PROTECTION OF PUBLIC DECENCY IN POLISH CRIMINAL LAW OF THE PRE-PARTITION PERIOD AGAINST CONDUCT CLASSIFIED TODAY UNDER ARTICLE 140 OF THE PETTY OFFENCES CODE

KRZYSZTOF WALA*

DOI: 10.26399/iusnovum.v14.4.2020.41/k.wala

1. INTRODUCTION

The notion of 'public decency' does not easily yield to definition, and yet at the same time, from an *a priori* perspective, the protection of this particular interest ('legal good' in continental parlance) deserves to be met with approval. According to one of the views expressed in the literature, public decency is the set of behavioural patterns, across the various spheres of human life, which a given society approves of and deems desirable, which has been shaped both on the foundation of history and tradition and through the lens of the current socio-economic and cultural situation, and the compliance with which serves the purpose of making sure society can function properly, while failure to comply implies a negative societal reaction to individual conduct.[1] In this approach, the correct understanding of the notion of 'public decency' should also reflect the historical dimension, which results from one of the characteristics of this protected interest, i.e. its historical variability. Public decency within the meaning of the Polish Petty Offences Code is currently

* PhD, Criminal Law and Criminology Department at the Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin; e-mail: krzysztof.wala@poczta.umcs.lublin.pl; ORCID: 0000-0002-9773-3926

[1] K. Wala, *Wykroczenie nieobyczajnego wybryku na tle pozostałych wykroczeń przeciwko obyczajności publicznej,* Warszawa 2019, pp. 78–79.

protected by the provisions of this Code's Chapter XVI,[2] which, unlike those of the Criminal Code (Chapter XXV: Offences against sexual freedom and decency),[3] do not exclusively include sexually motivated conduct. Among the many infractions against public decency, Article 140 Petty Offences Code, penalising 'indecent antics', comes front and centre.[4] The statutory elements of this offence literally indicate conduct which is supposed to have the characteristic of being indecent; moreover, this provision also opens a list of infractions against public decency. Its broad conception of the *actus reus* makes it possible for this offence to cover a somewhat diverse range of conduct for which violation of public decency is the common denominator. It is necessary to concur with Tadeusz Bojarski, who asserts that the conduct defined in Article 140 Petty Offences Code belongs to the category of notions the sense of which we understand or at least intuitively feel, but which at the same time elude easy definition.[5] Without delving into the details, it seems expedient to conclude that an 'indecent antic' is any conduct which violates socially acceptable and desirable models of behaviour and is thereby objectively capable of being offensive and shocking to a person with an average sense of decency.[6] The study of case files shows this offence to be attributed, most often, to offenders committing such acts as sleeping or lying in public in a place not intended for that purpose, while being in a condition capable of causing scandal; public defecation in a place not intended for the purpose; or public exposure.[7] Other types of conduct may also be eligible, as the judgment of the District Court in Janów Lubelski of 27 April 2009 illustrates. There, an 'indecent antic' was deemed to be (and this appears to be correct) showing in public a hand gesture universally regarded as vulgar (the middle finger).[8]

In the light of the above, the protection of public decency against such type of conduct in the pre-Partition period appears to be an interesting subject. An attempt to offer a concise introduction to this matter may, on the one hand, serve as a sort of curiosity, while on the other hand, it first of all provides a closer context for understanding the notion of public decency and its importance for the society's proper functioning. The objective of this article is to trace the regulatory evolution of the range of conduct subject to liability for an 'indecent antic' and therewith to draw attention to the variable perception of public decency and the diversification of its protection under criminal law over the centuries.[9] This analysis is limited to specific solutions in Polish municipal and rural law of the pre-Partition period.

---

2 Consolidated text, Dz.U. 2019, item 821, as amended.

3 Consolidated text, Dz.U. 2018, item 1600, as amended.

4 In accordance with Article 140 Petty Offences Code, whoever publicly engages in an 'indecent antic' shall be liable to the penalty of arrest, restriction of liberty, a fine up to 1,500 zlotys or reprimand. Other infractions stipulated in Chapter XVI of the Petty Offences Code include placing indecent forms of expression in a public space or using indecent words in public (Article 141) and the so-called *racolage* or soliciting, i.e. a specifically defined form of proposing to perform a lewd act (Article 142).

5 T. Bojarski, *Polskie prawo wykroczeń. Zarys wykładu*, Warszawa 2005, p. 213.

6 For a broader treatment of this topic, see K. Wala, *supra* n. 1, pp. 101–121.

7 *Ibid.*, pp. 185–233.

8 Judgment of the District Court in Janów Lubelski of 27 April 2009, II W 71/09, unpublished.

9 For the evolution of the legal protection of public decency during the Partitions and after regaining the independence, see K. Wala, *supra* n. 1, pp. 19–54.

The publication constraints are one reason for this limitation, and the other is the assumption that legal solutions close to the present content of Article 140 Petty Offences Code can best be sought precisely in local law.

