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BODY OF CRIME IN CZECH AND POLISH CRIMINAL LAW

STRUKTURA PRZESTĘPSTWA W CZESKIM ORAZ W POLSKIM PRAWIE KARNYM

Summary: The Republic of Poland and the Czech Republic are countries with a similar legal culture and legislative history. This is also noticeable in the field of criminal law. Therefore, it is useful to conduct comparative legal studies on the structure of the crime and its elements (unlawfulness, social harmfulness and culpability). Determining the similarity also in this area will allow to justify further research that may contribute to solving specific problems related to individual elements of the crime body. Thanks to this, the arrangements made within one of the presented laws could affect the other.

Keywords: criminal law, body of crime, unlawfulness, social harmfulness, culpability

Streszczenie: Rzeczpospolita Polska i Republika Czeska są krajami o zbliżonej kulturze prawnej oraz historii legislacyjnej. Jest to zauważalne również w dziedzinie prawa karnego. W związku z tym przydatne jest dokonanie badań prawnoporównawczych dotyczących struktury przestępstwa i jej elementów (bezprawności, społecznej szkodliwości i winy). Ustalenie podobieństwa również w tym zakresie pozwoli uzasadnić prowadzenie dalszych badań, mogących przyczynić się do rozwiązania szczegółowych problemów związanych z poszczególnymi elementami modelu przestępstwa. Dzięki temu ustalenia dokonane w ramach jednego z zaprezentowanych porządków prawnych mogłyby oddziaływać na drugi.

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Słowa kluczowe: prawo karne, struktura przestępstwa, bezprawność, społeczna szkodliwość, wina

INTRODUCTION

The value of comparative legal research for the development of science cannot be underestimated. It is particularly important to compare the norms of legal systems of countries with similar legal cultures. This article is devoted to an attempt to present the crime model in Czech criminal law and to compare this structure with the one developed under Polish law. The choice of Czech criminal law for comparative legal research results from its great similarity to Polish law[1]. Both the Republic of Poland and the Czech Republic are countries based on the principle of a democratic state under the rule of law, and their criminal law adopts a very similar formal and substantive construction of the crime or the principle of *nullum crimen/nulla poena sine lege*, which is universally valid pursuant to continental criminal law, as well as the principle of subsidiarity[2]. In the area of criminal law, the two countries also share a common legislative history, including the fact that they base previous criminal laws on the principle of social danger of the act, which characterized the Eastern Bloc countries[3]. In this regard, it is worth hypothesizing that the body of crime in Czech criminal law is very similar to the crime model found in the Polish legal system.

The provisions of the Czech Criminal Code[4] and the Polish Criminal Code[5], especially those creating the principles of criminal liability, will be researched. A formal-dogmatic analysis of the provisions of the law will be used for research purposes. The comparative law method will be used to synthesize the understanding of unlawfulness and culpability in Czech law with the interpretation of these issues under Polish criminal law.

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1 F. Ščerba, *Protection of Children in Czech Substantive Criminal Law and Its Comparition with the Polish Legal Regulation*, "ASEJ. Scientific Journal Bielsko-Biala School of Finance and Law" 2020, No. 4, s. 25; M. Grudecki, *The Assessment of Permissibility of Using Non-statutory Justifications in Czech and Polish Criminal Law*, "Časopis pro právní vědu a praxi" 2022, No. 3, s. 573-574.

2 F. Novotný et al., *Trestní právo hmotné*, Pilsen 2017, p. 13.

3 Z. Karabec et al., *Criminal Justice System in the Czech Republic*, Prague 2017, p. 22.

4 Zákon č. 40/2009 Sb ze dne 8. ledna 2009 - trestni zákonik, hereinafter referred to as TrZ.

5 Act of June 6, 1997 - Criminal Code (Journal of Laws of 2022, item 1138), hereinafter referred to as the Criminal Code.

BODY OF CRIME IN CZECH CRIMINAL LAW

The crime model in force in the Czech Republic can be read mainly from the provision of § 13 of the TrZ. According to it, a crime *(trestný čin*) is **an unlawful act that the criminal law recognizes as criminal and that conforms to the elements provided for by the Act**. The literature points out that from this definition result two obligatory and necessary prerequisites for the simultaneous fulfillment of the qualification of an act as a crime: **unlawfulness** *(protiprávnost*) and the realization of the **characteristics** *(znaky*) described in the criminal act – not only in the Criminal Code (TrZ), but also any other[6]. According to some representatives of the doctrine, Czech criminal law is based on **a formal definition of the crime**[7]. In the literature, these features indicated by the Criminal Law referred to in § 13 of the TrZ include[8]:

a) features *(znaky skutkové*): unlawfulness (*protiprávnost*), object *(objekt*), object side (*objektivní stránka*), and subject and subject side *(subiekt a subjektivní stránka*).

b) adequate age;

c) sanity *(příčetnost*).

Adequate age and sanity are not the hallmarks of crimes, as they are not among the typical characteristics to distinguish one criminal act from another[9]. On the contrary, they are common (general) features of all crimes[10]. They are a feature of the crime referred to as a "capable offender"[11] or a "freely acting offender"[12].

