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THE IMPACT OF RELAPSE INTO CRIME ON THE DEGREE OF OFFENDER'S GUILT IN CANON LAW AND POLISH LAW

The article aims to discuss the subject of relapse into crime in canon law and Polish law. With regard to canon law, the aforesaid institution of penal law will be presented against the provisions of the 1917 Code of Canon Law[1] and the 1983 Code of Canon Law.[2] Speaking of Polish law, the main focus will be the *Penal Code* of 1997.[3] Recidivism remains of interest to legal scholars specializing in either of the legal systems, hence encouraging reflection on whether it has an impact on the degree of offender's guilt.

1. Relapse into crime in canon law

This section will address relapse into crime in the CIC/17 and in the CIC/83. First, the concept of recidivism will be highlighted. Next, criteria will be discussed that must be met for recidivism to occur along with the types of relapse into criminal behaviour.

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[1] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, p. 1-593 [henceforth cited as: CIC/17].

[2] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [henceforth cited as: CIC/83].

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

1.1. Relapse into crime in the 1917 Code of Canon Law

The Pio-Benedictine Code, as the CIC/17, is often referred to, was promulgated on Pentecost on 27 May 1917 by the Apostolic Constitution *Providentissima Mater Ecclesia*.[4] It became effective on 19 May 1918 [Hemperek 1995, 129]. Provisions regarding ecclesiastical penal law are to be found in Book V CIC/17 "On Offences and Penalties."

Recidivism is regulated in can. 2208 § 1. Pursuant to this canon, a recidivist is one who, after a condemnatory sentence, commits again a crime of the same sort under such circumstances, particularly of time, so that pertinacity in bad will can be prudently identified. The described legal concept is known as special recidivism. The second paragraph of the same canon, however, provides for general recidivism, that is, two delicts of different sorts are enough for recidivism to occur, one of them closing with a condemnatory sentence. J. Syryjczyk explains that the principle contained in can. 2208 § 2 concerns not only special recidivism but also alludes to the general return to criminal behaviour, regardless of the type of committed crime [Syryjczyk 2005, 162]. Synthetically speaking, the following criteria must be met for recidivism to occur: 1) the offender is convicted by a final judgement for a past crime; 2) perpetration of a crime of the same kind; 3) pertinacity in bad will. These are cumulative criteria; therefore they must occur together in order for recidivism to take place [ibidem, 154]. In addition, it should be noted that return to criminal behaviour is a completely different phenomenon than the actual concurrence of offences, i.e. one offender commits several crimes, but they have not been sentenced for any of them yet. Similarly, there is a difference between recidivism and a situation where the offender commits many illegal acts that are combined into one in a legal sense. Such a series of natural acts of the perpetrator is, for practical, procedural and legal reasons, referred to as a continuous crime. Individual criminal acts committed by the same perpetrator are not new crimes unless a sentence has been imposed for all the facts that underlie a continuous crime. Therefore, recidivism will not take place if, between the acts that comprise a continuous crime, a canonical warning was issued which is not the same as conviction [ibidem, 155]. Also,

[4] Benedictus PP. XV, Constitutio apostolica *Providentissima Mater Ecclesia* (27.05.1917), AAS 9 (1917), p. 5-8.

recidivism will not occur through a permanent crime, that is, one whose effect is sustained [Mikołajczuk and Terpin 2018, 389]. This is because the offender sustains the condition induced by a criminal act, even after a canonical warning; they do not commit new crimes nor do they meet the criteria of recidivism [Syryjczyk 2005, 155]. It seems reasonable to consider whether the approach to recidivism in the CIC/17 covers uncommitted crimes, i.e. attempted or failed ones. The CIC/17 in can. 2235 says that if the offender did not commit the offence but only attempted it and failed, they could still suffer an adequate penalty. Thus, the question is whether such a conviction can be a criteria for recidivism to occur if another crime is committed. Opinions are divided because, on the one hand, we have information that there was a conviction for a previous crime, even if not committed, and, on the other, a new crime has been perpetrated. This, in turn, implies pertinacity in bad will. On the other hand, when strictly interpreting the provisions of the CIC/17, especially can. 2208 § 1, relapse into crime should be ruled out because the first crime has not been committed [ibidem, 156].

