Humanities and Social Sciences **2014**
HSS, vol. XIX, 21 (2/2014), pp.135-143 **April – June**

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POLITICAL OFFENSE AND THE SHAPE OF THE POLITICAL SYSTEM. REFLECTIONS ON THE SUBJECT AND SUBJECT MATTER THEORY. PART 1

Political offense is often regarded as a behavior involving an attack on an institution of the state, but also as a specific act committed with political motives directed against an entity which is not an institution of the state, for example, directed against a politician representing a different system of values, beliefs, practicing a different religion, glorifying a different ideology, etc. The view of the analyzed research issues in this text - a political offense - from the problem perspective, was based on the findings encountered in the functioning of modern political systems and solutions that determine the shape of criminal law, while at the same time using general principles of criminal law that determine the shape of normative arrangements. The main thesis put forward in the presented article has been linked to an attempt to answer the question - what factors related to a political system, as well as its dynamism (the ability to change, and the potential for democracy or non-democracy) affect the interpretation of the essence of a political offence by particular centers of public authority.
Keywords: political offense, political system, criminal law, criminal policy.

Political offense is often regarded as a behavior involving an attack on an institution of the state, but also as a specific act committed with political motives directed against an entity which is not an institution of the state, for example, directed against a politician representing a different system of values, beliefs, practicing a different religion, glorifying a different ideology, etc. Depending on the interpretation of this criminal act used both by the judicial authorities, and - as often happens – by the entities that create social reality, such as experts appearing in the media, etc., it can be defined quite differently - as committed with a political motive in which the political character of this crime is fundamental, or as an act in which the dominant role is played by criminal determinants. However, it seems that this is a very incomplete picture of the phenomenon.

The view of the analyzed research issues in this text - a political offense - from the problem perspective, was based on the findings encountered in the functioning of modern political systems and solutions that determine the shape of criminal law, while at the same time using general principles of criminal law that determine the shape of normative arrangements. For this purpose, selected (representative) regulations of criminal law relating to political offenses were used, as well as readings on the functioning of political systems and criminal law, and the author's own findings. The intention of the author - to explain the issue of a political offense and relate it to a real social event - was to present the research problem in a comprehensive way, which was related to the division of this

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issue into two parts. Firstly, the nature of a political offense and systemic factors (the shape of the political system) were analyzed affecting the interpretation of this phenomenon by individual centers of political power and other opinion makers. Secondly, further consideration of the research issue is connected with an attempt to model the essence of a political offense in the dynamically developing growing political reality. Hence, methodological issues, raised in this section, refer to the subsequent text constituting a continuation of this one and at the same time a whole of the author's reflections on the problem of the relationship existing between a political offense and the quality of functioning of the political system of the country.

The main thesis put forward in the presented article has been linked to an attempt to answer the question - what factors related to a political system, as well as its dynamism (the ability to change, and the potential for democracy or non-democracy) affect the interpretation of the essence of a political offence by particular centers of public authority. As a key determinant it was assumed that precisely these offenses are the primary influence for the assessment of the evolution of a political system. This was of fundamental importance for the shape of the presented considerations, since political offenses and the attitude of representatives of various centers of state power to them, by the very fact that they as policymakers affect the decisions concerning criminal law (criminal repressions) indicate the nature of a political system, its democracy or non-democracy. As a consequence there appears a dependence taking into account the scope of criminalization and the severity of criminal penalties for certain offenses of a political provenance that is fundamental (though not only) for the political system (its assessment). It is the 'model' to reflect the nature of a political system. Its credibility, though less tangible than that which results from political declarations, the content of party programs, formal and informal rules that generate the shape of a political system, or even legal acts of a constitutional nature, is - it seems – greater in the case of the proposed relationship: the scope of criminalization and the severity of penalization versus democracy and non-democracy of a political system.

The main research hypothesis, which the author believes is particularly important, and taking into account the cognitive effects, is a specific but fundamental dependency consisting in: how a change in a political system - above all from non-democratic to democratic (thus in the transition period), including whether this transformation is to modify the totalitarian or authoritarian system, and change it into a democratic system , or whether the change occurred within the non-democratic system - affects the perception of a political offense. Therefore, in other words, how the perception of a political offense proves (is a 'carbon copy' - representation) that a change in the political system has taken place. And this change may not have happened formally yet (institutionally), but has already occurred politically (people somehow subconsciously 'sense' the change, they know that they 'can do more', although this has not been sanctioned normatively yet). However, this change also determines (inevitably) a tendency to reckon with the past (political crimes committed by representatives of the centers of power who have remained unpunished), and - what is natural - intensifies the creation of a new normative system. This process is so important, but still - despite many similarities – it has a different (substantially different) course 'towards' democracy (then it is a political and legal evolution, because democracy has self-limiting mechanisms that do not allow for political savagery, e.g. human rights are respected); and yet different 'towards' non-democracy, 'towards' totalitarianism or authoritarianism (then there are no self-limiting mechanisms

of this process due to the very essence of these systems; nevertheless, they are effective and ruthless – a political and legal revolution takes place).

