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Can Criminal Law Instruments Implement the Concept of Restorative Justice?

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Abstract

Restorative justice underlies various legal solutions all over the world. The Polish legislator also made reference to restorative justice by including the settlement between the offender and the victim among sentencing directives.

The objective of this article is to conduct a more detailed examination of this directive in relation to the essence of RJ, and then to review and analyse the solutions adopted in Polish criminal law in terms of their usefulness for the implementation of the objectives of restorative justice. The text will concentrate on those instruments and penal measures which are not designed to be used for repression against the offender and create – at least seemingly – space for objectives closer to RJ. The compensatory measures, the probative measures and an active repentance will be taken into account.

The Polish criminal law is consistent with the continental model existing in all Europe. Therefore, conclusions resulting from this analysis may provide inspiration also for authors functioning in normative realities other than Polish.

Keywords: Restorative justice; Criminal law; Sentencing directives; Penal measures; Compensation mediation settlement

Introduction

Although restorative justice (further also referred to as RJ) has been the subject of numerous publications, both Polish and international, the concept continues to be a source of inspiration for legislators and legal researchers. Perhaps one reason for its vitality is its complex genesis – restorative justice derives from the combination of theoretical reflections of criminologists and victimologists and traditional practices of various communities all over the world [1-3]. The fact that the idea of restorative justice has become embedded in so many different national laws presumably explains why this concept is not homogeneous.

While the relationship between restorative justice and a reaction to a violation of social principles, or an offence and a resultant conflict, is indisputable, both retributivism and utilitarianism are questionable [1,4,5]. In lieu of or in addition to the penalty imposed by a court on behalf of the state, the idea is to bring the "stolen conflict" back to its parties and concentrate on eliminating the negative consequences of an offence [6,7]. One of the approaches to RJ concentrates on a meeting between a victim and

offender, developing a common solution and achieving reconciliation; whereas another one focuses on victim satisfaction and reparation of damage caused by the offence, even non-consensually [5]. On the other hand, J. Consedine highlights the idea of "common good", which is to be achieved by engaging the local community, i.e. people directly involved in the conflict, in solving it (2004).

However, as rightly observed by P. Zawiejski, the essence of restorative justice lies in its humanistic aspect – a meeting centred on the conflict or restriction of this concept to mere compensation are not legitimate (2016).

In the light of the above observations on the underlying principles of restorative justice, the question arises whether these principles can be implemented in criminal procedure by means of instruments of criminal law. M. Płatek distinguishes restorative justice from traditional criminal justice in the following manner: "Criminal justice does not stand in contradiction to restorative justice; both are focused on justice. What sets them apart is their view on the essence of crime and essence of the judicature" (2005). The questions which need to be addressed are whether the author accurately captured the differences and whether the differences in such important matters fade away in view of the enigmatically defined objective of the achievement of justice.

With the maximalist approach, restorative justice cannot be reconciled with the current model of criminal justice, since it assumes complete reconstruction of not just criminal law and procedure, but also social structures. On the other hand, representatives of a more moderate approach allow for a compromise [3]. Coexistence of state judicature and restorative justice institutions was anticipated by H. Zehr, one of the "godfathers" of the restorative paradigm. His postulates aim to give the victim and local community their rightful place in the system of responding to crime [8,9]. Attempts to "reconcile" the postulates of restorative justice and the underlying principles of the continental model of criminal law and procedure are made in the legislative works of European countries [10]. In line with the spirit of RJ, the offender should assume responsibility for the offence committed and bear the burden of repairing the harm done [11, 9]. While the burden may take the shape known to classical criminal law, penalty is not central to restorative justice. Moreover, H. Zehr warns against using the postulates of restorative justice to justify the imposition of penalties that are only seemingly in the interest of the victim (1990).

Assuming that what is crucial for restorative justice is the meeting between the parties and arriving at a solution to the conflict between them, and not solely repairing the damage, it becomes clear that this result cannot be achieved by way of a court decision [6]. The attachment to the state's *ius piuniendi* prevents the adoption of the restorative justice model. Given the above, we must subscribe to P. Zawiejski's view that such conclusions do not preclude the application of solutions typical of restorative justice alongside, or even as part of, criminal procedure. The resolution of a conflict between the offender and victim and repair of damage can theoretically be achieved by way of a verdict of a criminal court (2016). The question is whether the institutions known to the continental criminal law can aid processes typical of restorative justice?

