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SOCIAL HARM OF AN ACT IN THE LIGHT OF JUDICIAL INTERPRETATION

Introduction

Judicial interpretation (construction) is one of the types of interpretation that have limited binding effect. The limitation of the binding effect means that judicial interpretation is restricted to a specific case. Binding interpretation in specific cases is made by the court of first instance, the appeals court, and the Supreme Court. The interpretation made by the court of first instance applies only to the specific verdict. If the verdict becomes final, the interpretation of a legal provision adopted by the court becomes binding for the parties in the proceedings, but only in the specific case. On the other hand, the interpretation made by the appeals court is binding to the court of first instance to which the case is remanded. The interpretation made by the Supreme Court is binding to all cases deciding in the specific case.¹

All adjudicating panels of the Supreme Court are bound by the principles of law; however, it must be indicated that Resolutions of the Supreme Court that define guidelines pertaining to interpretation of laws and judicial practices do not have the force of legal principles. For many years, of particular importance have been guidelines concerning interpretation of the law and judicial practice; for the most part, they have played a positive role in ensuring proper interpretation of laws by courts. They had binding force until 31 December 1989 in the sense that their breach constituted an absolute ground for an appeal as was considered a violation of the norms of substantive law.

¹ S. Oliwiniak, in: A. Jamróz, ed., *Wstęp do prawoznawstwa* [Introduction to jurisprudence], Białystok 2007, pp. 134–135.

According to current law, the Supreme Court may only make resolutions intended to clarify legal provisions that raise doubts or whose application has resulted in different verdicts, and resolutions with decisions regarding legal matters that raise serious doubts in specific cases.²

One of the criminal law subjects that are referred to in numerous court verdicts is the social harm of an act. Social harm of an act constitutes a substantive element of an offense. As the Latin phrase goes, *nullum crimen sine periculo sociali*, i.e. there is no crime without social harm. In this specific phrase, the word ‘social’ means ‘to the society’, and the word ‘harm’ means real likelihood of occurrence of negative consequences that will result in harm and bring about fatal outcomes.³

The legislator does not define social harm but defines the circumstances that must be taken into account when evaluating the degree of social harm. The term ‘social harm’ is a synthetic term covering negative social value of a crime in its various aspects. The negative value may refer to ethics, usefulness, or order. In various types of crimes, the arrangement of those values is different.⁴ The linguistic interpretation of the term ‘social harm of the act’ allows for the assumption that what it expresses is the feature of an act that takes the form of violation or possible violation of a legal value or the interest of an individual or society as a whole. Social harm involves causing damage or harm, which are the negative consequences of an act that affects one or more persons. The nature of the harm may be different: tangible, physical, or intangible – mental or spiritual.⁵

The degree of social harm of a specific behavior that has the features of a forbidden act may be higher or lower, thus allowing comparison of individual forbidden acts to one another. In this sense, social harm is gradable.⁶

The Penal Code (P.C.) defines several legally relevant degrees of social harm: negligible, higher than negligible (art. 1 (2) of the P.C.), insignificant

² Art. 59 and art. 60 of the Act of 23 November 2002 on the Supreme Court, Journal of Laws no. 240, item 2052, as amended.

³ J. Zientek, “Karygodność i wina jako przesłanki odpowiedzialności w nowym kodeksie karnym” [Culpability and guilt as prerequisites for responsibility in the new penal code], *Prokuratura i Prawo*, 1998, no. 6, pp. 7–32.

⁴ S. M. Przyjemski, “Głosa do wyroku SN z dnia 28 czerwca 2005, file no. WA 14/05” [A gloss to the verdict of the Supreme Court of 28 June 2005, file no. WA 15/05], *Wojskowy Przegląd Prawniczy*, 2006, no. 1, p. 161.

⁵ M. Derlatka, “Społeczna szkodliwość czynu a definicja przestępstwa” [Social harm of an act and the definition of a crime], *Prokuratura i Prawo*, 2006, no. 6, pp. 123–127.