2. MUNICIPAL CRIMINAL LAW

The model and primary source for municipal criminal law was German town law. The main role in this area was played by the *Sachsenspiegel* ('Saxon Mirror') and the *Weichbild*. Some parts of the Northern Poland followed the Kulm law.[10] The identified source for criminal law, however, appears to focus mainly on liability for the most serious offences. Bogusław Sygit's analysis of offences defined in the Kulm law seems to confirm this.[11] No prescript relating to facts classifiable under the current Article 140 Petty Offences Code can be found in Bartłomiej Groicki's compilation.[12] The latter, grounded in the Articles of the Magdeburg law, based on the Latin translation of the *Sachsenspiegel* and of the *Weichbild* by Mikołaj Jaskier.[13] It ought to be added that Groicki did note that his collection of prescripts did not reflect all of the stipulations of the aforementioned collections of the Magdeburg law but only those which were of greatest practical significance.[14]

The absence of a corresponding regulation from the above-referenced source does not, however, imply that no prescripts protecting public decency against what is nowadays regarded as 'indecent antics' existed at all. It must be borne in mind that in Polish cities also *wilkierze* (from German *Willkür*), i.e. ordinances intended to supplement the aforementioned primary sources, were an important source of law. They were initially enacted by the monarch or by the city's landlord, but eventually municipal councils gained the right to pass them.[15] Among other sources of municipal law attention is drawn to urban privileges, including the founding *privilegia*, which acted as a sort of municipal constitution, as well as the guidelines on the application of the law provided by the Magdeburg court.[16] Another source of municipal law were the *ortyle* (from German *Urteil*), that is the pronouncements of the Magdeburg municipal bench. Those concerned complex cases and were provided at the request of filial municipalities (founded on the Magdeburg law), usually forming precedents.[17]

---

[10] B. Sygit, *Historia prawa kryminalnego,* Toruń 2007, p. 375.

[11] Listed crimes include, without limitation, homicide, wounding, rape, theft, receiving stolen property, or the desecration of a corpse, *ibid*., pp. 375–378.

[12] B. Groicki, *Artykuły prawa majdeburskiego. Postępek sądów około karania na gardle. Ustawa płacej u sądów (reprint ze wstępem K. Koranyiego)*, Warszawa 1954; in this collection Bartłomiej Groicki includes the most serious crimes defined in municipal criminal law, such as homicide, rape or theft, pp. 38–45.

[13] *Ibid*., introduction by K. Koranyi, p. IV.

[14] *Ibid*., p. 3.

[15] W. Uruszczak, *Historia państwa i prawa polskiego,* Vol. I: *(966–1795)*, Warszawa 2013, p. 90.

[16] *Ibid*., pp. 88–89.

[17] T. Maciejewski, [in:] *System Prawa Karnego. Źródła prawa karnego*, T. Bojarski (ed.), Vol. 2, Warszawa 2011, p. 12.

Among the criminal offences defined in municipal criminal law, offences against public decency first command our attention. In the subject literature those include: adultery, bigamy, rape, fornication, incest, homosexuality, sodomy, covert prostitution, pimping or the abduction of a female.[18] This list features acts that are currently not criminalised (e.g. homosexuality) or with a different classification than one nowadays based on Article 140 Petty Offences Code. It is worth briefly discussing adultery, though. The penalty for this crime was decapitation, although as Witold Maisel suggests, the practice of municipal courts since the 16th century was to commute that punishment.[19] For 'indecent antics', it will be expedient to recall the circumstances cited by Bartłomiej Groicki as potentially indicating the commission of this crime. He noted that, due to its nature, adultery was not easy to detect, though he submitted that evidence could be found in the suspected couple's groping, kissing or even frequently holding conversation with or smiling at each other.[20] In view of the above, it is noteworthy how certain examples of conduct currently classifiable under Article 140 Petty Offences Code[21] could have previously provided evidence of a more serious crime, which was adultery, under the Magdeburg law. Also the criminalisation of fornication and homosexuality stands out. The former meant the sexual intercourse of an unmarried couple. It is noted that such conduct could consist in either occasional sexual contact or prolonged relations, provided that the judges, as Marcin Kamler recalls, showed no greater interest in such distinctions.[22] The likely cause may have been, among other things, the evidentiary difficulties entailed by the nature of the act. As regards homosexuality, the aforementioned Kamler invokes a 1633 case from Sieradz, in which a baker Marcin Gołka was accused of having had sexual relations with Wojciech of Sromotka. The men were burned at the stake, which attests to the ancient laws' severity in this matter.[23]

The aforementioned matters relating to the criminalisation of adultery, fornication and homosexuality are a reflection of the changes occurring in the society's conceptions of decency and morality. It is evident that such conduct is not, in itself, currently criminalised. However, the attention called to this topic appears to be justified by its specific link to the modern concept of 'indecent antics'. The aforementioned behaviour can, for example, fulfil the constituent elements of an offence under Article 140 Petty Offences Code, but nowadays the particulars of the sexual partners are not relevant and what matters is the public nature of the act. Such a requirement is notably absent from the criminal law of the pre-Partition era, which could suggest that the *ratio legis* of the criminalisation of the conduct was grounded not only in a desire to protect public decency. In the case of adultery

---

[18] W. Maisel, [in:] *Historia państwa i prawa Polski*, Vol. II: *Dawne polskie prawo karne miejskie: Od połowy XV wieku do r. 1795*, J. Bardach (ed.), Warszawa 1966, pp. 354–355.

[19] *Ibid.*, 354.

[20] B. Groicki, *Porządek Sądow y spraw mieyskich Prawa Maydeburskiego na wielu mieyscach poprawiony*, Kraków 1562, pp. 133–134.

[21] For example, excessively passionate kissing combined with undressing the partner in a public place.

[22] M. Kamler, *Złoczyńcy. Przestępczość w Koronie w drugiej połowie XVI i w pierwszej połowie XVII wieku (w świetle ksiąg sądowych miejskich)*, Warszawa 2010, pp. 284–285.

