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Extraterritorial Jurisdiction in the Law of Misdemeanour (a Comparative Analysis)

Jurysdykcja ekstraterytorialna w prawie wykroczeń
(analiza porównawcza)

1. Introduction

Legal systems are constantly evolving. Ever higher standards of behaviour are demanded by increasing knowledge of the world. Traffic rules, health and safety legislation, legal standards that bind manufacturers – social life is now largely formally regulated by legal instruments[2]. Regulatory norms are linked to a sanction in order to force individuals to comply with the restrictions[3]. This in turn results in the expansion of the law of misdemeanours[4].

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[2] The article was written as part of the research project *A New Model of Law of Contraventions. Theoretical, normative and empirical analysis*, funded by the Polish National Science Centre, grant number 2017/27/B/HS5/02137. M. Aebi, A. Linde, *Long-Term*..., p. 108.

[3] T. Vormbaum, *A Modern*..., p. 134.

[4] I. Kohler-Hausmann, *Managerial*..., p. 611. By this term is meant the branch of law that defines the way in which minor offences, characterised by low social harm or constituting an exception to the infringement of the administrative regulation, are punished. To avoid misunderstandings, it is worth recalling the words of Andrew Simester: "Unlike many European nations, the common law knows no systematic and clear distinction between 'true' crimes and regulatory or administrative violations. We lack formal categories such as the German Ordnungswidrigkeiten or the French contraventions" – A. Simester, *Preface*..., p. 10.

The above processes have been in parallel with the increase in globalisation and the integration. States decided to relax border controls and create common customs areas (the European Union is particularly prominent here[5]). International agreements began to regulate more and more issues[6].

The two phenomena influence each other: regulatory solutions are adopted at international level in the form of international obligations, which also include criminalisation issues. This raises the question as to what extent it is possible to speak of "internationalising" misdemenour law. Is it at all possible – in the sense of criminal offences – to speak of responsibility for misdemeanours committed abroad, or of conventional misdemeanours?[7] A critical analysis of the solutions in this area is the aim of this paper.

The subsequent argumentation is divided into five parts. The first characterises the class of misdemeanours as specific types of sanctionable acts. The second part addresses the issue of misdemeanour jurisdiction in the context of the limits of state authority. The third part contains comparative legal analyses, covering regulations relating to misdemeanours jurisdiction contained in eight legal systems. The fourth is devoted to the issue of a convention-based penalisation of a misdemeanour. The fifth section discusses the problem of the cross-border effectiveness of the penalties imposed.

2. Misdemeanours as a specific form of the criminal justice response

Legal systems distinguish misdemeanour (contravention) liability from criminal liability sensu stricto[8]. Legislators recognise that the class of punishable conduct includes baheviors that are beyond the reach of classical criminal rationalisation[9]. Indeed, the purpose of misdemeanour liability is different from that of criminal liability *sensu stricto*. In the

5 See inter alia D.R. Troitiño et al., *The EU*…

6 See inter alia S.J. Hoffman et al., *International*…

7 M.C. Bassiouni, *The Penal*…, p. 27; R. O'Keefe, *International*…, p. 162.

8 See Section 4. The exception to this is French law.

9 S. Thomas Petersen, *Why Criminalize*…, p. 17; R.A. Duff, *Answering*…, p. 83; R. Canton, *Theories*…, p. 12; B.E. Harcourt, *Mill's*…, p. 163; T. Hörnle, *PJA von Feuerbach*…, p. 137; M. Thorburn, *The Radical*…, p. 279; J.S. Mill, *On Liberty*…; A. Ashworth, L. Zedner, *Preventive*…, p. 14.

case of crime, the condemnation of the perpetrator is important – the punishment is largely justified by the evil caused by the act[10]. Of course, this does not preclude other rationalisations from coexisting, but here the reaction to harm or insult is dominant. As regards misdemenours, accountability is primarily aimed at enforcing regulatory norms. The latter will very often not be clearly anchored in axiology[11]. Failing to comply with them does not result in harming or offending. But at the same time, due to economies of scale, compliance with these administrative rules is cost-effective for society[12]. For example, parking on the grass of a city park once does not cause harm. If such a practice is allowed to take hold, the result may be the destruction of common space. In this sense, the law of misdemeanours aims to sanction violations of public order. Its character is not so much condemnatory as disciplinary[13].

Of course, it should not be overlooked that the group of misdemeanours also includes behaviour that may lead to harm[14] (vandalism, petty theft, etc.). Acts of this kind attack concrete interests, belonging to specific individuals. The sense of their criminalisation is therefore not reduced to a reaction to the mere infringement of a regulation whose observance is socially profitable. At the same time, however, the low degree of harm precludes the application of the same form of reaction as in the case of crimes *sensu stricto*[15].

This is not just an issue of order or terminology. To determine the possible scope of extraterritorial jurisdiction, it is important to know whether the misdemenour is a violation of public policy in the broad sense or whether it also violates a specific individual interest.

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10 See inter alia T. Brooks, *Retribution*..., p. 19; H.L.A. Hart, *Punishment*..., p. 12.

11 For example: the decision to reduce speed limits in cities and to introduce right-hand traffic does not have an axiological dimension, but a functional one. See M. Hildebrandt, *Justice*..., p. 44.

12 See inter alia S. Thomas Petersen, *Why Criminalize*..., p. 113; A. Sattar, *Criminal*..., p. 33; E.I. Kelly, *The Limits*..., p. 21; D. Husak, *Overcriminalization*..., p. 189.

13 M.D. Dubber, *Histories*...; A. Linklater, *Transformation*..., p. 146; M. Valverde P. O'Malley, *Foucault*..., p. 326. See also M. Foucault, *Discipline*...

