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VICTIM'S LEGALLY PROTECTED INTERESTS IN CRIMINAL TRIAL UNDER THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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1. INTRODUCTORY REMARKS

De lege lata, although it was not obvious in the twentieth century, Article 2(1)(3) of the Criminal Procedure Code[1] expressly recognises the legally protected interests of the victim (also alternatively referred to as the "injured/aggrieved party" in legal texts), while respecting their dignity, as one of the objectives of the criminal trial.[2] The development of criminology in the twentieth century aroused interest in the victim, and in the second half of the twentieth century to the development of vic-

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1 Act of 6 June 1997: Criminal Procedure Code, Dz.U. No. 89, item 555, as amended, Dz.U. of 2017, item 1904; hereinafter CPC.

2 The previously applicable Criminal Procedure Code (Act of 19 April 1969: Criminal Procedure Code, Dz.U. No. 13, item 96, hereinafter: Former CPC) was silent as regards an analogous objective of criminal proceedings and, although the institution of an auxiliary prosecutor was envisaged, the list of the victim's rights was not very broad and the acquisition of the status of a party was contingent on the court issuing a decision to allow a person to participate as an auxiliary prosecutor, which had to be supported by the interests of the judiciary (Article 45 Former CPC). The introduction of the provision of Article 2(1)(3) in the presently binding Criminal Procedure Code was described in the literature as a sign of positive changes and democratisation of criminal law, and a symptom of its development from a restrictive model to a model more focused on eliminating the damage caused; cf. M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa 2013, p. 35.

timology, which made the victim the focus of research and led to the conclusion, obvious today, that a criminal event consists of three elements: the case, the act and its victim.[3] The Polish Criminal Procedure Code currently in force, shaped in the new social and economic reality, has recapitulated this view and, over the years, the position of the victim has been gradually and significantly strengthened. In the foreground of the considerations underway, it is necessary to decode the concept of legally protected interests of the victim used in Article 2(1)(3) CPC. It is surprising to note that commentators do not pay attention to this concept, focusing rather on specific rights which reflect the idea of strengthening the victim's position in the trial;[4] nor is the legislation on criminal procedure of any assistance as it, apart from Article 2, uses the concept of the victim's interest only on two occasions, i.e. in Article 11(1) CPC (which indicates that the victim's interest cannot be in conflict with discontinuance of proceedings in view of the penalty imposed for another offence) and Article 335(1) and (2) CPC (which provides that penalties and measures agreed upon by the public prosecutor with the suspect as part of a conviction without trial must also take into account the legally protected interests of the victim).

In the context of Article 2(1)(3) CPC, the literature has distinguished the victim's tangible interests (receiving a compensation from the perpetrator) and intangible interests (the victim's wish to punish the perpetrator of the offence or to protect the private sphere against threats resulting from their participation in the criminal proceedings) and general interests (that are, under the provisions of criminal procedure law, conferred on any victim in a given legal situation) and individual interests (with changing content, due to the factual situation and identified in specific proceedings).[5]

A legally protected interest must naturally originate from a specific legal norm. It may unquestionably derive from a norm of substantive criminal law, in particular from Article 46 of the Criminal Code,[6] which entitles the victim to apply to the court to order the perpetrator to remedy pecuniary damage or to redress any non-pecuniary injury. It may also derive from a norm of criminal procedure law.[7] For this purpose of the procedure to be achieved, not only a final judgment taking into account the victim's interests must be passed, but also the procedure must be carried out in a manner ensuring that the victim's procedural rights are respected

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[3] See W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym*, Kraków 2006, pp. 27–28; B. Gronowska, *Ochrona uprawnień pokrzywdzonego w postępowaniu przygotowawczym. Zagadnienia karnoprocesowe i wiktymologiczne,* Toruń 1989, p. 13.

[4] See e.g. A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, 8th edn, Warszawa 2018, pp. 18–20; J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, 3rd edn, Warszawa 2018, pp. 10–11.

[5] The first of these divisions was made by C. Kulesza, *Ewolucja uprawnień pokrzywdzonego w polskim procesie karnym*, [in:] L. Mazowiecka, W. Klaus, A. Tarwacka (eds), *Z problematyki wiktymologii. Księga dedykowana Profesor Ewie Bieńkowskiej*, Warszawa 2017, p. 84; general and individual interests are distinguished by M. Żbikowska, *Zasada lojalności w procesie karnym (odniesiona do pokrzywdzonego)*, Toruń 2015, pp. 96–109.

[6] Act of 6 June 1997: Criminal Code, Dz.U. No. 88, item 553, as amended, Dz.U. of 2017, item 2204; hereinafter CC.

[7] See S. Steinborn (ed.), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el.

and secondary victimisation is prevented. Furthermore, a civil law norm may also, to a certain extent, constitute the source of the victim's legal interest, in the context of the reference contained in Article 46 CC. The legally protected interest of the victim can therefore be defined as the need for legal protection under substantive or procedural criminal law, possibly also under civil law. It should be added that, in administrative and civil law, when analysing the concept of legitimate interest, it is emphasised that, in order to meet the criterion of legitimate interest, the need for legal protection must be objective and genuinely existing.[8] As such, legitimate interest cannot be based on the subjective perception of a party but must, in the specific circumstances of the case, objectively derive from a given legal norm which applies directly to the situation of the individual concerned.[9] Similarly, in criminal proceedings, the existence of the victim's legal interest in obtaining a specific decision should be subject to an objective assessment from the point of view of the legal norm and not the subjective perception of the victim.

