

AGGRAVATION OF CRIMES AGAINST PROPERTY DUE TO FEATURES OF THE SUBJECT OF COMMITTED ACT

BLANKA JULITA STEFAŃSKA *

DOI: 10.26399/iusnovum.v13.3.2019.29/b.j.stefanska

1. INTRODUCTION

A characteristic feature of an aggravated crime is that additional or modified constituent elements of the crime determining its consequences (called consequence-aggravated crimes) or other circumstances (called circumstance-aggravated crimes) are added to the constituent elements of the crime resulting in possible aggravation of penalty. A separate and independent penal sanction or a modified sanction are envisaged for such crimes.¹ One of the aggravating constituent elements are features of the subject of the committed act. According to the Polish Criminal Code,² subjects of an act committed resulting in aggravation of the crime include: a conceived child who achieved the ability to live by itself outside the pregnant woman's body (Article 152 § 3, Article 153 § 2), a helpless person due to his/her age, mental or physical condition (Article 189 § 2, Article 207 § 1a), a minor younger than 15 (Article 197 § 3(2)), an ancestor, descendant, adopted or adopting person, brother or sister (Article 197 § 3(3)), a minor (Article 199 § 2), an invoice or invoices stating

* PhD, Assistant Professor at the Department of Commercial Law, Faculty of Law and Administration of Lazarski University in Warsaw; e-mail: blanka.stefanska@lazarski.pl; ORCID: 0000-0003-3146-6842

¹ S. Śliwiński, *Polskie prawo karne*, Warszawa 1946, p. 82; K. Buchała, *Odpowiedzialność za przestępstwa kwalifikowane przez następstwa czynu*, *Wojskowy Przegląd Prawniczy* No. 1, 1972, p. 22; J. Kochanowski, *Przestępstwa kwalifikowane przez następstwa w kodeksie karnym*, *Państwo i Prawo* No. 1, 1972, pp. 62–64; W. Wolter, *Z rozważań nad kwalifikowanymi typami przestępstw*, *Państwo i Prawo* No. 8–9, 1972, p. 25; T. Bojarski, *Odmiany podstawowych typów przestępstw w polskim prawie karnym*, Warszawa 1982, p. 155; P. Konieczniak, *Uwagi o pojmowaniu typów zmodyfikowanych*, [in:] J. Giezek, J. Brzezińska (eds), *Zmodyfikowane typy przestępstw w teorii i praktyce sądowej*, Warszawa 2017, p. 41.

² Act of 6 June 1997: Criminal Code, Dz.U. 1997, No. 88, item 553, as amended; hereinafter Criminal Code.

a total amount due the value or the total value of which exceeds five times the value of an amount defined as property of great value (Article 270a § 2, Article 271a § 2), an entrusted movable object (Article 284 § 2), property of substantial value (Article 289 § 2, Article 294 § 1) and objects of special importance for culture (Article 294 § 2).

2. CRIMES AGAINST PROPERTY AGGRAVATED DUE TO THE SUBJECT OF THE COMMITTED ACT

Under the Criminal Code, the circumstances concerning a subject of an act committed resulting in aggravation of crimes against property are: an entrusted movable object (Article 284 § 2), property of substantial value (Article 289 § 2, Article 294 § 1) and objects of special importance for culture (Article 294 § 2).

An aggravating circumstance in the case of the crime defined as misappropriation of another person's movable object (Article 284 § 1 Criminal Code) is committing this act against entrusted property (Article 284 § 2 Criminal Code).

Property of substantial value – pursuant to Article 294 § 1 Criminal Code – is an aggravating constituent element of some crimes against property, namely: theft of another person's movable object (Article 278 § 1), theft of computer software (Article 278 § 2), misappropriation of another person's movable object or property right (Article 284 § 1), misappropriation (Article 284 § 2), switching into a telecommunication device (Article 285 § 1), fraud (Article 286 § 1), computer fraud (Article 287 § 1), destroying, damaging or making useless another person's property (Article 288 § 1), breaking or damaging a submarine cable or violating regulations applicable in the case of laying or repairing such cables (Article 288 § 3) and intentional handling stolen goods (Article 291 § 1).

These crimes are also aggravated when the subjects of the act committed are objects of special importance for culture (Article 294 § 2 Criminal Code).

Misappropriating another person's movable object (Article 284 § 1 Criminal Code) is an aggravated crime if it concerns a movable object which has been entrusted to the perpetrator and can also be aggravated if the object is of substantial value or special importance for culture; thus it may be a doubly aggravated crime. Misappropriating another person's property right is an aggravated crime only if the right is of substantial value.

While misappropriation is classified as an aggravated crime due to entrusted property involved in the same basic regulation (Article 284 § 2 Criminal Code), the qualification of the aforementioned crimes as aggravated ones due to substantial value of the property or objects of special importance for culture involved is provided for in a separate basic regulation which refers to regulations determining the basic crime (Article 294 § 1 and § 2 Criminal Code).

The specification of the regulations determining basic types of crimes provided for in Article 294 § 1 of the Criminal Code is exhaustive (*numerus clausus*), and this regulation cannot be applied to other crimes against property. It is aptly emphasised in the judicial decisions that: "A closed catalogue of ten crimes are qualified as aggravated crimes under Article 294 § 1 of the Criminal Code where committing

a crime with regard to property of substantial value is a circumstance resulting in stricter liability.”³ It has been pointed out in the judicature that this catalogue does not include such crimes as theft and burglary (Article 279 § 1 Criminal Code), racketeering and extortion (Article 282 Criminal Code)⁴ and robbery (Article 280 § 1 and § 2 Criminal Code)⁵. The assumption that, apart from the offences specified in Article 294 § 1 of the Criminal Code, other crimes can also be qualified as aggravated under this regulation leads to violation of the fundamental principle of penal law: *nullum crimen sine lege*.⁶ It might appear that it is questionable whether this regulation also covers handling stolen computer software. This crime is defined in Article 293 of the Criminal Code through making a reference that the provisions under Articles 291 and 292 of the Criminal Code, which provide definitions of intentional and unintentional handling stolen goods, respectively also apply to computer software. Article 291 § 1 of the Criminal Code is quoted in Article 294 § 1, and therefore, handling stolen computer software is also covered by this provision through this multilayered reference. Therefore, one should disagree with the view that the Criminal Code does not include any rule under which the regulation provided in Article 294 § 1 of the Criminal Code would refer to handling stolen computer software, and thus there are no grounds for aggravation of the crime of handling stolen computer software considering the value of the software, where it is argued that Article 294 § 1 of the Criminal Code could be applied *per analogiam*, which is inadmissible in penal law.⁷

Given the reference in Article 278 § 5 of the Criminal Code to § 1 of this regulation, there are no obstacles to qualifying theft of energy or a card authorising to withdraw money from an ATM as an aggravated crime under Article 294 § 1 of the Criminal Code due to substantial value of the property, but it would be difficult to assume that objects of special importance for culture could be a qualifying circumstance.⁸ The situation is different in the case of illegal forest logging (Article 290 § 1 Criminal Code). Constituent elements of this crime are defined in Article 290 § 1 of the Criminal Code, and the reference to the envisaged sanction for theft is only made regarding the scope of liability. Therefore, it is unreasonably assumed that Article 294 § 1 or § 2 of the Criminal Code is applicable to the offence defined in Article 290 § 1.⁹

³ Judgment of the Court of Appeal in Wrocław of 7 March 2016, II AKa 292/15, LEX No. 2023604.

⁴ *Ibid.*; judgment of the Court of Appeal in Katowice of 23 April 2009, II AKa 57/09, LEX No. 563083.

⁵ Judgment of the Supreme Court of 29 June 2006, V KK 391/05, Prokuratura i Prawo – insert 2007, No. 1, item 9.

⁶ Judgment of the Supreme Court of 22 August 2006, IV KK 4/06 OSNwSK 2006, No. 1, item 1583.

⁷ P. Kardas, *Prawnokarna ochrona informacji w polskim prawie karnym z perspektywy przestępstw komputerowych. Analiza dogmatyczna i strukturalna w świetle aktualnie obowiązującego stanu prawnego*, Czasopismo Prawa Karnego i Nauk Penalnych No. 1, 2000, pp. 117–118.

⁸ B. Michalski, [in:] A. Wasek, R. Zawłocki (eds), *Kodeks karny. Część szczególna. Komentarz do art. 222–316*, Vol. II, Warszawa 2010, p. 1261.

⁹ *Ibid.*, pp. 1260–1261.

3. AGGRAVATING CIRCUMSTANCES IN CRIMES AGAINST PROPERTY

The circumstances that characterise the subject of the act committed that cause qualifying the crime as aggravated are: entrusting the object, substantial value of the property and its special importance for culture.

3.1. ENTRUSTED PROPERTY

The qualifying constituent element of misappropriation of movable object (Article 284 § 2 Criminal Code) is committing this act with regard to movable object which has been entrusted to the perpetrator. This crime is defined as embezzlement.¹⁰ A stricter penalty is imposed for this act because it involves abuse of trust offered by the owner of the object to the perpetrator by vesting them with the power of disposal of the object linked with the manner of handling it as determined in a civil-law contract, and additionally combined with the proviso that it must be returned to the owner in the future.¹¹

The word "to entrust" means "to put something or someone at someone's disposal"¹². In linguistic terms, an entrusted movable object is the property which has been left at another person's disposal. This concerns a movable object that has

¹⁰ E. Pływaczewski, [in:] A. Marek (ed.), *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1986, p. 395; J. Śliwowski, *Prawo karne*, Warszawa 1975, p. 447; I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa 1989, p. 433; W. Świada, *Prawo karne*, Warszawa 1989, p. 484; M. Surkont, *Prawo karne*, Bydgoszcz–Gdynia 2001, p. 251; D. Pleńska, O. Górniok, [in:] I. Andrejew, L. Kubicki, J. Waszczyński (eds), *System prawa karnego. O przestępstwach w szczególności*, Vol. IV, part II, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1989, p. 412; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2006, p. 572; R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 2007, p. 491; A. Marek, *Prawo karne*, Warszawa 2009, p. 550; *idem*, *Kodeks karny. Komentarz*, Warszawa 2010, p. 605; R.A. Stefański, *Prawo karne materialne. Część szczególna*, Warszawa 2009, p. 560; M. Bojarski, [in:] M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2010, p. 585; A. Marek, J. Lachowski, *Prawo karne. Zarys problematyki*, Warszawa 2011, p. 288; D. Mocarska, *Wybrane zagadnienia prawa karnego materialnego*, Szczytno 2013, p. 176; D. Jagiełło, *Prawo karne materialne*, Skierniewice 2013, p. 156; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny. Komentarz*, Vol. III, Warszawa 2013, p. 217; L. Wilk, [in:] T. Dukiet-Nagórska (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warszawa 2014, p. 517; L. Gardocki, *Prawo karne*, Warszawa 2017, p. 341; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz. Art. 222–316*, Warszawa 2017, p. 712; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 880; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1734; J. Lachowski, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1272; M. Gałazka, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1349.