Taking into consideration the above assumptions, while preparing the presented articles characteristic research methods were used, primarily the comparative method by which it was possible to precisely compare, in many respects, the analyzed legal and political phenomena and the existence of mechanisms characteristic of democratic and non-democratic state institutions. Political offenses (committed by the political opposition or by the representatives of the centers of political power) and the scope of criminalization and penalization associated with these offenses - as it was mentioned - are basically correlated with the shape of the political system - as the author believes - of every country. Therefore, the term 'political offense' needs to be explained (the term: political system, has already been thoroughly explained in the literature - see e.g.: Juan J. Linz, *Totalitarian and Authoritarian Regimes*, Rienner, 2000; Juan Linz, Alfred Stepan, *Problems of democratic transition and consolidation: Southern Europe, South America, and Post-Communist Europe.* Baltimore: Johns Hopkins University Press 1996, and Eric Voegelin , *History of Political Ideas*, vol. I-VIII, 1997-1999). I understand by this act, first of all, (almost) every action against the state, that is behavior directed against the fundamental principles governing the functioning of the political system or action taken as a result of the occurrence of a specific political motive attributed to the perpetrator, but not only directing the offender against the institutions of the state, but also against centers of political power or entities characterized by 'politics', if the act is committed for the common good, and there are no potential particularistic benefits associated with it that may be attributed to the perpetrator. Referring to the first of these cases, it should be stated that the kind of good being attacked has a superseding character. This results, in a direct way, in limiting the unlawful behaviors (and it is a logical action) for acts against the functioning of the state institutions and 'attributes' related to these institutions, such as national security, sovereign authority, territorial independence, the constitutional system, particular activities of state organizations (in accordance with political concept – e.g. democratic), etc[2]. In the second case, the motive, which is believed to be political, becomes the most important. So, the perpetrator intends to achieve a political goal, and this 'pushes' him to the action (determines his attitude). The subjectivity of the perpetrator's action dominates over other factors in the process of committing the act, which affects the nature of the offense (it is political). Referring to the above observations, it absolutely should be noted that it is irrelevant whether we recognize the subject matter or subject approach as dominant, almost every action against the government or for political reasons will be considered political in nature, but not always, will be considered as a political offense by the (political) authorities. But at the same time if the authorities will not recognize the act as a political offense, usually their opponents (political opposition), will recognize it as a political act, and when they get power, whether in an evolutionary or revolutionary way (in the transition to a new political system), within the so-called coming to terms with the past, the act will become a 'full-fledged' political offense.

[2] L. Falandysz, K. Poklewski-Koziełł, *Political crime - an outline of problems*, Archives of Criminology 1990, vol. XVI, p. 193.

To sort out various perspectives of the concept of a political offense, let us introduce some theoretical solutions, indicating the essence of this term and helping to define the political offense. Presented below are selected theories, relating in various ways to the prohibited act: the subject and subject matter theory while the mixed theory, preponderance, and the theory of civil disobedience[3] will be analyzed in the subsequent articles within the cycle.

Significant problems that occur while characterizing a political offense are due to the presence of a certain dependence which complicates this phenomenon. Namely, when one tries to characterize it, subject and subject matter factors are introduced (one or the other prevails) or they are mixed together eclectically combining subject and subject matter determinants, as if forming (in an artificial connection) the subject and subject matter theory. Consequently, in one "system that inherently should be closed" there appear acts committed with political motives and behaviors connected with political nature of the attacked good whose statutory indicators in connection with the subject of protection are directly related to national security.

Consequently it must be stated that the above scheme should be based either on subject or subject matter factors, alternatively, on appropriately selected (in different circumstances differently) subject-subject matter factors, but not only the combined factors. These determinants are the theoretical foundation that will allow - as it seems – to expose much more precisely special behaviors that are criminalized by law to appropriate offenses, which can then be described as political - from the point of view of the analyzed theories of political offenses.