The Polish legislator also made reference to restorative justice by including the settlement between the offender and victim among sentencing directives. Our intention is to conduct a more detailed examination of this directive in relation to the essence of RJ, and then to review and analyse the solutions adopted in the Polish criminal law in terms of their usefulness for the implementation of the objectives of restorative justice. Article 53 § 3 of the Polish Criminal Code provides that "in imposing the penalty, the court shall also take into consideration the positive results of the mediation between the injured person and the perpetrator, or the settlement reached by them in the proceedings before the state prosecutor or the court". The mention of mediation resulted in the fact that this provision is unequivocally linked with restorative justice and interpreted accordingly. The norm derived from Article 53 § 3 CC is sometimes referred to as the conciliation directive [12].

A preliminary point to note is that the mediation settlement is not the only element allowed for in Article 53 § 3 CC. Interestingly, it is not even expressly mentioned there. The literature on the subject quite commonly assumes that what is required for a mediation procedure to be considered successful is reaching a settlement (and not just its implementation) [13], or even achieving "any outcome of mediation that is accepted by parties to a conflict, in particular the victim" [14,15]. The phrase "the court shall also take into consideration the positive results of the mediation" means *a contrario* that the court should not take into account the negative results [16,17]. The final part of Article 53 § 3 CC also points to settlements reached before a court or state prosecutor, but not before a mediator. The eventuality that the parties will reach a settlement before the authorities conducting proceedings can be interpreted as meaning that a

spontaneous settlement between the parties may be taken into account, in particular in circumstances where organisational considerations make professional mediation procedures impossible [18]. Another possible interpretation of Article 53 § 3 is that settlements between the parties reached with the involvement of the local community can be taken into consideration, which would be to a large extent in line with the tenets of restorative justice. Nevertheless, this is not the practice in Poland (Bek 2015). It may be conceded that, for the purposes of the conciliation directive, the concept of *settlement* has a slightly broader meaning than the one given to it in civil law, and it also encompasses a written apology to be accepted by the injured party, but does not involve any obligation to redress the damage or provide compensation [19]. In fact, the directive expressed in Article 53 § 3 CC does not accentuate compensation. Instead, it highlights the settlement between the parties, which suggests the acceptance by the Polish legislator of the primacy of the meeting referred to above.

It also appears important that the court take into account the settlement and other positive results of mediation. The conciliation directive means that the settlement between the injured party and offender is a critical factor shaping the operation of criminal law. A number of publications rightly emphasise that the court is not bound by the contents of the settlement, but it should instead attempt to shape its decision in such a manner that, if possible, it does not impair the settlement between the parties [20,21,13]. It should be also recalled that the court must simultaneously meet the requirements of other – at least equally important – sentencing directives, such as the directive of the degree of the offender's guilt, or the directive of the degree of social harm [12]. Therefore, even at this stage, it is clear that during criminal proceedings the victim and offender are not in charge of the conflict between them. The conflict "stolen" from them is "loaned" to them for the duration of the mediation procedure. However, once mediation is over, the fate of both parties (in particular the offender) essentially depends on the court. While the parties may make themselves mutually bound by the provisions of their settlement, yet they cannot bind the court with these arrangements. The terms of the settlement become a moral and civil obligation for the parties. With several exceptions, the settlement, or even reconciliation of the parties, redressing all damage, or the overall conflict resolution, do not necessarily imply impunity for the perpetrator.

The fact that the final decision as to the shape of the criminal law reaction is made by the court does not exclude the possibility of fulfilling the wishes of the parties, as expressed in the settlement, and does not prevent the application of the compensatory principles of restorative justice. Of all the different solutions and measures known to criminal law, those in which repressions against the offender are pushed into the background and priority is given to avoiding or repairing damage caused by the offence merit special attention. Compensatory and probative measures offer some space for RJ. The institution of active repentance may also be of interest in this regard, given that it rewards those perpetrators who have "voluntarily prevented damage that could result from a prohibited act or eliminated the damage already caused".

