

# The Assessment of Permissibility of Using Non-statutory Justifications in Czech and Polish Criminal Law\*

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## Abstract

The subject-matter of this paper is the acceptability of non-statutory justifications, analysed on the instance of very similar penal law systems of closely related countries, namely the Republic of Poland and the Czech Republic. In both of them, one can observe a phenomenon of invoking circumstances not set forth in any legal act and rendering an action prohibited in the light of judicature. This paper studies whether it is permitted that public authorities invoked such circumstances in a democratic state of law. It is claimed by certain author that by invoking it judicial authorities violate the principles of specificity, separation of powers and legality, being the cornerstones of Polish and Czech law, and, thus, jeopardise the legal security of individuals; moreover, this course of action may be a threat to the legal system. Regardless of the fact that Poland and the Czech Republic are studied here, the considerations may well apply to any other penal law systems based on the formal and material definition of a crime and the above-mentioned principles. The research method in use was that of analysing legal provisions (mainly, basic laws and penal codes) formally and dogmatically.

## Keywords

Penal Law; Unlawfulness; Justifications; Structure of Crime; nullum crimen sine lege principle.

## Introduction

Despite the differences that naturally occur in national legal orders, the basis for prosecuting a crime is always a committed act not accepted in the light of the law<sup>1</sup>. Beyond any doubt, the fact itself that a behaviour is shunned by the public does not yet mean that this behaviour should be a ground for penal liability if no other conditions stipulated in the applicable laws are met. A crime is, therefore, a crime if all the above-mentioned conditions are met. In no other case is it possible that a given act should result in penal liability. Crime is a concept which facilitates law-making according to the principles of penal law as well

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as renders the application of the law more effective. In the latter case, invoking this concept renders it easier to determine whether a given act is justified or penal liability is not as serious as it may seem.

The Polish penal law doctrine has developed many definitions of a crime, sometimes referring to its individual elements in different ways. The differences cannot be significant because the entire structure is based on the provision of Article 1 of the Polish Penal Code<sup>2</sup>, assuming that a crime is a prohibited act (*actus reus* and *mens rea*), committed without justifications (i.e. unlawful), socially harmful to a degree higher than negligible (penal)<sup>3</sup> and culpable<sup>4</sup>. A very similar model of crime can be based of § 12 and 13 of the Czech Penal Code<sup>5</sup>. It can be stated that a crime in Czech Republic is a prohibited act (*actus reus* and *mens rea*), socially harmful to the extent rendering it necessary to invoke penal law liability, and find a perpetrator guilty<sup>6</sup>.

Unlike the definitions in the communist codes, Czech from 1961 and Polish from 1969, presented definitions do not contain *expressis verbis* the requirement that a prohibited act should be dangerous to society. This does not mean that they are only a formal character<sup>7</sup>. Thanks to the substantive correction (§ 12 (2) of the Czech Penal Code) and the clause of a negligible degree of social harm (Article 1 (2) of the Polish Penal Code), as well as to a result of the fundamental laws (Article 31 (3) of the Polish Constitution<sup>8</sup> and Article 4 of the Czech Charter of Fundamental Rights and Freedoms<sup>9</sup>), the requirement to limit penalisation to behaviour violating the rights and freedoms of others, recognising their formal and material nature is justified<sup>10</sup>. In a democratic state of law, it is impossible to penalise

<sup>2</sup> The Act of 6 June 1997 – Criminal Code, Journal of Laws 2021, item 1023 as amended.

<sup>3</sup> Art. 2 § 2 Polish Criminal Code: A prohibited act whose social consequences is insignificant shall not constitute an offence.

<sup>4</sup> See ZAWIEJSKI, P. Pojęcie przestępstwa i podziały czynów zabronionych, In: DUKIET-NAGÓRSKA, T. (ed.). *Prawo karne. Część ogólna, szczególna i wojskowa*. Warszawa: Wolters Kluwer, 2018, p. 82; NAMYSŁOWSKA-GABRYSIĄK, B. *Prawo karne. Część ogólna*. Warszawa: C. H. Beck, 2011, p. 27; WARYLEWSKI, J. *Prawo karne. Część ogólna*. Warszawa: Wolters Kluwer, 2009, pp. 176–178.

<sup>5</sup> The Act of 9 February 2009 – Criminal Code, Journal of Laws 2009, item 40 as amended.

<sup>6</sup> KUČHTA, J. Material and Formal Frame of Crime in the Czech Criminal Law and the Regulation de Lege Ferenda (Germany). *Studia Iuridica Auctoritate Universitatis Pecs Publicata*. 2003, Vol. 132, p. 207; KARABEC, Z. et al. *Criminal Justice System in the Czech Republic*. Prague: Institute for Criminology and Social Prevention, 3. ed. 2017, p. 22. Available at: <http://www.ok.cz/iksp/docs/443.pdf>; The Czech Criminal Law: A handbook of basics of substantial law and use proceedings for a practical use in English. *Ondřejová & partner* [online]. P. 1. Available at: [https://www.ondrejova.cz/docs/141231\\_handbook-criminal-law-in-the-czech-republic.pdf](https://www.ondrejova.cz/docs/141231_handbook-criminal-law-in-the-czech-republic.pdf)

<sup>7</sup> Incorrectly, on the basis of Czech law: KALVODOVÁ, V. Selected problems of the new Czech Criminal Code. In: PLYWACZEWSKI, E. (ed.). *Current problems of the penal law and criminology*. Warszawa: Lex a Wolters Kluwer business, 2012, p. 260.

<sup>8</sup> The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, item 78, pos. 483 as amended.

<sup>9</sup> The Charter of Fundamental Rights and Freedoms of 16 December 1992, Journal of Laws 1998, item 162 as amended.

<sup>10</sup> HORSKÝ, J. Okolnosti vylučující protiprávnost v českém a německém trestním právu. Diploma Thesis. *Charles University* [online]. 2012, p. 8. Available at: <https://dspace.cuni.cz/handle/20.500.11956/48975>; PLEBANEK, E. O obronie koniecznej i innych kontratypach w świetle zasady proporcjonalności. *Czasopismo Prawa Karnego i Nauk Penalnych*. 2006, Vol. 10, no. 1, p. 72.

behaviour not posing any threats to legal interests; therefore, action not dangerous to society is not a crime.