¹¹ Judgment of the Court of Appeal in Wrocław of 22 December 2015, II AKA 310/15, LEX No. 1993083; judgment of the Court of Appeal in Szczecin of 12 June 2014, II AKA 101/14, LEX No. 1506290; judgment of the Court of Appeal in Szczecin of 27 February 2014, II AKA 15/14, LEX No. 1438217; O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego*, *op. cit.*, p. 413; E. Pływaczewski, [in:] A. Marek (ed.), *Prawo karne, op. cit.*, p. 395; J. Śliwowski, *Prawo karne, op. cit.*, p. 447; A. Marek, *Prawo karne, op. cit.*, p. 550; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny, op. cit.*, 217; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 713.

¹² H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 31, Poznań 2001, p. 349.

been received and possessed legally.¹³ This means vesting someone with the power of disposal of an object, subject to the obligation to return it.¹⁴ Entrusting an object entails the transfer of power of disposal of the object to a person other than the owner connected with determining a certain manner of handling the object by the person receiving it.¹⁵ As has been aptly emphasised in judicial decisions, this concerns the temporary transfer of the power of disposal of the object to the perpetrator, with the proviso that they are not becoming its owner or sole authorised user excluding the rightful owner but only its depositary who has a certain scope of rights, for example, to use the object or derive benefits from it.¹⁶ The object must be possessed by the perpetrator before it is misappropriated.¹⁷

The Supreme Court also aptly notes that this must be another person's movable object because the perpetrator must have the intention to deprive the entrusting person of the object owned by that person.¹⁸

The legal title of the transfer does not matter, unless this is a legal title transferring ownership. This can be a loan for use,¹⁹ storage,²⁰ rent,²¹ leasing²² or con-

¹³ Judgment of the Court of Appeal in Wrocław of 21 March 2018, II AKa 44/18, LEX No. 2486463.

¹⁴ Decision of the Supreme Court of 12 February 2009, OSNKW 2009, No. 6, item 47; D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego, op. cit.*, p. 413; 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. 401; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 417.

¹⁵ Judgment of the Court of Appeal in Warsaw of 13 August 2014, II AKa 213/14, LEX No. 1504518; judgment of the Court of Appeal in Warsaw of 8 April 2014, II AKa 81/14, LEX No. 2274006; D. Mocarcka, *Wybrane zagadnienia, op. cit.*, p. 177.

¹⁶ Judgment of the Supreme Court of 11 January 2017, IV KK 283/16, LEX No. 2200603; decision of the Supreme Court of 17 September 2008, III KK 131/08 OSNwSK 2008, No. 1, item 1860; judgment of the Court of Appeal in Gdańsk of 21 September 2017, II AKa 269/17, II AKa 403/16, LEX No. 2433296; judgment of the Court of Appeal in Rzeszów of 6 June 2013, II AKa 38/13, LEX No. 1322041; judgment of the Court of Appeal in Łódź of 28 January 2013, II AKa 293/12, LEX No. 1282760; judgment of the Court of Appeal in Katowice of 28 November 2012, II AKa 288/12, LEX No. 1236413; J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1938, p. 600; W. Świda, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warszawa 1973, p. 617.

¹⁷ Judgment of the Court of Appeal in Warsaw of 14 December 2016, II AKa 403/16, LEX No. 2249972.

¹⁸ Decision of the Supreme Court of 21 September 2017, IV KK 281/17, LEX No. 2401780.

¹⁹ Judgment of the Supreme Court of 28 June 1979, Rw 208/79, OSNKW 1979, No. 10, item 103; judgment of the Supreme Court of 18 September 1936, II K 838/36, OSNK 1937, No. 2, item 54; W. Świda, [in:] I. Andrejew et al., *Kodeks karny, op. cit.*, p. 617; A. Marek, *Prawo karne, op. cit.*, p. 550; *idem*, *Kodeks karny, op. cit.*, p. 605; D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego, op. cit.*, p. 413; A. Marek, J. Lachowski, *Prawo karne, op. cit.*, p. 288; E.W. Pływaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 1518; L. Gardocki, *Prawo karne, op. cit.*, p. 341.

²⁰ K. Buchała, *Prawo karne materialne*, Warszawa 1989, p. 657; M. Gałazka, [in:] A. Grześkowiak (ed.), *Prawo karne*, Warszawa 2009, p. 377; A. Marek, *Prawo karne, op. cit.*, p. 550; *idem*, *Kodeks karny, op. cit.*, p. 605; B. Michalski, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 1101; A. Marek, J. Lachowski, *Prawo karne, op. cit.*, p. 288; E.W. Pływaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny, op. cit.*, p. 1518; L. Gardocki, *Prawo karne, op. cit.*, p. 341.

²¹ Judgment of the Court of Appeal in Katowice of 5 June 2014, II AKa 144/14, LEX No. 1480412.

²² Judgment of the Court of Appeal in Katowice of 26 February 2016, II AKa 546/15, LEX No. 2087707; judgment of the Court of Appeal in Katowice of 12 November 2015, II AKa 420/15,

signment²³ agreement, pledge,²⁴ deposit,²⁵ authorisation to receive remuneration for work,²⁶ holding,²⁷ deposit,²⁸ handing over of an object in order to make copies or prints,²⁹ giving money to be paid into a specific bank account,³⁰ etc. This can also be a collateral to a bank or any other entity which is the perpetrator's creditor and being a form of debt security.³¹ The Supreme Court reasonably deemed that: "A collateral agreement is a so-called fiduciary transfer of ownership involving securing debts by transferring upon the creditor the ownership title to the movable object, and at the same time imposing the obligation on the creditor to enable the debtor to use the ownership title within the boundaries agreed by the parties. The transfer of ownership is admissible under such an agreement on the grounds of the regulations provided in Articles 155 and 156 of the Polish Civil Code and, in the light of the judicial decisions of the Supreme Court and the views expressed in the doctrine, agreements of this kind are a very effective form of securing loans."³² It is assumed that an illicit disposal by members of the management board by means of transferring funds from their company's bank account is misappropriation of funds entrusted to them, i.e. the offence under Article 284 § 2 of the Criminal Code.³³

LEX No. 1934419; judgment of the Court of Appeal in Katowice of 16 May 2013, II AKA 124/13, LEX No. 1378230; judgment of the Court of Appeal in Gdańsk of 9 January 2013, II AKA 446/12, LEX No. 1280023; judgment of the Court of Appeal in Wrocław of 22 February 2012, II AKA 30/12, LEX No. 1120041; judgment of the Court of Appeal in Kraków of 30 September 1998, II AKA 190/98, LEX No. 35254.

²³ Judgment of the Supreme Court of 26 August 1981, Rw 254/81, LEX No. 17441; judgment of the Supreme Court of 4 November 1936, III K 1765/36, OSNK 1937, No. 5, item 132; A. Marek, *Prawo karne, op. cit.*, p. 550; *idem*, *Kodeks karny, op. cit.*, p. 605; A. Marek, J. Lachowski, *Prawo karne, op. cit.*, p. 288; L. Gardocki, *Prawo karne, op. cit.*, p. 341.

²⁴ W. Świda, [in:] I. Andrejew et al., *Kodeks karny, op. cit.*, p. 617; E. Plywaczewski, [in:] A. Marek (ed.), *Prawo karne, op. cit.*, p. 395; D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego, op. cit.*, p. 413; A. Marek, *Prawo karne, op. cit.*, p. 550; *idem*, *Kodeks karny, op. cit.*, p. 605; A. Marek, J. Lachowski, *Prawo karne, op. cit.*, p. 288; E.W. Plywaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny, op. cit.*, p. 1518.

²⁵ D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego, op. cit.*, p. 413; E.W. Plywaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny, op. cit.*, p. 1518; J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny, op. cit.*, p. 1772.

²⁶ Judgment of the Supreme Court of 26 June 1978, II KR 134/78, OSNKW 1978, No. 10, item 116.

²⁷ Judgments of the Supreme Court: of 20 May 1946, K 332/46, OSNK 1947, No. 1, item 13; of 4 January 1937, II K 561/36, OSNK 1937, No. 6, item 164.

²⁸ Judgment of the Supreme Court of 19 December 1934, I K 987/34, OSNK 1935, No. 7, item 287; J. Makarewicz, *Kodeks karny, op. cit.*, p. 601.

²⁹ Judgment of the Supreme Court of 26 August 1981, Rw 254/81, OSN PG 1982, No. 12, item 159.

³⁰ L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 713.

³¹ Decision of the Supreme Court of 17 January 2013, II KK 69/12, LEX No. 1254673; judgment of the Court of Appeal in Rzeszów of 20 May 2014, II AKA 36/14, LEX No. 1474772; judgment of the Court of Appeal in Rzeszów of 11 June 2013, II AKA 38/13, LEX No. 1730676; judgment of the Court of Appeal in Poznań of 22 June 1995, II AKr 178/95, LEX No. 24210; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, pp. 713–714; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny, op. cit.*, pp. 1734–1735.

³² Judgment of the Supreme Court of 10 January 1997, III KKN 56/96, LEX No. 29517.

³³ Judgment of the Court of Appeal in Wrocław of 19 December 2013, II AKA 368/13, LEX No. 1416465.