Having said that, it is necessary to proceed to a fundamental reflection on the question whether and to what extent the purpose of the trial, namely taking into account the legally protected interests of the victim in a criminal trial, is constitutionally and conventionally warranted. In other words, it should be considered whether the legislator is normally required by the Constitution and the Convention to establish norms of substantive and procedural law that protect the interests concerned. The second part of the purpose stemming from Article 2(1)(3) CPC, i.e. respect for the dignity of the victim, and the obligations of states to protect the interests of victims of offences, resulting from instruments of international law other than the ECHR, also functioning within the framework of the Council of Europe,[10] and instruments of the EU law, are left outside the framework of these considerations.

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[8] See, in the context of administrative law, the Supreme Administrative Court judgment of 26 October 1999, IV SA 1693/97, LEX No. 4870, and in the context of civil law the judgment of the Court of Appeal in Łódź of 20 June 2017, I ACa 1627/16, LEX No. 2369673. In the judgment of the Court of Appeal in Białystok of 27 February 2017, I ACa 829/16, LEX No. 2256822, the expression "must exist on the basis of a reasonable assessment of the situation" was even used. As regards the legally protected interests of the victim, cf. M. Żbikowska's considerations, see *supra* n. 5, pp. 96–109.

[9] A.S. Duda, *Interes prawny w polskim prawie administracyjnym,* Warszawa 2008, p. 107.

[10] In particular, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA; as well as the Council of Europe instruments concerning narrowly defined groups of victims, such as the European Convention on the Exercise of Children's Rights of 25 January 1996, Dz.U. of 2000, No. 107, item 1128; the Convention on Action against Trafficking in Human Beings of 16 May 2005, Dz.U. of 2009, No. 20, item 107; or the Convention on Cybercrime of the Council of Europe of 23 November 2001, Dz.U. of 2015, item 728.

2. INTERESTS OF THE VICTIM UNDER SUBSTANTIVE LAW

The commentators on constitutional law rightly assume that the obligation of the state to protect the rights and freedoms of the individual also implies the obligation to "put in place a system of procedures, legal orders and prohibitions to prevent any violation or risks to the rights and freedoms",[11] this obligation being confined by the constitutional principle of proportionality.[12] Accordingly, whenever the effective protection of the rights and freedoms of individuals requires criminal law intervention, there arises an obligation on the state to criminalise.[13] The introduction of legal norms protecting the victim's personal interests is therefore also linked to the protective role of criminal law. At the same time, the decision to criminalise confirms that the conduct concerned has been regarded as violating not only personal interests of other persons, but also common interests.[14]

The case law of the European Court of Human Rights (ECtHR) has also played an essential role in the context of deriving positive obligations for states to criminalise certain acts. The Convention enumerates the rights of each individual, including the right to life and freedom. The Contracting States agreed, in the first place, that they would not violate these rights themselves (negative obligations of the states). However, the Convention, which is rapidly evolving in the case law of the ECtHR, also imposes positive obligations on them, i.e. the obligation to take active measures to protect individuals against violations of the rights guaranteed by the Convention, not only if these violations are done by the state but also by other persons.[15] In order to effectively guarantee the right to life, it is necessary not only that the state does not deprive people of their lives, but also that it takes active measures to protect individuals against the deprivation of life by other persons, thus prohibiting killing and introducing appropriate sanctions and effective mechanisms for enforcing them. Otherwise, the rights provided for in the Convention would be rendered illusory. The ECtHR considers that positive obligations on the part of states derive from the subject matter and purpose of the Convention and that the case law distinguishes substantive and procedural obligations, the substantive obligations being exercised through the introduction of appropriate legislation and the procedural obligations through the practical application of law so as to give effect to the protection of human rights.[16] The literature also distinguishes positive obligations of states such

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[11] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd edn, Warszawa 2012, p. 222.

[12] J. Kulesza, *Problemy teorii kryminalizacji. Studium z zakresu prawa karnego i konstytucyjnego*, Łódź 2017, pp. 35–56.

[13] L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa 1990, p. 98; the Constitutional Tribunal judgment of 9 October 2001, SK 8/00, OTK ZU 2001/7/211.

[14] J. Kulesza, *supra* n. 12, pp. 77–78.

[15] See in this context the ECtHR judgment of 9 June 2009 in *Opuz v. Turkey*, Application no. 33401/02; and M. Wąsek-Wiaderek, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. I, part 2: *Zagadnienia ogólne*, Warszawa 2013, pp. 86–87.

[16] J. Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*, Olsztyn 2014, p. 40 and the case law referred to therein; D. Czerniak, *Obowiązki państwa wobec ofiar zgwałcenia na tle orzecznictwa strasburskiego*, Prokuratura i Prawo No. 6, 2016, p. 31.

as the obligation to protect rights and freedoms under the ECHR and the obligation to assist an individual by conducting an effective investigation in the event of a violation of Convention norms,[17] which will be discussed later in this paper.

In the context of substantive law, the state is therefore under an obligation stipulated by the Constitution and Convention to introduce criminal law norms protecting the most important individual interests. Neither the literature nor the case law question the non-pecuniary interest of the victim, which stems from these provisions and the general functions of criminal law, and which boils down to obtaining moral satisfaction resulting from the defendant being found guilty or from a specific sentence being imposed on the defendant.[18] This is supported by both the universally accepted compensatory function of criminal law, according to which criminal law should eliminate the conflict that has arisen between the perpetrator and the victim (and not only between the perpetrator and the state) as a result of a prohibited act being committed, but also by the closely related, fundamental function of justice, which consists in adequate retribution for the harm done and its stigmatisation.[19] Indeed, justice must be done to the society as a whole, but also to the victim. As Lech Gardocki points out, "the fulfilment of the function of justice (measured by humanitarianism) plays a very important role in discharging a certain mental condition caused by the commission of an offence, which is experienced by the victim and other persons who have become aware of this fact. This condition is a mixture of harm, frustration and intimidation, and its discharge is referred to, in short, as satisfaction of justice. Disregarding this function of criminal law can have significant adverse social consequences."[20] Axiologically, it is argued in the literature that a victim has a moral claim against the state for fair punishment of the perpetrator of a prohibited act, which is sometimes considered to be more important than the element of compensation.[21]

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[17] This distinction was proposed by A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights*, Oxford–Portland–Oregon 2004, pp. 225–227.

