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PSYCHOLOGICAL DISORDERS IN THE PERPETRATOR OF A PROHIBITED ACT AS THE OBJECT OF JUDICIAL CONSIDERATION IN THE PROCEDURE FOR PETTY OFFENCES AFTER 1 JULY 2015

INTRODUCTION

Anyone who commits an act can be the subject of a minor offence, but not every perpetrator of an offence can be an accountable subject. This question is influenced by such factors as age and sanity. In the entire area of criminal law, including law on petty offences, responsibility is based on the principle of guilt. A perpetrator bears responsibility only for a culpable act, in other words contravention responsibility arises from a prohibited act whose perpetrator can be assigned guilt while it is being committed.[1]

Guilt is conceived as the mental attitude of the perpetrator (the psychological theory). A mental attitude has its source in human consciousness and will. Guilt is also considered from the evaluative perspective of the perpetrator's conduct (the normative theory). Both aspects associated with the definition of guilt are linked by a common denominator, that is free will which determines the choice of a conduct to pur-

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[1] See T. Bojarski, *Polskie prawo wykroczeń. Zarys wykładu* (Warszawa: LexisNexis, 2005), 81–82.

sue.[2] Accordingly, it can be assumed that culpable behaviour is one (including nonfeasance) which a particular individual had control of or specifically could have avoided by acting lawfully.[3] For this reason, the essence of guilt can be located in the offender's mental attitude to an act which is reprehensible in light of the Penal Code.[4]

The jurisprudence of broadly conceived criminal law distinguishes the notions of deliberate guilt and unintentional guilt, whereas the Polish Petty Offences Code,[5] unlike the Penal Code,[6] lays down the principle of guilt. The Polish law on petty offences lays down that the principle of equivalence of guilt forms the basis of liability in the sense that a person will be held accountable for a minor offence if it was either intentional or unintentional unless the statute provides the condition of intentionality for a particular offence. So, this solution is a reversed version of the one implemented by the Penal Code.[7] However, the principle of equivalence of different forms of guilt does not exempt the authorities applying the provisions of law on petty offences from the obligation to examine a specific case for intentionality or otherwise. This is so because the gravity of one's guilt has a considerable impact on the harshness of punishment.[8]

The presence of specific circumstances which make it possible to ascribe guilt to an offender should be kept distinct from the very idea of guilt. This is connected with the perpetrator's subjective capability of being attributed guilt, associated with the attainment of a certain age as provided for by the statute, and a suitable mental capacity which should enable the person to recognise the meaning of her actions and to direct her conduct – such condition is referred to as sanity.[9] Sanity – similarly to psychological disorders – has an effect on the defendant's appraisal of his capacity to act in court proceedings. Nonetheless, we should highlight the difference between the notion of sanity and that of capacity to act in court proceedings because

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[2] Cf. S. Ładoś, *Pozycja prawna oskarżonego z zaburzeniami psychicznymi* (Warszawa: Wolters Kluwer, 2013), 26.

[3] See D. Świecki, "Wina w prawie karnym materialnym i procesowym," *Prokuratura i Prawo* 11–12 (2009): 5.

[4] See Bojarski, *Polskie prawo wykroczeń*, 84.

[5] Act of 20 May 1971, Petty Offences Code, Journal of Laws of Laws of 2015, item 1094 [hereafter cited as POC].

[6] Act of 6 June 1997, Penal Code, Journal of Laws of Laws of 2016, item 1137 [hereafter cited as PC].

[7] The Polish Penal Code sees liability as arising mainly from intentional offences, while unintentional conduct leads to responsibility of a rather limited degree. See Bojarski, *Polskie prawo wykroczeń*, 87.

[8] The principle of equivalence of guilt forms has no application for fiscal offences, ibid., 88–89.

[9] Cf. Ładoś, *Pozycja prawna oskarżonego*, 26–27.

the capacity to comprehend the significance of a prohibited act and the controlling of one's conduct during the perpetration must not be equated with the capability of understanding the meaning of acts of legal procedure. The first institution is part of the substantive law on petty offences while the other is an issue of judicial procedure. Psychological disorders in the perpetrator of a prohibited act which are, among others, the object of judicial consideration affect the appraisal of his sanity, on the one hand, while on the other on the capacity to comprehend the meaning of acts of legal procedure. Therefore, it is necessary to determine the degree of sanity existing on the day of the alleged act in order to assign guilt to the defendant.[10] The major overhaul of the Code of Criminal Procedure, enacted on September 27, 2013,[11] amended the provisions governing the content of opinions issued by expert psychiatrists with respect to the mental health of the offender and the obligatory formal defence.[12] In contrast, the act of 20 February 2015 amending the Penal Code and some other acts,[13] which introduced the use of amended institutions of substantive criminal law into procedural criminal law and supplemented the scope of the reform promulgated in September 2013,[14] left intact the provision regulating the issues of insanity and diminished sanity.[15]

1. INSANITY AND DIMINISHED SANITY AS FACTORS EXCLUDING GUILT OR LIMITING THE ACCOUNTABILITY OF AN OFFENDER

Petty Offences Code does not offer a definition of sanity, but art. 17 regulates the questions of insanity and diminished sanity interpreted as circumstances excluding guilt or limiting the accountability of a perpetrator of an offence.[16] The provisions

[10] Ibid., 31–32.

[11] Act of 27 September 2013 amending the Code of Criminal Procedure and some other acts, Journal of Laws of 2013, item 1247.