The property does not necessarily need to be entrusted to the perpetrator directly by the owner; it can be entrusted to the perpetrator by a third party.³⁴ It is not required that the legal relationship between the parties be precisely determined. It is sufficient that property has been entrusted for keeping in the general sense which is a manifestation of trust in the keeper.³⁵ The goal of entrusting the object does not matter; it can also be illegal, for example, performed in order to bribe an official.³⁶

A movable object which has been entrusted to the perpetrator on the grounds of an agreement transferring its ownership title upon the perpetrator cannot be a subject of embezzlement.³⁷ A deposit agreement the subject of which is an amount of money does not provide such grounds because it causes transfer of ownership of this amount of money upon the person accepting the deposit.³⁸ Money which is the subject of so-called irregular deposit, i.e. advance payment, prepayment or loan, cannot be the subject of misappropriation.³⁹ Borrowed money is not another person's asset, it is one's own asset. A person who receives money as part of a loan or credit becomes its owner, and the creditor only is entitled to a claim of obligatory nature to be paid back the same amount of money (Article 720 § 1 Civil Code⁴⁰). However, an illicit order to withdraw money from an account by a person who has been entrusted with the right to dispose of the money kept on the bank account is a crime known as embezzlement.⁴¹

The Supreme Court is right when claiming that: "A movable object which has been entrusted to the perpetrator in a situation where the provisions of the agreement under which the property has been handed over indicate that the ownership title to this property has been transferred upon the perpetrator is not a subject of embezzlement."⁴² While misappropriating a movable object, the perpetrator must

³⁴ Judgment of the Supreme Court of 28 April 1949, K 228/49, OSNK 1949, No. 2, item 55; judgment of the Supreme Court of 14 March 1934, III K 1281/33, OSNK 1934, No. 9, item 19; W. Świda, [in:] I. Andrejew et al., *Kodeks karny, op. cit.*, p. 617; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 713; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny, op. cit.*, p. 1734.

³⁵ Judgments of the Supreme Court: of 26 September 1946, K 1052/46, OSNK 1947, No. 4, item 92; of 26 August 1981, R.w 254/81, OSN PG 1982, No. 12, item 159; W. Świda, [in:] I. Andrejew et al., *Kodeks karny, op. cit.*, p. 618; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 713.

³⁶ J. Makarewicz, *Kodeks karny, op. cit.*, p. 601; W. Świda, [in:] I. Andrejew et al., *Kodeks karny, op. cit.*, p. 617.

³⁷ Judgment of the Court of Appeal in Lublin of 2 April 2014, II AKa 122/13, LEX No. 1474565.

³⁸ Decision of the Supreme Court of 6 November 2015, V KK 304/15, LEX No. 1849096.

³⁹ Judgment of the Court of Appeal in Białystok of 30 March 2016, II AKa 8/16, LEX No. 2136974; judgment of the Court of Appeal in Białystok of 30 March 2016, II AKa 27/16, LEX No. 2039695; judgment of the Court of Appeal in Katowice of 1 August 2012, II AKa 264/12, LEX No. 1258294; judgment of the Supreme Court of 4 May 1937, II K 114/37, OSNK 1937, No. 11, item 314; W. Świda, [in:] I. Andrejew et al., *Kodeks karny, op. cit.*, p. 618.

⁴⁰ Act of 23 April 1964, Dz.U. 1964, No. 16, item 93, as amended.

⁴¹ Judgment of the Court of Appeal in Warsaw of 19 September 2012, II AKa 227/12, LEX No. 1238266; judgment of the Court of Appeal in Wrocław of 9 June 2006, II AKa 143/06, LEX No. 190485.

⁴² Decision of the Supreme Court of 17 September 2008, III KK 131/08, LEX No. 464973; judgment of the Court of Appeal in Wrocław of 5 December 2013, II AKa 388/13, LEX No. 2097459.

be acting with the intention of *res sibi habendi*, i.e. of depriving the entrusting person of their ownership. Another person's property, according to Article 284 § 2 of the Criminal Code – as is aptly claimed in the judicature – is the share capital of a limited liability company; it is property separate from the personal property of the company's shareholders.⁴³ This can be property of a limited liability company because for shareholders the company's property is another person's property.⁴⁴

The perpetrator must be aware of the fact that the property being misappropriated being in their possession is owned by someone else.⁴⁵

It is wrongly claimed in the legal doctrine that entrusted property is not an object handed over to carry out certain activities with it, for example, leaving a suit with a tailor for fitting, or utilising it for carrying out certain activities or to transport it, by pointing out that in these cases the perpetrator does not have the power of disposal of the object.⁴⁶ It is aptly noted in the doctrine that in such situations the perpetrator possesses the object and does not remove it from the authorised person's power of disposal, and thus does not abuse the person's trust.⁴⁷

3.2. PROPERTY OF SUBSTANTIAL VALUE

A circumstance that qualifies the crimes specified in Article 294 § 1 of the Criminal Code as aggravated is substantial value of property against which the prohibited act is committed. This is an economic term determining the value of such property.⁴⁸ The term property is used in this provision, while the subject of the committed act is referred to as an object in the regulations mentioned therein. This gives rise to the question about the link between these two terms. It is pointed out in the reasons for the bill of Criminal Code that the code "Also uses civil-law terminology to determine the subject of the crime, for the sake of linguistic and semantic accuracy, using where possible the word 'object' and not 'property' to determine the ownership right."⁴⁹ The use of the word "object" instead of "property" has been criticised in literature, recognising that the development of the Polish contemporary grammar, lexicology and law and penal law literature provide no grounds

⁴³ Judgment of the Court of Appeal in Białystok of 29 May 2014, II AKa 70/14, LEX No. 1480393.

⁴⁴ Resolution of the Supreme Court of 20 May 1993, I KZP 10/93, OSNKW 1993, No. 7–8, item 44 with a critical gloss by S. Łagodziński, *Państwo i Prawo* No. 1, 1994, pp. 112–115 and comments from R.A. Stefański, *A review of resolutions of the Criminal Chamber of the Supreme Court concerning material penal law for 1991–1993*, *Wojskowy Przegląd Prawniczy* No. 3–4, 1994, pp. 87–88; judgment of the Court of Appeal in Białystok of 20 November 2012, II AKa 138/12, LEX No. 1278079; judgment of the Court of Appeal in Wrocław of 23 October 2006, II AKa 224/06, OSAW 2008, No. 2, item 85.

⁴⁵ Judgment of the Court of Appeal in Gdańsk of 20 October 2015, II AKa 309/15, LEX No. 2006020.

⁴⁶ I. Andrejew, *Polskie prawo karne*, op. cit., p. 433; L. Gardocki, *Prawo karne*, op. cit., p. 341.

⁴⁷ L. Gardocki, *Prawo karne*, op. cit., p. 341.

⁴⁸ Judgment of the Court of Appeal in Wrocław of 24 May 2000, II AKa 149/00, OSA 2000, No. 11–12, item 78.

⁴⁹ I. Fredrich-Michalska, B. Stachurska-Marcińczak (eds), *Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warszawa 1997, p. 206.

for such use.⁵⁰ Given the fact that these terms are not synonymous, it is assumed in writings that the legislator, using the term “property” in Article 294 § 1 of the Criminal Code changed an object into property as the subject of the act committed envisaged in the regulations mentioned therein.⁵¹ This is not a correct view because it is expressly provided in Article 294 § 1 of the Criminal Code that this concerns the crimes determined in the regulations specified therein, and thus covering all the subjects of the acts committed as determined in the regulations specified. This is a collective term covering under the Criminal Code a movable object (Article 278 § 1, Article 284 § 1 or § 2, Article 288 § 1 and Article 291 § 1), an immovable object (Article 288 § 1, Article 291 § 1), computer software (Article 278 § 2), telephone call units (Article 285 § 1), property (Article 286 § 1 and Article 187 § 1) and submarine cable (Article 288 § 3).

Therefore, it needs to be understood that Article 294 § 1 of the Criminal Code refers to objects the value of which exceeds PLN 200,000; it is not the size of the damage incurred but the value of the act committed that matters.⁵² In cases where a constituent element is a damage (Article 288 § 1 or § 3, Articles 285 and 287 Criminal Code), this concerns the value of the damage exceeding this amount.⁵³

This constituent element is not controversial because it has been defined in Article 115 § 5 of the Criminal Code.⁵⁴ Pursuant to this provision, property of substantial value is property the value of which at the time of committing of the prohibited act exceeds PLN 200,000. The value of the property being the subject of the prohibited act should be calculated as at the time of committing the act and not at the time of passing the judgment.⁵⁵ A contrary view, where it is argued that this concerns a legal category and therefore it should be evaluated according to the time of passing the judgment and not the time of committing the crime, cannot be approved of.⁵⁶ This interpretation contradicts Article 115 § 5 of the Criminal Code which expressly concerns property value *verba legis* “at the time of committing of the prohibited act”.

The value of the crime subject in each case is the value the aggrieved has really incurred to bring back the previously existing condition and remove effects of

⁵⁰ A. Dermont, *Ustawowa zamiana „mienia” na „rzecz” w kodeksie karnym*, Prokuratura i Prawo No. 9, 2003, pp. 76–93.

⁵¹ A. Sośnicka, *Przestępstwo i wykroczenie przywłaszczenia w polskim prawie karnym*, Warszawa 2013, p. 115.

⁵² Judgment of the Court of Appeal in Białystok of 31 August 2016, II AKa 130/16, LEX No. 2208324.

⁵³ M. Gałązka, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny*, *op. cit.*, p. 1375.

⁵⁴ It has been pointed out in literature that defining notions with the use of terms expressed in monetary nominal values violates one of the key functions of the criminal law, i.e. the guarantee function (P.M. Dudek, *Inflacja pieniądza a prawo karne*, Państwo i Prawo No. 10, 2014, pp. 68–84).

⁵⁵ Decision of the Court of Appeal in Lublin of 22 December 1998, II AKz 118/98, LEX No. 62576; judgment of the Court of Appeal in Warsaw of 21 June 2013, II AKa 180/13, LEX No. 1342393; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit.*, p. 448; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit.*, p. 787; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit.*, p. 900; I. Zgoliński, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1300; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny*, *op. cit.*, p. 1748.

⁵⁶ Judgment of the Court of Appeal in Katowice of 30 August 2011, II AKa 295/11, LEX No. 1102916.

the crime. At the same time, this is the value of the subject agreed by the parties in the agreements binding on them, provided that such agreements have been concluded. It is unreasonable to increase this value, for example, by adding VAT to it in case of professional trade between entities that are engaged in business activity and are VAT payers.⁵⁷

In the case of a continuous offence, the values of the property affected by subsequent conduct are added together.⁵⁸ In case the crime has been committed in the form of complicity, the total value of the property is taken into account, and is not divided into the number of accomplices.⁵⁹

3.3. OBJECTS OF SPECIAL IMPORTANCE FOR CULTURE

An object of special importance for culture as the subject of committed act – pursuant to Article 294 § 2 of the Criminal Code – is a circumstance that qualifies for aggravation of the crimes specified in § 1 of this regulation. This is a discretionary constituent element, and it is not surprising that it provokes disputes in the legal doctrine. To identify this constituent element, it is necessary in the first place to identify cultural property. As it has been rightly noted in the judicial decisions: “To decide whether a given behaviour constitutes the crime defined in Article 278 § 1 of the Criminal Code in conjunction with Article 294 § 2 of the Criminal Code, it is necessary in the first place to identify whether the subject of the act committed is ‘cultural property’, and if the answer is positive, whether the object taken with the intention to misappropriate has been of a special qualified value for culture in the meaning used in Article 294 § 2 of the Criminal Code. The term ‘objects of special importance for culture’ used by the legislator in Article 294 § 2 of the Criminal Code indicates that there is a certain ‘hierarchy’ of cultural property objects only some of which are of special importance for culture, while other – regardless of their unquestioned significance for culture – do not have such a special feature. In this case the interpretive problem amounts to identifying the prerequisites that make a given object of ‘special importance’ for culture.”⁶⁰

In the legal doctrine, cultural property is defined, for example, as objects, means and values contributing to the material and spiritual heritage of the nation⁶¹ or movable and immovable objects of great significance for the nation’s cultural heritage, such as monuments, archaeological sites, constructions, works of art, manuscripts, books, buildings in which cultural property of the nation is stored or exhibited, and

⁵⁷ Judgment of the Court of Appeal in Katowice of 16 January 2014, II AKa 462/13, LEX No. 1455145.

