

CRIME OF DESECRATION OF A MONUMENT OR ANOTHER PUBLIC PLACE ARRANGED TO COMMEMORATE A HISTORIC EVENT OR TO HONOUR A PERSON (ARTICLE 261 CC)

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1. INTRODUCTION

Offences under Article 261 of the Criminal Code¹ are relatively rare in Poland. According to the Police statistics, there were 36 such offences reported in 2010, 46 in 2011, 52 in 2012, 64 in 2013, 72 in 2014, 54 in 2015 and 53 in 2016.² Looking at the cases reported in recent years, an event worth mentioning is the desecration of the Monument of Rotmistrz Witold Pilecki 2017 on Promenada Staomiejaska in Wrocław³ by a group of young people who lay on flower wreaths in front of that monument,⁴ and a photo of their act was posted on the Internet. In April 2017 in Gdańsk, a drunken 21-year-old man broke a memorial with information, part of the Monument of Danuta Siedzikówna, alias Inka.⁵ In October 2014, a female perpetrator desecrated the Monument Commemorating Jews of Częstochowa pouring nail polish on

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¹ Act of 6 June 1997: Criminal Code, Journal of Laws [Dz.U.] of 1997, No. 88, item 553, as amended; henceforth: CC.

² http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-13/63617,Zniewa_zenie-obiektow-o-znaczeniu-symbolicznym-art-261.html [accessed on 20/12/2017].

³ <https://www.wprost.pl/kraj/10072297/Zniewazenie-pomnika-Pileckiego-Pieta-i-Tarczynski-donosza-do-prokuratury-i-zadaja-scigania-sprawcow.html> [accessed on 20/12/2017].

⁴ There are six persons in the photo. They lie on the wreaths. Two women hold flowers in their teeth, and another one wears a ribbon made of a wreath on her head.

⁵ <https://www.tvn24.pl/pomorze,42/gdansk-zniszczyl-pomnik-inki-bo-byl-pijany,734630.html> [accessed on 20/12/2017].

it.⁶ A minor perpetrator of a prohibited act carrying a penalty was charged with desecration of a monument after he climbed the Monument of Pope John Paul II in Stargard in 2016, took a picture and posted it on a social networking website.⁷ In June 2017 in Gdańsk, a perpetrator broke and removed one of the figures of the Kindertransport Monument, stood in its place and took photographs.⁸ Such situations, often reported by means of mass communication, especially the Internet, are usually met with very strong negative social assessment, sometimes triggering lively discussions concerning the culture of the society and the need for adequate legal response to the conduct of the perpetrators of those acts.

2. DESECRATION OF MONUMENTS UNDER THE POLISH LAW

In the CC of 1932, there was no provision like Article 261 CC of 1997.⁹ It seems that we can find the first instance of criminalisation of desecration of a monument in the Decree of 13 June 1946 on offences especially dangerous in the period of rebuilding the country (referred to as Small Criminal Code). And so, Article 25 (in Chapter II – Crimes against public order) stipulated that who desecrates, damages or removes the publicly displayed: (1) national emblem, flag or another state sign of Poland or Poland's ally, (2) a monument or another work raised to commemorate or honour events or persons shall be subject to a penalty of imprisonment or detention for up to five years.¹⁰ The construction used in the CC Bill of 1956 was more casuistic and Article 241 §1 criminalised conduct in the form of desecration, destruction or damage to a monument or another work displayed publicly in order to honour or commemorate events or persons deserving special praise for their distinguished service to the Polish nation or international workers' movement (carrying a penalty of one to five years' imprisonment). Article 241 §2 laid down the

⁶ <https://slask.onet.pl/skazana-za-zniewazenie-pomnika-pamieci-zydow-czestochowian/wzxcg3z> [accessed on 20/12/2017].

⁷ <http://www.stargard.policja.gov.pl/zst/dzialania-policji/aktualno/7047,Uslyszal-zarzut-za-zniewazenie-pomnika-Papieza.html> [accessed on 20/12/2017].

⁸ <http://gdansk.naszemiasto.pl/artykul/uszkodzil-pomnik-kindertransportow-w-gdansk-zostal,4160020,artgal,t,id,tm.html> [accessed on 20/12/2017].

⁹ According to A. Błachnio, in such a case, the conduct of a perpetrator who desecrating a monument at the same time insulted or derided the Polish nation or the state, or desecrated the national emblem, flag, banner, ensign or any other Polish state sign, or destroyed or removed such a sign publicly displayed was the only ground for filing an indictment (Article 153 CC of 1932). A. Błachnio, *Przestępstwo znieważenia pomnika na gruncie kodeksu karnego*, PS No. 3, 2017, p. 103.

¹⁰ For more on those offences, compare M. Siewierski, [in:] J. Bafia. L. Hochberg, M. Siewierski, *Ustawy karne PRL. Komentarz*, Warsaw 1965, p. 52. M. Siewierski wrote: "Article 25(2) provides legal protection to monuments raised in the Polish People's Republic by the authorities, state bodies or social organisations to commemorate events or persons deserving it in the public opinion. The same applies to monuments raised formerly. On the other hand, e.g. private grave monuments are not subject to protection under that Article. Their damage is subject to Article 263 CC as damage to a thing or Article 168 CC if it concerns desecration of a grave". M. Siewierski, [in:] *Ustawy karne...*, p. 52, by this author, *Kodeks karny. Przestępstwa przeciwko porządkowi publicznemu. Zaoczny kurs: „Prawo karne – nowe kodeksy”*, script no. 16, Warsaw 1970, p. 19.

same penalty for a perpetrator desecrating a grave of a soldier of the Polish Army or an ally's army or a person deserving special praise for their distinguished service to the Polish nation or international workers' movement. The prohibited acts under Article 241 were laid down in Chapter XIX of the CC Bill of 1956 (Crimes against public order). Article 412 §2 of the CC Bill of 1963 (included in Chapter XXXIII – Crimes against public order) penalised desecration, damage or removal of a monument, an image or another similar work displayed publicly by the state or society in order to commemorate historic events or a person's merits (carrying a penalty of imprisonment of up to two years). On the other hand, Article 412 §1 criminalised desecration of the national emblem, flag, banner, ensign or another state sign determined by the Polish legislator or damage to or removal of such a sign displayed publicly. One should mention the fact that, in accordance with Article 412 §3 Bill, an attempt to commit offences under §1 and §2 was penalised.¹¹ In the CC Bill of 1966, the analysed offence was laid down in Article 280 §2 concerning desecration of a monument or another work displayed publicly in order to commemorate a historic event or honour a person, and carried a penalty of imprisonment of up to three years. Article 280 §1 criminalised desecration, damage or removal of the publicly displayed national emblem, flag, banner, ensign or another Polish state sign or a symbol of international workers' movement. Prohibited acts under Article 280 were covered by Chapter XXXII (Crimes against public order). The CC Bill of 1968 adopted exactly the same solutions as the Bill of 1966. And so, Article 291 §2 dealt with desecration of a monument or another work displayed publicly in order to commemorate a historic event or honour a person (carrying a penalty of imprisonment of up to three years) and Article 292 §1 criminalised desecration, damage or removal of the publicly displayed national emblem, flag, banner, ensign or any other Polish state sign or symbol of international workers' movement. Prohibited acts under Article 292 were included in Chapter XXXVII (Crimes against public order). They can be found used in the same wording in the CC of 1969, yet in Article 284¹² (Crimes against public order were laid down in Chapter XXXVI¹³). In the CC Bill of 5 March 1990, desecration of a monument was laid down in Article 283 (Chapter XXXVII – Crimes against public order), in the same wording as in the CC of 1969 ("Who desecrates a monument or another work displayed publicly in order

¹¹ In accordance with Article 29 §1 of the Bill, an attempt to commit an offence was penalised provided that an act carried a penalty of deprivation of liberty exceeding three years or if a special provision stipulated penalisation of an attempt.