⁶ J. Majewski, in: A. Zoll, ed., *Kodeks karny. Część ogólna. Komentarz. Tom I. Komentarz do art. 1–116 k.k.* [Penal code. General part. A commentary. Volume I. A commentary to art. 1–116 of the penal code], *Zakamycze* 2004, 2nd edition, thesis 1 to art. 115 (2) of the P.C.

(art. 66 (1) and art. 59 of the P.C.), and significant (art. 94 (1) of the P.C.). Determination that an act exceeded the threshold of the negligible degree enables distinguishing a misdemeanor from a criminal offense. A criminal offense is defined as a forbidden act whose social harm is of a degree that is higher than negligible.⁷ If an act has no social harm, it must be treated the same as the occurrence of a circumstance defined in art. 17 (1) (2) of the Code of Criminal Procedure (C.C.P.), which is defined as “the perpetrator has not committed a crime.”⁸ As has been rightly observed in case law, the degree of social harm of an act is the immanent characteristic of an act that enables differentiating insignificant acts from serious ones and considering as criminal offenses only those acts that cause true and real harm to specific values of individuals or the entire society. This variable characteristic of an act that formally has all the characteristics of a specific forbidden act is subject to individual evaluation and, depending on specific subjective and objective circumstances, may be considered as negligible, insignificant, high, or particularly high.⁹ It must be mentioned that in the current Penal Code, the legislator does not use the terms of high or particularly high degree of social harm of an act; however, historically speaking, the social harm of an act, which constituted a substantive element of a criminal act under the previous 1969 penal code, was also gradable. Although the previous Penal Code did not use the terms of high or particularly high degree of social harm of an act, these terms were present in the historical Decree of 12 December 1981 on the procedure to follow in special cases concerning criminal offenses and misdemeanors during martial law. In the Decree, the legislator provided for a high and particularly high degree of social harm of an act.¹⁰

As B. Kunicka-Michalska was right in observing, based on the Penal Code of 1997, courts do not analyze, and are not even authorized to analyze, the social harm of acts. They only analyze the degree of social harm in the light of art. 1 (2) of the P.C. and art. 115 (2) of the P.C.¹¹ According

⁷ M. Budyn-Kulik, in: M. Mozgawa, ed., “Kodeks karny. Komentarz” [Penal code. A commentary], 3rd edition, *LEX*, theses 1 and 2 to art. 115 (2) of the P.C.

⁸ Decision of the Supreme Court of 5 December 2012, file no. III KK 211/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2006, no. 1, p. 2357.

⁹ Verdict of the Appeals Court in Katowice of 13 January 2005, file no. II AKa 455/04, *Prokuratura i Prawo – insert*, 2006, no. 1, p. 21; verdict of the Appeals Court in Kraków of 20 June 2000, file no. II AKa 99/00, *Krakowskie Zeszyty Sądowe*, 2000, no. 7–8, p. 39.

¹⁰ Journal of Laws of 1981, no. 29, item 156.

¹¹ B. Kunicka-Michalska, “Z problematyki społecznej szkodliwości czynu” [On the problem of social harm of an act], *Przegląd Prawa Karnego*, 1998, no. 18, p. 5.

to art. 115 (2) of the P.C., “in evaluating the degree of social harm of an act, the court takes into account the type and nature of the violated value, the extent of the damage done or threatened, the method and the circumstances of the act, the gravity of the duties breached by the offender, the intent and the motives of the offender, the type of the violated principles of caution, and the extent to which they were breached.”¹² E. Plebanek was right in observing that the statutory definition of the circumstances that influence the evaluation of the degree of social harm of the act, given in art. 115 (2) of the P.C., constitutes a legal definition of the measures of degree of social harm.¹³

The aforementioned regulation has become the object of numerous verdicts of the Supreme Court and of appeals courts, mostly in the following four aspects: a list of circumstances determining the social harm of an act, elements that do not influence the social harm of an act, evaluation of various factual states with regards to the social harm of an act, and so-called incidents of lower importance.