14 For example: insult or petty theft.

15 A. Simester, A. von Hirsch, *Crimes*..., p. 35.

3. Extraterritorial jurisdiction over misdemeanours and the limits of state jurisdiction

When considering the question of misdemeanour jurisdiction, two assumptions have to be made. Firstly, by punishing the offence, states exercise the right to punish. The imposition of a penalty for a breach of the law is a pure manifestation of the *ius puniendi*[16]. Secondly, the right to punish is an exclusive competence of the state, derived from sovereignty[17]. That has further practical consequences. On the one hand, it is not possible for a non-state actor to hold an individual criminally liable or to introduce criteria for criminalisation (*sensu largo*). This can only happen based on delegated competence[18]. On the other hand, in exercising the right to punish, a state may not infringe the sovereignty of other states. A given state may prohibit the cutting of grass on Sundays and provide for a sanction for the violation of this rule. If such a prohibition is given the value of extraterritorial, universal validity, it will constitute a violation of the sphere of exclusive competence of foreign states.

In order to be effective across borders, penal provisions therefore needs to be built on one of two types of foundation. The state can either be in possession of the primary power or it can derive it from the fact of an agreement with other states to which it is entitled. In the context of misdemeanours, the above issues are at the forefront.

As said, class misdemenours fall into two categories. The first, which is broader, includes offences against public order, understood as a certain desired state of functioning of society. Their perpetrators do not directly violate individual legal interests – their behaviour does not cause harm. The second category consists of those types that have not been criminalised because of their lesser degree of social harm (e.g. petty theft). Here, the perpetrator's behaviour harms the interests of certain subjects.

Significant jurisdictional complications arise where the law of misdemeanours protects public order. This is due to the fact that two issues

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16 R.A. Duff, S. Green, *Philosophical*..., p. 127; K. Ambos, *Treatise*..., p. 101; A. Klip, *European*..., p. 239; G.P. Fletcher, *Basic*..., p. 10; M.D. Dubber, T. Hörnle, *The Oxford*...; A. Heinze, S. Fyfe, *The Normative*..., p. 14; S. Green, *The Authority*..., p. 134.

17 K. Ambos, *Punishment*..., p. 311; H. Satzger, *International*..., p. 1.

18 K. Ambos, *Treatise*..., p. 101; K. Ambos, *Punishment*..., p. 298; C. Pavel, *Divided*..., p. 36; A. Heinze, S. Fyfe, *The Normative*..., p. 17.

are linked together. First, the question of public order is an internal one. It does not tend to get discussed at the international level. In fact, public order is a reflection of the state of a particular social space, which is the desire of a particular society. As such, it is of a local character. Public order belongs to the sphere of exclusive powers from an international perspective[19]. As Dellavalle points out: „Generally speaking, an "ordered society" is a human community which is characterized by effective rules that make human interaction predictable. Understood in this sense, the assertion that "a society is ordered" does not imply any assumption concerning the ethical quality of the interactions that unfold within its boundaries."[20]. The line between what is tolerated and what constitutes a breach of public order is relatively free for each state to draw. The situations that states consider as such violations are largely cultural. The laws of states within the same cultural circle can be very different. For example, the drinking of alcohol in a park may be considered both a cultural practice (Germany[21]) as well as a behaviour that should be eradicated from the social space (Poland[22]). Public order is also local in the sense that an attack on such a good usually requires presence in a certain space. State cannot, within the limits of its own powers derived from sovereignty, regulate the conduct of individuals when they go abroad to act in this regard. Nor may they, within the limits of their own competences, impose penalties for offences against the public order of another state.

Secondly, the provisions defining the misdemenour against public order are often based on references, the content of which is linked to specific administrative acts, also in an open manner. In this situation, the constituent elements of the misdemenour cannot be determined without recourse to regulations of a strictly local nature. The provisions of the ordinance (prohibition of alcohol consumption in public places, prohibition of skateboarding, etc.) constitute the main content of the

19 K. Ziegler, *Domaine*…; D.P. Wood et al., *The Internationalization*…

20 S. Dellavalle, *Paradigms*…, p. 4.

21 Consumption of alcohol in public places is legal in Germany, although local regulations may impose certain restrictions – see inter alia: *Alkoholverbot*…

22 According to Article 14 paragraph 2a of the Polish Law on Upbringing in Sobriety, Dz.U. 1982, No. 35, item 230: "It is forbidden to consume alcoholic beverages in a public place, with the exception of places intended for their consumption on the spot, at points of sale of such beverages."

order or prohibition of conduct, which is only subsequently subject to a misdemeanour sanction.

The situation is somewhat simplified when the misdemenour affects the concrete interests of individuals, which can be protected by states according to the general principles of criminal jurisdiction. The state has the right to extend protection to its citizens, also using the *ius puniendi* in a broad sense[23]. Of course, this competence is not absolute. It will sometimes have to yield to the greater power of another state (whether to regulate or to criminalise)[24]. But it is self-executing and can be enforced without recourse to a delegation of competence. State X is entitled to punish perpetrator who committed petty theft abroad against its citizens. The violation of a concrete individual interest – even if the violation itself took place outside the country's borders – is an argument for granting the state the right to punish the offender. Even beyond its borders, the state protects the interests of its citizens.

As a result, there are two situations in which a state may hold an individual responsible for a criminal offence abroad. First, a state has an autonomous power to punish an offence committed abroad. The second situation is the delegation of such power by other states. Both options are used in the legal systems analysed.