¹² Article 284 §1. Who desecrates, damages or removes the publicly displayed national emblem, flag, banner, ensign or another state sign of Poland or Poland's ally, or a symbol of international workers' movement is subject to a penalty of deprivation of liberty of up to three years. §2. Who desecrates a monument or another work displayed publicly in order to commemorate a historic event or honour a person is subject to a penalty of deprivation of liberty of up to two years, limitation of liberty or a fine. §3. The provision of §1 is applicable in case an act is committed to the detriment of an allied state, provided the allied state assures reciprocity. Article 284 §3 was added by means of Article 1(6) of the Act of 29 May 1989 amending some provisions of criminal law, misdemeanour law and some other acts (Journal of Laws [Dz.U.] of 1989, No. 34, item 180) which entered into force on 6 June 1989.

¹³ For more on the issue, compare M. Siewierski, *Kodeks karny...*, pp.18–19.

to commemorate a historic event or honour a person is subject to a penalty of a fine or limitation of liberty”);¹⁴ the difference consists in the sanction.

In accordance with the CC of 1997, the analysed offence was given a very similar wording as in Article 284 §2 CC of 1969. Thus, pursuant to Article 261, “Who desecrates a monument or another public place arranged in order to commemorate a historic event or honour a person is subject to a penalty of a fine or limitation of liberty”. Thus, it is clear that the differences consist in the object of an act; while in Article 284 §2 CC of 1969 it was “a monument or a work publicly displayed”, in Article 261 it applies to “a monument or another public place”. In the same way as in all the former criminal codes (and bills), it was laid down in the chapters on offences against public order (Chapter XXXII). What draws attention is very clear mitigation of the sanction in the analysed provision; a penalty of deprivation of liberty was abandoned and a penalty of a fine and limitation of liberty remained. As far as an equivalent of Article 284 §1 CC of 1969 (desecration, damage or removal of the national emblem, flag, banner, etc.) is concerned, it can be found in Article 137 CC 1969¹⁵ (Chapter XVII – Offences against the Republic of Poland).

3. THE OBJECT OF PROTECTION

Public order, including “its manifestations that are associated with the occurrence of monuments and places of remembrance in public space, which should be perceived as an expression of common will to honour some people and events, constitutes the type of an object of protection.”¹⁶ Homage paid to people and historic events commemorated by monuments or specially arranged places constitutes an individual object of protection.¹⁷ According to another opinion, respect to places commemorating events important in the history of the country and people deserving special remembrance is an individual object of protection.¹⁸ It is emphasised in jurisprudence that “also the feelings of people for whom a given place or object has a symbolic significance are subject to protection. An attempt on these extremely important symbols, at least for a part of the community, may lead to great anxiety and even unrest. That is why, it is justifiable to include this provision in the Chapter

¹⁴ The Criminal Code Bill (submitted for expert discussion), edition of 5 March 1990, Warsaw 1990, p. 87.

¹⁵ §1. Who publicly desecrates, destroys or damages, or removes the national emblem, flag, banner, ensign or another state sign is subject to a penalty of a fine, limitation of liberty or deprivation of liberty of up to one year. §2. Who desecrates, destroys, damages or removes an emblem, flag, banner, ensign or another sign of another state publicly displayed by the embassy of that state or on demand of a Polish authority is subject to the same penalty.

¹⁶ A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz*, Warsaw 2017, p. 418.

¹⁷ J. Lach, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1121.

¹⁸ Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz do art. 117–211a*, Warsaw 2017, p. 571; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 797; D. Gruszecka, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014, p. 942.

devoted to public order.”¹⁹ As R. Krajewski notices, it mainly concerns “patriotic feelings often connected with individual experiences of Polish people, especially of the older generation. People honoured by a monument or another symbol of remembrance usually did something extremely important to the state, nation, local communities, due to their activities in various fields: social, political, scientific, educational or charitable. There are many places of remembrance devoted to fight and suffering for the Nation and its independent existence. As a result, although Article 261 CC refers desecration to a monument or another place, in fact, it is to protect the feelings of people for whom such objects and places have symbolic significance.”²⁰ M. Flemming is right to say that neither artistic nor material value of an object or place is important but the level of hurting people’s feelings.²¹

4. THE CONCEPTS OF MONUMENT AND ANOTHER PLACE ARRANGED IN ORDER TO COMMEMORATE A HISTORIC EVENT OR TO HONOUR A PERSON

The terms used in the provision of Article 261 CC, namely “monument” and “another public place arranged in order to commemorate a historic event or to honour a person” need explaining. It is necessary to start with the term “monument”. It must be pointed out that there is no formal definition of this term, although the word appears in many legal acts (and is used in different contexts). In accordance with the definition contained in *Słownik Języka Polskiego* (Dictionary of the Polish language), a monument is “a sculpture or a sculpture-like architectural work in the form of a statue, an obelisk, a plaque, a building, etc. raised to honour a person or to commemorate an event”.²² The dictionary indicates some other contexts in which the word is used in Polish (monument of nature, monument of construction, monument of culture, monument of the Polish language). The word “monument” (*pomnik*) originates from an old Polish form of the verb “to remember” (*pomnieć*).²³ Coming back to legal acts using the term “monument”, it is worth pointing out, inter alia, the Act of 23 July 2003 on the protection of antiquities and care for them,²⁴ which refers to a monument of history in Article 15;²⁵ the Act of 7 May 1999 on the protection of the

¹⁹ D. Gruszecka, [in:] J. Giezek (ed.), *Kodeks karny...*, p. 942.

²⁰ R. Krajewski, *Prawnokarna ochrona pomników i innych miejsc publicznych powstałych dla upamiętnienia zdarzenia historycznego lub uczczenia osoby*, WPP No. 3, 2010, p. 97.

²¹ M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi publicznemu. Rozdział XXXII Kodeksu karnego. Komentarz*, Warsaw 1999, p. 99.

²² M. Szymczak (ed.), *Słownik Języka Polskiego*, Vol. II, Warsaw 1984, p. 795. Compare also, W. Szolginia, *Architektura*, Sigma NOT, Warsaw 1992, p. 126.

²³ https://pl.wikipedia.org/wiki/Pomnik#cite_note-1 [accessed on 20/12/2017].

²⁴ Journal of Laws [Dz.U.] of 2003, No. 162, item 1568; uniform text of 24 October 2014, item1446.