The demonstrated crime model similarity is the first and the most important reason to choose the Polish and Czech penal law systems for the purpose of comparative law research. It is also worth noting that, at the beginning of the 21<sup>st</sup> century, Polish-Czech relations are extensive and multidimensional, especially, in terms of cooperation within the Visegrad Group<sup>11</sup>. Taking into account the legal systems, it can be observed that the laws of both of these countries are based on the principle of a democratic state of law<sup>12</sup>; their penal law considers the formal and material structure of a crime, and draws upon the continental penal law principle of *nullum crimen/nulla poena sine lege* and the principle of subsidiarity<sup>13</sup>. In terms of penal law, both countries share their legislative history, which include basing previous penal laws on the principle of the social danger of an act, typical of the Eastern bloc countries<sup>14</sup>. It is, therefore, possible to conduct comparative legal research, and its results may well be valuable for lawyers from these countries. In addition, one can observe an attempt, motivated by considerations of scholars studying penal law or jurisprudence, to create non-statutory justifications by penal law systems based on the formal and material definition of a crime. Often, the absence of social harmfulness of certain behaviours is perceived as the source of such circumstances<sup>15</sup>. Therefore, this issue requires comparative legal research, namely analysing (formally and dogmatically) provisions of Polish and Czech law. A particular emphasis should be paid to the basic laws of both countries and their penal codes.

The purpose of this paper is to examine the possibilities of invoking non-statutory, and, therefore, not set forth in any legal act, justifications and, at the same time, releasing a perpetrator of a typical prohibited conduct from penal responsibility, by judicial authorities. The justifications are described almost identically by the representatives of the Polish and Czech doctrine of penal law. In given circumstances, always involving a conflict of two interests protected by law, a perpetrator violating one of these interests does not commit a crime because this violation is at least tolerated in society<sup>16</sup>. The justifications are, therefore, ‘a tool’ that the

<sup>11</sup> WALCZAK, J. Stosunki polsko-czeskie 2004–2011. In: WOLAŃSKI, M. (ed.). *Polityka zagraniczna Polski w latach 2004–2011. Struktury. Koncepcje. Sąsiedzi*. Izrael, Polkowice: Wydawnictwo Dolnośląskiej Wyższej Szkoły Przedsiębiorczości i Techniki w Polkowicach, 2013, p. 160. Available at: <https://depot.ceon.pl/handle/123456789/4801>

<sup>12</sup> See Article 2 of the Constitution of the Republic of Poland; Article 1 (1) of the Constitution of the Czech Republic of 16 December 1992 r., Journal of Laws 2013, item 98 as amended.

<sup>13</sup> KUČHTA, 2003, op. cit., p. 207; KARABEC et al., 2017, op. cit., pp. 15–16; KRÓLIKOWSKI, M., ZAWŁOCKI, R. *Prawo karne*. Warszawa: C. H. Beck, 2015, p. 150.

<sup>14</sup> KARABEC et al., 2017, op. cit., p. 22.

<sup>15</sup> WOLTER, W. *Funkcje błędu w prawie karnym*. Warszawa: Państwowe Wydawnictwo Naukowe, 1965, p. 134; GUBIŃSKI, A. *Wyłączenie bezprawności czynu (o okolicznościach uchylających społeczną szkodliwość czynu)*. Warszawa: Uniwersytet Warszawski, 1961, p. 7; PINKAVA, J. *Okolnosti vylučující protiprávnost*. Doctoral thesis. Palacký University, Faculty of Law, 2020, p. 17. Available at: <https://theses.cz/id/tdfghz/>

<sup>16</sup> PINKAVA, 2020, op. cit., p. 15, 17; KLESZCZ, M., GRUDECKI, M. Pozbawienie życia w obronie koniecznej a katalog dóbr prawnych podlegających ochronie. *Roczniki Administracji i Prawa*. 2020, Vol. XX, no. 3, pp. 135–152, pp. 139–140. DOI: <http://doi.org/10.5604/01.3001.0014.4235>

court has at disposal to resolve a conflict of legal interests<sup>17</sup>. Many penal law scholars admit the possibility of invoking non-statutory justifications by judicial authorities even though there are more and more votes against this, drawing attention to the incompatibility of such procedures with the fundamental principles affecting the regulation and application of penal law, namely specificity, the separation of power and legality. Hence, a hypothesis that these measures are unacceptable in a democratic state of law is worth formulating.

The choice of the Polish and Czech legal systems for comparative legal research results from the mutual similarity of these states (the same legal culture, a similar level of economic development, geopolitical situation and geographical proximity)<sup>18</sup>. However, this does not mean that the decoded model cannot be used in relation to the legal orders of other countries, which is also based on an analogous model of crime.

## 1 Unlawfulness and Justifications in Czech and Polish Criminal Law

Under the Czech penal law, only an unlawful act can be a crime<sup>19</sup>. In the literature, it is indicated that this unlawfulness should be understood as the non-compliance of the behaviour with the legal norm<sup>20</sup>. There are certain situations in which a prohibited act is not socially dangerous, and, therefore, is not constitute a crime<sup>21</sup>. The Czech Penal Code distinguishes five such circumstances: the state of necessity (§ 28), necessary defense (§ 29), the injured party's consent (§ 30), permissible risk (§ 31) and the authorised weapon use (§ 32). Apart from this catalogue, it is claimed that there are other justification, including those related to other branches of law, for instance, performing rights or obligations (e.g. professional or parental) or following an order<sup>22</sup>. According to some of the representatives of the doctrine, it is also possible to resort to yet other justifications, not been regulated in the act<sup>23</sup>.

The Polish penal law also assumes that to be a crime an act must violate legal regulations, and, moreover, that not every time is a such an act a crime<sup>24</sup>. According to the *communis opinio*,

<sup>17</sup> PROVAZNÍK, J. Tradice jako okolnost vylučující protiprávnost. *Days of Law 2015, part X*. Masaryk University, 2016, p. 218. Available at: [https://is.muni.cz/publication/1358360/Dnyprava\\_2015.pdf](https://is.muni.cz/publication/1358360/Dnyprava_2015.pdf); KLESZCZ, GRUDECKI, 2020, op. cit., p. 139.

<sup>18</sup> ŽABA, M. *Skutki transgranicznego łączenia się spółek kapitałowych (studium porównawcze ustawodawstwa polskiego, czeskiego i słowackiego)*. Warszawa: C. H. Beck, 2019, pp. XLVI–XLVII; ŠČERBA, F. Protection of Children in Czech Substantive Criminal Law and Its Comparison with the Polish Legal Regulation. *ASEJ – Scientific Journal of Bielsko-Biala School of Finance and Law*. 2020, Vol. 24, no. 4, p. 25. DOI: <http://doi.org/10.19192/wsfip.sj4.2020.5>

<sup>19</sup> KARABEC et al., 2017, op. cit., p. 24.