[12] Cf. K. Dąbkiewicz, *Kodeks postępowania karnego. Komentarz do zmian 2015* (Warsaw: Wolters Kluwer, 2015), 254.

[13] Journal of Laws of Laws of 2015, item 396.

[14] Cf. Dąbkiewicz, *Kodeks postępowania karnego*, 26.

[15] Changes which the amendment of 20 February 2015 brought to the provisions of Chapter 3 of the Penal Code did not affect art. 31. See J. Majewski, *Kodeks karny. Komentarz do zmian 2015* (Warsaw: Wolters Kluwer, 2015), 43.

[16] Art. 17 POC provides: "§1. Any person who, by reason of mental disease, mental disability or any other disruption of mental capacity, was not able to recognise the meaning of his act or direct his conduct does not commit an offence. §2. If during the commission of an offence the offender's ability

of this article determine insanity using a method which is twofold, i.e. mixed. The first element is called psychiatric (or medical) since it identifies a mental illness, mental disability or other disruptions of mental capacity as the source of insanity, while the other element is called psychological (or legal) since it enumerates the consequences of insanity, namely the impossibility to grasp the meaning of an action or to control one's own conduct. The psychological (legal) element comprises two aspects: one pertains to intellect, which impacts the perception of the meaning of an act, while the other pertains to will, which determines the possibility of managing one's conduct. Intellect and will are mentioned disjunctively, as suggested by the use of "or." This is so because, occasionally, a dysfunction occurring in the sphere of will despite a capable intellect and undisturbed conscience can deprive the perpetrator of the ability to manage his conduct. Both elements of the provision at hand, the psychiatric (medical) and the psychological (legal) one, are mutually restrictive because not every psychological disorder permits an appraisal of sanity – only a disorder which deprives the offender of the ability to recognise his act or properly manage his behaviour does, whereas the lack of such abilities must be caused by one of the disorders indicated in the psychiatric element. Para. 2 of art. 17 does not contain a psychiatric element, but its direct connection with para. 1 implies that we are speaking of the same sources of psychological disorders but of a different quality – less intense – whose consequence is a major reduction of the ability to recognise the meaning of one's actions or to control one's conduct, not a total cancellation of these abilities.[17]

Insanity is a state in which the offender was not able, for specific reasons, to comprehend the significance of his act because his consciousness was disrupted, which made him unable to assess the harmful impact of his action and its social consequences. Insanity is also a mental state in which the offender was not able to direct his conduct, implying that he was aware of the meaning of his act but could not act otherwise due to the dysfunctional sphere of his will. Diminished sanity, in

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to recognise the meaning of his act or direct his conduct was severely diminished, the court may refrain from imposing a penalty or a penal measure. §3. The provisions of paras. §1 and 2 are not applied if the offender caused his drunkenness or intoxication, a stated which disabled or diminished his sanity, the consequences which he had predicted or could have predicted." The current wording of the provision results from the amendment of criminal law, which entered into force on 1 September 1998. See T. Bojarski, "Komentarz do art. 17," in *Kodeks wykroczeń. Komentarz*, ed. T. Bojarski et al. (Warsaw: Wolters Kluwer, 2015), 86.

[17] Cf. D. Hajdukiewicz, "Biegli psychiatrzy w postępowaniu karnym," *Niebieska Linia* 3 (2001): 10. "[...] as a rule, a mature person is capable of recognising the meaning of his actions and controlling his conduct, therefore he can be attributed guilt for a prohibited act and made criminally liable. Psychological disorders can deprive a person of these faculties or limit them substantially." Ibid.

contrast, occurs when the offender had a limited perception of the action and his ability to direct his conduct was restricted.[18]

The Petty Offences Code identifies three sources of insanity and diminished sanity. These are: mental illness, mental disability, and other disruptions to mental capacity. The category of mental illness encompasses schizophrenia, paranoia, bipolar disorder, reactive psychoses and neuroses. Mental disability is a mental retardation, either inborn or acquired, for example as a result of brain traumas suffered later in life or vascular diseases. The consequence of mental retardation is a low intelligence quotient. The IQ level makes is possible to differentiate between various degrees of mental disability: profound, severe, moderate, mild, and sub-average. In contrast, other disruptions to mental capability can be caused by diseases which interfere with the central nervous system (e.g. a brain tumour, viruses or bacteria, or old age).[19]

Some doubts have arisen in the literature of the subject whether the notion "other disruptions of psychological functioning," which covers only psychopathological conditions, also embraces psychological disorders that do not have a pathological nature. Currently, the prevailing view of the doctrine is that apart from psychological disorders other conditions which are not diseases should be taken into consideration since they can restrict or exclude sanity during the perpetration of a prohibited act. These would be personality disorders, anger, despair, and terror. Their impact on the ability to recognise the significance of one's action and direct one's conduct must be studied in detail on a case-by-case basis.[20]

Incapacity, which is regulated by art. 17 CC, excludes the offender's guilt, which means that he does not commit a contravention of the law,[21] hence no proceedings are instituted against him, and any pending proceedings are discontinued (art. 5 §1 point 2 CPC).[22] It should be underscored that insanity does not provide grounds for the acquittal of the offender. In contrast, substantially impaired sanity does not preclude guilt, and therefore does not obviate liability. In a situation when diminished sanity is determined, the court may hand down a conviction but refrain from

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[18] See T. Grzegorczyk, "Rozdział I–VII (art.1–48)," in *Kodeks wykroczeń. Komentarz*, ed. T. Grzegorczyk, W. Jankowski, and M. Zbrojewska (Warsaw: Wolters Kluwer, 2010), 82.