²⁵ 1. The President of the Republic of Poland, on a motion filed by a minister of culture and protection of national heritage, by means of a regulation, may recognise a registered antiquity or a cultural park of special value for culture as a monument and establish its borders.

2. Having obtained an opinion of the Council for the Protection of Antiquities, a minister of culture and protection of national heritage may file a motion referred to in (1).

former Nazi death camps,²⁶ which refers to monuments of holocaust in Article 2;²⁷ the Act of 16 April 2004 on the protection of nature,²⁸ which defines a monument of nature in Article 40²⁹. One should also mention that many other buildings or institutions function (or used to function) in Poland as monuments (*pomniki*), e.g. Pomnik – Centrum Zdrowia Dziecka in Warszawie (Monument – Centre of Child Health in Warsaw); Zamek Królewski w Warszawie – Pomnik Historii i Kultury Narodowej (Royal Castle in Warsaw – Monument of National History and Culture).³⁰ Moreover, in accordance with the building regulations in force (Act of 7 July 1994: Building Law),³¹ a monument is “a building” (Article 3(3)) and, as a result, is subject to all regimes concerning building structures. All this results in a difficult task of determining what kind of monument the legislator refers to in Article 261 CC (although, undoubtedly, these are not monuments of nature). The situation is even more difficult as at present the term “monument” has a broader use than its literal, linguistic meaning. It is hard to agree with the view that a monument must serve only to commemorate a person or an event (although it is usually so). As far as people are concerned, they are usually determined; their names are used in monuments’ names (e.g. Frederic Chopin Monument, Maria Skłodowska-Curie Monument), although one cannot exclude cases concerning a group of people (known in person, e.g. the Monument of the

3. Withdrawal of a status of a monument shall follow the same procedure as its recognition.

4. A minister of culture and protection of national heritage may file a motion to the World Heritage Committee to enter a monument of history onto the List of World Heritage Sites in order to provide it with protection, in accordance with the Convention concerning the Protection of the World Cultural and Natural Heritage adopted in Paris on 16 November 1972 (Journal of Laws [Dz.U.] of 1976, No. 32, items 190 and 191).

²⁶ Journal of Laws [Dz.U.] of 1999, No. 41, item 412; uniform text of 26 November 2015, item 2120.

²⁷ Article 2. The monuments of holocaust are as follows: (1) Auschwitz-Birkenau Memorial and Museum in Oświęcim; (2) Struggle and Martyrdom Memorial in Majdanek; (3) Stutthof Museum in Sztutowo; (4) Gross-Rosen Museum in Rogoźnica; (5) Museum of Struggle and Martyrdom in Treblinka; (6) Museum of the Former German Kulmhof Death Camp in Chełmno on Ner; (7) Museum of the Former Death Camp in Sobibór; (8) former Death Camp in Bełżec.

²⁸ Journal of Laws [Dz.U.] of 2004, No. 92, item 880; uniform text of 23 December 2016, item 2134.

²⁹ Article 40. 1. The monuments of nature are single natural living or lifeless formations or their groups having high biological, scientific, cultural, historical or landscape value, and characterised by individual features distinguishing them from other formations, enormous trees, domestic or foreign bushes, springs, waterfalls, karst springs, rocks, valleys, glacial erratics and caves.

2. In rural areas, provided it does not pose threat to people or property, trees-monuments of nature shall be protected until their complete natural decomposition.

3. A minister for the environment shall determine, by means of a regulation, the criteria for recognising natural living and lifeless formations as monuments of nature, taking into consideration the need to protect trees and bushes because of their size, age, shape and historical significance, and, in case of lifeless nature, their scientific, aesthetic and landscape value.

³⁰ As a result of Directive of the Minister of Culture and National Heritage of 1 April 2014 (Dz.Urz. MKiDN 2014.21 of 2 April 2014) the name was changed into Zamek Królewski w Warszawie – Muzeum. Rezydencja Królów i Rzeczypospolitej (Royal Castle in Warsaw – Museum, Residence of the Kings and the Republic).

³¹ Journal of Laws [Dz.U.] of 1994, No. 89, item 414, as amended.

Polish Post Defenders in Gdańsk,³² the Monument of the Defenders of Lublin³³), or of unidentified (or only partly identified) groups of people (e.g. the Monument of Warsaw Uprising, the Tomb-Monument of the Unknown Soldier in Warsaw). However, more and more often, monuments of animals are built, sometimes commemorating animals not actually existing at all but created by authors of culture or art (e.g. the Monument of Reksio, a character of a cartoon for children, in Biesko-Biała). As far as real animals are concerned, one should mention the Monument of Dżok, the dog,³⁴ on Bulwar Czerwiński on the Vistula River in Kraków, not far from the Wawel Castle and Grunwaldzki Bridge, or Camilla (Border collie breed) dog monument in a town of Amatrice in central Italy, who helped the Fire Brigade in the rescue operation after the earthquake and saved many people, however, did not survive injuries incurred during the operation.³⁵ There are many statements made in the doctrine concerning the issue whether Article 261 is applicable only to people or extends protection onto other monuments (e.g. of animals). According to A. Michalska-Warias, "Only a monument or another place intended to commemorate a person is subject to protection. This means that desecration of a monument depicting an animal or an object or a human silhouette not representing a real historic person does not match the features of the analysed offence."³⁶ A. Błachnio seems to express less categorical opinions and states that a monument "(...) does not include (...) (as a rule) animals, monuments of nature, monuments of fictitious characters or monuments placed in places other than public ones."³⁷ Since this author states that it is so "as a rule", it can mean that exceptions are admitted. Unfortunately, she does not indicate what exceptions these might be. Therefore, a question is asked whether the protection under Article 261 CC extends onto monuments of animals (at least those real ones). It should be said that since people decided to raise monuments to commemorate those animals, this means they had essential reasons for doing that, e.g. showing appreciation and respect to

³² The list of the defenders as well as their civilian companions is available at: https://pl.wikipedia.org/wiki/Obrona_Poczty_Polskiej_w_Gda%C5%84sku#Lista_obro.C5.84c.C3.B3w_oraz_towarzysz.C4.85cych_im_os.C3.B3b_cywilnych [accessed on 20/12/2017].

³³ There is a list of 596 names engraved on five brass plaques placed on this monument (in Zana Street, near Namysłowskiego Street in Lublin).

³⁴ The history of Dżok is believed to be one of Kraków's legends. It is about a dog, a black mongrel, whose master died in tragic circumstances: he suffered from a heart attack near Rondo Grunwaldzkie. The dog waited there for his master bred by the city dwellers surprising them and enjoying their sympathy. Having waited for about a year, the dog let Maria Müller become his new mistress. The woman died in 1998 and the dog ran away, wandered around railway tracks and eventually was killed by a train. Although at the beginning the city authorities were not eager to agree to the proposal to build the monument, many organisations (inter alia, the Kraków branch of the Society for the Care for Animals and the countrywide media based in Kraków), and well-known people (e.g. Z. Wodecki, J. Połomski, K. Piasecki and K. Cugowski as well as many ordinary city residents) contributed to the idea implementation. Professor Bronisław Chromy designed the sculpture and a German shepherd breed dog Kety unveiled the monument on 26 May 2001. https://pl.wikipedia.org/wiki/Pomnik_psa_D%C5%B0Coka [accessed on 20/12/2017].