<sup>20</sup> KUČHTA, 2003, op. cit., p. 209; KARABEC et al., 2017, op. cit., p. 24; BEDNÁŘ, J. *Základy trestního práva. Studijní opora*. Ústí nad Labem: Pedagogická fakulta UJEP, 2019, p. 8. Available at: <https://www.pf.ujep.cz/wp-content/uploads/2020/02/BEDN%C3%81%C5%98-Ji%C5%99%C3%AD.-Z%C3%A1klady-trestn%C3%ADho-pr%C3%A1va.-Studijn%C3%AD-opora.pdf>

<sup>21</sup> KUČHTA, 2003, op. cit., p. 209; KARABEC et al., 2017, op. cit., p. 24; PROVAZNÍK, 2016, op. cit., p. 217.

<sup>22</sup> KUČHTA, 2003, op. cit., p. 209; KARABEC et al., 2017, op. cit., p. 24; BEDNÁŘ, 2019, op. cit., p. 9.

<sup>23</sup> PINKAVA, 2020, op. cit., p. 18; PROVAZNÍK, 2016, op. cit., p. 216.

<sup>24</sup> WILK, L. Bezprawność i wina. In: DUKIET-NAGÓRSKA, T. (ed.). *Prawo karne. Część ogólna, szczególna i wojskowa*. Warszawa: LexisNexis, 2012, p. 103–105.

the Polish Penal Code stipulates five such circumstances: necessary defense (Article 25 § 1 and 2), a state of greater necessity (Article 26 § 1), experiment (Article 27), permitted criticism (Article 213), and resorting to otherwise prohibited actions if all other means have proved ineffective and ensuring immediate compliance is necessary (Article 319). Like in the Czech Penal Code, one can encounter the thesis that a given act is justified in the Polish system by other circumstances, not mentioned in the Penal Code, and related to other branches of law, for instance, permitted self-help<sup>25</sup>. As it is argued by some of the representatives of the doctrine, it is also possible to invoke different justifications, which have not been regulated in the act; in some cases, punishing a perpetrator appears to be pointless, which the legislator neither noticed, nor decreed as it was done in the case of other potential legal interest conflicts<sup>26</sup>. Like in the Czech Republic, it is noted that, although the non-statutory justifications are created by analogy, this analogy is permissible because it favours a perpetrator<sup>27</sup>.

## 2 Arguments for and Against Non-statutory Justifications

The main argument in favour of invoking the justifications not set forth in any legal act by judicial authorities is that penal law should be sufficiently flexible to be able to react faster to the changing social reality and justify behaviours omitted by the legislator, and not deserving to be treated as illegal in social perception<sup>28</sup>. An excellent instance are the so-called customary justifications. The Polish Supreme Court admitted that the tolling of church bells at certain hours by a priest cannot constitute a breach of public peace due to the customary (non-statutory) justification<sup>29</sup>. According to the Supreme Court, “*the custom (and undoubtedly we are dealing with it in concreto, since the tolling of church bells summoning the faithful to the Holy Mass has been an accepted behaviour in the Republic of Poland for centuries) may justify behaviour that meets the features of prohibited acts...*”<sup>30</sup>. Another instance of customary justifications both in the Czech Republic and in the Republic of Poland are so called spring justifications connected with local traditions; the instances of them include the traditional

<sup>25</sup> PUŁAWSKA, K. *Ryzyko sportowe jako okoliczność wyłączająca bezprawność czynu w polskim prawie karnym*. Lublin: Wydawnictwo Naukowe TYGIEL sp. z o.o., 2018, p. 48.

<sup>26</sup> HANC, J. L’art pour l’art, czyli o tzw. kontratyocie sztuki. *Santander Art and Culture Law Review*. 2020, Vol. 6, no. 1, p. 134. DOI: <http://doi.org/10.4467/2450050XSNR.20.007.12391>

<sup>27</sup> JĘDRZEJEWSKI, Z. Nullum crimen sine lege i kontratyoty a zasada jednośc porzadzku prawnego (jednolite bezprawnośc). *Ius Novum*. 2011, no. 1, p. 8; NOLL, P. *Übergesetzliche Rechtfertigungsgründe im besonders die Einwilligung des Verletzten*. Basel: Verl. f. Rech u. Gesellschaft, 1955, pp. 2–3; WARYLEWSKI, J. Zasada ustawowej określonośc przesłanek odpowiedzialnośc karnej a kontratyoty pozaustawowe. In: MAJEWSKI, J. (ed.). *Okolicznośc wyłączające bezprawnośc czynu. Materiały IV Bielańskiego Kolokwium Karnistycznego*. Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa, 2008, p. 22.

<sup>28</sup> HANC, 2020, op. cit, p. 134; BRZOZOWSKI, P. Pozaustawowe kontratyoty: zarys problematyki. *Studia Prawnicze*. 2013, Vol. 196, no. 4, p. 180. DOI: <http://doi.org/10.37232/sp.2013.4.6>; WOLTER, W. O kontratyotach i braku społecznej szkodliwośc czynu. *Państwo i Prawo*. 1963, Vol. 212, no. 10, p. 505; Judgement of the Polish Supreme Court of 7. 1. 2008, no. V KK 158/07.

<sup>29</sup> Judgement of the Polish Supreme Court of 30. 1. 2018, no. IV KK 475/17.

<sup>30</sup> Ibid.

Easter flogging of young girls (or water splashing – ‘śmigus-dyngus’) or stealing flags from the opponent’s camp by scouts<sup>31</sup>.

It is noted that the legislator is not able to foresee all the legal interest conflicts, thereby, law needs to be amended<sup>32</sup>. In such cases, punishing a perpetrator would go against the elementary sense of justice; therefore, it is necessary to invoke a non-statutory justification<sup>33</sup>. An instance of this type of injustice is prosecuting participants in sports competitions for behaviours that meets the features of prohibited acts. To avoid it, many Polish courts rely on the non-statutory justification of sports risk<sup>34</sup>. It is also indicated that the law as a regulator of interpersonal relations must take these relations into account<sup>35</sup>. Therefore, since the privilege of punishing minors is customarily adopted in the society, there must also be a non-statutory justification in penal law protecting parents who exercise this right<sup>36</sup>.

If it is impossible to provide non-statutory justifications, there is a risk of prosecuting persons in situations where it is grossly unfair; to avoid it, their behaviour would have to be exempted from penal liability due to other elements of crime structure. In some cases, however, it would lead to ‘deformation of the remaining elements of the structure of the crime’ by including the clause of a negligible degree of social harmfulness, extending the rules of proceeding with the legal interest or unjustified remodelling of the structure of culpability in order to apply what is permitted in the light of the applicable law. An instance of this type of behaviour is an attempt made by Małecki to excuse a hypothetical physician performing an eugenic abortion (which is currently banned in the Republic of Poland – previously, the defense resorted to was a statutory justification) by a non-statutory excuse (lack of guilt)<sup>37</sup>.