I. List of circumstances determining the social harm of an act

As A. Marek was right in observing, the degree of social harm of a forbidden act is determined by the subjective and objective prerequisites indicated in the aforementioned law. These prerequisites are evaluative. The type and nature of the violated value is the legal value that is affected by the forbidden act. The most reliable criterion for evaluation of the importance of values is the penalty carried by different types of criminal offenses, although what is quite useful in the evaluation of the ‘importance’ of a violated value is a gradation of the values according to their types, as defined in the Specific Part of the Penal Code.¹⁴ According to K. Mielcarek, assumption of the negligible degree of harm of an act should depend most of all on the criterion of the lower thresholds of the penalty as so-called penalty minimums reflect the lowest degree of social harm for a specific set of criminal offenses. The higher the statutory penalty (in par-

¹² Act of 6 June 1997, Journal of Laws of 1997, no. 88, item 553, as amended.

¹³ E. Plebanek, “Wypadek mniejszej wagi – kilka uwag w sporze o charakter instytucji i jego praktyczne konsekwencje” [Incidents of lower importance – a few comments on the dispute on the nature of the institution and its practical consequences], *Czasopismo Prawa Karnego i Nauk Penalnych*, 2011, no. 1, pp. 81–98.

¹⁴ A. Marek, “Kodeks karny. Komentarz” [Penal code. A commentary], *LEX*, thesis 2 to art. 115 (2) of the P.C.

particular its lower limit), the lower the likelihood that the act should not be punishable.¹⁵

The Supreme Court has a slightly different outlook on this issue. In one of its verdicts it was stated that one cannot in any case assume that the statutory penalty influences the evaluation of the harm of the act that a person has allegedly perpetrated. Such an evaluation should be conducted in conformance to the provisions of art. 115 (2) of the Penal Code, i.e. should be strictly related to the circumstances of the acts themselves: their subjective and objective aspects. In no case can one conclude that a specific category of criminal offenses (e.g. crimes against health) can be considered *a priori* to be socially harmful. Such evaluation must always be performed for each specific offense.¹⁶ As has rightly been observed in the literature, an act that is qualified as one of high general-abstract social harm (e.g. a traffic accident) may, in an analysis of specific circumstances, turn out to be of negligible social harm.¹⁷

Let us now briefly describe the measures of social harm of acts enumerated in art. 115 (2) of the P.C.

The extent of the damage done or threatened refers not only to damage to property but also to damage to other legally protected values or the extent of the threat to such values caused by the criminal act, e.g. an attempt.

On the other hand, the method and circumstances of the perpetration of the act cover a broad scope of circumstances that characterize both the committed act and the perpetrator. The circumstances must be considered regardless of whether they have been included in the statutory features of the associated act (qualified or privileged type).

The importance of the duties breached by the perpetrator constitutes a criterion that indicates the normative concept of guilt. The very word ‘importance’ is evaluative and leaves plenty of room for arbitrary evaluation in judicial practice.

Form of intent is a rather imprecise term which refers to the description of direct and eventual intent provided for in art. 9 (1) of the P.C.

¹⁵ K. Mielcarek, “Znikoma społeczna szkodliwość czynu w praktyce prokuratorskiej i sądowej” [Negligible social harm of an act in the practice of public prosecutors and courts], *Instytut Wymiaru Sprawiedliwości, Prawo w Działaniu*, 2008, no. 5, items 195–239.

¹⁶ Verdict of the Supreme Court of 8 December 2004, file no. II KK 210/04, *LEX*, no. 155024.

¹⁷ E. Plebanek, “Głosa do wyroku SN z dnia 23 September 2008, file no. WA 37/08” [A gloss to the verdict of the Supreme Court of 23 September 2008, file no. WA 37/08], *gloss LEX/el.*, 2009.