[19] Ibid., 83.

[20] See Ładoś, *Pozycja prawna oskarżonego*, 29–30.

[21] Art. 1 §2 POC provides: "The perpetrator of a prohibited act does not commit an offence if no guilt can be attributed to him at the moment of committing the act."

[22] Act of 24 August 2001, Code of Procedure for Petty Offences, Journal of Laws of 2016, item 1713 [hereafter cited as CPPO]. Art. 5 §1 point 2 CPPO goes as follows: "No proceedings are instituted and pending proceedings are discontinued when: 1) the act was not committed or no data are available to sufficiently justify a suspicion of its perpetration."

imposing a penalty and/or punitive measure. If the limitation of sanity was not considerable, the offender will be held liable on general terms.[23]

Sanity will not be questioned in the case of drunken offenders or those intoxicated with psychoactive substances. The provision of §3 of art. 17 CC excludes the possibility of triggering legal consequences against the offender related to his lack of sanity or diminished sanity, because he had caused his drunkenness or intoxication, a state which caused the exclusion or restriction of sanity providing that he anticipated or could have anticipated that. The idea that the offender caused his own specific state implies that he was aware of drinking alcohol or using psychoactive substances in quantities that would lead to his drunkenness or intoxication yet he would do that willingly voluntarily predicting the consequences of such behaviour. The requirement of being predictable may not be fulfilled if the exclusion or restriction of sanity resulted not only from making himself drunk or intoxicated but was caused by other factors, for example the taking of a medicine and following it with alcohol, not knowing that such a combination might lead to intoxication.[24] Similarly, sanity can be challenged, that is excluded or diminished, due to the occurrence of conditions having their source in chronic alcohol or narcotic drugs use: psychoses, profound personality changes, stupor or the occurrence of unique disturbances following alcohol use, that is pathological or atypical drunkenness. It should be noted that if intoxication caused by alcohol or other substance occurred in a person with permanent mental changes (mental disability, psychosis) or temporary psychological disturbances (reactions to depression or fear), the assessment of sanity as being excluded or substantially diminished will rely on the demonstrated disturbances rather than intoxication.[25]

2. DIAGNOSING THE MENTAL STATE OF THE OFFENDER

In the situation when the judicial body suspects that the offender is suffering from psychological disorders his sanity should be verified. The assessment of mental health and determination of psychological disorders, if any, require specialised knowledge, which the judicial body does not have, therefore should any doubts concerning the sanity of the offender emerge it becomes necessary to consult an expert psychiatrist.[26]

[23] See Grzegorczyk, "Rozdział I–VII (art.1–48)," 82.
[24] Ibid., 84.
[25] See Hajdukiewicz, "Biegli psychiatrzy," 11.
[26] See Grzegorczyk, "Rozdział I–VII (art.1–48)," 83.

Art. 42 §2 of the Code of Procedure for Petty Offences[27] provides that an expert psychiatrist is appointed by the court or prosecutor acting pursuant to art. 56 §1.[28] Art. 42 §2 CPPO, addressing reasonable doubts as to the mental health of the offender, has evolved over time. The first substantial change was introduced by the amendment of the Code of Procedure for Petty Offences enacted on 22 May 2003.[29] The legislator expressly pointed out that an expert psychiatrist is appointed not only by the court but also by a public prosecutor,[30] which provided the possibility of subjecting to psychiatric examination not only the defendant but also a person suspected of the offence as early as during the discovery process. Before the amending act entered into force, psychiatric examination was possible only when the person whose mental state was doubted formally became a party to the proceedings as

[27] Art. 42 CPPO provides: "§1. After receiving an expert's evidence the provisions of art. 193–201 CCP are applied accordingly. §2. In the case of reasonable doubt regarding the mental health of the defendant, the court or prosecutor acting pursuant to art. 56 §1 appoints an expert psychiatrist. The provision of art. 202 §5 CCP is applied accordingly. §3. The provisions of art. 204–206 CCP are applied accordingly with respect to an interpreter and specialists."

[28] Art. 56 §1 CPPO provides: "The discovery process referred to in art. 54 can also be conducted by a prosecutor or it can be referred to the police."

[29] Journal of Laws of Laws of 2003, No. 109, item 1031. Before art. 42 CPPO was amended, its wording was the following: "§1. After receiving an expert's evidence the provisions of art. 193–201 of the Code of Criminal Procedure are applied accordingly. §2. In the case of reasonable doubt regarding the mental health of the defendant, an expert psychiatrist shall be appointed. The provision of art. 202 §5 of the Code of Criminal Procedure is applied accordingly. §3. The provisions of the Code of Criminal Procedure are applied accordingly with respect to the interpreter and specialists."

[30] The previous provisions of CPPO did not permit the prosecutor conducting the explanatory proceedings to admit evidence provided by an expert psychiatrist. Under the current legislation, this is possible as pointed out by A. Skowron: "When the authority conducting explanatory proceedings or the court has doubts whether the defendant can be held responsible, or whether his health had any influence on the degree of his guilt or on the application of certain institutions of substantive law, which happens in a situation when the «defendant»'s capacity to recognise the meaning of his actions or to direct his conduct was substantially diminished during the perpetration (art. 17 §2 POC), it appoints an expert psychiatrist (*argumentum ex* art. 42 §2)." See A. Skowron, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* (Gdańsk: Wydawnictwo Arche, 2006), 103. The permissibility of appointing an expert psychiatrist at the stage of explanatory proceedings is also commented on by H. Skwarczyński: "[...] in accordance with the new wording of art. 42 §2 CPPO, following its amendment of 22 May 2003, a prosecutor is the authority permitted to appoint an expert psychiatrist during explanatory proceedings. In this case, it must be noted, the article mentions a defendant, identically to art. 42 §2 before the amendment, whereas this legal construct, to be precise, appears only during the judicial proceedings. Despite this formulation, *de lege lata* it should be assumed that it is permissible for a prosecutor to appoint an expert psychiatrist during the explanatory «proceedings», which prior to the amendment of CPPO seemed rather inadmissible. Additionally, in such a situation, the law provides for obligatory defence (art. 21 §1 point 2 CPPO). See H. Skwarczyński, "Inspektor pracy w nowym postępowaniu w sprawach o wykroczenia," *Praca i Zabezpieczenie Społeczne* 9 (2003): 30.

