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PROPORTIONALITY OF INTERESTS AND THE PRINCIPLE OF COMMENSURABILITY OF SELF-DEFENCE IN POLISH CRIMINAL LAW

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1. INTRODUCTION

Although it has been known since the times of Roman law, the institution of self-defence or necessary defence still arouses vivid emotions in the society while, at the same time, leading to numerous difficulties in its practical application. As an example, one can invoke the very recent situation in the Lublin region, where a 17-year-old killed his father with a knife while defending his mother, who had been abused by the father for many years. In about the same period, a military prosecutor from the city of Gdańsk injured two young people by firing at them as they were allegedly attempting to enter his house. In both cases, albeit different in terms of the underlying motivation, one can clearly see the complexity of self-defence and difficulties in its application in practice.

The features of self-defence in the strict sense are set out in Article 25 § 1 of the Polish Criminal Code,[1] which states that anyone who, in self-defence, repels a direct, unlawful attack on any interest protected by law, shall not be deemed to commit a crime. This wording of the provision directly suggests that in order for justifications (i.e. defences to criminal liability) to occur at all, an attack must take place first. However, the attack does not always authorise self-defence. An attack must fulfil four prerequisites jointly: it must be direct, unlawful, oriented against any interest protected by law, as well as it must be real (while the last of these

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[1] Act of 6 June 1997: Criminal Code (consolidated text, Dz.U. 2019, item 1950, as amended); hereinafter CC.

prerequisites is not mentioned explicitly in the text of the provision, it results from the relation between self-defence and an error regarding the justifications, as defined in Article 29 CC).[2]

When an attack has exhausted the aforementioned necessary conditions, it entitles a person to take defensive action, which is not tantamount to accepting the justifications of self-defence. In fact, there are some limits of this criminal-law institution, delineated by the features of the defensive action and, in particular, by the feature of 'necessary' defence. However, the analysis of self-defence raises a number of doubts, mainly related to differences in construing this notion (i.e. the dilemma between the 'self-containedness' or subsidiarity of defence and the commensurability of defence vis-à-vis the danger posed by an attack). The prevailing view in the Polish criminal law doctrine – which the author hereby identifies with – is that self-defence is fully self-contained, which means that it is assumed that the attack itself (as long as it exhausts the aforementioned characteristics) generates the right to act under necessary defence. While I leave this issue outside the scope of this paper, I think it is necessary to look more deeply into the problem of delineating the limits of self-defence or, more precisely, the commensurability of defence actions versus the degree of danger posed by the attack.

2. PRINCIPLE OF COMMENSURABILITY OF DEFENCE WITH THE DANGER POSED BY THE ATTACK

The legal norm which seems to emanate from the content of Article 25 § 1 CC does not contain a condition as to maintaining the proportion of interests in conflict. Nevertheless, a conclusion that may be drawn from Article 25 § 2 CC is that the legislator limits self-defence by establishing its limits, also in terms of the manner of defence. Since the times of the 1969 Criminal Code,[3] the condition of commensurability of the self-defence in the face of the danger posed by an attack has been directly determined by that act (Article 22 § 3 of the 1969 Criminal Code; currently: Article 25 § 2 CC), indicating the use of an incommensurate method of defence as an example of exceeding the limits of self-defence. The phrase 'in particular' used in that provision indicates that it is not the only possible case where the limits of self-defence may be exceeded, although, as Andrzej Marek believes, this is the most important one.[4]

A problem arises when it comes to the highly subjective analysis of the manner of defence that will be commensurate with a specific attack. As Paweł Petasz rightly points out, with this construction of a legal norm, the doctrine and case law should construe and clarify the meaning of 'commensurability' of the manner

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[2] M. Mozgawa, [in:] *Prawo karne materialne. Część ogólna*, M. Mozgawa (ed.), 3rd edn, Warszawa 2011, p. 230; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2014, p. 350.

[3] Act of 19 April 1969: Criminal Code (Dz.U. 1969, No. 13, item 94).

[4] A. Marek, *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warszawa 2008, pp. 88–89.

of defence. That author rightly indicates that what needs to be taken into account are, among others, circumstances such as the behaviour of the perpetrator, their physical strength, the tools used, or the predominance in the number of attackers.[5] A similar claim was also made by Marian Cieślak, who treated necessity in this respect in the humanistic sense, i.e. taking into account what can (or cannot) be reasonably required of the defending person, while considering social beliefs and feelings.[6] Therefore, from this perspective, it is justified and right to claim that every case should be examined *in concreto*, if only because the situation during an attack can change at any moment, and any defender should consider the effectiveness of their defence.

