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THE PRINCIPLES OF GUILT – REMARKS ON THE BACKGROUND OF THE POLISH PENAL CODE

In the development of the penal code, the appearance of the principle of guilt was an enormous progress in realizing responsibility for the committed prohibited act. According to some authors, it was already known in Roman times as one of the views on the law of punishment, while its definition in the present form appeared in contemporary times.[1] The old penal law functioned through objective liability: man's liability for all consequences of their acts, including those that they did not commit within their consciousness and those that they could not foresee (including those that were the result of an accident). The appearance of the principle of guilt, and before that – determination of the existence of a causal relation between man's behaviour and the consequence that the former brings about – led to subjectivization of penal law and made it possible to reduce the responsibility of the perpetrator to the consequences that the former could foresee.

Interest in the essence of guilt has been visible in Polish penal literature for a long time; however, opting for a specific theory in the binding regulations has become a problem in this respect. The Polish penal acts in the 20th century, despite the nearly universal acceptance of the principle of guilt in penal law, scarcely provided information on the perpetrated act or lack of guilt in the perpetrator's behaviour. The reason seems to have been the lack of agreement among the authors on defining the essence of guilt and, hence, choosing the binding theory of guilt. The justification to the 1969 code indicated that the reason for such a norm was the statement that the role of the code was not decreeing scientific arguments

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[1] K. BUCHAŁA, *Zasada winy – teraźniejszość i przyszłość*, "Studia Juridica" 1988, No. 16, p. 21.

but regulating liability in the manner sufficient for practice.[2] That was a way of avoiding the consequences resulting from the acceptance of a definite theory and being exposed to the accusations of its opponents. It is also not true that it is possible to determine the principles of liability in the act only to be used in practice. While using definite legal-penal institutions in the process of law application, an interpretation of certain theoretical assumptions lying at the base is made, which is impossible to avoid. If this was the case, any scientific and doctrinal considerations would be useless. This standpoint is confirmed by the fact that it is just those "principles of liability" that are discussed in the justification that were interpreted in a variety of ways, which can be seen in a number of definitions of guilt that came into being at that time.[3]

Despite the existing similarities between the principle of guilt and the principle of subjectivization of penal liability, the doctrine pays attention to a broader character of the principle of subjectivization. According to A. Wąsek, the principle of subjectivization is a "rule ordering to consider, while determining the basis of the scope and penal liability of the perpetrator, the latter's psychical experience, psychical disposition, etc.", which, when the principle of guilt is kept, can at the same time affect the broadening of his/her liability.[4] This can be seen, for example, in the punishability of attempted (also inept) crime and preparation for a crime.[5] On the other hand, the principle of guilt, according to this author, is "a rule of penal liability establishing that the perpetrator's guilt determines the basis and scope of penal liability".[6] The above definition of this principle of material penal law is of abstract character, whereas the scope of its binding is determined by the rules of law.

The science of penal law has been concerned with the essence of guilt for a long time. Theories of guilt became an attempt to determine it. Till now, a few more serious theories have been created, including the two most important: psychological and normative ones.[7]

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[2] *Uzasadnienie projektu kodeksu karnego z 1968 r*., Warszawa 1968, p. 96.

[3] Cf. a review of standpoints on this subject in: A. WĄSEK, *Ewolucja prawnokarnego pojęcia winy w powojennej Polsce*, "Przegląd Prawa Karnego" 1990, No. 4, pp. 12-14. On the other hand, J. WOJCIECHOWSKI claims that the concept of guilt in the penal code from 1969 was based on both theories: psychological in reference to intentional and unintentional guilt in the form of carelessness, and normative referring to negligence; J. WOJCIECHOWSKI: *Kodeks karny. Krótki komentarz praktyczny*, Skierniewice 1993, p. 13.

[4] A. WĄSEK, *Ewolucja prawnokarnego pojęcia winy w powojennej Polsce*, p. 7.

[5] On subjectivization of penal liability more in: J. KOCHANOWSKI, *Subiektywne granice sprawstwa i odpowiedzialności karnej*, Warszawa 1985, pp. 46 ff.