[18] See e.g. A. Gubiński, *Główne ogniwa reformy prawa karnego: ograniczenie punitywności i zadośćuczynienie pokrzywdzonemu*, Państwo i Prawo No. 7, 1981, p. 72; T. Hörle, *Distribution of Punishment – the Role of the Victim's Perspective*, Buffalo Criminal Law Review No. 3, 1999, p. 175 et seq.; W. Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji prawa karnego?*, Gdańsk 2006, p. 117; A. Kołodziejczyk, *Umorzenie absorpcyjne w polskim procesie karnym*, Warszawa 2013, p. 136 et seq.; A.T. Olszewski, *Umorzenie absorpcyjne*, Prokuratura i Prawo No. 1, 2008, p. 39. After all, auxiliary prosecutors often challenge court judgments with respect to the penalty and their gravamen is not questioned, considering it to be obvious and not requiring any further consideration, see W. Grzeszczyk, *Praktyczne aspekty gravamen w procesie karnym*, Prokuratura i Prawo No. 8, 2011, p. 11, pp. 17–18; judgment of the Court of Appeal in Wrocław of 10 March 2015, II AKa 40/15, LEX No. 1661287; judgment of the Court of Appeal in Wrocław of 16 December 2016, II AKa 325/16, LEX No. 2231122; judgment of the Court of Appeal in Warsaw of 3 June 2015, II AKa 89/15, LEX No. 1771183.

[19] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2012, p. 43, pp. 45–46; J. Giezek, [in:] M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, 7th edn, Warszawa 2017, pp. 33–34.

[20] L. Gardocki, *Prawo karne*, 18th edn, Warszawa 2013, pp. 7–8.

[21] F. Ciepły, *Chrześcijańska koncepcja kary kryminalnej a współczesne poglądy na karę*, Lublin 2010, p. 110; M. Kulik, *O założeniach aksjologicznych kodeksu karnego z 1997 roku*, [in:] A. Grześkowiak, I. Zgoliński (eds), *Aksjologiczne podstawy prawa karnego w perspektywie jego ewolucji*, Bydgoszcz 2017, pp. 104–105, 112–113. The latter of the authors notes that putting great emphasis on

Apart from the classifying provisions, Article 46 CC, which provides for a compensatory measure in the form of the obligation to redress the suffered damage or harm, is naturally the fundamental norm that constitutes the basis for establishing a specific legitimate interest of the victim. That provision ensures, *a priori*, that the victim's interest is taken into account since it is mandatory to order that damage be redressed, even in part, if the victim so requests. This interest may be satisfied by the victim in the manner and within the time limit specified in Article 49a CPC. While it would be difficult to infer a constitutional or conventional obligation to allow the victim to pursue their pecuniary claims in the context of criminal proceedings, without civil proceedings, the vast majority of European countries provide for such a mechanism, which is part of their obligation to ensure that the aggrieved parties can pursue their rights as effectively as practicable.[22] Undoubtedly, both the Constitution (Article 45(1) and Article 77(2)) and the Convention (Article 6(1)) require that the aggrieved parties be afforded an opportunity to pursue claims resulting from an offence at least in a civil trial.

The axiology of the constitutional and conventional order thus entails the obligation to provide the victim with adequate protection by establishing norms of substantive law that safeguard their legally protected interests and compensate them in both pecuniary and non-pecuniary aspects.

3. VICTIM'S PROCEDURAL INTERESTS

However, it should be borne in mind that, in addition to the creation of the victim's substantive-law interests, the legislator must put in place procedural measures for effectuating them, which largely implies the obligation to guarantee the victim's right to participate in and to obtain protection of their interests in criminal proceedings and, consequently, entails their right to court in criminal matters.

From a constitutional point of view, the right to court is apparently derived from Article 45(1) of the Constitution of the Republic of Poland which provides that "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". It is complemented and developed in detail from the negative side by Article 77(2) of the Constitution of the Republic of Poland which bars closing the recourse to the courts in pursuit of claims alleging infringement of freedoms or rights.[23] On the one hand, that right is vested in everyone and, as such, in all natural persons and legal persons governed by private law, on the other hand, only if those persons have a specific

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compensation and reconciliation between the victim and the perpetrator somewhat depreciates the victim by putting them on an equal footing, while the victim did no harm and cannot, as such, be treated on an equal footing. However, this view does not prevail, see e.g. in the same monograph, *Założenia aksjologiczne systemu reakcji karnych na przestępstwo na tle kodeksu karnego z 1997 roku*, pp. 130–131, authored by Mirosława Melezini.

[22] M. Wąsek-Wiaderek, *supra* n. 15, p. 83.

[23] P. Grzegorczyk, K. Weitz, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP*, Vol. I: *Komentarz. Art. 1–86,* Warszawa 2016, pp. 1092–1093.

relationship with the subject-matter of the proceedings in that the subject-matter refers to the legal situation of the person concerned.[24] The right to court is not given effect until a case within the constitutional meaning is to be examined which case involves the entity concerned. The concept of a "case", although it is still subject to dynamic development in the case law of the Constitutional Tribunal, includes disputes – involving natural or legal persons – arising from administrative and civil-law relationships and the determination of the merits of criminal charges, or, as it has been recognised in subsequent case law, any situation where the rights of a specific person need be established.[25] The case law of the Constitutional Tribunal has repeatedly considered whether a criminal case is also the case of the victim or only that of the defendant, and the case law is not uniform in this respect.

