bodily harm, theft, non-commercial fraud, or creating a common danger for multiple individuals. These clauses operate only with regards to a few specific offenses. The Polish legislature, however, once decided to enact a sui generis general non-punishment (impunity) clause (although it was

formally formulated as the basis for discontinuation of the proceedings) by introducing the so-called restitution remission in art. 59a PCC[13].

This provision had a relatively broad scope of application (to all crime types punishable by up to 3 years imprisonment, and in the case of crimes against property, up to 5 years). The condition for the discontinuation of the proceedings on this basis was to demonstrate, among other things, reconciliation with the aggrieved party and redressing the damage or the harm suffered, unless there was an exceptional circumstance justifying that the discontinuation of the proceedings would be contrary to the need to achieve the objectives of the penalty.

It is easy to see that the crimes against collective goods (e.g., functioning of offices or economic turnover) and those traditionally referred to as „victimless" crimes (e.g., forging a document, giving false testimony) were not covered by this provision. However, the legislature again changed this paradigm of thinking about the essence of criminal law and, one year after this provision came into force, the legislature repealed this solution.

Thus, at present, the issue of taking into account the perpetrator's post-factum behavior, as having an impact on the optimization of criminal liability, is present only in the case of the previously discussed impunity clauses and the general directives of the penalty imposition with respect to specific instances authorizing extraordinary mitigation of penalty[14] or renouncement of its imposition. Some of the latter complement

[13] § 1. If the perpetrator, who has not been previously sentenced for an intentional crime involving the use of force, has redressed the damage or compensated for the suffered harm before the start of the trial court proceedings, the criminal proceedings regarding a misdemeanour subject to the penalty of deprivation of liberty not exceeding 3 years or a misdemeanour against property subject to the penalty of deprivation of liberty not exceeding 5 years, or a misdemeanour provided for in art. 157 § 1, are discontinued upon the harmed party's motion. § 2. If an act has been committed against more than one harmed party, § 1 applies only if the perpetrator has redressed the damage and compensated for the suffered harm with regard to all the harmed parties. § 3. The provision § 1 does not apply if due exceptional circumstances the discontinuance of the proceedings would be inconsistent with the need of fulfilling the aims of the punishment – translation A. Wojtaszczyk, W. Wróbel, W. Zontek, *Criminal*...; A. Pilch, *Umorzenie*..., p. 100; A. Lach, *Umorzenie*..., p. 137–147; A. Jezusek, *Tzw. umorzenie*..., p. 95–118.

[14] „While imposing a penalty, the court takes into account primarily the (...) his behavior after the commission of the crime, especially his efforts to redress the damage or to satisfy the public sense of justice in any other form" – art. 53 § 2 PCC. When even the lowest penalty provided for a crime would be incommensurately severe.

the impunity clauses, constituting a sui generis another level of optimization of criminal liability (between the ordinary penalty and the complete lack of punishment).

5. General rationalization

The doctrine has not yet developed a clear dogmatic justification for the obligatory impunity of the perpetrator of a prohibited act resulting from his post-delictal behavior. In the Polish doctrine of criminal law, as early as the beginning of the 20th century, the specificity of these circumstances was emphasized, which did not fit into the general concepts of excluding unlawfulness or fault. Professor E. Krzymuski characterized them as „voluntary repair of the crime by its perpetrator, before the authorities found out about his guilt, and the repair consists in making the crime harmless in material terms or in compensating the material damage caused by them"[15]. In turn, W. Wolter, already more theoretically expressing the sense of the impunity clauses, wrote that „they break the normative relationship between the crime and the penalty, for reasons that occurred after the crime was committed, or for other reasons they neutralize the need to punish"[16]. Next D. Gajdus, in his work on active repentance, similarly to W. Wolter emphasizes that some forms of this institution „cause the perpetrator's impunity, thus breaking all relations between the committed crime, guilt and punishment as the normative consequences of the crime"[17]. Olga Sitarz thus emphasizes the criminal policy and pragmatic aspects of the decision of the legislature, which as a rule is binding on the courts, stressing that „a rational legislature, therefore, with great sensitivity to use the variables shaping the consequences of active grief shown by the perpetrator, implementing the assumed goals and functions, maintaining the consequences of the adopted solutions, which prevents ineffective and unfair regulations"[18]. The thesis is that the legislature has a certain amount of freedom, and that the criminal policy reasons of specific solutions are to be taken into account.