Compensatory Measures

Of all the measures that criminal courts have at their disposal, particular attention – in the context of restorative justice – should be given to compensatory measures. They are intended to repair harm and damage, thus meeting the requirements of one of the tenets of RJ. In general, these are sums of money that a court can award, as part of the custodial sentence, in favour of the injured party or other entitled persons. It is beyond any doubt that such financial burdens imposed on the offender, and in particular the compensatory measure that consists in the obligation to redress damage (Article 46 CC), may be a consequence of the commitments made in the mediation settlement. What was once a contractual obligation has thus become a compensatory measure whose implementation is subject to consequences characteristic of criminal law. The institution laid down in Article 46 CC can be considered a restorative justice tool only if it repeats a solution reached by the parties and indicated to the court in the motion of the injured person or in the mediation settlement. Where the aforementioned compensatory measure is applied exclusively on the initiative of the court, or where it results from the motion of the injured party not preceded by a settlement with the offender, it continues to be an attempt to ensure compensation for the injured party, but loses its relevance to the idea of RJ. In this situation compensation is not a result of a meeting between the parties and does not have to go hand in hand with the conflict resolution.

In its current wording, Article 46 CC explicitly obliges the court to use provisions of civil law while imposing the obligation to compensate or make amends for the harm caused, except for the provisions of civil law on the possibility to adjudge an annuity. In addition, pursuant to Article 56 CC, this measure became independent of the

principles governing the imposition of penalty and other means, thus meaning that e.g. the degree of the offender's guilt may not result in the compensation being reduced. At the same time, Article 56 CC separates the compensatory measure from the aforementioned conciliation directive derived from Article 53 § 3 CC, which may weaken the influence of the settlement concerning the obligation under Article 46 CC between the victim and offender. From the perspective of restorative justice, it would be helpful if the declarations made by the parties, included in the settlement and directed to the court, were treated as the motion specified in Article 46 CC. It appears that the court may and should act in response to the motion of the injured party for an amount even less than what would otherwise be determined based on the extent of damage and harm, provided that there are no doubts as to the voluntariness of the motion.

A further regulation important from the point of view of restorative justice is the possibility to adjudge a supplementary payment to the closest relative of a deceased victim of a crime (Article 46 § 2 CC). A financial settlement between the offender and the victim's family, which can serve as an example of the implementation of the idea of RJ, may be reflected in the application of the compensatory measure. In the light of Polish criminal law, there are three issues that may prevent arrangements in this regard from being fully taken into account. First, pursuant to the amended regulation, courts are now being forced to determine whether and, if so, to what extent, the life situation of the closest relative has deteriorated as a result of the victim's death, which complicates evidentiary proceedings. Secondly, the legislator limits the amount of the supplementary payment by introduction of a maximum amount of PLN 20.000. Thirdly, it appears that the aforementioned Article 56 CC obliges the court to apply sentencing directives also when adjudging a supplementary payment. It only expressly excludes from them the obligation to repair the damage done and compensate for the harm caused. This exclusion does not concern the supplementary payment in whatever form. This means that the amount of the supplementary payment depends not just on the extent of the damage and harm, but also e.g. on the degree of the offender's guilt.

The analysis of the possible legal consequences of reconciliation between the victim and offender as regards compensatory measures must also include the mandatory supplementary payment of PLN 10,000 for the person injured in one of the offences against safety in traffic, as specified in Article 47 CC. The imposition of the supplementary payment is mandatory also when the offender voluntarily repaired the damage and made amends for the harm caused. The court is released from the obligation to impose the measure defined in Article 47 CC on the offender only if instead of it, the court imposes an obligation to repair the damage or make amends for the harm caused in an amount greater than PLN 10,000. The regulation also affords the court the possibility to impose a lower supplementary payment e.g. in case of reconciliation between the victim and offender, i.e. for instance as a result of successful mediation. However, the court is in no position to waive entirely the imposition of the supplementary payment, which does not correspond to the principles of restorative justice, but still fulfils the restorative function of criminal law.

Probative Measures

Under Polish law, measures connected with placing the perpetrator on probation may be criminal law's reaction to an offence committed by the offender. These measures include conditional discontinuance of criminal proceedings, conditional suspension of the execution of a penalty, and conditional release from serving the remaining part of the sentence of deprivation of liberty. The common denominator for these institutions is that they reduce penal repressions resulting from the crime committed [22]. A reduction in repressions is conditional in nature, though, in the event where the results of the probation are positive, the repressions are remitted for an unspecified period of time, whereas the negative results imply that the repressions will be applied to their full extent. Although some authors maintain that probative measures weaken the retaliatory function of criminal law [22], this solution may in fact bring numerous advantages. Shifting the centre of gravity to the protective function of criminal law, with special regard to individual prevention necessary to formulate the criminological and social prognosis, appears to offer much broader perspectives for the use of restorative justice.