³⁵ <http://www.rmfm24.pl/fakty/swiat/news-w-amatrice-odslonieto-pomnik-psa-ratownika-stanowila-to-co-n,nId,2432741> [accessed on 20 /12/2017].

³⁶ A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

³⁷ A. Błachnio, *Przestępstwo znieważenia...*, p. 107.

animal love and loyalty (Dżok, the dog monument), or showing gratitude for saving people (the monument of Camilla), or for helping people in the fight against enemies (Animals in War Memorial).³⁸ Thus, if a monument has been raised to commemorate a real animal, it is an expression of human respect for it. So, why should this material expression of respect not be given legal protection under Article 261 CC? Those who desecrate such a monument disrespect the feelings of people who decided to raise animals' monuments. Obviously, it is hard to agree that this protection should also cover monuments of animals inexistent in real life (e.g. monuments of a beetle in Szczepieszyn or Reksio in Bielsko-Biała). In such cases, protection laid down in other provisions of the Criminal Code and the Misdemeanour Code³⁹ is sufficient (e.g. Article 288 CC, Article 51 MC, Article 124 MC, Article 51 MC, Article 140 MC).

Still speaking about monuments raised to honour people, it is necessary to recall M. Flemming's opinion that "a monument of even big artistic or historic value, such as statues of antique gods or mythical characters as well as allegoric silhouettes sometimes placed in parks or other public places are not subject to protection under Article 261. In such cases, the provisions of misdemeanour law are applicable."⁴⁰ The main idea behind the quoted statement is obviously right. If a monument presents a fictitious figure, inexistent in real life, the protection envisaged in Article 261 CC does not apply to it. However, it is not right to state that in such cases only the provisions classifying misdemeanours can be applicable, because the classification of a perpetrator's act may concern crimes (e.g. Article 288 CC – destruction or damage to things; Article 108(1) Act of 23 July 2003 on the protection of antiquities and care for them – destruction or damage to an antiquity).

5. GROUNDS FOR PENALISATION – PUBLIC DISPLAY

Public display is a necessary condition for penalisation of desecration of a monument. Such interpretation seems justified because of the legislator's use of the phrase "a monument or another public place", and not "a monument or a public place". The word "another" seems to be decisive and so it can be said that the legislator meant that monuments should also be treated as public places (strictly speaking, are located in such places). The interpretation of the aims also supports this way of thinking. It would not be justified to extend the legal protection on monuments in private areas, especially as those monuments were created following the will of a private person and financed by them (often without necessary building permits). However, doubts may also arise here, namely how to treat situations in

³⁸ The monument, which can be found on the edge of Hyde Park in London, commemorates animals that served and died under British military command. It was designed by the English sculptor David Backhouse and unveiled in November 2004 by Princess Anne, the Princess Royal. The monument expresses special appreciation of 60 animals honoured with the Dickin Medal, including 54 serving during World War II (32 pigeons, 18 dogs, three horses and a cat); https://pl.wikipedia.org/wiki/Animals_in_War_Memorial [accessed on 20/12/2017].

³⁹ Act of 20 May 1971: Misdemeanour Code, Journal of Laws [Dz.U.] of 1971, No. 12, item 114, as amended; henceforth: MC.

⁴⁰ M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p. 101.

which a monument used to be in a public place and now, as a result of changes in ownership relations, it is in a private area (e.g. the Monument of Irena Kosmowska⁴¹ in Krasienin, placed in a manorial park, which together with a manor house constitutes a private real estate now). These are exceptional situations but they do happen. It seems that such monuments should be moved to places that give access to the members of the public (before the land is sold to a private investor). Since it was not done, we should think that the monument is not under the protection of Article 261 CC (it can be subject to protection under Article 288 CC, Article 124 MC, Article 51 MC and Article 140 MC).

6. THE ISSUE OF MONUMENTS COMMEMORATING TOTALITARIAN SYSTEM

It is necessary to come back to the issue seemingly not raising doubts, namely monuments erected to honour real (dead or still living) people. Are they always, in absolutely every case, subject to protection under Article 261 CC? One should mention the Act of 1 April 2016 on the ban of propagating communism or any other totalitarian system by means of using names of organisational units, commune (*gmina*) subsidiary units, buildings, public facilities and monuments.⁴² In accordance with Article 5a of this Act, monuments cannot commemorate persons, organisations, events or dates symbolising communism or another totalitarian system or propagate this system in any other way.⁴³ The provision of Article 1(2) of the Act concerned is applicable, which means that the names referring to persons, organisations, events or dates symbolising repressive, authoritarian and not sovereign system of authority in Poland in the period 1944–1989 are treated as such propagating names. It should be noticed that the provision of Article 1(1) is not applicable to: (1) monuments not displayed publicly; (2) being in the area of cemeteries or other burial places; (3) exposed to the public within artistic, educational, collector's or scientific activities and the like for the purpose different than propagating a totalitarian system; (4) entered, on their own or as part of a bigger whole, into the registry of antiquities (Article 5a(3)). In accordance with Article 5a(1), a voivode, by means of a decision, must order an owner or a perpetual usufructuary of a real estate where there is a monument not matching the requirements laid down in Article 5a(1) to remove this monument.⁴⁴ The decision concerning the removal of a monument requires that

⁴¹ Born on 20 December 1879 in Warsaw, died on 21 August 1945 in Berlin, a Polish folk activist fighting for independence and education, MP of the Legislative Sejm as well as in the 1st and 2nd term of the Sejm of the Second Republic of Poland.

⁴² Journal of Laws [Dz.U.] of 2016, item 744 of 1 June 2016, as amended.

⁴³ In accordance with Article 5a(2), monuments also mean mounds, obelisks, sculptures, statues, busts, memorial stones and plaques, notices and signs.

⁴⁴ As it was stated in the justification to the Senate Bill amending the Act on the ban on propagating communism or any other totalitarian system by means of using names of buildings and public facilities (print no. 985), "The information provided by the voivodes indicates that there are about 469 facilities in the territory of 15 voivodeships (excluding Mazowieckie Voivodeship) that may match the criteria laid down in the Bill (the data do not include facilities

the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation issue an opinion confirming that a monument does not meet the requirements laid down in Article 5a(1) (Article 5b(2)). The owner or the perpetual usufructuary of the real estate must cover the cost of a monument removal (Article 5b(4)). Thus, there is a real problem whether it is possible to “desecrate” the monument that “commemorates persons, organisations, events or dates symbolising communism or another totalitarian system” (e.g. the monuments of Bierut or Lenin). Not all of those monuments have been removed from Polish towns, yet. How should the conduct of a perpetrator “desecrating”, e.g. a still existing monument of Lenin, be assessed? We should think that in such a case we do not deal with the features of a crime laid down in Article 261 CC, but liability for destruction of or damage to things (Article 288 CC, Article 124 MC),⁴⁵ because such a monument has a considerable financial value (and sometimes may be extremely valuable from the artistic or collector’s point of view, especially as quite often well-known artists designed those monuments).