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15 E. Krzymuski, *Wykład*..., p. 148.
16 W. Wolter, *Nauka*..., p. 159.
17 D. Gajdus, *Czynny*..., p. 80.
18 O. Sitarz, *Karnoprawne*..., p. 299.

According to the categories commonly accepted in the science of criminal law, dogmatic classification is not easy. Some solutions can be rejected immediately as inconsistent with the normative essence of the impunity clauses. It is essentially justification and excuses, which traditionally encompass cases shaped by justification factors contemporaneous to the act itself. These clauses can then be treated as certain mutations of the specific circumstances of the penalty assessment (resulting in the lack of the need not only to impose the sentence itself, but also to subject to the assessment of behavior in this respect), negative elements of the type of offense, or a certain iteration of a *de facto* discretionary model of criminal liability.

6. Instrument of penalty evaluation

The Polish Supreme Court dealt with the issue of developing a classification criterion when a provision of the act was formulated ambiguously and raised doubts as to the nature of the institution it regulates. In the decision of January 19, 2012, I KZP 22/11, the Court stated that:

> In case of doubts as to the legal nature of a provision contained in one of the chapters of the special part of the Penal Code it should be considered that if the modification of a criminal sanction provided for in this provision is justified by circumstances preceding or following its commission, it should be treated as an institution of judicial assessment of a penalty. If the circumstances specified in a given provision, which affect the amount of the criminal sanction, are directly related to the act and are relevant to the assessment of its social harmfulness, it should be considered that they constitute the type of the prohibited act (qualified or privileged).

Therefore, this gives rise to a thesis that the impunity clauses are only a variation (the most far-reaching in the adopted gradation) of circumstances affecting the eventual penalty. The first step in optimizing criminal liability will be the possibility of extraordinary mitigation, when even the lowest penalty provided for a crime would be incommensurately severe, which consists in the imposition of a penalty in the extent that amounts to less than the lowest statutory penalty, or in the imposition of a penalty of a more lenient type, following the precise statutory principles. The basis for extraordinary leniency may also be a specific case deemed by the legislature as *in concreto* deserving (at least) consideration

by the court of extraordinary leniency. Interestingly, we deal with such cases in the provisions providing for the impunity clauses. By way of example, in the provision providing for the impunity clause for the offense of taking a hostage, the statute also provides that the court may apply extraordinary mitigation of the penalty concerning the perpetrator of kidnapping coupled with particular torment to the hostage who has abandoned the intent of extortion and released the hostage; however the court applies extraordinary mitigation of the penalty only if the abandonment of the intent of extortion and the release of the hostage have been voluntary (art. 252 § 5 PCC).

Similarly, if the perpetrator of a crime provided for in art. 296 PCC has voluntarily redressed the total damage (after the investigation has been instigated), the court may apply extraordinary mitigation of the penalty (art. 307 PCC).

Another degree of optimalization – renouncement of penalty imposition – has two dimensions in Polish criminal legislation: general, in the provision of art. 59 of the Penal Code, and in detail concerning specific institutions of substantive criminal law that provide for independent grounds for such a renouncement. The general clause makes the decision on eventual waier dependant on i.a. the statutory penalty (max. 5 years of imprisonment), the degree of social harmfulness, imposition of a penal, compensatory measure, or forfeiture, and on meeting the objectives of the penalty. In the case of specific provisions providing circumstances in which renouncement is permissible, the legislature emphasizes the nature and factual reality of each specific situation. These aspects may justify by themselves the possibility of refraining from imposing a penalty in the case of acts punishable by even a quite severe penalty. What is more, the Code does not explicitly or implicitly indicate the need to adjudicate a penal, compensatory measure, or forfeiture or assess the degree of social harmfulness. An example may be the case of non-alimony discussed earlier, which provides for an impunity clause but also includes a decision related to the remission of a penalty in the case of a qualified type (exposing the entitled person to the impossibility of satisfying this person's essential living needs). The provision states that the court will waive the imposition of a penalty if the perpetrator of the crime provided for in § 1a has paid the total amount of overdue alimony within 30 days from being first questioned as a suspect, unless it is inexpedient

