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FREEDOM AS A VALUE PROTECTED BY CRIMINAL LAW

Freedom occupies an important place among the values protected by the law; it appears to be one of the basic human values, and perhaps the most important next to life. Deprivation of human freedom appears to be one of the most drastic forms of restriction of human rights and freedoms, to be resorted to only in cases of extreme necessity [1]. Violations of freedom are condemned in every democratic social system on the basis of judgments derived from the oldest ethical principles. Freedom in its varied aspects is of interest to various branches of law - mainly constitutional, international, civil and criminal law.

The Constitution of the Republic of Poland establishes a number of civil rights and freedoms, stipulating, inter alia, in Article 31, par. 1, that human freedom is subject to legal protection, and in Article 41, par. 1, that everyone is guaranteed personal inviolability and liberty; deprivation or restriction of freedom may take place only on the principles and in the manner prescribed by a statute. Protection of personal inviolability (and freedom as well) is provided for by a number of provisions of the Civil Code, among which Article 23 of the Civil Code is of fundamental importance, stating that "Personal rights of a human being, such as in particular health, freedom, honour, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of the dwelling (...) remain under protection of the civil law irrespective of the protection provided by other provisions". According to Article 24 of the Civil Code, the person whose personal good is endangered by someone else's action may demand that this action be abandoned, unless it is not unlawful. In the case of an infringement, he can also demand that the person who committed the infringement perform actions necessary to remove its effects (in particular, that the person makes a statement of appropriate content and in appropriate form). In the Polish civil literature there are two views on the issue of defining freedom as a personal good. According to one of them, a narrower approach limiting freedom to the freedom of movement is justified, whereas according to the other (dominant) one it refers not only to the physical side of interaction, but also to the freedom from all prohibited pressures

restricting the free disposal of personal values (inter alia, the freedom from fear, from the use of violence or execution of a threat) [2].

Under criminal law, freedom is discussed in various aspects and individual chapters of the Criminal Code are devoted to these various manifestations of freedom. For example, Chapter XXIII of the Polish Criminal Code is entitled "Crimes against freedom", Chapter XXV - "Crimes against sexual freedom and decency", and Chapter XXIV "Crimes against freedom of conscience and religion". Approaching the issue rather abstractly, one could say that each of the offences directed against personal rights is directed against freedom [3]. Each of the types of offences may be presented as aiming at protecting freedom "from attacks" on some good. And so, for example, in the case of murder it would be about freedom "from" attempts on life; and in the case of damage to health it would be about protection against attacks directed against health (in other words, freedom from such attacks). There is probably some logic in such a view, but by advocating it we would inadvertently make a significant proportion of offences similar to one another (which would necessarily entail certain criminal law consequences). The point, however, is to make a reasonably effective distinction between those crimes in which freedom is the sole object of protection, and those crimes in which freedom is an incidental (additional) object of protection, or the violation of some manifestation of freedom remains only in the background of the commission of a prohibited act [4].

The 1997 Polish Criminal Code does not know any closed system of provisions protecting freedom. This group, which is concentrated in Chapter XXIII ("Crimes against Freedom"), concerns such statutory features where - as a rule - freedom is the only protected value. This chapter includes the offences of unlawful deprivation of liberty (art. 189), trafficking in human beings (art. 189a), criminal threat (art. 190), stalking and identity theft (art. 190a), coercion (art. 191), recording or dissemination of an image of a naked person (art. 191a), medical treatment without the consent of the patient (art. 192), violation of home inviolability (art. 193). The circumstance indicating the direction of the legislator was that in these types of criminal acts the attack on personal freedom of the victim was the core of the violation of the value, and not only a phenomenon accompanying the act [5]. Statutory facts, in which an attack on freedom is only a means to violate other values (e.g. rape – Article 197 of the Criminal Code, robbery – Article 280 of the Criminal Code, extortion by robbery – Article 282 of the Criminal Code), are classified under a different scope of protection of legal values [6]. In such situations, an attack on freedom is in a way consummated by an attack on this very legal good, and freedom may be (although not necessarily) only an additional object of protection [7]. This is the case, for example, when the perpetrator uses violence against a person (and thus already harms the freedom of the person against whom the coercion was used), but his behaviour is directed towards the

infringement of another good, which is protected by the legislator as the main object of protection (e.g. robbery (Article 281 of the Criminal Code) – property).

Under the Criminal Code, freedom is understood in two ways: as physical freedom, the freedom to move around, to move from place to place, and as moral freedom, the freedom to manage one's goods, to exercise or not to exercise one's rights, to take this or that action. However, not every action contrary to man's will can be treated as an attack on his freedom. The will is only protected as a sign of freedom when it is in conformity with the legal order and concerns that range of goods which that order considers to be the sphere of the individual's autonomous decision [8]. The doctrine and judicature refer, inter alia, to physical and mental freedom, freedom of conscience and religion, freedom of speech, freedom of assembly and sexual freedom. The division into freedom "from something" and "to something", which occurs in the science of philosophy and is adopted in criminal law, is important. A typical example of the freedom "from" is the crime under Art. 191 (coercion), where freedom from coercion is at stake, while an exemplification of the freedom "to" is the crime under Art. 189 of the Penal Code (deprivation of liberty), where freedom of movement is at stake [9]. This is a legitimate concept, but the issue can also be looked at in a different way. It depends on whether one wants to look at the problem from the positive or negative side. From the linguistic side (of the analysis of concepts) it is possible in a considerable number of cases, and - it seems - it will always be possible in the aspect of defining freedom ("from something" or "to something"). A certain state (enriched by the element of will), which is freedom "from something" is at the same time freedom "to something". Thus, for example, in the case of Article 191 (coercion), it is just as possible to say that it protects freedom from coercion as that it protects freedom to live freely (that is, without coercion); in the case of Article 189 (deprivation of liberty), it is possible to say that it protects freedom of movement as well as to say that it protects freedom from obstacles to the exercise of the will's choice as to where to stay [10].

When analysing the notion of freedom, an issue concerning the subjective element should also be raised, since an infringement of freedom is usually accompanied by moral distress felt by the victim. As A. Surkont states: "To a certain extent, the notion of freedom also defines the limits of offences infringing upon it. The wronged party's consent to the infringement of freedom may abrogate the unlawfulness of the act, since the protection of freedom due to the interest of the individual comes to the fore" [11]. However, we must not lose sight of the fact that this subjective element can lead to doubts of interpretation. Individuals place a different value on freedom, and as a result the will to preserve it varies. For one person, a minimal interference in the sphere of his freedom will already be a serious attack on his personal goods, while another will disregard such interference or will not feel it at all. It follows,

therefore, that while the subjective factor should be taken into account in the analysis of freedom as a legal value, a correction through the objective factor is necessary. This means that the treatment of freedom must be reduced to a certain typical (average) measure. Thus, on the one hand, an exaggerated sense of freedom on the part of an individual who is over-sensitive on this point will not enjoy protection, while, on the other hand, legal protection will be due to those who, because of their age, state of health or because of other relevant circumstances, are not in a position to assess the infringement of their freedom. It may be thought that in such a situation it is reasonable to assume that their potential will (or, as it is sometimes called, presumed, hypothetical, supposed, probable will) is protected, which implies the extension of the scope of protection [12].

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