4. Comparative analysis of extraterritorial misdemeanour jurisdiction

In practice, the punishment of a misdemeanour is not exclusively internal, despite the characteristics described above. Many countries have adopted solutions similar to those found in the context of criminal law *sensu stricto*. An analysis of the solutions found in eight legal systems belonging to the continental legal culture[25]: Poland[26], the Czech

[23] The protective principle is well known in international law – see inter alia K.S. Gallant, *The Protective*..., p. 409.

[24] D. Zając, *The Method*..., p. 27.

[25] Systems derived from Anglo-Saxon culture, based on a strong presumption of non-territoriality of rights, are left outside the scope of consideration – see inter alia W.S. Dodge, *Understanding*...; J.H. Knox, *A Presumption*...; R.M. Jackson, *Common*...

[26] Ustawa z dnia 20 maja 1971 r. – Kodeks Wykroczeń, Dz.U. 1971, nr 12, poz. 114. Hereinafter: the Polish Code.

Republic[27], Germany[28], Austria[29], Lithuania[30], Serbia[31], France[32] and Switzerland[33] allows us to make the following observations.

In almost all of the legal systems mentioned above, there is at least the possibility of punishment for misedemenours committed abroad. The only exception is French legislation. In France, the category of misdemeanours is included in the general category of offences. In accordance with the wording of Article 1 of the French Penal Code, this area separates 'crimes' – felonies, 'délits' – offences sensu stricto, and 'contraventions' – misdemeanours. This division is used consistently throughout the Code. It is also reflected in the scope of the jurisdictional provisions. The Criminal Code applies only to acts committed on French territory and on French vessels (flag principle[34]) for the category of 'contraventions'. Extraterritorial jurisdiction does not apply to misdemeanours, only to felonies and offences[35]. Liability for misdemeanours is strictly territorial under French law.

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27 Zákon o Odpovědnosti Za Přestupky a Řízení o Nich, Zákon č. 250/2016 Sb. Hereinafter: the Czech Code.

28 Gesetz Über Ordnungswidrigkeiten (OWiG). Hereinafter: the German Code.

29 Gesamte Rechtsvorschrift Für Verwaltungsstrafgesetz 1991. Hereinafter: the Austrian Code.

30 Lietuvos Respublikos Administracinių Nusižengimų Kodeksas. Hereinafter: the Lithuanian Code.

31 Serbian Law on Misdemeanours, Službeni Glasnik RS, Nos. 65/13 of 25 July 2013, 13/16 of 19 February 2016, 98/16 of 8 December 2016 (CC), 91/19 of 24 December 2019 (Other Law) and 91/19 of 24 December 2019, < https://Mpravde.Gov.Rs/Files/01-Law%20on%20Misdemeanours%20%202020.Pdf >. Hereinafter: the Serbian Code.

32 French Criminal Code, Code Pénal, 22.07.1992, FRA-1992-L-62828. Hereinafter: the French Code.

33 Bundesgesetz Über Das Verwaltungsstrafrecht (VStrR) Vom 22. März 1974. Hereinafter: the Swiss Code.

34 For example, according to the Article 113-2 of the French Code: "French Criminal law is applicable to all offences committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory." See also: Article 113-3 (ships), 113-4 (aircrafts).

35 Article 113-6 of the French Code omits the class of misdemeanours altogether: "French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed. The present article applies even if the offender has acquired French nationality after the commission of the offence of which he is accused."

In other legislations, the way the principles of extraterritorial jurisdiction are defined refers to solutions inherent in criminal law sensu stricto. However, each system refers to them differently.

The Swiss law goes the furthest, referring extensively to the Swiss Penal Code, essentially transferring penal solutions sensu stricto to misdemeanour law[36]. This is not the optimal solution. As has been said, the purpose of misdemeanour law is different from that of criminal law. The scope of the competence of the state is also different in this case. By way of example, the state has the power to prohibit its own citizens from having sexual intercourse with persons under the age of 15, even during stays abroad. But it does not have the power to order its citizens in such a situation to sort their waste according to its own standards. There is a risk of over-penalising a misdemeanour by transferring the rules of criminal jurisdiction to misdemeanour law. It may also be an encroachment on the sovereignty of foreign states.

Other jurisdictions surveyed followed an intermediate path. They reduce the complex solutions of criminal law in order to adapt them to the needs of the law of misdemeanours. Even though they differ in the details, it is possible to identify important common elements. In each of these legislations, the principle of territoriality is central[37]. It is linked to the principle of the flag and to the dependent areas (the maritime

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[36] Article 2 of the Swiss Code stipulates: "The general provisions of the Criminal Code apply to misdemeanours that are punishable under federal administrative legislation, unless this Act or the individual administrative law provides otherwise." ["Die allgemeinen Bestimmungen des Strafgesetzbuches gelten für Taten, die in der Verwaltungsgesetzgebung des Bundes mit Strafe bedroht sind, soweit dieses Gesetz oder das einzelne Verwaltungsgesetz nichts anderes bestimmt."]. It includes references to the Art. 3-7 of the Schweizerisches Strafgesetzbuch – Swiss Criminal Code.

[37] Austrian Code, § 2 (1): "Unless the administrative provisions stipulate otherwise, only administrative offences committed in the territory of the country are punishable" ["Sofern die Verwaltungsvorschriften nicht anderes bestimmen, sind nur die im Inland begangenen Verwaltungsübertretungen strafbar."]; Czech Code, § 3 (1): "Under Czech law, liability for a misdemeanour committed on the territory of the Czech Republic is assessed." ["Podle právního řádu České republiky se posuzuje odpovědnost za přestupek, který byl spáchán na území České republiky."]; Serbian Code, art. 7 (2): "The offender shall be sanctioned for a misdemeanour stipulated by the regulations of the Republic of Serbia if the misdemeanour is committed in the territory of the Republic of Serbia or if it is committed on board of a domestic ship or aircraft while being outside of the territory of the Republic of Serbia" [official translation].

economic zone, the continental shelf)[38]. In German[39], Polish[40] and Serbian[41] law, it is the only general principle of jurisdiction.