to waive the imposition of a penalty due to the perpetrator's fault and the social harmfulness of the act.

Post-delictal circumstances providing for extraordinary leniency or withdrawal from the imposition of punishment do not present any rationalization other than that behind the impunity clauses in the aspect of substantive law. They refer to events of different quality, but still based on the same core. At the option of the legislature, certain types of behavior – irrespective of the subsequent quasi-neutralization activities – absolutely require conducting criminal proceedings and ending them with a display of the guilt of the perpetrator through the sentence. However, it seems that the most severe problem with respect to the agenda over the commented classification criterion of impunity clauses is their obligatory nature. In each case of a mandatory criminal provision, a constitutional issue arises related to who administers justice. After all, the discretionary power of the court as the only constitutionally empowered body to administer justice is being reduced, existing only at the level of interpretation, collection, and evaluation of evidence and the final application of the law to the facts. This may mean that the legislature has found that it is impossible to imagine such a factual configuration in which there would be an objective need to punish in the cases indicated in those specific clauses. Hence, the court's discretion in this area is excluded. It is also possible to adopt the view that, at the stage of lawmaking in impunity clauses, the legislature is guided by reasons other than those traditionally identified as sentencing directives.

7. The negative element of a crime

Let us suppose that the conclusion on the classification of the impunity clauses as an iteration of sentencing directives towards recognizing the absence of a need to punish (the most far-reaching criminal policy optimization) appears problematic due to the above-mentioned issues related to their obligatory nature. In that case, it is possible to look at them from a different angle. Just as the legislature has the constitutional (and in democracies, in principle, exclusive) competence to establish criminal law, this means that it can freely shape the scope of penalization by appropriately formulating the elements of the type of a prohibited act. In such a case, it could be assumed that these post-delictal clauses are,

in a way, negative elements of the particular type of offence they accompany. They are negative conditions for fulfilling the disposition of the norm, which determines the necessity to punish the perpetrator. Would this approach be defensible? It presents issues of a more or less fortunate linguistic approach to the provision and issues of a guarantee nature and its sufficient specificity. By „merging" the type with the impunity clause, we can construct, for example, the following offenses:

> Whoever exposes a human to immediate danger of loss of life or a danger of sustaining grievous bodily harm, which he does not avert, is subject to penalty.
> Whoever provides or promises to provide material or personal benefit to a person performing a public function in relation to performing this function, and the material or personal benefit, or its promise, have been accepted by that person, and perpetrator does not report this to a law enforcement authority responsible for prosecuting crimes, and does not discloses all the substantive circumstances of the crime before this authority has learned about it, is subject to penalty.

It can be immediately noticed that the above descriptions of crimes resulting from the semantic unification of elements of the type with the premises of the impunity clause contain two different behaviors, which are negatively evaluated. The first is, for example, creating a danger or giving a bribe, and the second is the failure to avert this danger or the lack of an effective denunciation. Moreover, in the case of the first of the exemplary types, it is unknown within what time horizon this risk would have to be lifted, because the legislature did not indicate any time limit in this particular clause. Thus, implementing criminal liability would depend on the perpetrator's unspecified-in-time omission (who would judge whether delaying the reversal of the danger already fulfills the elements or we still need to wait longer?). On the other hand, in the case of corruption, the fulfillment of the elements would depend on a factor external to the perpetrator, i.e., learning about the relevant circumstances of the crime. It raises problems on many levels of substantive criminal law, not only in terms of the certainty and clarity of the features of a prohibited act (nullum crimen sine lege certa), but in relation also to many other structures such as an attempt, the subjective side, incitement, or aiding. For example, incitement to such a crime of creating danger would have to include also the will of persuading the incited person not to prevent it, and in the case of bribery, the persuasion would also have to include convincing the direct perpetrator to refrain from subsequent denunciation.