[6] A. WĄSEK, *Ewolucja prawnokarnego pojęcia winy w powojennej Polsce*, p. 5.

[7] According to W. PATRYAS, determination of the essence of guilt still constitutes an open problem since no satisfying answer has been found so far [in:] *Interpretacja karnistyczna. Studium metodologiczne*, Poznań 1988, p. 210.

From the point of view of the psychological theory, the essence of guilt consists of the act-defined perpetrator's mental disposition towards the prohibited act that the former committed. According to the assumptions of this theory, guilt is identified with the subjective side of the crime (intentionality and unintentionality) and can be expressed through the relation of will or image. A characteristic feature of the views from the psychological theories is also treating guilt as a substance and, consequently, considering it in the sphere of existence. A. Wąsek, in spite of being a representative of advocates of the complex normative theory of guilt, also accedes to this opinion in the sphere of the ontological elements of guilt.[8] Psychological theories justified guilt according to the thought of the creators of the 1932 penal code,[9] while having very few followers now.

Normative theories came into being on the grounds of criticism of psychological concepts and they recognized the essence of guilt as the personal culpability of the perpetrated act. Normativists assumed that the essence of guilt consists in the possibility of bringing a charge because of the wrong decision made and the wrong behaviour. The basis of such a charge is infringing the norm of proceeding (expressing a prohibition of behaviors in the penal act addressed to the subjects towards which a given act is applicable) and finding the culprit in a "normal motivational situation" (if there are no circumstances excluding the guilt). According to A. Marek, "the essence of guilt does not lie within the psychical process (forbidden will) but is related to the objection that the perpetrator should not show such will".[10] Two main kinds of the normative theory appeared: a complex normative theory and a "pure" (finalistic) normative theory.

The complex theory, apart from the normative element constituting its basis, also contains the psychical element: the psychical relation of the perpetrator to the act, which is aptly expressed by K. Buchała: "guilt is negatively assessed (objected) intentionality or unintentionality".[11] On the other hand, the essence of guilt according to the "pure" normative theory is constituted only by the objectional nature of behavior from the point of view of definite values. Hence, guilt consists in the very objection posed to the perpetrator that the latter's behaviour opposed the legal norm. Such a definition of guilt arose thanks to treating intentionality or unintentionality as elements of an act (a sign of the finalistic concept of an act according to

[8] A. WĄSEK, *Ewolucja prawnokarnego pojęcia winy w powojennej Polsce*, p. 14.

[9] J. MAKAREWICZ, *Kodeks karny z komentarzem*, Lwów 1938, p. 74.

[10] A. MAREK, *Prawo karne*, Warszawa 2003, p. 133. The author refers to the sentence said by one of the creators of the normative theory, J. Goldschmidt that guilt is not the will to do something prohibited buy the prohitability of guilt.

[11] K. BUCHAŁA, Z. ĆWIĄKALSKI, M. SZEWCZYK, A. ZOLL, *Komentarz do kodeksu karnego. Część ogólna*, Warszawa 1994, p. 39.

H. Welzl). Normative theories, especially in the complex view, won recognition among the theoreticians and practicians of law.

It is also worth mentioning the relational theory of guilt by W. Patryas, which views guilt as a relation (feature) of the prohibited act.[12] It found its followers among some specialists on penal law. M. Rodzynkiewicz extended the definition of the relation of culpability introducing new elements and he also saw far-reaching consequences in the form of refuting the dogma of different grades of guilt – the relational view naturally does not allow for graduating the guilt (the relation of culpability occurs or not, there can be no relation in a certain degree – whereas in the normative view there can be abigger or smaller degree of culpability)[13]. J. Majewski and P. Kardas are also inclined to the view that guilt is a relation, but they suggest that on the ground of the Polish law the initial point should not be the relation of culpability but the relation of being guilty; besides, they put forward a thesis on the ambiguity of the name guilt[14].