1.2. Relapse into crime in the 1983 Code of Canon Law

In the CIC/1983, the provisions of penal law were included in Book VI which has 89 canons, and its material is divided into two parts, i.e. "Offences and Punishments in General" and "Penalties for Particular Offences" [Hemperek and Góralski 1995, 129].

Relapse into crime in the CIC/83 has the same meaning and significance as in the CIC/17: it is a repeated offence by the same perpetrator. Although the CIC/83 fails to provide a clear definition of recidivism, still some criteria can be identified that determine the existence of relapse into criminal behaviour. These criteria are included in can. 1326 § 1 as follows: 1) condemnation or declaration of penalty for a previously committed crime; 2) re-offending; 3) the existence of circumstances that indicate obstinate ill-will. At this point, it should be noted that under applicable regulations the cases discussed above fall under juridical or legal recidivism. For legal recidivism to take place, the above-listed criteria must occur jointly, i.e. cumulatively, which means that the absence of even one precludes a specific situation from being qualified as re-offending in a legal

sense [Syryjczyk 2008, 167]. An important pre-condition of recidivism is the perpetration of a crime after previous conviction or declaration of penalty *latae sententiae*. Adjudication on recidivism concerns the most recent crime and is based on a conviction or declaration of penalty, which confirms that the perpetrator has actually committed the crime before. In order to accept recidivism as valid, a judgement must be passed which has become *res iudicata* [ibidem, 167]. The condition of *res iudicata* arises when two consistent sentences have been passed regarding the same parties, the same request and the same title of plea, no appeal has been lodged within the prescribed time limit; or the case has been dismissed at the appellate level; or there has been renouncement of the trial; or a final judgement has been passed [Greszata-Telusiewicz 2013, 20]. *Res iudicata* means that a dispute between the parties to a trial has been definitively terminated and can no longer be challenged because it is considered just [ibidem]. If a new crime had been committed before the judgement became final, then there was no recidivism in a legal sense but the actual concurrence of crimes [Syryjczyk 2008, 167]. As in the CIC/17, a continuous crime or permanent crime is not recidivism in a legal sense [ibidem, 168]. Another of the necessary criteria of recidivism is re-offending but involving a completely different crime than before. Interpreting the provision of can. 1326 § 1 CIC/83, it does not matter whether the perpetrator commits a crime of the same type or not. Hence, re-offending in the juridical approach covers both return to the same type of crime and a crime completely different from the previous one [Idem 2005, 168]. The third criteria for recidivism to occur is obstinate ill-will. This special moral and psychological condition must be confirmed based on the circumstances of perpetrating another crime. Proof of obstinate ill-will may be the time that has elapsed between the old and new crime. Therefore, the rule is that the earlier the perpetrator returns to crime, the greater his or her pertinacity. By considering the aspect of time, a judge can tell whether in a particular case obstinacy in ill-will actually occurred [Idem 2008, 168].

2. Relapse into crime in Polish law

Penal law in force in Poland is laid down in the PC. Some penal provisions are also to be found in two types of additional statutes. First,

these can be laws containing exclusively or almost exclusively penal provisions. Second, these can be administrative acts that regulate a specific area of public life but also contain some penal provisions [Gardocki 2013, 31]. Recidivism is raised in Art. 64 and is defined as return of the same offender to crime, which leads to some negative consequences under penal law. Based on Art. 64, ordinary special recidivism, also known in the literature on the subject as ordinary re-offending, as well as multiple special recidivism, often referred to as multiple re-offending, can be identified [ibidem, 268]. The ordinary special recidivism covers cases when the offender sentenced for an intentional offence to imprisonment commits, within 5 years after serving at least 6 months of terms, another intentional offence similar to that for which they were already sentenced. In such a situation, the court may impose a penalty provided for the offence attributed to the offender of a length up to the maximum of the mandatory penalty increased by half. Whether to raise the upper limit of the mandatory penalty by half is to be decided by the court [Grześkowiak and Wiak 2017, 268]. It is important for recidivism that the new offence resembles the previous one. The definition of this type of offence is provided in Art. 115 § 3. It reads that similar offences are those which belong to the same type. In addition, the legislator emphasizes that offences with the use of violence or threat to use it or offences committed so as to gain material advantage are deemed similar. The other regulated type of relapse into crime is the so-called multiple re-offending, i.e. multiple special recidivism. For this institution to occur, the following conditions must be met: 1) the perpetrator has already been convicted in the conditions of ordinary special recidivism; 2) they have served at least one year of term in total; 3) within 5 years after serving all or part of the last term, they have committed an intentional offence against life or health, rape, robbery, theft with burglary or other offences against property with the use of violence or threat of violence. If all the three conditions are met, the court obligatorily imposes a penalty of deprivation of freedom provided for the attributed offence of a length over the minimum of the mandatory term and may impose it up to the maximum of the mandatory term increased by half [Gardocki 2013, 200].