As it is easy to see, this can lead not only to unanticipated consequences but also may require a far-reaching reinterpretation of the existing traditional institutions of substantive law.

8. Discretionary prosecution[19]

For a lawyer coming from a system in which the opportunism of prosecution has been adopted, the characteristics of these clauses of impunity probably resemble the overall criteria for assessing an act when considering whether it should be prosecuted at all[20]. Like in the UK, the Code for Crown Prosecutors states that:

> it has never been the rule that a prosecution will automatically take place once the evidential stage is met. On the contrary, a prosecution will usually occur unless the prosecutor is satisfied that public interest factors tending against prosecution outweigh those tending in favor. In some cases, the prosecutor may be satisfied that the public interest can be served appropriately by offering the offender the opportunity to have the matter dealt with by out-of-court disposal rather than bringing a prosecution (4.10)[21].

Thus, in the UK legal system, there is a competence of certain authorities to assess comprehensively whether a given behavior should become the subject of a criminal trial, leading to the breach of the presumption of innocence and the imposition of a (even symbolic) penalty. One of the criteria for a prosecutor in such a system is the public interest. It consists of several factors often mentioned not so much in statutes but instead in internal instructions of the prosecution service[22]. However, in

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19 A comparative approach on that issue, including presentations of a variety of definitional approaches to the concept is provided by M. Rogacka-Rzewnicka, *Oportunizm*..., p. 124–205.

20 See general E. Luna, M. Wade, *Prosecutors*..., p. 1414–1532.

21 < https://www.cps.gov.uk/publication/code-crown-prosecutors >.

22 4.11 When deciding the public interest, prosecutors should consider each of the questions set out below in paragraphs 4.14 a) to g) so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors, together with any public interest factors set out in relevant guidance or policy issued by the DPP, should enable prosecutors to form an overall assessment of the public interest. There are the following criteria (elaborated in depth in the Code): a) How serious is the offence committed? b) What is the level of culpability of the suspect? c) What are the circumstances of and the harm caused to the victim? d) What was the suspect's age and maturity at the time of the offence? e) What is the impact on the community? f) Is prosecution a proportionate response? g) Do sources of information require protecting?

these cases there is no question of such a far-reaching obligatory decision as we have to deal with in the case of the impunity clauses mentioned above. It is the prosecutor who can decide whether the perpetrator deserves punishment, taking into account, among other things, the perpetrator's behavior aimed at reducing the negative consequences of his own already-completed act.

In the case of, for example, the German or Austrian solutions, this opportunism does not go that far, but the criminal liability system provides for the possibility of taking into account the perpetrator's post-factum behavior. For example, art. 153 of the German Code of Criminal Procedure (Strafprozeßordnung, StPO)[23] provides that to decide not to prosecute (or possibly to discontinue the proceedings) one must show two circumstances occurring jointly:

a) low degree of guilt (geringe Schuld),
b) lack of public interest in prosecution (kein öffentliches Interesse an der Verfolgung besteht)[24].

The lack of social interest is considered to be present in cases where there is no need to punish due to the objectives of general or individual prevention, public safety, protection of the aggrieved party, or if there is no need to conduct full-scale criminal proceedings. On the other hand, another provision – art. 153a StPO[25] – conditions the waiver of bringing

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[23] < http://www.gesetze-im-internet.de/stpo/ >.