When assessing the commensurability of actions with the danger posed by an attack, Polish case law seems to favour the person who repels the attack. In its judgment of 11 July 1974, the Supreme Court ruled that 'a person acting in self-defence may use such means as are necessary to repel the attack. The use of a dangerous tool, particularly in moderation, cannot be regarded as exceeding the limits of self-defence if the defender did not have any other, less dangerous but equally effective means of defence at the time, and if the circumstances of the incident, and in particular the preponderance of the attackers and their manner of acting implied that the attack posed a threat to the life or health of the attacked person.'[7] The Supreme Court also formulated a similar claim in its judgment of 23 July 1980: '[...] the institution of self-defence allows for the use of any necessary means of defence in order to repel a direct and unlawful attack on life or health, while the kind of tool used must not determine that limits of such defence have been transgressed if the defender did not have any other, less dangerous tool at their disposal.'[8]

As rightly observed by Janusz Wojciechowski, it is therefore allowed 'to use any available means' in the defence of one's life or health, including acceptance for the use of dangerous tools. Of course, this does not preclude the essential principle whereby defence must always be commensurate with the danger posed by the attack, but it does not mean that defence must be based on a balance of powers. According to that author, the defender is entitled to defend themselves in such a way so as to gain an advantage over the attacker.[9] This claim seems to be confirmed by another position taken by the Supreme Court: 'No one can be denied the right to hold an attacker at a distance with whatever object is available, even if the attacker attacks someone with bare hands. The targeted person is not obliged to get into a brawl with the attacker and to risk blows in order to turn their defence

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[5] P. Petasz, *Glosa do postanowienia SN z dnia 27 kwietnia 2017 r., IV KK 116/17*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa 3, 2017, pp. 78–88.

[6] M. Cieślak, *Polskie prawo karne: zarys systemowego ujęcia*, Warszawa 1994, p. 224.

[7] The Supreme Court judgment of 11 July 1974, VI KRN 34/74, OSNKW 1974, No. 11, item 198.

[8] The Supreme Court judgment of 23 July 1980, V KRN 168/80, OSNPG 1981, No. 6, item 60.

[9] J. Wojciechowski, *Szeroki zakres obrony koniecznej*, Monitor Prawniczy 6, 1998, pp. 213–215.

against a direct unlawful attack into a balanced duel.'[10] Therefore, as these and other examples show, the Supreme Court has already expressed a position on this issue on multiple occasions, always taking the view that the law should not give way to lawlessness.[11] This view of the judiciary is also shared by most representatives of the doctrine.[12]

3. COMMENSURABILITY OF DEFENCE AND PROPORTIONALITY OF CONFLICTING INTERESTS

The analysis of the proportionality of the interests, those that were violated by the attacker and those violated by the defender, is a separate issue. In this regard, two positions can be essentially identified in the doctrine and in case law.

The first one, which disqualifies the principle of proportionality of interests and prevailed, in particular, under the 1932 Criminal Code,[13] does not allow for any limitation of the range of interests that can be legally violated by the person repelling an unlawful attack. This view was expressed, among others, by Leon Peiper, who claimed that 'despite the insignificant value of the interests at risk, it is therefore possible to even kill the attacker if the type of attack justifies it.'[14] Also, Stanisław Śliwiński argued that 'the principle of interest weighing or the proportional value of interests does not apply [...]. In defence of a purse containing just a few coins, the targeted person may even take the attacker's life (a more valuable interest), if no other defence method can be used. [...] lawlessness should not prevail over the law, and the attacker must reckon with the fact that they may even lose their life but will not triumph over the law even for a moment.'[15] The gross disproportionality of interests was also thought to be allowable by Arnold Gubiński,[16] Juliusz Makarewicz[17] and Stefan Glaser[18].

According to the second position, which is now accepted by the dominant group of the Polish judicature, this commensurability will be determined by the value of the interest threatened by an attack. The danger of an attack results not only from the intensity and manner of action undertaken by the attacker, but also – according to Andrzej Zoll – the danger of an attack is determined, to a decisive extent, by

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[10] The Supreme Court judgment of 9 March 1976, III KR 21/76, OSNKW 1976, No. 7–8, item 89.

[11] Recently, e.g. the decision of the Supreme Court of 27 April 2017, IV KK 116/17, LEX No. 2284193.

[12] See, e.g., M. Szafraniec, *Przekroczenie granic obrony koniecznej w polskim prawie karnym*, Kraków 2004, p. 98 and 102; J. Kulesza, [in:] *System Prawa Karnego*, Vol. 4: *Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, L. Paprzycki (ed.), Warszawa 2016, pp. 248–249.

[13] Regulation of the President of the Republic of Poland of 11 July 1932: Criminal Code (Dz.U. 1932, No. 60, item 57).