It applies to all misdemenours. Exceptions are created, referring to specific acts. The normative content of the principle of territoriality is here supplemented by a legal definition of the place where the offence was committed. It covers both the place of the offender's act and its effects in a broader sense (Poland[42], Czech Republic[43],

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38 Lithuanian Code, art. 4 (1): "A person who commits an administrative offence in the territory of the State of Lithuania or on board a vessel or aircraft flying the flag or insignia of the State of Lithuania shall be liable under this Code. In the cases provided for in the Special Part of this Code, a person who has committed an administrative offence in the economic zone of the Baltic Sea and the continental shelf of the Republic of Lithuania shall also be liable under this Code." ["Pagal šį kodeksą atsako asmuo, padaręs administracinį nusižengimą Lietuvos valstybės teritorijoje arba laive ar orlaivyje su Lietuvos valstybės vėliava ar skiriamaisiais ženklais. Šio kodekso specialiojoje dalyje numatytais atvejais pagal šį kodeksą atsako ir asmuo, kuris administracinį nusižengimą padarė Lietuvos Respublikos ekonominėje zonoje Baltijos jūroje ir Lietuvos Respublikos kontinentiniame šelfe."]

39 German Code, § 5: "Unless otherwise provided by law, only administrative offences committed within or outside the territorial scope of this Act on a ship or aircraft authorised to fly the federal flag or the nationality mark of the Federal Republic of Germany may be punished" ["Wenn das Gesetz nichts anderes bestimmt, können nur Ordnungswidrigkeiten geahndet werden, die im räumlichen Geltungsbereich dieses Gesetzes oder außerhalb dieses Geltungsbereichs auf einem Schiff oder in einem Luftfahrzeug begangen werden, das berechtigt ist, die Bundesflagge oder das Staatszugehörigkeitszeichen der Bundesrepublik Deutschland zu führen."]

40 Polish Code, art. 3: "§1 A person who has committed a misdemenour on the territory of the Republic of Poland, as well as on a Polish ship or aircraft, shall be liable under the rules set out in this Act. § 2 There shall be responsibility for misdemeanours committed abroad only if a special provision provides for such responsibility." ["§ 1 Na zasadach określonych w niniejszej ustawie odpowiada ten, kto popełnił wykroczenie na terytorium Rzeczypospolitej Polskiej, jak również na polskim statku wodnym lub powietrznym. § 2. Odpowiedzialność za wykroczenie popełnione za granicą zachodzi tylko wtedy, gdy przepis szczególny taką odpowiedzialność przewiduje."]

41 Serbian Code, art. 7 (3): "A misdemeanour offender shall be sanctioned for a misdemeanour committed abroad only where that is laid down by a law or a regulation."

42 Polish Code, art. 4 § 2: "The misdemeanour shall be deemed to have been committed at the place where the perpetrator acted or omitted to act, which he was obliged to do, or where the effect occurred or was intended to occur." ["Wykroczenie uważa się za popełnione na miejscu, gdzie sprawca działał lub zaniechał działania, do którego był obowiązany, albo gdzie skutek nastąpił lub miał nastąpić"].

43 Czech Code, § 3 (2): "A misdemeanour shall be deemed to have been committed on the territory of the Czech Republic if the perpetrator a) acted wholly or partly on the territory of the Czech Republic, even if the violation or threat to the interest protected by the law occurred or should have occurred wholly or partly abroad, or b) abroad if

Austria[44], Germany[45]). This gives the territorial principle a quasi-extraterritorial value. Two states may invoke it to punish the same act[46].

However, the predominance of the territorial principle does not exclude the extraterritorial penalization for misdemenours. Such a solution is adopted, but as an exception. The national systems have used different methods to this end, which have led to similar results

In order to establish extraterritorial liability for misdemenours, the German legislator has used an open-ended reference clause: "unless the law provides otherwise"[47]. The same is done in Serbian[48] and Austrian[49] law. The Polish legislator has specified that: "Responsibility for misdemenours committed abroad arises only if a specific provision provides for such responsibility". At the same time, Article 131 of the Polish Code stipulates that: "The provisions of Articles 119, 122 and 124 shall apply even if the offence is committed abroad". The enumerated provisions

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the violation or threat to the interest protected by the law occurred or should have occurred wholly or partly on the territory of the Czech Republic." ["Přestupek se považuje za spáchaný na území České republiky, jednal-li pachatel a) zcela nebo zčásti na území České republiky, i když porušení nebo ohrožení zájmu chráněného zákonem nastalo nebo mělo nastat zcela nebo zčásti v cizině, nebo b) v cizině, pokud porušení nebo ohrožení zájmu chráněného zákonem nastalo nebo mělo nastat zcela nebo zčásti na území České republiky."].

44 Austrian Code, § 2 (2) of the: "A misdemeanour is committed on domestic territory if the perpetrator acted or should have acted on domestic territory or if the result of the a misdemenour occurred on domestic territory." ["Eine Übertretung ist im Inland begangen, wenn der Täter im Inland gehandelt hat oder hätte handeln sollen oder wenn der zum Tatbestand gehörende Erfolg im Inland eingetreten ist."].

