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THE EBBS AND FLOWS. ON THE SCOPE OF CRIMINALIZATION IN POLISH CRIMINAL LAW FROM 2012 TO 2022

Abstract

In modern criminal law, the scope of criminalization in different legal systems is considered an important part of the description of these systems. This fact is not surprising, since criminalization and possible changes in its scope are closely related to the assessment of the situation of the individual, both in the context of the rights and freedoms to which he is entitled, and when the issue of criminalization is dealt with by looking at this phenomenon from the perspective of the protection to which individuals and societies are entitled (not only, but to a large extent, criminal law protection) in relation to individual goods, the violation or exposure of which is considered socially harmful.

This article takes as its object of analysis the changes in criminalization in Poland in the last decade (2012 – 2022). It analyzes and evaluates both changes in criminalization in the sense of expanding or narrowing the catalog of crimes, as well as changes in the intensity of criminalization, by which the author understands the tightening or softening of statutory threats of punishment. The latter is also discussed taking into account the use of legislative technique, aimed at shifting the emphasis from the judicial power to shape the punishment imposed in a specific criminal case, to the power of the legislature to set the statutory threat so that this power is exaggeratedly limited, mainly through the

narrow inclusion in the law itself of the possibility of choosing the type of punishment and its lower and upper limits of the statutory threat.

KEY WORDS

criminalization, acts harmful to society, offence, depenalisation, penal liability

SŁOWA KLUCZOWE

kryminalizacja, czyny społecznie szkodliwe, przestępstwo, depenalizacja, odpowiedzialność karna

1. INTRODUCTORY REMARKS

During the years that the 1997 Polish Criminal Code was in force, the scope of criminalization changed very often, and it was characteristic of these changes that they were almost always unidirectional in nature. In addition, they were generally accompanied by tightening of statutory criminal threats for individual crimes, i.e. equally unidirectional changes in the sphere of the intensity of criminalization. The latter types of changes were made to almost all provisions of the special part. In relation to offenses styled as crimes, a significant impact was made by removing from the Code the penalty of 25 years' imprisonment, as well as by raising the upper limit of the so-called term sentence of imprisonment by setting it at 30 years. The tightening of the statutory threat of punishment was of a special nature in those cases where it concerned raising the lower limit of the penalty, colloquially known as raising the minimum threshold of penalty for given crimes. This method is namely intended to force the courts to be really strict in the sphere of punishment, and not just to expand the possibilities of such a practice. In the criminal legal literature of the communist period, it was pointed out that with this kind of use of high thresholds of threats of punishment by the legislature, the courts are largely deprived of the power to shape the punishment, shifting this power to the legislature¹. Thus, this kind of action can even be called the formation of punishment policy by legislative means, which is certainly not indifferent to the quality of criminal justice. The main drawback here is not only the shifting of powers of various authorities, and therefore the negative effects of dehumanizing the actions

¹ See L. Gardocki, *Kształtowanie polityki karania drogą ustawodawczą*, 'Studia Iuridica' 1978, No. VII, p. 59 ff.

of the judiciary, even in countries that do not aspire to the principle of the triad of powers and the balance between them. Much more important, however, seem to be the disruptions in the sphere of responsibility for fair and rational punishment. The legislator creates a situation in which he himself largely determines the punishment in future criminal cases, even though he does not yet know the factual circumstances to be followed. Possible remorse for imposing unjust punishments, however, may be psychologically easier for the judge to bear, because after all, the collective entity (the legislator for short) includes many people: the originators (in the political sense) of the laws being created, the professionals drafting the bill and praising its high quality, the deputies and senators enacting amendments to criminal laws, those constitutionally obligated to uphold the constitution and comply with international obligations, and so on.

On the other hand, a judge imposing a penalty in a particular case can only use an excuse referring to the fact that he had a negligible influence on the fact that the law to which he is subject, after all, determined the severity of the sentence without his participation. As a result, responsibility for the sentence in the penalty part is diluted.

But were the changes in the intensity of criminalization really aimed solely at introducing harsher punishment? I think it is possible to give two examples of criminal law mitigation. The first example is the withdrawal of the decision to criminalize acts of drunk driving or driving under the influence of an intoxicant, being convinced that treating such a statistically significant mass of such acts as offences proved unrealistic. Thus, the previous legal status was restored using the method of punishing such acts as misdemeanors, i.e. not abandoning the retention of such violations in the set of punishable acts.