⁵⁸ M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit.*, p. 900.

⁵⁹ Judgment of the Supreme Court of 2 September 1955, I K 526/55, OSNCK 1956, No. 1, item 7; judgment of the Court of Appeal in Wrocław of 13 August 2013, II AKa 366/12, LEX No. 1369281; A. Sośnicka, *Przestępstwo i wykroczenie*, *op. cit.*, p. 117; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit.*, p. 900.

⁶⁰ Judgment of the Court of Appeal in Kraków of 27 June 2018, II AKa 90/18, LEX No. 2524972.

⁶¹ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 55.

centres covering a significant amount of cultural property.⁶² This term is defined in Article 2(1) of the Act of 25 May 2017 on the restoration of national cultural property,⁶³ according to which it is “a monument as defined in Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments, a movable object which is not a monument, and also elements or components thereof the preservation of which is in the public interest, considering their artistic, historical or scientific value or their significance for cultural heritage and development.” In turn, a monument – pursuant to Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments⁶⁴ – is a real estate or movable object, their elements or components, manmade or related to human activity and being proof of a past epoch or event, the preservation of which is in public interest, considering their historical, artistic or scientific value. Moreover, according to Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention and Protocol on the Protection of Cultural Property in the Event of Armed Conflict signed in the Hague on 14 May 1954,⁶⁵ cultural property is “irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above (...).” The latter definition is recognised as a model⁶⁶ and is suggested to be taken into account during the interpretation of cultural property referred to in Article 294 § 1 of the Criminal Code.⁶⁷

This is reasonable above all because it allows covering with legal protection a wide range of property which deserves this. The fact that it has been constructed for other needs does not impede its use. As it is rightly noted in the doctrine, although the scope of the legal definition covers the area of an act in which it is included, it is also applicable in pursuance of other legal acts, provided that it is included in an act which is recognised as fundamental in a given area,⁶⁸ and this convention is viewed as such.

It is reasonably recognised in the doctrine that cultural property comprises not only material cultural objects but also intangible achievements of humanity as

⁶² G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014, p. 1145.

⁶³ Dz.U. 2017, item 1086, as amended.

⁶⁴ Dz.U. 2018, item 2067, as amended.

⁶⁵ Dz.U. 1957, No. 46, item 212.

⁶⁶ A. Gerecka-Żołyńska, *W kwestii definicji dobra kultury i dzieła sztuki*, Prokuratura i Prawo No. 9, 1999, p. 106; A. Książopolska-Kukulska, *Dobra kultury jako przedmiot ochrony w prawie karnym*, Prokurator No. 2, 2007, p. 113.

⁶⁷ M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny, op. cit.*, p. 901; I. Zgoliński, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny, op. cit.*, p. 1300.

⁶⁸ M. Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2010, p. 212.

a value originating from the world of culture and belonging to it.⁶⁹ This can be both property of great economic value and one that has no material value.⁷⁰

Defining the special importance of such property is more complicated. Doubtlessly, objects of special importance for culture form qualified cultural property as compared to ordinary cultural property.⁷¹ This is property of great significance not only for Polish but also other cultures.⁷² It is rightly assumed in the doctrine that this concerns property of exceptional, unique, special meaning for culture, which has exceptional value, special meaning and unique nature.⁷³ It is pointed out that the special nature of cultural property results from its being covered with a form of legal protection linked to listing in the register of monuments or recognition as a historic monument, or adding a given object to the world cultural heritage list.⁷⁴ However, not every monument is an object of special importance for culture, while property which is not a monument,⁷⁵ has no historic monument status, is not registered in museum stock or is not part of a library collection⁷⁶ can be recognised as such an object. It does not have to be of substantial financial value and represent a high artistic level. What is essential is that its importance for culture results from the historical or cultural role of a given object.⁷⁷ Adding the monument to the UNESCO World Cultural Heritage List can be an additional criterion.⁷⁸

It is claimed in literature that it is practically impossible to define what an object of special importance for culture is because importance for culture cannot be defined at all, and qualifying special importance versus normal importance is infeasible.⁷⁹ Therefore, it is believed that regulations which cannot be precisely formulated by the legislator should not be in force because a citizen cannot be required to be aware of the scope of criminal prohibition and to comply with it if they are unable to determine its boundaries on their own.⁸⁰

⁶⁹ A. Przyborowska-Klimczak, *Dobro kultury*, [in:] K. Zeidler (ed.), *Leksykon prawa ochrony zabytków*, Warszawa 2010, p. 31.

⁷⁰ B. Michalski, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 1272; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 790.

⁷¹ G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny, op. cit.*, p. 1145.

⁷² W. Radecki, *Ochrona dóbr kultury w nowym kodeksie karnym*, Prokuratura i Prawo No. 2, 1998, p. 17.

⁷³ M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny, op. cit.*, p. 450; A. Marek, *Kodeks karny, op. cit.*, p. 622; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny, op. cit.*, p. 901.

⁷⁴ M. Trzciński, *Przestępczość przeciwko zabytkom*, Prokuratura i Prawo No. 6, 2011, p. 44.

⁷⁵ M. Trzciński, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna*, Warszawa 2010, p. 19; K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Warszawa 2007, pp. 42–58; W. Sieroszewski, *Ochrona prawna dóbr kultury w Polsce*, Warszawa 1971, p. 17.

⁷⁶ M. Kulik, *Przestępstwo i wykroczenia uszkodzenia rzeczy*, Lublin 2005, pp. 204–205.

⁷⁷ E.W. Pływawczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny, op. cit.*, p. 1544; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny, op. cit.*, p. 788.

⁷⁸ Judgment of the Court of Appeal in Kraków of 27 June 2018, II AKA 90/18, LEX No. 2524972; G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny, op. cit.*, p. 1145.

⁷⁹ J. Pruszyński, *Dziedzictwo kultury Polski: jego straty i ochrona prawna*, Vol. 2, Kraków, 2001, pp. 604–605; a critical view on this issue is also presented in J. Kaczmarek, M. Kierszka, *Pojęcia „mienie w wielkich rozmiarach”, „zniszczenie w świecie roślinnym lub zwierzęcym w znacznych rozmiarach” oraz „dobra o szczególnym znaczeniu dla kultury” w kodeksie karnym*, Prokuratura i Prawo No. 3, 2000, pp. 116–119.

⁸⁰ W. Radecki, *Ochrona dóbr kultury, op. cit.*, p. 17.

Given this constituent element, the question arises as to whether in the case where the value of the property of special importance for culture does not exceed the value which sets the boundary between a crime and an offence, i.e. PLN 500, as regards theft (Article 278 § 1 or § 3 Criminal Code, Article 119 § 1 Polish Code of Petty Offences⁸¹), misappropriation (Article 284 § 1 Criminal Code and Article 119 § 1 Code of Petty Offences) and object damaging (Article 288 § 1 or § 3 Criminal Code, Article 124 § 1 Code of Petty Offences), Article 294 § 2 of the Criminal Code is applicable. Different standpoints on this issue have been presented in literature.

There is a view that stricter liability concerns each of the crimes specified in Article 294 § 2 in conjunction with § 1 of the Criminal Code if the subject of the prohibited act is an object of special importance for culture, regardless of its financial value.⁸²

It is also assumed that in the case of acts which can be classified as both crimes and petty offences the qualification under Article 294 § 2 of the Criminal Code may only take place when the value of the object or damage exceeds the threshold separating the crime from the petty offence.⁸³ It is argued that Article 294 § 2 of the Criminal Code is only applicable when an act has all the constituent elements of the crime defined under Article 278 § 1 or Article 284 § 1 or Article 288 § 1 or § 3 of the Criminal Code and not of the petty offence defined under Article 119 § 1 or Article 124 § 1 of the Code of Petty Offences, respectively. Article 294 § 2 of the Criminal Code, due to its being linked to § 1, concerns only the crimes specified in the latter regulation. It is rightly emphasised that what decides on the aggravation under Article 294 § 2 of the Criminal Code is not the fact that a theft of an object of special importance for culture has been committed but that this theft is aggravated under Article 278 § 1 of the Criminal Code.⁸⁴ An act which is not a basic crime cannot be qualified as an aggravated crime.⁸⁵ Therefore, it is rightly argued in judicial decisions that: "Theft of an object of importance for culture which has no special nature the value of which exceeds the contraventionalisation threshold shall be a petty offence as defined under Article 278 § 1 of the Criminal Code, considering the value of the property. Thus, only the actions covering objects of importance for culture but not of special importance for culture and whose value does not exceed the value which determines the contraventionalisation threshold are petty offences."⁸⁶

⁸¹ Act of 20 May 1971, Dz.U. 1971, No. 12, item 114, as amended.

⁸² J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998, p. 509; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny, op. cit.*, p. 449.

⁸³ M. Kulik, *Przestępstwo i wykroczenie, op. cit.*, p. 160.

⁸⁴ W. Radecki, *Ochrona zabytków w polskim, czeskim i słowackim prawie karnym*, Prokuratura i Prawo No. 4, 2012, p. 24.

⁸⁵ B. Gadecki, *Kontrowersje wokół odpowiedzialności za zniszczenie lub uszkodzenie dobra o szczególnym znaczeniu dla kultury*, *Ius Novum* No. 4, 2013, p. 23.

⁸⁶ Judgment of the Court of Appeal in Kraków of 27 June 2018, II AKa 90/18, LEX No. 2524972.