SUBSTANTIVE ELEMENT IN THE DEFINITION OF CRIME IN CZECH CRIMINAL LAW

Despite the fact that in the above-presented definition of the crime there is no longer an *expressis verbis* material element, as was the case on the grounds of § 3(1) of the Czech Criminal Code of 1961[13], the necessity for the act to demonstrate social harm is interpreted from the essence of unlawfulness, consisting of a formal element and a material element – precisely social harm[14] – contradiction with the

[6] J. Jelínek et al., *Trestní právo hmotné. Obecná část. Zvláštní část*, Prague 2022, p. 134.

[7] J. Jelínek et al., *Trestní...*, p. 135; F. Novotný et al., *Trestní...*, p. 62; P. Šámal et al., *Trestní právo hmotné*, Prague 2022, p. 99; M. Fryšták, V. Kalvodová, J. Provazník, *Selected problems of the Czech criminal law*, Brno 2015, p. 20.

[8] In P. Šámal et al., *Trestní zákonik I. Obecná část (§ 1 -139*), Prague 2012, p. 143.

[9] P. Šámal et al., *Trestní zákonik...*, p. 144; J. Jelínek et al., *Trestní...,* p. 208.

[10] P. Šámal et al., *Trestní zákonik...*, p. 144; J. Jelínek et al., *Trestní...,* p. 142.

[11] J. Nezkusil, *Trestní právo hmotné*, Prague 2011, p. 13.

[12] V. Kratochvil, *Filozofie trestného činu v pojímání brněnské trestněprávní školy*, "Pravnik" 2019, no. 1, p. 51.

[13] Zákon č. 150/1961 Sb ze dne 29. listopadu 1961 - Trestni Zákon. "A crime is an act that is dangerous to the public, the elements of which are provided for in this Act".

[14] J. Jelínek et al., *Trestní...,* p. 134; J. Nezkusil, *Trestní...,* p. 14; V. Solnař et al., *Systém českého trestního*

law as a set of values[15]. **The crime must be a socially harmful act, since, in accordance with the principle of subsidiarity of criminal repression resulting from § 12 (2) of the TrZ only such can be subjected to criminal repression**[16]. This is the so-called substantive correction of unlawfulness[17].

The aforementioned provision of Section 12 (2) of the TrZ creates the principle of subsidiarity (the principle of criminal law as *ultima ratio*), according to which the criminal liability of the perpetrator and the associated criminal law consequences may be applied only in socially harmful cases, in which the application of liability under another legal provision is not sufficient. Under this norm, the court must consider in each case whether, taking into account the social harmfulness of the committed act and its nature and the consequences resulting from it, more effective protection of the violated legal interest is not provided by liability under other branches of law – administrative (including misdemeanors), civil or commercial[18]. These prerequisites (social harmfulness and ineffectiveness of the application of a legal regulation flowing from another branch of law) must be met cumulatively[19]. The instruments of criminal law carry a lot of negative consequences, and therefore, in doing justice to the view of this branch of law as the *ultima ratio* of response to socially undesirable acts, it is necessary first to use more discreet and cheaper instruments with fewer side effects[20]. Criminal liability is excluded in situations where the application of other types of liability will allow to fulfil its functions – corrective and preventive ones, and the implementation of the repressive function will prove to be unnecessary[21]. It can therefore be used when milder instruments are insufficient, inappropriate or have already been exhausted[22]. This obviously does not mean the impossibility of cumulative liability, for example, in the form of simultaneous criminal and civil liability[23].

práva, Prague 2009, p. 104; P. Mates, K. Šemik, *Společenská škodlivost jako znak přestupku*, "Bulletin Advokacie" 2021, no. 4, p. 31; P. Šámal, *Pojetí protiprávnosti podle nového trestního zákoníku*, "Právník" 2011, no. 8, p. 731.

15 V. Pelc, *Krajní nouze v trestním právu*, Prague 2021, pp. 162-163.

16 F. Novotný et al., *Trestní...*, p. 73; J. Nezkusil, *Trestní...*, p. 14; P. Šámal, *K pojmu trestného činu a souvisejícím otázkám v novém trestním zákoníku*, "Trestněprávní Revue" 2009, no. 5, p. 133; J. Jelínek, *K pojmu trestného činu v novém trestním zákoníku*, [in:] J. Jelínek (ed.), *O novém trestním zákoníku. Sborník příspěvků z mezinárodní konference Olomoucké právnické dny, květen 2009 trestněprávní sekce*, Prague 2009, p. 25.

17 M. Fryšták, V. Kalvodová, J. Provazník, *Selected...*, p. 20; J. Jelínek, *K pojmu...,* p. 21.

18 P. Šámal, *K pojmu...,* p. 137; J. Jelínek, *K pojmu...,* p. 27.

19 J. Jelínek, *K pojmu...,* p. 25.

20 A. Tibitanzlová, J. Mulák, *Ještě několik poznámek na téma zasady subsidiarity trestní represe*, „Trestněprávní Revue" 2018, no. 5, p. 116.