Slightly different reasons have led to a certain relaxation of the laws on so-called divided acts (into offences and misdemeanors) against property. This problem has a history dating back to 1966 when, changing a certain tradition, the inclusion of certain punishable acts against property (this mainly involved theft as a form of seizure of social property) as crimes was abandoned, and responsibility for misdemeanors against property was introduced in its place, with the boundary of the division into crimes against property and misdemeanors against property being drawn according to the criterion of the value of the property that was the object of violation. The value of property prior to the last change in this regard was determined by an amendment law to, among other things, the Code of Misdemeanors bearing the name "On amending the provisions of the Act – the Criminal Code and certain other laws", which introduced a provision establishing, in place of the amount of PLN 500, a value of PLN 800 as the limit separating offences against property from misdemeanors against property.

This relaxation of the severity of criminal laws was undoubtedly due to economic reasons. Rising inflation, without such a change of the law, would have resulted in a significant tightening of responsibility for criminal acts against

property, artificially (i.e. without changing the total number of counted offences and misdemeanors against property combined) raising the size of this statistically most significant group of crimes.

The issues of the intensity of criminalization and the scope of criminalization make up the common notion of a repressive (more broadly or more narrowly and more severely or more leniently) approach to the issue of impact on individuals and social groups. In this paper I would like to focus on the scope of criminalization.

To begin with, a discussion of this topic includes the assumption of measurability of this scope. This assumption is not questioned in criminalization theory. However, this does not mean that measuring this phenomenon is an easy undertaking. The question of what can be a unit of measurement here can be raised right away. To go along the line of least resistance, leading to false conclusions, would be to simply count criminal laws because the history of criminal law and also the comparison of contemporary criminal legislation in different legal systems (and also comparative law studies) make it quite easy to establish that this is a road to nowhere or even a route that leads straight to nonsensical results. One can, of course, limit oneself to some partial findings, for example, consisting in comparing a single law with the legal situation found at the time of its entry into force and concluding that the scope of criminalization was narrowed down because the law introduced a clause on non-criminality of abortion that did not previously exist in the system in question. Undoubtedly, a much more difficult task would be to try to answer the more general question, “Does the law in country A have a broader scope of criminalization than the criminal law in country B?”

Therefore, if our aspirations do not reach that far, we can certainly mostly count for less ambitious research on useful results provided by sub-studies.

2. PRO-CRIMINALIZATION ACTIVITIES

The scope of criminalization in Polish criminal law changed several times in the decade mentioned in the title of this paper, with the most profound changes contained two laws with almost identical titles. The first was titled: The Law of 13 June 2019 on amendments to the law – Criminal Code and certain other laws (hereinafter Big Amendment 2019). This law was, by a judgment of the Constitutional Court on 14 July 2020 (Kp 1/19) found to be fully inconsistent with Article 7 in conjunction with Article 112 and Article 119(1) of the Polish Constitution. The second law of 7 July 2022 on amendments to the Law – Criminal Code and certain other laws (Dz. U. (Journal of Laws) 2022, item 2600) hereinafter referred to as the Big Amendment 2022 is currently awaiting the expiration of *vacatio legis*.

The title of this paper uses a parabola in which criminalization is compared to the flows and decriminalization to the ebbs of the sea. Observing and describing the world of criminal legislation, it is not difficult to see that we are much more often dealing with high tides than low tides. At the same time, this is the case not only in periods of several years but also over several hundred years. We may be shocked by the severity, and sometimes even cruelty of the criminal law reality two thousand, five hundred or even as recently as three hundred years ago. However, this should not confuse us if we took at this reality in terms of criminalization. Its scope is steadily increasing and the number of acts at risk is many times higher than a similar number in past eras. Episodic periods of decriminalization do occur (a good example is the era of the Enlightenment, when the French Declaration of the Rights of Man and of the Citizen of 1789 decided that only dangerous acts harmful to society could be punished). This was, undoubtedly, addressed to the legislator as a prohibition of the discretionary expansion of the scope of punishable acts characteristic of states of unenlightened absolutism.

On the other hand, in the 1960s and 1970s, decriminalization trends could be observed with regard to sexual crimes (adultery, consensual homosexual relations between adults, or zoophilia). Such a picture of periodic decriminalization trends is, moreover, not entirely true if we exclude from perception the habit of Eurocentrism, which is quite common in our cultural circle.

