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**Measures for the Protection of the Victim in Polish Penal Code
and Judicial Decisions***

Srodki służące ochronie interesów ofiary przestępstwa
w polskim kodeksie karnym i praktyce sądowej

A number of measures which may perform a compensating role for the victims of the crime in Polish penal code is quite numerous, since the duty to redress the damage, the duty to apologize to the injured person and the special financial award belong to them.

Within the limits of the following presentation first of all we shall consider the duty of redressing the damage. There were two reasons which determined this choice. Firstly, we lack a complete statistic material and empirical research concerning the use of remaining measures in practice. Secondly, there are some doubts about some of these measures, whether they really serve the victims' interest.

As to the duty of redressing the whole damage or just a part of it and the duty of apologizing to the injured person, we shall not be dealing with its legal character. It is enough to mention that their aims are compensatingly-educational and can be imposed together with the following penal measures: a conditional discontinuance of the penal proceedings, penalty of restriction of liberty, conditional suspension of the penalty of deprivation of liberty and conditional release from serving the full sentence of the last penalty (parole). It should be also stressed that the code does not perform any hindrance to simultaneous imposing of both of the above-mentioned duties upon one perpetrator.

Imposing the duty of redressing the damage is in fact optional, excluding the case of causing a damage in property when the proceedings are

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conditionally discontinued and in the case of causing a damage in social property by fraudulent seizure of it in case of adjudgment of conditional discontinuation and conditional release. However, the imposing of the duty to apologize to the injured person is always optional.

According to the common interpretation, the duty to redress the damage is based on civil law rules. The term "damage" has to be understood as both a damage in property and in personal estates of a man e.g. life, liberty, dignity, immunity.¹ The duty may be imposed only when the damage has not been redressed yet. The penal code does not give any limits as to the way of redressing the damage, it can be worked out not only by refunding the equivalence of the property but also by the covering the costs of the medical treatment or restoration of the former state.

In conformity with the doctrine's and judicature's standpoint imposing of this duty should be treated as a rule also in cases when the statute provides the optionality of its adjudgment.² Also the obligation to redressing the whole damage should become the rule, while redressing of the part of it may be taken into consideration only when the evaluation of the full extent of the damage is particularly difficult or impossible because of the poor financial situation of the perpetrator or when the injured person took an active part in causing the damage himself.

Next, the duty of apologizing to the injured person — according to the commentator's point of view — should be applied in case of crimes against man's dignity, which does not mean at the same time that you cannot apply this duty in cases of other crimes. It is suggested that the imposing of it should be guided by the need to eliminate the source of the conflict between the perpetrator and the injured person and to give the latter a moral satisfaction.³

The third of the mentioned measures, that is a special financial reward, is a kind of reaction joining penal and civil elements. It is not regulated by the separate provision of the penal code and its application is dependent on the character of the crime. This measure can be imposed on perpetrators of crimes of hooligan character, defame, slander and cutting wood in forest with an intention of stealing it. For the first two

¹ Cf. Z. Gostyński: *Karnoprawny obowiązek naprawienia szkody*, Katowice 1984, p. 62 and ff.

² E. Bieńkowska: *Ochrona interesów pokrzywdzonego (osoby fizycznej) w świetle przepisów polskiego prawa karnego materialnego oraz działalności państwa na rzecz ofiar przestępstw*, „Studia Prawnicze” 1985, no. 1—2, pp. 246—247.

³ J. Bafia, K. Mioduski, M. Siewierski: *Kodeks karny. Komentarz*, Warszawa 1987, pp. 247—248.

groups of offences mentioned, which considerably dominate in practice, imposition of a special financial award is optional and, what is more important, may be granted not only to the injured person, but also for social purpose chosen by the court.

The statutory solution of this kind faces strong criticism, because it is difficult to understand why this measure, especially with the acts against human dignity, may be granted not only to the victim.⁴

In case of the offences of hooligan character this measure was intended by the legislator to serve first of all as an additional punishment, but not as a measure imposed for the injured person's interest. Important is also the fact that the describing of an offence as "hooligan" in the code is greatly inaccurate, evokes a free choice in practice and it has been for long postulated to abandon this term altogether.⁵

We have statistic data concerning the frequency of imposition the special financial reward, but they are insignificant for us (similarly to some empirical research) because they do not inform whether this measure is applied for the benefit of the injured person or for other social purpose.

