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DEFINING AND FIGHTING ORGANISED CRIME IN POLISH SUBSTANTIAL CRIMINAL LAW

The article refers to the problems connected with defining organised crime for the purposes of substantial criminal law. Is also discusses the framework of Polish criminal law regulations designed to fight this dangerous phenomenon.

Key words: *organised crime, criminal association, organised criminal group.*

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Определение организованной преступности и борьба с ней по уголовному законодательству Республики Польша

В статье рассматриваются проблемы, связанные с определением организованной преступности с точки зрения материального уголовного права. Автор также обсуждает нормы польского уголовного законодательства, которые направленны на борьбу с этим общественно опасным явлением.

Ключевые слова: *организованная преступность, преступное сообщество, организованная преступная группа.*

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Визначення організованої злочинності і боротьба з нею за кримінальним законодавством Республіки Польща

У статті розглядаються проблеми, пов'язані з визначенням організованої злочинності з точки зору матеріального кримінального права. Автор також розглядає норми польського кримінального законодавства, які спрямовані на боротьбу з цим суспільно небезпечним явищем.

Ключові слова: *організована злочинність, злочинне співтовариство, організована злочинна група.*

Problem statement. Polish criminal law has had, like many other European criminal law systems, a long tradition of prohibiting organised criminal activity. In the past, however, the criminal law was mainly directed against different types of conspiracies which could be dangerous to the state and the political system (the prohibition of participation in secret societies can be treated as its aspect), though also the committing of common offences by «bands» of criminals was considered a dangerous phenomenon leading at least to aggravated responsibility for crimes committed by such criminal bands' members. Such an approach to organised criminal activity can be detected in all the criminal codes of the states occupying Poland's territory in the XIX century. For example, the criminal statute from 1845 which was binding in the Polish Kingdom controlled by Russia, contained numerous provisions referring to aggravated responsibility for offences committed as a result of conspiracy, prohibited the participation in secret societies and also prohibited the creation and participation in «bands» whose aim was to commit common offences of no political context [1, p. 53-97].

The modern Polish criminal law, for historical reasons (Poland lost its independence in 1795 and regained it in 1918), started with the Criminal Code from 1932. This legal act contained provisions forbidding any activity within an association which intended to commit any offence in the meaning of the criminal code, i.e. a felony or a misdemeanour. The term «criminal association» was then repeated by the next Polish Criminal Code which was accepted in 1969. The collapse of the Soviet Union and the socialist economy led to the need to create another criminal code, free from ideological bias

and such a new act was accepted in 1997. Yet even before the new law could be prepared, the law-maker introduced important changes in the 1969 Criminal Code referring to the prohibition of criminal organised activities. This was connected with the appearance of numerous organised gangs after the economic and political transformation which had started in Poland in 1989. In 1995 a new form of a forbidden organised structure, alongside the traditional criminal association, was introduced – an organised criminal group. This was considered necessary as the new emerging forms of group criminality were often not very well structured and only loosely organised which made it difficult to treat them as criminal associations that so far had been understood to refer to really well organised, hierarchical structures.

Analysis of recent research and publications. During the same period (i.e. in the 1990 s) organised crime as such started to be perceived in Poland as an important phenomenon, not really known before the transformation. Of course, there were many different types of criminal structures in the «socialist Poland», yet, as the state was controlling the lives of the citizens in many ways, the organised criminality of that period was mainly connected with the so called shadow economy (within the state-owned factories and enterprises some of the production was often directed onto the black market, which was connected with the permanent lack of many goods in the socialist economy) and never had the chance to develop on a larger scale. The collapse of the socialist state and the transition to free market economy were connected with the side effect of the appearance of organised criminal groups which started to take advantage of the new opportunities by engaging e.g. in drug trafficking, extortions from legal entrepreneurs and frauds of many types [2, p. 35-43].