45 German Code, § 7: "(1) A misdemeanour is committed at any place where the perpetrator acted or, in the case of omission, should have acted, or where the result of the misdemenour occurred or, according to the perpetrator's imagination, should have occurred. (2) The act of a participant is also committed at the place where the elements of the misdemenour under the law authorising the imposition of a fine have been realised or, according to the perceptions of the participant, should have been realised." ["(1) Eine Handlung ist an jedem Ort begangen, an dem der Täter tätig geworden ist oder im Falle des Unterlassens hätte tätig werden müssen oder an dem der zum Tatbestand gehörende Erfolg eingetreten ist oder nach der Vorstellung des Täters eintreten sollte. (2) Die Handlung eines Beteiligten ist auch an dem Ort begangen, an dem der Tatbestand des Gesetzes, das die Ahndung mit einer Geldbuße zuläßt, verwirklicht worden ist oder nach der Vorstellung des Beteiligten verwirklicht werden sollte."].

46 This will be the case if, for example, the offender's conduct takes place on the territory of State X and the effect takes place on the territory of State Y.

47 German Code, § 5, cited above: "Wenn das Gesetz nichts anderes bestimmt".

48 Serbian Code, Art. 7 (3): "A misdemeanour offender shall be sanctioned for a misdemeanour committed abroad only where that is laid down by a law or a regulation."

49 Austrian Code, § 2 (1), cited above.

criminalise offences against property: theft, embezzlement, confiscation and destruction of property. A similar solution is introduced by the Czech Penal Code, where it provides for the liability of citizens for acts committed in a foreign country[50].

The solutions outlined above imply the co-existence of two elements: a general principle that introduces liability on a territorial basis, and exceptions that are defined on a point-by-point basis. Three points are worth mentioning.

The solutions outlined above were based on states' own competences and did not refer to delegation.

Secondly, the external effectiveness of the law on misdemeanours is introduced when the misdemeanour is an attack on a concrete interest attributed to an individual (property, dignity)[51]. This is not the case for misdemeanours that are purely administrative in nature and concern public order. This corresponds to the division of misdemeanours into two categories described above: public order misdemeanours and criminal misdemeanours[52]. Where misdemeanours are of a policing nature, the states exercise restraint and refrain from applying the law

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50 Czech code, § 3 (3): "According to the legal system of the Czech Republic, liability for a misdemenour committed abroad by a citizen of the Czech Republic or a stateless person with permanent residence in the Czech Republic, or by a legal entity or a natural person engaged in business activities with its registered office in the Czech Republic or at least with its activities or immovable property in the Czech Republic, shall be determined as follows [...]" ["Podle právního řádu České republiky se posuzuje odpovědnost za přestupek spáchaný v cizině státním občanem České republiky nebo osobou bez státní příslušnosti, která má na území České republiky povolen trvalý pobyt, anebo právnickou nebo podnikající fyzickou osobou, která má na území České republiky své sídlo nebo zde alespoň vykonává svoji činnost anebo zde má svůj nemovitý majetek, jestliže [...]".

51 For example above mentioned Polish regulations; also extraterritorial misdemenour jurisdiction in Czech law concerns behaviour attacking the honour and dignity of an individual, mentioned in § 7 (1) of Zákon o Některých Přestupcích, Zákon č. 251/2016 Sb.: "A natural person commits an a misdemenour by (a) injuring the honour of another by ridiculing or otherwise grossly insulting him or her, (b) injuring the health of another, or (c) intentionally disrupting civil coexistence by (1) threatening another with bodily harm, (2) falsely accusing another of a misdemenour, (3) committing an act of endorsement against another, or (4) committing any other abusive act against another." ["Fyzická osoba se dopustí přestupku tím, že a) jinému ublíží na cti tím, že ho zesměšní nebo ho jiným způsobem hrubě urazí, b) jinému ublíží na zdraví, nebo c) úmyslně naruší občanské soužití tak, že 1. jinému vyhrožuje újmou na zdraví, 2. jiného nepravdivě obviní z přestupku, 3. se vůči jinému dopustí schválnosti, nebo 4. se vůči jinému dopustí jiného hrubého jednání."].

52 M. Hildebrandt, *Justice*..., p. 43.

extraterritorially. From the point of view of the requirements of international law outlined above and the essential characteristics of the law of misdemeanours, the solution thus outlined appears to be optimal. It allows for a flexible adaptation of state policy to the requirements of international law by establishing the principle of territoriality as a basic rule and by defining exceptions to the extraterritoriality of the law linked to specific types of misdemeanours.

Thirdly, the catalogue of "extraterritorial" offences is linked to a personal criterion only in Czech law. This means that in other legal systems, the misdemeanour jurisdiction can also apply to foreign nationals without any special restrictions. This may lead to tensions in international relations[53]. The nationality of the victim was not considered by any of the systems analysed as a factor supporting the establishment of extraterritorial jurisdiction.

To the extent that they provide for extraterritorial prosecution, some countries also make reference to international regulations. For example, Section 3(3)(c) of the Czech Code provides for the criminalisation of offences committed abroad if "an international treaty forming part of the legal system of the Czech Republic so provides" (tak stanoví mezinárodní smlouva, která je součástí právního řádu České republiky). References to international law are also contained in Lithuanian law. Reconstructing the normative meaning of a provision formulated in this way – as regards the content of the obligation – is not obvious. The next section of this paper deals with this issue.

5. Extraterritorial misdemeanour jurisdiction based on international obligation

The extraterritorial penalisation of a misdemeanour may be based either on state sovereignty or on the delegation of powers. In the classical sense, delegation implies the transfer of a certain set of competences to another entity, combined with the renunciation of their exercise by the delegating entity[54].