As it has been mentioned before, the first penal measure parallelly to which you can impose the duty to redress the damage is conditional discontinuance of the proceedings, which is adjudicated not only by the court but also by the public prosecutor. It is a measure based on the conditional renounce from the perpetrator's conviction, whereas the statutory range of possibilities to apply it has to be regarded as very wide. It can be imposed on all the offences threatened with a punishment not exceeding three years of deprivation of liberty, whose perpetrators have not ever been sentenced and are likely to respect the legal order in the future.

In practice the conditional discontinuance is applied about ten times more often by the public prosecutor than by the court. But we must limit the following remarks to those characteristic of the court's decision as far as this problem is concerned, because our criminal statistics do not give any information about the frequency of use of the above mentioned duty accompanying these measures in the prosecutor's practice. This fact is a considerable drawback of our statistical registration system and limits our knowledge in the field of compensating crimes' victims to a large extent, since the conditional discontinuance of the proceedings is one of the most often used non-isolating measures reaching the perpetrators, whose guilt was stated in the penal proceedings.

⁴ Bieńkowska: *op. cit.*, pp. 256—257.

⁵ Cf. J. Nowiński: *Chuligański charakter czynu ze stanowiska polityki kryminalnej*, Wrocław 1989, p. 25 and ff.

And so for the major part of the 70's the duty of redressing the damage was about 17% of all the duties, decreasing to about 6—10% in the following decade, which is about half of the previous data. It was happening so in spite of the more and more often imposing of duties upon people whose penal proceedings were conditionally discontinued.

Most often however, in about 75—95% of cases, there was applied the duty of financial benefit which was the recognizance to give a certain amount of money to the Polish Welfare Committee or Polish Red Cross. The practice of this kind was only increasing a difficult financial situation of a perpetrator, and the victims' situation was getting worse because they were given the compensation less often. The duty of apologizing to the injured person was decreasing considerably at the same time, which seems to prove that also the practice proved that the compensating value of it was doubtful.

From a point of view of the problems connected with the issue more correct here is the counting of the shares of the duties in the whole number of decisions about the conditional discontinuance. It will turn out then, that this percentage was still lower because its level in the first decade reached 10% decreasing to 6—8% in the 80's, which means that it has decreased by almost a half. The statistic data presented here do not give us information about how often a court was imposing a duty redressing the damage when its imposition was optional. The results of empirical research allow us to think that the duty was applied as a rule only in cases of offences against property, that is when it was obligatory, and was not applied when damages were not material.⁶

In the light of the arguments given so far, it is not difficult to notice that duties serving the protection of injured person's interests were decided very rarely in the courts' practice.

It is strange, that according to the recommendation of the Supreme Court included in the guide lines dated 1971 and 1976, the imposing of the duty to redress the damage should be treated as a rule, even if it is optional then.⁷

The next penal measure that can be accompanied by the duties with which we were concerned is a penalty of restricted liberty. The court imposing this penalty may put the sentenced person under obligation to redress the damage and apologize to the injured person only.

⁶ M. Leonieni, W. Michalski: *Warunkowe umorzenie postępowania karnego w świetle ustawy i praktyki sądowej*, Warszawa 1972, p. 117 and 123; B. Kuniczka - Michalska: *Warunkowe umorzenie postępowania karnego w praktyce sądowej*, „Studia Prawnicze” 1976, no. 4, pp. 154—159.

⁷ Guide lines of the Supreme Court of 29th January 1971 (OSNGW 1971, no. 3, 33, V) and Guide lines of the Supreme Court of 26th November 1976 (OSNKW 1977, 1—2, art. 1).

Statutory possibilities of using the penalty of restricted liberty were relatively wide, because the legislator's intention was that this penalty should be one of the main alternatives to imprisonment. Courts, however, treat this penalty a bit cautiously as its quantity in the whole number of penal measures was about 15%, dropping in the last years to about 10 or less per cent.

Independently of the higher or lower frequency of imposing the penalty of restricted liberty a number of parallelly imposed duties is systematically and considerably diminishing, because in the first period of the code being in force the duties were imposed in 8—10%, while starting from the half of the 80's just about 4% of all cases.

