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The Construct of Strict Liability in Criminal Law of England and Wales in the Context of Polish Legal Regulations on the Subjective Element in the Structure of a Prohibited Act

Konstrukcja odpowiedzialności zobiektywizowanej (strict liability) w prawie karnym Anglii i Walii na tle polskich uregulowań elementu podmiotowego w strukturze czynu zabronionego

ABSTRACT

The construction of strict liability has been for years one of the most controversial concepts in the field of substantive criminal law in common law countries. While the very idea of basing the liability of an individual of a repressive nature on a regime based on strictly objective assessments seems to stand in opposition to the principles of criminal law that are fundamental to Western systems, such as the individualization of liability and the principle of guilt, at the same time, the use of the construct discussed may bring about considerable instrumental benefits, especially with regard to the protective function of criminal law. The article discusses the concept of strict criminal liability as developed in the system of England and Wales and presents the position that this concept occupies in relation to the classic for Anglo-Saxon countries, a two-element approach to the structure of a prohibited act, based on the correspondence of both objective and subjective components, and then transfers the considered problems onto the Polish criminal law plane in order to analyse the possibility of adapting an analogous construct in the statutory regulation of the subjective side of a prohibited act. In addition, the article

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presents the thesis that the advantages of strict liability may support the modification of the national approach towards a partial resignation from the requirements of the presence of a specific subjective element in the psyche of the perpetrator of a prohibited act in relation to all its objective features.

Keywords: strict liability; subjective side; prohibited act; individualization of liability; principle of guilt; criminal law

INTRODUCTION

For years, the construct of strict liability developed in the criminal law regime of England and Wales – probably like no other concept from the general part of substantive criminal law – has been generating interest among commentators from the common law world, sparking vivid academic debates and provoking extremely diverse opinions. On the one hand, the very idea of basing liability of an individual of a repressive nature on a regime close to risk seems to stand in opposition to the grounding principles of criminal law, such as individualization of liability and the principle of guilt. On the other hand, however, one may argue that the application of the construct in question may entail by no means negligible instrumental benefits for contemporary criminal justice systems, especially in relation to the protective function of criminal law operating in the areas of social life where the activity of an individual may potentially involve considerable threats to the interests of the community, and the criminal sanctions provided for by law are not particularly significant (e.g. the areas of traffic safety, occupational safety).[1]

This article seeks to present the construct of strict liability as it exists in the criminal law system of England and Wales and determine the placement of this construct in relation to the classical, dual take on the structure of a prohibited act based on the correspondence of its objective and subjective components. That aim is accompanied by the aspiration to transfer the deliberations concerning strict liability onto the Polish criminal law plane in order to analyse the possibility of adapting an analogous construct in the statutory regulation of the subjective side of a prohibited act.

Having regard to the objective so formulated, the next parts of this study shall comprise, first of all, a synthetic overview of various definitional approaches as regards strict liability, developed over the years in the opinions of English legal commentators and case law, especially focusing on the currently prevailing and favoured formal understanding of this concept. Then, the next part of the paper concerns the principles that govern the reconstruction of elements of a prohibited act based on strict liability, as developed in British criminal law, and finally the

[1] See L.L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, "Cornell Law Review" 1993, vol. 78(3.

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author embarks on an analysis transposed onto the plane of applicable provisions of the Polish Penal Code,[2] in particular as regards Article 9 PC, and requirements that follow therefrom in the scope of coinciding elements of the subjective and objective side of an offence. As will be argued, the advantages of strict liability may militate for a modification of the Polish approach in favour of a partial abandonment of the requirements for the presence of a specific subjective element in the perpetrator's psyche in relation to all objective features of a prohibited act, especially as regards the types of acts of lesser gravity.

DIVERGENT VARIANTS OF STRICT LIABILITY

As pointed out in the British literature on the subject, the controversy that has arisen in the last few decades over the use of strict liability in the criminal law of England and Wales and other countries belonging to the common law legal culture has been largely due to the noticeable conceptual confusion in the opinions of legal academics and commentators over the very term used to describe the construct in question. It is worthwhile to mention the work of S.P. Green who – in his well--known essay from 2005 – indicates that the single term "strict liability" is used in English and American literature to refer, in fact, to a wide range of divergent legal institutions depriving the structure of an offence and the conditions of criminal liability of culpability elements to a greater or lesser extent. This author identifies six different contexts in which the term "strict liability" is used in legal doctrine, as well as in judicature – cited here for the sake of clarity.[3]

The first meaning of strict liability, as recognised by S.P. Green, is the formal one – which links the concept in question to the manner of reconstructing the set of elements of a prohibited act.[4] In this sense, the term "strict liability offences" will be construed as denoting those offences whose typization explicitly or implicitly omits the requirement of the existence of a specific component of *mens rea*, i.e. the subjective element that corresponds to one or more objective elements of a given act. In the sense discussed, acts based on the concept of strict liability will therefore be simply those whose normative structure assumes criminal liability of the perpetrator irrespective of the existence of a certain mindset towards the committed act as a whole or some of its objective components.[5]

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[2] Act of 6 June 1997 – Penal Code (consolidated text, Journal of Laws 2020, item 1444, as amended), hereinafter: PC.

[3] See S.P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, [in:] *Appraising Strict Liability*, ed. A.P. Simester, Oxford 2005, pp. 1–2.

[4] See *ibidem*, pp. 2–4.

[5] See A. Ashworth, *Should Strict Criminal Liability Be Removed from All Imprisonable Offences?*, "Irish Jurist" 2010, vol. 45; idem, *Principles of Criminal Law*, Oxford 1991, pp. 135–136.