The analysis of the arguments ‘against’ should be given more space than the description of the arguments ‘for’. The focus on the former stems from their importance, and also the fact they do not require in-depth argumentation (as they are quite obvious). Arguments against the application of non-statutory justification can be divided into three groups due to their relationship with the rules applicable both in the Polish and Czech legal systems. These arguments are as follows:

- 1) related to the principle of specificity;
- 2) related to the principle of separation of powers;
- 3) related to the principle of legality.

<sup>31</sup> PROVAZNÍK, 2016, op. cit., p. 219, 222; KRAJEWSKI, R. Kontratypy weselne. *Palestra*. 2014, no. 5–6, p. 18. Available at: <https://palestra.pl/pl/czasopismo/wydanie/5-6-2014/arttykul/kontratypy-weselne>

<sup>32</sup> PLEBANEK, E. *Materialne określenie przestępstwa*. Warszawa: Wolters Kluwer, 2009, p. 225.

<sup>33</sup> DUKIET-NAGÓRSKA, T. Kilka uwag o zasadzie nullum crimen sine lege w polskim porządku prawnym. In: KRAJEWSKI, K. (ed.). *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*. Warszawa: Wolters Kluwer Polska, 2009, p. 47.

<sup>34</sup> Judgement of the Polish Supreme Court of 27. 4. 1938, no. 2 K 2010/37; Judgement of the District Court in Łódź of 9. 3. 2021, no. IV K 155/14.

<sup>35</sup> GUBIŃSKI, 1961, op. cit., p. 66.

<sup>36</sup> Ibid.

<sup>37</sup> MAŁECKI, M. Przerwanie ciąży wyłączające winę. *Państwo i Prawo*. 2021, Vol. 906, no. 8, p. 207.

### 3 Arguments against Non-statutory Justifications – the *Nullum Crimen Sine Lege* Principle

The principle of *nullum crimen sine lege*, also known as the principle of specificity, is the foundation of the modern penal law of democratic states<sup>38</sup>. Both the Czech and Polish penal law systems are based on this principle, specifically referred to in: Article 39 of the Czech Charter of Fundamental Rights and Freedoms and Article 42 (1) of the Polish Constitution. According to its requirements, to hold a perpetrator responsible for a prohibited act, the act must first be described in a legal act of the rank of the statute (*lex scripta et praevia*) in a way clear and understandable for the recipient (*lex certa*). In addition to the requirements set forth by the legislator, the principle of specificity also includes obligations towards the authority applying the law not to use analogy and interpretation extending to the detriment of a perpetrator (*lex stricta*)<sup>39</sup>. This rule guarantees that individuals will not be held criminally liable if they have not committed the prohibited act described in the statute<sup>40</sup>.

Certain authors express opinion that the principle of specificity does not apply to justifications because they do not constitute penal liability, but *vive versa* cause its lack<sup>41</sup>. Supporters of this view claim that the essence of the principle of specificity is to ensure the predictability of criminal law, and the requirement is met when the addressee knows that his behavior meets the features of a prohibited act. For them, the justification is only something additional, which narrows the scope of criminalization, but does not constitute it. However, this cannot be true. An individual, to be fully aware of what behaviours and in what situations are prohibited under penalty, must know the provisions that, in given circumstances, justify certain acts. If they are not aware of such provisions contents, they will not be able to determine beyond any reasonable doubt for what behaviour may they be held criminally responsible. Permission to invoke non-statutory justifications prevents an individual from ascertaining whether they are committing a crime by acting in a given way<sup>42</sup>. It should also be noted that it will be difficult to determine the non-statutory features of justifications (i.e. those described only by doctrine and jurisprudence); they are often unclear, which is in contradiction with the requirement resulting from the *nullum crimen sine lege certa* principle<sup>43</sup>.

<sup>38</sup> RYCHLEWSKA, A. The nullum crimen sine lege principle in the European Convention of Human Rights: The actual scope of guarantee. *Polish Yearbook of International Law*. 2016, Vol. XXXVI, p. 163. DOI: <http://doi.org/10.7420/pyil2016h>

<sup>39</sup> *Ibid.*, pp. 163–164.

<sup>40</sup> *Ibid.*, p. 164.

<sup>41</sup> See ZOLL, A. Pozaustawowe okoliczności wyłączające odpowiedzialność karną w świetle konstytucyjnej zasady podziału władzy. In: LESZCZYŃSKI, Ł. (ed.). *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci profesora Andrzeja Wąska*. Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2015, p. 425; BYCZYK, M. Zasada nullum crimen sine lege a normy ostrożnościowe (na szczególnym przykładzie tzw. naruszeń sportowych). In: SEPIOŁO, I. (ed.). *Nullum crimen sine lege*. Warszawa: Wydawnictwo C. H. Beck, 2013, p. 292; WARYLEWSKI, J. Kontratypy wiosenne. *Palestra*. 1999, Vol. 499–500, no. 7–8, p. 24. DOI: <https://doi.org/10.1023/A:1017219517786>; GUBIŃSKI, 1961, op. cit., p. 6; WOLTER, 1965, op. cit., p. 43, 134.

<sup>42</sup> DUKIET-NAGÓRSKA, 2009, op. cit., p. 47.

<sup>43</sup> KUBIAK, R. Czy istnieje kontratyp zwyczajny. *Prokuratura i Prawo*. 2015, no. 7–8, p. 88. Available at: <https://pk.gov.pl/prokuratura/prokuratura-i-prawo/opublikowane-numery/rok-2015/numer-7-8-21/numer-7-8-21/>; ZACHUTA, A. Czy istnieją 'wiosenne kontratypy'? *Edukacja Prawnicza*. 2006, Vol. 79, no. 4, p. 47.

The discussed principle requires that penal law institutions should be properly comprehensible<sup>44</sup>. For some non-statutory justifications, this requirement cannot be met at all. An instance would be the so-called justification of art, which is associated with an extraordinary difficulty in determining what art is and who the artist is<sup>45</sup>. A non-statutory justification can hardly be defined. Consensus regarding the features of some of them cannot prejudice a positive assessment of the entire institution.