[23] *Ibid.*, p. 298.

the intention was also to protect the institution of marriage, while fornication and homosexuality were condemned by the Church (similarly to adultery, of course), whose doctrines largely affected the shape of criminal law.

Moreover, authors focus on the existence of ordinances governing such aspects of the *mores* as playing dice, rendering assistance to excommunicates, or throwing excessively sumptuous parties.[24] The last one was within the purview of sumptuary laws. As Witold Maisel submits, the reason for the existence of such prescripts was the desire to avoid hatred incited in the nobility by manifestations of opulence among the burgher class.[25] The direct impulse, as some also claim, came from the need to implement the ethical principles developed by the doctrines of the Church on the wrongfulness of excess.[26] At least some of the enactments in this area, however, show traces of the protection of public decency. As an example cited by Stanisław Estreicher, Kraków's municipal sumptuary laws prohibited wearing excessively short gowns that were not decent enough.[27]

As Maisel writes, municipal criminal law also had a list of offences against the public order. These included such conduct as drunkenness, noise or brawls, usually involving fines.[28] The ordinance of Olsztyn of 19 August 1568 could serve as an illustration here.[29] Its Chapter XIII outlawed, under the penalty of 3 ingots (*grzywna* – nominal silver ingot), raucous screams without a just cause after nine hours or at night. Chapter XIV, on the other hand, provided that no one should be allowed unbecoming dancing after nine hours (in the evening) with servants or other vagabonds or detain people in one's house (after that hour), under such penalty as an ordinance might provide. Later, it stipulated that whoever after the last sound of the clock leaves the alehouse or goes to other houses should without any singing or screaming go back to his house rather than roaming the streets, screaming and inciting brawls. Anyone caught doing so should be punished as the Council or the mayor may see fit.[30] It seems that the *ratio* of such prescripts was mainly grounded in a desire to protect the night's rest and quiet hours, and therewith the public order and peace, rather than public decency, which is attested by the fact that the elements of the crime stipulated night time as the *tempus sceleris*. One can draw the conclusion that such conduct would nowadays be classified mainly under Article 51 Petty Offences Code.[31] In some situations, however, the

---

[24] M. Bogucka, H. Samsonowicz, *Dzieje miast i mieszczaństwa w Polsce przedrozbiorowej*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1986, p. 65.

[25] W. Maisel, [in:] *Historia państwa*, *supra* n. 18, p. 352.

[26] For more about municipal sumptuary laws, see S. Estreicher, *Ustawy przeciwko zbytkowi w dawnym Krakowie*, Rocznik Krakowski Vol. I, Kraków 1898, pp. 102–134.

[27] *Ibid.*, p. 110.

[28] W. Maisel, [in:] *Historia państwa*, *supra* n. 18, pp. 352–353.

[29] For more about that particular ordinance, see D. Bogdan, *Wilkierze miasta Olsztyna 1568–1696*, Olsztyn 2016.

[30] On the basis of the Polish translation of the prescripts provided by D. Bogdan, *supra* n. 29, pp. 71–73.

[31] § 1. Whoever by screaming, noise, alarm or other antic disturbs the peace and public order or the night's rest, or gives scandal in a public place, shall be liable to arrest, restriction of liberty or a fine. § 2. If the act defined under § 1 is of a rowdy nature or the perpetrator is intoxicated by alcohol, a narcotic drug or any other substance or agent of similar effect, the

classification could also involve Article 140 Petty Offences Code (when not violating the night's rest, which Article 51 Petty Offences Code requires). Also the ordinances of other cities prohibited conduct somewhat proximate to 'indecent antics', for example, the ordinance of Giżycko, originating, as Grzegorz Białuński submits, from between 1669 and 1723.[32] Its Article 8 stipulated a penalty for any cursing, knavery or godlessness.[33] Article 7 could also be of significance in the context of protecting the public decency; it mandated oversight of one's servants and the reporting of any debauchery to the mayor and the council.[34] Section 23 in Chapter IV (Civic conduct) of the 1634 ordinance of Starogard[35] provided that no citizen or apprentice craftsman or any other person must break up tables, benches or other items in front of houses, let alone take any liberties toward a human being, under the penalty of 3 ingots. Similarly to the previous examples, such conduct is more resemblant of the modern Article 51 Petty Offences Code, provided that the aforementioned 'taking of liberties' with regard to another person appears to be broad enough to be classified as an 'indecent antic' in certain situations. Section 24 of this ordinance is also noteworthy in stipulating that an indecent and foul life should not be tolerated in any citizen or other inhabitant of the city or outside the city, which may lead to a conclusion that there is a link with 'indecent antics'. The later part of the prescript criminalised the intentional harbouring of a harlot, which potentially suggests that the whole of it may have addressed prostitution and specifically penalised that trade. Tadeusz Maciejewski invokes the example of Article 52 of the 1581 ordinance of Nowy Staw, which made a crime of lewd singing and indecent dancing.[36] It may be noted that the oldest of the preserved ordinances of Prussian cities, that is the one of the New Town of Toruń, of 1300,[37] in its § 50 punished with a fine anyone who danced indecently, sang indecently or otherwise acted in an indecent manner.[38]

Some attention should also be paid to the existence of numerous provisions concerning alcohol and especially restrictions on its consumption or trade. While these provisions do not show a direct link with the protection of public decency against conduct nowadays classified as 'indecent antics', they potentially constitute a form of preventive action. For example, Kraków ordinances prohibited innkeepers from selling beer on site ('takeaway' sale was legal) 'when the eve had twice been sounded on the town hall.'[39] Moreover, Chapter VI of the aforementioned 1568

---

penalty shall be arrest, restriction of liberty or a fine. § 3. Incitement and aiding and abetting shall be penalised.