The perpetrator's motivation is a collective term covering all the intellectual and emotional elements that determine the perpetrator's attitude and that explain why he or she has committed the crime. The type of violated caution principles and the degree of their violation are criteria for evaluation of inadvertent crimes which usually involve a lack of caution, although caution principles can be violated willingly too. Lack of caution has an objective aspect when an area has certain procedures that are legally defined or have been recognized in case law, e.g. safety principles in road traffic; it also has a subjective aspect related to the perpetrator's disregard for the duty to be cautious, which is necessary for finding that the perpetrator's acts constitute willful misconduct.¹⁸

If breach of principles of caution that are mandatory in certain circumstances constitutes a feature of the objective side of a forbidden act committed willfully and, consequently, is the prerequisite of illegality of the perpetrator's behavior, then the importance of the breached principles of caution and the extent to which they were breached must be considered, in the context of all the prerequisites defined in art. 115 (2) of the P.C., as being of key importance to the evaluation of the degree of social harm of such an act.¹⁹

As far as the list of circumstances that determine the degree of social harm of an act is concerned, in their verdicts courts have been unanimous and considered the list of circumstances given in art. 115 (2) of the P.C. as a closed one and found that the circumstances that have a large influence on the evaluation of the social harm of specific behaviors depend on the type of forbidden act that is in question. Moreover, the provision is of an objective-subjective nature, with objective circumstances being considered of key importance. Case law does not enable extensive interpretation of elements that influence the evaluation of social harm of acts by prohibiting extensive interpretation both to the advantage and to the disadvantage of the perpetrator.²⁰ The degree of social harm of an act depends, among

¹⁸ A. Marek, "Kodeks karny. Komentarz" [Penal code. A commentary], *LEX*, thesis 2 to art. 115 (2) of the P.C.; decision of the Supreme Court of 15 February 2007, file no. IV KK 273/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, p. 444.

¹⁹ Verdict of the Supreme Court of 1 February 2006, file no. V KK 226/05, *Orzecznictwo Sądu Najwyższego Izba Karne i Wojskowa*, 2006, no. 5, p. 44.

²⁰ Verdict of the Supreme Court of 23 June 2009, file no. II KK 13/09, *LEX*, no. 512956; decision of the Supreme Court of 17 December 2010, file no. V KK 383/10, *Prokuratura i Prawo – insert*, 2011, no. 4, p. 4; decision of the Supreme Court of 4 March 2009, file no. V KK 22/09, *LEX*, no. 495325; verdict of the Supreme Court of 16 September 2008, file no. A 35/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 1849; verdict of the Supreme Court of 26 April 2007, file no. WA 18/07, *Orzecznictwo*

others, on the legal norms that the act breaches. If the forbidden act violates two or more values protected by the criminal law, its social harm is increased.²¹

Since the list of circumstances given in art. 115 (2) of the PC is closed, then if in the evaluation of the degree of social harm of an act the circumstances enumerated in the aforementioned article are not considered, or if circumstances not enumerated there are considered, then claims that substantive law has been breached are justified.²²

The approach to the list of elements that influence the evaluation of the degree of social harm of an act is similar in the doctrine. It is assumed that art. 115 (2) of the P.C., while providing courts with a list of circumstances that should be considered when evaluating the degree of social harm of an act, does not list such circumstances as examples only but rather provides a closed list that cannot be modified in any way in the current law, for instance by adding other circumstances that have not been enumerated in the aforementioned article.²³ All of the enumerated circumstances are linked to the act, its objective and subjective aspects (the form of the intent, the motivation), and the degree of social harm can only be determined based on evaluation of the act itself, as opposed to evaluation of the perpetrator.²⁴ When discussing the social harm of an act, one must keep in mind the fact that, in the comprehensive approach that dominates in doctrine and case law, the social harm of an act depends on objective and

Sądu Najwyższego w Sprawach Karnych, 2007, no. 1, item 988, *Biuletyn Prawa Karnego*, 2008, no. 11, p. 65; verdict of the Supreme Court of 25 September 2007, file no. WA 34/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 2047; decision of the Supreme Court of 23 June 2008, file no. WZ 36/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 1285; verdict of the Supreme Court of 11 October 2006, file no. II KK 52/06, *LEX*, no. 202113; verdict of the Appeals Court in Katowice of 13 January 2005, file no. II AKa 455/04, *Prokuratura i Prawo – insert*, 2006, no. 1, p. 21.