21 F. Ščerba et al., *Trestní...,* p. 162; A. Tibitanzlová, J. Mulák, *Ještě...*, p. 119.

22 A. Tibitanzlová, J. Mulák, *Ještě...*, p. 116.

23 A. Tibitanzlová, J. Mulák, *Ještě...*, p. 119. See also Resolution of the Supreme Court of the Czech Republic of August 10, 2018, 8 TDO 803/2016, "Sbírka soudních rozhodnutí a stanovise" 2017, no. 10, č. 50.

According to the principle presented above, the lack of social harmfulness of the perpetrator's act prevents the occurrence of criminal repression, so the substantive element must fit into the concept of crime[24]. If the act is not socially harmful, it is not a crime and does not give rise to criminal liability[25]. Thanks to this institution, it is possible to eliminate insignificant acts that should not be punished, although they formally fulfil the elements of criminal acts (the principle of *minima non curat pretor*)[26]. The norm of criminal law in such cases is not able to respond properly to the particularly low degree of social harmfulness of the act[27]. The Czech legislator was worried that the formal concept of crime would overload the judiciary with minor cases, hence through a substantive correction it tried to prevent this[28]. The principle of subsidiarity mitigates the formal aspect of the concept of a crime under § 13 section 1 of the TrZ[29], making it possible to avoid severe criminal repression in any case of behavior consistent with the elements of the crime[30]. It seems that this is why, according to some representatives of the doctrine, the Czech Criminal Code eventually adopted **a formal-substantive** definition of the crime[31].

UNLAWFULNESS AS AN ELEMENT OF THE STRUCTURE OF A CRIME IN CZECH CRIMINAL LAW

An unlawful act in Czech criminal law is an act that contradicts legal norms decoded from the entire law[32]. Unlawfulness is an expression of the danger the act poses to society[33]. The conception of illegality as the incompatibility of an act with the whole order corresponds with the conception of crime as an unlawful act[34]. Sources of illegality can be sought, for example, in violations of constitutional law norms, especially those resulting from the Charter of Fundamental Rights and Free-

[24] F. Ščerba et al., *Trestní zákonik. Komentář*, Prague 2020, p. 155.
[25] F. Ščerba et al., *Trestní...* , p. 125.
[26] P. Šámal et al., *Trestní právo...*, p. 104; P. Šámal, *Trestní zákonik a naplňováni funkcí a základních zasad trestního práva hmotného*, „Bulletin Advokacie" 2009, no. 10, p. 23; P. Šámal, *K pojmu...,* p. 134; A. Tibitanzlová, J. Mulák, *Ještě...*, p. 119.
[27] K. Kandová, *Materiální a (nebo) procesní korektiv v trestním právu*, „Trestněprávní Revue" 2017, no. 5, p. 113.
[28] P. Šámal, *K pojmu...,* p. 134.
[29] A. Tibitanzlová, J. Mulák, *Ještě...*, p. 115; J. Jelínek, *K pojmu...,* p. 25; V. Pelc, *Krajní...,* p. 147.
[30] K. Kandová, *Materiální...,* p. 114.
[31] P. Šámal, *Trestní...,* p. 23; Z. Karabec et al., *Criminal...*, p. 16; K. Kandová, *Materiální...,* p. 115. A. Tibitanzlová, J. Mulák*(Ještě...*, p. 116) call it a materialized formal definition.
[32] F. Novotný et al., *Trestní...*, p. 142; J. Jelínek et al., *Trestní...*, p. 134; P. Šámal et al., *Trestní právo...*, p. 101; F. Ščerba et al., *Trestní...,* p. 174; P. Šámal, *Několik poznámek k úpravě zavinění v rekodifikaci trestního práva hmotného*, [in:] *Ve službách práva. Sborník příspěvků k 10. výročí založení pobočky nakladatelství C.H. Beck v Praze*, Prague 2003, p. 262.
[33] V. Solnař et al., *Systém...,* p. 104.
[34] P. Šámal et al., *Trestní zákoník...*, p. 148.

doms[35]. This does not mean that the source of the standard whose exceeding will mean illegality cannot also be the criminal act itself[36].

Unlawfulness in the Czech criminal law doctrine is treated as one of the features of a prohibited act, along with the object of protection, the object side, the subject and the subject side[37]. Indeed, sometimes it is possible to distinguish one crime from another thanks to the unlawfulness, for example, when the source of illegality is indicated in a specific provision ("in a manner other than that permitted by law...")[38].

Illegality can be excluded by means of a legal norm resulting from a legal act other than the criminal act and by a norm having its source in the criminal statute itself (circumstances excluding unlawfulness)[39]. Because of the principle of internal inconsistency of the law, it does not matter which legal regulation (derived from which branch of law) excludes the unlawfulness of the act[40].

