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The pandemic from the criminal-law perspective. Selected issues

Abstract

The recent pandemic, which is affecting virtually all the countries in the world, has posed a range of formidable challenges for public authorities. One of these has involved developing legal procedures to protect the lives and health of citizens, as well as to maintain a functional State apparatus and economy. It was necessary, however, that the regulations adopted to that end did not undermine core principles, even in emergency and dangerous situations. They were meant to safeguard core democratic values, while also setting certain limitations. It was imperative that the legislation be passed in accordance with constitutional rules. And this particularly involved legal sanctions, which are the focus of this paper. The paper examines Polish Penal Code provisions in terms of their alignment with the current pandemic situation. Consideration is given to whether they require improvements, and, if so, what could be improved.

Key words: cause a public hazard, cause damage, disaster, epidemiological hazard, intentional fault, unintentional fault, the concept of extended culpability, pandemic, consequence.

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Introduction

The pandemic has posed formidable challenges for both the Polish authorities and the entire Polish community. The legislative branch, too, has faced the difficult task of passing urgent legislation, while following all the procedural requirements. It is unacceptable to have, in effect, laws which are ill-conceived, of poor quality, and impracticable without extensive support from the judicial branch. This was precisely the case with the 2019 Penal Code overhaul, including both general and specific provisions – in fact, all categories of offences. It is evident that some changes were introduced to criminal laws as part of "Shield 4.0", a battery of laws devised in response to the pandemic crisis. For instance, they established a new justification for an offence under Article 231 of the Penal Code (PC), to counter the pandemic, to eliminate punishability for the omission or excess of powers where committed to advance social interests in this difficult time. Hence the profound implications of the 14 July 2020 judgement of the Constitutional Tribunal (Kp 1/19)[1], which declared the regulations passed in 2019 as unconstitutional, due to procedural defects. It should be noted here that the criminal regulations incorporated in the "Shield 4.0" contained the same errors as those committed by Parliament a year ago – now also declared to be in violation of the Constitution. Therefore, the TC judgement of 14 July 2020 made it possible to question the Penal Code provisions adopted as part of "Shield 4.0"[2].

What is very interesting is that the "Shield 4.0" provisions did not address the regulations set out in Article 165 § 1 (1) PC, nor any other provisions related to security, including public, traffic or environmental security. This raised the question of whether or not the aforementioned regulations passed in response to the pandemic served their intended purpose, and whether they should be changed. It can be said that this question underpins the enquiry presented in this paper. It should be noted, however, that over the previous 60 years or so Poland had faced no pandemic hazards, despite the emergence of multiple life-threatening, or even deadly, infectious diseases. Salmonella poisoning, and the hazards associated with sexually transmitted diseases, HIV, sepsis, rabies, etc. occurred locally. As a result, there was no need for courts to rule on cases involving large-scale hazards to life, health, or property in situations like the

1 P. Szymaniak, „Gazeta Prawna" 2020, nr 136.
2 P. Kardas, „Gazeta Prawna" 2020, nr 136.

one Poland is experiencing in 2020. The subject was of little interest to the legal canon, and research thereon is scarce. Suffice it to mention the Supreme Court judgement of 12 August 1988[3].

It is a great regret that the State authorities have thus far shunned the deployment of police authorities, municipal police, or Road Transport Inspection officers to perform tasks such as measuring drivers' body temperatures. This could act as a significant preventive measure to identify possible pandemic hazards.

Basic issues around identifying the attributes of the offence of causing an epidemiological hazard

Article 165 § 1 (1) PC is included in Chapter 20 of the Penal Code, entitled *Offences against public security.* In this chapter, the legislators incorporated a separate provision to penalise behaviour which infringes the legally protected right of "public security". A general assumption can be made that the behaviour listed in the said chapter infringes multiple and diverse legally protected rights. And the most important of these is the right to the protection of life, health, and property. The provisions have been designed to target, first and foremost, behaviour (including omission) posing large-scale hazards to life, health, or property. This involves causing a hazard, or an event preceding a specific consequence, and in relation to Article 165 § (1) (1) PC, an epidemiological hazard, which is a broader category than the possibility of contracting an infectious disease, or of animal or plant contagion. The legislators have substantially expanded the list of criminally prosecuted actions compared to those detailed in Chapter 20 of the Penal Code of 1969, although they did not omit the experiences associated with the application of Chapter 33 of the Penal Code of 1932. The actions listed in Chapter 20 of the Penal Code have been incorporated into three chapters of the specific part of the Penal Code. Crucially important, Chapter 20 includes a list of behaviours which are of three kinds, and involve causing an epidemiological hazard or other dangers to life, not only to people, but also to animals and plants, and attempting to abruptly