Putting the offender on probation, in particular when it is accompanied by the simultaneous application of semi-custodial elements, is largely disconnected from simple repression or re-establishment of justice, since it instead concentrates on prescribing the probation period in such a manner as to ensure that the offender will abide by the law in the future. The normative shape of probative measures allows for support and supervision of the offender through a probation officer and probationary obligations. Assigning these two functions the importance they deserve ought to take into account the legitimate interests of the victim. Moreover, in some cases, ensuring

that the harm caused is redressed is a prerequisite for the application of probative measures. In this regard, the question arises as to whether the Polish criminal law rules governing the placement of the perpetrator on probation support the claim that the road to the implementation of the postulates of restorative justice is open in this area.

A further analysis of this issue must be preceded by a review of the various probative measures. This is due to the fact that the normative *status quo*: conditional discontinuance of criminal proceedings, conditional suspension of the execution of the penalty of deprivation of liberty, and conditional early release are not equivalent institutions.

In the case of conditional discontinuance of criminal proceedings, the imposition of the penalty of deprivation of liberty is conditionally suspended, although the perpetrator has been found guilty of committing an offence [22]. In order for the discontinuance to be applied, it is necessary to establish the circumstances regarding the attribution of blame to the offender. The offence in question must not constitute a considerable violation of the legal order – it must not be subject to a penalty exceeding 5 years of deprivation of liberty, the perpetrator's guilt and social consequences of the act committed are not significant, and the circumstances of its commission do not raise doubts. In the event that criminal proceedings are conditionally discontinued, penal repression is mitigated to the greatest possible extent: despite the committed offence, the perpetrator maintains a clean criminal record. Given that the profits are so large, the legislator sets out a strict requirement that the perpetrator cannot have any previous convictions for an intentional offence.

It should be emphasised that the imposition of obligations on the offender is, as a general rule, optional with one exception: the obligation to redress the damage. The offender shall be required to redress the damage done in whole or in part if any damage was done and if so, it was not redressed before the court's decision to apply conditional discontinuance of the proceedings. As a result, it may be deduced that in the case of conditional discontinuance of criminal proceedings, the legislator created an instrument for solving the conflict between the victim and offender. A person who suffered a loss in interest protected by criminal law has a better chance of compensation since, first of all, the obligation to indemnify is imposed *ex officio*, and secondly, evading an obligation may lead to the reinstatement of conditionally discontinued proceedings. Given that there are more obligations that can be imposed by the court on the offender potentially leading to the resolution of the conflict caused by the offence, such as apologising to the injured person, it may be concluded that the conditional discontinuance of criminal proceedings is theoretically capable of fulfilling the postulates of restorative justice.

The question is, however, whether the instruments laid down for conditional discontinuance and intended to respect the interests of victims and their right to have the damage caused by the offence redressed are effective, or whether they are of a purely formal nature. It appears that assuming that the former is the case is likely to draw valid objections. First of all, the victim has no real influence on the court's decision on the application of conditional discontinuance of criminal proceedings. Secondly, Article 67 § 3 CC provides for the obligation to redress the damage in whole or in part. Therefore, it is important to establish in which situations the court may decide to order partial restitution: the offender's difficult financial situation, his diminished responsibility, or specific circumstances of the commission of the crime. All these circumstances concentrate on the offender while overlooking the needs and legitimate interest of the victim, which is not conducive to conflict resolution. Thirdly, the legislator associates the negative outcome of probation with evasion of the reparation of damage by the offender, and not an actual lack of restitution. In other words, the perpetrator intentionally strives to not fulfil his obligations [23], although it is possible for him to do so. As a result, the potential reinstatement of conditionally discontinued proceedings due to e.g. evasion of restitution is closely connected with the offender and his conduct during the probationary period, while the role of the victim is marginalised in this process. Therefore, even if the victim negotiates satisfactory terms of a settlement before the court's decision to conditionally discontinue the proceedings, and the court then incorporates these terms into its judgment, the control of the probation period will not include an evaluation of the performance or failure to perform the terms of the settlement.