²¹ Verdict of the Supreme Court of 26 April 2007, file no. WA 18/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 988.

²² Verdict of the Supreme Court of 12 December 2006, file no. IV KK 395/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2006, no. 1, p. 2413; decision of the Supreme Court of 23 May 2007, file no. II KK 28/07, *LEX*, no. 280699; verdict of the Supreme Court of 3 April 2008, file no. WA 11/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 807.

²³ J. Majewski, op. cit., thesis 5 to art. 115 (2) of the P.C.; J. Giezek, ed., “Kodeks karny. Część ogólna. Komentarz” [Penal code. The general part. A commentary], *LEX*, 2007, theses 3 and 5 to art. 115 (2) of the P.C.; J. Warylewski, “Przegląd orzecznictwa z zakresu prawa karnego materialnego za rok 2006” [Review of the verdicts in the area of substantive penal law in 2006], *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2007, no. 2, pp. 11–42.

²⁴ Verdict of the Supreme Court of 8 June 2005, file no. WA 13/05, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2005, no. 1., item 1129.

subjective elements. On the other hand, the circumstances related to the perpetrator are not important to the determination and only influence the penalty.²⁵

II. Elements that do not determine the social harm of an act

Closely related to the problem of the measure of social harm of an act is the problem of verdicts of the Supreme Court and the appeals courts that are based on elements that do not determine the degree of the social harm of an act. The elements include the perpetrator's clean criminal record, his or her good repute, stable lifestyle, and the fact that he or she supports a child.²⁶ Other circumstances that are definitely not included in the list enumerated in art. 115 (2) of the P.C. include the personal conditions and characteristics of the perpetrator, the personal characteristics of the victim, and the attitude of the perpetrator demonstrated in the course of the proceedings given the allegations he or she is facing.²⁷

Thus, it is not permissible to make evaluation of the degree of social harm of an act dependent on factors that are not directly linked to it and were present before or after the offense (e.g. the perpetrator's admission of guilt, voluntary remedy of the harm caused by the offense, his or her expression of remorse, and his or her reconciliation with the victim), and on factors that characterize only the broadly defined personality of the perpetrator, in particular the elements that the Penal Code defines as "the personal conditions and characteristics of the perpetrator," such as his or her age, health, family and property situation, education, vocation, etc.²⁸ Similarly, the subjective belief of the victims that they have been hurt cannot have a significant impact on the evaluation of the degree of social danger of the act committed by the perpetrator and, in particular, of the guilt of the perpetrator.²⁹ This is because the degree of guilt is not included in the

²⁵ Verdict of the Supreme Court of 8 July 2003, file no. WA 31/03, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2003, no. 1, item 1517.

²⁶ Verdict of the Supreme Court of 11 April 2011, file no. IV KK 382/10, *LEX*, no. 846390; decision of the Supreme Court of 21 August 2008, file no. V KK 257/08, *LEX*, no. 449083.

²⁷ Decision of the Supreme Court of 4 March 2009, file no. V KK 22/09, *LEX*, no. 495325.

²⁸ Resolution of the Supreme Court of 16 September 2008, file no. SNO 68/08, *LEX*, no. 491427; decision of the Supreme Court of 25 June 2008, file no. V KK 1/08, *Orzecznictwo Sądu Najwyższego Izba Karne i Wojskowa*, 2008, no. 9, item 75.