As was emphasized earlier, the Polish penal law – basing on the codes from 1932 and 1969 – decreed penal liability according to the principle of guilt, but that followed only indirectly from the interpretation of some regulations. There was neither a distinct declaration of guilt nor a definition of what guilt was and how to establish it. Art. 18 § 2 provided that the regulation of Art. 18 § 1 did not apply in the scope of causes and effects of diminished accountability if the diminishment of accountability was the "perpetrator's guilt", which means that the latter identified guilt with intentionality or unintentionality. It is accepted on this basis that the code viewed guilt according to the psychological theory.[15] In the code from 1969, the principle of guilt was reconstructed on the basis of Article 7 containing the "form of guilt" and Article 120 § 1, establishing what a prohibited act was. The expressions "out of intentional guilt" and "out of uninten-

[12] W. PATRYAS, *Interpretacja karmistyczna*, pp. 191-198. His is a New, methodological way of defining guilt although treating guilt as a relation appeared earlier, cf. K. BUCHAŁA, *Wina, wina nieumyślna*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze" 1977, No. 4, p. 92.

[13] M. RODZYNKIEWICZ, *Pojęcie winy w prawie karnym – próba analizy krytycznej na tle ujęcia relacyjnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1992, No. 3, pp. 17-19. According to M. RODZYNKIEWICZ, guilt should be ascribed "when there occurs a relation of compatibility between the perpetrator's behaviour and the presented description (objective language) Hence, the definition of guilt itself must have the character of a metalanguage", p. 22.

[14] J. MAJEWSKI, P. KARDAS, *O dwóch znaczeniach winy w prawie karnym*, "Państwo i Prawo" 1993, No. 10, p. 74.

[15] However, according to W. Wolter, guilt under the rule of the 1932 code, was viewed normatively and the statement used in Art. 18 § 2 was omission, cf. W. WOLTER, *Prawo karne*, Warszawa 1947, pp. 257-258.

tional guilt" used by the legislator pointed to the understanding of guilt according to the complex normative theory.[16]

Article 1 § 3 of the penal code from 1997 directly states – enumerating particular elements of a crime – that "the perpetrator does not commit a crime if they cannot be ascribed guilt during the act", which constitutes a clear declaration of recognizing guilt as anecessary condition of an offence. The code formulation does not distinctly refer to one theory of guilt but it can be concluded that it is based on the normative theory.[17] According to some, however, it is now always possible to unequivocally establish whether this is its complex kind or the "pure" one.[18]

Separation of the notions "intentionality" and "unintentionality" (i.e. the elements of the subjective side) from guilt testifies to the purely normative variety. The basis of the above-mentioned normalization is adopting the view that the subjective side of the prohibited act is this part of the features that concerns the perpetrator's relation to the act realized by the latter. On the other hand, the subjective side together with the objective one provide the basis to apply legal qualification of a given act, which means establishing its punishability. It is only the punishable act that can be submitted to assessment and it can be stated whether it is culpable or not.[19]

The occurrence of the principle of guilt in penal law – according to the present penal code – is connected with two functions performed by guilt. These are, above all, the legitimating function which gives the basis for the state's reaction in the form of punishment for a prohibited act (Article 1 § 3 of the penal code) as well as the limiting function – in the form of establishing the punishment on the basis of the degree of guilt (Article 53 § 1 of the penal code).[20]

The first aspect is expressed in justifying the activities of state organs – or, strictly speaking – trial organs – in reaction to the commitment of a prohibited act

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[16] A. WĄSEK, *Ewolucja prawokarnego pojęcia winy w powojennej Polsce*, pp. 12 ff.

[17] This is also the standpoint of the authors of this code, e.g. A. Zoll, [in:] K. BUCHAŁA, A. ZOLL eds., *Kodeks karny, część ogólna. Komentarz do art. 1-116 Kodeksu karnego*, Kraków 1998, p. 24, whereas realization of the project of the Penal code from December 1989 directly referred to the normative theory of guilt: Art. 1 § 4. "The perpetrator of a prohibited act is subject to penal liability only if at the moment of the act legal behaviour could be required from them" – ibid., pp. 23-24.