7. THE ISSUE OF ANOTHER PUBLIC PLACE ARRANGED TO COMMEMORATE A HISTORIC EVENT OR TO HONOUR A PERSON

The second feature used in Article 261, i.e. “another public place arranged in order to commemorate a historic event or to honour a person”, also needs analysing. According to A. Michalska-Warias, it refers to public places, which were arranged in a special way to commemorate a historical event or honour a person (e.g. a mound, a separated flowerbed with a notice, a plaque built in a wall of a building, a tree planted to commemorate an event or a person).⁴⁶ According to M. Kalitowski, a place like this can be, e.g. the space arranged in a special way where an important historic event occurred (e.g. the field of battle), a fragment of a building arranged to commemorate the work of an important institution in it or a residence of an outstanding historic person.⁴⁷ As O. Górniok raises (and R. Krajewski follows⁴⁸), “a historic event in its precise meaning is such an event that historians register in the history of the world, nation or local communities. Its broader meaning refers to all events, really registered and reported by tradition (the place where Mickiewicz

propagating Ukrainian or Lithuanian nationalism, and Prussian, Russian and German militarism) (...). Assuming that an average cost of one facility removal (based on a quotation made for 66% of facilities), the cost of removal of the remaining 156 facilities may account for PLN 1.7 million; the total cost of removal of all 469 facilities (excluding Mazowieckie Voivodeship and monuments propagating Ukrainian and Lithuanian nationalism, and Prussian, Russian and German militarism) may be estimated at circa PLN 5 million”. <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=985> [accessed on 20/12/2017].

⁴⁵ According to A. Michalska-Warias, at present, such a monument is not intended to honour a person but only to provide evidence of the past epoch. A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

⁴⁶ *Ibid.*

⁴⁷ M. Kalitowski, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1453.

⁴⁸ R. Krajewski, *Prawnokarna ochrona...*, pp. 97–98.

used to meet Maryla), which are associated with the feelings or visions of a given community and for the commemoration of which it arranged them. Assuming that they deserve legal protection, we should assign the term 'historic event' this broader meaning."⁴⁹ Taking into consideration a teleological element, we should state that this course of reasoning is right, however, we must state that it is in conflict with grammatical interpretation. One cannot recognise what did not really happen as a historic event because the term "historic" (semantically) clearly indicates that this event (really) took place in the past.⁵⁰ There is also a question how the term "a person" used in the provision should be understood. In accordance with a Polish language dictionary definition, a person is "a human being" as well as "a character in a work of literature".⁵¹ Statute does not associate the term with its real historic being, and thus, from the linguistic point of view, there are no obstacles in the way of a given public place being arranged to commemorate a person existing only in literature or legends. But if we assume that a monument must be devoted to a person (persons) who really lived (and sometimes really living animals), and a public place arranged in order to commemorate a historic event (i.e. one that really took place in history), there are no grounds for legal protection of places arranged to commemorate a fictitious person.

In accordance with the wording of the provision, a place (arranged to commemorate a historic event or to honour a person) must be public, and thus, as a rule, accessible to indefinite circle of people without a special permission. Therefore, commemorating an event or a person in a private house or garden does not meet the requirement.⁵² However, it seems that in the context of Article 261 CC, a public place may be one, which, as M. Flemming rightly notices, "is in a closed area and in places such as museums, former death camps, military barracks, regardless of the fact whether access to them is limited or entry is charged or depends on the fulfilment of other conditions such as visiting in organised groups, only with a guide, etc. It is important that after fulfilling specified requirements also in those cases, they are accessible to big unlimited groups of people in terms of numbers defined in advance."⁵³

Z. Cwiakalski makes a right comment that it is not important whether a place commemorates a historic event connected with Polish or foreign history or whether a hero served Poland or another country. This, on the other hand, makes the author draw a conclusion that "a monument or another arranged place must be 'formally recognised'. Therefore, the protection is applicable only in the period when this recognition is valid."⁵⁴ As far as a monument is concerned, it seems that the above comment is right at least because a monument is a building and because of that is subject to definite regimes resulting from building regulations. The situation is not

⁴⁹ O. Górniok, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. II, Gdańsk 2005, p. 346.

⁵⁰ <https://sjp.pwn.pl/sjp/historyczny;2560620.html> [accessed on 20/12/2017].

⁵¹ <https://sjp.pwn.pl/sjp/osoba;2496525.html> [accessed on 20/12/2017].

⁵² Z. Cwiakalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 572.

⁵³ M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p.101.

⁵⁴ Z. Cwiakalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 1422.

so clear, however, in the context of “other public places arranged to commemorate a historic event or a person”. A. Błachnio is right to point out that “Public places arranged to commemorate a historic event or to honour a person are (...) places accessible to an indefinite circle of people, which were given such a status by authorities but also places that gained such a status as a result of the conduct of the society or local organisation (e.g. in order to commemorate a local guerrilla unit that fought a battle with the occupant in a given place).”⁵⁵ It is also indicated in jurisprudence that statute does not require that this commemoration be made by official institutions, so one cannot exclude that it took place on a private person’s initiative and at the cost of that person. However, this may lead to interpretation difficulties, especially when somebody commemorates a controversial person or one that is assessed negatively in a given community.⁵⁶ According to Z. Ćwiakalski, both a monument and an arranged place must be established in accordance with legal regulations in force, i.e. after obtaining necessary permits. Thus, a monument or a place arranged in an unlawful way is not subject to legal protection.⁵⁷ It must be stated that, in general, this author is right, claiming the case is not completely unambiguous. Undoubtedly, it is not possible to (legally) raise a monument without an adequate permit. However, the situation is not so clear in case of another arranged place. One cannot exclude a situation in which it is arranged by a private person or local community without any permit and is customarily accepted by the society. It seems that in such a case a place like that, in general, is not deprived of legal protection referred to in Article 261 CC. However, in case the place is arranged to commemorate a person or historic events that are negative from the point of view of the Polish state’s interests or Polish history, it is not justified to provide it with legal protection and desecration thereof will not constitute crime under Article 261 CC (although there is a possibility of considering liability, e.g. under Article 140 MC or Article 51 MC).

8. FEATURES OF THE ACT OF DESECRATION

As far as the features of an act of desecration are concerned, it is indicated in the doctrine that desecration should be understood in the same way as in accordance with Article 216 CC, i.e. as the type of conduct which in common perception may insult the honour and memory of persons or historic events commemorated by a monument or another public place.⁵⁸ It should be assumed that the essence of desecration/insult means showing contempt, which represents a stronger negative attitude to values represented by the protected right than disrespect.⁵⁹ Disrespectful

⁵⁵ A. Błachnio, *Przestępstwo znieważenia...*, p. 106.

⁵⁶ M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny...*, p. 797.

⁵⁷ Z. Ćwiakalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 572.

⁵⁸ A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419; A. Herzog, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 1649; O. Górniok, [in:] O. Górniok at al., *Kodeks karny...*, p. 346.