Permission to use this type of penal law structure for the part of law theoreticians and practitioners is *sui generis* lack of fairness towards individuals. No one should be surprised by the fact that a justifying circumstance, not having its source in an act of generally-applicable law, may not actually prevent their actions from being seen as crimes. The lack of the statutory limits of circumstances preventing the attribution of penal unlawfulness means no statutory limits of penal lawlessness; the individual will not know what is prohibited and what is permitted<sup>46</sup>. Due to its guarantee character, the entire issue of the principles of penal liability should be regulated in the act<sup>47</sup>. The *nullum crimen sine lege* principle should cover all, both positive and negative, premises for incurring penal liability<sup>48</sup>.

The argument supporting this thesis is also the necessity to respect the rights of the crime victim, infringed by the behaviour of a perpetrator, whose actions may, yet, be justified on grounds not connected with a relevant law<sup>49</sup>. This is due to the fact that everyone must refrain from acts that would prevent the exercise of the rights of the one acting under a justification<sup>50</sup>. It is also in the interest of the aggrieved party to know what behaviour belongs to the catalogue of unlawful acts<sup>51</sup>. J. Provažník draws attention to the described fact, adding, however, that the aggrieved party is not a party to a substantive relationship like a perpetrator, and, therefore, the state does not incur any obligations towards them<sup>52</sup>. Despite this, he indicates that this thesis conflicts with the efforts to raise the standards of human rights

<sup>44</sup> See ALTENA, J. Nullum crimen sine lege certa Onduideljkheid in het strafrecht op het niveau van primaire en secundaire rechtsregels. *Strafblad*. 2019, no. 3, p. 12. Available at: <https://hdl.handle.net/1887/81356>

<sup>45</sup> Judgement of the Polish Supreme Court of 5. 3. 2015, no. III KK 274/14; HANC, 2020, op. cit., p. 136.

<sup>46</sup> Cf. SITARZ, O. Problem kontratypów pozaustawowych. In: DUKIET-NAGÓRSKA, T. (ed.). *Prawo karne. Część ogólna, szczególna i wojskowa*. Warszawa: Wolters Kluwer, 2018, p. 178.

<sup>47</sup> GRZEŚKOWIAK, A. Nullum crimen, nulla poena sine lege anteriori. In: WIERUSZEWSKI, R. (ed.). *Prawa człowieka. Model prawny*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo Polskiej Akademii Nauk, 1991, p. 506; WRÓBEL, W. *Zmiana normatywna i zasady intertemporalne w prawie karnym*. Kraków: Zakamycze, 2003, p. 102; ZACHUTA, 2006, op. cit., p. 48.

<sup>48</sup> See JĘDRZEJEWSKI, Z. Obrona konieczna, agresywny i defensywny stan wyższej konieczności w prawie cywilnym i karnym – usprawiedliwienie (legalizacja) czynu zabronionego między wolnością a utilitaryzmem (proporcjonalnością, solidarnością). In: PRZYŁĘBSKA, J. et al. (eds.). *Państwo. Konstytucja. Prawo. Księga pamiątkowa poświęcona Sędziemu Trybunału Konstytucyjnego Profesorowi Henrykowi Ciochowi*. Warszawa: Trybunał Konstytucyjny, 2018, p. 85.

<sup>49</sup> ZOLL, 2015, op. cit., p. 1409; KOPEĆ, M. *Kontratypy pozaustawowe a zasada trójpodziału władzy*. In: CIEPŁY, F. (ed.). *Odpowiedzialność karna artysty za obrażę uczuć religijnych*, Warszawa: Instytut na rzecz Kultury Prawnej Ordo Iuris, 2014, p. 225–226.

<sup>50</sup> WRÓBEL, 2003, op. cit., p. 259.

<sup>51</sup> DEMENKO, A. Granice wolności sztuki w polskim prawie karnym. In: BIECZYŃSKI, M. et al. (eds.). *Wolność sztuki w Polsce i w Niemczech w świetle prawa konstytucyjnego i karnego*. Warszawa: Wydawnictwo Wyższej Szkoły Psychologii Społecznej, 2012, p. 117.

<sup>52</sup> PROVAŽNÍK, 2016, op. cit., p. 216.

protection<sup>53</sup>. The in bonam partem analogy for a perpetrator cannot become an in malam partem analogy for the aggrieved party in a democratic state of law<sup>54</sup>. Therefore, in the case of non-statutory justifications, it loses the argument of the general admissibility of applying analogies in favor of the perpetrator in criminal law. Obviously, this is irrelevant in the case of crimes in which there is no victim. Nevertheless, it is worth noting that, in such cases, a situation connected with justification occurs very rarely (if not at all). Legal interests most often collide when the individuals by whom these goods are possessed are subject to this collision, too. In the case of the most frequently distinguished statutory and non-statutory justifications (necessary defense, experiment, the consent of the injured party, sports risk, custom, disciplining minors, and resorting to otherwise prohibited actions if all other means have proved ineffective and ensuring immediate compliance is necessary), there is always an aggrieved party. A certain exceptions can only be a state of necessity, in the case of which the common good may be sacrificed, or authorised use of a weapon or permissible risk. These circumstances, however, constitute statutory justifications, therefore, they are beyond the scope of the considerations.

It is also worth noting that only taking into account the circumstances affecting the lack of unlawfulness can permit an individual to see what interests are actually protected by the legal system and what values it promotes<sup>55</sup>. Therefore, all that legal certainty requires is the statutory regulation of the justifications. Unawareness of the full scope of unlawfulness is in contradiction with the principle of protecting citizens' trust in the state, which is an inseparable element of every democratic state of law<sup>56</sup>. The Republic of Poland and the Czech Republic are no exception.

#### **4 Arguments against Non-statutory Justifications – the Principle of the Separation of Powers**

The supporters of non-statutory justifications can be accused of accepting the risk of actual law-making by the judiciary, which is not actually authorised to legislate at all<sup>57</sup>. This way, the court compensates the errors or omissions of the legislator who did not provide for a given justification in the penal statute<sup>58</sup>. Such an activity is incompatible with the principle of the separation of powers, binding in both the Polish and the Czech political system (Article 10 of the Polish Constitution and Article 2 (1) of the Czech Constitution)<sup>59</sup>, and preventing

<sup>53</sup> Ibid.

<sup>54</sup> JĘDRZEJEWSKI, 2011, op. cit., p. 10.

<sup>55</sup> ZONTEK, W. *Modele wyłączania odpowiedzialności karnej*. Kraków: Krakowski Instytut Prawa Karnego Fundacja, 2017, p. 16.

<sup>56</sup> WĘGLIŃSKA, J. Zasada ochrony zaufania obywateli do państwa i do stanowionego przez nie prawa jako dyrektywa poprawnej legislacji. *Prawo w działaniu. Sprawy cywilne*. 2020, no. 42, p. 169. Available at: <https://pzd.iws.gov.pl/wp-content/uploads/2020/07/Justyna-W%C4%99gli%C5%84ska.pdf>

<sup>57</sup> PROVAZNÍK, 2016, op. cit., p. 216.