4. LEGAL QUALIFICATION OF AN ACT

The manner in which aggravated types of crimes are construed in Article 294 § 1 and § 2 of the Criminal Code also affects the legal qualification of criminal acts. It is insufficient to refer only to Article 294 § 1 or § 2 of the Criminal Code because this provision does not determine the constituent elements of any type of a prohibited act as this is defined in the regulation to which reference is made. It is rightly indicated in the judicature that: "The provision of Article 294 § 1 of the Criminal Code does not determine itself the constituent elements of any type of a prohibited act, and therefore a crime cannot be qualified solely on the grounds of Article 294 § 1 of the Criminal Code without linking this provision to a defined basic type of crime against property."⁸⁷ Article 294 § 1 of the Criminal Code is linked to any of the regulations specified in it determining the basic type of crime. The description of an aggravated type is provided for in two provisions which should be considered jointly during the interpretation of its constituent elements. Therefore, a complex legal qualification is necessary based on the regulation which determines the basic type of a given crime and Article 294 of the Criminal Code.⁸⁸ The Supreme Court rightly argues that it is impossible to qualify a crime solely on the grounds of Article 294 § 1 of the Criminal Code without linking this provision to a certain basic type of crime against property.⁸⁹ In the legal qualification of the crime known as theft of an object of substantial value, reference should be made to Article 278 § 1 in conjunction with Article 294 § 1 of the Criminal Code. When additionally this is an object of special importance for culture, the legal qualification should be as follows: Article 278 § 1 in conjunction with Article 294 § 1 and § 2 of the Criminal Code. In case when the perpetrator commits the crime specified in Article 294 § 1 with regard to property of substantial value which is an object of special importance for culture, the cumulative qualification under Article 294 § 1 and § 2 of the Criminal Code⁹⁰ is applied.

The regulation provided in Article 294 § 1 of the Criminal Code containing an aggravating constituent element with regard to the crime specified therein cannot be in cumulative concurrence with the basic provision determining the statutory constituent

⁸⁷ Judgment of the Court of Appeal in Wrocław of 22 August 2018, II AKa 229/18, LEX No. 2556682; judgment of the Court of Appeal in Wrocław of 23 September 2016, II AKa 274/16, LEX No. 2171230; judgment of the Court of Appeal in Warsaw of 21 September 2016, II AKa 210/16, LEX No. 2171261; judgment of the Court of Appeal in Warsaw of 13 July 2016, II AKa 196/16, LEX No. 2171262; judgment of the Court of Appeal in Warsaw of 30 June 2016, II AKa 177/16, LEX No. 2171258; judgment of the Court of Appeal in Warsaw of 19 April 2016, II AKa 262/15, LEX No. 2112343; judgment of the Court of Appeal in Wrocław of 27 March 2013, II AKa 72/13, LEX No. 1313479; judgment of the Court of Appeal in Kraków of 7 June 2001, II AKa 107/01, KZS 2001, No. 7–8, item 46; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny, op. cit.*, p. 479; I. Zgoliński, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny, op. cit.*, p. 1299.

⁸⁸ Judgment of the Court of Appeal in Katowice of 29 June 1999, II AKa 179/99, OSA 2000, No. 7–8, item 52; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny, op. cit.*, p. 479; G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny, op. cit.*, p. 1145.

⁸⁹ Judgment of the Supreme Court of 23 January 2002, V KKN 497/99, Prokuratura i Prawo – insert 2002, No. 5, item 2.

⁹⁰ G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny, op. cit.*, p. 1145.

elements of a given crime.⁹¹ It is aptly emphasised in the jurisprudence that cumulative qualification may never concern cases of complex qualification when constituent elements of one type of a prohibited act are determined in two or more regulations.⁹²

Article 294 § 1 of the Criminal Code can be applied in the legal qualification pertaining to a sequence of crimes and be used as grounds for sentencing and imposing a penalty in case when each of the crimes concerns property of substantial value.⁹³ The aggregate value of the property against which the crimes have been committed exceeding the substantial value threshold is not sufficient to apply this regulation in the case of a sequence of crimes.⁹⁴ A sequence of crimes does not take place in the case of committing crimes which have the constituent elements of the basic and aggravated types of the crime because the identical legal qualification is required under Article 91 § 1 of the Criminal Code.⁹⁵

In the case of sentencing for a crime specified in Article 294 § 1 of the Criminal Code concerning property of substantial value, the penalty is imposed solely on the grounds of the regulation provided in Article 294 § 1 of the Criminal Code.⁹⁶

To qualify the crime as aggravated under Article 294 § 1 of the Criminal Code, it is required that the accomplice also has acted intentionally and that the value of the financial benefit achieved exceeds PLN 200,000.⁹⁷

The perpetrator's direct intention concerns illegal obtaining of the property *per se* (Article 278 § 1 Criminal Code), while the substantial value of the property (Article 294 § 1 Criminal Code) can be part of the possible intention.⁹⁸

⁹¹ Judgment of the Court of Appeal in Warsaw of 13 August 2014, II AKa 213/14, LEX No. 1504518; judgment of the Court of Appeal in Wrocław of 27 March 2013, II AKa 72/13, LEX No. 1313479; judgment of the Court of Appeal in Katowice of 3 March 2011, II AKa 42/11, LEX No. 846484; judgment of the Court of Appeal in Katowice of 19 October 2006, II AKa 145/06, Prokuratura i Prawo – insert 2007, No. 6, item 35; judgment of the Court of Appeal in Kraków of 7 June 2001, II AKa 107/01, LEX No. 49489; judgment of the Court of Appeal in Kraków of 7 June 2001, II AKa 107/01, Prokuratura i Prawo – insert 2002, No. 5, item 19.

⁹² M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny, op. cit.*, p. 489.

⁹³ Judgment of the Supreme Court of 11 March 2008, III KK 523/07, Prokuratura i Prawo – insert 2008, No. 6, item 10; judgment of the Supreme Court of 2 February 2007, V KK 133/06, OSNKW 2007, No. 3, item 27 with an approving gloss by J. Potulski, *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2007, No. 4, pp. 143–148; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny, op. cit.*, p. 483; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny, op. cit.*, p. 900; I. Zgoliński, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny, op. cit.*, p. 1299; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny, op. cit.*, p. 1748.

⁹⁴ Judgment of the Court of Appeal in Kraków of 8 April 1999, II AKa 34/99, KZS 1999, No. 5, item 32.

⁹⁵ M. Dąbrowska-Kardas, P. Kardas, *Czyn ciągły i ciąg przestępstw: komentarz do art. 12 i 91 Kodeksu karnego*, Kraków 1999, p. 92; M. Gajewski, *Glosa do uchwały SN z dnia 11 sierpnia 2000 r.*, I KZP 17/2000, OSP 2001, No. 9, item 123; *idem*, *W sprawie tożsamości kwalifikacji prawnej jako koniecznej przesłanki uznania, że przestępstwa zostały popełnione w warunkach ciągu przestępstw*, *Przegląd Sądowy* No. 11–12, 2000, p. 115 et seq.; J. Lachowski, *Glosa do uchwały SN z dnia 11 sierpnia 2000 r.*, I KZP 17/2000, *Monitor Prawniczy* No. 16, 2001, p. 845 et seq.

⁹⁶ Judgment of the Court of Appeal in Katowice of 3 February 2011, II AKa 457/10, LEX No. 846490; I. Zgoliński, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny, op. cit.*, p. 1299.

⁹⁷ Judgment of the Court of Appeal in Warsaw of 18 November 2015, II AKa 315/15, LEX No. 2009533.

⁹⁸ Judgment of the Court of Appeal in Warsaw of 29 October 2014, II AKa 213/14, LEX No. 1713034.

5. CONCLUSIONS

- 1) The circumstances which under the Criminal Code cause aggravation of crimes against property as regards the subject of the act committed are: an entrusted movable object (Article 284 § 2), property of substantial value (Article 289 § 2, Article 294 § 1) and objects of special importance for culture (Article 294 § 2).
- 2) An entrusted object is an aggravating circumstance in the case of the crime defined as misappropriation of property (Article 284 § 2 Criminal Code). An entrusted object is one which has been handed over to the perpetrator with the power of disposal, subject to the obligation to return it. It is in the perpetrator's possession before being misappropriated.
- 3) Property of substantial value or an object of special importance for culture – pursuant to Article 294 § 1 and § 2 of the Criminal Code – is a constituent element aggravating some crimes against property under the Criminal Code listed in Article 294 § 1, namely: theft of another person's movable object (Article 278 § 1), theft of computer software (Article 278 § 2), misappropriation of another person's movable object or property right (Article 284 § 1), misappropriation (Article 284 § 2), switching into a telecommunication device (Article 285 § 1), fraud (Article 286 § 1), computer fraud (Article 287 § 1), destroying, damaging or making useless another person's property (Article 288 § 1), breaking or damaging a submarine cable or violating regulations applicable in the case of laying or repairing such cables (Article 288 § 3) and intentional handling stolen goods (Article 291 § 1). The list of the regulations defining the basic types of the crimes is exhaustive (*numerus clausus*), and this regulation may not be applied to other crimes against property.
- 4) Property of substantial value is property the value of which at the time of committing of the prohibited act exceeds PLN 200,000 (Article 115 § 5 Criminal Code). The value of the property being the subject of the prohibited act should be calculated as of the time of committing the act and not at the time of passing the judgment.
- 5) Cultural property as referred to in Article 294 § 2 of the Criminal Code has the same meaning as in the definition provided in Article 2(1) of the Act of 25 May 2017 on the restoration of national cultural property, pursuant to which this is "a monument as defined in Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments, a movable object which is not a monument, and also elements or components thereof the preservation of which is in the public interest, considering their artistic, historical or scientific value or their significance for cultural heritage and development." One argument for giving it this meaning is the fact that it is determined in an act which is recognised as fundamental as regards cultural property.
- 6) When performing the legal qualification of an aggravated crime due to substantial value of the property or its being an object of special importance for culture, it is insufficient to refer to Article 294 § 1 or § 2 of the Criminal Code alone because this regulation does not define the constituent elements of any prohibited act, and it is necessary to also indicate the regulation defining the basic type.