The subject matter approach is directly correlated with the nature of the offense in relation to the type of legal interest, which is under attack. The catalogue of offenses was within this theory limited to behaviors directed against institutions of the state and the country as such, which possesses certain attributes of power, for example (as already mentioned): territorial sovereignty, internal and external security, constitutional order, etc[4]. On the basis of this theory it is possible to determine relatively precisely the nature of political offense. Thus, it has strong normative factors, is stable from a legal point of view. Moreover, it is clear when assessing the offense, as the object of protection is clearly defined, i.e. the state or its institutions. The object of protection is therefore characterized on the basis of specific code or non-code solutions (as a last resort) and in this regard there are no important controversies of a substantive nature. A feature of this theory is its clarity, because it implies that the perpetrator of an offense of a political provenance is the person making the attack on normatively typified goods. In this case, an attack on the welfare protected by law, which is not related to the functioning of state institutions (these are inherently political in nature) will not be considered political, and if the offender committed this offense for political motives (regardless of this) it will be 'just' an ordinary criminal offense (purely criminal) [5]. Protected legal interests that allow to qualify an act as political (as a political offense) are clearly distinguished here (exhaustively) in a normative manner (in a code, or more broadly - statutory), and are political in nature. In the event of an attack on these interests, the political system is

[3] *Ibidem*, p. 192-193.
[4] *Ibidem*, p. 193.
[5] Z. Ciopiński, *Political offenses on a comparable basis*, „Scientific Papers of the Academy of Internal Affairs" 1986, no. 45, p. 102.

affected, the act also becomes political. It includes all the interests which determine the implementation by the state of all its functions, both in its internal structure and operating as an entity on the international arena[6]. If, during the course of existence of an offense, there appear political elements (protected interests have a political dimension), then the emerging statutory signs are inherently associated with the politics of the interests, which directly affects the character of an offense - it becomes political. If, however - considering the issue within the theory - there will be no such factors the act should not be identified with a political offense. The category of motive, in this case, does not constitute an essential or even any determinant in the process of typing the perpetrator's behavior. The only qualification is the subject matter of a specific act, and thus the attacked interests protected by law. In a situation when the interests have not been defined in a precise way, the offense cannot be precisely determined and cannot be characterized as political, at least we have to deal with such a dilemma from a scientific point of view (from a political point of view, it is of course possible). Given the penal law point of reference, this theory is essentially justified and does not raise serious doubts as to interpretation. However, with the emergence of specific questions, such as: whether political offenses are offenses against the state - there appear certain doubts. Since, whether these are acts only directly threatening the state, or also acts related to these crimes, but not directly threatening the viability of the state, e.g. offenses against public order in relation to the functioning of the local organs of public authority (after all, they are political in nature, although in local scale), the administration of justice, etc. Thus, are they also political offenses?[7]

In my opinion, this theory should be interpreted in a restrictive manner, and thus the institution of the state and categories associated with it should be treated specifically. And so, I would distinguish here the attacked interests protected by law, the attack on which, would classify the act as a political offense: internal and external security of the state, territorial indivisibility, constitutional system, sovereignty of making decision by the authorities, the functioning of the highest executive bodies (e.g. the Council of Ministers, Prime Minister, but also minister, president, chancellor, etc.), the legislature (Sejm, the Senate, etc.) and the unrestrained functioning of the justice system (but it is not about the protection of individual courts, but rather the integrity of the democratic principles of justice and the operation of its highest authorities, such as Tribunal of State, Constitutional Tribunal, Supreme Court, etc.). Furthermore, in this case certain conditions must be met (for an attack on a particular institution or authority of the state to be treated as an attack on the state, and therefore as a political offense): firstly, the agency (institution) is to represent the state in its relations with another country, secondly, it has to be a central body (not just a local representative), thirdly, it has to be a constitutional body of the state.

The subject theories of political offenses have a fundamentally different nature. In this case, the motive (political) 'pushing' the perpetrator towards achieving the political objective gains significant importance. Consequently, political motivation, which guides the perpetrator of an offense, has a specific character. Subjective determinants characterizing the description of this offense are therefore the dominant factor. However, in the description of this offense as political, an important explaining factor, is the

[6] J. R. Kubiak J. R., *Political offense - the basic problems*, „Lawfulness" 1986, no. 8/9, p. 63.
[7] J. R. Kubiak, *Genesis and theories of political offense*, „Palaestra" 1984, no. 12, p. 9-10.