3 Wyrok SN z dnia 12 sierpnia 1988 r., OSNKW 1989, nr 1–2, poz. 8, and a critical gloss by L.K. Paprzycki, OSP 1992, nr 1, poz. 11; L.K. Paprzycki, *Bezduszność czy konieczność*, „Rzeczpospolita" 1998, nr 7, s. 9.

compromise elements of the broadly defined infrastructure, and transport safety[4].

It is important not to forget the offences mentioned in Chapter 22 of the Penal Code, which penalise behaviour compromising broadly defined environmental security.

The objective element of the misdemeanour under Article 165 § 1 (1) PC

The provision of Article 165 § 1 (1) PC uses the terms "epidemiological hazard", "spreading an infectious disease" and "animal or plant contagion". As such, it involves causing a hazard to the life or health of multiple people, or a large-scale hazard to property. By extension, the terminology used in this provision is similar to that of Article 163 § 1 (PC) and Article 174 § 1 (PC), describing a consequence in the form of a hazard which might be caused with intentional fault and direct intent, as well as oblique intent and unintentional fault. What is specific to this misdemeanour is that it causes a hazard as a result of failing to observe directives issued by the administrative authorities during the pandemic as a safety measure. These directives serve to protect both perpetrators and victims. Hence, at the core of the misdemeanour is causing a real hazard to the life or health of multiple persons, or a large-scale hazard to property, or, in other words, causing the hazard of a disastrous event.

In order for the offence under Article 165 § 1 (1) to be recognised as such, it is necessary to determine, based on the available evidence, the actual possibility that a given epidemic will occur, or that a specific infectious disease, as defined in Article 3 (1) of the Infectious Diseases and Infections Act of 6 April 2001, or an as-yet unidentified condition which has the attributes of an infectious disease, or a known condition causing as-yet unknown life- or health-threatening symptoms, will spread[5].

In essence, these diseases are of a kind which poses a threat to humans, and which, in the event of an epidemic, might also involve other diseases, not

4 Cf. G. Bogdan, [w:] *Kodeks karny. Część szczególna*, t. 2, red. W. Wróbel, A. Zoll, Warszawa 2017, s. 424.

5 Wyrok SA w Lublinie z dnia 14 marca 2005 r., II Aka 51/05, OSA 2007, nr 5, poz. 22.

necessarily infectious, but ones caused by, for instance, chemical reagents, an extensive potential range, or an increasing hazard[6].

It is important here to pinpoint the attributes of spreading an infectious disease, or animal or plant contagion. This requires proving consequences which go far beyond the occurrence of a specific hazard. Spreading microbes alone, then, will not be regarded as a prohibited act. It is necessary that a condition spread among a number of organisms large enough to cause a real threat that the disease or contagion will expand further[7].

The attributes of the subjective element

Anyone can be the subject of an offence under Article 165 § 1 (1) PC, since this misdemeanour is considered an act with a generally specific subject. This is where the concept of the so-called extended culpability comes into the picture[8].

The legislators have introduced a distinction between two types of offence of causing an epidemiological hazard – the intentional (Article 165 § 1 (1) PC), and the unintentional types (Article 165 (2) PC), as well as the aggravated type, as defined in Article 165 § 3 and 4 PC, resulting in the death of a person, or a severe health disorder in multiple persons. It is worth noting here that the outcome does not need to involve multiple infections to be recognised as a criminal consequence. This line of reasoning was presented in the 11 October 2012 judgement of the Appellate Court in Szczecin, which formulated the following premise. "Marketing a product containing bacterial foci has the attributes of an offence under Article 165 § (1) (1) PC by the mere fact of causing a risk of infection for a large number of people. And the fact that no one becomes ill does not preclude the act from being recognised as an offence"[9].

