

## **Duty to redress the damage as a probationary measure**

**by**

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Whereas probationary measures take various shapes in European legislations, their essence comes down to withholding the sentencing or deferring the execution of a penalty of imprisonment subject to the placement of the perpetrator under probation while unincarcerated.

In Polish criminal procedure, the court may subject a convicted accused to so-called measures entailing the placement of the perpetrator under probation<sup>2</sup>, including but not limited to conditional discontinuation of criminal proceedings (Article 67 § 3 k.k.) and conditional suspension of the execution of the penalty (Article 72 § 2 k.k.).

The judicial imposition on the convict of the duty to redress in whole or in part the damage done by the crime is a probationary measure. Article 67§ 3 k.k. contains clear language as the mandatory imposition on the convict of the duty to redress the damage, if any, where at the same time the prerequisites of conditional discontinuation of the proceedings or conditional suspension are met. The court always rules on the duty to redress damage *ex officio* and the imposition of such duty may solely be effected by a judicial pronouncement. On the other hand, where the penalty is conditionally suspended, the court may impose on the convict the duty to redress the damage in whole or in part. On the other, where the execution of the penalty is suspended conditionally, the court may impose on the convict the duty to redress the damage in whole or in part.

The duty to redress the damage is provided for in international law to safeguard the interests of the victim in criminal law. It is necessary to mention the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985 and Council of Europe Committee of Ministers Recommendation No. R(85) 11 to the Member

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<sup>2</sup> Chapter VIII of the Polish Criminal Code of 6 June 1997 (Dz.U.97.88.553, z późn. zm. /Journal of Laws 97.88.553 as amended/) (hereinafter the "k.k.").

States on the position of the victim in the framework of criminal law and procedure of 28 June 1985. Those two instruments stress the necessity for compensation and restitution primarily from the perpetrator of the offense from which the damage arose.

In Polish legal doctrine, two main functions of the duty to redress the damage are distinguished: the restitutive function and the preventive-formative one.

The main purpose of the duty to redress damage under Article 67 § 3 k.k. and Article 72 § 2 k.k. is to coerce the convict to remedy the harm caused by the crime committed. Where the convict fails to discharge the duty pending the probation period, procedure leading to the execution of the suspended penalty or resumption of the suspended proceedings will be commenced with regard to the convict.

"In accordance with the tenor of Article 67 § 3 k.k., where conditionally suspending the criminal proceedings, the court shall: first – impose on the perpetrators the duty to redress the damage solely when the damage in respect of the victim's goods arose as a result of the crime they committed. Second – the said duty is incumbent on the court solely when such damage as of the time of conditional discontinuation of the criminal proceedings is still in existence."<sup>3</sup>

Where the damage arose as a consequence of the perpetrator's act<sup>4</sup>, "the court, by virtue of the norm of Article 72 § 2 k.k. may impose on the convict the duty to redress the damage unless the court has ordered the punitive measure of which mention is made in Article 39 point 5 k.k. ( duty to redress the damage or recompense the wrong sustained), but solely to the extent the said damage has not been recompensed. Furthermore, it is also beyond doubt that the, "damage which the duty to redress may be placed on the perpetrator by the court is solely the equivalent of the actual damage arising directly from the crime and not more remote (not directly tied to its commission) consequences of the act."<sup>5</sup> In deciding the matter, it is necessary to be guided by expediency, while first of all one of the chief tasks of criminal law is to recompense the damage sustained by victims of crime.<sup>6</sup>

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<sup>1</sup> Judgment of the Supreme Court of 16 May 2002, docket no. III KK 189/02, Lex no. 53327.

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<sup>1</sup> Gostyński, Z., *Obowiązek naprawienia szkody w prawie karnym*. Warsaw: Wydawnictwo Prawnicze, 1999, p. 132 et seq.

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<sup>1</sup> Judgment of the Supreme Court of 9 July 2008, docket no. III KK 137/08, Lex no. 436369.