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As regards the formal meaning of the concept of strict liability, for the purpose of further analyses, it is necessary at this point to highlight yet another important distinction voiced in the literature of common law countries, namely the distinction between the construct of impure strict liability and pure strict liability (absolute liability).[6] The former concept will denote here the construct of a type of a prohibited act involving *mens rea* elements – referring, however, only to a part of the *actus reus* elements, while with regard to the remaining components of the objective side (most frequently those concerning the result or the object of the activity), the fulfilment of the corresponding subjective element is not essential in order to ascribe the commission of a prohibited act. It should be pointed out that said variant of strict liability is by far the most common in practice, with its application exemplified by the type of a prohibited act laid down in Section 5 (1) of the Sexual Offences Act 2003, pertaining to sexual intercourse with a minor under the age of 13, *expressis verbis* stipulating the requirement of intentionality on the part of the perpetrator with regard to the conduct feature, however omitting the subjective element concerning the age of the minor.[7] Absolute liability, on the other hand, denotes an extreme variant of strict liability, where the structure of a given type of a prohibited act does not provide for any elements of a subjective nature, thus, indeed, reducing the content of the sanctioned norm to a description of the behaviour itself, bringing about a specific effect or prohibited state of affairs by the action of the perpetrator.[8]

However, as has already been pointed out, the application of the concept of strict liability is not limited to the aforesaid formal meaning, and the term itself is sometimes used in the opinions of legal academics and commentators also in the context of various legal constructs going beyond the sphere of reconstruction of a prohibited act, which S.P. Green, in his work, gathers under an umbrella term of substantive strict liability.[9]

The aforesaid constructs include, first of all, normative solutions eliminating the possibility of the defendant to invoke certain defences excluding criminal liability by negating the fulfilment of *mens rea* elements required by a given type of a prohib-

[6] See S.P. Green, *op. cit.*, p. 3; G.R. Sullivan, *Criminal Law: Theory and Doctrine*, Oxford 2003, p. 167.

[7] Section 5 (1) of the Sexual Offences Act 2003 (UK Public General Acts 2003 c. 42): "A person commits an offence if – (a) he intentionally penetrates the vagina, anus or mouth of another person with his penis, and (b) the other person is under 13". As regards the aspect of strict liability in terms of the feature of the impact object under this provision, see *R v G (Appellant)* [2008] UKHL 37.

[8] The examples of such a far-reaching application of the strict liability model are scarce in the literature on the subject. See *R v Larsonneur* [1933] 24 Cr App Rep 74.

[9] See S.P. Green, *op. cit.*, pp. 10–11. The distinction between the formal and the substantive meaning of strict liability has also been pointed out by other authors. See K.W. Simons, *When Is Strict Criminal Liability Just?*, "Journal of Criminal Law and Criminology" 1997, vol. 87(4).

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ited act. An example of this type of institution may be found in regulations governing the issue of voluntary intoxication, present in some state law systems of the United States of America, which exclude the possibility of considering non-pathological intoxication as precluding the imputation of the required subjective element of the offence.[10] A similar in essence regulation was developed in the case law of England and Wales following the ruling in *R v Majewski* where the principle was adopted that the incapacity of the perpetrator to perceive the significance of an act caused by voluntary intoxication does not constitute a circumstance precluding the commission of an offence which does not require specific intent.[11] Despite the fact that the solutions cited here do not in themselves eliminate subjective features from the structure of the type of a prohibited act, in view of the effective weakening of the principle of guilt, they are treated by some representatives of English and American legal science as forms of strict liability.[12]

Moreover, the term "strict liability" is also used in reference to legal presumptions, which allow for inferring the fulfilment of the required elements of the subjective side from the existence of certain circumstances of an objective nature.[13] As indicated in the literature on the subject, such constructs – also relatively frequent in the law of England and Wales – are often combined with procedural solutions which provide for shifting the burden of proof for certain exonerating circumstances onto the defence in criminal proceedings.[14] An example of the use of such a normative structure may be found in a type of a prohibited act specified in Section 169A (1) of the Licensing Act 1964[15] concerning the supply of alcoholic beverages to persons under the age of 18.[16] The provision in question is commonly interpreted as based on the construct of strict liability with regard to the element of the age of

[10] See J.H. Peterson, *The Voluntary Intoxication Defense in Florida: A Question of Intent*, "Stetson Law Review" 1984, vol. 13(3). See also *Montana v Egelhoff* [1996] 518 US 37.

[11] See *R v Majewski* [1977] AC 443.

[12] See S.P. Green, *op. cit.*, p. 5. On the sidelines of the above, it seems legitimate to conclude that with regard to the Anglo-Saxon doctrine's consideration of legal solutions related to voluntary intoxication as forms of objective responsibility, interesting analogies can be drawn with the discussion still present in Polish legal science in the context of the interpretation of Article 31 § 3 PC. On the interpretation of Article 31 § 3 in terms of objectivising responsibility, see J. Lachowski, *Przejawy obiektywizacji odpowiedzialności karnej w k.k. z 1997 r.*, "Studia Prawnicze" 2006, no. 1.

[13] See S.P. Green, *op. cit.*, p. 6, considering an example from American law.

[14] See F. Picinali, *Innocence and Burdens of Proof in English Criminal Law*, "Law, Probability and Risk" 2014, vol. 13(3–4).

[15] As amended by Section 1 of the Licensing [Young Persons] Act 2000 (UK Public General Acts 2000 c. 30).