Circumstances excluding unlawfulness are treated by representatives of the Czech criminal law doctrine as situations in which the perpetrator's act, although it fulfils the characteristics of any of the prohibited acts, is committed for special motives that make it beneficial to society (insufficiency of social harmfulness of the act)[41]. An act committed under a circumstance excluding unlawfulness is only similar to a criminal act but it does not entails a danger to society and thus cannot be a crime[42]. The authority, creating circumstances that exclude unlawfulness, enables individuals to effectively protect not only their own interests, but also the interests of other members of society and the community as a whole[43].

Circumstances excluding unlawfulness in the Czech Criminal Code are: necessary defense *(nutnou obranu*), state of superior necessity *(krajní nouzi*), authorized use of weapons (*oprávněné použití zbraně*), permission of the injured party (*svolení poškozeného*), acceptable risk *(přípustné riziko*)[44]. According to representatives of the doctrine, this catalogue is not closed, but exemplary, since analogy *in bonam partem* (in favour of the perpetrator) is allowed[45]. It is pointed out that there is a risk that the legislator has not decreed all the circumstances excluding unlawfulness, which, if they occur in a given state of facts, could lead to the risk injustice to the

[35] Usnesení předsednictva České národní rady 2/1993 Sb ze dne 16. prosince 1992 o vyhlášení LISTINY ZÁKLADNÍCH PRÁV A SVOBOD jako součásti ústavního pořádku České republiky. See P. Šámal et al., *Trestní zákonik*..., p. 148.
[36] Ibidem.
[37] P. Šámal et al., *Trestní zákonik*..., p. 208.
[38] Ibidem.
[39] F. Ščerba et al., *Trestní*... , p. 174.
[40] Ibid, pp. 174-175.
[41] P. Šámal et al., *Trestní právo*..., p. 244; E. Janečková, *Právni aspekty sebeobrany*, Prague 2015, p. 22.
[42] E. Janečková, *Právni*..., p. 22.
[43] Ibidem, p. 23.
[44] E. Brucknerová, *Trestní právo hmotné a procesní. Obecná část*, Brno 2022, p. 86.
[45] E. Janečková, *Právni*..., pp. 22-23; V. Pelc, *Krajní*..., p. 134.

perpetrator[46]. Examples of circumstances not contained in the code that exclude unlawfulness in Czech criminal law are the exercise of granted rights or the fulfilment of entrusted duties and acting in accordance with established tradition[47].

CULPABILITY AS AN ELEMENT OF THE STRUCTURE OF A CRIME IN CZECH CRIMINAL LAW

According to § 13 section 2 of the TrZ, criminal liability for a crime requires wilful misconduct, unless the criminal act expressly provides that negligent misconduct is sufficient. Therefore, it seems that culpability does not constitute a separate element in the structure of a crime in Czech criminal law. It is included as an element of the subject side of the features of the crime[48]. However, this does not change the fact that Czech criminal law is based on the principle of culpability[49].

Culpability (actually culpable act, or culpability in the narrower sense – *zavinění*)[50] in Czech criminal law is understood as the **internal mental attitude of the perpetrator towards the objectively occurring in reality elements of the act he undertook**, existing at the moment of this act[51]. In Czech criminal law, it is generally accepted that culpability is an obligatory element of the subject side of a crime and one of the conditions for incurring criminal liability (the principle of culpability - *nullum crimen sine culpa*)[52].

Two forms of culpability are commonly distinguished in Czech criminal law: wilfulness and negligence[53]. Within the framework of willful misconduct, a distinction can be made between **direct intent** *(úmysl přímý*) and **indirect/conceivable intent** *(úmysl nepřímý či eventuální*), differing fundamentally in the content of the volitional component[54]. **Negligent culpability** means a situation in which the perpetrator failed to exercise due diligence in undertaking a certain act and caused legally relevant consequences with it[55]. It is divided into **conscious carelessness** *(nedbalost vědomá*) and **unconscious carelessness** *(nedbalost nevědomá*)[56]. Therefore, culpability can be attributed to the perpetrator when, at least given the circum-

[46] V. Pelc, *Krajní...*, p. 134.
[47] Ibidem, p. 134.
[48] P. Šámal et al., *Trestní zákonik...*, p. 145.
[49] P. Šámal et al., *Trestní zákonik...*, p. 210; J. Herczeg, *Zavinění a omyl w novém trestním kodexu*, „Bulletin Advokacie" 2009, no. 10, p. 47; P. Šámal, *Několik...*, p. 265.
[50] In a broader sense, *(vina)* means the sum of the prerequisites for criminal liability. See V. Solnař et al., *Systém...*, p. 271.
[51] P. Šámal et al., *Trestní zákonik...*, pp. 211-212; F. Ščerba et al., *Trestní...*, p. 205; J. Nezkusil, *Trestní...*, p. 24; V. Pelc, *Krajní...*, p. 152.
[52] P. Šámal, *Několik...*, p. 255; P. Šámal et al., *Trestní právo...*, p. 244; J. Nezkusil, *Trestní...*, p. 24.
[53] P. Šámal et al., *Trestní zákonik...*, p. 212; J. Herczeg, *Zavinění...*, p. 47.
[54] Ibidem, p. 221.
[55] P. Šámal et al., *Trestní zákonik...*, p. 235; J. Herczeg, *Zavinění...*, p. 49.
[56] F. Ščerba et al., *Trestní...*, p. 205; J. Jelínek et al., *Trestní...*, p. 244.

stances and personal situation, he should have known and could have known that with his act he would consist of the features of the crime[57].

