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## THE PRINCIPLE OF SUBJECTIFYING OF PENAL LIABILITY AND GUILT

In the doctrine of penal law and in judicial decisions, it is pointed out that the fundamental principle of penal law is subjectification of penal liability.<sup>1</sup> The basic premise of this universally approved rule is to reject the concept of purely objective responsibility and to take into account the state of perpetrator's awareness when establishing the existence of penal liability. Initially, penal liability was objectified, and the offence was described in its entirety only with the use of subject signs, most often indicating only as a result of the perpetrator's behavior [Marek 1993, 124]. The gradual breakthrough for penal law to include a greater degree of psychological relation gave rise to the principle of guilt [Wilk 2012, 109-10]. Some representatives of the penal law doctrine identify the attribution of guilt directly with the principle of subjectifying of penal liability [Gardocki 2010, 9]. The doctrine also has the view that guilt should be part of the structure of the offence, which includes the whole essence of subjectifying liability [Rejman 1999, 156]. Acceptance of the view on identifying the principle of guilt with the principle of subjectification is also sometimes signaled in judicial decisions.<sup>2</sup> The problem analyzed in this article is to determine whether the principle of guilt and the principle of subjectivization can really be equated with each other. For the purposes of these analyzes, it is necessary to determine whether the principle of guilt covers all elements relating to subjectivization that occur in the structure of

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<sup>1</sup> Judgment of the Supreme Court of 17 September 2004, IV KK 162/04; Decision of the Supreme Court of 3 January 2006, II KK 80/05.

<sup>2</sup> Judgment of the Supreme Court of 4 November 2002, III KK 58/02.

the offence and to determine whether the premises for assigning guilt are always associated with subjectification.

### **1. Determining the premises for the guilt**

It should be noted that expressed in the provision of Art. 1, para. 3 of the Penal Code,<sup>3</sup> the principle of guilt in doctrine and judicial decisions is not understood uniformly [Świecki 2010, 4]. The legislator did not define this concept. Some representatives of the field of penal law indicate that on the basis of applicable legal regulations, attributing guilt is tantamount to bringing the perpetrator of an allegation because of behavior violating the norm of penal law, when the perpetrator's characteristic and the situation in which he found himself allowed him to remain faithful to the requirements of the law [Dukiet-Nagórska 2012, 43]. According to the presented opinion, the essence of the guilt is determining whether the perpetrator could be required to choose a variant of lawful conduct. Attribution of guilt in accordance with this opinion is possible if the perpetrator is characterized by: 1) subjective capacity to incur penal liability, conditioned by reaching a certain age (Art. 10 PC) associated with the maturity of the perpetrator; 2) the ability, undisturbed by pathological factors, to recognise the significance of the act or to control one's conduct (Art. 31 PC); 3) recognition of unlawfulness (Art. 30 PC); 4) no excused error that a circumstance has occurred, which constitutes a feature of a prohibited act carrying a less severe penalty (Art. 28, para. 2 PC); 5) no excused error that a circumstance has occurred which excludes unlawfulness or guilt (Art. 29 PC); 6) the requirement to comply with lawful conduct, falling away in an abnormal motivational situation, underlying the exclusion of guilt in the limits of necessary defence (Art. 26, para. 2 PC). Intent and inadvertence within the framework of the crime based on this understanding are only part of the description of the prohibited act and do not fall within the scope of the guilt.

Other representatives of the doctrine point out differently, however, that the essence of guilt, in addition to the previously mentioned premises, also

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<sup>3</sup> Act of 6 June 1997, *the Penal Code*, Journal of Laws of 2019, item 1950 as amended [henceforth cited as: PC].

includes intent and inadvertence [Marek 2007, 23]. First of all, the premise of guilt is the so-called party to the crime, as defined in Art. 9 PC, i.e. intention to commit a crime (for intentional crimes) or recklessness or negligence (for unintentional crimes) [Gardocki 2010, 53]. The attribution of guilt is, according to the indicated concept, both on the premise of the subjective party and the need to determine whether it is a person who is guilty [ibidem, 23]. The doctrine expresses the view that the current legal status does not prevent the intent and inadvertence co-determination of both the features of a prohibited act and guilt [Kaczmarek 2006, 277]. The essence of guilt cannot be explained solely by means of normative accusation, without the subject of this allegation [Marek 2007, 23].