From this standpoint, it is evident that the act under Article 165 (1) (1) PC belongs to the category of constructive offences, as do the acts under Article

6 Ibidem.

7 Compare: R.A. Stefański, *Przestępstwa przeciwko bezpieczeństwu powszechnemu i w komunikacji. Rozdział XX i XXI Kodeksu karnego. Komentarz*, Warszawa 2000, s. 61.

8 Cf. wyrok SA we Wrocławiu z dnia 24 sierpnia 2016 r., II Aka 201/16. More on the subject: K.J. Pawelec, *Bezpieczeństwo i ryzyko w ruchu drogowym*, Warszawa 2020, s. 297–302.

9 Wyrok SA w Szczecinie z dnia 11 października 2012 r., II Aka 165/12, LEX nr 1237928.

163 PC and Article 174 PC. By extension, both the existing canon and case law on the aforementioned acts could be applied in the construction process. Therefore, it seems reasonable to assume that an offence under Article 165 § 1 (1) PC which has been committed with direct intent might occur only as an exception, and exclusively when it is associated with another offence, such as a terrorist attack or sabotage. Conversely, it might be controversial to regard an intentional act (as well as an omission) as oblique intent. Indeed, no notable record exists of any adjudication in which such an interpretation was applied to cases in which a person caused an event which posed a hazard for the health and life of multiple persons, or a large-scale hazard for property, or a large-scale road-traffic accident, or cases involving offences under Chapter 23 of the Penal Code, i.e. crimes against the environment and events involving an epidemiological hazard, despite their tragic consequences. It is generally unacceptable to consider that a perpetrator who is himself or herself exposed to a health hazard can act with oblique intent in relation to the offence under Article 165 § 1 (1) PC. However, certain exceptions to this rule can be made – for instance, when the infected person intentionally comes into contact with other people despite being aware of his or her infection. In actuality, this could potentially represent an altogether different offence, under Chapter 19 of the Penal Code – e.g. Article 161 PC or Article 163 § 1 PC. As a rule, however, an offence under Article 165 § 1 (1) PC should not be considered in terms of an intentional fault with direct intent. Conversely, an intentional fault with oblique intent cannot be ruled out with regard to a person who fails to observe clearly defined safety rules, despite being diagnosed with a viral infection, or experiencing specific symptoms of this infection which are commonly known and typical. Such a person should be regarded as intentionally violating the pandemic safety rules, warranting a reasonable suspicion that he or she has committed the misdemeanour under Article 165 § 1 (1) PC with an intentional fault and oblique intent.

The unintentional causation of an epidemiological hazard is directly related to the elements of a punishable action as defined in Article 9 § 2 PC. It can be assumed that the perpetrators of offences under Article 165 § 3 and 4 PC are those who violate the pandemic safety rules despite being aware of their ongoing viral or bacterial infection. The line between an unintentional fault (Article 9 (2) PC), and an intentional fault with regard to oblique intent (Article 9 § (1) PC) is not clear-cut, albeit with a slight preponderance in favour of the former. It is not sufficient to assume that the perpetrator acknowledged the

consequences of causing an epidemic. Rather, evidence should be presented to demonstrate that such an acceptance was part of his or her mental processes[10].

Hence, the concept of conscious unintentionality, which states that deduction is not the only process involved in causing a direct epidemic hazard, seems to be the most valid one in this context. When substantiating the adopted legal classification, it is insufficient to merely identify the type of prohibited act. Indeed, the substantiation should explain how the individual attributes of the given type of prohibited act are interpreted, in particular those which raise doubts as to their construction[11].

However, the objective here is not to make an arbitrary choice between one of the possible interpretations afforded by the canon or case law. Rather, it is about presenting the arguments which support, in view of the court which is making the interpretation, the specific choice. Where such a substantiation is impossible, or where several equally valid interpretations exist, there is good reason to believe that the provision might be in violation of the constitutional guarantee function of criminal law, including in particular the principle of specificity (Article 42 (1)) of the Constitution of Poland). And this, in turn, would warrant a legal query with the Constitutional Tribunal on the constitutionality of the regulation in question[12].

The concurrence of legal rules

As shown by practice, an offence under Article 165 § 1 (1) PC might coincide with other acts against the environment, as defined in Chapter 22 of the Penal Code. Their nature, however, precludes their concurrence with the penal provisions of statutes concerning a specific matter, such as the laws on food and catering, pharmaceuticals, medical devices, cosmetics, chemicals and their mixtures, products of animal origin, and biocidal products, as well as drug-abuse laws[13].