[32] For more about this document, see G. Białuński, *Nieznany wilkierz miasta Giżycka*, Echa Przeszłości 14, 2013, pp. 39–48.

[33] *Ibid.*, p. 42.

[34] *Ibid.*

[35] *Wilkierz miasta Starogardu 1634 r. (kopia wilkierza)*, Starogard Gdański 1959.

[36] T. Maciejewski, *Zbiory wilkierzy w miastach Państwa Zakonnego do 1454 r. i Prus Królewskich lokowanych na prawie chełmińskim*, Gdańsk 1989, p. 117.

[37] For more about that particular ordinance, see T. Maciejewski, *Wilkierze miasta Torunia*, Poznań 1997, pp. 31–32.

[38] G. Bender, *Die ältesten Willküren der Neustadt Thorn, Zeitschrift des Westpreussischen Geschichtsvereins*, Heft VII, Danzig 1882, p. 115.

[39] S. Kutrzeba, *Piwo w średniowiecznym Krakowie*, Rocznik Krakowski Vol. I, Kraków 1898, p. 47.

ordinance from Olsztyn made anyone who proposed to sell beer, mead or liquor on Sunday or other holiday before the Holy Mass liable to a fine paid to the city. The later part of the chapter stipulated that, on pain of forfeiting the municipal citizenship, one should not serve beer or allow drunkenness in one's house on holidays such as the Palm Sunday or the Holy Week, or on those days when the people especially celebrated the Holy Communion.[40] Similarly, a Reszel ordinance dated to 1606 prohibited the sale of alcohol on Sundays, holidays and mornings, and alcohol was not to be sold to servants after 9 p.m.[41] Considering that the majority of acts nowadays classified as 'indecent antics' are committed under the influence of alcohol,[42] it appears to be a viable hypothesis that the above-provided examples of restrictions on alcohol could in some way have involved the protection of public decency in special times such as holidays or night hours.

To recapitulate, municipal criminal law provided for the protection of public decency against conduct proximate to modern 'indecent antics', though there was a measure of diversity in this protection, and it appears often to have had a secondary character. The diversification can be explained by legal particularism, although there are perceivable common features such as the existence of a sort of prevention exhibited in restrictions on the sale of alcohol. The secondary character, on the other hand, relates to how the main goal of a large part of the above-discussed examples was the protection of the public order against various sorts of incidents, especially at night time or during holiday periods or religious celebrations. However, due to the nature of those acts, it appears to be justified also to search for the protection of decency there. Furthermore, decency was largely protected by the criminalisation of sexual conduct such as adultery, homosexuality or fornication. The protection of decency was also stipulated by detailed provisions such as sumptuary laws. Of course, the practical effectiveness of the legal provisions of the time is an entirely different matter. The literature on the subject notes that restrictions on the sale of alcohol were not always effective, as all sorts of brawls occurred at inns, arising among other reasons from the diversity of customers gathering in such places.[43]

3. RURAL CRIMINAL LAW

In the literature, rural criminal law is regarded as the aggregate of norms of customary and statutory law defining criminal offences and specifying penalties applied by council courts and by courts operated by property owners.[44] As regards the sources of this law, Józef Rafacz mentions the Magdeburg law, ordinances issued by landowners, prescripts adopted by village assemblies, as well as legal custom,

---

[40] D. Bogdan, *supra* n. 29, pp. 57–59.

[41] J. Kiełbik, *Siedemnastowieczny wilkierz jako źródło regulacji życia mieszkańców Reszla*, Komunikaty Mazursko-Warmińskie 4, 2004, p. 478.

[42] K. Wala, *supra* n. 1, pp. 193–194.

[43] K. Ossowski, *Karczma – późnośredniowieczne centrum rozrywki?*, [in:] P. Tompa, *Człowiek a historia*, Vol. III, Piotrków Trybunalski 2016, pp. 27–28.

[44] R. Łaszewski, *Wiejskie prawo karne w Polsce XVII i XVIII wieku*, Toruń 1988, p. 7.

with the role of the latter having been quite significant.[45] Ryszard Łaszewski also adds precedents from village courts and 'land law' (precedents of Polish courts).[46] Considering the foregoing, the primary source of knowledge about rural criminal law should be found in rural court registers ('books' or *libri*), the analysis of which makes it possible to study the practical application of that law and illustrates the types of cases heard by village courts in this area of the law. Also the analysis of ordinances issued by landowners (*wilkierze* again) is an important matter here. Protection of public decency (in the aspect of the modern 'indecent antics') will hereinafter be discussed mostly on the basis of the analysis of the aforementioned court registers and rural ordinances.