The situation is different in the case of delegation of *ius puniendi*. In order to make the law of misdemeanours effective abroad, states do not

[53] D. Zając, *The Method*..., p. 47.

[54] C.A. Bradley, J.G. Kelley, *The Concept*..., p. 3; B. Iancu, *Legislative*..., p. 7.

stop enforcing the law themselves. They merely introduce the possibility (usually on the basis of reciprocity) of enforcing it in cases that would classically remain outside national jurisdiction. In fact, there is no transfer of jurisdiction to state X, but rather a renunciation of the recognition of a certain competence as exclusive by state Y. In this arrangement, State Y authorises State X to extend the penalization of a misdemeanour to the prosecution of certain conduct that traditionally falls within the jurisdiction of State Y. Such penalization would constitute a violation of the sovereignty of state Y in the absence of such authorisation.

This is done through international agreements. They take the form of a kind of 'implicit delegation' derived from the content of an international obligation. Misdemeanour law merely complements a specific legal standard that the parties undertake to implement. Here, the regulatory norms at the heart of the treaty provisions are followed by the punishment of a misdemeanour. To enforce compliance, states sometimes agree to prosecute perpetrators of violations. An international treaty may or may not oblige a state to criminalise certain conduct committed abroad. Three considerations are relevant.

Firstly, the individual is not under any obligation with regard to the content of the international agreement[55]. The state is obliged to implement the obligation. The behaviour of the individual cannot be judged in terms of the norm as defined by international law if it does not incorporate its provisions into its domestic legal system. This also applies to liability for misdemeanours.

Secondly, the mere fact that an international treaty is in place does not have any bearing on the possibility of cross-border prosecution. Such agreements do not usually aim at extending jurisdiction. The aim of states is merely to harmonise the standard of enforcement within their own national jurisdictions. This leads to convergence between national systems as regards how a misdemenour is punished. However, this does not automatically entail a change in jurisdiction. Each state is responsible for prosecuting the misdemeanour within its own jurisdiction.

Thirdly, the distinction between administrative, misdemeanour and criminal law sensu stricto is not used in international law. Analysing the content of international acts, two categories of repressive instruments

[55] J. Klabbers, *The Individual*..., p. 107; S. Gorski, *Individuals*...

can be identified: administrative and criminal. It is not clear to which of these categories the law of misdemeanours belongs, in particular whether the introduction of a penalty for a misdemeanour can be the fulfilment of the obligation to introduce criminal law instruments. The answer depends on the structure of the national legal system concerned by the implementation.

5.1. Penalisation of a misdemeanour as the fulfilment of an international obligation of a penal nature

International obligations may explicitly specify the obligation to consider a given type of conduct as an "offence". There are two possible situations here.

On the one hand, international obligations may explicitly require that certain conduct be considered "criminalised" as an offence or crime. In terms of substantive law, such obligations may require that the conduct in question be expressly made a criminal offence with a specific penalty (e.g. imprisonment) or a severe penalty. For example, under Article 13(1) of the Budapest Convention on Cybercrime: "Each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 2 through 11 are punishable by effective, proportionate and dissuasive sanctions, which include deprivation of liberty"[56]. Such a description of behaviour excludes the possibility of the fulfilment of an obligation by means of the punishment of a misdemeanour. The essence of a misdemeanour is the imposition of a relatively light penalty in a simple and rapid procedure. The penalty of imprisonment, even if it is imposed under this regime, is of short duration and therefore of a minor nature.

The national penalization of a misdemeanour can be a method of implementing an international obligation where the term "offence" is used – without any indication of the seriousness of the act or the nature of the penalty. Misdemeanour liability remains an offence *sensu largo*, at the interface between administrative law and criminal law[57]. Domestic legislation is characterised by a relatively high degree of nuance in this

[56] Council of Europe, Convention on Cybercrime, 23 November 2001.
[57] M. Mavany, *Das Strafrecht*..., p. 205; M. Hildebrandt, *Justice*..., p. 45.

respect, which is lacking in international law. From the perspective of international law, criminal liability is understood in a broad and general way, encompassing all forms that are classified as criminal sensu largo in domestic law. At the level of substantive law, there is no argument that misdemeanours can be classified exclusively as administrative measures. This depends solely on the decision of the national legislator.

At the level of procedure, the issue is more complex. International obligations requiring states to criminalise are supplemented by procedural provisions of a strictly penal nature (the principle of aut dedere aut iudicare, which requires the extradition of the offender if he or she refuses to be punished). For example, Article 22(3) of the Budapest Convention, already cited, states that: "Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in Article 24, paragraph 1, of this Convention, in cases where an alleged offender is present in its territory and it does not extradite him or her to another Party, solely on the basis of his or her nationality, after a request for extradition." This involves the use of extradition procedures. However, these are reserved for the most serious criminal behaviour. Usually it will not be possible to start an extradition procedure if the state decides to use the penalty for a misdemeanour. States may, of course, exceptionally introduce the possibility of extradition in the case of misdemeanours. This solution is quite rare. For example Austrian Code in § 2 (3) stiputales: "No one may be extradited to another state for an administrative offence, and a penalty imposed by a foreign authority for an administrative offence may not be enforced within the country, unless expressly provided otherwise in international treaties"[58]. If an obligation of a substantive legal nature has been linked to a procedural obligation of a strictly penal nature, its implementation as principle will require the application of criminal penalisation. Implementation involving punishment for an misdemeanour will be considered flawed in those jurisdictions that do not allow extradition in the law of misdemeanour. This is because it will not allow the full implementation of an international obligation that is complex in nature: material and procedural.