BIBLIOGRAPHY

- Andrejew I., *Polskie prawo karne w zarysie*, Warszawa 1989.
- Andrejew I., Świda W., Wolter W., *Kodeks karny z komentarzem*, Warszawa 1973.
- Banaszak B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009.
- Bojarski A. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2010.
- Bojarski T., *Odmiany podstawowych typów przestępstw w polskim prawie karnym*, Warszawa 1982.
- Buchała K., *Odpowiedzialność za przestępstwa kwalifikowane przez następstwa czynu*, *Wojskowy Przegląd Prawniczy* No. 1, 1972.
- Buchała K., *Prawo karne materialne*, Warszawa 1989.
- Dąbrowska-Kardas M., Kardas P., *Czyn ciągły i ciąg przestępstw: komentarz do art. 12 i 91 Kodeksu karnego*, Kraków 1999.
- Dąbrowska-Kardas M., Kardas P., [in:] A. Zoll (ed.), *Kodeks karny. Komentarz*, Vol. III, Warszawa 2013.
- Dermont A., *Ustawowa zamiana „mienia” na „rzecz” w kodeksie karnym*, *Prokuratura i Prawo* No. 9, 2003.
- Dudek P.M., *Inflacja pieniądza a prawo karne*, *Państwo i Prawo* No. 10, 2014.
- Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2016.
- Fredrich-Michalska I., Stachurska-Marcińczak B. (eds), *Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warszawa 1997.
- Gadecki B., *Kontrowersje wokół odpowiedzialności za zniszczenie lub uszkodzenie dobra o szczególnym znaczeniu dla kultury*, *Ius Novum* No. 4, 2013.
- Gajewski M., *W sprawie tożsamości kwalifikacji prawnej jako koniecznej przesłanki uznania, że przestępstwa zostały popełnione w warunkach ciągu przestępstw*, *Przegląd Sądowy* No. 11–12, 2000.
- Gajewski M., *Glosa do uchwały SN z dnia 11 sierpnia 2000 r.*, I KZP 17/2000, *OSP* No. 9, 2001.
- Gardocki L., *Prawo karne*, Warszawa 2017.
- Gerecka-Żołyńska A., *W kwestii definicji dobra kultury i dzieła sztuki*, *Prokuratura i Prawo* No. 9, 1999.
- Góral R., *Kodeks karny. Praktyczny komentarz*, Warszawa 2007.
- Górniok O., Hoc S., Kalitowski M., Przyjemski S.M., Sienkiewicz Z., Szumski J., Tyszkiewicz L., Wąsek A., *Kodeks karny. Komentarz*, Vol. II, Gdańsk 2005.
- Grześkowiak A. (ed.), *Prawo karne*, Warszawa 2009.
- Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, Warszawa 2018.
- Jagiełło D., *Prawo karne materialne*, Skierniewice 2013.
- Kaczmarek J., Kierszka M., *Pojęcia „mienie w wielkich rozmiarach”, „zniszczenie w świecie roślinnym lub zwierzęcym w znacznych rozmiarach” oraz „dobra o szczególnym znaczeniu dla kultury” w kodeksie karnym*, *Prokuratura i Prawo* No. 3, 2000.
- Kardas P., *Prawnokarna ochrona informacji w polskim prawie karnym z perspektywy przestępstw komputerowych. Analiza dogmatyczna i strukturalna w świetle aktualnie obowiązującego stanu prawnego*, *Czasopismo Prawa Karnego i Nauk Penalnych* No. 1, 2000.
- Kochanowski J., *Przestępstwa kwalifikowane przez następstwa w kodeksie karnym*, *Państwo i Prawo* No. 1, 1972.
- Konieczniak K., *Uwagi o pojmowaniu typów zmodyfikowanych*, [in:] J. Giezek, J. Brzezińska (eds), *Zmodyfikowane typy przestępstw w teorii i praktyce sądowej*, Warszawa 2017.
- Książopolska-Kukulska A., *Dobra kultury jako przedmiot ochrony w prawie karnym*, *Prokurator* No. 2, 2007.
- Kulik M., *Przestępstwo i wykroczenia uszkodzenia rzeczy*, Lublin 2005.
- Kulik M., [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2017.

- Lachowski J., *Glosa do uchwały SN z dnia 11 sierpnia 2000 r., I KZP 17/2000*, Monitor Prawniczy No. 6, 2001.
- Lachowski J., [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
- Łabuda G., [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014.
- Makarewicz J., *Kodeks karny z komentarzem*, Lwów 1938.
- Marek A., *Prawo karne*, Warszawa 2009.
- Marek A., *Kodeks karny. Komentarz*, Warszawa 2010.
- Marek A., Lachowski J., *Prawo karne. Zarys problematyki*, Warszawa 2011.
- Michalski B., [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny. Część szczególna. Komentarz do art. 222–316*, Vol. II, Warszawa 2010.
- Mocarska D., *Wybrane zagadnienia prawa karnego materialnego*, Szczytno 2013.
- Mozgawa M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2017.
- Oczkowski T., [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
- Pleńska D., Górniok O., [in:] I. Andrejew, L. Kubicki, J. Waszczyński (eds), *System prawa karnego. O przestępstwach w szczególności*, Vol. IV, part II, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1989.
- Pływaczewski E., [in:] A. Marek (ed.), *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1986.
- Pruszyński J., *Dziedzictwo kultury Polski: jego straty i ochrona prawna*, Vol. 2, Kraków 2001.
- Przyborowska-Klimczak A., *Dobro kultury*, [in:] K. Zeidler (ed.), *Leksykon prawa ochrony zabytków*, Warszawa 2010.
- Radecki W., *Ochrona dóbr kultury w nowym kodeksie karnym*, Prokuratura i Prawo No. 2, 1998.
- Radecki W., *Ochrona zabytków w polskim, czeskim i słowackim prawie karnym*, Prokuratura i Prawo No. 4, 2012.
- Sieroszewski W., *Ochrona prawna dóbr kultury w Polsce*, Warszawa 1971.
- Sońska A., *Przestępstwo i wykroczenie przywłaszczenia w polskim prawie karnym*, Warszawa 2013.
- Stefański R.A., *A review of resolutions of the Criminal Chamber of the Supreme Court concerning material penal law for 1991–1993*, Wojskowy Przegląd Prawniczy No. 3–4, 1994.
- Stefański R.A., *Prawo karne materialne. Część szczególna*, Warszawa 2009.
- Surkont M., *Prawo karne*, Bydgoszcz–Gdynia 2001.
- Szwarczyk M., [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2006.
- Śliwiński S., *Polskie prawo karne*, Warszawa 1946.
- Śliwowski J., *Prawo karne*, Warszawa 1975.
- Świda W., *Prawo karne*, Warszawa 1989.
- Trzciniński M., *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna*, Warszawa 2010.
- Trzciniński M., *Przestępczość przeciwko zabytkom*, Prokuratura i Prawo No. 6, 2011.
- Wilk L., [in:] T. Dukiet-Nagórska (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warszawa 2014.
- Wilk L., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz. Art. 222–316*, Warszawa 2017.
- Wojciechowski J., *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998.
- Wolter W., *Z rozważań nad kwalifikowanymi typami przestępstw*, Państwo i Prawo No. 8–9, 1972.
- Zeidler K., *Prawo ochrony dziedzictwa kultury*, Warszawa 2007.
- Zgoliński I., [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
- Zgółkowa H. (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 31, Poznań 2001.
- Zieliński M., *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2010.

AGGRAVATION OF CRIMES AGAINST PROPERTY DUE TO FEATURES OF THE SUBJECT OF COMMITTED ACT

Summary

This article discusses aggravated types of crime against property considering the features of the act committed. This concerns an entrusted movable object (Article 284 § 2 of the Polish Criminal Code), property of substantial value (Article 289 § 2, Article 294 § 1 Criminal Code) and objects of special importance for culture (Article 294 § 2 Criminal Code). Interpretation of these constituent elements has been provided by making references to views presented by the representatives of the legal doctrine and in case law. The author assumes that an entrusted object is one which has been handed over to the perpetrator with the power of disposal, subject to the obligation to return it. It is in the perpetrator's possession before being misappropriated. Property of substantial value or an object of special importance for culture – pursuant to Article 294 § 1 and § 2 of the Criminal Code – is a constituent element aggravating some crimes against property under the Criminal Code listed in Article 294 § 1, namely: theft of another person's movable object (Article 278 § 1), theft of computer software (Article 278 § 2), misappropriation of another person's movable object or property right (Article 284 § 1), misappropriation (Article 284 § 2), switching into a telecommunication device (Article 285 § 1), fraud (Article 286 § 1), computer fraud (Article 287 § 1), destroying, damaging or making useless of another person's property (Article 288 § 1), breaking or damaging a submarine cable or violating regulations applicable in the case of laying or repairing such cables (Article 288 § 3) and intentional handling stolen goods (Article 291 § 1). The list of the regulations defining the basic types of the crimes is exhaustive (*numerus clausus*), and this regulation may not be applied to other crimes against property. Property of substantial value is property the value of which at the time of committing of the prohibited act exceeds PLN 200,000 (Article 115 § 5 Criminal Code). The value of the property being the subject of the prohibited act should be calculated as of the time of committing the act and not the time of passing the judgment. In the author's opinion, cultural property has the same meaning as in the definition provided in Article 2(1) of the Act of 25 May 2017 on the restoration of national cultural property, pursuant to which this is "a monument as defined in Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments, a movable object which is not a monument, and also elements or components thereof the preservation of which is in the public interest, considering their artistic, historical or scientific value or their significance for cultural heritage and development." One argument for giving it this meaning is the fact that it is determined in the act which is recognised as fundamental as regards cultural property.