3. Relapse into crime and guilt in canon law

The rule of *nullum crimen sine culpa* is broadly applicable both in canon and secular law. Although these are two distinct legal orders, both approach guilt as one of the constitutive elements of crime. In canon law, crime has its objective and subjective component. The objective component is, simply put, the external violation of a penal act or precept, i.e. a norm that, when encroached upon, entails a canonical sanction. The sanction may be defined or not defined, which means that, in the former case, the law provides its type and duration directly, while, in the latter case, it depends on the judge's prudent assessment. The faithful who violates the law that does not go with a criminal sanction violates the moral order and is compelled to repair the damage, although they do not commit a crime and are not subject to a penalty [Pawluk 1990, 68-69]. In contrast, the subjective element of crime is *gravis imputabilitas*, i.e. grave imputability [Mikołajczuk and Terpin 2018, 383]. For a crime to occur, it is not enough for someone to be the physical cause of an illegal act only. There must be a causal link between the act and the doer, and this act must be fully owned by the perpetrator who is morally accountable. The perpetrator is morally capable to be held accountable if they were aware of their act and controlled their own behaviour. The source of imputability is guilt which can be intentional (*dolus*) and unintentional (*culpa*) [Pawluk 1990, 70]. According to can. 1321 § 2 CIC/83, punished are crimes committed deliberately while those committed due to omission of due diligence are not punished unless the law or precept provides otherwise. Thus, in the science of canon penal law, intentional guilt is the deliberate violation of a law or precept. For guilt to exist, it is necessary for the perpetrator to have prior knowledge of the law that has been violated. Voluntary or intentional guilt implies freedom of action and freedom of choice when committing a crime, and, therefore, it manifests itself in the will to commit it. It consists of knowledge of the violated norm and a desire to violate it, which is typified by freedom of choice and freedom of action or omission. The knowledge of the norm means such a state of the perpetrator in which he or she is aware that they are acting against the law. It does not naturally follow that the offender is aware of the criminal sanction for the violation of the law [Mikołajczuk and Terpin 2018, 385].

Relapse into crime aggravates the perpetrator's guilt and tends to justify a more severe penalty. Re-offending, therefore, works to the detriment of the perpetrator by increasing their guilt, that is, it has an impact on the subjective component of the crime [Syryjczyk 2005, 163]. This concept was reflected in the CIC/17 in the canon discussed earlier, i.e. 2208 § 2. In attempting to keep a balance between crime and penalty, the ecclesiastical legislator provides that the circumstances of the crime be investigated. Can 2218 § 1 CIC/17 requires that equitable proportion must be observed between crime and penalty, i.e. the perpetrator's imputability must be taken into account along with scandal and harm caused. Therefore, the judge is obliged to determine whether the circumstances of the crime indicate higher or lower accountability of the offender and, therefore, their guilt. Pursuant to the provisions of the CIC/17, re-offending is a circumstance that aggravates guilt, in particular special recidivism which involves the offender's obstinacy in ill-will [ibidem]. Re-offending increases the perpetrator's guilt when they demonstrate malice and perverse will. Recidivism is also a socially dangerous because it exposes the offender's dismissive attitude of the church discipline and no effects of the penalty meted out previously. These arguments support the idea that recidivism is a circumstance that entitles the judge to increase penalty up to an extraordinarily level. The CIC/17 provided for two options of increasing penalty. The first one envisaged going beyond the maximum penalty provided for in the law, while the other proposed the imposition of another penalty on top of the legal measure provided for in the law [ibidem, 155].