For a long time a view, though unfavourable for the aggrieved parties, has prevailed according to which a criminal case is not *a priori* a case of the victim and the same has no standing to initiate court proceedings on their own, but they can exercise the right to court upon a bill of indictment being filed by the competent entity, as well as by initiating civil proceedings.[26] In one of the judgments, the Constitutional Tribunal made it clear that "the purpose of criminal proceedings conducted directly against the perpetrator does not immediately affect the rights and freedoms of the victim",[27] which does not seem to be entirely consistent with the wording of Article 2 CPC.

This position is set out at length in the Constitutional Tribunal judgment of 15 June 2004, SK 43/03.[28]

According to the Tribunal, the Constitution does not stipulate the right for citizens to initiate criminal proceedings against a person and a criminal case is the case of the defendant. However, since court proceedings underway are likely to affect the victim's interests in a number of ways, when a competent prosecutor files a bill of indictment, the case also becomes, in a sense, the victim's case. Accordingly, the victim becomes a specific entity covered by the safeguards resulting from the constitutional right to court, but only as regards three components of this right, namely: the right to shape criminal proceedings as per the requirements of justice;

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[24] The Constitutional Tribunal judgment of 9 June 1998, K 28/97, OTK 1998/4/50.

[25] L. Jamróz, *Prawo do sądu – zarys problematyki*, [in:] A. Jamróz, L. Jamróz, *Prawa jednostki w demokratycznym państwie prawa*, Białystok 2016, p. 167; the Constitutional Tribunal judgments: of 12 March 2005, K 35/04, OTK ZU 2005/3A/23; of 13 March 2012, P 39/10, OTK-A 2012/3/26; or of 22 October 2013, SK 18/11, OTK-A 2013/1/4.

[26] The Constitutional Tribunal judgment of 2 April 2001, SK 10/00, Dz.U. No. 32, item 384; the Constitutional Tribunal judgment of 12 May 2003, SK 38/02, Dz.U. No. 88, item 818.

[27] *Ibid*.

[28] Dz.U. no. 145, item 1545. See also the Constitutional Tribunal judgment of 25 September 2012, SK 28/10, Dz.U. item 1095, in which the Tribunal found the mandatory nature of a one-month time limit for filing a subsidiary bill of indictment by the victim to be in line with Article 45(1) of the Constitution of the Republic of Poland and confirmed the view reflected in the existing case law, according to which a criminal case become the case of the victim only when a bill of indictment is filed by the competent prosecutor. The mandatory nature of the time limit in question is criticised in the literature, see E. Kruk, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżenia uprawnionego oskarżyciela w polskim procesie karnym*, Lublin 2016, pp. 388–389. Cf. J. Głębocka, *Prawo pokrzywdzonego do sądu – wstęp do problematyki*, Przegląd Sądowy No. 11–12, 2012, pp. 87–102.

the right to obtain, without undue delay, a binding decision on a criminal case duly brought before a court by a competent prosecutor; and the right to have the court hearing the case to comply with the constitutional requirements of jurisdiction, independence, impartiality and autonomy. The victim's right to initiate court proceedings is exercised primarily in civil proceedings.

The Constitutional Tribunal took a different view in its judgment of 18 May 2004, SK 38/03, holding that the decision on criminal liability for an offence, in so far as it concerns an act which infringes the victim's legally protected interest, is at the same time a decision regarding the victim's legitimate interests and, as such, falls within the concept of a case.[29] The victim may exercise their right to court in both criminal and civil proceedings, and it is in criminal proceedings that the victim may seek protection that civil law will never provide them with, in the form of non-pecuniary compensation resulting from the conviction and the sentence. The existence of this type of the victim's interests is of a legally relevant nature, which is confirmed by the legal system affording the victim a specific procedural status in criminal and minor offence proceedings. The inability to give effect to the indicated interests of the victim in specific proceedings should therefore be assessed in the context of the safeguards set out in Article 45 of the Constitution.

In the subsequent case law, on two occasions the Constitutional Tribunal adopted a view unfavourable to the aggrieved parties (judgment of 25 September 2012, SK 28/10, and judgment of 19 May 2015, SK 1/14[30]), while in the judgment of 30 September 2014, SK 22/13, it once again held that a criminal case is, from the very beginning, the victim's case "in so far as it concerns an act that violates or compromises their legally protected interests", and only the victims themselves are entitled to opt for the procedural strategy to pursue their rights.[31] However, the view that a criminal case is not the victim's case until a bill of indictment is filed with the court by a competent entity and that the victim themselves cannot infer from the Constitution their right of access to a criminal court and the right to initiate criminal proceedings before the court, must still be regarded as prevailing.[32]

The above reasoning of the Tribunal has been criticised in the literature. It is specifically indicated that the scope of the guarantee of the right to court is subjectively broader in Article 45 of the Constitution of the Republic of Poland than in Article 6 ECHR. The provision of Article 6 ECHR is expressly, in its essential part, directed at the rights of "everyone charged with a criminal offence", while Article 45 of the Constitution of the Republic of Poland guarantees "everyone" the right to court.[33]

Undoubtedly, once the court procedure has been initiated by a competent prosecutor, the victim has, in the course of the proceedings, the other components of the constitutional right to court, i.e. the right to obtain a decision within a reasonable

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[29] Dz.U. No. 128, item 1351.

[30] OTK-A 2015/5/64.

[31] OTK-A 2014/8/96.

[32] See also M. Rogalski, *Procesowe gwarancje zasady legalizmu*, [in:] B. Dudzik, J. Kosowski, I. Nowikowski (eds), *Zasada legalizmu w procesie karnym*, Vol. I, Lublin 2015, p. 379.