The perpetrator's act may be committed as a result of **gross negligence (*hrubá nedbalost*)**, i.e. when the perpetrator's approach to the requirement of exercising due care indicates his obvious recklessness towards the interests protected by law[58]. In the literature it is assumed that this is not an additional form of negligence, but only an expression of the degree of this negligence required by the Czech Criminal Code[59]. A circumstance that excludes wilful misconduct and conscious negligence in Czech criminal law is a **mistake as to the elements of the crime** (***skutkový omyl***). Culpability is also excluded by a mistake of law (***právní omyl***) and mistake as to the **circumstance excluding unlawfulness**. One can also encounter the view that **the state of insanity (*nepříčetnost*)** excludes culpability[60], although, as already mentioned, insanity by most authors is included as a separate feature of the crime described in the criminal act.

BODY OF CRIME IN POLISH CRIMINAL LAW

According to P. Kardas in the Polish science of criminal law there are several competing approaches to the structure of the crime[61]. The representatives of the doctrine distinguish models consisting of three to six elements[62]. Each of the crime models presented above has its advantages and disadvantages which become apparent depending on the purpose for which the analysis is conducted using them[63]. However, it is important to remember to take into account the provisions of the General Part of the Criminal Code, especially Articles 1, 2, 7 and 9[64], when choosing a particular approach. Therefore, four – or five-element concepts seem to be the most popular. The four-element concept assumes that a crime is an act that is unlawful, socially harmful to a degree greater than negligible (punitive), and culpable[65]. The five-element concept "adds" to these components the element of punishability, understood as the compliance of behaviour with the elements of the type of prohibited act with the simultaneous the absence of circumstances excluding punishability[66].

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[57] P. Špicar, *Zavinění jako neodmyslitelná součást trestného činu?*", "Trestněprávní Revue" 2007, no. 5, p. 122.
[58] J. Herczeg, *Zavinění...*, p. 51.
[59] J. Herczeg, *Zavinění...*, p. 51; P. Šámal et al.., *Trestní právo...*, p. 230; F. Ščerba et al., *Trestní...*, p. 238.
[60] E. Brucknerová, *Trestní...*, p. 54; A. Rosůlek, *Srovnání české a polské právní úpravy odpovědnosti za činy spáchané ve stavu nepříčetnosti pod vlivem návykových látek*, "Trestněprávní Revue" 2019, no. 10, p. 210.
[61] P. Kardas, *O relacjach między strukturą przestępstwa a dekodowanymi z przepisów prawa karnego strukturami normatywnymi*, „Czasopismo Prawa Karnego i Nauk Penalnych" 2012, no. 4, p. 25.
[62] P. Kardas, *O relacjach*…, p. 25.
[63] Ibidem, p. 26.
[64] l. Gardocki, *Pojęcie przestępstwa i podziały przestępstw w polskim prawie karnym*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio G" 2013, vol. LX, 2, p. 30.
[65] M. Grudecki, O. Sitarz, *Prawo karne i prawo wykroczeń. Skrypt*, Warszawa 2022, p. 30; M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warszawa 1990, p. 65.
[66] See, e.g., A. Zoll, *Karalność i karygodność czynu jako odrębne elementy struktury przestępstwa*, [in:] T. Kaczmarek (ed.), *Teoretyczne problemy odpowiedzialności karnej w polskim oraz niemieckim prawie karnym* Warszawa 1994, p. 108.

The difference between the above approaches consists in the different understanding of the sources of unlawfulness as an element of the structure of the crime. According to the four-element theory, the compliance of the perpetrator's behaviour with the elements of the type of criminal act is a component ofunlawfulness[67]. In the five-element theory, compliance is a separate element in the structure of the crime as the sphere of punishment.

THE SUBSTANTIVE ELEMENT IN THE DEFINITION OF A CRIME IN POLISH CRIMINAL LAW

Due to the existence of a negligible social harmfulness clause in Article 1 § 2 of the Criminal Code, it is not possible to consider the definition of crime in Polish criminal law as formal[68]. Moreover, according to some representatives of the doctrine, it is part of the stream of substantive definitions of the crime[69]. This thesis, however, is too far-reaching. After all, the provision of Article 1 § 1 of the Criminal Code indicates that only those who commit an act prohibited under penalty by the law in effect at the time of its commission are subject to criminal liability. This is a formal element, emphasizing that a crime can only be an act prohibited by the act[70]. Therefore, K. Doroszewska is right when she claims that pursuant to the Polish Criminal Code of 1997 there is **a formal-substantive definition of the crime**[71].