Rural criminal law recognized multiple offences against public decency. These included, without limitation, adultery, incest, sodomy, fornication (premarital intercourse), discordant relations in marriage, tobacco smoking (though this particular prohibition was justified mainly by security reasons, i.e. concerns that a fire might break out) or careless living (e.g. playing cards or dice, incurring debts).[47] Particular attention is commanded by the crime of indecent conduct, distinctly highlighted by Ryszard Łaszewski. The author characterises this offence as consisting in frivolous behaviour, 'wicked conversation' or similar misconduct giving rise to suspicions of adultery or some other carnal sin.[48] It should be noted that the concept of this particular offence is very broad in scope. In a later part of his work, Łaszewski observes that a large number of cases tried as indecent conduct pertained to situations in which married women received other men in their houses or otherwise spent time with them (at inns or fairs). Cohabitation between an unmarried couple and other sexually coloured 'wickedness' also formed part of this group.[49] The examples, therefore, highlight the protection of decency at a sort of the forefront, i.e. a desire to prevent graver offences, such as adultery and 'carnal sin' (a sexual intercourse between unmarried partners) that were acts criminalised in the old times. However, indecent conduct was not limited to sexuality. Łaszewski also identifies excessive drunkenness as part thereof. Penalties such as flogging and small fines were the typical consequence visited on the offenders.[50]

Having dealt with the general characteristics of rural criminal law in the aspect of the protection of public decency, it is now fitting to move on to the discussion of specific examples. And so it is worth paying some attention to Michał Antoni Sapieha's ordinance of 1749 for the Tuchola district (*starostwo*).[51] This instrument, according to its own recitals, was binding on all commoners (non-nobles) of the district and was issued with a view to maintaining peace and order in the area. Attention is drawn to section 5, which stipulated as follows: 'Let everyone beware of unbecoming taking of God's name without need, or oath, or curse or malediction,

---

45 J. Rafacz, *Ustrój wsi samorządnej małopolskiej w XVIII wieku*, Lublin 1922, pp. 360–361.
46 R. Łaszewski, *supra* n. 44, p. 9.
47 Z. Zdrójkowski, [in:] *Historia państwa*, *supra* n. 18, pp. 368–370.
48 R. Łaszewski, *supra* n. 44, p. 131.
49 *Ibid.*, p. 131.
50 *Ibid.*, p. 132.
51 *Archiwum Komisji Prawniczej*, Vol. 11, Kraków: Akademia Umiejętności, 1938, pp. 311–321.

under the penalty of a pound of wax; so is to be punished anyone who should omit to attend the Holy Mass on account of drunkenness.' This prescript's main purpose appears to have been to protect religion; however, the mention of indulging drunkenness in lieu of attending the mass can also imply the protection of public decency. Section 29 is also interesting. It required every inn to contain a lockbox for alms for the poor but also the money paid by those who, 'offend by cursing, malediction, unneeded oath or some other ill habit.' This solution clearly manifests a desire for compensation to be provided, among others, by the perpetrators of indecent acts.[52]

Section 23 of the ordinance for the nobiliary villages of the county (*powiat*) of Lubawa was issued in 1756 by Wojciech Leski, Bishop of Kulm and Pomesania. Under these provisions, every inhabitant of one of those villages was required to lead a virtuous, honest and modest life and avoid all evil. The later part explained this meant, among other things, avoiding the carnal sin, drunkenness, theft, receiving stolen goods and other similar offences. Any offender was to be punished, 'according to the reason of our castle office or rural office.'[53] Attention is drawn by the particularly broad concept of the *actus reus* (which appears to include modern 'indecent antics'), as well as the unspecified penalty.

A similarly moralising tone can be found in a 1628 statute for the villages of Świlcza and Woliczka, one of the prescripts of which provided: 'may no one entertain drunkenness, adultery, fornication, quarrels, treasons or homicide, or other sins.'[54] Here, too, the penalty is left unspecified.

In the context of the prevention of indecent conduct, it is also worth paying some attention to section 30 of the ordinance of 1758 for the *mensa* villages of the bishopric of Kulm: 'To prevent all excess and frivolity, it is mandated that innkeepers dare not serve drinks later on any day than that hour of the night on which everyone should come to his house and not step outside.'[55] Later, the prescript prohibited innkeepers from selling alcohol during religious services and commanded to care to prevent all excess and frivolity. Any contraventions were punished as the superior authority saw fit. This is another example of a solution apparently intended, among other things, to protect the public decency before a violation even happened. Section 93 of the same ordinance, on the other hand, addresses behaviour at weddings and christenings. Any participant of such celebrations was to act modestly and concordantly and avoid all discord, noise or beating of others under the penalty of two ingots to the village and one to the Church.[56]

---

[52] The sums so collected were to be forwarded to the superior authority or spent on the poor or for the Church's purposes; similar solutions were also provided for in other ordinances. For example, a 1616 ordinance for a village belonging to the Oliwa Abbey, in its Article XXV, ordered every innkeeper to have a lockbox for collecting money from those who, 'by malediction, cursing and other ill examples and habits offend and transgress.' See: *Archiwum Komisji Prawniczej*, Vol. 11, *supra* n. 51, p. 70.

[53] *Ibid.*, p. 346.

[54] Cited after B. Baranowski, *Sprawy obyczajowe w sądownictwie wiejskim w Polsce wieku XVII i XVIII*, Łódź, 1955, p. 38.

[55] *Archiwum Komisji Prawniczej*, Vol. 11, *supra* n. 51, p. 372.

[56] *Ibid.*, 377.