²⁹ Decision of the Supreme Court of 9 September 2008, file no. WZ 53/08, *LEX*, no. 458865.

list of circumstances that determine the degree of social harm of an act that is given in art. 115 (2) of the P.C.³⁰

As early as in 2004, the Supreme Court pointed at the invalidity of the opinions expressed in some verdicts of courts of lower instances that used criteria for determination of the degree of social harm of an act that were not included in the list of circumstances to be used in such evaluations provided by the Penal Code (art. 115 (2) of the P.C.). This problem was most pronounced when an act was determined to be of negligible social harm due to the circumstances pertaining to the perpetrator (his or her age, clean criminal record, good repute, professional success, etc.). Such reasoning is in clear conflict with the objective-subjective concept of evaluation of the degree of social harm of an act.³¹

The perpetrator's behavior after the criminal offense is detected is clearly not a part of the objective-subjective (comprehensive) approach to the substantive contents of a crime defined in art. 115 (2) of the P.C.³² Case law emphasizes that in evaluating the social harm of an act courts must not consider circumstances that take place after the act.³³

As for a long time has been assumed in practice, widespread occurrence of offenses of a given type cannot influence the evaluation of the degree of social harm of an act either. Widespread occurrence of crimes, if it is generally recognized, can be considered by a court in its determination of a penalty as a part of general prevention.³⁴ The so-called general prevention is irrelevant to evaluation of the degree of social harm of an act because it is not included in the list of circumstances enumerated in art. 115 (2) of the P.C.³⁵

Recidivism is certainly an aggravating factor and has a significant impact on the penalty, but in its nature it pertains to the perpetrator and not

³⁰ Decision of the Supreme Court of 26 September 2006, file no. WK 12/06, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2006, no. 1, item 1808.

³¹ Verdict of the Supreme Court of 2 April 2004, file no. IV KK 25/04, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2004, no. 1, item 668.

³² Verdict of the Supreme Court of 25 September 2007, file no. WA 34/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 2047.

³³ Verdict of the Supreme Court of 19 October 2005, file no. IV KK 234/05, *LEX*, no. 164274.

³⁴ Verdict of the Appeals Court in Kraków of 14 May 2008, file no. II AKa 50/08, *Krakowskie Zeszyty Sądowe*, 2008, no. 7–8, p. 64; verdict of the Appeals Court in Katowice of 30 November 2006, file no. II AKa 289/06, *Krakowskie Zeszyty Sądowe*, 2007, no. 5, p. 60.

³⁵ Decision of the Supreme Court of 12 April 2007, file no. WZ 10/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 818.

to the offense and has no impact on the evaluation of the degree of social harm of the offense committed by the perpetrator.³⁶

Of note is the fact that M. Filar was ahead of the case law pertaining to this problem; in 1997 he stated that art. 115 (2) of the P.C. clearly and with clear intention limits the scope of the term ‘social harm’ to only those circumstances that are strictly related to the features of the act, thus excluding circumstances that are outside of the features of the offense and that pertain either to the perpetrator’s characteristics “outside of the act” (e.g. his previous life, his clean criminal records, his repute, etc.), or to the general situation (the widespread occurrence of the offense).³⁷

III. Evaluation of various facts with regard to the degree of social harm of an act

In their adjudication, the Supreme Court and the appeals courts have analyzed, on many occasions, specific facts and considered them with regard to the degree of social harm of an act. For instance, in the case of a robbery, it was observed that, due to the dual object of protection (i.e. property on the one hand and the inviolability, freedom, health, and life of a person on the other), the degree of social harm depends, on the objective side, not on the value of the item that was robbed (which is often accidental and not related to the intent of the perpetrator who simply takes whatever the victim has on him), but rather the extent of the threat to the health or even the life of the victim. The further perpetrators of robbery go beyond the threshold of violence against the victim, which *in concreto* is required to incapacitate the victim, the higher the degree of social harm must be considered in the criminal-law evaluation of the offense.³⁸ The offense of robbery has a qualified form which involves the use of a dangerous tool or a firearm. Although the use of a “firearm” or “another similarly dangerous object” meets the features of a crime committed in accordance with art. 280 (2) of the P.C., the degree of social harm of such an act involving the use of, for example, gas pistols, is quite different than that of an act involving the use of, for example, a knife or a metal rod. There is a difference between the

³⁶ Verdict of the Appeals Court in Katowice of 22 January 2004, file no. II AKa 497/03, *Krakowskie Zeszyty Sądowe*, 2004, no. 9, p. 69.