In the Polish law, a crime can only be a socially harmful act. This requirement results from the constitutional principle of proportionality (Article 31 section 3 of the Constitution of the Republic of Poland), which allows criminalization – the recognition of a given social pathology as a criminal act – only if it threatens values valued in society (is socially harmful *in genere*, and in principle socially dangerous)[72]. As already mentioned, the degree of this social harmfulness must exceed the threshold of insignificance so that a specific – committed in a given state of facts – act can be considered a crime. The legislator in Article 115 § 2 of the Criminal Code has included quantifiers of the degree of social harmfulness, enabling the judicial authorities to assess this degree.

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[67] P. Zawiejski, *Pojęcie przestępstwa*, [in:] *Prawo karne. Wykład akademicki*, T. Dukiet-Nagórska, O. Sitarz (eds.), Warszawa 2021, p. 146.
[68] L. Gardocki, *Pojęcie…*, p. 32.
[69] L. Gardocki, *Pojęcie…*, pp. 32-33; R. Zawłocki, *Pojęcie i funkcje społecznej szkodliwości czynu w prawie karnym*, Warszawa 2007, p. 74.
[70] L. Gardocki, *Pojęcie…*, p. 32.
[71] K. Doroszewska, *Społeczna szkodliwość czynu jako określenie zła w polskim prawie karnym?*, „Młody Jurysta" 2016, no. 4, p. 18.
[72] R. Zawłocki, *Pojęcie…*, p. 111.

UNLAWFULNESS AS AN ELEMENT OF THE STRUCTURE OF A CRIME IN POLISH CRIMINAL LAW

In the Polish science of criminal law, there are two opposing monistic and pluralistic ways of presenting unlawfulness[73]. According to the monistic perspective, unlawfulness is the contradiction of behavior with the sanctioned norm, the source of which is not the criminal law – from it can only be inferred about the sanctioned norms[74]. This is a *de facto* contradiction to the entire law[75]. The pluralistic concept assumes, conversely, that the sources of both sanctioning norms and sanctioned norms are the provisions of the criminal law[76]. This view is advocated by most criminal law experts[77]. In short, according to this theory an act is characterized by unlawfulness when it conforms to the elements of the type of criminal act and not committed in a justification situation[78]. Then it falls within the scope of norming and within the scope of application of the sanctioned norm[79].

Representatives of the Polish science of criminal law agree that, regardless of the concept adopted, the characteristic in question cannot be attributed to the perpetrator's act committed under a circumstance excluding unlawfulness (countertype). The justification is permission to violate a criminally protected right in such cases in which the absence of this permission would be socially unprofitable (the violation of the interest is justified). The justifications in the Polish Criminal Code are necessary defence, state of superior necessity, experimentation, permissible criticism and ultimate necessity. Some authors also point to the existence of non-code and non-act justifications. They justify this fact by the need to make the criminal law more flexible in situations not foreseen by the legislator, in which it would be unjust to punish the perpetrator[80]. There is also no shortage of opponents of such non-code criminal law institutions, accusing them of being incompatible with the principles of determinacy, separation of powers or legalism[81].

[73] M. Grudecki, *Kontratypy pozaustawowe w polskim prawie karnym*, Warszawa 2021, p. 13.
[74] A. Zoll, *Karalność…*, p. 102.
[75] K. Patora, *Pojęcie „bezprawności" w różnych gałęziach prawa*, „Prokuratura i Prawo" 2018, no. 10, p. 65.
[76] M. Grudecki, *Kontratypy…*, p. 547.
[77] J. Wyrembak, *Bezprawność jako sprzeczność czynu sprawcy z normą prawną*, „Wojskowy Przegląd Prawniczy" 2007, no. 3, p. 67; P. Wolnik, *Nieświadomość reguł ostrożności jako błąd przy przestępstwach nieumyślnych*, „Czasopismo Prawa Karnego i Nauk Penalnych" 2004, no. 2, p. 99.
[78] M. Grudecki, O. Sitarz, *Prawo*..., pp. 31-32.
[79] Ibidem.
[80] M. Grudecki, *The Assesment*..., pp. 577-578.
[81] M. Grudecki, *Kontratypy…*, pp. 549-551.

CULPABILITY AS AN ELEMENT OF THE BODY OF A CRIME IN POLISH CRIMINAL LAW

Most contemporary researchers of Polish criminal law argue that the provisions of the Criminal Code present culpability purely normatively, limiting it exclusively to the allegation that the perpetrator violated the sanctioned norm in a situation where the circumstances, conditions and personal characteristics allowed him to behave in an unlawful manner[82]. The content of Article 1 § 3 of the Criminal Code, however, does not prejudge this, as the authors of the current criminal law have abandoned the purely normative definition of culpability planned in one of the drafts of the code, taking into account the voices of dissent, according to which statutory regulations should not settle theoretical disputes[83].