Conditional suspension of the execution of a penalty consists in voluntary resignation from the execution of the penalty of deprivation of liberty for the term of probation. This means that the repressions imposed will not be executed if the term of probation is successfully completed. Conditional suspension may be granted to persons sentenced to deprivation of liberty for up to a year, provided that the perpetrator was not sentenced to imprisonment at the time of committing of the offence. Its essence lies the conviction that despite not serving the

penalty of deprivation of liberty, the offender will in the future observe the legal order. If conditional suspension is granted, the gains for the perpetrator are quite significant: although the offence he committed is in the opinion of the court serious enough to pass a sentence of deprivation of liberty, the sentenced individual does not in fact have to serve it. The conditional permission to remain at liberty, in one's family and professional environment, should as a rule be conducive to greater restitutive capabilities of the perpetrator, in particular with respect to finance. During the term of probation (1-3 years), the court may appoint a probation officer to assist and control the conduct of the offender and may obligate the offender, for example, to apologise to the victim, provide support for another person, or refrain from contacting the injured person. Furthermore, pursuant to Article 72 § 2 CC, the court may obligate the perpetrator to pay a consideration or redress the damage in whole or in part, unless it has prescribed a compensatory measure. Also in this case did the legislator provide for institutions that could potentially fulfil the postulates of restorative justice. The injured party has no influence on the decision to conditionally suspend the execution of a penalty. His/her consent or lack thereof, as well as any potential arrangements between him/her and the offender with respect to ways of remedying the damage and compensating the victim for the harm caused by the offence, have no binding force on the sentencing process, although obviously they may be taken into account. Similarly, restitution may concern only part of the damage, and decisions in this regard will be conditional on reasons attributable solely to the sentenced person and will not take into consideration the situation of the victim, or the scope of any settlement between the victim and offender. On the whole, such a form of probation can in no way be regarded as conducive to the fulfilment of the postulates of restorative justice.

As regards the last measure, it should be pointed out that conditional release makes it possible to release a convicted person from serving the penalty of deprivation of liberty after he has served a specified part of the penalty, which is half in most cases. Furthermore, the granting of conditional release is dependent on a simultaneous positive criminological and social prognosis. In the case of conditional release, the time remaining to the completion of the sentence is a probation period (usually 2-5 years). Of all the measures discussed thus far, conditional release offers the perpetrator a relatively minor preferential treatment, as it releases him from serving merely the remaining part of the sentence (mostly small). On the other hand, it does not formulate any special requirements applicable to the offender – formally, after serving a specified portion of the penalty, all prisoners, including those convicted for the most serious crimes and recidivists, become eligible to apply for conditional release.

This may be further facilitated by the fact that the legislator provided for combining conditional release with special rehabilitation measures, facilitating the reintegration of the offender into society and allowing for the verification of his conduct at liberty. Likewise, as a rule, the court may choose to assign a probation officer, and may impose the same obligations as those applicable to conditional suspension of the execution of penalty. If the damage caused by the offence for which the offender has been sentenced has not been redressed, the court may obligate him to redress it.

Conditional release is adjudicated in enforcement proceedings to which the victim is not a party and does not even have the possibility to attend the proceedings or appeal against the court's decision. This is not conducive to giving the victim the importance he or she deserves. Establishment of Article 72 § 2 CC as the legal basis for adjudication of the obligation to redress damage in the case of conditional release means that only partial restitution is possible, and again, for reasons attributable solely to the sentenced person. Last but not least, conditional release may be revoked e.g. if the offender evades the obligations imposed on him, meaning that the only thing that is examined is the offender's attitude towards the offence committed. Consequently, it must be stated that the victim is consistently ignored in the case of conditional release – he or she has no status whatsoever and in essence his/her opinion does not matter, therefore the postulates put forward by proponents of restorative justice cannot be fulfilled.