It can also be noted that there has been decriminalization to a certain extent in Poland and in other so called socialist countries, because some of the criminal provisions in force in them after 1989 sounded completely nonsensical after the change of the political and economic system. I am referring, for example, to the provisions on the crime of acquiring goods for resale at a profit or accumulating goods in quantities obviously disproportionate to one's needs as a consumer (Article 222 of CC 1969). In the political sphere, it was, for example, the crime of insulting the system of the People's Republic of Poland (Article 270 of CC 1969), or inciting acts undermining allied unity (Article 133 CC 1969).

However, returning to the scope of criminalization in Polish criminal law of the past decade, several groups of pro-criminalization decisions should be singled out in particular. These were:

- 1/ criminal provisions deemed necessary to combat international terrorism;
- 2/ criminal provisions to combat usury;
- 3/ criminal provisions to combat illegal adoption;
- 4/ criminal laws created to combat alimony evasion;
- 5/ penal regulations to tighten the fight against sexual abuse, especially to protect children from adult sexual abuse;
- 6/ criminal provisions to protect traffic safety;
- 7/ regulations created to protect information from acts that have the form of so-called computer crimes;
- 8/ provisions expanding criminalization in the environmental sphere;

9/ indirectly expanding the scope of criminalization by the Constitutional Court repealing of abolition of one of the statutory provisions defining the scope of legal abortion;

Some of these groups require short commentary

Ad.1/ With regard to counter-terrorism, this is especially true of Article 165a(1) CC that criminalized various forms of financing terrorist activities, introduced into the Criminal Code in 2015 and tightened by the Big Amendment 2022. Numerous provisions of the Criminal Code also target terrorism, stipulating punishment for disseminating content that may facilitate the commission of a terrorist crime or participating in training or self-mastery of content intended to facilitate the commission of a terrorist crime (Article 255a of the CC), various forms of participation in an organized group or association intended to commit a terrorist crime (Article 258 of the CC) and also crossing a border to commit a terrorist crime (Article 259a of the CC). The definition of a terrorist crime is provided in Article 115(20) CC. Undoubtedly, a certain connection with the issue of legal ways of fighting terrorism is also made by Article 23(1) of the Law of 10 June 2016 on anti-terrorist activities² that regulated the so-called special use of weapons. It involves a departure from the rule that weapons are used in a way that causes the least possible harm to the person against whom the weapon is used. In colloquial language, this special use can be defined as a deliberate lethal shot in the absence of any other way to save the life of the hostage. Although this kind of conclusion is also implied by the provision on the state of superior necessity (Article 26(2) CC), its regulation in the Anti-Terrorism Law makes the “fatal shot” a legal action, and not just a premise to exclude guilt by the application of Article 26(2) CC.

Ad.2/ Usury, a phenomenon known since ancient times, has been criminalized in various ways in the Polish legal system. From the restrained Article 268 of the 1932 CC to the provisions requiring the application of a rather complicated mathematical formula to ascertain the fulfillment of the elements of this crime --- successive attempts to better regulate this problem apparently do not satisfy the legislature. The most recent move in this regard was made under the Law “On Amending Certain Laws on Covering Activities in Connection with the Spread of the SARS-Cov-2 Virus” of May 15, 2020³, which formulated two new provisions (Article 304 (2) and (3) CC), and then by the Law of 6 October 2022 “On Amending Laws to Counteract Usury” added the text of Article 115(20) CC, that occupy almost a full page and explain what is to be understood by “costs other than interest”.

Ad.5/ Criminal provisions on the protection of children from exposure to sexual abuse were subject to numerous changes during the period under review, both consisting of necessary, as it turned out in court practice, clarifications of

² Dz. U. (Journal of Laws) of 2016, item 904.

³ Dz. U. (Journal of Laws) of 2020, item 875.

code provisions and the tightening of statutory threats, as well as the creation of a register of persons convicted of sexual offenses and the extension of the statute of limitations for crimes against children. An important change in this regard was also the expansion (by the Law of 23 March 2017, Dz. U. (Journal of Laws) of 2017, item 773) in Article 240 CC of the list of offenses that create an obligation for those who know of their commission, attempt or criminal preparation to notify law enforcement authorities. Namely, Article 200 CC, which describes the crime of sexual intercourse or other sexual activity with a child under 15 years of age, has been added to this list. The creation of such an obligation, failure to comply with which is punishable by imprisonment of up to 3 years, may dramatically affect the conduct of superiors towards perpetrators of sexual crimes against children.

The intensification of legislative and organizational efforts made to protect children in the sexual sphere is not a specifically Polish trend. On the contrary, it is a worldwide phenomenon, which is also the subject of international documents and conventions. One of the better-known conventions is the 2015 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse⁴ (commonly known as the Lanzarote Convention).