[24] „§ 153 Absehen von der Verfolgung bei Geringfügigkeit: 1) Hat das Verfahren ein Vergehen zum Gegenstand, so kann die Staatsanwaltschaft mit Zustimmung des für die Eröffnung des Hauptverfahrens zuständigen Gerichts von der Verfolgung absehen, wenn die Schuld des Täters als gering anzusehen wäre und kein öffentliches Interesse an der Verfolgung besteht. Der Zustimmung des Gerichtes bedarf es nicht bei einem Vergehen, das nicht mit einer im Mindestmaß erhöhten Strafe bedroht ist und bei dem die durch die Tat verursachten Folgen gering sind. (2) Ist die Klage bereits erhoben, so kann das Gericht in jeder Lage des Verfahrens unter den Voraussetzungen des Absatzes 1 mit Zustimmung der Staatsanwaltschaft und des Angeschuldigten das Verfahren einstellen (...)".

[25] „§ 153a Absehen von der Verfolgung unter Auflagen und Weisungen: (1) Mit Zustimmung des für die Eröffnung des Hauptverfahrens zuständigen Gerichts und des Beschuldigten kann die Staatsanwaltschaft bei einem Vergehen vorläufig von der Erhebung der öffentlichen Klage absehen und zugleich dem Beschuldigten Auflagen und Weisungen erteilen, wenn diese geeignet sind, das öffentliche Interesse an der Strafverfolgung zu beseitigen, und die Schwere der Schuld nicht entgegensteht. Als Auflagen oder Weisungen kommen insbesondere in Betracht: 1. zur Wiedergutmachung des durch die Tat verursachten Schadens eine bestimmte Leistung zu erbringen, 2. einen Geldbetrag zugunsten einer gemeinnützigen Einrichtung oder der Staatskasse

an indictment upon meeting certain conditions by the suspect, including compensation for damage, compensation for harm, payment of interest for a social purpose, participation in indicated classes or courses, taking serious efforts to settle with the aggrieved party (i.e., an agreement between the perpetrator and the victim) and thus to rectify the offense in whole or in part, or to seek to remedy it. Likewise, art. 191 of the Austrian Code of Criminal Procedure (Strafprozeßordnung, StPO[26]) provides that the charges be waived, or the proceedings discontinued, in the event of an act punishable by imprisonment not exceeding 3 years, a fine, or both, if the following conditions are met:

a) the degree of guilt, the consequences of the crime, the suspect's behavior (especially in terms of redressing the damage), circumstances relevant to the sentence imposed that the violation/disturbance of the legal order by the act (der Storwert der Tat) is minor,
b) punishment or other penal reaction is not necessary to prevent the suspect from committing another crime but also to prevent other persons[27].

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zu zahlen, 3. sonst gemeinnützige Leistungen zu erbringen, 4. Unterhaltspflichten in einer bestimmten Höhe nachzukommen, 5. sich ernsthaft zu bemühen, einen Ausgleich mit dem Verletzten zu erreichen (Täter-Opfer-Ausgleich) und dabei seine Tat ganz oder zum überwiegenden Teil wieder gut zu machen oder deren Wiedergutmachung zu erstreben, 6. an einem sozialen Trainingskurs teilzunehmen oder 7. an einem Aufbauseminar nach § 2b Abs. 2 Satz 2 oder an einem Fahreignungsseminar nach § 4a des Straßenverkehrsgesetzes teilzunehmen. (…) (2) Ist die Klage bereits erhoben, so kann das Gericht mit Zustimmung der Staatsanwaltschaft und des Angeschuldigten das Verfahren vorläufig einstellen und zugleich dem Angeschuldigten die in Absatz 1 Satz 1 und 2 bezeichneten Auflagen und Weisungen erteilen. Absatz 1 Satz 3 bis 6 und 8 gilt entsprechend. Die Entscheidung nach Satz 1 ergeht durch Beschluß. Der Beschluß ist nicht anfechtbar. Satz 4 gilt auch für eine Feststellung, daß gemäß Satz 1 erteilte Auflagen und Weisungen erfüllt worden sind" – < http://www.gesetze-im-internet.de/stpo/ >.

26 < https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326 >.