[14] L. Peiper, *Komentarz do kodeksu karnego*, Kraków 1936, p. 83.

[15] S. Śliwiński, *Polskie prawo karne materialne*, Warszawa 1946, p. 156.

[16] A. Gubiński, *Wyłączenie bezprawności czynu*, Warszawa 1961, pp. 21–22.

[17] J. Makarewicz, *Kodeks karny z komentarzem*, 3rd edn, Lwów 1932, pp. 77–79.

[18] S. Glaser, *Polskie prawo karne w zarysie*, Kraków 1933, p. 138.

the value of the targeted interest.[19] In its judgment of 26 April 1979, the Supreme Court stated: 'In order to thwart an unlawful and direct attack on any interest protected by law, one can only use such means of defence which are in the right proportion to the imminent danger as well as the extent and the value of the interest under attack.'[20]

However, some opinions in the doctrine present a somewhat different view of the proportionality of interests in self-defence. While Andrzej Marek stated that 'in the institution of self-defence, the principle of the proportion of interests does not apply to the interest under attack and the interest violated as a result of the repelled attack,'[21] in the very next sentence he claimed that 'this does not mean that a gross imbalance is allowable in this respect'.[22]

This reasoning is also widely accepted by the judiciary, and a nearly identical justification can be found in a number of rulings issued by courts at different levels. For instance, the Court of Appeal in Kraków[23] argued on several occasions that 'Although the proportion between the interest threatened by an attack and the interest violated by repelling the attack does not apply in self-defence, this does not mean that a glaring disproportion of these interests is acceptable.'[24] The Regional Court in Poznań, in turn, decided that 'there was such a glaring disproportion between the interests attacked and those violated as a result of the defence, that the Court has found that the defendant exceeded the limits of self-defence.'[25] The Regional Court in Łódź argued that it 'fully shares the view that the assumption regarding the need to defend oneself against an unlawful attack contains a requirement of moderate (necessary) manner of defence where the defender gains an advantage necessary to repel the attack and, despite the absence of the principle of proportionality of the interest at risk of attack and the interest violated as a result of repelling the attack, also the inadmissibility of a glaring disproportion of those interests.'[26] The Court of Appeal in Szczecin stated that 'self-defence has an intrinsic character and, unlike a state of necessity, does not require a proportion between the interest under attack and the interest violated when the attack is repelled, yet any glaring disproportion is not admissible.'[27]

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[19] A. Zoll, *Art. 25, teza 53*, [in:] *Kodeks karny. Część ogólna*, Vol. I, Part 1: *Komentarz do art. 1–52*, W. Wróbel, A. Zoll (eds), Warszawa 2016, p. 563.

[20] The Supreme Court judgment of 26 April 1979, II KR 85/79, OSNPG 1979, No. 11, item 147.

[21] A. Marek, *Art. 25, teza 21*, [in:] A. Marek, *Kodeks karny. Komentarz*, 4th edn, Warszawa 2007, p. 72.

[22] *Ibid*.

[23] Judgment of the Court of Appeal in Kraków of 8 January 2019, II AKa 139/18, LEX No. 2686024; judgment of the Court of Appeal in Kraków of 13 September 2016, II AKa 83/16, LEX No. 2268986; judgment of the Court of Appeal in Kraków of 5 December 2012, II AKa 165/12, LEX No. 1312606.

[24] *Ibid*.

[25] Judgment of the Regional Court in Poznań of 26 January 2018, III K 230/17, LEX No. 2454189.

[26] Judgment of the Regional Court in Łódź of 30 May 2016, IV K 5/16, LEX No. 2129120.

[27] Judgment of the Court of Appeal in Szczecin of 29 June 2016, II AKa 84/16, LEX No. 2151552.

This view was also shared, among others, by the Appellate Courts in Gdańsk[28] and in Lublin[29]. Therefore, one can conclude that both the doctrine and case law generally accept that although the proportion of interests is not required in self-defence, a glaring disproportion between these interests cannot be accepted.

Despite the universal acceptance of this assumption, it is essential to draw attention to three important problems that emerge in this context. Firstly, when analysing such a view at the linguistic level, one notices that it seems somewhat inconsistent. Within the same sentence authors argue that, although the proportion of interests does not apply in self-defence, such proportion cannot be grossly violated. If we talk about criminal liability in the event of a glaring disproportion of interests (when the limits of self-defence have been exceeded and the defender has been attributed with a certain type of guilt), then such criminal liability can be assumed if there is an obligation to maintain the proportion of interests. What is a disproportion, or 'gross disproportion', if not a violation of the principle of proportion? If a glaring disproportion between the value of interests is the factor that determines criminal liability, then this should be understood as follows: there is a requirement to maintain the proportion of interests and a violation of that proportion – although only if 'glaring' – generates criminal liability. However, if one and the same sentence claims that 'there is no proportion of interests in self-defence, but glaring disproportion is not allowed,' then such a sentence contains an internal contradiction.