Expanding the scope of criminalization in this sphere certainly cannot always be accepted without hesitation. For example, the crime described in Article 199(1) CC of abusing a relationship of dependence to coerce another person into sexual intercourse or other sexual activity was not objectionable in its traditional form. Sub-sections 2 and 3 of this provision added to the Code in 2014 no longer merit such uncontroversial approval. The criminalization of sexual intercourse or other sexual activity with a minor, combined with a pecuniary or personal benefit or its promise to a minor in return, provided for in the final part of Article 199(2), can be reasonably justified by the need to prevent child prostitution. On the other hand, the fulfillment of the elements consisting in the perpetrator abusing the trust of a minor raises doubts as to whether this is a descriptive characteristic with a sufficiently sharp scope for the requirements under the principle of *nullum crimen sine lege certa*. It is also some kind of a paradox that the same code accommodates provisions regarding the age of the perpetrator, and these are reduced to 15 and even 14 years (in case of murder), and at the same time a 17-year-old person can be victimized by a crime whose construction makes him to be treated as a child against whom seduction has been committed.

Staying with the issue of the scope of criminalization in the sphere of crimes against sexual freedom, it is necessary to draw attention to the deserving criticism of the legislator's approach to the issue of criminalization of the crime of rape. The relevant provisions of the Criminal Code have recently undergone changes introduced by the Big Amendment 2022, consisting in a radical increase

⁴ Dz. U. (Journal of Laws) of 2015, item 608.

in the intensity of criminalization. Poland, however, has not joined the contemporary trend to expand the definition of rape in the direction of recognizing sexual intercourse or other sexual activity undertaken without the consent of the other person as rape. According to this conception, the traditional definition of rape by using the characteristics of the manner of action, such as “violence, threat or deception” remains only partly valid, since these formulations include, among other things, the lack of consent on the part of the victim. However, the minimum condition sufficient to consider some act as rape is the absence, expressed in words or non-verbal behavior, of consent to sexual intercourse or other sexual activity. The change of a definition is increasingly common in the legislations of other countries, especially European ones. It has not yet been made in Polish criminal law, despite Poland’s obligation to do so as a country that has ratified the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, called the Istanbul Convention after the place of its signature⁵.

Subsection 1 of Article 36 of the aforementioned Convention formulates this obligation very clearly, stating: “Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: (...)” The text goes on to describe in great detail the types of actions of the perpetrator of rape that allow him to be attributed with the commission of this crime, provided that such conduct occurred “without his consent” (that is, without the consent of the person against whom such behavior is directed). Furthermore, the paragraph of the cited provision of the Convention stresses that “Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances”.

3. “WHOLESALE” AMENDMENTS TO THE CRIMINAL CODE

A characteristic feature of the activity of the Polish criminal legislator in recent years has been the use of bills amending criminal law, in particular the Criminal Code, in a manner that in the vernacular could be described as “wholesale”. The comprehensiveness of the criminal amendments proposed in these drafts is in itself neither an advantage nor a disadvantage. Such methods of reforming criminal law are known in other countries. For example, they were used in Germany, where, however, criminal law codification commissions were used to prepare drafts of such amendments, subjected to professional discussions and public judgment.

⁵ Dz. U. (Journal of Laws) of 2015, item 961.

In the conditions of modern Poland, such “wholesale” projects and their handling looked different. In 2019, the Sejm passed a comprehensive law on amendments to the Law – Criminal Code and certain other laws. This law did not enter into force because the President referred it to the Constitutional Court, which, in a judgment of 14 July 2020⁶, found that the law was passed in violation of constitutional legislative procedures. However, the authors of the bill (it was the bill prepared by the government) did not give up on making changes to the Criminal Code. This proceeded in two ways. First, several changes were made to the Criminal Code when laws related to the pandemic were passed. The hallmark of such amendments was the lack of connection between the subject matter of the law in which they were inserted and the specific criminal legal issue regulated by the amendments. In the vernacular, they were called “throw-ins” because they constituted a foreign body smuggled into the sometimes voluminous laws in violation of the rules of proper legislation, such as the omission of important procedural rules required when amending provisions of code rank. Such conduct violates the prohibition of bypassing special procedural rules or unfounded application of the so called privileged legislative “paths”. There is also no doubt that such “ways” of quickly enacting certain legislation may have straightforward political goals that win out over the intended substantive results. A good example of this is the Law of 19 June 2020 on interest rate subsidies for bank loans to COVID-19-affected entrepreneurs and simplified proceedings for approval of the arrangement in connection with the occurrence of COVID-19⁷. The subject matter of this law is evident from its title. However, it is impossible to reasonably explain what the amendments contained in this law regarding the aggregate penalty or the new type of crime against property described in the newly introduced Articles 115(9a) and 278a of the Criminal Code have in common with this subject. In addition, the aforementioned provisions did, after all, amend provisions of code rank, but the procedure for their enactment had the same flaws as the procedure for the enactment of the Big Amendment 2019, which, for this reason, the Constitutional Court found to be in violation of the Constitution⁸.