[16] Section 169A (1) to (3) of the Licensing Act 1964 (UK Public General Acts 1964 c. 26): (1) A person shall be guilty of an offence if, in licensed premises, he sells intoxicating liquor to a person under eighteen. (2) It is a defence for a person charged with an offence under subsection (1) of this section, where he is charged by reason of his own act, to prove that he had no reason to suspect that the person was under eighteen. (3) It is a defence for a person charged with an offence under subsection

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the minor, while at the same time allowing for the possibility of exonerating the perpetrator from criminal liability in the event of demonstrating on his part the absence of a knowing violation of the rules of due diligence in the sale effected (Section 169A (2) to (3) of the Licensing Act 1964). In this case, therefore, while the structure of the type of a prohibited act does not entirely ignore the subjective element, the reversal of the burden of proof effectively relieves the prosecution of the obligation to establish at trial the existence of a certain form of a mental mindset as regards the act on the part of the perpetrator.

In the context of substantive formulations of the strict liability concept, it should also be emphasised that the criminal law of England and Wales traditionally provides for a clear distinction between categories of the subjective side of a prohibited act in the form of recklessness and negligence. At the same time, unlike in the context of the present regulations of the Polish Penal Code, this dichotomy in the Anglo-Welsh system is also pertinent in terms of typization of offences by distinguishing separate types of offences by negligence and offences by recklessness.[17] While the current *mens rea* construct of recklessness, developed in case law, has not, since the clarification of the legal framework following from the judicial decision in *R v G and R*, aroused much controversy in the context of maintaining the standard of subjective guilt, requiring the element of predictability of commission of the prohibited act,[18] the negligence formula known in the English legal context is of a purely objective nature, focusing on the infringement of rules of prudent conduct in respect of legally protected interests, which a reasonable person in the given situation would be expected to observe.[19] As has been pointed out by some of the English legal academics and commentators, since the concept of negligence does not refer to the actual mental experiences on the part of the perpetrator of a prohibited act whatsoever – and since it is permissible to attribute negligence even to a person who is unaware of the circumstances making their conduct criminal, one may not speak here about adhering to the principle of guilt; in fact, offences by negligence should be treated as a category of strict liability offences.[20]

(1) of this section, where he is charged by reason of the act or default of some other person, to prove that he exercised all due diligence to avoid the commission of an offence under that subsection.

[17] See C. Bliźniak, *Specyfika regulacji mens rea w polskim kodeksie karnym na tle prawa krajów anglosaskich*, "Prokuratura i Prawo" 2018, no. 10.

[18] *R v G and R* [2003] UKHL 50. See A. Lewna, *Obiektywizacja odpowiedzialności za lekkomyślność w prawie karnym Anglii i Walii (spojrzenie komparatystyczne)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2018, no. 2.

[19] See *McCrone v Riding* [1938] 1 All ER 137. See also J. Herring, *Criminal Law*, London 2011, p. 75.

[20] See D. Husak, *Varieties of Strict Liability*, "Canadian Journal of Law and Jurisprudence" 1995, vol. 8(2); S.P. Green, *op. cit.*, p. 7.

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Finally, S.P. Green points out that the concept of strict liability is sometimes used in the opinions of English legal academics and commentators to denote violations under criminal law of the smallest gravity, often of a purely order-related nature. Under the substantive criminal law of England and Wales, which does not recognize systematically distinct categories of crimes and contraventions, such types of prohibited acts, referred to in the literature as regulatory offences or *malum prohibitum*, constitute a diverse and dispersed group with a common denominator being a relatively low degree of social harm and a low level of stigmatisation of perpetrators by the general public.[21] Leaving aside here the issues of precise delineation of boundaries as regards the category of regulatory offences[22] it should be stated that while a considerable part of these offences is constructed on the basis of strict liability in the formal sense, there are also those which require some form of *mens rea* on the part of the perpetrator (usually negligence). In his study, S.P. Green notes in this context the tendency of some of the English jurisprudence to generalise concepts and thus equate strict liability with regulatory offences or *malum prohibitum*, irrespective of the presence or absence of the subjective side element in the type of a particular prohibited act.[23]

Taking into account all the above-presented variants of the meaning of strict liability, preference should be given to the first-mentioned formal one, which links the concept in question to the way the elements of the type of a prohibited act are formulated. It seems legitimate to conclude that only the formal meaning so described remains sufficiently clear to constitute a useful tool for the purpose of conducting a dogmatic-legal analysis. This is because it clearly separates, on the one hand, the strict liability regime, and, on the other hand, the classic Anglo-Welsh model of criminal responsibility where the necessary requirement for attributing the commission of a prohibited act to the perpetrator is, at the very least, their failure to observe the standard of care required under the given circumstances from a reasonable person (i.e. the minimum standard of *mens rea* in the form of negligence). For these reasons, in the further parts of this paper, the concept of strict liability will be used in reference to the construct of a type of a prohibited act which lacks the subjective side element corresponding to at least one element of the objective nature.

[21] See A.P. Simester, *Is Strict Liability Always Wrong?*, [in:] *Appraising Strict…*, pp. 21–50.

[22] See S. Dimock, *The Malum prohibitum – Malum in se Distinction and the Wrongfulness Constraint on Criminalization*, "Dialogue" 2016, vol. 55(1); R. Glover, *Regulatory Offences and Reverse Burdens: The 'Licensing Approach'*, "Journal of Criminal Law" 2007, vol. 71(3).

[23] S.P. Green, *op. cit.*, pp. 8–9.