<sup>58</sup> Ibid.

<sup>59</sup> PIOTROWSKI, R. Zasada podziału władzy w Konstytucji RP. *Przegląd Sejmowy*. 2007, Vol. 81, no. 4, p. 113; BOBEK, M., POUPEROWA, O. *An Introduction to the Czech Legal System and Legal Resources Online*. Available at: [https://www.nyulawglobal.org/globalex/Czech\\_Republic1.html#\\_3.\\_The\\_Legal\\_Order](https://www.nyulawglobal.org/globalex/Czech_Republic1.html#_3._The_Legal_Order)

abuse of power by any state organs; that contributes to the respect for the dignity of the individual and guaranteeing their rights<sup>60</sup>. The separation of powers consists in separating authorities and assigning them to groups of organs, as well as entrusting each of the groups of organs with a power of authority and defining the relations between them in a way ensuring mutual independence<sup>61</sup>. The principle of the separation of powers is one of the main elements of the rule of law, and a distinguishing feature of European political culture, which forms the basis of the modern democratic *acquis constitutionnel*<sup>62</sup>.

The principle of the separation of powers is related to the necessity to set forth the main functions of the state; in material terms, these are the main directions of the state organization's activity (legal spheres of activity)<sup>63</sup>. These functions are related to the essence of individual powers<sup>64</sup>. Legislation involves creating abstract and general legal norms, whereas administration (executive and business-management) is limited to organising the life of the state and protecting human rights and freedoms, and justice is the resolution of conflicts arising from the legal relationship and the interpretation of the law<sup>65</sup>. Each of these functions is performed by the authorities designated by legal norms, and it is these authorities that may and have to take specific actions<sup>66</sup>. The most important competences in the scope of a given function belong to the essence of a particular authority<sup>67</sup>. An attempt to enter this realm for the part of any other authority would violate the principle of the separation of powers<sup>68</sup>. It is worth bearing in mind that the courts are an authority separate and independent from the other ones (Article 173 of the Polish Constitution, Article 81 of the Czech Constitution). As noted by the Polish Constitutional Tribunal, the relationship between the judiciary and other authorities must be based on the principle of strict separation as opposed to, for instance, the relationship between the legislature and the executive, permitting mutual influence or cooperation<sup>69</sup>.

Both in the Polish and Czech legal systems, the legislative authority has the power to establish universally-binding law. Referring this problem to the field of penal law, it must be recognised that it is the legislature that is not only entitled, but also obliged, to define

<sup>60</sup> Judgement of the Polish Constitutional Court of 9. 11. 1993, no. K 11/93; PIOTROWSKI, 2007, op. cit., p. 124.

<sup>61</sup> KUČA, G. *Zasada podziału władzy w Konstytucji RP z 1997 roku*. Warszawa: Wydawnictwo Sejmowe, 2014, p. 91.

<sup>62</sup> SARNECKI, P. Współczesne rozumienie podziału władzy. In: JANKOWSKI, K. (ed.). *Nowa Konstytucja RP. Wartość, jedność, instytucje*. Toruń: Adam Marszałek, 1992, p. 20; PIOTROWSKI, 2007, op. cit., p. 115.

<sup>63</sup> KUČA, 2014, op. cit., p. 97.

<sup>64</sup> *Ibid.*, p. 94.

<sup>65</sup> MAŁAJNY, R. *Doktryna podziału władzy „Ojców Konstytucji” USA*. Katowice: Uniwersytet Śląski, 1985, p. 38.

<sup>66</sup> KUČA, 2014, op. cit., p. 96.

<sup>67</sup> *Ibid.*, p. 97.

<sup>68</sup> WYRZYKOWSKI, M. *Zasada demokratycznego państwa prawnego*. In: SOKOLEWICZ, W. (ed.). *Zasady podstawowe polskiej Konstytucji*. Warszawa: Wydawnictwo Sejmowe, 1998, p. 79; WASILEWSKI, A. Władza sądowa w Konstytucji Rzeczypospolitej Polskiej. *Państwo i Prawo*. 1998, Vol. 629, no. 7, p. 5.

<sup>69</sup> Judgement of the Polish Constitutional Court of 15. 1. 2009, no. K 45/07.

the conditions for prosecution<sup>70</sup>. Only the statute [Article 31 (3) of the Polish Constitution, Art. 4 of the Czech Charter of Fundamental Rights and Freedoms] may be a source of the restriction of the rights and freedoms of a citizen, describing the prohibited behaviour, which implies the possibility of incurring penalties<sup>71</sup>. As already mentioned, the provisions stipulating the justifications are a part of this description because, in isolation from them, it is impossible to interpret a relevant penal law prohibition. Using a non-statutory justification does not constitute the administration of justice, and, therefore, an assessment of whether the consequences provided for by a legal norm may be applicable in a given case<sup>72</sup>. This is nothing but the application by the court of a legal provision that does not come from the constitutionally-authorized legislator, and, thus, a serious violation of the principle of the separation of powers<sup>73</sup>. The judiciary then enters the area constitutionally reserved for the legislature, which is unacceptable<sup>74</sup>. That action constitutes a violation of ‘core of competence’ of the legislative branch by judicial authorities. This ‘core’ includes establishing the abstract and general rules of universally-binding law<sup>75</sup>. Justification undoubtedly belongs to this. In a situation where a judge chooses a non-statutory justification, they express their own axiological preferences although the legislator did not do so<sup>76</sup>. This will happen, for instance, in the case of the so-called a justification of art, when the collision of a legal interest (artistic creation) with another legal interest, for instance, religious feelings, could be resolved in favour of the former.

It is true, as J. Provazník claims, that the court may sometimes be able to resolve the conflict between two legal interests, which the legislator did not foresee, and for which the statutory method of solution was not stipulated<sup>77</sup>. However, in order for it to be permissible, such a right for a court should be included either in the constitution or in an ordinary act. Such a solution is the clause of negligible social harmfulness in Polish law (Article 1 § 2 of the Polish Penal Code) and the subsidiarity clause in Czech law (§ 12 section 2 of the Czech Penal Code). The difference between these clauses and the non-statutory justifications lies in the fact that the legislator has permitted the judiciary to assess whether a specific act exceeds a negligible degree of social harmfulness (Polish law) or whether it is sufficient to apply a legal remedy other than a penal one (Czech law); the former course of action

<sup>70</sup> ZOLL, A. Znaczenie konstytucyjnej zasady podziału władzy dla prawa karnego materialnego. *Ruch Prawniczy, Ekonomiczny i Socjologiczny*. 2006, Vol. LXVIII, no. 2, p. 324. Available at: [http://repozytorium.amu.edu.pl:8080/bitstream/10593/6363/1/26\\_Andrzej\\_Zoll\\_Znaczenie%20konstytucyjnej%20zasady%20podzia%C5%82u%20w%C5%82adzy%20dla%20prawa%20karnego\\_323-335-.pdf](http://repozytorium.amu.edu.pl:8080/bitstream/10593/6363/1/26_Andrzej_Zoll_Znaczenie%20konstytucyjnej%20zasady%20podzia%C5%82u%20w%C5%82adzy%20dla%20prawa%20karnego_323-335-.pdf)

<sup>71</sup> Cf. WRÓBEL, 2003, op. cit., pp. 109–111.