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[58] Austrian Code in § 2 (3) stipulates: "Niemand darf wegen einer Verwaltungsübertretung an einen anderen Staat ausgeliefert werden, und eine von einer ausländischen Behörde wegen einer Verwaltungsübertretung verhängte Strafe darf im Inland nicht vollstreckt werden, es sei denn, dass in Staatsverträgen ausdrücklich anderes bestimmt ist."

5.2. Penalisation of a misdemeanour as the fulfilment of an obligation of an administrative nature

Besides requiring criminal law instruments, international obligations also refer to administrative measures. An example of this is to be found, inter alia, in Article 22.1. of the Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse[59], where it stipulates: "Without prejudice to Article 28 and the right of Member States to provide for and impose criminal sanctions, Member States shall, in accordance with national law, provide for competent authorities to have the power to impose administrative sanctions and other administrative measures in relation to at least infringements of Articles 4 and 15." A similar obligation is laid down in Article 41 of the Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps: "Member States shall establish rules on penalties and administrative measures, applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. Those penalties and administrative measures shall be effective, proportionate and dissuasive."[60].

At the national level, there are essentially two models that are at work here. First, states could adopt an administrative liability model[61]. In this approach, the mere fact of a breach of certain rules is a prerequisite for the imposition of administrative sanctions. Secondly, it is possible to introduce liability based on the principle of fault, similar to criminal liability *sensu stricto*[62]. In practice, both solutions may exist simultaneously. The inclusion of a certain type of behaviour in a certain type of liability regime will depend solely on the will of the legislator. In both cases, the aim of the legislator is to put in place solutions aimed at the enforcement of law of a regulatory nature. Their observance is intended to guarantee a certain standard of public policy. In cases where an international obligation requires the state to carry out acts of an administrative nature, the

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59 Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on Transparency of Securities Financing Transactions and of Reuse and Amending Regulation (EU) No 648/2012.

60 Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on Short Selling and Certain Aspects of Credit Default Swaps.

61 A.P. Simester, *Is Strict*..., p. 42.

62 J.R. Spencer, A. Pedain, *Approaches*..., p. 250, 257, 285.

fulfilment of this obligation will be possible through the establishment of liability for misdemeanours.

With regard to the analysis of the international obligations in force in this area, two points should be borne in mind.

Firstly, administrative measures may also have an impact on the definition of forms of government response. The aforementioned Regulation on transparency of securities financing transactions and reuse, in Article 22.4f, states that: "in respect of a natural person, a maximum administrative pecuniary sanction of at least EUR 5 000 000 or, in Member States whose currency is not the euro, the equivalent in national currency on 12 January 2016". Simultaneously, Article 22.2 states: "The administrative penalties and other administrative measures taken for the purposes of paragraph 1 shall be effective, proportionate and dissuasive". Such a sanction, especially if correlated with the income criterion, could be successfully described in misdemeanour law.

Secondly, on the procedural side, the obligation to determine administrative measures is not supplemented by provisions on jurisdiction or the procedural principle of aut dedere aut iudicare. The contracting parties do not aim to ensure the absolute prosecution and punishment of those found to infringe the law. Rather, the states seek to ensure a uniform standard of protection, primarily by harmonising national practices. The difference in approach is not only of a technical nature. In the case of criminal law regulation, states aim to respond to wrongdoing. They want to punish a particular person, condemn his behaviour and change it for the future. In the case of administrative measures, the focus is on regulating the behaviour of individuals. The advantage of enforcing what needs to happen comes from economies of scale[63]. It is not cost-effective to deploy a significant number of resources to pursue administrative offenders in a foreign country. For the establishment of a certain standard of behaviour (e.g. compliance with traffic rules) it is sufficient that each contracting party enforces administrative liability within its territorial jurisdiction. This is also in line with the vision of public order as a value that can be defined locally.

[63] M. Hildebrandt, *Justice*..., p. 61.

5.3. Evaluation of the method of determination of the jurisdiction of the law of misdemeanours by reference to international law

A comparison of the content of national laws and international obligations reveals a paradox. National legislation openly refers to international law in order to establish extraterritorial jurisdiction over misdemeanours. At the same time, international law does not in fact include a rule with the normative content that is relevant from the perspective of the reference. International agreements do not provide for extraterritorial law enforcement.

On the one hand, where international law explicitly requires penalization as an offence with extraterritorial jurisdiction, the obligation is linked to the procedural solutions appropriate for criminal liability sensu stricto (extradition). It excludes implementation by amending the law of misdemeanours.

On the other hand, there is virtually no element of extraterritorial effectiveness of the regulation where international law imposes obligations with respect to administrative sanctions (see Article 22 of the EU Regulations cited above). As a result, it is difficult to identify the provisions of international law to which the national provisions, which are an indication of the provisions of the convention, would refer.

In such a situation, the reference to international law is more likely to be seen as a kind of safety valve. Just in case international law so requires, the solution provides for the possibility of extending the punishment of a misdemeanour to conduct committed abroad. However, it is not optimal for two reasons.

In the first place, international obligations, in so far as they lay down the obligation to prosecute and to punish, will always require explicit implementation. As we have already seen: The individual is not the addressee of international law. It is very rare for international regulations to have direct effect on individual[64]. The State must introduce the criminalisation of the conduct referred to in the obligation under national law. It is only in absolutely exceptional situations that international law requires the extraterritorial effect of the law of misdemeanours. The optimal solution seems to be the introduction of punctual exceptions in

[64] K. Ambos, *Treatise*..., p. 100; H. Satzger, *International*..., p. 2; A. Heinze, S. Fyfe, *The Normative*..., p. 18.

favour of extraterritoriality. The German or Polish model is a good example. There is no need for a general rule covering exceptional situations.