³⁷ M. Filar, “Podstawy odpowiedzialności karnej w nowym kodeksie karnym” [Grounds for criminal responsibility in the new penal code], *Palestra*, 1997, no. 11–12, p. 7.

³⁸ Verdict of the Appeals Court in Lublin of 14 September 2009, file no. II AKa 124/09, *LEX*, no. 550505.

act of a perpetrator who intends to commit robbery, even with a firearm, if the victim is an accidental person who, as the perpetrator expects, may carry assets and items worth, at best, several hundred zlotys, and the act of a perpetrator who plans to rob a convoy carrying large sums of money worth hundreds or even tens of thousands of zlotys.³⁹

Of note is the rightful opinion, which is universal in case law, that by committing an act that violates legal values protected by several laws, perpetrators commit offenses with a higher degree of social harm than if their acts violated only one provision of criminal law.⁴⁰

In one of its verdicts, the Supreme Court has referred to the social harm of an act defined in art. 263 of the P.C., i.e. holding, manufacturing, and trading in firearms and ammunition. It decided that the quantity and type of ammunition held by the perpetrator without the required permit is a circumstance that should influence the evaluation of the degree of social harm of the act. The crime defined in art. 263 of the P.C. is aimed against the security of the public and of individuals, and the threat to the security is proportional to the quantity of the ammunition produced, held, or made available to unauthorized persons by a person who does not hold the required authorization.⁴¹

Of note is also the verdict of the Supreme Court in a case involving a criminal offense under art. 158 of the P.C. which penalizes so-called participation in a fight. The Supreme Court stated that it must not be assumed that evaluation of the social harm of an act allegedly committed by the defendant depends on the victim's consent to participate in the fight; thus, by expressing his "intent to participate in a fist fight," the victim consented to specific consequences in the form of bodily injuries. This introduction by the Court, in evaluation of the degree of social harm of an act, of a kind of exclusion of illegality of the act consisting in a "fist fight" is quite incomprehensible.⁴²

³⁹ Verdict of the Appeals Court in Katowice of 8 October 2009, file no. II AKa 97/09, *LEX*, no. 553871.

⁴⁰ Verdict of the Supreme Court of 26 April 2007, file no. WA 18/07, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2007, no. 1, item 988; verdict of the Appeals Court in Kraków of 10 May 2007, file no. II AKa 79/07, *Krakowskie Zeszyty Sądowe*, 2007, no. 6, p. 40.

⁴¹ Verdict of the Supreme Court of 31 May 2001, file no. WA 16/01, *LEX*, no. 553878.

⁴² Verdict of the Supreme Court of 11 March 2003, file no. WA III KKN 17/01, *LEX*, no. 77443.

IV. Incidents of lower importance

A rather extensive number of court verdicts have been announced since the introduction of the 1997 Penal Code pertaining to the so-called “incidents of lower importance.” The Supreme Court is of the opinion that the basic criterion for evaluating incidents of lower importance is the degree of social harm of the associated acts. In its analysis, the courts must take into account the circumstances enumerated in art. 115 (2) of the P.C., namely the type and nature of the violated value, the scope of the committed or potential damage, the methods and circumstances of the act, the importance of the duties violated by the perpetrator, the degree of guilt, the motivation, and the objective of his or her actions.⁴³ What determines whether an act is an incident of lower importance is the objective and subjective features of the act, with particular focus on those elements that are characteristic of the specific type of criminal offenses. On the objective side, of particular importance are the behavior and the actions of the perpetrator, the means used, the nature and scope of the caused or potential damage to a legally protected value, and the time, place, and other circumstances of the act. The circumstances that are particularly important on the subjective side are the degree of guilt, the motivation of the perpetrator, and the objective of his or her actions.⁴⁴

Basically right is also the opinion, expressed in case law, that an act of hooliganism must not be regarded as an accident of lower importance.⁴⁵ This opinion has been expressed on the background of the crime of robbery under art. 280 (1) of the P.C. which, depending on its specific circumstances, may be considered an act of hooliganism.