All these factors brought the concept of organised crime to the attention of the law-maker and scholars. And the appearance of new aggressive gangs led to the introduction into the Criminal Code from 1969 and then to its acceptance by the code from 1997 of the second form of organised criminal activity – the organised criminal group. The two terms (criminal association and organised criminal group) have never been defined in the codes and the task to explain these terms was left to the criminal law doctrine and the courts.

Before the meaning of these terms can be discussed, it should be stressed that the Polish substantial criminal law does not use the term «organised crime» as such. This is fully understandable and moreover seems to represent the proper approach to the problem. Organised crime is mainly a criminological concept which means that its definitions found in literature often differ in many ways and – as the task of criminology is to describe the researched phenomena in detail – the definitions are also often quite extended. As an example one may quote the relatively short definition formulated by an American criminologist Donald R. Cressey who, on the basis of his research of American organised crime forms after the II world war, stated that:

An organised crime is any crime committed by a person occupying, in an established division of labor, a position designed for the commission of crime providing that such division of labor also includes at least one position for a corrupter, one position for a corruptee, and one position for an enforcer [3, p. 319].

Another well known definition proposed by Howard Abadinsky is much more detailed. According to that author:

Statemant of the base materials. Organized crime is a nonideological enterprise involving a number of persons in close social interaction, organised on a hierarchical basis, with at least three levels/ranks, for the purpose of securing profit and power by engaging in illegal and legal activities. Positions in the hierarchy and positions involving functional specialization may be assigned on the basis of kinship or friendship, or rationally assigned according to skill. The positions are not dependent on the individuals occupying them at any particular time. Permanency is assumed by the members who strive to keep the enterprise integral and active in pursuit of its goals. It eschews competition and strives for monopoly on an industry or territorial basis. There is a willingness to use violence and/or bribery to achieve ends or to maintain discipline. Membership is restricted, although nonmembers may be involved on a contingency basis. There are explicit rules, oral or written, which are enforced by sanctions that include murder [4, p. 5].

As it can be observed on careful reading of these two exemplary definitions, their authors in fact seem to describe only a chosen type of all possible organised criminal activities, and especially in case of the definition proposed by Abadinsky, one must notice that it in fact seems to refer to a typical «mafia-type» organisation and is based on the observation of the phenomenon of Italian-American crime syndicates.

Such definitions are undoubtedly a very important result of criminological research and can be used in the process of police fighting with organised crime, yet their adoption into the substantial criminal law framework does not seem to be a good solution. This is connected with the fact that the more features are put into a criminal law definition, the more features have to be then proved in court and therefore defining organised crime for the purposes of substantial criminal law in the above presented way could be in fact counterproductive – the inability of the prosecutor to prove e.g. that the organisation had internal sanctions, would mean that the group of people who committed a crime or crimes together could not be treated as members of an organised criminal structure.

The Polish law-maker used the term «organised crime» for the purposes of criminal law only once in 1994, in the first shape of the new offence of money-laundering which was then introduced into the Polish criminal law system. According to the statute from 12th October 1994 on the protection of business trading, it became a crime to introduce into the legal market the profits stemming from organised crime activities mentioned in art. 5 of the statute (these included, among others, drug selling, extortions and illegal trade of weapons). This construction proved to be of no practical significance as it was practically impossible to prove all the statutory features of the offence, and the new Polish Criminal Code from 1997 contained a totally new construction of the offence of money-laundering in which there was no reference to organised crime whatsoever. Therefore, when the code came into force on the 1st September 1998, the term «organised crime» became anew only a criminological concept, also used by law enforcement agencies (there are e.g. special police and prosecution units which are to fight organised crime), but not present in the statutory language of substantial criminal law.

