

MORALITY AS AN OBJECT PROTECTED BY CRIMINAL LAW

The concept of "morality" is synonymous with the Latin words *moralitas* and *mores*, referring to the Latin *mos* (*moris*), meaning "custom (habit), good and bad conduct, manners" [1]. This understanding of the word "custom" (understood as *mores*) is supported by J. Szczepański [2] and by K. Kwaśniewicz who holds that custom comprises "norms of behaviour recognized by the community and expressed in moral terms" [3]. According to J. Grad, the authors who propose such definitions take the popular assumption that a certain set of moral activities (and sometimes their entirety) is an objective equivalent of morality (hence a separate, special term to denote this complex of moral activities) [4]. Moreover, morality, unlike custom, which is usually approached in "behavioural" terms, is situated in the "spiritual" realm (sphere of "spiritual values"). For this reason, subjective concepts are used in relation to morality, unlike to custom. Usually, when defining morality, it is about norms, orders, prohibitions, rules and moral values [5], which is why such a relationship between custom and morality often results in considering them as tantamount. This is reflected in the interchangeable use of morally-focused expressions: "moral" – "decent", "immoral" – "indecent" [6]. According to M. Ossowska, "Despite the mutual character of interaction between law and morality, morality is undoubtedly more a determinant for law than a factor determined by it" [7]. The relationship between law and morality has developed differently across different cultures and historical periods. K. Imieliński refers to sexual morality based on the principles of general morality, but being a set of principles, norms and assessments that evaluate sexual conduct in detail. In his opinion, in forming this morality, one should take into account the fact that in an ideologically diverse society there is no universally binding code of moral norms or uniform stereotypes of norms of sexual behaviour, as is the case with legal norms. The groups and subgroups existing within society may promote various, sometimes contradictory, values and norms of conduct, prohibitions and orders, which may result in a conflict regarding the normative system [8]. K. Imieliński states that "The social forms and moral content of interpersonal relations have always been dependent on or even determined by the nature of the social order that existed each time and the corresponding prevailing morality expressed in the system of moral norms and values. Thus, general and sexual moral principles, norms and values have an objective foundation in the form of the social order existing at a particular stage of historical development. Society-specific regulations of the coexistence between both sexes are established in the form of moral principles that

correspond to the new social order. These principles and in general norms and values reflect moral awareness, which – as a form of social awareness – determines the quality of people, their mutual relations and behaviour, and helps solve moral problems in accordance with individual and social needs” [9]. The relation of moral norms to legal norms can be described, following J. Kluza, as the crossing relationship, because not all ethical principles are reflected in legal regulations. As the author points out: “For criminal law, this convergence is even more limited, as the purposes of criminal sanctions, aimed primarily at protecting legal goods specified by the legislature, differ fundamentally. However, since the system of positive law has a certain core and is rooted in the historical cultural heritage, certain connections between criminal law and morality are necessary” [10].

The issue of legal good has been repeatedly discussed by Polish criminal law scholars. K. Buchała pointed out that "Values, upon becoming an object of protection of criminal law norms, become legal goods" [11], and a legal good should be understood as "that social value which is protected by the sanctioned norm" [12]. Legal good was defined in a similar manner by M. Cieślak, according to whom it is "an important social value" [13], as well as other authors who refer to social values when characterizing legal good [14]. This understanding of legal good results in morality becoming a statutory equivalent of public morality, created as a result of the legislature's decision and included in the statutory criteria of crime. According to A. Sakowicz, it allows concluding that "the protection of morality – a vague legal good – has its source in social values" [15]. Morality in the aspect of sexual offences is aimed at establishing a moral order, it is an arbitrary legal good relativised to moral principles [16]. As M. Filar puts it, morality remains in a close context with morals as a general and abstract social good [17], while J. Warylewski claims that it is an expression of moral norms functioning in society and deserves protection only to the extent to which it does not infringe upon individual rights guaranteed by the system of national law and international conventions [18]. In view from the above, one should support introducing a distinction between the concepts of "morality" and "morals" (although many authors still consider them tantamount) [19]. "Morality" are good and bad customs, which can be more broadly defined as a set of moral actions (behaviours). "Morals" are certain values that fall within the concept of "morality", but do not by themselves constitute the basis for their assessment in criminal-law terms, unless the starting point supporting the criminalization of this value is also the protection of a certain good. Only a material and actual threat or violation of a specific good, causing a specific and concrete social harm, can constitute a basis for criminalisation. It should also be borne in mind that the actual reasons for criminalisation and the justification presented for it may coincide or not. This may have resulted from the fact that these reasons are sometimes consciously concealed or are not fully realised by the legislature [20].

In addition to sexual freedom, morality is a generic object of protection for sexual offences described in Chapter XXV of the Polish Criminal Code. According to the traditional approach, the subject of protection of sexual crimes was the so-called sexual morality or even just the woman's honour and dignity, and it was only in the twentieth century that tendencies emerged to indicate sexual freedom as a good protected by criminal prohibitions concerning this category of crimes. In the explanatory memorandum to the government's draft Penal Code of 1997, it was pointed out that the reason for placing crimes against sexual freedom and morality in one chapter is that sexual freedom and morality – treated as separate legal goods – are usually attacked combined [21].

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UDC 343(043.2)

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FREEDOM AS A VALUE PROTECTED BY CRIMINAL LAW

Freedom occupies an important place among the values protected by the law; it appears to be one of the basic human values, and perhaps the most important next to life. Deprivation of human freedom appears to be one of the most drastic forms of restriction of human rights and freedoms, to be resorted to only in cases of extreme necessity [1]. Violations of freedom are condemned in every democratic social system on the basis of judgments derived from the oldest ethical principles. Freedom in its varied aspects is of interest to various branches of law - mainly constitutional, international, civil and criminal law.

The Constitution of the Republic of Poland establishes a number of civil rights and freedoms, stipulating, inter alia, in Article 31, par. 1, that human freedom is subject to legal protection, and in Article 41, par. 1, that everyone is guaranteed personal inviolability and liberty; deprivation or restriction of freedom may take place only on the principles and in the manner prescribed by a statute. Protection of personal inviolability (and freedom as well) is provided for by a number of provisions of the Civil Code, among which Article 23 of the Civil Code is of fundamental importance, stating that "Personal rights of a human being, such as in particular health, freedom, honour, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of the dwelling (...) remain under protection of the civil law irrespective of the protection provided by other provisions". According to Article 24 of the Civil Code, the person whose personal good is endangered by someone else's action may demand that this action be abandoned, unless it is not unlawful. In the case of an infringement, he can also demand that the person who committed the infringement perform actions necessary to remove its effects (in particular, that the person makes a statement of appropriate content and in appropriate form). In the Polish civil literature there are two views on the issue of defining freedom as a personal good. According to one of them, a narrower approach limiting freedom to the freedom of movement is justified, whereas according to the other (dominant) one it refers not only to the physical side of interaction, but also to the freedom from all prohibited pressures