In view of the above, it may be assumed that the Polish probation system is not fully conducive to the implementation of the principles of restorative justice. Obviously there are some elements that contribute to conflict resolution and they deserve recognition: the mitigation of penal repression, as offered by probation, may motivate the offender to make concessions in the settlement agreement, and the fact that this mitigation is conditional in nature will motivate him to abide by the terms of the settlement. The flexibility of restrictions that may be imposed during the period of probation, including the absence of a closed catalogue of probative obligations, allows for inclusion in the sentence of virtually any conditions of the settlement agreed by the parties. Moreover, placing the perpetrator on probation is a safeguard for the victim in that the court controls the provisions of the settlement and their future

implementation. As regards the restitution, it is of fundamental importance for probation and, as such, should lie at the heart of the court's concerns. The obligation to redress damage ought to determine the shape of probation, since the perpetrator's attitude towards the damage that he caused and its repair has a significant prognostic meaning [24]. What constitutes an advantage of probation with regard to RJ may also be its disadvantage. Conditional mitigation of penal repression is always optional, thus the court may respect the settlement between the parties, yet it is not bound to do so. Linking the release from detention with a period of probation postpones the moment when the repression imposed on the perpetrator as a result of the committed offence receives its final shape. While two of the three measures are adjudicated in the fact-finding proceedings, the third one, namely probation assessment, is conducted in the enforcement proceedings. However, alteration of the stage of proceedings is of fundamental importance for this issue. Both fact-finding proceedings and enforcement proceedings are intended to fight crime and, while it is fair to say that there is a shared unity of the purpose of penalty adjudication and enforcement, measures applied to pursue this purpose differ depending on the phase of the criminal proceedings [25]. Fulfilment of the postulates of restorative justice in enforcement proceedings is difficult in that the objective of this stage of proceedings is to enforce penalties, punishments and other penal measures, as may be provided for in the sentence. At this stage of the proceedings, the focus is on the convicted person, while the victim recedes into the background. The underlying idea is to enforce penalty in such a manner that the offender does not reoffend, which is in the interest not only of the offender, but also of society as a whole. As a result of a departure from objectivisation of restorative justice and shifting the emphasis to the mechanism of individualisation [24], the crime committed (and, as a result, the victim) must be pushed into the background. Even if the victim is satisfied with the terms of the settlement that were transferred into the wording of the sentence, not paying regard to the victim in the process of controlling the execution of the settlement may in fact revive or even intensify the conflict caused by the offence.

Active Repentance

The so-called active repentance is an institution of Polish substantive criminal law that affords special protection to the interests of the injured party. Regulations of this kind are not present in Anglo-Saxon law, but can be encountered in most continental Europe countries.

Taking into account the conditions and penal consequences, two main models of active repentance may be identified: active repentance expressed by the offender prior to the commission of a crime (i.e. at the stage of punishable preparation or intent to commit an offence), and active repentance expressed following the commission of a crime.

In order to address the question whether provisions of the law that directly or indirectly concern active repentance can fulfil the postulates of restorative justice, it is necessary to provide a brief overview of these institutions, with special emphasis on their mechanism.

Active repentance, expressed both at the stage of preparation of a crime or attempt to commit a crime, is characterised by the same constitutive elements:

- Conduct different than (opposite to) punishable conduct – the perpetrator must desist from action or prevent damage/harm,
- The intended prohibited act was not committed,
- Voluntariness of conduct of the perpetrator.

A proper assessment of the potential role of active repentance in the restorative justice model requires an analysis of the consequences thereof, and in particular of the mechanism behind these consequences. Under provisions of Polish law (Articles 15 § 1, 17 § 1 and 22 § 1 CC), otherwise punishable preparation of an offence and an attempt to commit it are not subject to punishment if the perpetrator has expressed active repentance. This absence of punishment is not conditional on the wishes of the injured party, his or her position, or whether or not he or she has forgiven the offender. Impunity is guaranteed even in circumstances where the injured party suffers negative consequences of the act (although the offender did not commit the act he originally intended to commit), provided that these consequences do not have the qualities of another prohibited act. This means that the fear, pain, and loss of confidence and trust on the part of the victim are not the subject of a separate penal assessment in case of effective regret.

Unconditional impunity in case of the typical model of active repentance means that once it has been acknowledged, no criminal proceedings shall be initiated, and were they to be initiated earlier, and then they shall be discontinued (Article 17 point 4 of the Code of Criminal Procedure). The prosecution service of court is only entitled to examine whether the conditions for impunity have indeed been met, i.e. whether the fact that an offence was not committed resulted from a decision taken

(voluntarily) by the offender. The legal consequence of active repentance expressed prior to the commission of an offence is complete removal of criminal liability.

At this point, consideration should therefore be given to the functions attributed to active repentance with the aim of contrasting them with the functions of restorative justice. As indicated in the literature, active repentance performs the following functions: retaliatory, preventive, educational, and compensatory. Furthermore, it should be stressed that active repentance is intended to protect the interests of the injured party, although the Polish penal law in fact provides information only on the advantages for the offender.