⁵⁹ It is worth drawing attention to Article 315 §1 CC of 1969, where the legislator differentiated desecration from disregarding (“A soldier who insults or shows disregard to his superior with

conduct alone in connection with a monument or another place arranged in order to commemorate a historic event or the feelings of a person is not an offence of desecration. Therefore, one cannot speak about desecration (e.g. of a monument) in case a given person standing in front of it does not take his hat off or holds his hands in his pockets.⁶⁰ The doctrine assumes that an act of desecration can only be committed in action.⁶¹ Theoretically, one can consider extraordinary cases of omission (e.g. a person obliged to clean monuments consciously does not remove big amounts of birds' droppings from it because it displays a person he does not approve of and wants to express his negative opinion this way).

The following examples of desecration of a monument (a place) are listed in the doctrine:

- physical attacks (e.g. pouring paint or waste, placing inscriptions in vulgar language on it and throwing eggs) or verbal desecration (however, in such a way that it reaches other people; therefore, it must be done in the presence of other people or in their absence but recorded on film and publicised on the Internet) (A. Michalska-Warias),⁶²
- staining, placing abusive derogatory remarks or symbols and signs, pouring liquid, throwing mud and other objects (M. Flemming),⁶³
- destroying, removing or polluting; writing words or drawing pictures on a monument (O. Górniok),⁶⁴
- pouring paint, throwing mud (J. Piórkowska-Flieger),⁶⁵
- vulgar words, gestures, insulting inscriptions, pouring paint, throwing waste (D. Gruszecka),⁶⁶
- statements, gestures and specific conduct, e.g. bodily functions performed in front of a monument, placing inscriptions or drawings, throwing some objects at a monument or a place, removing some fragments, pouring liquids (Z. Ćwiakalski),⁶⁷
- abusive gestures, statements, spitting, writing or drawing on it (K. Wiak),⁶⁸
- performing activities that are commonly recognised as discrediting the honour or memory of a person or a historic event (E. Pływaczewski, A. Sakowicz).⁶⁹

a gesture, a word or in another way is subject to a penalty of deprivation of liberty for up to three years”).

⁶⁰ W. Kulesza, *Zniestawienie i zniewaga*, Warsaw 1984, p. 174.

⁶¹ Thus, inter alia, A. Herzog, [in:] R.A. Stefański (ed.), *Kodeks karny...*, p. 1649; Z. Ćwiakalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 571; A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

⁶² A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

⁶³ M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p.101.

⁶⁴ O. Górniok, [in:] O. Górniok at al., *Kodeks karny...*, p. 346.

⁶⁵ J. Piórkowska-Flieger, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 772.

⁶⁶ D. Gruszecka, [in:] J. Giezek (ed.), *Kodeks karny...*, p. 942.

⁶⁷ Z. Ćwiakalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 571.

⁶⁸ K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 1217.

⁶⁹ E. Pływaczewski, A. Sakowicz, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny. Komentarz*, Vol. II, Warsaw 2010, p. 515.

It seems that the above-presented catalogue of desecration-related activities may be extended; we can add using a monument to skateboard or roller-skate,⁷⁰ placing stickers or putting underwear on it, drinking alcohol and having sex on it.

In order to assess whether desecration has been committed, objective criteria must be used.⁷¹ Therefore, the opinions dominating in the society and moral norms, and not a subjective belief, e.g. of a witness, are decisive in determining whether given conduct constituted desecrating or not.⁷² J. Wojciechowski's opinion seems to be different as he states that in order to determine whether given conduct constitutes desecration of a monument (a place), it is necessary to take into account the feelings of people for whom that monument (place) is important as a symbol or an object of remembrance.⁷³

Desecration of a monument (or another public place arranged to commemorate a historic event or to honour a person) classified as a crime does not have to be committed in public (although it must be in a public place of course). Thus, it may be committed in absence of third persons, secretly; it is essential that other people get to know the consequences.⁷⁴ Therefore, a crime is committed under Article 261 CC in case somebody pours paint over a monument in the presence of many people and when he does it at night in witnesses' absence, and the fact is discovered after some time (e.g. the following day), and when the act of desecration does not leave any visible evidence on a monument (a perpetrator urinated there, which was recorded on film and publicised on the Internet).

8.1. FORMAL NATURE

The crime classified in Article 261 CC is formal in nature; its commission does not require that a perpetrator should cause changes in the outside world. And it is not necessary for the feelings of people for whom the place or a monument has a symbolic significance to be offended. The crime is committed the moment an act alone is performed.⁷⁵

⁷⁰ It is necessary to carefully depart from the classification of this type of conduct under Article 261 CC. It must be remembered that a perpetrator's awareness of the fact that his conduct constitutes desecration is required (he must want it or agree for it). This may be controversial in case of juvenile perpetrators who often use monuments as space to train or demonstrate their sporting skills. Compare also, comments by R. Krajewski, *Prawnokarna ochrona...*, p. 102.

⁷¹ Thus, K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...*, p. 1217.

⁷² Compare, the Supreme Court resolution of 5 June 2012, SNO 26/12, LEX No. 1231618 (based on Article 216 CC).

⁷³ J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warsaw 2000, p. 493.

⁷⁴ Compare, the Supreme Court judgement of 28 March 1952, I K 135/52, OSN(K) 1952/4/48.

⁷⁵ The following authors believe the crime is formal in nature: Z. Cwiakalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 1421; A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 420; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny...*, p. 797; A. Herzog, [in:] R.A. Stefański (ed.), *Kodeks karny...*, p. 1649.

8.2. INTENTIONAL ACT

The crime under Article 261 CC is common in nature and is committed only intentionally. M. Flemming is right to comment that a perpetrator's awareness must concern the desecrating character of his act and the special features of the facility or place that is subject to unlawful action.⁷⁶ There is no unanimous opinion concerning the type of intention in case of the crime analysed. According to some authors, it can be committed only with direct intent, which is confirmed by intentionality of desecration (M. Flemming,⁷⁷ A. Marek,⁷⁸ A. Michalska-Warias,⁷⁹ E. Pływaczewski and A. Sakowicz,⁸⁰ A. Lach⁸¹). Some representatives of the doctrine are right to believe that it can be direct intent as well as oblique intent (Z. Ćwiakalski,⁸² M. Mozgawa,⁸³ O. Górniok,⁸⁴ R. Krajewski,⁸⁵ A. Błachnio,⁸⁶ R. Góral,⁸⁷ J. Piórkowska-Flieger⁸⁸). In my opinion, both types of intent may take place. It is hard to agree with the opinion that desecration might occur only in cases when a perpetrator wants to commit it, and that cases when a perpetrator agrees for conduct, which he can predict may be recognised as desecrating, would be outside the scope of liability. R. Krajewski is right to notice that assuming only direct intent would limit the legal protection of monuments and other places arranged to commemorate a historic event or honour a person, and in his opinion, "it is also important that oblique intent, seemingly constituting a minor form of intentionality, is easier to prove."⁸⁹ These arguments are certainly also important, however, it seems that what is fundamental is the fact that the term "desecrate" is open to both forms of intent and there are no rational reasons to assume that it is intentionally tinged (especially as it is easy to imagine various forms of behaviour in which a perpetrator agrees that his conduct may constitute desecration).

⁷⁶ M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p. 100.