## **2. Determining whether the premises for attributing guilt exhaust the range of elements relating to subjectivization of penal liability**

Assuming, first of all, the presumption characteristic of a purely normative theory of guilt, according to which the essence of guilt does not include intent and inadvertence, it should be pointed out that guilt understood in this way, despite being based solely on premises strictly connected with the principle of subjectivization, referring directly to psychological factors, determining whether the perpetrator could be required to choose a variant of lawful conduct, it certainly does not exhaust the whole concept of subjectification of penal liability. Since, according to such a concept, we assume that intent and inadvertence are outside the criteria of attributing guilt – and undoubtedly these constructions relate to psychological experiences – then the subjectification of liability should certainly be understood more broadly than such a guilt. The subject side expresses the mental attitude of the perpetrator to the act.

It should also be pointed out that the elements subjectivizing liability in penal law can also be found in elements other than guilt, intent and inadvertence. Despite numerous dogmatic disputes regarding the notion of an act, it is unanimously emphasized that one cannot speak of penal liability in a situation when the organism is affected by factors that deprive a person of the possibility of acting in accordance with the will. Therefore, the act requires mentally controlled behavior. Not just objective reality, but following certain personal considerations regarding the perpetrator results

in the possibility of recognizing a specific situation as a human act. By defining the subject of liability, the effect approach is rejected, according to which every effective human action is a behavior determined by the will of the subject [Pohl 2012, 96]. A. Wąsek, on the other hand, emphasizes that the subjectification of penal liability also manifests itself in the phenomenon of committing a crime, including in the construction of complicity, for which it is important to analyze the agreement concluded between the perpetrators [Wąsek 1990, 6-7]. Also the concept of social consequences, characterized in the provision of Art. 115, para. 2 PC, it contains subjective elements, because it takes into account the intentions and motivation of the perpetrator. Undoubtedly, the element subjectivizing penal liability can also be seen in accepting responsibility for the attempt and preparation, when the will of the perpetrator can be considered reprehensible regardless of the consequences of this will. As pointed out by J. Giezek, the doctrine and jurisprudence dominates the view that the structure of the so-called in a counterparty circumstance, there must be a subjective element [Giezek 2013, 298].<sup>4</sup> Therefore, even among the circumstances excluding unlawfulness, one can indicate a significant subjective element for penal liability. Therefore, regardless of the way of understanding guilt, subjectification of liability also applies to other elements than guilt. Thus, even a general analysis of individual elements of the structure of the crime proves that the impact of the principle of subjectivization on penal law occurs on many levels of the multifaceted structure of the crime. Moreover, as A. Wąsek rightly observes, subject-tivizing elements repeatedly extend penal liability, while the principle of guilt is undoubtedly intended to narrow down and not extend the scope of penal liability [Wąsek 1990, 6-7].

### **3. Determining whether all the premises of a guilt are elements affecting the subjectification of penal liability**

In order to establish the relationship between guilt and subjectification, it should also be determined whether all the elements belonging to the premises for imputation of guilt – mentioned by representatives of the comprehensive normative concept of guilt – constitute elements that su-

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<sup>4</sup> Judgment of the Appeal Court in Lublin of 15 January 1998, II Aka 181/97.

bject to penal liability. It should be admitted that determining the intent of the perpetrator's actions actually refers to the subjectification of penal liability, because it involves determining the psychological connection between the perpetrator and the act. In the case of a direct intention, the content of such a psychic connection can be described as willingness, pursuit of an imaginary goal. The content of the psychic connection may also constitute the perpetrator's awareness itself, including the need to implement the condition described in the subject-related features of the prohibited act. As for the possible intention, the content of the perpetrator's mental relationship with the act can be seen as agreeing to a well-known high probability of committing a prohibited act. On the other hand, in the case of unintentional offences, the content of the perpetrator's mental relationship with the act can only be described as anticipating the possibility of committing a prohibited act. At the same time, it should be noted that in the case of unintentional inadvertence, "there is neither the will to effect nor even awareness of the effect, and thus the last link, which after the fall of the will can be considered a psychic connection" [Buchala 1954, 43]. Therefore, while intent actually refers to the psychological experiences of the perpetrator, it seems that in the current legal status the essence of inadvertence is only to refer to the precautionary rules required in given conditions [Wróbel 2006, 663].