indication of whether the act was infamous (and criminal) or beneficial (and political). An evaluation of an act as a phenomenon is important from a social point of view, therefore public opinion is important in this case, taking into account the morally irreproachable motives guiding the perpetrator, or lack thereof. So, whether there was an element characterizing perpetrator's activity for the greater good[8]. The subject theory, at the same time, has a significant impact on comparative analysis in connection with the assessment of motivation attributed to the perpetrator of the offense with its normative classification. In this case, a characteristic caesura should be noted separating the achievement by the offender of a basic objective from side objectives, which, however, may have been or had to be achieved in the commission of a crime (to achieve the primary objective). Therefore, the perpetrator, committing the main offense, may incidentally commit another offense, e.g. common (criminal), but during legal assessment it must be stated that it was of a minor nature, supplementary to the primary objective. In view of the above, in the evaluation of the perpetrator's actions (whether it was a political act), who made an attempt at constitutional state agencies, and committed a common offense (what kind of crime it was, how it was committed, was it possible to avoid this act, or minimize losses or casualties, etc.), it is necessary to determine whether this act was committed for political motives, and what - as indicated - indirect act was committed, whether it was also political. Finally, it is necessary to evaluate the entire process associated with the committed act, to take into account the characteristics of the offender and the circumstances of the case and, therefore, determine whether a political offense was committed[9].

Consequently, the category of motive, which according to this theory must be political, becomes fundamentally important. However, the political offense itself is classified differently in different political systems, which also should be taken into consideration. In democratic systems (liberal) an act committed with political motives, assumes rather positive values, especially – which is characteristic - when it is committed in a foreign non-democratic system. Whereas in non-democratic systems, an act committed with political motives has clearly negative connotations, it is an action against the system 'as such'; it is striving for counter-revolution, etc. It has such a connotation, because of the nature of things the perpetrator acts against the center of political power, which in order to gain this power (usually) had to commit a political offense (a revolutionary act). However, now this new action (counter-revolutionary) may be especially dangerous (for those in power).

Proponents of the subject theory, which is extremely important, as political offenses recognize only those which were not committed for egotistic reasons. However, what already seems to be very problematic, in a non-democratic system, the perpetrators will always be assigned such (negative) motives, while in other systems (democratic - their representatives) in such situations they will be assigned positive motives. This contradiction is obviously unsolvable. In turn, the opponents of the subject theory, indicate that the motive and the purpose that affect the attitude of the offender should not affect the determination of the legal classification of the act, since - as indicated by the critics of this theory (and they seem to be right) - in certain circumstances, almost any

[8] Z. Ciopiński, *Political offenses on a comparable basis,* p. 102.
[9] H. Popławski, *Political offenses,* „Scientific Papers of the Academy of Internal Affairs" 1986, no. 42, p.120.

prohibited act may be treated as a political offense. Thus, the motive and the purpose chosen by the perpetrator may only affect the type and level of penalty, and not on the legal classification of the act. Summing up, the subject theory is based on the assumption that it is *causa efficiens* – thus, the political motives of the offender's actions and *causa finalis* – that is a political objective, determine the subject matter of a political offense. Opponents of this notion suggest that with such an attitude, a political assassination can be judged as a political act, and not strictly criminal, because the motive was political, which does not change the fact that murder is just murder[10]. Supporters, on the other hand, point out - which has already been emphasized - that the action is to be devoid of selfish motives.

Referring to the preceding discussion, one should pay attention to the two main offenses, which by their very nature of things are political in nature or related to political. I mean here the crime of terrorism and genocide[11]. The political dimension of these acts is obvious. The use of violence and producing political effects is 'in itself' political terrorism, which in turn, based on the logical inference would be a political offense[12]. Apolitical terrorism, in fact, does not exist[13]. It always affects the quality of the functioning of society, which is inseparable from the 'politics'. However, taking into account that 'political dimension' of a crime is connected with certain connotations of a social nature, which are a consequence of the activities of eighteenth and nineteenth century thinkers and politicians, and more broadly, the perpetrators of political offenses acting against despotic power, who in the name of unselfish motives strived to achieve social objectives referring to the humanitarian principles of the Enlightenment and thinkers such as Montesqiueu, Holbach, Diderot, Rousseau, Voltaire, Filangerii, Beccaria and Thomasius, then if we assume that they committed political offenses against undemocratic centers of a public authority, the use of a corresponding term for the perpetrators of terrorism or genocide seems to distort the structure and genesis of this offense.

Taking into account both the subject and subject matter theory, it seems reasonable to assume that a real mapping in an uncontroversial way of the subject concept is extremely difficult. In this case, the number of potential political offenses would be huge, because this theory does not establish clearly outlined caesuras limiting the prohibited act. Simply, ordinary, criminal offences, in certain circumstances, would claim the status of political offenses. Therefore, it seems that the subject matter criterion, which takes the state with its institutions as a point of reference, becomes more feasible to implement[14].