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Where the damage has been redressed it is not necessary to impose the duty, the damage having been remedied and thus no longer existing. This is because the debt owed to the victim by virtue of having done damage extinguishes upon the victim's receipt of due monetary restitution, regardless who recompensed the damage and for what reason. Existence of the damage as at the time of the judgment is a prerequisite of the adjudication of the duty to redress the damage. The same damage may not be redressed twice unless it was not redressed in whole the first time.<sup>7</sup>

Furthermore, it is also beyond doubt that that damage which the duty to redress may be placed on the perpetrator by the court is solely the equivalent of the actual damage arising directly from the crime and not more remote (not directly tied to its commission) consequences of the act.

The damage the court requires the perpetrator to redress, "is the equivalent of the actual damage arising directly from the crime and it is not permitted in assessing it to have regard to such components and elements of the damage as arose from the consequences of the act, e.g. interest."<sup>8</sup> It is therefore beyond doubt that the court may not require the suspect to redress the above above the said equivalent.<sup>9</sup>

Furthermore, "the duty to redress the damage done by the crime, which the court imposes in suspending an adjudicated penalty of imprisonment, encompasses redress of the damage (in whole or in part) solely to the extent the said damage has not been recompensed. The duty here being described may concern solely those components of the damage which are directly connected with the commission by the perpetrator of the attributed crime and not those which arise from more remote consequences of the act."<sup>10</sup>

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<sup>7</sup> Marek, A., *Kodeks karny. Komentarz*. Wolters Kluwer, 2010, *Lex – komentarz do art. 72 Kodeksu karnego, teza 10*.

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<sup>7</sup> Stefański, R.A., *Gloss to the judgment of the Supreme Court of 9 July 2008, II KK 137/08*, *Probacja* 1, 2009, p. 146.

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<sup>7</sup> Judgment of the Supreme Court of 4 February 2002, docket no. II KKN 385/01, Lex no. 53028.

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<sup>7</sup> Judgment of the Supreme Court of 27 February 2002, docket no. IV KK 15/08, Lex no. 354823.

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<sup>7</sup> Judgment of the Supreme Court of 18 April 2007, docket no. III KK 470/06, Lex no. 262685.

The criminal law consequences of the imposition duty to redress damage as imposed in connection with conditional discontinuation of criminal proceedings or conditional suspension of the penalty arise in result of a final judicial pronouncement having a constitutive character. In accordance with the tenor of Article 67 § 3 k.k. and Article 72 § 2 k.k., the court rules *ex officio* on the duty to redress the damage as a probationary condition. The victim may move to impose the duty to redress the damage as a probationary condition. In such a situation, for the court, the motion may serve as a statement wherein the victim indicates the extent and form of redress. While not binding on the adjudicating authority, it is not without significance to the court's determination of the manner of redress. If, however, the victim does not narrow down the grounds for imposition of the duty, does not indicate the character thereof, being content solely to require redress of the damage, then the court should, in recognition of the victim's entitlement to make dispositions of the initiative in this respect, hear the request under Article 46 § 1 k.k. and not Article 72 § 2 k.k., as long as the prerequisites of the cited Article are met. Apart from the victim also the public prosecutor (*prokurator*) may come with the motion for redress of the damage as a probationary measure, being entitled to come with relevant motions in respect of probationary measures.

The imposition of the duty to redress the damage requires determination of the extent of the said duty, bearing in mind, however, that criminal law does set out the rules determining it. Detailed conditions of the imposition of the duty to redress the damage in criminal proceedings require account to be made of diverse circumstances capable of reducing the extent of the duty.

"The duty to redress the damage under Article 67 § 3 k.k. is based on the same principles as the civil law obligation and the value of the performance may not exceed the value of that obligation."<sup>11</sup>

Provisions of criminal law enable the imposition of the duty to redress the damage as a probationary measure, while, "it is also beyond doubt that that damage which the duty to redress may be placed on the perpetrator by the court is solely the equivalent of the actual damage arising directly from the crime and not more remote (not directly tied to its commission) consequences of the act, e.g. interest."