Second, the full reconstruction of the normative content of the provision is made considerably more difficult by the use of an open-ended reference to international law. An analysis of the content of the international obligations that bind the State, an interpretation of those obligations and, in extreme cases, a resolution of the conflict of norms are required to determine whether a particular offence is of a conventional nature. All these procedures require special skills. Individuals, as the addressees of the norms, do not have these skills. The principle of *nullum crimen sine lege stricta* may thus be violated.

6. The extraterritorial effect of penalties for misdemeanours

The introduction of formal grounds for imposing a punishment on the person who has broken the law is the essence of a misdemeanour. This penalty can take various forms: a fine, imprisonment, an obligation to perform community service or, finally, an obligation to refrain from certain behaviour (driving, using the Internet, etc.). In most cases, enforcing the sentence will not involve a cross-border element. The deprivation of liberty takes place in the prison of the forum state, while the fine is paid into its treasury. In certain situations, however, the measures applied will impose an obligation on the offender to do or to abide by an act. This obligation may also have an effect outside the forum state. A driving ban is an example of this type of sanction. The question arises as to the conditions under which such a driving ban may also be effective abroad. In order to answer this question, two aspects of the question have to be taken into account.

Firstly, from the perspective of international law, punishment constitutes a sovereign act of the state towards the individual. It formulates a code of conduct. It is part of a norm that is binding on the person punished. The decision taken by the authority restricts individual freedom. The person who is punished enjoys a narrower catalogue of rights and freedoms than the person who is not punished. The spatial effect of this directive can be as broad as the authority of the state over the individual. If in a given situation there are jurisdictional links in favour of the foreign effectiveness of such a restriction, the individual will be

bound by it. This question cannot be resolved in abstracto. The catalogue of connecting factors is a variable one and can only be determined in the context of a specific case. To illustrate the above with an example: If state X imposes a driving ban on its national, such a restriction may also be effective (in a material sense) abroad. This is supported by the existence of a specific personal link, which is the basis of the state's powers. Such a bond does not exist in the case of a foreigner. The power of the punishing state to regulate how he behaves will be too weak.

Secondly, it is not the case that the foreign state will respect the prohibition once it has established the extraterritorial effect of the prohibition. If the matter is not the subject of an international agreement, the authorities of the foreign state will remain passive. For example, the German police will not arrest a driver who has been the subject of a South African court ban. However, there is nothing in international law to prevent South Africa from responding to the breach of the ban if information about his driving in Germany reaches the South African authorities.

Both of these are made much easier to deal with when they become internationalised. Driving bans are a very good example of this. The countries of the European Union have agreed among themselves that they will respect each other's restrictions on the right to drive a car. Article 11(4) of the Driving Licence Directive states: "A Member State shall refuse to issue a driving licence to an applicant whose driving licence has been restricted, suspended or withdrawn in another Member State. Directive on driving licences[65]". An obligation to respect restrictions imposed by other Member States is therefore introduced by the international commitment.

Prohibitions/orders to refrain from a particular act or omission, imposed after the commission of a crime, are therefore not local in the strict sense. Their effectiveness may also derive from the scope of the state's authority – or from an international agreement as an element of specific delegation.

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[65] Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on Driving Licences (Recast) (Text with EEA Relevance), Official Journal of the European Union, L 403/18, 30.12.2006.

7. Conclusions

The following conclusions can be drawn from the above considerations:

1) misdemeanour law is inherently concerned with public order breaches and is therefore local in nature – the introduction of sanctions is primarily concerned with the protection of local public order,
2) despite its local nature, many states introduce mechanisms that extend the effectiveness of misdemeanour liability to acts committed abroad; this runs the risk of encroaching on the exclusive competence of foreign states,
3) when describing the principles of liability for misdemenours committed abroad, individual legal systems use solutions inherent in criminal law sensu stricto, but in a reduced form,
4) the construction of the conventional misdemenour described in Czech and Lithuanian law raises the most doubts; the use of an open reference to the norms of international law does not seem to be a desirable solution here – it hinders the decoding of the normative content of the jurisdiction principle and introduces chaos into the process of applying the law,
5) the penalties imposed for misdemeanours may, in certain situations, also have an impact on the scope of the rights and freedoms of the individual during his or her stay abroad.

Summary

Legal regulation is increasingly the basis for functioning in the modern world. Driving a car or carrying out construction work safely are no longer naturally evolved. They are defined through norms of law. Increasingly, states are using misdemeanour law to enforce it – not to condemn evil, but to discipline individuals.

These developments are accompanied by the processes of globalisation. There has been a move towards the standardisation of national legal systems, particularly in the area of regulation. In a world based on the free movement of goods and services, standardised procedures for constructing buildings or driving a car make it easier to function.

Against this background, the question arises to what extent misdemeanour law has acquired the value of a transnational liability regime. Is it possible to punish misdemeanours committed abroad? Is it possible to speak of a conventional misdemeanour in the same way as one speaks of a criminal offence? This thesis seeks to answer these questions.

The subsequent argumentation is divided into five parts. The first characterises the class of misdemeanours as specific types of sanctionable acts. The second part addresses the issue of misdemeanour jurisdiction in the context of the limits of state authority.

The third part contains comparative legal analyses, covering regulations relating to misdemeanours jurisdiction contained in eight legal systems. The fourth is devoted to the issue of a convention-based penalisation of a misdemeanour. The fifth section discusses the problem of the cross-border effectiveness of the penalties imposed.

Keywords

jurisdiction, misdemeanour law, petty crimes

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