Due to the fact that the essence of guilt has not been decreed, one can still find representatives of the doctrine who take into account the mental attitude of the perpetrator with regard to his act. In their view, the Polish Criminal Code reflects a comprehensive theory of culpability, since the fact that intentionality and inadvertence are elements of the subjective side does not necessarily exclude their influence on the form and degree of culpability[84]. According to this view, culpability is the alleged mental attitude of the perpetrator towards his act[85].

Regardless of the accepted view of the essence of guilt, the Polish science of criminal law unanimously supports the view of the existence of code circumstances that prevent the imputation of culpability. Culpability cannot be attributed to a minor, a person in an abnormal motivational situation or under the influence of an excusable error as to the law, a circumstance excluding illegality or guilt[86] or as to the features.

SUMMARY

The research conducted confirms the hypothesis stated in the introduction. The body of crime decoded from the Czech Criminal Code is very similar to one of the models developed under the Polish Criminal Act. In both legal systems, there is a formal-substantive definition of the crime. While it was emphasized that a crime is an act prohibited by the act at the time it is committed, at the same time a kind of

[82] See, e.g., P. Zawiejski, *Pojęcie…*, p. 153; A. Zoll, The *Kodeks karny. Zasady odpowiedzialności karnej*, Warszawa 1998, pp. 23-26.

[83] A. Zoll, [in:] W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Volume I. Commentary to Articles 1-52*, Warszawa 2016, pp. 46-47.

[84] J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2020, p. 392; Ł. Breguła, *Glosa do wyroku Sądu Najwyższego z 8.2.2017 r.*, „Iustitia") 2019, no. 2, p. 79.

[85] M. Zelek, *Wina w prawie karnym i prawie deliktów – przyczynek do dyskusji na temat tożsamości pojęcia winy w prawie polskim*, „Acta Iuris Stetinensis" 2019, no. 2, p. 116.

[86] P. Zawiejski, *Pojęcie…*, p. 154.

safety valve has been left to exclude the criminalization of behavior that admittedly corresponds to those prohibited, but which carries little threat to legal interests. In the Czech legal system, such a possibility is provided by the so-called substantive correction (§ 12 section 2 of the TrZ), while in Poland it is provided by the clause of negligible social harmfulness (Article 1 § 2 of the Criminal Code).

It is also impossible to notice significant differences in defining unlawfulnessas an element of the structure of a crime. Representatives of the Czech criminal law doctrine understand it as a contradiction of human behaviour with the legal order, which corresponds with one of the theories popular in Poland – the monistic theory. The treatment of unlawfulness as a hallmark of a crime in Czech criminal law is, however, different. In Poland, at most, the realization of the elements of a prohibited act – in the absence of a justification circumstance – can determine whether the act meets the characteristic of unlawfulness. The catalogue of circumstances excluding unlawfulness in both legal orders partially overlaps. Much greater divergence can be seen regarding the admissibility of invoking non-statutory circumstances excluding unlawfulness. Representatives of the Czech science of criminal law allow such a possibility. In the case of Polish criminal law experts, opinions are divided.

The biggest difference between the Czech and Polish approaches to the crime model is the way in which culpability is understood as its subjective element. In Czech criminal law, the psychological theory of culpability is still alive, capturing it as the perpetrator's mental attitude toward the act, manifested in either intentionality or inadvertence (negligence). In Poland, by contrast, a pure normative theory of culpability prevails, transferring this relationship to the subject side (one of the elements of the criminal act) and treating culpability solely as the allegedness of the unlawful act. Nevertheless, there are still voices among Polish criminal law experts that point to the validity of a comprehensive theory of culpability, considering it to be the alleged mental attitude of the perpetrator towards his act, which would partially correspond to the view in Czech criminal law science.

References

Literature

Breguła Ł., *Glosa do wyroku Sądu Najwyższego z 8.2.2017 r., III KK 226/16*, „Iustitia" 2019, No. 2.

Brucknerová E., *Trestní právo hmotné a procesní. Obecná část*, Brno 2022.

Cieślak M., *Polskie prawo karne. Zarys systemowego ujęcia*, Warszawa 1990.

Doroszewska K., *Społeczna szkodliwość czynu jako określenie zła w polskim prawie karnym?*, „Młody Jurysta" 2016, No. 4.

Fryšták M., Kalvodová V., Provazník J., *Selected problems of the Czech criminal law*, Brno 2015.

Gardocki L., *Pojęcie przestępstwa i podziały przestępstw w polskim prawie karnym*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio G" 2013, Vol. LX, 2.

Grudecki M., *Kontratypy pozaustawowe w polskim prawie karnym*, Warszawa 2021.

Grudecki M., *The Assesment of Permissibility of Using Non-statutory Justifications in Czech and Polish Criminal Law*, „Časopis pro právní vědu a praxi" 2022, No. 3.

Grudecki M., Sitarz O., *Prawo karne i prawo wykroczeń. Skrypt*, Warszawa 2022.

Herczeg J., *Zavinění a omyl w novém trestním kodexu*, „Bulletin Advokacie" 2009, No. 10.

Janečková E., *Právni aspekty sebeobrany*, Praha 2015.