[33] P. Wiliński, *Proces karny w świetle Konstytucji*, Warszawa 2011, pp. 138–139.

time, the right to court of proper jurisdiction and the right to a fair trial, and thus to have effective measures to protect their legitimate interests, the right to be heard, the right to ensure that the procedure is foreseeable, the procedural situation is foreseeable and that the decision is duly reasoned.[34] It seems that, as it stands now, the case law of the Constitutional Tribunal may lead to a conclusion that the legislator is required to ensure that the victim be afforded the status of a party to the court proceedings underway since the victim has the right to court in criminal cases at the time a bill of indictment is filed.

This is slightly different in the context of the European Convention on Human Rights. As regards the guarantees of a fair trial, Article 6 ECHR treats civil and criminal cases separately, with the guarantees of fairness of a criminal trial relating to "the determination of any criminal charge brought against him [D.C.'s note: the entitled person]" and, thus, only the defendant. As a consequence, the victim does not enjoy the conventional right to a fair trial in criminal matters, and in particular the right to have proceedings against another person instituted, since they are not a beneficiary of the right to court in criminal matters; however, this approach has been criticised by legal commentators who seek to imply that most elements of a fair trial can also be extended to the victim.[35] However, this does not change the fact that, in the context of Article 6 ECHR, national law may (but not necessarily has to) vest in the victim the right to be a party to a criminal trial entitled to seek pecuniary compensation for the damage and harm suffered. The refusal to allow such a victim to participate in criminal proceedings does not amount to an infringement of the right of access to a court, provided that the victim has the opportunity to take part in civil proceedings. Where national law provides for the participation of the victim in criminal proceedings as a party and in the context of these proceedings a decision concerning their interests, in particular civil claims, is to be rendered, or a defamation case is pending, only then do they benefit from the guarantees of Article 6 in view of the principle of equality of arms.[36] In particular, in such case the victim is then entitled to have the case heard: by an independent and impartial court or tribunal established by law, fairly (i.e. based on the right to a fair trial), publicly (openly) and within a reasonable time. It should be noted, however, that it is has been repeatedly indicated in the case law of Polish courts that a criminal trial should be fair not only to the defendant, but also to the victim. In turn, the

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[34] As regards the components of the constitutional right to court, see P. Wiliński, *supra* n. 32, p. 117; the Constitutional Tribunal judgment in case K 28/97 referred to above.

[35] A. Wróbel, P. Hofmański, [in:] L. Garlicki (ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności*, Vol. I: *Komentarz do artykułów 1–18*, Warszawa 2010, p. 304. See the ECtHR judgment of 29 October 2001 in *Helmers v. Sweden*, Application no. 22/1990, § 28; the ECtHR decision of 29 March 2001 in *Asociacion de Victimas del Terrorismo v. Spain*, Application no. 54102/00; E. Kruk, *supra* n. 26, p. 271; P. Hofmański, *Europejska Konwencja Praw Człowieka i jej znaczenie dla prawa karnego*, Białystok 1993, p. 249. Cf. W. Gliniecki, *Przyspieszanie i usprawnianie postępowania karnego a ochrona interesów pokrzywdzonego*, Prokuratura i Prawo No. 2, 2007, p. 61.

[36] The ECtHR judgment of 28 October 1998 in *Assenov v. Bulgaria*, Application no. 90/1997, § 111; and the ECtHR judgment of 16 November 2006 in *Tsalkitzis v. Greece*, Application no. 11801/04, § 29; E. Bieńkowska, [in:] C. Kulesza (ed.), *System Prawa Karnego Procesowego*, Vol. VI: *Strony i inni uczestnicy postępowania karnego*, Warszawa 2016, p. 323; M. Wąsek-Wiaderek, *supra* n. 15, pp. 82–83.

literature also suggests that the Convention should be amended so as to include the victims' rights in the list of the rights expressly guaranteed by the Convention.[37]

However, Article 6 ECHR is not the only potential source of protection of victims' rights in criminal proceedings. As shown above, in the ECtHR's view, it is incumbent on the Contracting Parties to the Convention to effectively guarantee the rights that the Convention affords to individuals, including to provide effective procedural remedies in the event of those rights being infringed, even in horizontal relationships, i.e. not by the state but by another individual. Accordingly, when an offence is committed against an individual's personal interests, such as life, liberty or health, the state is under the conventional duty to ensure that an effective procedure is in place to identify the offender and to hold them liable. Under this procedure, states must protect the dignity of the victim and prevent secondary victimisation.[38] The fulfilment of substantive obligations by the state is therefore independent of its procedural obligations. Even if the state introduces appropriate substantive criminal law provisions, these must be supported by a "system of enforcement of justice to prevent and combat violations of these provisions".[39] Although initially the concept of effective investigation, i.e. the pre-trial stage of criminal proceedings, was primarily developed in this context in case law, currently these requirements tend to be applied to the criminal procedure as a whole, since the victim has the right to benefit from an effective administration of justice. A set of rights that the state has to provide as part of its positive procedural obligations is systematically developed in the case law and now includes, without limitation, access to the case files.[40]

4. CONCLUSION

In conclusion, procedural authorities are required to identify, of their own motion, the victim's legitimate interest under the norms of substantive and procedural law and to take it into account within the limits of those norms. These interests are to be taken into account and considered in a final ruling. The obligation to introduce substantive-law norms to protect the victim's interests is derived from both the constitutional and conventional obligation to genuinely guarantee the right of individuals to life, freedom, including sexual freedom, the right to privacy and other fundamental rights, also in horizontal relationships. In turn, providing victims with interests resulting from the substantive law entails the obligation to create an effective judicial remedy for pursuing them, which is related to the issue of a fair

[37] See, for example, the judgment of the Court of Appeal in Lublin of 12 August 1999, II AKa 98/99, Prokuratura i Prawo No. 1, 2000, item 27; cf. judgment of the Court of Appeal in Szczecin of 3 March 2016, II AKa 15/16, LEX No. 2044441. The above-mentioned suggestion is formulated by E. Bieńkowska, [in:] C. Kulesza (ed.), *supra* n. 36, pp. 324–325.