The CIC/83 does not contain a provision resembling can. 2208 § 2 CIC/17, which reads that whoever commits several offences of different type adds to their culpability [ibidem, 171]. The present-day law rejects the absolute principle that the degree of guilt increases automatically along with the growing number of committed offences. Consequently, the idea of automatic aggravation of penalties for each case of recidivism was also abandoned. In addition, it should be noted that the judge, although aware of re-offending under can. 1326 § 1, no. 1, is not obliged to make the penal sanction provided for a specific offence more severe. The CIC/83 treats recidivists more liberally because not every case of recidivism requires a severe penal sanction. If leaves the choice to the discretion of the judge [Idem 2008, 171].

4. Relapse into crime and guilt in Polish penal law

As already mentioned elsewhere, guilt is a necessary constitutive element of crime in Polish law as well. In accordance with Art. 1, para. 3 PC, the offender of a prohibited act does not commit an offence if no guilt can be attributed to them at the moment of committing the act. The PC clearly formulates the principle of guilt as a necessary component of the definition of crime. Guilt is the basis for penal liability to occur and causes an illegal act to be named a crime [Grześkowiak and Wiak 2017, 90]. Because the legislators do not wish to define the term 'guilt' and leave it to doctrinal disputes, modern penal law and legal sciences have advanced many theories concerning guilt. One of them is the psychological theory of guilt. It assumes that guilt is a psychological experience of the perpetrator that binds them with their act, existing in connection with the act and developing through the act. This theory branched further into the theory of will and the theory of imagination. The former says that the perpetrator's guilt is determined by the element of the will to commit an illegal act. However, according to the theory of imagination, the decisive factor is prediction, consciousness, and imagination, in other words, the intellectual element. Thus, guilt occurs when the perpetrator is aware of the act and possibly of its effect – and this awareness stimulates their desire (will) to commit the illegal act – or they abandon the act under the influence of this awareness [ibidem, 94]. Another theory of guilt is the normative theory which says that guilt is not a psychological fact but a value judgement. Advocates of this theory believed that guilt was not that the perpetrator desired what he should not have desired, but that the perpetrator should not have desired what he actually desired. Another theory of guilt is the 1930s pure normative theory of guilt. It held that the perpetrator acted against the applicable legal order although he or she could have behaved differently in the situation in which they found themselves [ibidem, 95]. The Polish legislator does not support any specific theory of guilt. However, there are opinions that it approves of the pure normative theory, as demonstrated in the aforesaid Art. 1, para. 3 PC which speaks of guilt in the context of attributable guilt. Separating guilt as an element of crime from intention or the lack of it may also indicate that the legislator has opted for the pure

normative theory of guilt and has certainly rejected the psychological approach [ibidem, 96].

In Polish law, guilt is inextricably linked to the subjective aspect of crime. It consists of the psychological phenomena that accompany the subjective sphere, i.e. the perpetrator's external behaviour, and express the perpetrator's mental attitude to the committed act. The subjective side is the most important pre-condition for guilt to exist. Without the subjective aspect required under penal law and specifying the type of crime, the perpetrator cannot be accused of offending, and, thus, their penal liability is not there due to the lack of guilt [Gardocki 2013, 81]. Depending on the adopted concept of guilt, the element of the subjective aspect is intentional and unintentional guilt [Grześkowiak and Wiak 2017, 109].

Given the considerations above, it should be noted that the institution of recidivism is related to committing a crime deliberately. At the core of intentionality there is the intention to commit an illegal act, which means that the perpetrator is aware of and has a will to carry on with the act and make it criminal through their behaviour. The PC in Art. 9, para. 1 distinguishes two forms of intent that determine whether penal liability occurs: direct intent and conceivable intent [ibidem, 110].