<sup>72</sup> ZOLL, 2006, op. cit., p. 324.

<sup>73</sup> NOWORYTA, R. Karcenie wychowawcze w świetle art. 96<sup>1</sup> KRO. *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury*. 2012, Vol. 5, no. 2, p. 113. Available at: <https://www.kssip.gov.pl/sites/default/files/kw7.pdf>

<sup>74</sup> ZOLL, A. Związanie sędziego ustawą. In: TRZCIŃSKI, J., JANKIEWICZ, A. (eds.). *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*. Warszawa: Biuro Trybunału Konstytucyjnego, 1996, p. 250; KARDAS, P. Głosa do postanowienia Sądu Najwyższego z 9 stycznia 1996 r., II KRN 159/95. *Palestra*. 1997, Vol. 41, no. 1–2, p. 250.

<sup>75</sup> KUČA, 2014, op. cit., p. 129.

<sup>76</sup> HANC, 2020, op. cit., p. 150.

<sup>77</sup> PROVAZNÍK, 2016, op. cit., p. 216.

does not violate the principle of the separation of powers. The legislator did not provide for a similar possibility of justification, therefore, the lack of a specific provision renders it impossible to create an exception to the principle of separation of powers. These two circumstances, which affect the avoidance of penal liability, cannot be compared with each other in the light of the principle of separation of powers. The degree of the social harmfulness of the act is examined by the court *in concreto*, the justification is general and abstract. In order to create this type of regulation, distance and objectivity are needed, which are possessed by the legislative authorities, constructing them in isolation from a specific case<sup>78</sup>. Moreover, the ‘intersection’ of the functions of individual powers can be considered acceptable only if it does not infringe on their essence and is based on the applicable law<sup>79</sup>. These conditions remain fulfilled with regard to the court’s ability to release a perpetrator from penal liability due to the negligible degree of social harmfulness of their act as opposed to invoking a non-statutory justification.

J. Kuchta aptly notices that in no case can it be stated that an act is unlawful solely on the basis of the absence of social danger<sup>80</sup>. He indicates that, in such a case, the existing justifications appear redundant<sup>81</sup>. In his opinion, it is the legislator who should decide whether a given circumstance may render an act unlawful or not<sup>82</sup>. This view is undoubtedly worth accepting. It is based on the dogmatic structure of crime, according to which the element of social harmfulness of behaviour is preceded by making it unlawful. To put things in a nutshell, then, there are no unlawful acts that are not socially harmful.

## 5 Arguments against Non-statutory Justifications – the Principle of Legality

The norms of Article 7 of the Polish Constitution and of Article 2 (3) of the Czech Constitution express the principle of legality, which requires public authorities to act on the basis of law and within the limits of the law, constituting a formal element of the concept of the rule of law<sup>83</sup>. This means that, while taking actions within the scope of state authority, organs must demonstrate a clear legal basis for their actions, which cannot be presumed<sup>84</sup>. All legislative acts should be legitimised by the provisions of the constitution or in the acts issued on the basis of it<sup>85</sup>. The discussed principle is to guarantee an individual

<sup>78</sup> DŁUGOSZ, J. *Ustawowa wyłączność i określoność w prawie karnym*. Warszawa: C. H. Beck, 2016, p. 289.

<sup>79</sup> WASILEWSKI, 1998, op. cit., p. 5.

<sup>80</sup> KUCHTA, 2003, op. cit., pp. 209–210.

<sup>81</sup> Ibid, 210.

<sup>82</sup> Ibid.

<sup>83</sup> NOWACKI, J. *Formalne państwo prawne (kwestia charakterystyki)*”, *Teoria prawa i filozofia prawa. Współczesne prawo i prawoznawstwo*. Toruń: Uniwersytet Mikołaja Kopernika, 1998, p. 207; BIEN-KACAŁA, A. *Zasada praworządności i jej gwarancje w Konstytucji RP z 1997 r.* In: KAŁA, D. (ed.). *Praworządność i jej granice*. Warszawa: Oficyna a Wolters Kluwer business, 2009, p. 46.

<sup>84</sup> GÓRZYŃSKA, T. *Zasada praworządności i legalności*. In: SOKOLEWICZ, W. (ed.). *Zasady podstawowe polskiej Konstytucji*. Warszawa: Wydawnictwo Sejmowe, 1998, p. 93.

<sup>85</sup> BANASZAK, B. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: C. H. Beck, 2012, p. 78.

the possibility of predicting the legal consequences of their actions; the overriding values are legal certainty, legal security and the predictability of the decisions of state authorities<sup>86</sup>. Therefore, state bodies may not exceed the scope of their powers; they are obliged to act on the basis of the law, and any violation of the law must result in depriving the body of its legitimacy<sup>87</sup>. The manner of exercising these exclusive powers will, thereupon, not result from the arbitrariness of the actions of the authorities, but rather from the exercise of their powers<sup>88</sup>.

The catalogue of the sources of universally-binding law in the Republic of Poland is closed (Article 87 of the Polish Constitution)<sup>89</sup>. Pursuant to this provision, the sources of universally-binding law are: the Constitution, statutes, ratified international agreements, regulations and the enactments of local law. Czech basic law does not contain a similar provision although it is indicated that the Czech legal system is also based on statutes, executive regulations, local laws, international agreements and the judicature of the Constitutional Court (negative legislator)<sup>90</sup>. A closed system of the sources of law prevents the dispersion of the sources of law making and enables a proper control of the process of its creation<sup>91</sup>. The open catalogue of law universally applicable in the countries of the common law system, taking into account, in particular, the treatment of custom or precedents as law-making facts, means a threat of the arbitrariness of law, uncertainty in its application, the lack of efficiency of the rules for resolving conflicts between legal acts, as well as the unsteadiness of the entire legal system<sup>92</sup>. The prevailing customs, views of the doctrine or judicature cannot constitute a source of law in neither of the two countries in question; their role is limited to being a tool helping to interpret the provisions of law correctly<sup>93</sup>, and, thus, interpret the full form of penal law norm.