[38] See e.g. the ECtHR judgment of 28 May 2015 in *Y v. Slovenia*, Application no. 41107/10.

[39] The ECtHR judgment of 5 January 2010 in *Railean v. Moldova*, Application no. 23401/04, § 27. For more details, see D. Czerniak, *supra* n. 16, pp. 38–44.

[40] M. Wąsek-Wiaderek, *supra* n. 15, pp. 91–92; and the ECtHR judgment of 25 June 2009 in *Beganović v. Croatia*, Application no. 46423/06; the ECtHR judgment of 4 August 2001 in *Kelly and Others v. the United Kingdom*, Application no. 30054/96.

criminal trial and the victim's right to court. Although it has not been decided on constitutional grounds that a victim has the right of access to a court in criminal cases, and in the text of the Convention the guarantees of the fairness of the criminal trial are referred to the victim only in so far as they pursue civil claims, the evolving case law of the Constitutional Tribunal and of the European Court of Human Rights makes it possible to conclude that the purpose of the criminal trial in the form of the obligation to take into account the legally protected interests of victims has constitutional and conventional sources and that, consequently, the legislator and then the procedural authorities are required to give effect to them.

BIBLIOGRAPHY

Banaszak B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd edn, Warszawa 2012.

Bieńkowska E., [in:] C. Kulesza (ed.), *System Prawa Karnego Procesowego*, Vol. VI: *Strony i inni uczestnicy postępowania karnego*, Warszawa 2016.

Bojarski M. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, 7th edn, Warszawa 2017.

Ciepły F., *Chrześcijańska koncepcja kary kryminalnej a współczesne poglądy na karę*, Lublin 2010.

Czepek J., *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*, Olsztyn 2014.

Czerniak D., *Obowiązki państwa wobec ofiar zgwałcenia na tle orzecznictwa strasburskiego*, Prokuratura i Prawo No. 6, 2016.

Duda A.S., *Interes prawny w polskim prawie administracyjnym*, Warszawa 2008.

Gardocki L., *Zagadnienia teorii kryminalizacji*, Warszawa 1990.

Gardocki L., *Prawo karne*, 18th edn, Warszawa 2013.

Garlicki L. (ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności*, Vol. I: *Komentarz do artykułów 1–18*, Warszawa 2010.

Gliniecki W., *Przyspieszanie i usprawnianie postępowania karnego a ochrona interesów pokrzywdzonego*, Prokuratura i Prawo No. 2, 2007.

Głębocka J., *Prawo pokrzywdzonego do sądu – wstęp do problematyki*, Przegląd Sądowy No. 11–12, 2012.

Gronowska B., *Ochrona uprawnień pokrzywdzonego w postępowaniu przygotowawczym. Zagadnienia karnoprocesowe i wiktymologiczne*, Toruń 1989.

Grzeszczyk W., *Praktyczne aspekty gravamen w procesie karnym*, Prokuratura i Prawo No. 8, 2011.

Gubiński A., *Główne ogniwa reformy prawa karnego: ograniczenie punitywności i zadośćuczynienie pokrzywdzonemu*, Państwo i Prawo No. 7, 1981.

Hofmański P., *Europejska Konwencja Praw Człowieka i jej znaczenie dla prawa karnego*, Białystok 1993.

Hörle T., *Distribution of Punishment – the Role of the Victim's Perspective*, Buffalo Criminal Law Review No. 3, 1999.

Jamróz L., *Prawo do sądu – zarys problematyki*, [in:] A. Jamróz, L. Jamróz, *Prawa jednostki w demokratycznym państwie prawa*, Białystok 2016.

Kołodziejczyk A., *Umorzenie absorpcyjne w polskim procesie karnym*, Warszawa 2013.

Kruk E., *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżenia uprawnionego oskarżyciela w polskim procesie karnym*, Lublin 2016.

Kulesza C., *Ewolucja uprawnień pokrzywdzonego w polskim procesie karnym*, [in:] L. Mazowiecka, W. Klaus, A. Tarwacka (eds), *Z problematyki wiktymologii. Księga dedykowana Profesor Ewie Bieńkowskiej*, Warszawa 2017.

Kulesza J., *Problemy teorii kryminalizacji. Studium z zakresu prawa karnego i konstytucyjnego*, Łódź 2017.
Kulik M., *O założeniach aksjologicznych kodeksu karnego z 1997 roku*, [in:] A. Grześkowiak, I. Zgoliński (eds), *Aksjologiczne podstawy prawa karnego w perspektywie jego ewolucji*, Bydgoszcz 2017.
Melezini M., *Założenia aksjologiczne systemu reakcji karnych na przestępstwo na tle kodeksu karnego z 1997 roku*, [in:] A. Grześkowiak, I. Zgoliński (eds), *Aksjologiczne podstawy prawa karnego w perspektywie jego ewolucji*, Bydgoszcz 2017.
Mowbray A., *The Development of Positive Obligations under the European Convention on Human Rights,* Oxford–Portland–Oregon 2004.
Olszewski A.T., *Umorzenie absorpcyjne*, Prokuratura i Prawo No. 1, 2008.
Rogalski M., *Procesowe gwarancje zasady legalizmu*, [in:] B. Dudzik, J. Kosowski, I. Nowikowski (eds), *Zasada legalizmu w procesie karnym*, Vol. I, Lublin 2015.
Safjan M., Bosek L. (eds), *Konstytucja RP*, Vol. I: *Komentarz. Art. 1–86*, Warszawa 2016.
Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, 8th edn, Warszawa 2018.
Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, 3rd edn, Warszawa 2015.
Steinborn S. (ed.), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el.
Sych W., *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym*, Kraków 2006.
Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa 2013.
Wąsek-Wiaderek M., [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. I, part 2: *Zagadnienia ogólne*, Warszawa 2013.
Wiliński P., *Proces karny w świetle Konstytucji*, Warszawa 2011.
Wróbel W., Zoll A., *Polskie prawo karne. Część ogólna*, Kraków 2012.
Zalewski W., *Sprawiedliwość naprawcza. Początek ewolucji prawa karnego?*, Gdańsk 2006.
Żbikowska M., *Zasada lojalności w procesie karnym (odniesiona do pokrzywdzonego)*, Toruń 2015.