Keywords: object of special importance for culture, property of substantial value, subject of the act committed, aggravated crime, entrusted object, basic type of crime, aggravating constituent element

TYPY KWALIFIKOWANE PRZESTĘPSTW PRZECIWKO MIENIU ZE WZGLĘDU NA WŁAŚCIWOŚCI PRZEDMIOTU CZYNNOŚCI WYKONAWCZEJ

Streszczenie

Przedmiotem artykułu są typy kwalifikowane przestępstw przeciwko mieniu ze względu na właściwości przedmiotu czynności wykonawczej. Chodzi o powierzoną rzecz ruchomą (art. 284 § 2 k.k.), mienie znacznej wartości (art. 289 § 2, art. 294 § 1 k.k.) oraz dobro o szcze-

gólnym znaczeniu dla kultury (art. 294 § 2 k.k.). Została dokonana wykładnia tych znamion z odwołaniem do wypowiedzi w doktrynie i judykaturze. Autorka przyjmuje, że rzeczą powierzona jest ta, która została przekazana sprawcy we władanie z obowiązkiem zwrotu. Znajduje się ona w posiadaniu sprawcy przed dokonaniem jej przywłaszczenia. Mienie znacznej wartości lub dobro o szczególnym znaczeniu dla kultury – zgodnie z art. 294 § 1 i 2 k.k. – jest znamieniem kwalifikującym niektórych przestępstw przeciwko mieniu, enumeratywnie wymienionych w art. 294 § 1 k.k., a mianowicie: kradzieży cudzej rzeczy ruchomej (art. 278 § 1 k.k.), kradzieży programu komputerowego (art. 278 § 2 k.k.), przywłaszczenia cudzej rzeczy ruchomej lub prawa majątkowego (art. 284 § 1 k.k.), sprzeniewierzenia (art. 284 § 2 k.k.), włączenia się do urządzenia telekomunikacyjnego (art. 285 § 1 k.k.), oszustwa (art. 286 § 1 k.k.), oszustwa komputerowego (art. 287 § 1 k.k.), zniszczenia cudzej rzeczy, uszkodzenia lub uczynienia jej niezdatną do użytku (art. 288 § 1 k.k.), przerwania lub uszkodzenia kabla podmorskiego albo naruszenia przepisów obowiązujących przy zakładaniu lub naprawie takiego kabla (art. 288 § 3 k.k.) i umyślnego paserstwa (art. 291 § 1 k.k.). Wylczenie przepisów określających podstawowe typy przestępstw jest wyczerpujące (*numerus clausus*) i przepis ten nie może być zastosowany do innych przestępstw przeciwko mieniu. Mieniem znacznej wartości jest mienie, którego wartość w czasie popełnienia czynu zabronionego przekracza 200 000 zł (art. 115 § 5 k.k.). Wartość mienia stanowiącego przedmiot czynu winna być liczona w odniesieniu do czasu popełnienia czynu, a nie odniesiona do czasu orzekania. Dobro kultury, zdaniem autorki, ma takie samo znaczenie, jakie nadano mu w definicji zawartej w art. 2 pkt 1 ustawy z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury, w myśl której oznacza ono „zabytek w rozumieniu art. 3 pkt 1 ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami, rzecz ruchomą niebędącą zabytkiem, a także ich części składowe lub zespoły, których zachowanie leży w interesie społecznym ze względu na ich wartość artystyczną, historyczną lub naukową, lub ze względu na ich znaczenie dla dziedzictwa i rozwoju kulturalnego”. Za nadaniem takiego znaczenia przemawia zamieszczenie definicji w ustawie uważanej za podstawową w dziedzinie dóbr kultury.

Słowa kluczowe: dobro o szczególnym znaczeniu dla kultury, mienie znacznej wartości, przedmiot czynności wykonawczej, przestępstwo kwalifikowane, rzecz powierzona, typ podstawowy przestępstwa, znamię kwalifikujące

TIPOS AGRAVADOS DE DELITOS CONTRA EL PATRIMONIO DEBIDO A LAS CARACTERÍSTICAS DE SUJETO PASIVO

Resumen

El artículo versa sobre tipos agravados de delitos contra el patrimonio debido a las características de sujeto pasivo. Se trata de bien mueble depositado (art. 284 § 2 del código penal), bien de valor importante (art. 289 § 2, art. 294 § 1 del código penal) y bien de una importancia especial para la cultura (art. 294 § 2 del código penal). Se presenta la interpretación de elementos citando la doctrina y jurisprudencia. La autora entiende que el bien depositado es un bien entregado al autor de delito para su dominio, con la obligación de devolverlo. Se encuentra en la posesión del autor de delito antes de su usurpación. El bien de valor importante o y bien de una importancia especial para la cultura – de acuerdo con el art. 294 § 1 y 2 del código penal – es elemento agravante de algunos delitos contra el patrimonio, enumerados en el art. 294 § 1 del código penal, o sea: hurto de bien mueble ajeno (art. 278 § 1 del código penal), hurto de programa de ordenador (art. 278 § 2 del código penal), usurpación de bien mueble ajeno

o de derecho real (art. 284 § 1 del código penal), malversación (art. 284 § 2 del código penal), conexión al dispositivo de telecomunicación (art. 285 § 1 del código penal), fraude (art. 286 § 1 del código penal), fraude informático (art. 287 § 1 del código penal), destrucción de bien ajeno, deterioro o su inutilidad (art. 288 § 1 del código penal), corte o deterioro de cable submarino o infracción de regulación aplicable a la hora de su instalación o reparación (art. 288 § 3 del código penal) y encubrimiento doloso (art. 291 § 1 del código penal). La enumeración de preceptos que prescriben tipos básicos es exhaustiva (*numerus clausus*) y este elemento agravante no puede aplicarse a otros delitos contra el patrimonio. El bien de valor importante es un bien cuyo valor a la hora de la comisión de delito no excede 200 000 PLN (art. 115 § 5 del código penal). El valor de bien – objeto de delito – ha de calcularse teniendo en cuenta el momento de la comisión de delito y no el momento de la sentencia. El bien cultural, según la autora, tiene el mismo significado que su definición contenida en el art. 2 punto 1 de la ley de 25 de mayo de 2017 sobre restitución de bienes culturales nacionales, según la cual es “el monumento definido en art. 3 punto 1 de la ley de protección de monumentos y su cuidado, bien mueble que no sea monumento, sus partes integrantes o complejos cuya preservación está en interés social, debido a su valor artístico, histórico o científico o debido a su importancia para el patrimonio y desarrollo cultural”. Este significado es fundado, ya que la definición está en la ley primordial en cuanto a los bienes culturales.

Palabras claves: bien de una importancia especial para la cultura, bien de valor importante, sujeto pasivo, tipo agravado, bien depositado, tipo básico de delito, elemento agravante

ВИДЫ КВАЛИФИЦИРОВАННЫХ ПРЕСТУПЛЕНИЙ ПРОТИВ СОБСТВЕННОСТИ ПО СВОЙСТВАМ ПРЕДМЕТА ИСПОЛНИТЕЛЬНОГО ПРОИЗВОДСТВА

Резюме

В статье рассмотрены виды квалифицированных преступлений против собственности по свойствам предмета исполнительного производства. Речь идет о доверенном предмете движимого имущества (ст. 284 § 2 УК), об имуществе, представляющем значительную ценность (ст. 289 § 2, ст. 294 § 1 УК), а также о предметах, имеющих особое культурное значение (ст. 294 § 2 УК). Предложено толкование этих квалифицирующих признаков со ссылками на высказывания по данному вопросу, имеющиеся в правовой доктрине и судебной практике. Автор исходит из того, что доверенным имуществом является такое имущество, которое было передано во владение обвиняемому с обязательством возврата. Таким образом, до момента незаконного присвоения имущество находится в распоряжении обвиняемого. Согласно ст. 294 § 1 и 2 УК, имущество, представляющее значительную ценность и предметы, имеющие особое культурное значение, являются квалифицирующим признаком некоторых преступлений против собственности, перечисленных в ст. 294 § 1 УК, а именно: кража чужого движимого имущества (ст. 278 § 1 УК), кража компьютерной программы (ст. 278 § 2 УК), незаконное присвоение чужого движимого имущества или имущественного права (ст. 284 § 1 УК), растрата (ст. 284 § 2 УК), незаконное подключение к телекоммуникационному устройству (ст. 285 § 1 УК), мошенничество (ст. 286 § 1 УК), компьютерное мошенничество (ст. 287 § 1 УК), уничтожение, повреждение или приведение в негодность предмета, принадлежащего другому лицу (ст. 288 § 1 УК), обрыв или повреждение подводного кабеля или нарушение правил прокладки или ремонта такого кабеля (ст. 288 § 3 УК), умышленный оборот краденым (ст. 291 § 1 УК). Данный перечень неквалифицированных видов преступлений является исчерпывающим (*numerus clausus*), поэтому

рассматриваемые квалифицирующие признаки не могут применяться к другим преступлениям против собственности. Имуществом, представляющим значительную ценность, считается такое имущество, стоимость которого на момент совершения запрещенного действия превышает 200 000 злотых (ст. 115 § 5 УК). Стоимость имущества, являющегося объектом преступления, должна исчисляться на момент совершения запрещенного действия, а не на момент вынесения приговора. По мнению автора, предмет, представляющий особое культурное значение, должен пониматься в соответствии с определением, содержащимся в ст. 2 п. 1 Закона О реституции национальных культурных ценностей, согласно которому он определяется как «памятник культуры в значении ст. 3 п. 1 Закона О защите и сохранении памятников старины, движимый объект, не являющийся памятником, а также их составные части или комплексы, сохранение которых отвечает общественным интересам в силу их художественной, исторической или научной ценности либо ввиду их значения для культурного наследия и развития». В пользу использования данного определения говорит тот факт, что оно содержится в законе, который считается основополагающим в области охраны культурных ценностей.

Ключевые слова: предметы имеющие особое культурное значение, имущество представляющее значительную ценность, предмет исполнительного производства, квалифицированное преступление, доверенное имущество, неквалифицированное преступление, квалифицирующий признак

DIE STRAFTATBESTÄNDE DER EIGENTUMS- ODER VERMÖGENSDELIKTE IM HINBLICK AUF DIE MERKMALE DES GEGENSTANDS DER STRAFBAREN HANDLUNG

Zusammenfassung

Gegenstand des Artikels sind die Straftatbestände des Eigentums- oder Vermögensdelikts im Hinblick auf die Merkmale des Gegenstands der Tat. Dabei geht es um anvertraute beweglichen Sachen (Artikel 284 § 2 des polnischen Strafgesetzbuches), Eigentum von erheblichem Wert (Artikel 289 § 2, Artikel 294 § 1 des polnischen Strafgesetzbuches) und Güter von besonderer Bedeutung für die Kultur (Artikel 294 § 2 des polnischen Strafgesetzbuches). Es wurde eine Auslegung dieser Tatbestandsmerkmale mit Verweis auf die Rechtsprechung und das rechtswissenschaftliche Schrifttum vorgenommen. Die Autorin geht davon aus, dass die anvertraute Sache dem Täter mit der Pflicht zur Rückgabe zum Besitz übertragen wird. Diese Sache befindet sich also in seinem Besitz, bevor der Täter sie sich widerrechtlich aneignet. Eigentum von erheblichem Wert oder besonders wertvolles Kulturgut, d.h. Güter von besonderer Bedeutung für die Kultur sind – gemäß Artikel 294 § 1 und 2 des polnischen Strafgesetzbuches – Tatmerkmal mehrerer in Artikel 294 § 1 des polnischen Strafgesetzbuches abschließend aufgezählter Eigentums- oder Vermögensdelikte und zwar von: Diebstahl einer fremden beweglichen Sache (Artikel 278 § 1 des polnischen Strafgesetzbuches), Diebstahl von Computer-Software (Artikel 278 § 2 des polnischen Strafgesetzbuches), widerrechtliche Aneignung einer fremden beweglichen Sache oder von fremdem Eigentum (Artikel 284 § 1 des polnischen Strafgesetzbuches), Unterschlagung (Artikel 284 § 2 des polnischen Strafgesetzbuches), Anschluss an ein fremdes Telekommunikationsgerät – Telekommunikationsbetrug (Artikel 285 § 1 des polnischen Strafgesetzbuches), Betrug (Artikel 286 § 1 des polnischen Strafgesetzbuches), Computerbetrug (Artikel 287 § 1 des polnischen Strafgesetzbuches), Zerstörung fremden Eigentums, Beschädigung oder Unbrauchbarmachung von fremdem Eigentum (Artikel 288 § 1 des polnischen Strafgesetzbuches), Durchtrennen oder Beschädigung eines Seekabels oder Verstoß gegen die bei der Verlegung oder Instandsetzung eines solchen Kabels geltenden Vorschriften