the defendant. At the time, the appropriate forum for the taking of evidence based on an expert psychiatrist's opinion was by way of court proceedings.[31] The mechanisms offered by that procedure excluded the possibility of assessing the accused person's sanity at the stage of explanatory proceedings. This was due to the absence of regulations which would permit the alleged offender to undergo psychiatric examination, and also because law enforcement authorities were not obliged to interrogate the person during the discovery process. This led to a situation in which competent authorities, which had no information about the accused person's poor mental condition, submitted to the court a request for penalty which might already contain a negative procedural premise. That gave rise to legally binding rulings against the defendant, who in fact could be insane.[32] Pursuant to art. 5 §1 CPPO, misdemeanour proceedings against such a person should not be instituted at all.[33]

The situation in which the mental health of the suspect is disregarded, in Skowron's opinion, can be avoided if the right to appoint an expert psychiatrist is not vested only in the prosecutor but also in the police, an authority which is the most likely to intervene in cases involving offences.[34] However, Ładoś argues, a judicial-psychiatric examination which becomes a pure formality in all cases should be categorically avoided. A judicial-psychiatric examination in a criminal proceedings should take place only if there is reasonable doubt as to the sanity of the offender. This is because the admission of this kind of evidence can produce negative consequences – the offender who is forced to seek medical assistance needs to have his most intimate sphere of life examined, that is his psyche, which constitutes a severe burden and a stigmatising factor. Even when it becomes apparent that a diagnosis is necessary, the judicial body has to decide whether it is necessary to have the offender examined psychiatrically or whether an opinion in this matter can be issued

[31] Before the amendment was legislated by the act of 22 May 2003, A. Zachuta emphasised: "The possibilities in terms of evidence during the explanatory proceedings are extensive, considering the aim of this stage, while the limitations include the inadmissibility of evidence gained from an expert psychiatrist's opinion because in cases concerning offences the appropriate forum for the taking of this sort of evidence is court proceedings, whereas the entity competent to make such a decision is the court. See A. Zachuta, „Postępowanie w sprawach o wykroczenia (czynności wyjaśniające)," *Monitor Prawniczy* 5 (2002): 216.

[32] As a result, a sentence could be passed in the absence of the defendant because that was permitted by art. 71 §4. A final judgement in default or a penalty order thus issued with respect to an insane person must have functioned in legal proceedings until it was eliminated through the use of extraordinary remedies. The downsides of the previous procedure forced the legislator to amend art. 42 §2. See Skowron, *Kodeks postępowania*, 188.

[33] "An insane offender cannot commit an offence within the meaning of art. 5 §1 point 2 *in fine*." Ibid., 20.

[34] Ibid., 188–189.

on the basis of the material gathered in the case files, for example based on medical documentation.[35] A similar view is expressed by M. Cieślak, who argues that a decision concerning a judicial-psychiatric diagnosis should be very well-balanced by an authority instituted to preserve the rule of law and at the same time a person who is expected to have a thorough legal training, that is a legal university course of study (not only the so-called administration study), legal apprenticeship, for example prosecutor training ending with a special exam, or suitable experience. He also believes that a psychiatric examination will not be neutral for a given person in terms of his feelings or reputation.[36] Therefore it would seem legitimate to authorise such organs as a prosecutor or the court to appoint expert psychiatrists who are the most competent individuals in this respect. The police is not suitably trained so they should not have such an entitlement. A decision to institute a psychiatric examination always requires that a judicial body have a more extensive knowledge in this area. The lack of such insight can effectively cause that a psychiatric examination is ordered somewhat prematurely or its diagnosis is groundlessly disregarded, as a result of an incorrect identification of the mental state of the accused.

The appointment of expert psychiatrists to produce their opinions should always be preceded by a reasonable suspicion of the court or a prosecutor about the possibility of the mental health of the offender being disrupted, which might have affected his sanity during the commission of the alleged act or hinder his participation in the pending proceeding.[37] Art. 42 §2 CPC, which validates a psychiatric diagnosis, was amended again by the act of 5 November 2009,[38] which was for reference purposes only because the fragment related to the form of a psychiatric opinion was moved from para. 4 CPC to para. 5 CCP upon the amendment of art. 202 of the latter.[39] The provision of this article was changed in the extent indicated above, but the said requirements concerning a psychiatric opinion were upheld.[40] Currently art. 42 §2 CPC makes a direct reference to art. 202 §5 CCP, which specifies the roles

[35] See Ładoś, *Pozycja prawna oskarżonego*, 86–87.

[36] See M. Cieślak, "Rozdział VIII," in *Psychiatria w procesie karnym*, by M. Cieślak et al. (Warsaw: Wydawnictwo Prawnicze, 1991), 466–68.