Secondly, a systemic interpretation is in favour of excluding the principle of proportionality of interests in self-defence. Besides, Tadeusz Bojarski rightly observes that it would be a mistake[30] to derive the requirement to maintain the proportion of interests from Article 25 § 2 CC, by analogy to the justifications of a state of utmost necessity. It should be noted that three consecutive criminal codes expressly introduce this principle in one provision but not in the next, which clearly indicates the position adopted in that act of law in this respect. The author rightly points out that exercising one's right to self-defence in an extreme situation, such as defending a purse with only a few coins, or a small amount of fruit, in a way that leads to bodily harm, formally fits within the limits of the justified necessary

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28 'It is accepted in the doctrine and case law that the limits of self-defence may be exceeded by breaching the requirements arising from the necessary defence, the so-called "intensive excess", [...] as a result [among others – the author's note] of a gross disproportion between the value of the interest threatened by an attack and the value of the interest of the attacker targeted by the defence action.' – judgment of the Court of Appeal in Gdańsk of 4 June 2014, II AKa 124/14, LEX No. 1511636.

29 'The principle of the proportion of the interest threatened with an attack and the interest violated as a result of repelling the attack does not apply to self-defence. This does not mean, however, that a gross disproportion of these interests would be allowed in this respect. [...] The extent to which the limits of self-defence are exceeded is determined, in particular, by the disproportion between the value of the interest attacked and the value of the attacker's interest targeted when repelling the attack, as well as by the disproportion in the intensity and manner of the attack and defence.' – judgment of the Court of Appeal in Lublin of 2 March 2010, II AKa 3/10, LEX No. 583684.

30 T. Bojarski, *Art. 25, teza 5*, [in:] *Kodeks karny. Komentarz*, T. Bojarski (ed.), 7th edn, LEX 2019, available online at: https://sip.lex.pl/#/commentary/587634447/489414 (accessed 17.1.2020).

defence.[31] However, there can be no doubt that if one balances the value of these conflicting interests (property of negligible value and the attacker's health or life), it must be recognised that they are grossly disproportionate.

Thirdly, when providing a teleological interpretation of the provisions governing self-defence under Polish criminal law, it should be stated that, given the essence of this institution, rather than contrasting the values of interests concerned, which, as already established, are characteristic of a lesser harm defence, one should assess instead the proportionality of the defence vis-à-vis the danger generated by the attacker. After all, a threat to the attacker's health or life occurs in the vast majority of cases involving self-defence: if someone attacks a specific legal interest, it is almost always the case that the defender who takes action to defend their legal interest may cause harm to the attacker's health or life because the contact-based response may entail certain health-related consequences. The point is that the method of defence used and the means employed in defence should be adequate to the level of the threat. Of course, when assessing such adequacy, one will analyse the interests concerned, but there can be no question of 'weighing' the values of interests on the basis of proportionality where, if a gross violation of values is found, this would automatically lead to the conclusion that the limits of self-defence have been exceeded. It should be stressed that this value is only one of the elements considered in the *ex ante* assessment of the commensurability of the defence with the attack, alongside other premises, such as, e.g.: (1) the circumstances of the attack, i.e. the number of attackers, time of day, location of the event, (2) the physical capabilities and health status of both parties, and (3) the dynamics of the situation and the ability of the attacked person to consciously assess it. Therefore, it seems that the aforementioned view prevailing in the doctrine and case law is difficult to be accepted.

The classic judgment described in the context of proportionality in most criminal law course books is the Supreme Court judgment of 6 September 1989, where the court stated that 'the defence is incommensurate when the offender infringes the interest of the attacker to a greater extent than necessary, or infringes the interest where it was not necessary to infringe it.'[32] One should also recall the position expressed by the Supreme Court in its judgment of 19 April 1982: 'The defence undertaken must […] be commensurate with the danger posed by the attack. This proportionality should be assessed in terms of the threat to the interest being attacked, existing at the time of the attack by the attacker, and the consequences of the attack being repelled.'[33] In this context, one should also recognise the relevance of the decision made in the judgment of 13 June 2013 issued by the Administrative Court in Łódź, which stated that 'the use of a lethal tool, such as a knife, against the perpetrators of harmless taunts, however unlawful such taunts might be, must not result in the adoption of the justifications of self-defence as this would be

[31] *Ibid*.

[32] The Supreme Court judgment of 6 September 1989, II KR 39/89, OSNPG 1990, No. 2–3, item 16.