⁷⁷ As M. Flemming writes, "*Animus iniurandi* is an important feature of desecration. A perpetrator must know that his action constitutes desecration and must want it. His intention must embrace conditions for penalisation of his action. As a result, a crime under Article 261 can be committed in general only with direct intent." M. Flemming, *Ibid.*, p. 100.

⁷⁸ A. Marek, *Kodeks karny. Komentarz*, Warsaw 2010, p. 559.

⁷⁹ According to this author, "The legislator's use of the verb 'desecrates', which refers to conduct characterised by the will to express a specific emotional attitude towards a desecrated object, plays a decisive role in direct intent." A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 420.

⁸⁰ E. Pływaczewski, A. Sakowicz, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny...*, p. 513.

⁸¹ A. Lach, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny...*, p. 1121.

⁸² Z. Ćwiakalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 572.

⁸³ M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny...*, p. 797.

⁸⁴ O. Górniok, [in:] O. Górniok et al., *Kodeks karny...*, p. 345.

⁸⁵ R. Krajewski, *Prawnokarna ochrona...*, p. 100.

⁸⁶ E. Błachnio, *Przestępstwo znieważenia...*, p. 109.

⁸⁷ R. Góral, *Kodeks karny. Praktyczny komentarz z orzecnictwem*, Warsaw 2005, p. 424.

⁸⁸ J. Piórkowska-Flieger, [in:] T. Bojarski (ed.), *Kodeks karny...*, p. 773.

⁸⁹ R. Krajewski, *Prawnokarna ochrona...*, p. 100.

9. PENALISATION OF DESECRATION UNDER POLISH LAW

In practice, desecration under Article 261 CC often consists in destruction or damage, which results in the necessity of using cumulative classification (Article 261 in conjunction with Article 288 §1 or §2); in case the value of the destroyed property is lower than a quarter of minimum salary, we deal with an ideal concurrence of a crime and a misdemeanour (Article 261 CC in concurrence with Article 124 §1 MC). An ideal concurrence (concerning one act) of the provisions of Article 261 CC with Article 141 MC (placing an obscene inscription or drawing in a public place) or with Article 140 MC (an indecental deed) is possible.⁹⁰

There is a special manifestation of desecration of monuments or other places arranged to commemorate a historic event or honour a person (mainly in the context of war memorials) that can sometimes consist in placing a symbol of totalitarian systems on them with the aim to identify the honoured with the fighters for the introduction of a given political system and to assign these monuments or places political meaning instead of the historic one. The provision concerning desecration of a monument (or another arranged public place referred to in Article 256 §1 CC) may concur with the provision consisting in public incitement to hatred based on national and ethnic differences.

As A. Michalska-Warias argues, it seems that there may be cumulative concurrence of the provision of Article 261 CC and other provisions of Chapter XXXII (Crimes against public order), e.g. under Article 254, when desecration takes place in the course of a public gathering, or under Article 262 §1 CC, when a desecrated monument constitutes a dead person's grave at the same time.⁹¹

Sometimes, monuments may have value as antiquities and their destruction (which also constitutes desecration of a monument) will imply a necessity to apply cumulative classification under Article 261 in concurrence with Article 108(1) of the Act of 23 July 2003 on the protection of antiquities and care for them ("Who destroys or damages an antiquity is subject to a penalty of deprivation of liberty for a period from six months to eight years").

It is indicated in the doctrine that real specific concurrence of the provisions of Article 261 and the provision of Article 196 CC (insult of religious feelings) is possible when a desecrated monument or a place is subject to religious worship or a place devoted to conducting religious rituals. It mainly applies to situations when a monument or another religious object is in a place of worship.⁹²

It also seems that real specific concurrence of the provision of Article 261 and Article 137 §1 or §2 CC criminalising public desecration of, inter alia, a national emblem, flag, banner, ensign or another state sign of Poland (§1) or another state (§2) is possible. Monuments often have a national emblem and sometimes a flag or a banner is hung on them. In such a situation, a perpetrator's desecrating conduct

⁹⁰ M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny...*, p. 798.

⁹¹ A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 421.

⁹² R. Krajewski, *Prawnokarna ochrona...*, p. 101.

should be classified under Article 261 in concurrence with Article 137 §1 (or §2) in conjunction with Article 11 §2 CC.

It also seems possible that a perpetrator performs an act, which constitutes desecration of a monument and insults natural persons (e.g. relatives putting flowers in front of a monument or the guard of honour). Then, the cumulative classification can be based on Article 261 in concurrence with Article 261 §1 CC. If the person insulted is an officer (or a person assisting him), then the cumulative classification can be based on Article 261 in concurrence with Article 226 §1 CC. In case the person insulted is the President of the Republic of Poland (e.g. a perpetrator throws eggs at the President and a monument), we deal with real specific concurrence of the provisions of Article 135 §2 CC and Article 261 CC. In case a person insulted in public is the head of another country or accredited head of diplomatic representation of another state or another person that is subject to similar protection in accordance with statute, agreements or commonly recognised international customs, then the cumulative classification under Article 136 §3 CC in concurrence with Article 261 CC is justified. In a situation when a person insulted in public is a member of diplomatic representation of a foreign state or a consular officer and the act is committed while they perform their professional duties, it is necessary to consider legal classification under Article 136 §4 CC in concurrence with Article 261 CC in conjunction with Article 11 §2 CC.

9.1. PENALTIES

A crime under Article 261 CC carries a penalty of a fine or limitation of liberty. In accordance with Article 33 §1 CC, a self-standing fine may account for 10 to 540 daily rates (and a daily rate accounts for PLN 10 to 2,000 – Article 33 §3 CC). A court may sentence a perpetrator to limitation of liberty (for a period from one month to two years). Conditional discontinuation of the criminal proceedings is possible (in accordance with Article 66 CC; of course, provided that all requirements laid down in this provision are met). Abandonment of a penalty imposition is also possible (pursuant to Article 59 CC) for a crime under Article 261, certainly, provided that social harmfulness of an act is not considerable. In such a case, a court adjudicates a penal measure (provided that this measure meets the aim of penalty). Due to the fact that a crime is committed against public order, it is possible that it will have the features of hooliganism (in accordance with Article 115 §21 CC) and then the penalty is imposed in accordance with Article 57a CC (with a possibility to adjudicate on compensation pursuant to Article 57a §2 CC). In case of a perpetrator of a crime under Article 261 CC, a court may decide to publicise a sentence if it believes that this way the aims of a penalty will be achieved with respect to its having desired social influence. It is also possible to adjudicate the seizure of objects (Article 44 CC) or obligation to redress the damage (or compensate) under Article 46 CC.