The model description of mental experiences contained in inadvertence takes into account situations where there is no mental node and the perpetrator does not know that he is committing a prohibited act [ibidem, 662]. Proponents of inadvertent observing the unconscious relationship between the perpetrator and the act manifested in the form of the possibility of prediction cannot deny that inadvertence must also be attributed when the lack of prediction is an effect, e.g. the lack of knowledge, which obviously results in a lack of possibility of prediction from a psychological point of view [ibidem, 664]. Part of the doctrine emphasizes directly that indicated in Art. 9, para. 2 PC the obligation to anticipate is, in fact, an objective category, determined not according to the abilities of a given offender, but according to a certain norm applicable to every citizen who engages in behavior with a socially unacceptable risk of negative consequence. Therefore, it is justified to state that also determining the possibility of awareness is in fact an element of the subject matter [Wróbel

i Zoll 2011, 214]. T. Kaczmarek directly states that “in case of inadvertence, objectification of guilt occurs” [Kaczmarek 2004, 35]. The indicated author aptly notes that the possible predictability indicated in the content of Art. 9, para. 2 is in fact objective predictability according to the normative standards. However, this observation confirms that the mere attribution of the unintentional perpetrator can only be based on objective evaluation [ibidem]. Summing up, it should be pointed out that, despite the fact that unintentionality, according to the representatives of the normative theory of guilt in a comprehensive approach, belongs to the very essence of the guilt, it is impossible to assume that it constitutes an element subjectivizing liability. It should be noted, therefore, that it seems erroneous to consider that recognition of intent and inadvertence as the criteria for attributing guilt ensures that guilt becomes a peculiar medium of subjectifying liability. Based on the assumptions about subjectivization or the necessity of the existence of a mental node, it is difficult to consider as an element of guilt the element in its essence.

### **Conclusion**

Since one can indicate situations where the elements subjectifying liability are outside the criteria determining the attribution of guilt – and this regardless of the adopted concept of guilt – and situations where, according to some representatives of the doctrine, elements belonging to the essence of the guilt, i.e. the unconscious intent does not affect any subjectification of liability, it seems obvious that the principle of guilt and the principle of subjectivization of penal liability cannot be equated with each other and should be treated separately. The conducted research showed that the principle of subjectivization of liability remains superior to the principle of guilt understood in a manner characteristic of purely normative theory. In turn, guilt comprehended in a comprehensive way contains elements common with the principle of subjectivization, but at the same time the principle of subjectivization and guilt understood in this way have separate elements from each other and thus the scope of both concepts intersect. The analysis of the principle of subjectification in penal law cannot be limited only to the issue of guilt and should take into account a number of other institutions of substantive penal law that relate to the

sphere of psychological experiences. The fact that guilt cannot be directly identified with subjectification, and that guilt is based only on some of the elements that subject liability, does not in any way reduce the scope of subjectification in the context of all penal liability. To speak of guilt, it must be stated that the preceding elements of the structure of crime were fulfilled [Zoll 1983, 111-13]. Without this negative assessment of the conduct itself, it is unacceptable to plead guilty.

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## **The Principle of Subjectifying of Penal Liability and Guilt**

### Summary

The article refers to the issue of the principle of subjectification of penal liability, rarely analyzed in the doctrine of penal law and judicial decisions. The main purpose of the discussion is to try to answer the question whether the principle of subjectivization, defined as one of the fundamental principles of penal law, can be equated with the principle of guilt. For the purposes of the considerations contained in the article, it was necessary to determine the essence of the guilt and determine whether the structure of the offence contains elements other than guilt related to the subjectification of liability. It was also necessary to determine whether all premises of guilt always relate solely to issues related to subjectivization.

**Key words:** guilt, subjectification of penal law, principle of subjectifying, perpetrator, inadvertence

## **Zasada subiektywizacji odpowiedzialności karnej a wina**

### Streszczenie

Artykuł porusza rzadko analizowaną w doktrynie prawa karnego i orzecznictwie sądowym kwestię istoty zasady subiektywizacji odpowiedzialności karnej. Podstawowym celem rozważań jest próba odpowiedzi na pytanie czy zasada subiektywizacji, określana jako jedna z fundamentalnych zasad prawa karnego, może być utożsamiana z zasadą winy. Na potrzeby rozważań zawartych w artykule koniecznym było ustalenie istoty zawinienia i określenie, czy w strukturze przestępstwa występują inne niż związane z winą elementy mające znacznie dla subiektywizacji odpowiedzialności. Niezbędne było także ustalenie,

czy wszystkie przesłanki zawinienia zawsze odnoszą się wyłącznie do kwestii związanych z subiektywizacją.

**Słowa kluczowe:** wina, subiektywizacja odpowiedzialności karnej, zasada subiektywizacji, przestępca, nieumyślność

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