[33] The Supreme Court judgment of 19 April 1982, II KR 67/82, Gazeta Prawna 4, 1983, p. 8.

disproportionate and, thus, unnecessary.'[34] Thus, the court does not analyse the preserved proportion of interests that remain in conflict but, instead, the adequacy of the manner of defence adopted in the face of the threat, whether at the technical implementation of the defence (the manner and method of defence used) or the instrument used for defence.

4. COMMENSURABILITY OF DEFENCE UNDER THE ECHR

In the context of the commensurability of defence with the danger posed by an attack, the legal norm arising from Article 2 para. 2(a) of the European Convention on Human Rights (ECHR) remains valid. It prohibits deliberate deprivation of a person's life where such defence is not absolutely necessary. Undoubtedly, the ratified international agreements, after they have obtained the prior consent of the Parliament expressed in an act of law, are ranked higher in the hierarchy of the sources of law in the Polish system than domestic laws or equivalent legislation. Since there is no doubt that the European Convention on Human Rights is such a ratified international agreement, all lower-ranking laws must comply with it. This also applies to the Criminal Code. In this sense, it should be recognised that Article 2 para. 2(a) – which contains specific premises not included in Article 25 PCC – imposes a certain limitation on the justifications of self-defence in the Polish Criminal Code. With regard to the necessary defence, according to this provision, no one may be deliberately deprived of their life, unless this results from the absolutely necessary use of force in defence of any person from unlawful violence.

Pursuant to Article 2 para. 2(a) ECHR, a perpetrator may be intentionally deprived of life in defence only if the attack is directed against any person and also when it is absolutely necessary. The latter premise is seen by some representatives of the Polish doctrine as an exception to the principle of self-contained nature of self-defence, but only to the extent indicated (intentional deprivation of life).[35] However, one cannot invoke this provision to conclude that there is a ban on self-defence in specific cases (which, indeed, could restrict its intrinsic nature), but only that there is an obligation to curb it, i.e. not to apply an incommensurate *manner* of defence consisting in the deliberate deprivation of human life.[36] An intentional deprivation of life can only take place when absolutely necessary, i.e. when other *means* or *manners* of defence are or will be ineffective. Moreover, it should be pointed out

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[34] Judgment of the Court of Appeal in Łódź of 13 June 2013, II AKa 85/13, OSAŁ 2013, No. 4, item 41.

[35] See J. Giezek, [in:] *Kodeks karny. Część ogólna. Komentarz*, J. Giezek (ed.), 2007, p. 218; A. Zoll, [in:] *Kodeks karny*, 2016, *supra* n. 19, p. 417; W. Zontek, *Art. 25*, [in:] *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, M. Królikowski, R. Zawłocki (eds.), 4th edn, Warszawa 2017, Legalis; decision of the Supreme Court of 1 February 2006, V KK 238/05, OSNKW 2006, No. 3, item 29.

[36] Jan Kulesza and Alicja Grześkowiak aptly expressed their views on the matter (J. Kulesza, [in:] *System Prawa Karnego*, *supra* n. 12, p. 165; A. Grześkowiak, *Art. 25*, [in:] *Kodeks karny. Komentarz*, A. Grześkowiak, K. Wiak (eds), 6th edn, Warszawa 2019, Legalis). See also the decision of the Supreme Court of 15 April 2015, IV KK 409/14, Legalis.

that the extensive case law of the European Court of Human Rights in this area indicates that the perception of effectiveness should be assessed through the eyes of the defender and their subjectively reasonable belief that other means are ineffective, even if such a belief turns out to be wrong at a later stage.[37] It is pointed out in the case law that 'a different approach would entail unrealistically high requirements imposed on the state and its personnel, which could generate a risk for the lives of officials and other persons.'[38] Therefore, also in the context of the ECHR provisions, there can be no requirement that a proportion must be maintained between the values of different interests if that would entail criminal liability in the event that such proportion is grossly violated.

5. CONCLUSION

In addition to its obvious function to ensure the protection of legal interests against those who commit an unlawful attack, self-defence is also intended to maintain public order, while the awareness of the possibility of defence measures, in accordance with the rule that 'the law should not yield to lawlessness', should be a deterrent to potential aggressors. This, of course, does not pertain to the tasks carried out to maintain domestic order and security by state services, as these tasks are reserved exclusively for state authorities. However, this does not mean that self-defence can only be applied to defend strictly individual interests, or interests with a value close to the attacker's interests that are put at risk as a result of a defensive action. In this context, the view expressed by Andrzej Zoll raises doubts. He argues that 'the relationship between the value of the interest sacrificed (the attacker's interest) and that of the interest attacked by the attacker should be considered to a greater extent.'[39] Bearing in mind that taking any defence action involving contact (pushing the attacker back, hitting hard or kicking) poses a threat to the attacker's health or, in the case of a more intensive action, even to their life, the adoption of the aforementioned view may significantly restrict the possibility of using self-defence in practice. This restriction is so significant in scope that, in fact, it distorts the idea of this justification.