Article 261 CC – adjudications, convictions and conditional discontinuation

	Adjudications	Convictions	Conditional discontinuation
2007	8	8	0
2008	5	5	0
2009	5	5	0
2010	6	6	0
2011	5	3	2
2012	5	5	0
2013	data unavailable	4	data unavailable
2014	data unavailable	3	data unavailable
2015	3	1	2
2016	4	2	2

Source: *Krajowy Rejestr Karny, skazania prawomocne*

Article 261 CC – types of penalties

Article 261 CC Types of penalties	Self-standing fine	Limitation of liberty	Deprivation of liberty with conditional suspension of penalty execution	Deprivation of liberty without conditional suspension of penalty execution
2007	0	8	0	0
2008	4	1	0	0
2009	2	1	2	0
2010	4	1	0	1
2011	2	1	0	0
2012	1	4	0	0
2013	1	3	0	0
2014	1	2	0	0
2015	0	1	0	0
2016	2	0	0	0

Source: *Krajowy Rejestr Karny, skazania prawomocne*

If we take into consideration all adjudications under Article 261 CC over the period of the last ten years (2007–2016), we deal with 41 cases (however, we lack data for 2013–2014). Taking into account that we dealt with five convictions in those two years, we should state that the number of adjudications in the analysed period was at least 46. Within those (at least) 46 adjudications, in 42 cases perpetrators were convicted, and in four cases, conditional discontinuation of the criminal proceedings took place.⁹³ In 17 cases, courts passed a self-standing fine sentence (37% of adjudications) and in 22 cases sentenced the perpetrators to limitation of liberty (47.8%). In six cases, the criminal proceedings were conditionally discontinued (13%). It is hard to draw binding conclusions based on such a small number of convictions; however, it is evident that the penalty of limitation of liberty applied in almost half of all cases prevails. It is worth mentioning that according to the statistics, in three cases, the penalty of deprivation of liberty was applied (in two cases with conditional suspension of the penalty execution and in one case in an absolute form). It is interesting mainly because the sanction of Article 261 CC envisages only a penalty of a fine or limitation of liberty. Thus, a question is raised about the origin of the penalty of deprivation of liberty in the statistics. It seems that in the three above-mentioned cases, there was a real specific concurrence of provisions (and cumulative classification) and a penalty was imposed based on the provision stipulating the most severe penalty (maybe, e.g. under Article 288 §1 or §2 CC). However, the main act recognised was desecration of a monument or another public place arranged to commemorate a historic event or to honour a person (Article 261 CC).

10. CONCLUSIONS

Summing up the considerations concerning the type of crime classified in Article 261 CC, it is worth quoting R. Krajewski's comments. He analyses whether decriminalisation of this prohibited act would be justified. In his opinion, social harmfulness of such desecrating (e.g. a monument) conduct is not considerable enough to recognise it as requiring that a perpetrator must incur criminal liability. As R. Krajewski states, "(...) at least some cases of desecration of a monument or another place are connected with a perpetrator's drunkenness or have the features of hooliganism, which does not of course constitute justifying or extenuating circumstances at all, but it seems that, in social perception, it does not have much in common with insult, which is usually understood as conscious, deliberate act aimed at hurting somebody. It is also not really known to what extent the classification of this crime in the Criminal Code in force results from a well-weighted legislative decision and to what extent it is just an automatic transfer of it from the former Criminal Code copying the decision of the communist legislator of the early post-war period, especially as the pre-war legislation did not deal with such a prohibited act. It seems that the

⁹³ There are no data concerning the number of conditional suspensions in the period 2013–2014.

latter is quite possible. Thus, the call for relative decriminalisation, because absolutely not complete one might be justified in today's circumstances." It is hard to fully agree with the above arguments. One can assume that the decision to criminalise desecration of, inter alia, a monument was a well-weighed and not just an automatic act. It is clearly stated in the justification for the CC of 1997 (the part concerning crimes against public order) that it repeals "a number of crime types laid down in Chapter XXXVI of the CC of 1969 unambiguously associated with the totalitarian system",⁹⁴ and the crime of desecration of a monument was not recognised as such. Obviously, the origin of the provision is not estimable but it does not have to automatically negate the sense of it, especially as nowadays, in accordance with the Act on decommunisation, monuments that simply should not exist in free Poland are removed. Those that remain should be provided with appropriate legal protection. It seems that (despite a small number of crimes under Article 261 CC reported and even smaller number of convictions) the provision should remain a crime classified in the Criminal Code. However, if we decided to decriminalise it, it would not be necessary to develop a provision adequate to Article 261 in the Misdemeanour Code because Article 140 MC (indecent deeds), which is extremely capacious, and Article 51 MC (public order disturbance) would play this role.

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CRIME OF DESECRATION OF A MONUMENT OR ANOTHER PUBLIC PLACE
ARRANGED TO COMMEMORATE A HISTORIC EVENT
OR TO HONOUR A PERSON (ARTICLE 261 CC)

Summary

The article analyses the statutory features of the crime classified in Article 261 Criminal Code (desecration of a monument or another public place arranged to commemorate a historic event or to honour a person). It also draws attention to changes in the treatment of this offence in the Small Criminal Code (of 13 June 1946) – Article 25, CC Bills (of 1956, 1963, 1966, 1968 and 1990) and CC of 1969 (Article 284 §2). The article presents an analysis of a complex issue of provisions concurrence, which shows that the provision of Article 261 CC is often in real specific concurrence with other provisions (e.g. Article 136 §3, Article 137 §1 or §2, Article 288 §1 or §2 CC, Article 256 §1 CC, Article 108(1) of the Act of 23 July 2003 on the protection of cultural heritage sites and taking care of them). Statistics indicate that the number of offences under Article 261 is not big (e.g. 53 offences registered in 2016). Despite the small number of these crimes, it seems that this type of a prohibited act should continue to be classified in the Polish Criminal Code.

Keywords: desecration of a monument, public place, concurrence of provisions, real specific concurrence of provisions

PRZESTĘPSTWO ZNIEWAŻENIA POMNIKA LUB INNEGO MIEJSCA
PUBLICZNEGO URZĄDZONEGO W CELU UPAMIĘTNIENIA ZDARZENIA
HISTORYCZNEGO LUB UCZCZENIA OSOBY (ART. 261 K.K.)

Streszczenie

Przedmiotem artykułu jest analiza ustawowych znamion przestępstwa stypizowanego w art. 261 k.k. (znieważenie pomnika lub innego miejsca publicznego urządzonego w celu upamiętnienia zdarzenia historycznego lub uczczenia osoby). Zwrócono uwagę również na zmiany w ujmowaniu tego występku w tzw. małym kodeksie karnym (z 13 czerwca 1946 r.) – art. 25, projektach k.k. (z 1956 r., 1963 r., 1966 r., 1968 r., 1990 r.) oraz w k.k. z 1969 r. (art. 284 §2). Przeprowadzono analizę złożonej problematyki zbiegu przepisów, która pokazała, że przepis art. 261 k.k. często pozostaje w rzeczywistym właściwym zbiegu z innymi przepisami (np. z art. 136 §3, art. 137 §1 lub §2, art. 288 §1 lub §2 k.k., art. 256 §1 k.k., art. 108 ust. 1 ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami). Statystyki wskazują, że liczba przestępstw z art. 261 nie jest znaczna (np. 53 przestępstwa stwierdzone w 2016 r.). Pomimo niewielkiej liczby przestępstw, zasadne wydaje się być utrzymanie tego typu czynu zabronionego w polskim kodeksie karnym.

Słowa kluczowe: znieważenie pomnika, miejsce publiczne, zbieg przepisów, rzeczywisty właściwy zbieg przepisów

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