Interesting examples of the protection of public decency can be found in rural court registers. And thus Anna Biernacka received 15 strokes of the birch for her intemperance showing in how she 'lifting her scarves, demanded to be kissed;'[57] Jadwiga, the wife of Oleiarz, received 30 whips for shamelessly bending over toward the foreman;[58] and Zofia Salonka was given 30 whips for 'bending over' in Antoni Kowalczyk's direction and verbally disparaging him, which, according to the text of the judgment, had been confirmed by the witnesses of the incident.[59] The imposition of penalties for such type of conduct appears to have been predicated not only on the insult offered to a specific person against whom the gesture was performed but also the offender's violation of public decency. This is emphasized by Tomasz Wiślicz, who wrote an analysis of criminal liability for insulting gestures in rural criminal law.[60] He also noted other associated examples. Particular attention is drawn to the facts in which Katarzyna Pasiutka protruded her 'shameful members' toward Michał Krasieński, whereby she scandalised the inn's visitors at the time.[61] This description clearly shows that the need to punish the offender arose, among other things, from her violation of the public decency. Wiślicz submits that the intensified protection of public decency against nudity in rural relations was the result of the activities of the clergy, aspiring to instil Catholic ethical principles in the countryside.[62]

At this point other sets of facts described in court registers should be noted that could today be described as an 'indecent antic'. And thus, in 1685, Klimek Caputa was fined one ingot and one pound of wax to the Church for how he: 'failed to act in a becoming and staid manner; namely, among the people at the inn he engaged in levity and frivolous dealings, bringing ignominy also on the office as a whole.'[63] There is also an interesting case of 1738 concerning Jakub Trzepak, Tomasz Trzepak, Tomasz Jarczak and Antoni Głaszczyński. They were accused of not attending church: 'and if any one of them came, then first he had misplaced his head in the brewery and in such state came to converse more than pray, by which they made of themselves a scandal to others.'[64] The description of the incident shows reference to the offenders' violation of decency by improper behaviour

---

[57] B. Ulanowski, *Księgi sądowe wiejskie*, Vol. I, Kraków 1921, p. 736 (see no. 4290).

[58] B. Ulanowski, *Księgi sądowe wiejskie*, Vol. II, Kraków 1921, p. 295 (see no. 7167).

[59] *Ibid.*, p. 308 (see no. 7204).

[60] T. Wiślicz, *Gest obraźliwy na wsi polskiej w XVII i XVIII wieku*, Przegląd Historyczny 88/3–4, 1997, pp. 417–425.

[61] *Ibid.*, p. 424.

[62] *Ibid.*, pp. 424–425.

[63] S. Grodziski, *Księgi sądowe wiejskie klucza jazowskiego 1663–1808,* Wrocław–Warszawa–Kraków 1967, p. 44 (see no. 22).

[64] *Ibid.*, 112 (see no. 119). Jakub and Tomasz Trzepak and Tomasz Jarczak were punished with 50 strokes with a rope, and Jakub Trzepak and Tomasz Jarczak additionally had to prostrate themselves in church on Sunday for the whole duration of the Mass. Antoni Głaszczyński, on the other hand, in lieu of the whipping, had to kneel in church and give four pounds of wax to the Church. The penalties imposed on the individual offenders in this case varied because in addition to the act described they had also engaged in other illegal activities. For example, it was additionally alleged against Tomasz Trzepak that he: 'had an excessive liking for the smoking of the pipe,' that is he enjoyed his tobacco too much.

during religious services. Today, it appears such conduct could be classified under Article 140 Petty Offences Code. In a different case, Bartosia Jakobowa and Bartosia Benedyktowa stood accused of their quarrels, fights and other noises between them which caused scandal among all the common people. Both received the penalty of being flogged, respectively 30 and 20 times. Should any further quarrels have ensued between them, the penalty was to have been 100 whips.[65] Also in the context of these facts attention was called to the perception of the offenders' conduct by others (causing scandal).

As these examples show, the protection of decency in rural areas was an important matter in old Polish law. Similarly to municipal criminal law, here too legal particularism makes itself noticeable. It appears that the protection of decency, as well as its very conception were tightly linked to the religious sphere, which, for the obvious reasons, is especially visible in the examples from villages owned by the Church. This conclusion is prompted by the frequent invocations of God both in rural ordinances[66] and in the judgments of rural courts.[67] Bohdan Baranowski observed a different aspect of this phenomenon. When analysing the topic of liability for adultery in rural criminal law, he observed that the true cause for the repression of immorality in rural areas was the desire to reinforce the feudal exploitation of peasants by landowners.[68] It seems to be a viable conclusion that the protection of decency and the contents attributed to it were the product of the two causes, while the individual weight assigned to each of the two reasons depended on numerous other factors (e.g. the geographical area or the identity of the landowner enacting the document).

4. CONCLUSION

In conclusion, the legal protection of public decency against conduct that nowadays is defined as 'indecent antics' pre-existed the codification period. In Polish criminal law of the pre-Partition era, the main role in this regard was played by custom and by municipal and rural ordinances, provided that the protection of public decency was very often linked to the protection of the public order. That, in turn, resulted in many cases where conduct identifiable today as an 'indecent antic' received a classification according to prescripts the main *ratio* of which had no connection with public decency (e.g. sumptuary laws) but served as the primary protection of other legal interests. It is also perceivable that the scope of the lawmaker's interference or the scope of criminalisation were diversified, which was prompted

---

[65] B. Ulanowski, *supra* n. 58, Vol. II, p. 294 (see no. 7171). The case happened in 1756.

[66] For example, the introduction to the ordinance for the village of Kozibór (confirmed in 1729 by the *starost* of Dybów, J. Niewieściński) made a clear mention that its provisions were: 'for the glory of God and for the betterment of peace and concern among the people and neighbours;' see: *Wilkierz dla Wsi Koziboru z 1719 r.*; *Archiwum Komisji Prawniczej*, Vol. 11, *supra* n. 51, p. 200.

[67] For example, the adultery committed by Jan Wadowski and Elżbieta Kolasówna (the offence defined as 'carnal sin') was referred to as a: 'grave insult to Lord God Almighty'; S. Grodziski, *supra* n. 63, p. 140 (see no. 179).