(Artikel 288 § 3 des polnischen Strafgesetzbuches) und vorsätzliche Hehlerei (Artikel 291 § 1 des polnischen Strafgesetzbuches). Die Aufzählung der Vorschriften zu den Basisstraftaten ist abschließend (*numerus clausus*), das heißt diese Vorschrift kann nicht auf andere Vermögensdelikte angewendet werden. Eigentum von erheblichem Wert ist Vermögen mit einem Wert, der zum Zeitpunkt der Verübung der strafbaren Handlung 200.000 PLN übersteigt (Artikel 115 § 5 des polnischen Strafgesetzbuches). Der Wert des Eigentums, das Gegenstand der Zuwiderhandlung ist, wird für den Zeitpunkt der Straftatverübung, nicht aber den Zeitpunkt des Ergehens des Urteils berechnet. Kulturgüter haben nach Auffassung der Autorin die gleiche Bedeutung, wie in der Begriffsbestimmung von Artikel 2 Punkt 1 des polnischen Gesetzes vom 25. Mai 2017 über die Rückgabe von Kulturgütern (Ustawa z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury) zugewiesen. Danach handelt es sich bei Kulturgut um ein „Denkmal im Sinne von Artikel 3 Punkt 1 des polnischen Gesetzes über den Denkmalschutz und die Denkmalpflege (Ustawa o ochronie zabytków i opiece nad zabytkami), eine bewegliche Sache, die kein Denkmal ist, sowie auch deren Teile oder Zusammenfassungen von Teilen, deren Bewahrung mit Rücksicht auf ihren künstlerischen, historischen oder wissenschaftlichen Wert oder aufgrund ihrer Bedeutung für das kulturelle Erbe und die kulturelle Entwicklung im gesellschaftlichen Interesse liegt“. Dafür, dass ihm eine solche Bedeutung verliehen wird, spricht, dass sie in das Gesetz aufgenommen wurden, das als grundlegend im Bereich der Kulturgüter gelten muss.

Schlüsselwörter: Güter von besonderer Bedeutung für die Kultur, Eigentum von erheblichem Wert, Gegenstand der Zuwiderhandlung, Straftatbestand, anvertraute Sache, Basisstraftat, Tatmerkmal

TYPES QUALIFIÉS DE CRIMES CONTRE LA PROPRIÉTÉ EN RAISON DES PARTICULARITÉS DE L'OBJET DE L'ACTE EXÉCUTIF

Résumé

Le sujet de l'article sont les types qualifiés de crimes contre la propriété en raison des particularités de l'objet de l'acte exécutif. Il s'agit d'une chose mobilière qui nous est confiée (l'article 284 § 2 du code pénal), un bien de valeur considérable (l'article 289 § 2, l'article 294 § 1 du code pénal) et un bien revêtant une importance particulière pour la culture (l'article 294 § 2 du code pénal). Une interprétation de ces signes a été faite en référence à des déclarations en doctrine et en jurisprudence. L'auteur suppose que la chose confiée est celle qui a été remise à l'auteur en possession, avec l'obligation de la rendre. Elle est en possession de l'auteur avant qu'elle ne soit appropriée. Propriété de valeur considérable ou bien d'une importance particulière pour la culture – conformément à l'article 294 § 1 et 2 du code pénal – est un élément qualificatif de certains crimes contre la propriété, énumérés à l'article 294 § 1 du code pénal, à savoir: vol d'une chose mobilière d'autrui (l'article 278 § 1 du code pénal), vol d'un programme d'ordinateur (l'article 278 § 2 du code pénal), appropriation illicite d'une chose mobilière d'autrui ou d'un droit de la propriété (l'article 284 § 1 du code pénal), détournement (l'article 284 § 2 du code pénal), connexion à un appareil de télécommunication (l'article 285 § 1 du code pénal), fraude (l'article 286 § 1 du code pénal), fraude informatique (l'article 287 § 1 du code pénal), destruction de la propriété de quelqu'un d'autre, l'endommagement ou la rendant inutilisable (l'article 288 § 1 du code pénal), rupture ou endommagement du câble sous-marin ou violation de la réglementation en vigueur lors de la mise en place ou de la réparation d'un tel câble (l'article 288 § 3 du code pénal) et recel intentionnel (l'article 291 § 1

du code pénal). L'énumération des règles définissant les principaux types d'infractions est exhaustive (*numerus clausus*) et cette disposition ne peut pas être appliquée à d'autres crimes contre la propriété. Un bien de valeur considérable est un bien dont la valeur au moment de commettre un acte prohibé dépasse 200 000 PLN (l'article 115 § 5 du code pénal). La valeur des biens constituant l'objet de l'acte devrait être calculée en fonction du moment où l'infraction a été commise et non en fonction du moment où la décision a été rendue. Selon l'auteur, le bien de la culture a le même sens que dans la définition donnée à l'article 2 point 1 de la loi du 25 mai 2017 sur la restitution de biens culturels nationaux, selon laquelle c'est «un monument au sens de l'article 3 point 1 de la loi sur la protection des monuments et le soin des monuments, une chose mobilière qui n'est pas un monument, ainsi que leurs éléments constitutifs ou assemblées dont la préservation est dans l'intérêt public du fait de sa valeur artistique, historique ou scientifique, ou de sa valeur pour le patrimoine et développement culturel». Le fait qu'elle ait été inscrite dans l'acte considéré comme fondamental dans le domaine des biens culturels parle pour lui donner un tel sens.

Mots-clés: bien revêtant une importance particulière pour la culture, bien d'une valeur considérable, objet de l'acte exécutif, crime qualifié, bien confié, type de crime de base, élément qualificatif

TIPI CLASSIFICATI DI REATI CONTRO IL PATRIMONIO A MOTIVO DELLE CARATTERISTICHE DELL'OGGETTO DEL REATO

Sintesi

Oggetto dell'articolo sono i tipi classificati di reati contro il patrimonio a motivo delle caratteristiche dell'oggetto del reato. Si tratta beni mobili affidati (art. 284 § 2 del codice penale), di beni di notevole valore (art. 289 § 2, art. 294 § 1 del codice penale) o di beni culturali di particolare importanza (art. 294 § 2 del codice penale). È stata eseguita l'interpretazione di queste fattispecie con riferimento alla dottrina e alla giurisprudenza. L'autrice assume che la cosa affidata sia quella che è stata consegnata in possesso all'autore del reato, con obbligo di restituzione. Si trova in possesso dell'autore del reato prima della sua appropriazione indebita. Il bene di notevole valore o il bene culturale di particolare importanza, secondo l'art. 294 § 1 e 2 del codice penale, sono una fattispecie che comprende alcuni reati contro il patrimonio, espressamente elencati nell'art. 294 § 1 del codice penale, e in particolare: furto di un bene mobile altrui (art. 278 § 1 del codice penale), furto di un programma informatico (art. 278 § 2 del codice penale), appropriazione indebita di un bene mobile o di un diritto patrimoniale altrui (art. 284 § 1 del codice penale), appropriazione indebita di beni affidati (art. 284 § 2 del codice penale), inserimento in un dispositivo di telecomunicazioni (art. 285 § 1 del codice penale), truffa (art. 286 § 1 del codice penale), truffa informatica (art. 287 § 1 del codice penale), distruzione, danneggiamento dei beni altrui o azione di renderli inutilizzabili (art. 288 § 1 del codice penale), interruzione o danneggiamento di cavo sottomarino o violazione delle norme in vigore durante la posa e la riparazione di tale cavo (art. 288 § 3 del codice penale) e ricettazione dolosa (art. 291 § 1 del codice penale). L'elenco delle norme di legge che stabiliscono i tipi fondamentali di reati è esaustivo (*numerus clausus*) e tale norma di legge non può essere applicata ad altri reati contro il patrimonio. Bene di notevole valore è un bene il cui valore al momento del compimento del reato supera i 200 000 PLN (art. 115 § 5 del codice penale). Il valore del bene che costituisce l'oggetto del reato deve essere calcolato in riferimento al momento del compimento del reato, e non al momento della sentenza. L'espressione "bene

culturale” secondo l’autrice ha il significato che gli è stato attribuito nella definizione contenuta nell’art. 2 punto 1 della legge del 25 maggio 2017 sulla restituzione dei beni culturali nazionali, ai sensi dei quali si tratta di “un monumento ai sensi dell’art. 3 punto 1 della legge sulla tutela e la cura dei monumenti, un bene mobile che non è un monumento, e anche le sue parti o unità componenti, la cui conservazione è di interesse sociale a motivo del loro valore artistico, storico o culturale, o a motivo del loro significato per il patrimonio e lo sviluppo culturale”. Depone a favore dell’attribuzione di tale significato il suo inserimento nella legge considerata fondamentale nel settore dei beni culturali.

Parole chiave: bene culturale di particolare importanza, bene di notevole valore, oggetto del reato, reato particolare, cosa affidata, tipo fondamentale di reato, fattispecie di classificazione

Cytuj jako:

Stefańska B.J., Aggravation of crimes against property due to features of the subject of committed act [*Typy kwalifikowane przestępstw przeciwko mieniu ze względu na właściwości przedmiotu czynności wykonawczej*], „Ius Novum” 2019 (Vol. 13) nr 3, s. 32–56. DOI: 10.26399/iusnovum.v13.3.2019.29/b.j.stefanska

Cite as:

Stefańska, B.J. (2019) ‘Aggravation of crimes against property due to features of the subject of committed act’. *Ius Novum* (Vol. 13) 3, 32–56. DOI: 10.26399/iusnovum.v13.3.2019.29/b.j.stefanska