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THE POSITION OF STRICT LIABILITY IN RELATION TO THE CLASSIC STRUCTURE OF CRIMINAL RESPONSIBILITY IN THE ANGLO-WELSH LAW

As the British literature on the subject indicates, the concept of objective criminal responsibility, originally almost completely eliminated from the English legal regime in the course of the feudal law reforms, developed again in the second half of the 19th century, when the social and economic realities of the industrial revolution era urged Westminster legislature to find a new legal formula that would better secure interests of the general public, especially in relation to the dynamically changing economic relations and completely new types of human activity relating to the development of technology, that brought about previously unknown challenges in such spheres as security or public health. In the area of criminal law, a partial shift away from individualization of liability may be observed during the period in question.[24] It is at that point that the formulation of the basic assumptions of strict liability in its modern form took place in case law, and said assumptions to this day define the position that the construct of strict liability occupies in relation to the classic formula of criminal liability in the common law legal culture, expressed by the maxim: *Actus non facit reum nisi mens sit rea*.

A key turning point in the early development of the case law relating to the issue in question certainly dates back to the 1895 ruling in *Sherras v De Rutzen*,[25] a case involving the commission of a prohibited act provided for under Section 16 (2) of the then applicable Licensing Act 1872, which involved the unauthorised supply of alcoholic beverages by a person licensed to sell the like to a police officer on duty.[26] In that case, the court of first instance, referring to the lack of a direct reference in a provision of the criminal statute to the requirement of fulfilling any type of *mens rea*, opted for a purely objective interpretation of the indicated type of offence, thus holding that the arguments presented in the course of the proceedings by the defendant, which amounted to questioning the existence of any awareness on his part as to the official function of his customer at the time of the sale, are irrelevant for the attribution of criminal liability. However, the High Court, hear-

[24] See F.G. Jacobs, *Criminal Responsibility*, London 1971, pp. 93–96. On the social conditions underlying the development of strict liability constructs, see A. Norrie, *Crime, Reason and History*, London 2014, pp. 102–134.

[25] See *Sherras v De Rutzen* [1895] 1 QB 918.

[26] Section 16 (2) to (3) of the Licensing Act 1872 (UK Public General Acts 1872 c. 94): "If any licensed person-supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty unless by authority of some superior officer of such constable (…) shall be liable to a penalty not exceeding, for the first offence ten pounds, and not exceeding for the second or any subsequent offence twenty pounds. Any conviction for an offence under this section shall, unless the convicting magistrate or justices shall otherwise direct, be recorded on the license of the person convicted".

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ing the case on appeal by the defence, rejected this line of reasoning, attributing key importance to the direction of interpretation of the elements of the offence in a manner consistent with the principle of guilt, and thus deeming it necessary to incorporate an element of the subjective side into the structure of the type of a prohibited act, even in cases where no express statutory requirements exist in this respect. As vividly illustrated by a member of the bench of the High Court in the above-mentioned ruling: "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence".[27] It is therefore legitimate to conclude that already in the late 19th century British judiciary established the relation of the strict liability regime to the classical concept of criminal liability based on the coincidence of the objective and subjective elements of a prohibited act, adopting the principle of the primacy of subjective guilt manifested in the presumption as to the presence of the *mens rea* element in the structure of an offence.

The existence of the presumption in question has been repeatedly reaffirmed in the decades following *Sherras v De Rutzen*, and its contemporary formulation is most fully expressed by the ruling of the British House of Lords in *Sweet v Parsley*,[28] in the reasons for which Lord J. Reid, in relation to the interpretation of the Westminster Statute in the context of strict criminal liability, argued as follows: "(…) our first duty is to consider the words of the Act: If they show a clear intention [of the Parliament] to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that *mens rea* is required in one form or another. Such cases are quite frequent. But in a very large number of cases, there is no clear indication [in the Act] either way. In such cases, there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent (…) there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*".[29]

It should be noted, however, that the presumption favouring the presence of an element of the subjective side in the structure of the type of a prohibited act, which stems from the aforesaid line of case law, may be subject to two limitations in the English and Welsh criminal law. Firstly, the rules of literal interpretation may speak in favour of abandoning the requirement of full correspondence between the *actus reus* and *mens rea* elements, thus allowing for the conclusion on

[27] Cited by P. Jamieson, *A Question of Criminal Guilt – Mens Rea Under Animal Protection Law*, "The University of Queensland Law Journal" 1988, vol. 15(1), p. 75.

[28] See *Sweet v Parsley* [1970] AC 132.

[29] As cited in The Law Reports (Appeal Cases), http://www.worldlii.org/uk/cases/UKHL/1969/1.html (access: 2.2.2022).

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the strict liability in respect of a specific type of a prohibited act to be drawn from the express wording of the criminal law act.[30] Secondly, also in cases where the literal interpretation of a given provision fails to provide unambiguous outcome as to the requirements of *mens rea*, the adoption of the strict liability construct will be admissible when the use of other methods of reasoning – taking into account the subject matter of a given legal act – leads to the disclosure of a clear intention of the legislator in this respect.[31] In order to carry out a comprehensive analysis of the role of strict liability in the area of the substantive criminal law of England and Wales, it is vital to refer to auxiliary criteria developed in case law, used for assigning a given type of a prohibited act to the regime of strict liability in cases raising interpretation doubts.