Recidivism under the provisions of the PC is associated with an extraordinary strengthening of penalty. It consists in invoking, in certain situations, e.g. special recidivism, a series of offences, making the criminal activity a permanent source of income, committing a crime in an organized group or conspiracy, or committing a terrorist act, the option of imposing a greater penalty than provided for the offence, or limitation of the possibility of imposing a milder penalty [Gardocki 2013, 199]. Thus, the consequence of the judge finding that the offence was a re-offending may be, in the case of special recidivism, the imposition of the penalty provided for the offence in question up to the upper limit of the mandatory penalty increased by a half. Again, it should be stressed that this is optional. The consequences are much more severe in the case of multiple recidivism: mandatory penalty of deprivation of liberty, mandatory penalty above the lower statutory limit and optional imposition of the penalty up to the upper limit of the mandatory penalty increased by a half.

Conclusion

The discussed legal provisions regarding relapse into crime reveal certain similarities as well as differences in approach to this institution in canon law and Polish secular law. Both under canon law and Polish law, some criteria and conditions must be met for recidivism to occur. Moreover, in both cases these are cumulative, i.e. the absence of any of them rules out re-offending. Speaking of similarities, under both canon law and Polish law, recidivism is a circumstance that is likely to aggravate penalty. However, in Polish law this is optional when the court deals with ordinary special recidivism. The analysis additionally exposes that the provisions of the CIC/83 were significantly relaxed compared with the provisions of the CIC/17. The ecclesiastical legislator did not explicitly indicate that the faithful returning to criminal behaviour increase their level of guilt, as was the case in the CIC/17. However, the science of penal law reports such a regularity, especially when obstinacy in ill-will is found, which is a prerequisite for recidivism to occur. On the other hand, the secular legislator omits to offer guidance as to whether a person returning to crime increases their guilt, while offering the judge a possibility of extraordinary strengthening of penalty or making it mandatory in the conditions of multiple special recidivism.

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The Impact of Relapse into Crime on the Degree of Offender's Guilt in Canon Law and Polish Law

Summary

Relapse into crime is disturbing for two reasons. First of all, it highlights the ineffectiveness of the penalty imposed on the perpetrator. Second, it is a violation of legal norms and legal order, which should be observed in every community. Both the ecclesiastical and secular legislator acknowledge the need to regulate the institution of recidivism. Both legal orders formulate criteria to be met for recidivism to occur. Both in canon law and Polish penal law, these criteria are cumulative. However, in canon law, recidivism is a circumstance that may aggravate the penalty for a prohibited act. Whether to increase the penalty will therefore depend on the judge's prudent assessment. The secular legislature, on the other hand, does envisage higher penalties for re-offending but based on the type of recidivism in place. If it is ordinary special recidivism, whether to tighten the punishment is left to the judge's discretion. In the case of multiple special recidivism, to mete out a more severe penalty is mandatory.

Key words: crime, relapse into crime, recidivism, guilt, canon law

Wpływ powrotu do przestępstwa na stopień winy sprawcy czynu w prawie kanonicznym i prawie polskim

Streszczenie

Powrót do przestępstwa jest zdarzeniem niepokojącym głównie z dwóch powodów. Po pierwsze świadczy o nieskuteczności zastosowanej kary wymierzonej sprawcy przestępstwa. Po drugie jest obrazą norm prawnych i porządku prawnego, które powinny być przestrzegane w każdej społeczności. Zarówno prawodawca kościelny, jak i świecki dostrzega potrzebę regulacji takiej instytucji. W obu porządkach prawnych zostały określone przesłanki konieczne do zaistnienia recydywy. Zarówno w prawie kanonicznym, jak i polskim prawie karnym są to przesłanki łączne. Jednakże na gruncie prawa kanonicznego recydywa jest okolicznością, która może zwiększyć karę za popełniony czyn. Zwiększenie dolegliwości kary będzie zatem zależało od roztropnej oceny sędziego. Ustawodawca świecki natomiast uzależnia wymierzenie większej kary

od rodzaju recydywy, której dopuścił się sprawca. Jeśli była to recydywa specjalna zwykła zaostrzenie kary pozostaje fakultatywne. W przypadku recydywy specjalnej wielokrotnej wymierzenie surowszej kary jest obowiązkowe.

Słowa kluczowe: przestępstwo, powrót do przestępstwa, recydywa, wina, prawo kanoniczne

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