VICTIM'S LEGALLY PROTECTED INTERESTS IN CRIMINAL TRIAL UNDER THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Summary

The paper considers the issue of constitutional and conventional sources of one of the objectives in criminal proceedings, namely taking into account the legally protected interests of the victim (injured party). The author defines the notion of legally protected interests of the victim and distinguishes substantive-law and procedural interests. Both have constitutional and conventional sources as proven by the analysis of the European Court of Human Rights and the Polish Constitutional Tribunal case law. Effective protection of human rights and freedoms requires establishing provisions of substantive law, including criminal law, while their implementation should be guaranteed by introducing appropriate procedural mechanisms, in particular the victim's right to court, including the right to a fair trial. The conclusion was therefore that the objective of criminal proceedings indicated in Article 2 § 1 para. 3 CPC is constitutionally and conventionally defined.

Keywords: injured party, objectives of criminal proceedings, right to court, states' positive obligations, fair trial, procedural fairness, legally protected interest

UWZGLĘDNIENIE PRAWNIE CHRONIONYCH INTERESÓW POKRZYWDZONEGO JAKO CEL PROCESU KARNEGO W ŚWIETLE KONSTYTUCJI RZECZPOSPOLITEJ POLSKIEJ I EUROPEJSKIEJ KONWENCJI PRAW CZŁOWIEKA

Streszczenie

W artykule rozważono zagadnienie istnienia konstytucyjnych i konwencyjnych źródeł celu procesu karnego w postaci uwzględnienia prawnie chronionych interesów pokrzywdzonego. Zdefiniowano pojęcie prawnie chronionych interesów pokrzywdzonego oraz wyróżniono interesy o charakterze materialnoprawnym i procesowym. Jedne i drugie mają źródła konstytucyjne i konwencyjne, co wynika z przeprowadzonej analizy orzecznictwa Trybunału Konstytucyjnego i Europejskiego Trybunału Praw Człowieka. Efektywna ochrona praw i wolności jednostki wymaga bowiem ustanowienia norm prawa materialnego, w tym karnego, a z kolei ich realizacja winna być zagwarantowana wprowadzeniem odpowiednich mechanizmów proceduralnych, w szczególności prawa pokrzywdzonego do sądu, w tym do sprawiedliwości proceduralnej. W konkluzji stwierdzono zatem, że cel procesu karnego wskazany w art. 2 § 1 pkt 3 k.p.k. jest konstytucyjnie i konwencyjnie określony.

Słowa kluczowe: pokrzywdzony, cele procesu karnego, prawo do sądu, pozytywne obowiązki państw, rzetelny proces karny, sprawiedliwość proceduralna, prawnie chroniony interes

ESTIMACIÓN DE INTERESES PROTEGIDOS LEGALMENTE DEL PERJUDICADO COMO LA FINALIDAD DEL PROCESO PENAL DESDE LA PERSPECTIVA DE LA CONSTITUCIÓN DE LA REPÚBLICA DE POLONIA Y DEL CONVENIO EUROPEO DE DERECHOS HUMANOS

Resumen

El artículo reflexiona sobre la existencia de fuentes constitucionales y convencionales de la finalidad del proceso penal que consiste en estimación de intereses protegidos legalmente del perjudicado. Se define el concepto de intereses protegidos legalmente del perjudicado y se diferencia intereses sustanciales y procesales. Ambos tienen fuentes constitucionales y convencionales, lo que resulta del análisis de la jurisprudencia del Tribunal Constitucional y del Tribunal Europeo de Derechos Humanos. La protección efectiva de derechos y libertades del individuo requiere establecer normas de derecho sustantivo, incluyendo derecho penal. Su ejecución ha de ser garantizada mediante mecanismos procesales, en particular el derecho del perjudicado a un juicio justo, incluyendo la justicia procesal. Como conclusión se determina que el la finalidad del proceso penal señalado en art. 2 § 1 punto 3 del código de procedimiento penal queda determinado constitucional y convencionalmente.

Palabras claves: perjudicado, finalidad de proceso penal, derecho a un juicio justo, obligaciones positivas de Estados, proceso penal justo, interés protegido legalmente

УЧЕТ ОХРАНЯЕМЫХ ЗАКОНОМ ИНТЕРЕСОВ ПОТЕРПЕВШЕГО КАК ЦЕЛЬ УГОЛОВНОГО ПРОЦЕССА В СВЕТЕ КОНСТИТУЦИИ РЕСПУБЛИКИ ПОЛЬША И ЕВРОПЕЙСКОЙ КОНВЕНЦИИ О ПРАВАХ ЧЕЛОВЕКА

Резюме

В статье рассматривается вопрос конституционных и конвенционных источников цели уголовного процесса, заключающейся в учете охраняемых законом интересов потерпевшего. Автор дает определение охраняемых законом интересов потерпевшего, а также выделяет материально-правовые и процессуальные интересы. Как следует из анализа судебной практики Конституционного суда и Европейского суда по правам человека, у обеих групп интересов имеются как конституционные, так и конвенционные источники. Дело в том, что для эффективной защиты прав и свобод человека требуется наличие норм материального (в том числе уголовного) права. В свою очередь, реализация этих норм должна быть обеспечена внедрением соответствующих процессуальных механизмов, в частности, права потерпевшего на защиту своих интересов в суде и на процессуальную справедливость. Таким образом, можно сделать вывод о том, что цель уголовного процесса, изложенная в ст. 2 § 1 п. 3 УПК, имеет конституционные и конвенционные основания.

