Janusz Strankowski

Summary of a doctoral dissertation entitled:
"The principles of ordering the offender to remedy damage or compensate for injury pursuant to the Criminal Code of 1997"

This doctoral dissertation presents an analysis of the problem of applying the provisions of the Civil Code to the court ordering an offender to remedy damage as it is referred to in Article 46 § 1 of the Criminal Code after changes introduced by the Act on Amending the Criminal Code and Certain Other Acts of 20 February 2015 (also known as the February Amendment of 2015), which have been entered into force since 1 July 2015.

The institutions allowing remedies for damage caused by a crime to be sought directly in a criminal procedure have been present in the Polish legal system since the interwar period. They have evolved, taking the form of an adhesive claim, a probation condition or compensation adjudicated *ex officio*. Throughout this time, these solutions – to a greater or lesser extent – have deviated from the civil law regulation allowing remedies for damage, which is still valid, even for adhesive claims, which might seem to be simply a civil action located inside frames of criminal procedure. While the previous regulations were in force, the gravity of the code-based solutions was meant to have a repressive and educational effect for the perpetrator. What is more, the practice of applying institutions aimed at remedying damage resulted gradually in their visible marginalization. It was the Criminal Code of 1997 that first used the penal measure of the obligation to remedy damage, as referred to in Article 46 § 1 of the Criminal Code, though the adopted solutions came under heavy criticism practically from the moment they entered into force, primarily related to keeping as many as four different institutions allowing a compensatory obligation to be ordered, all remaining in not entirely clear relations with each other, and all still limited by measures focusing on the perpetrator rather than on the aggrieved party. This was clearly demonstrated by the fact that these measures were subordinated to the directives on assessing the penalty. Since its entered into force, Article 46 of the Criminal Code has been modified three times, gradually expanding its scope of application, with the changes introduced by the February Amendment of 2015 clearly being the most far-reaching. The penal measure in the form of the obligation to remedy the damage, which we are most familiar with today, was moved to a newly-created category of compensatory

measures. This was not a purely cosmetic change. The measure was excluded from the application of the directives on assessing the penalty by the court. Moreover, it was made obligatory to apply civil law provisions when the obligation to remedy damage is ordered, an obligation that had not previously been understood unambiguously .

This dissertation offers a complex analysis of a complex phenomenon – the application of civil law norms as a substantive basis to order the obligation referred to in Article 46 § 1 of the Criminal Code, which is a research problem that has not yet been looked at in scientific publications. Although there are authors that have addressed the obligation to remedy damage in general, or have focused on the broader complex problem of compensation in criminal law, which have also based on the regulations introduced by the February Amendment of 2015, the problem of applying civil law norms has not yet been subject to an in-depth analysis.

In the introductory part of the dissertation, I describe the framework of the selected research problem and formulates a hypothesis whereby the obligation to remedy the damage, as referred to in Article 46 § 1 of the Criminal Code, takes the form of a peculiar civil action within a criminal procedure, where the action is governed by the principles of criminal procedure, but grounded exclusively on the regulations of private law. I made the assumption that there is no basis to apply the private law norms within a criminal procedure otherwise than in the civil procedure. Moreover, this hypothesis applies also to the obligation to interpret, and consequently apply, provisions governing the obligation to remedy the damage in the way allowing the aggrieved party to enforce compensation for the damage arising from the offence in the criminal procedure as easily as the aggrieved party could enforce their claims in an independent civil procedure.

These deliberations are presented in five chapters, aimed at familiarizing the reader with both the background and the merits of the discussed legislative change, which the author sees as guaranteeing – for the first time in the modern history of Polish criminal law – compensation to the aggrieved party for damage incurred as a result of the offence, in principle of the full amount, without the need to resort to the civil procedure.

In the first chapter I present the development of the institutions related to the aggrieved party seeking remedies for damage suffered directly in a criminal procedure, including through the application of institutions typical for reparatory justice, as opposed to retributive justice. This part also explains the scientifically proposed models, not only Polish, of applying compensatory institutions in criminal law. The author presents the evolution of compensatory instruments in the history of criminal law, as well as the changes in criminal law in this scope

in the period from the 1920s until a period right before the February Amendment of 2015 entered into force.

Chapter II contains deliberations concerning the direct reasons for the changes that were adopted as part of the February Amendment and describes how this modified the nature of the obligation referred to in Article 46 § 1 of the Criminal Code as a result of this bill. This is specifically important given the fact that a tendency to ascribe a penal nature to the obligation to remedy the damage, which I believe is wrong, can still be observed in the literature, which has often been used to limit the civil law regulations in the process of ordering the obligation to remedy.