10 Wyrok SN z dnia 21 lipca 1970 r., IV KR 120/70, OSNPG 1970, nr 11–12, poz. 151; K.J. Pawelec, *Bezpieczeństwo…*, s. 40–41.

11 More on the subject: I. Tuleya, [w:] *Praktyczny komentarz do zmian procedury karnej*, W. Cieślak i in., Warszawa 2017, s. 608–611.

12 More on the subject: K.J. Pawelec, *Bezpieczeństwo…*, s. 305–307.

13 More on the subject: *Pozakodeksowe przestępstwa przeciwko zdrowiu. Komentarz*, red. M. Mozgawa, Warszawa 2017, s. 225, 332, 359, 365, 441, 505, 529, 541.

The reason is that these regulations penalise isolated cases involving the marketing or use of products, substances, and articles. While they can certainly have attributes of commonness, Article 165 § 1 (1) PC represents *lex specialis*.

Conclusions

It is worth noting that Article 163 § 1 PC uses the term "causing an event", essentially associated with an offence with consequences, while Article 165 § 1 PC relates to "causing a hazard", Article 173 PC – "a disaster", Article 174 PC – "the hazard of a disaster", and Article 181 § 1 PC – "destruction in the world of plants and animals". In essence, these are acts which lead to disasters, or a direct hazard thereof, although they objectively differ in terms of the actions which cause them. Therefore, it might be a advisable to standardise these terms, at least in respect of their consequences which affect, or might affect, multiple persons or highly valuable property, and as such are disasters or cause a direct hazard thereof. Legislators should, then, give consideration to introducing a statutory definition of "disaster" and "causing a direct hazard" to Article 115 PC. This would involve standardising the terms in the said provisions. Indeed, the causation of an event described in Article 165 § 1 (1) PC is a disaster, as is causing an epidemiological hazard or destruction in the world of plants or animals. Changes to nomenclature, and a new, generally applicable statutory definition of disasters, would definitely put an end to doctrinal disputes, and discrepancies in case law, ensuring compliance with Article 42 (1) of the Constitution of Poland with regard to the specificity of criminal-law provisions. A disaster could, then, be defined as an event which abruptly and dangerously disrupts common security in every sphere of economic life, and which is dangerous to humans, animals, the environment, and economic security, and which causes extensive and severe large-scale consequences for people or property, and also results in a hazard to common safety which is difficult to manage.

This definition, which is only a proposal, seems to be important for both internal and external State security, as it provides a statutory motivation for the authorities to continue monitoring the ever-changing world, including the

dangers it brings, and analysing it – and this should mean, in H. Arendt's words, understanding the unspoken and the unwritten.[14]

To put it briefly, a hazard should be identified as something which precipitates a consequence, or what might happen as a result.

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Rulings

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Pandemia w ujęciu polskiego prawa karnego. Zagadnienia wybrane

Streszczenie

Pandemia, która dotknęła ostatnio dosłownie wszystkie państwa świata, postawiła przed organami władz publicznych wiele trudnych zadań, w tym wypracowania procedur prawnych chroniących życie i zdrowie obywateli, a także zapewniających sprawne funkcjonowanie aparatu państwowego oraz gospodarek. Jednakże uchwalone normy prawne nie mogły naruszać podstawowych zasad, nawet w sytuacjach wyjątkowych, zagrożeniowych. Miały chronić podstawowe wartości demokratyczne, ale też zakreślać pewne ograniczenia. Musiały być uchwalane zgodnie z regułami konstytucyjnymi. Dotyczyło to zwłaszcza tych, które przewidywały sankcje karne. Tej też problematyce poświęcona została niniejsza publikacja. Analizuje ona przepisy kodeksu karnego pod kątem ich dostosowania do aktualnej pandemicznej sytuacji. Rozważa, czy wymagają one zmian, a jeżeli tak, to, w jakim kierunku.

Słowa kluczowe: sprowadzenie niebezpieczeństwa, powodowanie zniszczenia, katastrofa, zagrożenie epidemiologiczne, wina umyślna, wina nieumyślna, konstrukcja rozszerzonej odpowiedzialności, pandemia, skutek

14 H. Arendt, [w:] F. Martel, *Global gay. Comment la revolution gay change le monde*, Flammarion 2013, s. 81.