[18] On its purely normative understanding J. ZIENTEK, *Karygodność i wina jako przesłanki odpowiedzialności w nowym kodeksie karnym*, "Prokuratura i Prawo" 1998, No. 6, pp. 17-27; critically on his subject P. JAKUBSKI, *Wina i jej stopniowalność na tle kodeksu karnego*, "Prokuratura i Prawo" 1999, No. 4, pp. 43-50.

[19] A. ZOLL, *Ogólne zasady odpowiedzialności karnej w projekcie kodeksu karnego*, "Państwo i Prawo" 1990, No. 10, p. 33.

[20] A. ZOLL, [in:] K. BUCHAŁA, A. ZOLL (eds.), *Kodeks karny*, *Ogólne zasady odpowiedzialności karnej w projekcie kodeksu karnego*, pp. 42-43.

through the establishment of guilt as one element of crime besides punishability, culpability and unlawfulness. The literature rightly emphasizes that guilt can be ascribed only to the person who is sufficiently conscious of their behaviour and its possible consequences having made a free choice in a given situation.[21] This is an important statement since it strengthens the guaranteeing function of penal law – penal liability is dependent on guilt. The principle of guilt has the importance of aconstitutional principle (although formally it is not expressly stated as such) because it can be derived both from the principle of a democratic state of law and the principle of man's dignity (Articles 2 and 30 of the RP Constitution). Therefore, retracting from this principle in the penal code or other penal acts is seriously limited.[22] According to the authors of the code, to realize the above assumption it is necessary to pay more attention to the establishment of guilt in the process of realizing penal liability: "guilt must be an element of crime independently established in the penal proceedings" – states the justification to the project of the code.[23] This is undoubtedly the right premise but the code itself does not make its realization easier. The declaration of guilt included in Article 1 § 3 of the penal code contains only the consequences of the lack of guilt for a crime having no positive definition of what guilt is, what elements it is made of, or what premises make it happen. That is the reason why it was suggested that the premises of guilt that must be fulfilled jointly should be established on the basis of particular solutions of the code so that the perpetrator could be ascribed a specific prohibited act.[24]

Such a person must possess the ability to bear the guilt expressed in reaching the proper age (Article 10 of the penal code) and the proper state of mind, i.e. accountability, at least diminished (Article 31 of the penal code), the possibility of recognizing the unlawfulness of a specific act as well as recognizing whether there occur circumstances excluding unlawfulness or guilt (Articles 29 and 30 of the penal code). Besides, it should be recognized that behaviour consistent with law can be required from them in a specific situation (Articles 26 § 2, 318 and 344 of the penal code).[25] In order to ascribe guilt, the proper kind of the subjective side established by law is also necessary. Article 8 of the penal code provides that

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[21] M. KRÓLIKOWSKI, [in:] M. KRÓLIKOWSKI, R. ZABŁOCKI (eds.), *Kodeks karny. Część ogólna. Komentarz do art. 1-31*, Vol. I, Warszawa 2010, p. 202.

[22] A. WĄSEK, *Ewolucja prawokarnego pojęcia winy w powojennej Polsce*, p. 6. The author also refers to a similar view in the Constitution of the Federal Republic of Germany and an analogous standpoint on this interpretation.

[23] *Uzasadnienie projektu kodeksu karnego z 1997 roku*, "Państwo i Prawo" 1994, No. 3 (an insert), p. 5.

[24] A. ZOLL, [in:] K. BUCHAŁA, A. ZOLL (eds.)., *Kodeks karny*, pp. 24-25.

[25] A. MAREK, *Prawo karne*, p. 136.

a crime can be committed only intentionally, whereas in the case of a misdemeanour it can also be committed unintentionally if the act provides so. Such a standpoint proves that for a crime to be committed it is not enough to state that the perpetrator committed a culpable prohibited act but it is necessary to check whether there occurs a feature of intentionality required by the legislator (it follows from the wording of this rule that the principle is committing aprohibited act in an intentional way – in relation to a crime – absolutely! – whereas it is only in the case of a misdemeanour that the legislator can clearly establish the exceptions stipulating for unintentional commitment of a prohibited act).