The issue of interpretative tools by which the intention of the legislator to place a particular type of offence within the ambit of strict liability may be inferred from a provision of a criminal law act was addressed in a synthetic manner by the adjudicating panel of the Privy Council in the ruling issued in *Gammon (Hong Kong) Ltd v Attorney General for Hong Kong*,[32] where several categories of factors relevant for the purposes such an interpretation were noted. According to the ruling, it is first crucial to determine whether the type of the prohibited act in question is *mala in se* or rather falls into the category of regulatory offences. In the case of regulatory offences, it is more likely that Parliament's intention was to construct liability on a strict liability basis.[33] It seems legitimate to conclude that apart from the nature of the subject of regulation, which in the case of *malum prohibitum* does not directly concern the protection of fundamental legal interests of an individual nature, the degree of social stigma attached to conviction for a specific act may be relevant in the context discussed. The second auxiliary criterion invoked by the Privy Council is the existence of a specific social interest in the prosecution of certain categories of prohibited acts. Thus, if a given type of offence entails a threat to important interests of general public character, this fact justifies its interpretation as a strict liability offence.[34] Moreover, the level of the criminal sanction provided for is im-

[30] As it seems, such a situation occurs with regard to the type of offence – already mentioned in the earlier part of this study – under Section 5 (1) of the Sexual Offences Act 2003 where a clear distinction was made between the conduct element intended by the perpetrator and the object element subjected to strict assessment, by placing the above-mentioned elements of *actus reus* in two separate drafting units of the provision, providing at the same time a clear indication as to the condition of intentionality with respect to only one of them.

[31] See *B (A Child) v Director of Public Prosecutions* [2000] 2 AC 428 (HL).

[32] *Gammon (Hong Kong) Ltd v Attorney General for Hong Kong* [1985] AC 1 (HL).

[33] However, it is worth pointing out again in this context that the category of regulatory offences as such – or more specifically the precise delimitation of its scope – poses difficulties for English legal academics and commentators. See J. Horder, *Strict Liability, Statutory Construction and the Spirit of Liberty*, "Law Quarterly Review" 2002, vol. 118(3).

[34] See also *Alphacell Ltd v Woodward* [1972] AC 824 (HL).

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portant in this context, on the assumption that the higher the limits of the criminal punishment, the less likely the legislator would be inclined to construct liability for a given type of a prohibited act on the basis of strict liability.

The general conclusion that can be drawn from the considerations presented in this part of the paper is that while the construct of strict liability is relatively broadly used in substantive criminal law of England and Wales, its role in relation to the typical model of responsibility based on the correspondence of the subjective and objective elements of an act may be described as a subsidiary, and the main area in which this concept is used remains – at least generally – the area of criminal law offences of the least gravity, threatened primarily with relatively mild non-custodial sanctions and being of an order-related nature. Subject to certain exceptions concerning impure strict liability (as in the case of offences against sexual freedom involving minors), the sphere of regulatory offences construed in this way also pertains to the fundamental arguments raised in the literature on the subject in favour of retaining said construct in the English system, pointing out the prevalence of instrumental benefits associated with the use of strict liability for the economics of the justice system and the function of protecting the interests of the general public over guarantee considerations.[35]

CORRESPONDENCE OF SUBJECTIVE AND OBJECTIVE ELEMENTS OF A PROHIBITED ACT IN POLISH LAW AND THE PROBLEM OF A PARTIAL WAIVER OF SUBJECTIVE SIDE REQUIREMENTS

Contrary to the regulations discussed in the previous parts of this study, which are in force within the ambit of the substantive criminal law system of England and Wales, in the 1997 Penal Code the Polish legislator adopted, as a rule, a formula of coincidence of the subjective and objective side of a prohibited act, referring – in the wording of the provisions of Article 9 §§ 1 and 2 PC – the forms of the subjective side defined therein to the entirety of a "prohibited act", i.e. conduct with the features defined in the criminal law act (Article 115 § 1 PC). A similar conclusion should also be drawn from the provisions of Article 8 PC, which defines the subjective side of offences against the background of their division into felonies and misdemeanours without allowing for a waiver of the requirement as to the occurrence of a specific form of the perpetrator's mental attitude towards the act, even in reference to a part of its objective elements.[36] Moreover, accepting the assumptions of a comprehensive theory of guilt – which allows for recognising a double location of intentionality and unintentionality (in the structure of a prohibited act and in

[35] See A.P. Simester, *op. cit.*, pp. 25–30.
[36] See C. Bliźniak, *op. cit.*, pp. 137–143.

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guilt) – the conclusion about coincidence of subjective and objective side elements may also be drawn from the wording of Article 1 § 3 PC, which requires that guilt be present on the part of the perpetrator at the moment of the act.[37] Despite the apparent clarity of such a normative construction, it is pointed out in the literature on the subject that the issue of coincidence of subjective and objective elements of the perpetrator's conduct may potentially generate difficulties from the point of view of establishing the conditions for criminal liability. As regards intentionality, J. Lachowski notes that the awareness of the perpetrator (being a component of this form of the subjective side) may encompass some of the elements of the objective side far before the element describing a conduct belonging to a given type of a prohibited act materialises and at the moment of acting some of these elements may not necessarily be reflected in the psyche[38], which, so it seems, is not in complete harmony with the rules of correspondence set out in the wording of Article 9 PC. On the other hand, if it would be established that certain objective elements have been realised only after the conduct element materialised, the lack of coincidence of two categories of features of a prohibited act type may in effect render it impossible to ascribe intention, and thus liability for an intentional offence.[39]

Further problems relating to the thus construed coincidence of the subjective and objective side elements of a prohibited act arise when considering the issue of actual complexity of mental phenomena, synthetically presented in the wording of Article 9 PC. In particular, regard should be given to the view expressed in the Polish criminal law doctrine that while in the context of intentionality the scope of the perpetrator's awareness must cover all the elements of the factual situation reflected in the objective features of the type, this condition is not always applicable to the scope of volitional components of intention.[40] Elements of will, expressed in the Penal Code wording as "wanting" and "agreeing", indeed denote mental phenomena which by their very nature may concern only those elements of reality which the perpetrator may influence with their conduct. Thus, the perpetrator's will in fact refers only to the materialisation of the conduct element of the type of a prohibited act in the conditions determined by the remaining objective elements

[37] See J. Lachowski, *Strona podmiotowa czynu zabronionego*, [in:] *System Prawa Karnego*, vol. 3: *Nauka o przestępstwie. Zasady odpowiedzialności*, ed. R. Dębski, Warszawa 2017, p. 561. For a different approach, see A. Barczak-Oplustil, *Zasada koincydencji winy i czynu w Kodeksie karnym*, Kraków 2016, pp. 18–19, who precludes linking the principle of coincidence of the subjective and objective side of the act with the content of Article 1 § 3 PC, which seems to result from the presented pure normative theory of guilt.