Summarizing the above considerations, it should be noted that the advantage of the subject or subject matter theory does not depend on objective evidence used by researchers in the identification of a reliable concept on the basis of which an answer to

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[10] S. Rozenband, *Political offense*, [in:] *Handy encyclopedia of criminal law*, ed. W. Makowski, Warszawa 1936, p. 1332.

[11] The concept of genocide has been formulated for the first time in a book *Axis Rule in Occupied Europe* published in 1944 by Rafał Lemkin. The definition proposed by this author was: „Genocide is a crime which destroys national, racial and religious groups". cit.: J. Sawicki, *Genocide. From the concept to convention 1933-1948*, Kraków 1949, p. 21.

[12] K. Indecki, *Criminal law in the face of terrorism and terrorist attack*, Łódź 1998, p. 45.

[13] K. Indecki, *Criminal law in the face of terrorism and terrorist attack*, Łódź 1998, p. 45.

[14] S. Rozenband, *Political offense*…, p. 1332.

the question will be designed: what is a political offense? This is determined by political premises, namely the shape of the political system at a given time and country (degree of democracy or non-democracy, prevailing ideology, etc.), the geopolitical location of the country, the internal relations that determine its security and - above all - the dominant center of political power in the system. Consequently, when there appear external or internal threats to the existence of the country, the institutions of the state, the centers of state power (political), especially if the latter does not have the attribute of social legitimacy derived on the basis of a democratic electoral process, a process of instrumental use of criminal law and repressive apparatus are initiated, which aims to maintain the current status quo. Therefore, a broadly designed criminalization of various acts and their restrictive penalization is introduced, which concerns - above all - any behavior threatening the institutions of the state, but in fact threatening the centers of power. This, in turn, is directly correlated with the classification proposals occurring in the context of the subject matter theory, while often vague and subject to valuation concepts, such as internal and external security, etc. are used. At the same time, terms amenable to unambiguous assessment are omitted. This is obviously a deliberate action to pacify political opponents. On the one hand, it makes it difficult - from a scientific point of view – to define an act as a political offense, however in the understanding of the authorities in relation to the circumstances of the committed act, it will be (depending on what is more necessary for these authorities from a tactical point of view) a political offense, banditry, criminal offense, terrorism, etc. Whereas (usually) for a representative of e.g. the political opposition committing the act will be a political action, and therefore a political act, but sometimes not even a crime. In the reverse situation, when there is no real threat to the existence of the country and especially for the center of power that has gone through a fair electoral process, it is then willing to liberalize penal solutions concerning committed political offenses. Thus, it is willing to accept constructions arising from the subject theory of political offenses[15]. The proposed concept is obviously ideal, and taking into account that social life is hybridized, it should not be regarded as a model with no alternative.

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[15]Z. Ciopiński, *Political offenses on a comparable basis*, p. 103.

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PRZESTĘPSTWO POLITYCZNE A KSZTAŁT SYSTEMU POLITYCZNEGO. ROZWAŻANIA NA TEMAT TEORII PODMIOTOWEJ I PRZEDMIOTOWEJ. CZĘŚĆ 1

Przestępstwo polityczne uznawane jest często jako zachowanie polegające na ataku na instytucję państwa, ale również jako określony czyn popełniony z motywów politycznych ukierunkowany przeciwko podmiotowi nie będącemu instytucją państwa, np. skierowany przeciwko politykowi reprezentującemu odmienny system wartości, światopogląd, wyznającemu inną religię, gloryfikującemu odmienną ideologię, itp. Ujęcie analizowanego zagadnienia badawczego w powyższym tekście – przestępstwa politycznego - w perspektywie problemowej, zostało oparte na ustaleniach występujących w ramach funkcjonowania współczesnych systemów politycznych oraz rozwiązaniach determinujących kształt prawa karnego, przy czym wykorzystano tutaj ogólne zasady prawnokarne determinujące kształt ustaleń normatywnych. Zasadnicza teza postawiona w prezentowanym artrykule została związana z próbą odpowiedzi na pytanie – jakie czynniki przynależne systemowi politycznemu, oraz jak jego dynamiczność (możliwość zmiany, a także potencjał demokratyczności lub niedemokratyczności) wpływają na interpretowanie przez poszczególne ośrodki władzy publicznej istoty politycznego przestępstwa.

Słowa kluczowe: przestępstwo polityczne, system polityczny, prawo karne, polityka kryminalna

DOI:10.7862/rz.2014.hss.23

Przesłano do redakcji: czerwiec 2014
Przyjęto do druku: lipiec 2014