Summing up, it must be said that self-defence is a particular kind of justification or defence to criminal liability because when there is an obvious collision of interests, the value of such interests – although it is not entirely irrelevant – plays a secondary role. The limits of such defence, assessed *ex ante*, depend *in concreto*

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[37] *Andronicou and Constantinou v. Cyprus*, 9 October 1997, RJD 1997-VI, § 192; *Mihaylova and Malinova v. Bulgaria*, 24 February 2015, the ECtHR (Fourth Section), application no. 36613/08, § 57; *Armani Da Silva v. the United Kingdom*, 30 March 2016, the ECtHR (Grand Chamber), application no. 5878/08, § 248. See also M.A. Nowicki, *Art. 2*, [in:] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, 7th edn, available online at: https://sip.lex.pl/#/commentary/587259723/527092 (accessed 20.1.2020).

[38] *Bubbins v. the United Kingdom* of 17 March 2005, the ECtHR (Third Section), application no. 50196/99, § 138.

[39] W. Wróbel, A. Zoll, 2014, *supra* n. 2, p. 349.

on the situation and on the behaviour of the people involved. In other words, they depend on the unique circumstances of the event. For this reason, the view that a gross disproportion between the conflicting interests results essentially in the boundaries of this justification being exceeded cannot be accepted.

BIBLIOGRAPHY

Cieślak M., *Polskie prawo karne: zarys systemowego ujęcia*, Warszawa 1994.
Glaser S., *Polskie prawo karne w zarysie*, Kraków 1933.
Gubiński A., *Wyłączenie bezprawności czynu*, Warszawa 1961.
Kodeks karny. Część ogólna. Komentarz, J. Giezek (ed.), Warszawa 2007.
Kodeks karny. Część ogólna, Vol. I, Part 1: *Komentarz do art. 1–52*, W. Wróbel, A. Zoll (eds), Warszawa 2016.
Kodeks karny. Część ogólna. Komentarz do art. 1–116, M. Królikowski, R. Zawłocki (eds), 4th edn, Warszawa 2017.
Kodeks karny. Komentarz, T. Bojarski (ed.), 7th edn, Warszawa 2016.
Kodeks karny. Komentarz, A. Grześkowiak, K. Wiak (eds), 6th edn, Warszawa 2019.
Makarewicz J., *Kodeks karny z komentarzem*, 3rd edn, Lwów 1932.
Marek A., *Kodeks karny. Komentarz*, 4th edn, Warszawa 2007.
Marek A., *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warszawa 2008.
Mozgawa M., *Prawo karne materialne. Część ogólna*, 3rd edn, Warszawa 2011.
Nowicki M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, 7th edn, LEX.
Peiper L., *Komentarz do kodeksu karnego*, Kraków 1936.
Petasz P., *Glosa do postanowienia SN z dnia 27 kwietnia 2017 r., IV KK 116/17*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa 3, 2017.
System Prawa Karnego, Vol. 4: *Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, L. Paprzycki (ed.), Warszawa 2016.
Szafraniec M., *Przekroczenie granic obrony koniecznej w polskim prawie karnym*, Kraków 2004.
Śliwiński S., *Polskie prawo karne materialne*, Warszawa 1946.
Wojciechowski J., *Szeroki zakres obrony koniecznej*, Monitor Prawniczy 6, 1998.
Wróbel W., Zoll A., *Polskie prawo karne. Część ogólna*, Kraków 2014.

PROPORTIONALITY OF INTERESTS AND THE PRINCIPLE OF COMMENSURABILITY OF SELF-DEFENCE IN POLISH CRIMINAL LAW

Summary

This paper presents the issue of the proportionality of interests in the context of the condition of commensurability of self-defence with the danger arising from an unlawful and direct attack on a specific interest protected by law. The aim of the study is to analyse this condition of commensurability by construing the notion of the necessary defence and by determining whether this condition implies an obligation to retain the proportion of the value of interests in conflict in the case of specific defences to criminal liability. In order to achieve this goal, the author primarily employs the formal and dogmatic method as well as the method of analysing

judicial decisions. While the condition of proportionality of interests is not expressly contained in the regulations governing the institution of self-defence in Polish criminal law, such an analysis seems justified, in particular, because of the view commonly held in the doctrine and case law whereby a glaring disproportion of interests is inadmissible in self-defence. In his analysis, the author presents a critical assessment of the aforementioned view.