[38] See J. Lachowski, [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, LEX/el. 2020, theses for Article 9 PC.

[39] See T. Kaczmarek, *Sporne problemy umyślności*, [in:] *Umyślność i jej formy*, ed. J. Majewski, Toruń 2011, pp. 33–37.

[40] See J. Lachowski, *Strona podmiotowa…*, p. 557.

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within the scope of his awareness. It is only with this proviso that one may speak of the intentionality of committing a prohibited act, if the perpetrator has no real impact on the remaining, not conduct-related elements of the factual situation, but only has the will to attack a legally protected value, the features of which are reflected in his psyche.[41] Such a view, although well-established in the opinions of Polish legal academics and commentators, seems to fail to fully correspond with the wording of Article 9 PC which relates "wanting" or "agreeing" to the entirety of the prohibited act (the argument following from the literal interpretation of Article 9 § 1 PC: "A prohibited act is committed intentionally if the perpetrator has the intention to commit it, i.e. wants to commit it or, foreseeing the possibility of committing it, agrees to it" [emphasis – A.L.]). The foregoing leads to the conclusion that the principle of coincidence of the subjective and objective side elements should not be treated in absolute terms, which leaves room for considering the possibility of partially waiving the requirements in the area of occurrence of a specific mental mindset of the perpetrator towards the committed act. There are several categories of arguments in favour of such a modification.

The first one is the role that the adaptation of strict liability could play in the context of strengthening the protective function of criminal law, operating in those spheres of social life that are related to threats to important legally protected values of a collective nature. As already mentioned in the preceding sections of this paper, historically, the most important reason justifying the introduction of strict liability into the criminal law of England and Wales was the consideration of public safety problems. Even today, in the criminal law of Anglo-Saxon countries, the doctrine of strict liability is still applicable primarily in situations where the interest of the general public justifies special concern for a particular protected value in such areas as public health, construction, transport, food production or environmental protection. The use of this construct, particularly in the context of complex economic activities, makes it possible to shift the burden of risk associated with a specific, socially dangerous undertakings onto entities best placed to prevent infringements effectively.[42] Since civil law often determines the liability for damages in such cases on an objective basis in the tortious regime, and since the possible costs associated with such liability are an inherent element of the economic risk, there is no reason why criminal law instruments should not also be used in a similar manner.[43] They can serve to complement civil law regulations in cases where there is an important

[41] *Ibidem*, p. 562 and the literature cited therein. See also I. Andrejew, *Ustawowe znamiona czynu. Typizacja i klasyfikacja przestępstw*, Warszawa 1978, p. 206.

[42] See G. Richardson, *Strict Liability for Regulatory Crime: The Empirical Research*, "Criminal Law Review" 1987 (May).

[43] See A.P. Simester, *op. cit.*, p. 29.

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public interest to do so, or where private parties do not have adequate means to effectively enforce their rights through civil litigation.[44]

The above-mentioned argument is directly connected to the next one: the partial resignation from the requirements as to the presence of a subjective element in the structure of an offence may serve to halt the erosion of criminal law as observed today by the literature on the subject, which takes place by shifting penalisation of certain categories of acts from the sphere of broadly understood criminal law to the sphere regulated by administrative law (i.e. the expansion of the set of behaviours specified by the legislator as administrative infringements, punishable by administrative penalties, coupled with a simultaneous reduction of the set of behaviours specified as crimes or contraventions).[45] As rightly indicated in this context by W. Zalewski, reasons for this peculiar phenomenon of "punitivisation" of administrative law, which has both a quantitative (according to some estimates presented in the literature from the beginning of the present century, one could distinguish provisions regulating the imposition of fines or other sanctions of this type by administrative authorities, sometimes with a high repressive potential, in almost 50 parliamentary statutes being in force in Poland – including environmental law, anti-monopoly law, road traffic regulation, construction law, energy law or pharmaceutical law)[46] as well as qualitative dimension (the introduction of Section IVa titled "Administrative Monetary Penalties" to the Administrative Procedure Code in 2017)[47] lay, among other things, in the criticism of the classical, subjectivist model of criminal liability based on mental elements of culpability and in the crisis of guilt identified as an individual moral charge.[48] From the point of view of the state's interests, operating administrative sanctions instead of criminal penalties is easier and faster, there is greater control of the central authorities over their adjudication, and budgetary gains from their imposition are potentially bigger.[49] Being largely based on objective principles, liability for an administrative infringement is thus an attractive alternative to liability for a criminal offence.[50] However, the phenomenon in question raises significant concerns with regard to the protection of the rights of individuals, whose possibilities to defend themselves against arbitrariness of

[44] *Ibidem*, p. 30.

[45] See M. Bogusz, *Delikt administracyjny i kara administracyjna z perspektywy konstytucyjnej*, [in:] *„Administratywizacja" prawa karnego czy „kryminalizacja" prawa administracyjnego?*, eds. M. Bogusz, W. Zalewski, Gdańsk 2021, pp. 20–24 and the literature cited therein.

[46] See D. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004, pp. 119–136.

[47] Act of 7 April 2017 amending the Act – Code of Administrative Procedure and certain other acts (Journal of Laws 2017, item 935).