[37] Cf. D. Hajdukiewicz, *Podstawy prawne opiniowania sądowo-psychiatrycznego w postępowaniu karnym, w sprawach o wykroczenia oraz w sprawach nieletnich* (Warsaw: Instytut Psychiatrii i Neurologii, 2007), 205ff.

[38] Act of 5 November 2009 amending the Penal Code, Code of Criminal Procedure, Executive Penal Code, Fiscal Penal Code, and some other acts, Journal of Laws of 2009, No. 206, item 1589.

[39] Act of 6 June 1997 (Code of Criminal Procedure), Journal of Laws of Laws No. 2016, item 1749 [hereafter cited as CPC].

[40] See T. Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia. Komentarz* (Warsaw: Wolters Kluwer, 2012), 174.

of expert psychiatrists with respect to the mental health of the perpetrator of a prohibited act.[41] After the act of 27 September 2013 introduced the amendment, the content of the provisions of art. 42 §2 CPC regulating the appointment procedure for an expert psychiatrist was not changed, but art. 202 §5 CCP – adopted by these provisions – was amended. The change affected the scope of expert opinions. As of 1 July 2015, the requirements which experts must comply with are: assessment of the offender's sanity at the moment of committing the alleged prohibited act, appraisal of his current mental health, and an indication whether this condition permits him to participate in the proceedings and defend himself independently and reasonably, and if need be to identification of the circumstances enumerated in art. 93b of the Penal Code.[42] The opinion on these circumstances will apply to only medical (psychiatric) and psychological grounds for a decision relating to a protective measure in the form of a stay in a psychiatric institution.[43]

The *ultima ratio* principle of the precautionary measure was regulated by art. 93 PC before July 1, 2015, to be repealed by the amendment enacted on September 27, 2013. Its function, with regard to the placement of an offender in a closed institution or

[41] Art. 202 §5 CCP imposes on expert psychiatrists the obligation to declare whether the mental condition of the offender allows him to participate in criminal proceedings even though the ordering authority does not formulate such a request. The purpose of the examination is chiefly to make sure that the suspect takes part in the proceedings in an informed manner and is able to defend himself. Cf. D. Hajdukiewicz, *Unormowania prawne opiniowania sądowo-psychiatrycznego w sprawach karnych i w sprawach nieletnich. Podstawowe wiadomości dla specjalizujących się w psychiatrii* (Warsaw: Instytut Psychiatrii i Neurologii, 2002), 23–24.

[42] Currently, art. 202 §5 CPPO provides as follows: "An expert opinion must contain declarations concerning both the sanity of the accused at the moment of committing the alleged act, an appraisal of his current mental health, and especially an indication whether this condition permits him to participate in the proceedings and defend himself independently and reasonably, and if need be identification of the circumstances enumerated in art. 93b of the Penal Code."

[43] Art. 93b PC provides: "§1. When necessary, the court may order a precautionary measure in order to prevent the offender from committing another prohibited act if other legal measures specified by this code or imposed pursuant to other statutes prove insufficient. The precautionary measure referred to in art. 93a §1 point 4 can be imposed only to prevent the offender from committing another prohibited act f significant social harmfulness. §2. The court repeals the precautionary measure if its further application is no longer necessary. §3. A precautionary measure and the manner of its application should correspond to the degree of social harmfulness of the prohibited act which an offender may commit, the likelihood of its commission, as well as the requirements and developments of the therapy or the addiction treatment. The court may change the imposed precautionary measure or the manner of its application if the previously imposed measure has become inappropriate or its application is not possible. §4. More than one precautionary measure can be imposed on an offender; the provisions of §§1 and 3 are applied taking into account all imposed precautionary measures. §5. The Court commits an offender to a psychiatric institution only if provided by the Act."

committing him to outpatient treatment, was transferred to the said article 93b PC,[44] whereas the regulation of the duty of the court to hear psychiatrists and a psychologist, and a sexologist in the case of persons with disturbed sexual preferences, before imposing a precautionary measure, was transferred to the Executive Penal Code, that is to art. 199b §2 EPC.[45]

It becomes necessary to hear experts on the circumstances listed in art. 93b PC when the experts have determined exclusion of sanity or its substantial limitation.[46] However, pursuant to §5 of art. 96b PC, the court commits an offender to a psychiatric institution, which is a measure that the most severely restricts human rights, only in cases specified by the Act and indicated in art. 93g PC.[47] Art. 93g PC provides that a stay in a psychiatric institution is ordered if there are special reasons for specific categories of offenders (specified in art. 93c PC[48]) who can commit

[44] Cf. Majewski, *Kodeks karny*, 355.

[45] Act of 6 June 1997 (Executive Penal Code), Journal of Laws of 1997, No. 90, item 557 as amended. [hereinafter cited as EPC]. Art. 199b §2 EPC provides as follows: "Before imposing, modifying or repealing a precautionary measure, the court hears: 1) a psychologist, 2) and a psychiatrist for cases concerning insane persons, those with diminished sanity or with personality disorders, or when the court considers it appropriate, 3) experts indicated in points 1 and 2 and a medical sexologist or a psychologist-sexologist in cases concerning persons with disturbed sexual preferences. An addiction expert can be heard in cases concerning addicted persons."

[46] In its provision for a precautionary measure, art. 93b PC makes a direct reference to art. 93a §1 point 4 PC: "§1. The precautionary measures are the following: […] 4) stay in a psychiatric institution."