Ключевые слова: потерпевший, цели уголовного процесса, право на суд, позитивные обязанности государств, справедливое судебное разбирательство, процессуальная справедливость, охраняемый законом интерес

BERÜCKSICHTIGUNG DER GESETZLICH GESCHÜTZTEN INTERESSEN DES OPFERS ALS ZWECK DES STRAFVERFAHRENS IM LICHTE DER POLNISCHEN VERFASSUNG UND DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION

Zusammenfassung

Der Artikel befasst sich mit der Frage der Existenz verfassungsmäßiger und konventioneller Quellen für den Zweck des Strafverfahrens in Form der Berücksichtigung der gesetzlich geschützten Interessen des Opfers. Das Konzept der gesetzlich geschützten Interessen des Opfers wurde definiert und zusätzlich wurden materielle und verfahrenstechnische Interessen ausgezeichnet. Beide haben verfassungsrechtliche und konventionelle Quellen, die sich aus der Analyse der Rechtsprechung des Verfassungsgerichts und des Europäischen Gerichtshofs für Menschenrechte ergeben. Ein wirksamer Schutz der Rechte und Freiheiten des Einzelnen erfordert die Festlegung materieller Rechtsstandards, einschließlich des Strafrechts, und deren Umsetzung sollte wiederum durch die Einführung geeigneter Verfahrensmechanismen gewährleistet werden, insbesondere durch das Recht des Opfers auf Gericht, einschließlich Verfahrensgerechtigkeit. Die Schlussfolgerung besagt daher, dass der Zweck des Strafverfahrens is angegeben in Artikel 2 § 1 Punkt 3 der Strafprozessordnung ist verfassungsrechtlich und konventionell festgelegt.

Schlüsselwörter: Opfer, Ziele des Strafverfahrens, Recht auf Gericht, positive Verpflichtungen der Staaten, faires Strafverfahren, Verfahrensgerechtigkeit, gesetzlich geschützte Interessen

CONSIDÉRER LES INTÉRÊTS LÉGALEMENT PROTÉGÉS DE LA VICTIME COMME OBJECTIF DE LA PROCÉDURE PÉNALE À LA LUMIÈRE DE LA CONSTITUTION POLONAISE ET DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

Résumé

L'article examine l'existence de sources constitutionnelles et conventionnelles de l'objet du procès pénal sous la forme de la prise en compte des intérêts légalement protégés de la victime. Le concept des intérêts légalement protégés de la victime a été défini et les intérêts matériels et procéduraux ont été distingués. Les deux ont des sources constitutionnelles et conventionnelles, ce qui résulte de l'analyse de la jurisprudence du Tribunal constitutionnel et de la Cour européenne des droits de l'homme. Une protection efficace des droits et libertés individuels nécessite l'établissement de normes de droit matériel, y compris le droit pénal, et leur mise en œuvre devrait à son tour être garantie par l'introduction de mécanismes procéduraux appropriés, en particulier le droit de la partie lésée à un procès, y compris à la justice procédurale. La conclusion indique donc que le but de la procédure pénale indiqué à l'art. 2 § 1 point 3 du code de procédure pénale est constitutionnellement et conventionnellement déterminé.

Mots-clés: victime, partie lésée, objectifs du procès pénal, droit à un procès, obligations positives des États, procès pénal équitable, justice procédurale, intérêt légalement protégé

PERSEGUIMENTO DEGLI INTERESSI GIURIDICAMENTE TUTELATI DELLA PARTE LESA COME OBIETTIVO DEL PROCESSO PENALE ALLA LUCE DELLA COSTITUZIONE DELLA REPUBBLICA DI POLONIA E DELLA CONVENZIONE EUROPEA PER LA SALVAGUARDIA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI

Sintesi

Nell'articolo è stata trattata la questione dell'esistenza di fonti, nella Costituzione e nella Convenzione, dell'obiettivo del processo penale come perseguimento degli interessi giuridicamente tutelati della parte lesa. È stato definito il concetto giuridico di interessi giuridicamente tutelati della parte lesa e sono stati distinti gli interessi di natura sostanziale da quelli di natura procedurale. Entrambi trovano fondamento nella Costituzione e nella Convenzione, come deriva dall'analisi condotta della giurisprudenza della Corte Costituzionale e della Corte europea dei diritti dell'uomo. L'efficace tutela dei diritti e delle libertà dei singoli richiede infatti l'adozione di norme di diritto sostanziale, compreso quello penale, e d'altra parte la loro realizzazione deve essere garantita con l'introduzione di adeguati meccanismi procedurali, in particolare il diritto alla giustizia della parte lesa, che comprende l'equità procedurale. In conclusione è stato quindi affermato che l'obiettivo del processo penale indicato negli art. 2 § 1 punto 3 del codice di procedura penale è stabilito nella Costituzione e nella Convenzione.

Parole chiave: parte lesa, obiettivi del processo penale, diritto alla giustizia, obblighi positivi degli stati, processo penale equo, equità procedurale, interesse tutelato giuridicamente

Cytuj jako:

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