The tendency presented downwards was not consistent with guide lines of the Supreme Court of 1979 where there was a recommendation saying that it should be a rule to impose on the sentenced person duty to redress the damage.⁸

Though in structure of duties accompanying restriction of liberty dominates redressing of the damage (75 to 90%), this duty is still imposed less often. While in the first decade of the analyzed period in every hundred of men sentenced for penalty of restricted liberty, seven people were obligated to redress the damage and in the next decade this duty was imposed upon four to three sentenced only. In this way the possibility of obliging the perpetrator to redress the damage caused by the crime, the possibility which was to be "a rule" according to the guide lines of the Supreme Court, but in fact was used in practice in exceptional cases.

According to the searchers point of view this practice could be "an indication of judges' conviction that the severity of the penalty of restricted liberty is high enough and thus should not be intensified by additional duties".⁹

In case of using the next penal measure, that is conditional suspension of deprivation of liberty, the code allows to impose not only redressing of the damage and apologizing to the injured person, but additionally several other duties as well, which do not serve the injured person's interest. Statutory range of using this measure should be also recognized as relatively wide.

In practice a conditional sentence is the most often used penal measure which is in 30—40% cases accompanied by some duties, however the

⁸ Guide lines of the Supreme Court of 30th May 1979 (OSNKW 1979, no. 7—8, 77, 7).

⁹ L. Kubicki, J. Skupiński, J. Wojciechowska: *Poglądy i oceny sędziów na temat kary ograniczenia wolności*, „Studia Prawnicze” 1974, no. 3, pp. 74—75.

ability to compensate the injured person is used only to some extent.¹⁰ The occurrence of redressing of the damage is on the similar level of about 10—12%.

However, if we count the occurrence of the duty to redress the damage in the whole number of imposition of conditional sentence, it will turn out that throughout the majority of the analyzed period its number was 6—8% and starting from the half of the 80's it increased slightly to reach 9—10%, but still was lower than in 1970—1972 when its percentage was 11—13.

It may be supposed that similarly to the case of the penalty of restricted liberty, relatively rare imposing of the duty to redress the damage was strictly connected with the fact that the conditional sentence is usually accompanied by a high fine, so the imposition of compensation is regarded by judges as an additional financial trouble for the perpetrator.

Finally, the last measure with which the duty to redress the damage can be joined is a conditional release from serving the full sentence of deprivation of liberty (parole). Additionally, there can be imposed the same duties upon the perpetrator as in the case of the conditional sentence. Information regarding the practice of imposing the duty to redress the damage which is analyzed here is limited in time. This information shows that the duty is applied only in less than one per cent of all the sentenced. We are lacking however any empirical research which would explain this state. This phenomenon should not seem to be strange if we consider the fact that people leaving prisons are usually in a difficult financial situation, have problems with getting jobs and first of all they have to take care of finding the means for living.

Summing up the above arguments it is worth answering the following question: how often was a duty to redress the damage generally imposed, counting its occurrence from the whole sum of the three previously mentioned penal measures (i.e. conditional discontinuance, penalty of restriction of liberty and conditional sentence).

A conditional release may be disregarded here because of the lack of complete statistic data and also because of the fact that analyzed duty is used together with this institution in sporadic cases only. It will turn out then that this percentage almost throughout the whole period of the code in force trended on relatively stabilized level, namely between 6—8%.

This percentage, meaning 4,000—6,000 people in absolute numbers has to be regarded as very low, considering that the perpetrators sentenced

¹⁰ M. Leonieni: *Warunkowe zawieszenie wykonania kary pozbawienia wolności* Warszawa 1974, p. 149; S. Bułaciński: *Obowiązek naprawienia szkody*, „Gazeta Prawnicza” 1976, nr 20.

to restricted liberty, conditional sentence and conditional discontinuance of penal proceedings constitute about two-thirds of all people sentenced by Polish courts.

At the same time, it is claimed that in every 100 people sentenced by courts only 6—8 were obligated to redress the damage. The above data clearly show the lack of care about the injured persons' interest, as it is hard to suppose that the damage did not occur or was redressed by the perpetrator voluntarily before the court's verdict in the remaining cases.

Taking into account the lack of researchers' interest in the presented problems a trial of explaining the sources of the presented state must have hypothetical character.