[47] Art. 93g PC goes like this: "§1. The court commits the offender referred to in art. 93c point 1 to a suitable psychiatric institution where it is highly probable that he will commit another prohibited act involving considerable social damage to society occurring in connection with a mental disease or disability. §2. When sentencing an offender referred to in art. 93c point 2 to imprisonment without a conditional suspension, the penalty of 25 years of imprisonment or life imprisonment is imposed by the court in a suitable psychiatric institution if it is highly probable that he will commit another prohibited act involving considerable social damage to society occurring in connection with a mental disease or disability. §3. When sentencing an offender referred to in art. 93c point 3 to imprisonment without a conditional suspension, the penalty of 25 years of imprisonment or life imprisonment is imposed by the court in a suitable psychiatric institution if it is highly probable that he will commit a crime against life, health or sexual freedom occurring in connection with sexual preference disorder."

[48] Art. 93c PC provides: "Precautionary measures can be used with respect to an offender: 1) against whom the proceeding has been discontinued concerning an act which was committed in a state of insanity provided for in art. 31 §1; 2) if he has been convicted of an offence perpetrated in a state of diminished sanity specified in art. 31 §2; 3) if he has been convicted of an offence specified in art. 148, art. 156, art. 197, art. 198, art. 199 §2 or art. 200 §1, committed as a result of a sexual preference disorder; 4) if he has been sentenced to imprisonment without a conditional suspension for an intentional offence specified in chapters XIX, XXIII, XXV or XXVI, which was committed as a result of a personality disorder of such character or severity that there is at least a high probability of his committing another prohibited act using violence or threatening to use violence; 5) if he has been sentenced for an offence committed in connection with alcohol addiction, a narcotic drug or other agent acting in a similar way."

a prohibited act involving great damage to society again. The provisions of this article cannot be used for minor violations because these are acts whose impact, in principle, is not as high as that of offences.[49] For this reason, law on petty offences does not provide for a precautionary measure involving placement in a psychiatric hospital, nor does it provide for a psychiatric examination combined with hospital observation. A psychiatric examination of a suspect or defendant in a case involving a contravention can take place only in outpatient settings.[50]

In contravention proceedings only one expert psychiatrist is appointed, in contrast to criminal proceedings, where the statute requires the participation of at least two expert psychiatrists in the issuance of the opinion. Also, in petty offence cases it is also unacceptable to issue a comprehensive opinion on the offender's health, made in cooperation with experts in other fields, for example with a psychologist.[51] In contrast, a psychological or psychiatric examination is possible with respect to a defendant, as this is provided for by art. 74 §2 point 2 CCP,[52] adopted by art. 20 §3 CPPO regulating procedural obligations.[53]

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[49] See Bojarski, *Polskie prawo wykroczeń*, 56.

[50] Cf. Skowron, *Kodeks postępowania*, 189.

[51] Ibid.

[52] Art. 74 CCP provides: "§1. The accused is under no obligation to prove his innocence or obligation to submit evidence in his disfavour. §2. However, the accused is under the obligation to submit to: (1) to an external examination of his body and to other examinations not involving anyinvasion of bodily integrity; in particular, the fingerprints of the accused may be taken; hemay be photographed and presented to other persons, in order to establish his identity; 2) to psychological and psychiatric examinations and to examinations involving certain tests to be conducted upon his body, except surgical procedures, provided that they are conducted by a person on the health-service staff, according to medical directions and do not constitute a challenge to the health of the accused. If such examinations are indispensable; in particular, the accused is obliged, in conformity with the above conditions, to submit blood and excretory samples, subject to point 3; 3) to have a swab sample obtained from the mucous membrane of his cheeks by a police officer if this is essential and there is no danger that this procedure will harm the health of the accused or others. §3. The suspect can be subjected to the examinations or procedures referred to in §2 point 1, and in conformity with the conditions specified in §2 points 2 or 3, blood, hair, cheek mucous membrane samples or other excretory samples may be taken. §3a. The accused or the suspect is called to observe the obligations imposed by §2 and 3. If the accused or the suspect refuses to submit to these obligations, he may be detained and brought in under duress, or he may be subjected to physical force or other technical means to be overpowered to the extent necessary to carry out a particular action. §4. The Minister of Justice in consultation with the Minister of Health issues an ordinance setting forth the detailed conditions and manner of subjecting the accused or the suspect to medical examination and their participation in activities referred to in §2 points 1 and 3 and §3, taking care that acquisition, recording and analysis of evidence are done consistently with the current state of research in criminology and forensic medicine."

[53] Art. 20 §3 CPPO provides: "Art. 72 §§1 and 2, art. 74 §§1 and 2, art. 75, art. 76 and art. 175 of the Code of Criminal Procedure are applied accordingly."

It should be underscored that the purpose of a psychiatric examination conducted in cases involving petty offences is the offender's mental state rather than his sanity. Therefore, the necessity to admit evidence based on the opinion furnished by an expert psychiatrist will be due to doubts as to the mental health of the alleged offender, including his psychological disorders. Such doubts may concern both his mental state at the time indicated by the prosecutor in the motion for punishment or before that time, which may impact the assessment of sanity, but also the offender's mental state after that date, which will be vital for the determination whether or not the offender's mental state permits him to take part in the proceedings. In the light of the foregoing, a psychiatric diagnosis may not rely solely on doubts about the person's sanity at the time of the offence; the experts should establish whether the mental state of the suspect or defendant permits him to participate in the judicial proceedings and also whether he is able to defend himself.[54]