[68] B. Baranowski, *supra* n. 54, p. 45.

by the dynamic nature of the legal interest protected by those prescripts. The fact that the criminal law of old times criminalised certain conduct (e.g. homosexuality, fornication) attests to the historical transformations of the perception of public decency. The existence of legal regulation of this particular interest is an emanation of the latter's importance to the proper functioning of society.

BIBLIOGRAPHY

Archiwum Komisji Prawniczej, Vol. 11, Kraków: Akademia Umiejętności, 1938.

Baranowski B., *Sprawy obyczajowe w sądownictwie wiejskim w Polsce wieku XVII i XVIII*, Łódź 1955.

Bender G., *Die ältesten Willküren der Neustadt Thorn, Zeitschrift des Westpreussischen Geschichtsvereins*, Heft VII, Danzig 1882.

Białuński G., *Nieznany wilkierz miasta Giżycka*, Echa Przeszłości 14, 2013.

Bogdan D., *Wilkierze miasta Olsztyna 1568–1696*, Olsztyn 2016.

Bogucka M., Samsonowicz H., *Dzieje miast i mieszczaństwa w Polsce przedrozbiorowej*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1986.

Bojarski T., *Polskie prawo wykroczeń. Zarys wykładu*, Warszawa 2005.

Estreicher S., *Ustawy przeciwko zbytkowi w dawnym Krakowie*, Rocznik Krakowski Vol. I, Kraków 1898.

Grodziski S., *Księgi sądowe wiejskie klucza jazowskiego 1663–1808*, Wrocław–Warszawa–Kraków 1967.

Groicki B., *Artykuły prawa majdeburskiego, Postępek sądów około karania na gardle, Ustawa płacej u sądów (reprint ze wstępem K. Koranyiego)*, Warszawa 1954.

Groicki B., *Porządek Sądow y spraw mieyskich Prawa Maydeburskiego na wielu mieyscach poprawiony*, Kraków 1562.

Historia państwa i prawa Polski, Vol. II: *od połowy XV wieku do r. 1795*, J. Bardach (ed.), Warszawa 1966.

Kamler M., *Złoczyńcy. Przestępczość w Koronie w drugiej połowie XVI i w pierwszej połowie XVII wieku (w świetle ksiąg sądowych miejskich)*, Warszawa 2010.

Kiełbik J., *Siedemnastowieczny wilkierz jako źródło regulacji życia mieszkańców Reszla*, Komunikaty Mazursko-Warmińskie 4, 2004.

Kutrzeba S., *Piwo w średniowiecznym Krakowie*, Rocznik Krakowski Vol. I, Kraków 1898.

Łaszewski R., *Wiejskie prawo karne w Polsce XVII i XVIII wieku*, Toruń 1988.

Maciejewski T., *Zbiory wilkierzy w miastach Państwa Zakonnego do 1454 r. i Prus Królewskich lokowanych na prawie chełmińskim*, Gdańsk 1989.

Maciejewski T., *Wilkierze miasta Torunia*, Poznań 1997.

Maisel W., [in:] *Historia państwa i prawa Polski*, Vol. II: *od połowy XV wieku do r. 1795*, J. Bardach (ed.), Warszawa 1966.

Ossowski K., *Karczma – późnośredniowieczne centrum rozrywki?*, [in:] *Człowiek a historia*, P. Tompa (ed.), Vol. III, Piotrków Trybunalski 2016.

Rafacz J., *Ustrój wsi samorządnej małopolskiej w XVIII wieku*, Lublin 1922.

Sygit B., *Historia prawa kryminalnego*, Toruń 2007.

System Prawa Karnego. Źródła prawa karnego, T. Bojarski (ed.), Vol. 2, Warszawa 2011.

Ulanowski B., *Księgi sądowe wiejskie*, Vol. I and II, Kraków 1921.

Uruszczak W., *Historia państwa i prawa polskiego*, Vol. I: *(966–1795)*, Warszawa 2013.

Wala K., *Wykroczenie nieobyczajnego wybryku na tle pozostałych wykroczeń przeciwko obyczajności publicznej*, Warszawa 2019.

Wiślicz T., *Gest obraźliwy na wsi polskiej w XVII i XVIII wieku*, Przegląd Historyczny 88/3–4, 1997.
Zdrójkowski Z., [in:] *Historia państwa i prawa Polski*, Vol. II: *od połowy XV wieku do r. 1795*, J. Bardach (ed.), Warszawa 1966.

PROTECTION OF PUBLIC DECENCY IN POLISH CRIMINAL LAW OF THE PRE-PARTITION PERIOD AGAINST CONDUCT CLASSIFIED TODAY UNDER ARTICLE 140 OF THE PETTY OFFENCES CODE

Summary

The article presents the issues related to the protection of public decency against conduct currently classified as indecent antics (Article 140 of the Petty Offences Code) in the period until Poland lost its independence in the 18th century. The regulations in force at that time have been analysed, along with the factual cases examined by the courts.

Keywords: public decency, indecent antic, municipal criminal law, rural criminal law

OCHRONA OBYCZAJNOŚCI PUBLICZNEJ PRZED ZACHOWANIAMI KWALIFIKOWANYMI OBECNIE Z ART. 140 K.W. W POLSKIM PRAWIE KARNYM OKRESU PRZEDROZBIOROWEGO

Streszczenie

W artykule została przedstawiona problematyka związana z ochroną obyczajności publicznej przed zachowaniami współcześnie kwalifikowanymi jako nieobyczajne wybryki (art. 140 k.w.) w okresie do utraty przez Polskę niepodległości w XVIII wieku. Analizie poddano funkcjonujące w tym czasie przepisy, jak i przedstawiono stany faktyczne rozpatrywane przez sądy.