Keywords: self-defence/necessary defence, proportionality, commensurability, value of interests, attack, disproportion of interests, proportion of interests, justifications (defences to criminal liability)

PROPORCJONALNOŚĆ WARTOŚCI DÓBR A ZASADA WSPÓŁMIERNOŚCI OBRONY KONIECZNEJ W POLSKIM PRAWIE KARNYM

Streszczenie

Niniejszy artykuł przedstawia problematykę proporcjonalności wartości dóbr w kontekście warunku współmierności obrony koniecznej do niebezpieczeństwa wynikającego z bezprawnego i bezpośredniego zamachu na określone dobro chronione prawem. Celem opracowania jest przeprowadzenie analizy owego warunku współmierności poprzez dokonanie wykładni pojęcia konieczności obrony oraz ustalenie czy z tego warunku wynika obowiązek zachowania proporcji wartości dóbr pozostających w kolizji w danej kontratypowej sytuacji. Aby osiągnąć zarysowany cel, autor artykułu posługuje się przede wszystkim metodą formalno-dogmatyczną oraz metodą analizy judykatury. Choć warunek proporcjonalności dóbr nie jest wyrażony *expressis verbis* w treści przepisów regulujących instytucję obrony koniecznej w polskim prawie karnym, taka analiza wydaje się być zasadna w szczególności z uwagi na powszechnie funkcjonujący w doktrynie oraz orzecznictwie pogląd jakoby rażąca dysproporcja dóbr była w obronie koniecznej niedopuszczalna. Autor w swojej analizie dokonuje krytycznej oceny wskazanego wyżej poglądu.

Słowa kluczowe: obrona konieczna, proporcjonalność, współmierność, wartość dóbr, zamach, dysproporcja dóbr, proporcja dóbr, kontratyp

PROPORCIONALIDAD DE VALOR DE BIENES Y EL PRINCIPIO DE RACIONALIDAD DE LEGÍTIMA DEFENSA

Resumen

El presente artículo presenta el problema de proporcionalidad de valor de bienes en el contexto de la condición de racionalidad de la legítima defensa en cuanto al peligro resultante de agresión ilegitima que ponga en peligro bienes jurídicos. La finalidad de la obra es analizar este principio de racionalidad mediante la interpretación del concepto de la necesidad de la defensa y determinar si este principio implica la obligación de preservar la proporcionalidad de valor de bienes que están en conflicto en cada caso. Para realizar este fin, el autor del artículo utiliza sobre todo el método formal y dogmático y analiza la jurisprudencia. Aunque la condición de proporcionalidad de bienes no está *expressis verbis* prevista por los preceptos que regulan la legítima defensa en el derecho penal polaco, tal análisis resulta importante, ya

que la doctrina y jurisprudencia dicen como regla general que la desproporción flagrante de bienes es inadmisible en la legítima defensa. El autor en su análisis critica tal postura.

Palabras claves: legítima defensa, proporcionalidad, racionalidad, valor de los bienes, agresión, desproporción de bienes, proporción de bienes, contratipo

СООТВЕТСТВИЕ ЦЕННОСТИ ЗАЩИЩАЕМЫХ ИНТЕРЕСОВ ПРИНЦИПУ СОРАЗМЕРНОСТИ НЕОБХОДИМОЙ ОБОРОНЫ

Аннотация

В статье обсуждается проблема ценности защищаемых интересов в контексте условия, что меры необходимой обороны должны быть соразмерны с опасностью, возникшей в результате прямого незаконного посягательства на определенные интересы, защищенные правом. Цель работы состоит в том, чтобы проанализировать условие соразмерности путем интерпретации понятия необходимости обороны, а также установить, следует ли из этого условия обязанность соблюдать соразмерность ценности пришедших в противоречие интересов в ситуации, исключающей ответственность. Для достижения намеченной цели автор использует, прежде всего, формально- догматический метод, а также метод обобщения судебной практики. Хотя условие соразмерности защищаемых интересов и не выражено *expressis verbis* в положениях польского уголовного права, регулирующих институт необходимой обороны, такой анализ представляется оправданным, в особенности с учетом широко распространенного в доктрине и судебной практике мнения о том, что при необходимой обороне неприемлема грубая несоразмерность действий обороняющегося ценности защищаемых интересов. На основании проведенного анализа автор выражает критический взгляд на такое мнение.