"The court, adjudicating under Article 72 § 2 k.k. the duty to redress the damage, in its judgment sets out also the time and manner wherein the said duty shall be discharged."<sup>12</sup>

In accordance with the tenor of Article 415 § 5, second sentence, of the Code of Criminal Procedure<sup>13</sup> (hereinafter the "k.p.k."), vindictive damages or the duty to redress the damage or recompense the wrong sustained is not imposed where the claim arising from the commission of the crime is the subject of different proceedings or has been the subject of a final ruling. In the jurisprudence of the Supreme Court, it is also pointed out that the prohibition arising from Article 415 § 5 k.p.k., second sentence, refers to each statutorily defined criminal law obligation to redress the damage, and therefore also the one set forth in Article 72 § 2 k.k.<sup>14</sup> In light of the above, the "prohibition arising from Article 415 § 5 k.p.k., second sentence, refers to each statutorily defined criminal law obligation to redress the damage, and therefore also the one set forth in Article 72 § 2 k.k. and Article 75 § 2 point 1 of the former k.k. Breach of that procedural provision results in the necessity to reverse the adjudication made in that regard as flagrantly unjust."<sup>15</sup>

Adoption by the court of the duty to redress the damage as a probationary measure is a solution of great advantage to the accused. Conditional discontinuation of the proceedings doubtless has many benefits for the perpetrator of the crime committed. The judgment conditionally discontinuing the proceedings, whether passed under Article 341 § 5 k.p.k. or under Article 414 § 1 k.p.k., is not a conviction. Furthermore, the accused has no obligation to plead guilty where this measure is applied. It is also beyond doubt that a person in whose respect criminal proceedings have been discontinued conditionally may not be regarded as one punished for a crime. In light of a procedural situation so beneficial to the perpetrator, with the simultaneous awareness that failure to comply with the probationary measure imposed in the form of redress of the damage will cause the trial to begin anew, redress of the damage by the perpetrator should take place the way it was determined by the court. Polish Criminal Code equips the court with an opportunity to have significant formative impact on

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<sup>1</sup> Resolution of the Supreme Court of 24 May 2005, docket no. I KZP 17/05, Lex no. 148690.

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<sup>1</sup> Polish Code of Criminal Procedure of 6 June 1997. (Dz.U.97.88.553, z późn. zm. /Journal of Laws 97.88.553 as amended/)

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<sup>1</sup> Judgment of the Supreme Court of 23 November 2006, docket no. IV KK 328/06, OSNKW no. 2, item 14.

Judgment of the Supreme Court of 18 June 2009, docket no. IV KK 145/06, OSNKW 2009, no. 9, item 77.

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<sup>1</sup> Judgment of the Supreme Court of 17 February 2011, docket no. II KK 20/11, Lex no. 785279.

the convict throughout the entire duration of the probation term. Thus conditional suspension of the execution of the penalty may be shaped in the ruling in accordance with the objectives of probation. Imposition of duties on the convict throughout the probation term is left in the discretion of the court, which may impose on the convict the duty to redress the damage in whole or in part. Imposition of the said duty within the framework of the probation term entailed by conditional suspension of an adjudicated penalty is precluded where the court has adjudicated the duty to redress the damage as a punitive measure (Article 39 point 5 k.k.) or has required the perpetrator to disburse the benefit mentioned in Article 39 point 7 k.k. Failure to discharge the adjudicated duty constitutes basis for (optionally) ordering the execution of the adjudicated penalty.

In practice it happens that a convict fails to comply with the duty to redress the damage. In such circumstances of the case, the court is obliged to consider whether the convict's avoidance of the redress is culpable. This is due to the fact that failure to discharge the imposed duty, e.g. due to objective difficulties or obstacles may not constitute basis of resumption of the proceedings may not constitute the basis for resumption of the proceedings if no ill will has been found in the perpetrator.<sup>16</sup> Moreover, "failure to comply with the duty to redress the damage, where arising from objective causes, may not constitute the premise justifying an order that a suspended penalty of imprisonment be served."<sup>17</sup>

The concepts set out above should successfully induce perpetrators of crime to redress the damage.

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16 Order of the Supreme Court of 12 October 1988, docket no. V KRN 212/88, OSNPG 1989, no. 3, item 44.

17 Order of the Supreme Court of 25 June 1996 r., docket no. V KKN 44/96, Lex no. 26350.