Słowa kluczowe: obyczajność publiczna, nieobyczajny wybryk, miejskie prawo karne, wiejskie prawo karne

PROTECCIÓN DE DECENCIA PÚBLICA ANTE LOS COMPORTAMIENTO CALIFICADOS ACTUALMENTE COMO ART. 140 DE CÓDIGO DE FALTAS EN EL DERECHO POLACO EN EL PERÍODO ANTES DE LAS PARTICIONES

Resumen

El artículo presenta la problemática relacionada con la protección de decencia pública ante los comportamientos calificados actualmente como excesos inmorales (art. 140 de código de faltas) hasta la pérdida de independencia por Polonia en el siglo XVIII. Se analizan las normas vigentes en aquella época, como los hechos juzgados por los Tribunales.

Palabras claves: decencia pública, excesos inmorales, derecho penal municipal, derecho penal rural

ЗАЩИТА ОБЩЕСТВЕННОЙ НРАВСТВЕННОСТИ ОТ ПОВЕДЕНИЯ, ПРЕДУСМОТРЕННОГО СТ. 140 КОАП, В ПОЛЬСКОМ УГОЛОВНОМ ПРАВЕ В ПЕРИОД ДО РАЗДЕЛОВ РЕЧИ ПОСПОЛИТОЙ

Аннотация

В статье рассматриваются вопросы, связанные с защитой общественной морали от поведения, которое в настоящее время классифицируется как непристойная выходка (ст. 140 КоАП) в период до потери Польшей своей независимости в XVIII веке. Анализируются действующие на то время законодательные акты, а также фактический материал по делам, рассматриваемым судами.

Ключевые слова: общественная мораль; непристойная выходка; городское уголовное право; сельское уголовное право

DER SCHUTZ DER ÖFFENTLICHEN SITTLICHKEIT NACH AKTUELL ARTIKEL 140 DES POLNISCHEN ORDNUNGSWIDRIGKEITSGESETZES QUALIFIZIERTEN VERHALTEN IM POLNISCHEN STRAFRECHT IN DER ZEIT VOR DEN TEILUNGEN POLENS

Zusammenfassung

Der Artikel befasst sich mit der Problematik des Schutzes der öffentlichen Sittlichkeit vor Verhaltensweisen, die in unserer Zeit als grober Unfug (Artikel 140 des polnischen Ordnungswidrigkeitsgesetzes) eingestuft werden, in der Zeit bis zum Verlust der staatlichen Unabhängigkeit Polens im 18. Jahrhundert. Einer Analyse unterzogen werden die in dieser Zeit geltenden Vorschriften und es werden die von den Gerichten geprüften Sachverhalte dargelegt.

Schlüsselwörter: öffentliche Sittlichkeit, grober Unfug, Stadtstrafrecht, Landstrafrecht

PROTECTION DE LA MORALITÉ PUBLIQUE CONTRE LES COMPORTEMENTS ACTUELLEMENT QUALIFIÉS EN VERTU DE L'ART. 140 DU CODE DES CONTRAVENTIONS EN DROIT PÉNAL POLONAIS DE LA PÉRIODE PRÉCÉDANT LE PARTAGE

Résumé

L'article présente les enjeux liés à la protection de la moralité publique contre les comportements actuellement qualifiés comme des excès indécents (article 140 du Code de contraventions) dans la période jusqu'à la perte de l'indépendance par la Pologne au XVIIIe siècle. Les dispositions en vigueur à l'époque ont été analysées et les faits examinés par les tribunaux ont été présentés.

Mots-clés: moralité publique, excès indécent, droit pénal municipal, droit pénal rural

TUTELA DELLA PUBBLICA DECENZA DAI COMPORTAMENTI ATTUALMENTE QUALIFICATI DALL'ART. 140 DEL CODICE DELLE CONTRAVVENZIONI NEL DIRITTO PENALE POLACCO DEL PERIODO PRIMA DELLE SPARTIZIONI

Sintesi

Nell'articolo viene presentata la questione legata alla tutela della pubblica decenza nei confronti dei comportamenti attualmente qualificati come atti indecenti (art. 140 del Codice delle contravvenzioni) nel periodo fino alla perdita dell'indipendenza da parte della Polonia nel XVIII secolo. Sono state analizzate le norme in vigore a quel tempo e sono stati presentati i fatti esaminati dai tribunali.

Parole chiave: pubblica decenza, atto indecente, diritto penale urbano, diritto penale rurale

Cytuj jako:

Wala K., *Protection of public decency in Polish criminal law of the pre-Partition period against conduct classified today under Article 140 of the Petty Offences Code [Ochrona obyczajności publicznej przed zachowaniami kwalifikowanymi obecnie z art. 140 k.w. w polskim prawie karnym okresu przedrozbiorowego]*, „Ius Novum" 2020 (14) nr 4, s. 155–169. DOI: 10.26399/iusnovum.v14.4.2020.41/k.wala

Cite as:

Wala, K. (2020) 'Protection of public decency in Polish criminal law of the pre-Partition period against conduct classified today under Article 140 of the Petty Offences Code'. *Ius Novum* (Vol. 14) 4, 155–169. DOI: 10.26399/iusnovum.v14.4.2020.41/k.wala