Ключевые слова: необходимая оборона; пропорциональность; соразмерность; ценность защищаемых интересов; посягательство; несоразмерность защищаемых интересов; соразмерность защищаемых интересов; обстоятельства, исключающие ответственность

DIE ANGEMESSENHEIT DES WERTES VON RECHTSGÜTERN UND DAS VERHÄLTNISMÄSSIGKEITSPRINZIP BEI NOTWEHR

Zusammenfassung

In dem Artikel wird die Frage der Verhältnismäßigkeit des Wertes von Rechtsgütern im Hinblick auf die Bedingung der Verhältnismäßigkeit der Notwehr zu der Gefahr behandelt, die sich aus einem rechtswidrigen und direkten Angriff auf ein bestimmtes durch die Rechtsordnung geschütztes Gut ergibt. Ziel der Studie ist eine Analyse dieser Verhältnismäßigkeitsvoraussetzung durch Auslegung des Begriffes der Notwehr und Prüfung, ob aus dieser Voraussetzung die Pflicht erwächst, in einer betreffenden Situation, wenn Rechtsfertigungsgründe bestehen, das Verhältnis der kollidierenden Rechtsgüter zu wahren. Um sich dem umrissenen Ziel anzunähern, geht der Autor des Artikels vor allem formal-dogmatisch vor nimmt eine Judikaturanalyse der Rechtssprechung vor. Obwohl die Voraussetzung der Verhältnismäßigkeit von Rechtsgütern in den Bestimmungen zur Institution der Notwehr im polnischen Strafrecht nicht explizit ausgedrückt ist, erscheint eine solche Analyse gerechtfertigt, insbesondere mit Rücksicht auf die in der Rechtslehre und

Rechtsprechung verbreitete Ansicht, dass ein krasses Missverhältnis der Rechtsgüter bei der Notwehr unzulässig wäre. Bei seiner Analyse unterzieht der Autor die vorstehend genannte Ansicht einer kritischen Bewertung.

Schlüsselwörter: Notwehr, Angemessenheit, Verhältnismäßigkeit, Wert von Rechtsgütern, Angriff, Missverhältnis der Rechtsgüter, Verhältnis der Rechtsgüter, Rechtsfertigungsgrund

LA PROPORTIONNALITÉ DE LA VALEUR DES BIENS ET LE PRINCIPE DE PROPORTIONNALITÉ DE LA DÉFENSE LÉGITIME

Résumé

Cet article pose la question de la proportionnalité de la valeur des biens dans le contexte de la condition de proportionnalité de la défense légitime au danger résultant d'une atteinte illicite et directe à un bien spécifique protégé par la loi. Le but de l'étude est d'analyser cette condition de proportionnalité en interprétant la notion de la défense légitime et de déterminer si cette condition implique une obligation de maintenir la proportion de la valeur des biens restant dans une collision dans une situation contradictoire donnée. Afin d'atteindre l'objectif esquissé, l'auteur de l'article utilise principalement la méthode formelle-dogmatique et la méthode d'analyse de la jurisprudence. Bien que la condition de proportionnalité des biens ne soit pas exprimée *expressis verbis* dans le contenu des dispositions régissant l'institution de la défense légitime en droit pénal polonais, une telle analyse semble justifiée, en particulier en raison de l'opinion couramment utilisée dans la doctrine et la jurisprudence selon laquelle une disproportion flagrante des biens est inacceptable en défense légitime. Dans son analyse, l'auteur évalue de manière critique le point de vue susmentionné.

Mots-clés: défense légitime, proportionnalité, commensurabilité, valeur des biens, atteinte, disproportion de biens, proportion de biens, contre-type

PROPORZIONALITÀ DEL VALORE DEI BENI E PRINCIPIO DELLA PROPORZIONALITÀ DELLA LEGITTIMA DIFESA

Sintesi

Il presente articolo presenta la questione della proporzionalità del valore dei beni nel contesto della condizione di proporzionalità della legittima difesa in una situazione di pericolo derivante da un attentato diretto e illegittimo ad un determinato bene giuridicamente tutelato. Lo scopo dell'elaborato è l'analisi di tale condizione di proporzionalità attraverso l'interpretazione del concetto di legittima difesa e la determinazione se da tale condizione derivi l'obbligo di rispettare una proporzione del valore dei beni in collisione nella determinata situazione scriminante. Per realizzare l'obiettivo tratteggiato l'autore dell'articolo utilizza soprattutto il metodo dogmatico-formale e il metodo dell'analisi della giurisprudenza. Sebbene la condizione della proporzionalità dei beni non è indicata *expressis verbis* nelle norme che regolamentano l'istituto della legittima difesa nel diritto penale polacco, tale analisi può essere ritenuta giustificata in particolare a motivo della posizione, universalmente vigente nella dottrina e nella giurisprudenza, che una manifesta sproporzione dei beni sia inammissibile

nella legittima difesa. L'autore nella sua analisi esegue una valutazione critica della posizione sopra indicata.

Parole chiave: legittima difesa, proporzionalità, proporzionalità, valore dei beni, attentato, sproporzione dei beni, proporzione dei beni, scriminante

Cytuj jako:

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