From the perspective of restorative justice, the evaluation of active repentance expressed at the stage of preparation or attempt to commit a crime leads to several important conclusions.

- Active repentance does, without a doubt, implement one of the underlying ideas of restorative justice – reparation, redressing of damage [26].
- Active repentance is intended to provide additional protection of the interests of the injured party. However, expression of active repentance by the offender benefits not only the victim and the offender who gains impunity, but also society and the judiciary.
- Active repentance does not offer the victim anything beyond the prevention of damage in the narrow sense and potential redressing of damage in broad terms (should social unrest caused by the attempt to commit a crime be deemed as damage). The victim does not have the opportunity to express – as part of the ongoing proceedings – his or her emotions generated by victimisation, or to listen to the offender in an attempt to analyse why the injured party fell victim to the crime. Moreover, the victim does not have the opportunity to forgive the offender.
- Active repentance expressed by the offender does not necessarily mean that the offender feels remorse, assumes responsibility, and admits wrongdoing. While this motivation may indeed trigger active repentance, this is not necessarily always the case, and Polish law does not require that. It is essential to note that the positive attitude of the offender does not guarantee that he will certainly gain forgiveness from the victim. The offender "only" gains impunity, but there is no room for the emotional experiences that could affect his further life.
- While the penal consequences of active repentance expressed prior to the commission of a crime resolve the legal (and only legal) dispute, they in fact prevent the resolution of a potential conflict as part of an official procedure.

The second type of active repentance refers to the offender's conduct post-crime that is intended to eliminate damage or prevent it and which entails certain consequences that, as provided for by the legislator either mitigates or eliminates criminal liability. Referred to as the so-called post-crime active repentance, this type of repentance is not general in nature – the legislator has provided for profits accruing from the expression of active repentance in several cases (in particular offences against property, economic and financial offences, offences against safety). Offenders who committed other types of offences and prevented the infringement of interest or redress the damage caused shall be liable under the general rules laid down in the Code, pursuant to which in imposing the penalty, the court shall take into account the offender's conduct following the commission of the crime (Article 53 § 2 CC). The court may also apply extraordinary mitigation of the penalty when the damage incurred has been repaired (Article 60 § 2 point 1).

This type of active repentance takes two main forms: The "classic" forms of post-crime active repentance consist in repairing the damage. This form predominantly serves a compensatory, and more generally, restitutive function. The underlying principle in this case is that the offender is granted certain rights only after meeting the conditions for redressing the damage caused or otherwise making restitution. Therefore, active repentance expressed after the infringement of interest is focused on the victim, but not through the protection of his or her interests, but through their restitution. Its penal consequences usually take the form of optional extraordinary mitigation of the penalty. It appears that this form of active repentance seems highly likely to perform an educational function – it may shape the moral behaviour of the offender.

On the other hand, post-crime active repentance intended to "prevent damage" plays an important preventive role. The legislator renounces its *ius puniendi* (which in practice means impunity) even if the offender has already committed a prohibited act, as long as the offender prevented the infringement of interest. This type of active repentance applies to a special type of offences – when conduct that does not infringe specific interest is subject to penalty. Therefore also in this case (as in the case of active repentance expressed at the stage of preparation or attempt to commit an offence) active repentance may sometimes help to minimise primary victimisation,

prevent material damage, or minimise fear caused by the commission of an offence, and thus prevent the creation of a conflict or significantly reduce it.

The analysis carried out above allows the conclusion that active repentance expressed post-crime and preventing damage cannot be treated as an element of restorative justice. The reasons for this are the same as those for active repentance expressed prior to the commission of an offence. In short, unconditional impunity leaves no room for a resolution of the conflict between the offender and the victim and community. The same applies to active repentance expressed post-crime and post-infringement of interest intended to prevent the infringement of other interest (e.g. voluntary release of a hostage). Again, the special preventive character of this solution calls for the omission of the postulates of restorative justice. Nevertheless, from the perspective of the injured party and society as a whole, this is ultimately a good solution, as effective prevention is better than compensation.

While it is undeniable that active repentance expressed post-crime and intended to redress damage is strongly compensatory in nature, it does not automatically follow that it fulfils the postulates of restorative justice. Several points should be raised in this regard.