[48] See W. Zalewski, *Administratywizacja prawa karnego*, [in:] *„Administratywizacja" prawa karnego…*, pp. 89–91.

[49] *Ibidem*, p. 96.

[50] See D. Danecka, *Konwersja odpowiedzialności karnej w administracyjną w prawie polskim*, Warszawa 2018, pp. 67–69.

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the authorities (especially in the case of administrative regulations providing for a high degree of bureaucratic discretion, e.g. with regard to determining the level of financial penalties) are very limited in administrative proceedings.[51] The question of securing the enforcement of the right to court, derived from Article 45 (1) of the Constitution of the Republic of Poland of 2 April 1997,[52] also remains problematic, if one takes into account the scope of judicial review of administrative decisions concerning the imposition of penalties by public authorities, limited exclusively to the criterion of the decision's compliance with the law.[53] In this context, it is legitimate to conclude that the modification of criminal legislation towards the adoption of a limited concept of strict liability within the Polish legal framework (assuming objective assessments only in relation to certain, strictly defined elements of the offence), especially in the context of types of prohibited acts of a more regulatory nature, the commission of which is not associated with significant social stigmatisation, would make it possible to secure important instrumental benefits in the sphere of procedural economy, however without simultaneous resignation from the whole criminal law regime and a number of guarantees associated with it. After all, as rightly indicated in the English literature, the creation of types of offences without subjective components excludes the necessity to prove before the court the existence of *mens rea* on the part of the perpetrator at the time when he or she committed the act, which, in turn, makes it possible to significantly simplify the proceedings and shorten their expected duration, reducing costs.[54] Such a modification would, of course, imply a fundamental remodelling of the existing paradigm of criminal responsibility by limiting the possibility of invoking factual defences against a criminal charge, related to the existence of a certain form of mental attitude towards the act on the part of the perpetrator, but as far as the coherence of the legal system is concerned, this solution seems, from a broader perspective, more desirable than moving the penal function entirely outside the area of criminal law.

Natural difficulties relating to the observance of appropriate standards of proof, occurring in relation to mental phenomena accompanying the perpetrator's conduct, provide additional arguments in favour of the above-mentioned partial resignation from the element of the subjective side in the structure of a prohibited act. After all, since by their very nature, internal psychological processes at the moment of

[51] See K. Czichy, *O niestosowaniu gwarancji karnych do administracyjnych kar pieniężnych*, "Prokuratura i Prawo" 2018, no. 12.

[52] Journal of Laws 1997, no. 78, item 483, as amended, hereinafter: the Polish Constitution. English translation of the Polish Constitution is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.5.2023).

[53] See J. Turski, *Administracyjne kary pieniężne w świetle Konstytucji RP – wybrane zagadnienia*, "Zeszyty Naukowe Wyższej Szkoły Administracji i Biznesu im. Eugeniusza Kwiatkowskiego w Gdyni" 2014, no. 20, pp. 169–172.

[54] See A.P. Simester, *op. cit.*, p. 26.

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committing an act may only be established in the course of criminal proceedings by means of secondary evidence,[55] findings in this respect, as compared to the fulfilment of other features of the type, are burdened with a relatively high risk of miscarriage of justice. In this context, it has been long pointed out in the literature of the common law countries that the concept of strict liability, by waiving the requirement in question, makes it possible to achieve a situation where the content of a court judgment corresponds more closely to what is actually properly established with evidence in criminal proceedings, while at the same time limiting the likelihood of judicial errors.[56]

When considering the possibility of adapting the construction of impure strict liability in Polish criminal law, the problem of a potential conflict of this institution with the provisions of the Polish Constitution cannot be overlooked. Bearing in mind the limited nature of this study, which does not allow for an exhaustive discussion of all the issues arising in this context, the Article 42 (1) of the Polish Constitution should be referred to, according to which criminal liability is imposed only on a person who committed an act prohibited under penalty by the law in force at the time when the act was committed. This principle does not preclude the punishment of an act which, at the time it was committed, constituted an offence under international law. It is worth noting that it is not clear from the quoted formula of the Polish Constitution that criminal responsibility in the Polish legal order may be based exclusively on the principle of guilt. However, such an interpretation has emerged both in the jurisprudence of the Constitutional Tribunal and in the doctrine. As an example, one may cite the view of A. Zoll, according to whom the principle of guilt derives from the individualization of responsibility, which in turn may be derived from the wording of Article 42 (1) of the Polish Constitution and Article 1 § 1 PC ("Criminal liability is imposed only on the one who (…)" [emphasis – A.L.]).[57] In turn, the Constitutional Tribunal in its judgment of 3 November 2004 (K 18/03) derives the principle of *nullum crimen sine culpa* directly from the notion of an "act" contained in Article 42 (1), at the same time claiming that "any repressive liability must refer to this premise of reprehensibility, which is the possibility of lawful behaviour" and that "the constitutional condition for repressive liability is the possibility of a lawful behaviour and the avoidance of sanctions".[58] It seems that by speaking of "reprehensibility", the Tribunal here captures the essence of guilt,[59] and thus at the same time

[55] See M. Królikowski, [in:] *Kodeks karny. Część ogólna. Komentarz do artykułów 1–116*, eds. R. Zawłocki, M. Królikowski, Legalis 2021, theses for Article 9 PC.

[56] See A.P. Simester, *op. cit.*, p. 27.

[57] See A. Zoll, *Kodeks karny. Część ogólna*, vol. 1: *Komentarz do art. 1–116*, Warszawa 2012, p. 54.

[58] Judgment of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK-A 2004, no. 10, item 103.

[59] See A. Zoll, *op. cit.*, p. 55.