It seems, that one of the main reasons for the lack of care about the injured person's interest is a punitiveness of our penal law and criminal policy realized on its basis. As it has been previously mentioned, we cannot exclude the fact that the judges regard the duty of redressing the damage to be still intensifying a big severeness of the imposed penalties.

The draft of new penal code which has been worked out, lately maintains the previously discussed duties of redressing the damage and apologizing to the injured person, which may accompany conditional discontinuance of proceeding, conditional sentence and the penalty of restriction of liberty.

Apart from the above, the redressing of the damage and also the special financial award are given a status of independent (separate) penal measures.

According to the first of these measures the draft provides that redressing of the damage will be imposed only after an injured person's request in case of a sentencing for crimes causing death, serious detriment to health, injury to body's organ or health disorder, crimes against communications safety, against environment and property or economic trade.

However, the court may impose a special financial award for the injured person instead of the duty to redress the damage. A special financial award would be a means to compensate for the serious detriment to health, injury to body's organ, health's disorder and also for the moral detriment or physical sufferings.

As the draft's motivation stated, the possibility of this change was introduced "assuming the difficulties in gaining the evidence" as to the establishing the size of the damage. Additionally, court may impose a special financial award "for the social aims connected with health care" in case of sentencing for "the intentional crimes against life or health

or for some other intentional crimes, whose result is man's death, serious detriment to health, injury of body's organ or health's disorder".

According to the draft, the amount of a special financial award cannot be higher than fivefold of the lowest monthly payment during the judgment of the first instance, which means, considering the present level of payments, that the maximum amount of money to pay would be about 6 million zł, which is rather a symbolic compensation.

The presented solutions mean that the imposing of the duty of redressing the damage as a separate measure is a rule but only in cases of strictly chosen crimes and only at the injured person's request. It is strange considering the fact that while imposed the identical duty accompanying the previously mentioned penal measures such request is not required.

Besides, the draft maintains the form of the special financial award which is not only a measure imposed for injured person's interest but also may be grant for the social purpose connected with health care.

It does not seem to be strange that the described regulations, which met some critical remarks in professional literature, end with the conclusion that they do not improve enough the present victim's situation.¹¹

STRESZCZENIE

Przedmiotem artykułu jest charakterystyka i ocena przewidzianych w polskim prawie karnym środków penalnych mających na celu zadośćuczynienie ofiarom przestępstw. Obejmują one nawiązkę i obowiązek przeproszenia pokrzywdzonego oraz naprawienia w całości lub w części wyrządzonej szkody. Mogą one być orzekane obok warunkowego umorzenia postępowania, kary ograniczenia wolności, warunkowego zawieszenia kary pozbawienia wolności i warunkowego zwolnienia z odbycia reszty kary. Rozważania prowadzono w trzech zasadniczych płaszczyznach. W pierwszej z nich dokonano krytycznej analizy kształtu prawnego tych środków w obowiązującym kodeksie karnym. W drugiej zaś, bazując na materiałach statystycznych oraz rezultatach badań empirycznych, starano się ukazać ich funkcjonowanie w praktyce sądowej. Podjęto również próbę wyjaśnienia zagadnienia, dlaczego środki służące zabezpieczeniu interesów pokrzywdzonych stosowano relatywnie rzadko, pomimo szerokiej ustawowych możliwości ich orzekania. Wreszcie w ostatniej części przedstawiono propozycje zmian w unormowaniu tych środków zamieszczone w opracowanym ostatnio projekcie kodeksu karnego. Ocena tych propozycji wypadła na ogół pozytywnie, choć niektóre z nich — moim zdaniem — nie zasługują w pełni na aprobatę i wymagają stosownego skorygowania.

¹¹ E. Bieńkowska: *Standardy europejskie w odniesieniu do ofiar przestępstw a reforma prawa karnego materialnego*, „Państwo i Prawo” 1990, no. 6, p. 98 and ff.; *id.*: *Refleksje o reformie prawa karnego na tle wyników badania ankietowego ofiar przestępstw*, „Państwo i Prawo” 1991, no. 4, p. 82 and ff.; J. Szumski: *Karnoprawny obowiązek naprawienia szkody w praktyce sądowej*, „Państwo i Prawo” 1993, no. 7, p. 91 and ff.