In connection with the code's view on culpability from the negative side, an opinion pointing to the possibility of introducing guilt presumption appeared in the literature. It would consist in presuming culpability of the perpetrated act following from the fact of realizing the features of a prohibited act. Emphasis is placed above all on the practical aspect of such an assumption, which is the impossibility of proving the fulfilment of all premises of culpability, especially the impossibility of examination of evidence on the "possibility of other behaviour".[26] Besides, an attempt was made to constitutionally justify such a view referring to Article 30 of the RP Constitution and the recognition of man's inborn dignity as the source of man's responsibility for their deeds.[27] According to the advocates of this concept, the court is not exempt from an obligation to carefully consider whether in a given situation there are any circumstances excluding or diminishing the perpetrator's guilt.

Such a standpoint cannot be accepted since then attributing guilt to the perpetrator would come down only to establishing whether in a specific situation there are any circumstances that reverse guilt or not. The authors of the present code treat this process in a much broader manner placing the court under an obligation to carryout reasoning oriented at justifying the objection of the possibility of the perpetrator subordinating themselves to an order or prohibition following from the legal norm.[28] The assumptions in question were better referred to in the version of the principle of guilt from the 1989 project of the penal code

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[26] M. KRÓLIKOWSKI, [in:] M. KRÓLIKOWSKI, R. ZABŁOCKI (eds.), *Kodeks karny*, p. 207 and the literature quoted there.

[27] W. WRÓBEL, *Wina i zawinienie a strona podmiotowa czynu zabronionego, czyli o potrzebie posługiwania się w prawie karnym pojęciem winy umyślnej i nieumyślnej*, [in:] J. GIEZEK (ed.), *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, Kraków 2006, pp. 678-679.

[28] Cf. e.g. A. ZOLL, *Strona podmiotowa i wina w kodeksie karnym z 1997 r. i w projektach jego nowelizacji*, [in:] *Prawo – społeczeństwo – jednostka. Księga jubileuszowa dedykowana Profesorowi Leszkowi Kubickiemu*, Warszawa 2003, p. 409.

on the basis of which the perpetrator's guilt could be ascribed only if at the moment of the act, behaviour consistent with the law could be required from them. The present wording of Art. 1 § 3, differing from the former one, also clearly orders to ascribe guilt to the perpetrator (and not examine whether there are circumstances excluding guilt) in order to acknowledge that they committed an offence. The trial principle of presumption of innocence stipulating that the accused person is considered not innocent until their guilt is proved and confirmed with a valid sentence (Art. 5 § 1 of the code of penal proceedings) refers to the positive examination of guilt. "Proving" guilt means examining whether behaviour consistent with law could be required from the perpetrator at the moment of the act, considering their degree of maturity, the capability of recognizing illegality and the motivational situation. Hence, it would not be possible to apply the trial principle of presumption of innocence if the material concept of presumption of culpability was adopted.

On the other hand, the limiting function of guilt determines the limits of distress while applying the penalties which cannot be trespassed by the court either while choosing the kind of penalty or while adjudicating its size.[29] According to Art. 53 § 1 of the penal code, the court inflicts a penalty in such a way that it should not exceed the degree of guilt. Such an attitude is based on the idea of the penal law of the act (and not the penal law of the perpetrator): it is only the perpetrator's act that can be the basis of presenting the charges and the perpetrator himself is to be punished not for what he is but for what he has done.[30]

One should agree with the thesis that the degree of guilt in this case must not be determined in the context of ascribing the guilt. It should be made more objective, referring to the very act, the harm done, and at the same time considering such elements concerning the scope of the perpetrator's liability as his maturity and accountability.[31] The proper adjustment of the penalty to the degree of guilt is supposed to justify the former and make it adjusted to individual resocialization needs of the perpetrator.