The two terms which are used by the criminal law, i.e. criminal association and organised criminal group are therefore the only concepts which can be employed to describe the actual phenomenon of organised crime on legal grounds. This seems to be the proper solution, adopted also in many other countries. The French law forbids – in art. 450-1 of the Criminal Code – to participate in an «association de malfaiteurs» which means «any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment» and moreover it treats the fact that an offence was committed by a «bande organisée» (organised gang) as an aggravating circumstance in many cases (the organised gang means, according to art. 132-71 «any group formed or association established with a view to the preparation of one or more criminal offences, preparation marked by one or more material actions») [5, p. 763-793]. Also in the German Criminal Code the participation in organised criminal structures is treated in a similar way and the forbidden form of criminal organisation is described in § 129 as a criminal association (*kriminelle Vereinigung*) [5, p. 87-178] and a similar construction can be found in the Spanish criminal law as well, where the grouping of people for criminal or other illegal purposes constitutes the offence of participation in an illegal association (asociaciones ilícitas) according to art. 515 of the Spanish Criminal Code, while the participation and other form of activities connected with criminal organisations and groups constitute the offence described by art. 570bis and 570ter of the Spanish Criminal Code [5, p. 795-821].

Another legislative technique worth mentioning here is the one present in Italian Criminal Code. As Italy has known the phenomenon of mafia for many years, the law-maker decided to introduce two forms of punishable criminal organisations. One is the «ordinary» criminal association (associazione per delinquere), described in art. 416, another – a mafia-type association (associazione di tipo mafioso), described in art. 416bis, which is punished with more severe punishments and is more difficult to

prove as the characteristics of such a mafia-type association are described in the provision on the basis of Italy's experience with its mafias (hence the provision mentions the use of intimidation and the rule of omertà, which is typical of the Sicilian Cosa Nostra, while the other Italian criminal organisations – Camorra and 'ndrangheta are also explicitly mentioned). Yet, the legislative technique employed here means that, whenever it should be impossible to prove the features of a mafia-type association, there will remain the possibility of finding the accused guilty of participation in an «ordinary» criminal association [5, p. 641-675].

If one looks at the international law documents referring to organised crime, it becomes obvious that the term «organised crime» is mainly used to describe the phenomenon as such but the legislative part uses more precise terms. The best example is the United Nations Convention against transnational organised crime from 2000. The Convention uses the term «organised crime» many times – in its title and preamble and in the statement of purpose in art. 1 of the Convention (The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively). Yet, when it comes to the substantial criminal law part of the Convention the term used and defined is «an organised criminal group» [6, p. 90]. According to art. 2 section (a) this term refers to «a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit», while «structured group» refers to «a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure».

As can be seen, the definition used in the UN Convention is quite broad and encompasses in fact organised criminal structures that would not be considered manifestations of organised crime by many criminologists. This seems especially true of organised groups which have the aim of committing only one offence. And this again seems to be the only proper approach, as substantial criminal law should seek the minimum requirements for treating a given organised structure as such, while the court's task is to reflect the level of the organisation achieved and the seriousness of threat for the society in the punishment imposed on individual offenders for the participation in such a structure.

The modern Polish criminal law conforms to the above shown pattern and has in fact always conformed to it (the acceptance on the UN Convention did not require any changes in the criminal law). The main provision establishing the responsibility for different forms of activities connected with organised crime is art. 258 of the Polish criminal code. According to § 1 of art. 258 whoever participates in an organised group or association which have the aim to commit an offence or a fiscal offence is guilty of a misdemeanor punished with imprisonment from 3 months to 5 years. If the group or association is armed with weapons or intends to commit a terrorist-type offence, the punishment is from 6 months to 8 years of imprisonment. The establishing of or directing the organised criminal group or criminal association, including the one armed with weapons, is punished with imprisonment from 1 to 10 years (so it is still a misdemeanor according to the Polish criminal law) while analogous activities concerning a structure intending to commit a terrorist-type offence constitute a felony punished with imprisonment from 3 to 15 years. The Polish criminal law distinguishes between the so called common offences which are described by the criminal law and some other statutes and the fiscal offences (referring to acts against the financial interests of the state and other public bodies) which are regulated exclusively by the Fiscal Criminal Code and which are treated as a separate group, with a separate regime of responsibility and punishments.