Judicial-psychiatric diagnosis offers the possibility of determining the actual mental state of the perpetrator, also at the time of the proceedings, and it is essential for the fulfilment of his procedural guarantees.[55] Art. 21 §1 point 2 CPPO introduces the requirement of obligatory defence for a defendant whose sanity raises reasonable doubts. Doubts concerning sanity, however, must be realistic and objective, substantiated by the evidence or observations of the judicial body. These cannot rely only on guesswork, but it is not essential that they should be obvious – it is enough if the sanity of the defendant is at least diminished.[56] The above doubts seem relevant for a situation in which an expert confirms these doubts in his opinion, which will lead to the appointment of mandatory defence. There is the view in the literature of the subject that *ex officio* defence should be available to the offender from the moment of declaring his mental ineptitude, also before the decision to admit evidence based on the opinion of an expert psychiatrist. This is due to the guaranteed right of defence because in this case it can be effectively applied only when the defendant exercises his right to have a defence counsel as soon as doubts arise concerning the state of his mental health.[57] However, the duty to use the assistance of a defence counsel ceases when the sanity of the defendant no longer gives rise to doubt and he has a full mental capability according to the opinion of an expert psychiatrist.[58] Art. 21 §2 CPPO concerning the cessation of mandatory defence was modified

[54] Cf. Ładoś, *Pozycja prawna oskarżonego*, 90–91.

[55] Ibid., 32.

[56] See the judgement of the Supreme Court dated November 21, 1977, file ref. no. Z 34/77, OSNKW 1977, no. 12, item 138; see also Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia*, 106.

[57] See A. Skowron, *Glosa do wyroku SN z dnia 30 marca 2015 r., II KK 77/15*, LEX/el. 2015.

[58] See Grzegorczyk, *Kodeks postępowania w sprawach o wykroczenia*, 106–7.

by the amendment of September 27, 2013, and since July 1, 2015 it provides that mandatory defence ceases as soon as the court accepts as justified the opinion of an expert psychiatrist saying that the act was not committed in a state of excluded or severely diminished capacity of the offender to recognise his actions or manage his behaviour, and that his mental state permits him to take part in the proceeding and conduct his defence in an independent and reasonable manner.[59] By amending the said provision the legislator partially resolved the problem concerning the exercise of the right of defence. Under the previous legislation, art. 21 §2 CPPO provided that obligatory defence ceased in the case when the sanity of the defendant could not be doubted, giving rise to certain reservations. It should be noted that the wording of the provision led to the improper application of the category of sanity when the effectiveness of acts of legal procedure was assessed. This is so because sanity is an institution of substantive criminal law and it is connected with the moment of committing the prohibited act rather than the suspect's mental state during the ongoing proceeding. There is, after all, a significant difference between limitations of sanity and limitations of mental capability, the latter causing specific procedural effects. It seems then that the legislator put emphasis on doubts concerning sanity, while the mental state of the offender during the court proceedings was not taken into consideration when assessing the grounds for obligatory defence.[60] The change applied to art. 21 §2 CPPO now makes it possible for a person afflicted by some forms of mental deficiency to take advantage of mandatory defence; although such a condition does not affect an appraisal of her sanity, it can adversely affect her capacity to understand the judicial procedure and thus restrict the possibility of defending herself independently. The legislator, however, did not fully relinquish this legally objectionable instrument. Unfortunately, its form has not changed despite the amendment of §1 point 2 of the said article, some interpretative discrepancies persisting. It would seem desirable, then, to modify art. 21 §1 CPPO, whereby the formulation "reasonable doubts concerning sanity" would be replaced by conditions which in §2 of this article govern the cessation of mandatory defence[61] or at least by

[59] Before the amendment, 21 CPC was as follows: "§1. In a contravention case, the defendant is to have a public counsel in proceedings before the court if: 1) he is deaf, mute or blind; 2) there is reasonable doubt regarding his sanity. §2. In the case referred to in §1 point 2 the obligation to use services of a defence counsel ceases if the court-appointed expert declares that the sanity of the defendant raises no doubts unless otherwise decided by the court. §3. In cases referred to in §1 the participation of a defence counsel is mandatory in a trial, and in a sitting if provided for by statute. §4. In cases referred to in §1 the defendant has no counsel of his choice, he is assigned a defence counsel by the court."

[60] Cf. Ładoś, *Pozycja prawna oskarżonego*, 185–86.

[61] Art. 79 CCP illustrates the appropriate modification of provisions concerning mandatory defence. After the amendment of September 27, 2013, its wording is the following: "§1. In criminal proceed-

those contained in art. 42 §2 CPPO, i.e. "reasonable doubts concerning the mental health of the defendant" for better correlation of the two articles. In practice, the fine tuning of the conditions for the cessation of mandatory defence is quite relevant since it enables the suspect (defendant) to omit to use this right when reporting his alleged mental problems, which later will not be confirmed later by experts. If the experts demonstrate that the suspect, both while committing the act and during the pending proceeding, was of a sound mind, their motion causes the decision to assign a counsel to be withdrawn. Hence it is important that the expert opinion should unequivocally resolve all doubts of a judicial body regarding the defendant's mental condition, otherwise the opinion may be judged as incomplete, vague or self-contradictory, which in turn would justify the ordering of a supplementary opinion or admitting evidence based on other experts' opinion. In the case when the conclusions stated in the opinions should be reviewed critically, there may be the risk that the defence counsel will be rashly cancelled, which leads to a considerable weakening of the position of the defendant in an adversarial litigation.[62]

CONCLUSION

The result of a psychiatric examination of an accused person or a defendant in contravention proceedings has great deal of importance because it affects their procedural status. On the one hand, the psychological disorders of the alleged perpetrator of the offence which are the object of judicial consideration affect the appraisal of his sanity, but on the other on his ability to understand the meaning of the acts of legal procedure as the application of the right to have a defence counsel.