Izdebski⁹ rightly describes this situation as a manifestation of legal nihilism, while Jagiełło emphasizes¹⁰ that most of these changes (e.g., those concerning cumulative penalty) are not related to the pandemic. On the other hand, in his opinion, as for the changes within the criminal procedural law, in particular, attention should be paid to those that raise questions about the right to defense.

⁶ Ref. no. Kp 1/19, OTK-A 2020, No. 1, item 36.

⁷ Dz. U. (Journal of Laws) of 2020, item 1086.

⁸ See more on this topic in H. Izdebski, *Legislacja dotycząca Covid-19 i ustawowy nihilizm prawny*, (in:) T. Gardocka, D. Jagiełło (eds), *Pandemia Covid-19 a prawa i wolności*, Warsaw 2020, pp. 52–53.

⁹ *Ibidem*, p. 56.

¹⁰ D. Jagiełło, *Prawo karne w Polsce a pandemia*, (in:) T. Gardocka, D. Jagiełło (eds), *Pandemia Covid-19 a prawa i wolności*, Warsaw 2020, pp. 109–110.

The second attempt to make extensive changes to the Criminal Code is the Act of 7 July 2002 amending the provisions of the Criminal Code and certain other laws¹¹. This law, or Big Amendment 2002 for short, largely repeats the provisions of the Big Amendment 2019, omitting, of course, the provisions enacted earlier in the aforementioned “throw-ins” or with the addition of provisions of the kind of Article 10(2a), implementing a new idea formed in the time between the proceedings of the big amendments of 2019 and 2022.

The expansion of the scope of criminalization in Polish criminal law made by the Big Amendment 2022 concerns a number of more or less significant crimes. These are amendments to existing offenses or the creation of new types of crimes against property (e.g., Article 278(1a) – theft of an ATM card, Article 282(2) – blackmail as a type of extortion, Article 306 – theft of a vehicle license plate) and crimes against public order (e.g., Article 256 – public propagation of Nazi, communist, fascist or other totalitarian state systems). The enumeration is only exemplary, and besides, it does not evaluate the new regulations from the point of view of their rationality and the possibility of their impact on the protection of important goods from socially harmful attacks, as well as from the point of view of the interpretation issues that are likely to arise here.

Certainly, these new criminal law regulations will be the subject of much controversy and difficult interpretations in future court decisions, commentaries, articles and monographs.

Among the many issues that arise in connection with this amendment, certainly worth noting is the criminalization of preparation for murder and the criminalization of acceptance of an order to commit murder. In particular, the issue for serious discussion is certainly the inclusion of the criminalization of preparation for murder. The Polish literature offers an apt remark that there are arguments against the criminalization of preparation for murder, but they do not rather apply to its variation that consists in entering into an agreement¹².

4. EBBS

Decriminalization cases occurred much less frequently between 2012 and 2022. Mention should be made first and foremost of the case of decriminalization of driving a vehicle other than a motor vehicle while intoxicated, already indicated at the beginning of this study. However, it was not, as is often the case in such a situation, a complete decriminalization of a certain category of acts (i.e. a situation involving

¹¹ Dz U. (Journal of Laws) of 2022, item 2600.

¹² See O. Sitarz, (in:) T. Dukiet-Nagórska (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warsaw 2016, pp. 140–141.

a profound change, in which the act, as formulated in Article 4(4) CC, “is no longer prohibited under penalty”), but returned to the status of an act punishable as a misdemeanor. Separately, mention should be made of the rare cases of depenalization in the period under review. I am referring here to the introduction of subsection 2a to Article 25 CC in 2018, using the classic depenalization formula “shall not be punished” with regard to the situation of exceeding the limits of necessary defense, in response to an attack related to infringement of the inviolability of home.