It should be noted that the Polish criminal las has started to recognise terrorist organised groups fairly recently. Earlier the participation in such groups or association would have been treated as participation in a common criminal structure. The introduction of the concept of terrorist-type offences and the separate type of organised terrorist structures was connected with Poland's accession to the European Union and the need to conform to European law standards in the field of terrorism fighting,

which were then set out in the European Union **Council Framework Decision of 13 June 2002 on combating terrorism**. It should, however, be stressed that the Polish law-maker decided to use a different legislative technique than the one used in the framework decision and instead of adding a whole group of terrorist-type offences in the special part of the criminal code, he decided to introduce a broad concept of a terrorist offence in the general part of the code, so that a larger group of offences than in the framework decision could be considered «terrorist». The definition of a terrorist offence can be found in art. 115 § 20 of the Polish Criminal Code. According to it, an offence becomes terrorist when it is punishable by a maximum imprisonment of at least five years and if it is committed with the aim of: seriously intimidating many persons, compelling a public authority organ of the Republic of Poland or of another state or an organ of an international organisation to perform or abstain from performing certain acts, causing serious destabilisation in the political system or economy of the Republic of Poland, another state or international organisation. A threat to commit such an act should also be considered a terrorist offence [7, p. 157-170].

As far as the two main types of criminal structures are concerned, i.e. the organised criminal group and the criminal association, the law-maker, as has already been mentioned, has decided not to define these terms, leaving the task to the courts and criminal law doctrine. Generally, there seems to be no doubt that both types of structures have to consist of at least three members, both have to present some stability in time (so they cannot be randomly formed for the immediate commission of the offence) and both need to manifest some kind of structure (otherwise they could not be considered organised), while the main difference between them lies in the achieved organisational level – it is again uncontroversial that the criminal association is the higher organisational form, while an organised criminal group does not need to have a very precise structure and may be organised even rather loosely as long as it does possess some elements of organisational structure [8, p. 646-674].

It can be argued that the first step in analysing these two forms of organised structures should be to detect their minimal features without which a given group of persons can never be considered to have formed an organised criminal group or a criminal association. Therefore the one feature which distinguishes the two forms on this minimal level (as both need to have the characteristic features mentioned above) is the presence of a vertical structure which is necessary only in the case of a criminal association. In other words: no criminal structure can be labelled «criminal association» if it does not possess a leader, while an organised criminal group does not need to have a leader and may be organised horizontally – its organisational structure may manifest itself in the stable devision of tasks among its members who may make decisions «democratically» and have no formal leader. Of course, the bigger a given group is, the more organisational features may need to be detected, including the presence of leadership, to prove the organised character of such a group at all. It should be also mentioned that some of the Polish Appellate Courts have expressly stated in their decisions that an organised criminal group does not need to have a leader. (See the verdict of the Appellate Court in Kraków from 21 March 2001, II AKa 28/01 and from 16 February 2012, II AKa 252/11 as well as the verdict of the Appellate Court in Katowice from 8 December 2010, II AKa 181/10).

According to art. 259 of the Polish Criminal Code, a member of all types of criminal structures described in art. 258 may avoid punishment and criminal proceedings altogether if he voluntarily renounces his participation in such a structure and does one of the following: either discloses all important pieces of information about the committed offence to a prosecution organ or prevents the commission of an intended offence, including a fiscal one.

However, this option of avoiding punishment is not very often used in practice, as the meeting of the requirements set in art. 259 does not excuse the offender from responsibility for the offences he committed as a member of an organised criminal structure and it is difficult to meet the requirement of disclosing all important pieces of information referring to the commission of the offence from art. 258 without mentioning the offences committed by the members of such a structure [9, p. 557].

It should be also emphasised that in practice, since the introduction of the concept of an organised criminal group into the Criminal Code from 1969 (and then in the now binding code from 1997), this form of criminal organised activity has become almost the only one applied in the legal qualification by prosecutors and courts. As it is the broader concept of the two currently used be the law-maker, it as assumed that it is always easier to prove the features of an organised criminal group than the features of a criminal association. Hence the absolute predominance of that concept in the criminal justice practice.