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gives the principle of guilt the central importance on the grounds of the Polish legal order in relation to any regime of responsibility of a repressive nature.[60] It should be pointed out, however, that given the criticism that the Tribunal's reasoning, deriving the principle of guilt from the term "act", has met with in the doctrine,[61] it is possible to adopt an interpretation according to which the constitutional provision in question simply expresses the principles *nullum crimen, nulla poena sine lege anteriori* and *lex retro non agit*, without referring to the subjective factors determining criminal responsibility at all, let alone excluding only a partial waiver of them.

Finally, it is necessary to mention at this point the content of Article 42 (3) of the Polish Constitution, according to which everyone is presumed innocent until his or her guilt is established by a final court judgment. It seems that one may defend the view that this principle manifests itself mainly in the sphere of procedural guarantees of a fair trial. Thus, it is, as expressed by the Constitutional Tribunal in the judgment of 16 May 2000 (P 1/99): "A constitutional norm ordering the observance of certain rules of procedural conduct (…) addressed to everyone, in particular, the addressees of this directive are all public authorities".[62] The relevance of the provision under consideration thus primarily touches upon the plane of procedural criminal law (through the adoption of the principle *in dubio pro reo* and the imposition of the burden of proof on the prosecution), but not the substantive law. It is worth pointing out that a similar, limited conception of the presumption of innocence has also dominated British jurisprudence, seeking compatibility between strict liability and the content of Article 6 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the provisions of which were incorporated into the legal order of England and Wales by the Human Rights Act 1998.[63] In this sense, the presumption of innocence simply means that the burden of proving that the offender's conduct fulfilled the elements of a particular type of a prohibited act rests solely on the prosecutor, but the presumption itself does not indicate what the elements of the type should be. On the other hand, the essence of strict liability, in the formal sense, manifests itself precisely in the elimination of certain subjective elements from the structure of the offence, and thus in the determination of its features which are to be the subject of proof (or perhaps more precisely those which do not have to be proven) – in contrast to the presumption of innocence, which merely answers the question as to who is to provide proof.[64]

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[60] See B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 273.

[61] See J. Lachowski, *Wina w prawie karnym*, [in:] *System Prawa Karnego*, vol. 3: *Nauka o przestępstwie…*, p. 682; A. Zoll, *op. cit.*, p. 55.

[62] Judgment of the Constitutional Tribunal of 16 May 2000, P 1/99, OTK 2000, no. 4, item 111.

[63] Human Rights Act 1998 (UK Public General Acts 1998 c. 42).

[64] See G.R. Sullivan, *Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights*, [in:] *Appraising Strict…*, pp. 210–217.

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From this point of view, therefore, it is also possible to conclude, the adaptation of a limited strict liability construction would not be in clear contradiction with the Polish Constitution.

CONCLUSIONS

Summing up the above considerations, it should be noted that in Polish criminal legislation it is worth considering the possibility of introducing regulations similar to the English-Welsh construct of strict liability in its formal sense, particularly in the variant which assumes the absence of *mens rea* only with regard to certain precisely defined elements of the objective side a prohibited act. It seems that such a modification would render it possible to avoid the problems related to the coincidence of the subjective and objective elements of an act, as indicated in this study, while in the procedural sphere – allow for reducing the degree of arbitrariness inherently linked to proving that the subjective elements are fulfilled. This would also make it possible to at least partially curb the currently observed transfer of the penal function outside the sphere of criminal law to other branches of the law, in particular administrative law. At the same time, especially in relation to those categories of prohibited acts whose commission entails a relatively mild criminal sanction and a low degree of social stigmatisation of perpetrators, the benefits resulting from the application of strict liability may prevail over the risk of weakening the guarantee functions of criminal law.

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ABSTRAKT

Konstrukcja zobiektywizowanej odpowiedzialności karnej (*strict liability*) od lat należy do najbardziej kontrowersyjnych w doktrynie koncepcji z zakresu materialnego prawa karnego krajów kręgu *common law*. O ile sama idea oparcia odpowiedzialności jednostki o charakterze represyjnym na reżimie opartym o oceny ściśle obiektywne wydaje się stać w kontrze do podstawowych dla

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systemów zachodnich pryncypiów prawa karnego, takich jak indywidualizacja odpowiedzialności i zasada winy, o tyle z zastosowania omawianej tu konstrukcji mogą wypływać niebagatelne korzyści instrumentalne, zwłaszcza w odniesieniu do ochronnej funkcji prawa karnego. W artykule omówiono konstrukcję odpowiedzialności zobiektywizowanej występującą w systemie prawa karnego Anglii i Walii oraz zaprezentowano pozycję, jaką konstrukcja ta zajmuje w stosunku do klasycznego dla krajów anglosaskich dwuelementowego ujęcia struktury czynu zabronionego, opartego na korespondencji składników o charakterze przedmiotowym i podmiotowym, by następnie przenieść rozważane problemy na grunt polskiego prawa karnego w celu przeanalizowania możliwości zaadoptowania analogicznej konstrukcji w kodeksowej regulacji strony podmiotowej czynu zabronionego. Ponadto przedstawiono tezę, że wskazywane w angielskiej doktrynie zalety konstrukcji *strict liability* mogą przemawiać za modyfikacją krajowego ujęcia w kierunku częściowej rezygnacji z wymagań występowania w psychice sprawcy czynu zabronionego określonego elementu podmiotowego w odniesieniu do wszystkich znamion przedmiotowych.

Słowa kluczowe: zobiektywizowana odpowiedzialność karna; strona podmiotowa; czyn zabroniony; indywidualizacja odpowiedzialności; zasada winy; prawo karne

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