The principle of guilt as the basis of responsibility has much greater importance than in other fields of law, where other kinds of responsibility occur as well, e.g. in civil law, responsibility on the basis of risk. Penal law is assumed to be based on responsibility for one's own guilt and such a solution could not be applied. A certain change has taken place since the act came into life on re-

[29] K. BUCHAŁA, [in:] K. BUCHAŁA, A. ZOLL (eds.), *Kodeks karny*, p. 386.
[30] Ibidem, p. 42.
[31] M. KRÓLIKOWSKI, [in:] M. KRÓLIKOWSKI, R. ZABŁOCKI (eds.), *Kodeks karny*, p. 211.

sponsibility of collective subjects for the acts prohibited upon the pains[32] since the basis of bringing a collective subject to justice is establishment of guilt in the choice or guilt in supervision from the organ or representative of the collective subject (Art. 5 of this act). This kind of responsibility does not, however, belong to penal liability in the strict sense also because it has a secondary character (it is necessary to earlier convict a person for an offence or a fiscal offence, according to the conditions determined in Art. 3 and 4 of this act) and, besides, the applied penal measures are not of a strictly personal character.

The concept of guilt contained in the binding penal code was not favourably accepted by many lawyers. Maybe, like in case of anumber of other solutions, it should be modified and supplemented with certain aspects. However, it should be emphasized that this is the first attempt to introduce the principle of guilt in our legal system in a clear way. The authors of the 1997 code ventured to declare the principle of guilt and speak for a definite concept of guilt. The future fate of these solutions, the changes of which have been attempted more than once, are not known. Maybe these changes be profoundly reflected upon and maybe they will not bring effects in the form of regress in the Polish penal law.

The concepts on the essence of guilt presented here in brief "usually mean ordering definite institutions carried out with the aim of providing and justifying the aptness of the definition of guilt",[33] which is connected with adopting the view that guilt is a theoretical and not dogmatic notion(which means that it is not defined by act) and hence it is (still) possible to create different propositions about the ways of viewing guilt on theoretical grounds.

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[32] The act from 28 October 2002, "Dziennik Ustaw" [Journal of Laws] No. 197, item 1661, as amended.

[33] W. PATRYAS, *Interpretacja karnistyczna*, p. 191.

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THE PRINCIPLES OF GUILT – REMARKS ON THE BACKGROUND OF THE POLISH PENAL CODE

S u m m a r y

Guilt, besides punishability and culpability, constitutes an element of the definition of a crime. Scientific literature broadly describes problems pertaining to the essence of guilt and it creates its definitions. However, there is no agreement in this respect and a few more important theories of guilt have been put forward. The 1997 code for the first time introduced the declaration of guilt and the solutions about guilt which principally differ from the previous ones. The Author of the present paper makes an attempt to get a closer look at the problem of guilt, its importance for penal liability as well as trying to point out which solutions concerning the perpetrator's guilt have been adopted in the present code.

Key words*:* guilt; principle of subjectivization; normative theory of guilt; psychological theory of guilt; relational theory of guilt; intentionality; unintentionality.

ZASADY WINY
– UWAGI NA TEMAT KONTEKSTU POLSKIEGO KODEKSU KARNEGO

S t r e s z c z e n i e

Wina, oprócz karalności i karygodności, stanowi element definicji przestępstwa. Literatura fachowa szeroko opisuje problemy związane z istotą winy i tworzy jej definicje. Nie ma jednak w tym względzie zgody i przedstawiono kilka dalszych istotnych teorii winy. Kodeks z roku 1997 po raz pierwszy wprowadził przyznanie się do winy i rozwiązania dotyczące winy, które zasadniczo różnią się od poprzednich. Autorka niniejszego artykułu próbuje przyjrzeć się bliżej problemowi winy, jego istotności dla odpowiedzialności karnej, jak również stara się wskazać, które rozwiązania dotyczące winy sprawcy przestępstwa zostały przyjęte przez obowiązujący kodeks.

Słowa kluczowe: wina; zasada subiektywizacji; normatywna teoria winy; psychologiczna teoria winy; relacyjna teoria winy; umyślność; nieumyślność.

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