The fact that offences are committed by organised structures results not only in the criminal responsibility for membership in such structures, but also leads to serious consequences connected with the punishment imposed for the offences committed by organised offenders. According to art. 65 of the Polish Criminal Code the court is obliged to use special punishment regime in case of three categories of offenders, i.e. the so called professional offenders (these are persons who made a constant source of their income of committing offences), offenders who committed an offence as members of a criminal organised group or a criminal association and offenders who committed a terrorist-type offence. All these offenders should be punished according to the rules provided for the so-called multi-recidivists, which means the possibility of imposing aggravated punishment on them and longer terms in prison to be served before conditional release can be granted (while one may generally be granted the conditional release from prison after serving the half of the imposed punishment, these offenders can be conditionally released after serving ¾ of their punishment). These more severe requirements for the conditional release refer also to those offenders who are only guilty of the offence of participation in a criminal organised group or a criminal association or of other forms of activity connected with such structures, i.e. establishing or directing them [10, p. 208-216].

On the other hand, since one of the main difficulties connected with organised crime fighting is the existence of strong loyalty between the members of such oragnisations, the Polish law-maker has also decided to introduce some incentives which could make some offenders willing to cooperate with the prosecutors and the courts. This aim is served by two main legislative solutions, one found in the Criminal Code and one in a separate statute. The first one, sometimes called «the little crown witness», is expressed in art. 60 § 3 and 4 of the Polish Criminal Code. According to § 3 – the court is obliged to use the extraordinary mitigation of punishment (which means that the punishment imposed has to be below the minimal punishment provided for a given offence), and may then even conditionally suspend such punishment in the case an offender who committed an offence together with at least two other persons and who discloses to a prosecution organ information referring to persons engaged in the commission of the offence and important circumstances of the offence. According to art. 60 § 4 the court may in turn, on the prosecutor's motion, use the extraordinary mitigation of punishment and may then even conditionally suspend such punishment in the case an offender who, besides the testimony he presents during his own trial, discloses to a prosecution organ and presents important circumstances, not known before, of an offence whose punishment exceeds 5 years of imprisonment.

The «big» or «real» crown witness is in turn regulated by a special statute from 25 June 1995 on the Crown Witness (before the acceptance of this statute, the institution of the crown witness had not been known in the Polish criminal law system). The offender who meets the requirements for becoming a crown witness can avoid conviction and punishment altogether if he decides to co-operate with the justice system and reveals all the information referring to the organised crime activity in which he was engaged. Getting the status of a crown witness is not possible in the case of offenders who took some part in the commission of a murder, who acted as provocateurs to offences covered by the statute (e.g. all offences connected with organised crime activities and some corruption offences) and those who established or directed a criminal organised structure.

It should be also stressed that the statute on the crown witness creates the legal basis for special forms of protection which can be granted to such witnesses and their families. It is therefore possible

not only to provide police protection for such persons but also to give them false identities and, in the most serious cases, even provide surgical operations which are to make it impossible to uncover their true identities.

It seems that on the substantial criminal law level the existing Polish regulations referring to organised crime form a sufficient complex of solutions for organised crime fighting. The way of describing the possible forms of organised criminal structures seems to be generally proper and it should be stressed as well that it is fully in accordance with the international standards and does not significantly differ from the solutions functioning in many other countries.

Conclusions. The article first discusses the problems of defining the concept of organised crime for the purposes of substantial criminal law. The Author argues that this term serves best the criminological needs, while substantial criminal law should use more precise terms like «organised criminal group». Then the solutions employed by the Polish law-maker are discussed against the background of some other national and international solutions with emphasis put on the fact that the existing substantial criminal law framework for fighting organised crime in Poland seems to be fully adequate for the needs of the criminal justice system.

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