At the time of the COVID-19 pandemic, an issue arose as to whether to expand the possibility of excluding criminal liability of perpetrators by using the statutory formula “does not commit the offense specified in Article 231 or Article 296 of the CC (...) who, during the period of epidemic threat or state of epidemic declared due to COVID-19, while acquiring goods or services necessary for the control of this infectious disease, violates official duties or regulations in force in this regard, if he acts in the public interest and without committing these violations the acquisition of these goods and services could not be realized or would be significantly endangered”. This provision, quoted in brief, was introduced by the Law of 3 March 2020 on amending certain laws in the health care system related to the prevention and suppression of COVID-19. Its continuation was based on the same scheme in other statutes¹³.

A similar provision was created in the sphere of health care, namely Article 24 of the Law of 28 October 2020 on amendments to certain laws in connection with countering emergencies related to the occurrence of COVID-19 (Dz. U. (Journal of Laws) of 2020, item 2112 as amended). Namely, this provision introduces a pandemic-related justification (or perhaps excuse?) relating to medical professionals. It reads briefly as follows:

“...does not commit the offense referred to in Article 155, 156(2), Article 157(3) or Article 160(3) of the Law of 6 June 1997 – Penal Code, who, during the period of the declaration of an epidemic emergency or epidemic state, providing medical services on the basis of (...) in the prevention, diagnosis, or treatment of COVID-19 and acting under special circumstances, committed a criminal act, unless the result caused was the result of a gross disregard for the care required under the circumstances”.

Such episodic regulations, created for an emergency situation often in haste and not necessarily with the professional assistance of lawyers, created a number of problems for criminal justice practitioners as well as for commentators dealing in this branch of law. In the textbook “Criminal Law”¹⁴ I posed a number of questions related to this. First of all, I consider it important to recognize the essence of the circumstances created in these provisions that exclude criminality. Are they justifications, or rather only excuses? Let us try to hypothesize here, that if it is

¹³ See L. Gardocki, *Prawo karne*, Warsaw 2021, pp. 118–119.

¹⁴ *Ibidem*, p. 119.

a matter of exclusion of criminality in the framework of medical actions quoted above, then it must be considered that in the referenced Article 24 we are dealing with an extraordinary institution that abrogates the criminality of the act due to the absence of guilt. Although the circumstances that exclude the criminality of an act traditionally include the so-called therapeutic activities among the justifications, it is believed that, if the specified conditions are met, they are simply lawful activities, but after all, in these classical cases of therapeutic activities we are dealing with an action prescribed by the art of medicine (*lege artis*). But can we say that similarly lawful acts that are medically erroneous because they violate the rules of conduct imposed by medicine, only that they do not blatantly violate these rules. I think, that the extraordinariness of the situation cannot legalize or recognize as correct such behavior that objectively violates the rules of medicine. In my opinion, it is more accurate to say that for reasons beyond the control of the perpetrator his defective behavior is forgivable.

Within the framework of rulemaking affecting criminalization (more often) or decriminalization (less often), there still remains the problem of liability for violations and possible waste of public funds in connection with the failed attempt to organize the 2020 presidential election by mail.

The matter was initially attempted to be handled by drafting a bill entitled “On the legality of actions of municipal bodies involved in the organization of the 2020 presidential election”. This draft opened with a solemn preamble-justification that was then followed by 5 articles, of which Article 5 is key. It reads:

“No crime has been committed by a mayor or city president who, during a state of epidemic, handed over to the designated operator the electoral register in connection with the general election for the President of the Republic of Poland ordered in 2020.”

It must be admitted that the authors of this draft made a strange assumption that reality can be modified at will by a statute and even when it comes to the historical past, one can, for example, consider that certain acts and their legal assessment at the time they were committed did not exist. One can do it by writing in the statute that nothing of the sort happened.

On the other hand, the authors did not intend to permanently decriminalize such acts committed by mayors and city presidents. For this reason, it was decided to resort to the abolition, a well-known institution of criminal law.

The draft mentioned above was withdrawn from the Sejm, and replaced by another one, written in a less absurd style. Subsequently, a Law on the Omission of Prosecution for Certain Acts Related to the Organization of Elections for the Office of the President of the Republic of Poland, Ordered for 10 May 2020¹⁵ was passed.

¹⁵ Dz. U. (Journal of Laws) of 2022, item 2698.

This law, in its Article 1, used the classic abolitionist formula: “No proceedings shall be initiated, and those initiated shall be discontinued”. Within the framework of the issues considered here, we cannot classify it as a normative act containing decriminalization provisions.

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