The third chapter focuses on the issues related to the determining the legal basis of imposing an obligation to remedy damage. The phrase, "by application of civil law provisions," as used in Article 46 § 1 of the Criminal Code, is vague and may give rise to a number of concerns, both with respect to the scope and the technique of the reference. This chapter presents, among other things, an analysis of possible situations of applying the norms of foreign private law, as well as the possibility to apply inter-temporal principles in the event of changes in legal status between the perpetration of the act and issuing orders in relation to it. The author also calls for a broad understanding of civil law to be assessed based on the criterion set by the method of regulating legal relations. Finally, the author explains the problems with interpreting provisions, which sometimes seem to be different in criminal and civil law, giving rise to the natural problem of "reconciling" two branches of law as part of one institution.

Chapter IV, the most extensive part of this dissertation, is devoted to assessing the understanding of the notion of damage or harm, as a prerequisite to imposing the obligation referred to in Article 46 of the Criminal Code. Analyzing the problem of applying civil law provisions to order the obligation to remedy damage requires first answering such questions as the extent to which the differences between the notion of damage and harm under criminal and civil law, or the differences in the perception of a relationship between a criminal offence or a civil law tort and damage or harm will determine the scope of application of the civil law in criminal proceedings. The deliberations contained in this chapter delve into the factors that should be taken into consideration when determining the scope of the obligation to remedy the damage imposed on the perpetrator through correctly determining the scope of their liability as well as assessing the level of reprehensibility of the act, which is different when evaluated based on the principles of criminal and civil law. In this chapter, the author also tries to answer questions about the interpretational problems that might arise when you apply causal link principles that are different in these types of law, or the understanding of the effect of the

offence. It is also necessary to answer the question whether the application of the provisions of the civil law to order the perpetrator to remedy the damage will lead to the term “aggrieved party” being redefined, or at least the existing interpretation of this term being modified.

In the fifth and final chapter, I explain how the compensatory obligation may be subject to modifications, both expansion and limitation. This is obviously a certain linguistic convention, the circumstances discussed in this chapter are taken into consideration as early as at the stage of determining the scope of the obligation, but are separated this way to show that, in comparison to the simplest arrangement covering the full compensation for the damage in the relation between one perpetrator and the aggrieved party, there might be differences arising from the occurrence of many perpetrators or, due to the financial status criteria, a contribution by the aggrieved party, or the lapse of time. Finally, I justify the possibility to apply the rules of social coexistence as a kind of an anchor allowing the obligation to remedy damage to be modified for axiological reasons.

The verification of the research hypothesis carried out in this dissertation shows, as I present in the summary, that the thesis whereby the obligation referred to in Article 46 § 1 of the Criminal Code continues to be criminal law in nature is no longer reasonable, since the nature of this obligation is now rooted in civil law. My understanding of the above is based on the fact that this obligation is ordered in the criminal procedure and in compliance with criminal law principles, while the material grounds for ordering this obligation constitute provisions of broadly defined private law covering norms located also outside of the Civil Code, and sometimes the norms of material law as well. The decisive factor when determining the current nature of the obligation to remedy damage or compensate for injury, which is much more important than the obligation to follow the provisions of civil law, which in fact was binding before, constitutes the exclusion of this measure from the directive of assessing the penalty. In fact, it is the current wording of Article 56 of the Criminal Code, which to a certain extent revolutionizes the perception of the shape of the discussed obligation, transforming it into a certain civil action located within a criminal procedure.

The principles of ordering the perpetrator to remedy the damage and compensate for the injury suffered have been in force since the effective entry into force of the February Amendment of 2015 to the Criminal Code. A more thorough analysis of these, carried out from a material law perspective on allowing this obligation, leads to arrive at the conclusion that the aggrieved party no longer has to follow the time-consuming and costly path of seeking indemnification through a civil procedure. This is the case, as identical protection can now be obtained directly through the criminal proceedings, which will be faster and easier, while at the

same time the scope of the remedy of the damage will be identical. What has been removed is a multi-step ladder that merely forced a victim of crime to first carry out a criminal procedure, in which the victim received only partial satisfaction for the damage suffered, before then initiating civil proceedings. Of course, this two-step path has not been excluded now. The aggrieved party continues to benefit from the privilege in the form of a binding force of a final and enforceable judgement of a criminal court for an offence leading to damage. However, now this path of enforcing claims should be an exception rather than a rule. Therefore, it is reasonable to say that, for the first time in modern Polish criminal law, there exists an instrument that is fully compensatory, and it should be used, in practice, in a way that fully corresponds to its normative structure.

Key words:

damage, harm, remedy of damage, compensation, criminal law, damages, compensation, application of law, interpretation