Also in the case of this form of active repentance, the voluntariness that is required by Polish law does not mean the *de lege lata* morally positive attitude, meaning consequently that Polish law does not require a conciliatory attitude to accompany active repentance. At the same time, it should be pointed out that the additional conditions, as may sometimes be required, to be met by the offender to be eligible for a penalty mitigation or elimination (denunciation) do not overshadow the restorative model, although they do raise some ethical and moral doubts. On the other hand, the statutory terms for active repentance – e.g. information reaching law enforcement authorities, institution of proceedings, rendering of a judgment – may unlawfully prevent the restorative process. More importantly, however, satisfaction of the expectations of the injured party is of no legal significance in either form of active repentance expressed following the infringement of interest.

It should also be stressed that the mitigation of punishment, wherever it is optional, provides a real opportunity for eliminating the conflict (since there are no formal obstacles to conducting criminal proceedings and thus e.g. mediation) and satisfying the needs of the injured party and the offender. However, this opportunity does not follow from the essence of restorative justice; instead, it merely permits the conclusion that its overall penal consequences do not thwart this process.

On the whole, it should be repeated that from the perspective of restorative justice, active repentance expressed prior to the commission of a crime and active repentance expressed post-crime but before the infringement of interest – as functionally identical – constitute forgiveness by the state, without checking whether the injured party is satisfied and whether the conflict has been resolved. This means that while the institution of active repentance is of great significance for the injured party, *de lege lata* it cannot be considered an element of restorative justice.

It cannot be denied that active repentance expressed post-crime and after the damage has been caused corresponds more closely *de lege lata* to the concept of restorative justice. Moreover, post-crime active repentance that opens (and not closes) the process of conflict resolution would make the Polish criminal law system less conducive to denying the offence and would increase the probability that the parties interact in a civil manner or restore their previous relations (in line with the principle "penalty is the enemy of truth"). From the perspective of restorative justice, the *de lege lata* strength of this type of active repentance is that it does not exclude it – it provides a chance for the elimination of conflict.

Conclusions

The overall assessment of the provisions of the Polish substantive criminal law from the perspective of restorative justice makes it necessary to acknowledge that it is not a model which promotes the ideas of alternative conflict resolution. It appears that the Polish legislator has gradually introduced into the criminal law system a number of institutions focused on the injured party, or even made direct reference go one of the tools of RJ – mediation and settlement between the victim and offender, without duly taking into account the remodelling of the criminal law system towards restoration. Given that the objective is to resolve conflict, the main observation is that all these measures are rather illusory. In most cases, they fulfil only selected postulates of RJ – e.g. encourage the redressing of damage, without actually requiring any dialogue between the parties, or establish a mechanism for the assessment of the performance of the settlement based entirely on the situation of the offender. In our view, the Polish criminal law falls short of the standards established by RJ. In this

context, it must be remembered that one of the recent amendments of the CC abrogated a provision (adopted quite recently) whose objective was to take into account in greater detail the conciliatory attitude of the parties, in particular of the offender. In essence, the repealed provision of Article 59a CC required the court of prosecution service to unconditionally discontinue proceedings in cases involving minor offences upon a motion from the injured party, subject to the condition that before the trial proceedings have been declared opened by a court of first instance, the offender, who was not previously penalised for an intentional offence committed with the use of violence, had reconciled with the victim, e.g. through mediation, and redressed the damage caused or compensated for the harm incurred. This provision was awaited by prosecutors, judges, and mediators alike. However, it was particularly important for the parties who were thus able to "reclaim" the conflict that had been stolen from them and could relatively freely manage the criminal proceedings. Nevertheless, it must be recognised that the changes that have recently been taking place in Poland are not conducive to conciliatory attitudes, and the reverse is in fact the case – strict and repressive criminal law is likely to be restored.

In the light of the above, the question is whether criminal law instruments can implement the idea of restorative justice. It appears that the "classical" criminal law is difficult to transform into the restorative model, as it then loses a number of its characteristic features applied for the purposes of performing its basic functions (retaliatory, rehabilitative, deterring). While conflict resolution is a priority, it may in fact be legitimate for restorative justice to function not so much as part of criminal law in the broad sense, but beside it. Such a system would therefore make it possible to retain the best features of each model, and depending on the situation – pursue specific goals.

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