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ings the accused is to have a defence counsel if: 1) he is minor; 2) he is deaf, mute or blind; 3) there is reasonable doubt whether his capacity to recognise the meaning of his act or direct his conduct was not excluded or substantially diminished; 4) there is reasonable doubt whether his mental health permits him to participate in the proceedings or conduct his defence in an independent and reasonable manner. §2. The accused is to have a defence counsel also if the court considers that necessary due to the presence of other circumstances impedes defence. §3. In cases referred to in §§1 and 2 the participation of a defence counsel is mandatory in a trial, and in those sittings where the presence of the accused is mandatory. §4. Regarding as justified the opinion of the expert psychiatrists declaring that the accused did not commit the act in a state of excluded or diminished capacity to recognise the significance or to direct his conduct and that the mental health of the accused permits him to participate in the proceeding and conduct his defence in an independent and reasonable manner, the court decides that the participation of the counsel is not mandatory. In such a case the president of the court or the court releases the counsel of his duties unless other circumstances require that the accused be assigned a public defence counsel."

[62] See Ładoś, *Pozycja prawna oskarżonego*, 188ff.

A psychiatric examination can be ordered only when there is reasonable doubt as to the sanity of the offender. The admission of this kind of evidence can trigger negative personal consequences (the inconvenience of the examination which interferes with the private sphere) and social ones (the problem of stigmatisation). The currently applicable provisions rightly assign the prosecutor or the court the right to appoint expert psychiatrists in such cases as minor contraventions of law. Here a claim must be made that the admission of evidence based on a judicial-psychiatric diagnosis should be appropriately restricted by competent judicial bodies so that it does not become a formality in the procedure for petty offences but constitutes a necessary measure in justified cases.

Likewise, the importance of a critical assessment of psychiatric evidence should be underscored since such an appraisal is extremely difficult for a judicial body. A judicial-psychiatric opinion focuses on human psyche without which it is impossible to measure without tangible criteria, while the main diagnostic tool is still a targeted interview. Therefore, it is important that the lawyer (judge or prosecutor) should have the basic knowledge of psychiatry, while legal professional training should incorporate the acquisition of such skills.

The amendment of criminal procedure and procedure for petty offences of September 27, 2013, highlighted the importance of current mental health of the defendant (suspect) for the exercise of his procedural guarantees. Consequently, apart from appraisal of sanity, the assessment of the capacity to act in court proceedings and the intellectual performance of the defendant (suspect) during the proceedings is very important, including the assessment of the capacity to remember and communicate observations, which directly determines the ability to defend oneself. The amendment of art. 21 CPPO introduced necessary changes with respect to the defendant's right to have the assistance of a defence counsel in petty offence proceedings. Thanks to those changes the defendant is entitled to mandatory defence if expert psychiatrists conclude that he manifests psychological disorders which do not necessarily affect the assessment of his sanity while affecting his interpretation of acts of legal procedure and consequently the appropriate exercise of his rights. This follows from the interpretation of art. 21 §2, which determines the conditions for the cessation of mandatory defence. In contrast, the provision of art. 21 §1 point 2 CPPO in the version in force after July 1, 2015, unfortunately still treats a reasonable doubt concerning the defendant's sanity as an obligatory condition, which gives rise to the defectiveness of such wording. The considerations presented in this article permit a *de lege ferenda* postulate that the legislator should abandon the phrase "doubt concerning sanity" and clarity and ease of interpretation split the basis for the institution of mandatory defence into *tempore criminis* and *tempore*

procedendi conditions, just like it was regulated in §2 of this article when setting forth the conditions for using the assistance of a defence counsel.

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PSYCHOLOGICAL DISORDERS IN THE PERPETRATOR OF A PROHIBITED ACT AS THE OBJECT OF JUDICIAL CONSIDERATION IN THE PROCEDURE FOR PETTY OFFENCES AFTER 1 JULY 2015

Summary

The subjective capacity of an offender to be assigned guilt is determined by such circumstances as the attainment of the age required by the law and a suitable mental state. Psychological disorders, which are the source of insanity or diminished sanity as regulated by the Petty Offences Code, lead to a considerable reduction of the capacity to recognise the significance of an act or direct one's conduct, and this in turn leads to the exclusion of guilt or restricts responsibility under the Petty Offences Code. The existence of doubt regarding the mental state of an offender implies the appointment of expert psychiatrists by a competent judicial body in order to conduct a psychiatric examination. The doubt must be reasonable and objective, though, supported by evidence or observations of the judicial body. The opinion of an expert psychiatrist is pivotal to the proceedings as it explains the offender's conduct during and after the perpetration of a prohibited act, which permits an assessment whether the offender's mental condition allow him to take part in the proceedings, including self-defence. The judicial and psychiatric diagnosis also has adverse consequences for the examined person so it must not be regarded as a mere formality in every petty offence case. The act of September 27, 2013 amended the provisions for procedure for petty offences in terms of, among others, regarding provisions concerning the content of psychiatric assessment furnished by experts and the formal mandatory defence. The article aims to determine the scope of this revision and its impact on the exercise of procedural guarantees of the offender.

Key words: insanity and diminished sanity in the Petty Offences Code; judicial and psychiatric diagnosis in petty offences procedure; mandatory defence in petty offences procedure.

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