27 „§ 191 Einstellung wegen Geringfügigkeit. (1) Von der Verfolgung einer Straftat, die nur mit Geldstrafe, mit einer Freiheitsstrafe bedroht ist, deren Höchstmaß drei Jahre nicht übersteigt, oder mit einer solchen Freiheitsstrafe und Geldstrafe hat die Staatsanwaltschaft abzusehen und das Ermittlungsverfahren einzustellen, wenn 1. in Abwägung der Schuld, der Folgen der Tat und des Verhaltens des Beschuldigten nach der Tat, insbesondere im Hinblick auf eine allfällige Schadensgutmachung, sowie weiterer Umstände, die auf die Strafbemessung Einfluss hätten, der Störwert der Tat als gering anzusehen wäre und 2. eine Bestrafung oder ein Vorgehen nach dem 11. Hauptstück nicht geboten erscheint, um den Beschuldigten von der Begehung strafbarer Handlungen abzuhalten oder der Begehung strafbarer Handlungen durch andere entgegen

It can be presumed that a significant number of the cases in which the circumstances described in the act as determining the application of the impunity clause would occur, in a system based on the principle of opportunism in prosecution (in either its „pure" Anglo-American version, or a limited version with the participation of a court, as is the case in Germany or Austria) would ultimately not be assessed in a criminal trial. However, in contrast to the categorical statutory decision that a crime „is not subject to penalty" and therefore under the Polish criminal procedure not subject to criminal proceedings, in the indicated systems it is the overall assessment of the perpetrator and the act and its consequences, as well as the perpetrator's behavior after the fulfillment of the elements, that would determine the assessment of the need of eventual punishment. Therefore, it seems that the consequences of applying the impunity clauses cannot be unequivocally „equated" with a sui generis discretionary prosecutorial decision. The obligatory nature of the solution essentially excludes (or at least significantly limits) this kind of discretion.

9. Conclusion

So what is the true nature of the impunity clauses? There is no single answer to this question because, depending on the adopted point of view and systemic conditions, they share some of the characteristics of various traditional material and procedural law institutions. However, each case contains some distinction structurally, which breaks out of a given category in a more or less problematic way. One thing you can be sure of is the conviction that the legislature, while creating a system for optimizing criminal liability, has noticed the necessity of a specific safety valve in cases where, after the fulfillment of such elements, the perpetrator behaves in such a way that, assessed in the light of specific circumstances, demonstrates that there is no need to punish the perpetrator, in

zu wirken. (2) Nach Einbringen der Anklage, im Verfahren vor dem Landesgericht als Geschworenen- oder Schöffengericht nach Rechtswirksamkeit der Anklageschrift wegen Begehung einer strafbaren Handlung, die von Amts wegen zu verfolgen ist, hat das Gericht unter denselben Voraussetzungen (Abs. 1) das Verfahren bis zum Schluss der Hauptverhandlung mit Beschluss einzustellen. § 209 Abs. 2 erster Satz gilt sinngemäß" – see general H. Fuchs, E. Ratz, *Wiener*..., commentary to the art. 191 StPO.

the sense that a trial would be to some extent contrary to the assumptions of the state's criminal policy. Naturally, it should be noted that the post-delictual impunity clauses provided for in Polish criminal law are neither homogeneous nor generally applicable to cases where the rationalization of the elimination of the need to punish is analogous. They constitute somewhat arbitrary, point-based interventions by the legislature in the system of criminal liability that it has created. Their obligatory nature means that such optimization takes place in the field of general decisions made at the stage of lawmaking, and only in terms of interpretation and subsumption at the stage of administering justice. It may therefore pose a constitutional issue of violation of separation of powers.

Summary

Criminal law provides a variety tools for optimizing the scope of eventual criminal liability of an individual. Some of them are associated with the act's or perpetrator's features that determine due to axiological reasons the lack or strong reduction of liability. There is however another category of instruments that determine the lack of liability based on a behavior of a perpetrator undertaken after the crime has been committed. What is the rationalization behind such a peculiar solution? Why the legislature considers it as a useful tool? In this paper some threads of that rationalization are analyzed and explained.

Key words

Impunity, post factum behavior, excuses, justifications, discretion

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