Jelínek J., *K pojmu trestného činu v novém trestním zákoníku*, [in:] J. Jelínek (ed.), *O novém trestním zákoníku. Sborník příspěvků z mezinárodní konference Olomoucké právnické dny, květen 2009 trestněprávní sekce*, Praha 2009.

Jelínek J. et al., *Trestní právo hmotné. Obecná část. Zvláštní část*, Praha 2022.

Kandová K., *Materiální a (nebo) procesní korektiv v trestním právu*, „Trestněprávní Revue" 2017, No. 5.

Karabec Z. et al., *Criminal Justice System in the Czech Republic*, Praha 2017.

Kardas P., *O relacjach między strukturą przestępstwa a dekodowanymi z przepisów prawa karnego strukturami normatywnymi*, „Czasopismo Prawa Karnego i Nauk Penalnych" 2012, No. 4.

Kratochvil V., *Filozofie trestného činu v pojímání brněnské trestněprávní školy*, „Pravnik" 2019, No. 1.

Mates P., Šemik K., *Společenská škodlivost jako znak přestupku*, „Bulletin Advokacie" 2021, No. 4.

Nezkusil J., *Trestní právo hmotné*, Praha 2011.

Novotný F. et al., *Trestní právo hmotné*, Pilzeň 2017.

Patora K., *Pojęcie „bezprawności" w różnych gałęziach prawa*, „Prokuratura i Prawo" 2018, No. 10.

Pelc V., *Krajní nouze v trestním právu*, Praha 2021.

Rosůlek A., *Srovnání české a polské právní úpravy odpovědnosti za činy spáchané ve stavu nepříčetnosti pod vlivem návykových látek*, „Trestněprávní Revue" 2019, No. 10.

Solnař V. et al., *Systém českého trestního práva*, Praha 2009.

Šámal P., *K pojmu trestného činu a souvisejícím otázkám v novém trestním zákoníku*, „Trestněprávní Revue" 2009, No. 5.

Šámal P., *Několik poznámek k úpravě zavinění v rekodifikaci trestního práva hmotného*, [in:] *Ve službách práva. Sborník příspěvků k 10. výročí založení pobočky nakladatelství C.H. Beck v Praze*, Praha 2003.

Šámal P., *Pojetí protiprávnosti podle nového trestního zákoníku*, „Právník" 2011, No. 8.

Šámal P. et al., *Trestní právo hmotné*, Praha 2022.

Šámal P. et al., *Trestní zákonik I. Obecná část (§ 1 -139*), Praha 2012.

Šámal P., *Trestní zákonik a naplňováni funkcí a základních zasad trestního práva hmotného*, „Bulletin Advokacie" 2009, No. 10.

Ščerba F., *Protection of Children in Czech Substantive Criminal Law and Its Comparition with the Polish Legal Regulation*, „ASEJ. Scientific Journal Bielsko-Biala School of Finance and Law" 2020, No. 4.

Ščerba F. et al., *Trestní zákonik. Komentář*, Praha 2020.

Špicar P., *Zavinění jako neodmyslitelná součást trestného činu?*, „Trestněprávní Revue" 2007, No. 5.

Tibitanzlová A., Mulák J., *Ještě několik poznámek na téma zasady subsidiarity trestní represe*, „Trestněprávní Revue" 2018, No. 5.

Warylewski J., *Prawo karne. Część ogólna*, Warszawa 2020.

Wolnik P., *Nieświadomość reguł ostrożności jako błąd przy przestępstwach nieumyślnych*, „Czasopismo Prawa Karnego i Nauk Penalnych" 2004, No. 2.

Wróbel W., Zoll A. (red.), *Kodeks karny. Część ogólna*, tom I: *Komentarz do art. 1-52*, Warszawa 2016.

Wyrembak J., *Bezprawność jako sprzeczność czynu sprawcy z normą prawną*, „Wojskowy Przegląd Prawniczy" 2007, no. 3.

Zawiejski P., *Pojęcie przestępstwa*, [in:] *Prawo karne. Wykład akademicki*, T. Dukiet-Nagórska, O. Sitarz (ed.), Warszawa 2021.

Zawłocki R., *Pojęcie i funkcje społecznej szkodliwości czynu w prawie karnym*, Warszawa 2007.

Zelek M., *Wina w prawie karnym i prawie deliktów – przyczynek do dyskusji na temat tożsamości pojęcia winy w prawie polskim*, „Acta Iuris Stetinensis" 2019, no. 2.

Zoll A., *Karalność i karygodność czynu jako odrębne elementy struktury przestępstwa*, [in:] T. Kaczmarek (ed.), *Teoretyczne problemy odpowiedzialności karnej w polskim oraz niemieckim prawie karnym*, Warszawa 1994.

Zoll A., *Kodeks karny. Zasady odpowiedzialności karnej*, Warszawa 1998.

Case law

Resolution of the Supreme Court of the Czech Republic of August 10, 2018, 8 TDO 803/2016, "Sbírka soudních rozhodnutí a stanovise" 2017, no. 10, č. 50.