However, it appears that since the degree of social harm of an act is the basic criterion for the evaluation of whether an act can be considered an incident of lower importance, then the hooligan nature of an act does not by itself prevent the act from being qualified as an incident of lower importance.

Similarly, the value of the object of the criminal offense is only one of the elements that influence the evaluation of the degree of social harm of an act and the fact that it is low does not by itself determine the low social

⁴³ Verdict of the Supreme Court of 14 January 2004, file no. V KK 121/0, *LEX*, no. 83755.

⁴⁴ Decision of the Supreme Court of 14 January 2004, file no. V KK 106/11, *LEX*, no. 1044068.

⁴⁵ Verdict of the Appeals Court in Wrocław of 29 September 2010, file no. II AKa 270/10, *LEX*, no. 621279.

harm of an act and does not translate into automatic qualification of the act as an incident of lower importance. What determines whether an act is an incident of lower importance is the degree of social harm of the act; the criteria for its evaluation are precisely defined in art. 115 (2) of the P.C. The low value of the object of the offense does not *a priori* lead to the assumption that the offense is an incident of lower importance.⁴⁶

The allegation of violation of substantive law related to incidents of lower importance can be considered as reasonable if the plaintiff demonstrates that in considering the case the court took into account circumstances other than those enumerated in art. 115 (2) of the P.C. or ignored some of those circumstances.⁴⁷

As a conclusion, it should be stated that the qualification of specific acts as incidents of lower importance is not an easy task for courts. Given the fact that it is not clear when acts should be considered as incidents of lower importance, the continued presence of this institution in the Penal Code is debatable and deserves to be discussed.⁴⁸

Conclusion

The social harm of acts has been subject to judicial interpretation in many cases. As far as the list of circumstances that determine the degree of social harm of an act is concerned, in their verdicts courts have been unanimous and considered the list of circumstances given in art. 115 (2) of the P.C. as a closed one, and found that it must not be extended or reduced by way of judicial interpretation.

The following circumstances are immaterial to the evaluation of the degree of social harm of an act: the perpetrator's clean criminal record, good repute, stable lifestyle, personal conditions and characteristics (age, health, family and property situation, education, vocation, successful career), personal characteristics of the victim, the attitude toward the allegations demonstrated by the perpetrator during the judicial process, the perpetrator's admission of guilt, his or her voluntary remedy of the damage

⁴⁶ Verdict of the Appeals Court in Katowice of 15 December 2005, file no. II AKa 375/05, *LEX*, no. 183821.

⁴⁷ Decision of the Supreme Court of 10 December 2008, file no. II KK 235/08, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych*, 2008, no. 1, item 2540.

⁴⁸ K. Banasik, "Wypadek mniejszej wagi w prawie karnym" [Incidents of lower importance in penal law], *Prokuratura i Prawo*, 2008, no. 3, pp. 48–67.

caused by the offense, his or her expression of remorse, his or her reconciliation with the victim, the widespread nature of offenses of this type, and the perpetrator's recidivism. Case law emphasizes that in evaluating the social harm of an act courts must not consider circumstances that take place both before and after the act. The only circumstances that may be considered are those enumerated in art. 115 (2) of the P.C. that were present on the date of the act.

The fairly large number of court verdicts pertaining to the substantive characteristics of offenses, i.e. the social harm of acts, clearly demonstrates that this is not an easy problem, not only for theoreticians of law but also for bodies responsible for its implementation.

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