Considering the above, it should be stated that judicial law-making, including creating or invoking a non-statutory justification, does not comply with the principle of the rule

<sup>86</sup> Judgement of the Polish Constitutional Court of 21. 12. 1999, no. K 22/99; RYCHLEWSKA, A. Zasada nullum crimen sine lege na tle współczesnej idei państwa prawa. *Czasopismo Prawa Karnego i Nauk Penalitych.* 2017, Vol. XXI, no. 3, p. 102. Available at: <https://www.czpk.pl/index.php/zeszyty-archiwum/zeszyt-2017-3>

<sup>87</sup> NOWACKI, 1998, op. cit., p. 207; BANASZAK, 2012, op. cit., p. 78.

<sup>88</sup> BANASZAK, 2012, op. cit., p. 78.

<sup>89</sup> DUDEK, D. *Prawo konstytucyjne w zarysie. Wybór źródeł.* Lublin: Lubelskie Wydawnictwa Prawnicze, 2002, p. 73; DZIAŁOCHA, K. Zamknięty system źródeł prawa powszechnie obowiązującego w Konstytucji i w praktyce. In: SZMYT, A. (ed.). *Konstytucyjny system źródeł prawa w praktyce.* Warszawa: Wydawnictwo Sejmowe, 2005, p. 9; ZACHUTA, 2006, op. cit., p. 47.

<sup>90</sup> CHROMA, M. The Czech Legal System and Contexts. In: BHATIA, V. et al. (eds.). *Multilingual and Multicultural Contexts of Legislation: An International Perspective.* Frankfurt am Main, New York: Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2003, p. 5. Available at: [https://www.researchgate.net/publication/236213263\\_The\\_Czech\\_Legal\\_System\\_and\\_Contexts](https://www.researchgate.net/publication/236213263_The_Czech_Legal_System_and_Contexts)

<sup>91</sup> SAFJAN, M. Refleksje na temat zwyczaju. In: KĘPIŃSKI, M. et al. (eds.). *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtyśkiemu.* Poznań: Wydawnictwo Naukowe UAM, 2005, p. 89.

<sup>92</sup> Cf. DZIAŁOCHA, 2005, op. cit., p. 10.

<sup>93</sup> RADECKI, W. Nowa czeska koncepcja odpowiedzialności za wykroczenia na kanwie monografii Heleny Praškovéj. *Prokuratura i Prawo.* 2018, no. 4, p. 11. Available at: <https://pk.gov.pl/prokuratura/prokuratura-i-prawo/opublikowane-numery/rok-2018/numer-4-24/numer-4-2018/>; CHROMA, 2003, op. cit., p. 6.

of law and legality. Even if one accepts a different view than the adopted one, permitting the existence of the sources of universally-binding law other than those stipulated in the Polish and Czech legal system, one should still bear in mind the words of W. Wróbel that the use of the norms of common law may be permitted only when not it does limit the rights or freedoms of the individual<sup>94</sup>. The creation of abstract-general circumstances that prevent a perpetrator's behaviour from being considered unlawful, leads to the restriction of the rights or freedoms of an individual, in relation to whose interests an unlawful behaviour may be undertaken. Therefore, the justifications should be included only in the acts of statutory law.

One may wonder whether the construction of non-statutory justifications by analogy is not the creation of law, but its application<sup>95</sup>. According to this view, it does not violate the closed list of sources of law, but protects against unfair (unjustice) decisions<sup>96</sup>. It seems, however, that using non-statutory justifications is something more than just applying the law. It is, after all, the creation of a new institution of criminal law, not provided for by the legislator. Bearing this in mind, it should be stated that this is a violation of the principle of legality – acting not within the law, but outside it.

## 6 Non-statutory Justifications and other Defenses

It should also be noted that, in many cases, it is not necessary at all to invoke or create a new justification<sup>97</sup>. Both the Polish and the Czech systems of penal law do not lack tools enabling the perpetrator to be released from penal liability in situations where it would be unfair to assign it to them. First of all, in situations where the society accepts a given behaviour, *prima facie* being a prohibited act, and treats it as normal<sup>98</sup>, we are dealing with the so-called primary legality. Primary legality differs from secondary legality (obtained by means of justification) in that the behaviour undertaken within its framework from the very beginning is socially acceptable and does not violate the rules of proceeding with the legal interest, and, thus, not exceeding the penal prohibition<sup>99</sup>. Taking into account the fact that the conflict of behaviour with the rules of conduct with legal interest is a feature of any type of a prohibited act<sup>100</sup>, it should be emphasised that a socially-acceptable act will never fulfill the criteria set forth in the statutory description of behaviour prohibited under penalty (*actus reus*). The action of a perpetrator is justified at the early stage of penal law evaluation: the moment of assessing the *actus reus*. Only in these situations can

<sup>94</sup> WRÓBEL, 2003, op. cit., p. 182.

<sup>95</sup> This is what one anonymous reviewer of the article suggests.

<sup>96</sup> Ibid.

<sup>97</sup> STACHURA, I. Karcenie wychowawcze i ryzyko sportowe. Próba analizy statusu normatywnego wybranych kontratypów pozaustawowych. *Czasopismo Prawa Karnego i Nauk Penalnych*. 2007, Vol. XI, no. 2, p. 142. Available at: <https://www.czapk.pl/index.php/zeszyty-archiwum/zeszyt-2007-2>

<sup>98</sup> PINKAVA, 2020, op. cit., p. 147.

<sup>99</sup> GRUDECKI, 2020, op. cit., p. 58.

<sup>100</sup> GIEZEK, J. *Przejrzyność oraz przypisanie skutku w prawie*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1994, p. 88.

one speak about the complete absence of social harmfulness of behaviour. The instances of primarily-legal acts include the violations of legal interests during sports competition (e.g. damage to health caused to boxers by fellow sportsmen, the violations of bodily inviolability by footballers) or the cultivation of generally-accepted customs (e.g. disturbing night rest on New Year's Eve or by giving gifts to commission members after the master's examination). In these situations, there is no need to invoke the non-statutory justification.

*Prima facie* approval of primary legality may be in contradiction with the previously expressed arguments against non-statutory justifications. However, it is not so. Behavior in accordance with the rules of proceeding with the legal interest makes it impossible to attribute the features of a prohibited act in ordinary, socially acceptable situations, and thus approved by public authorities. These rules limit the scope of criminalization so that it does not include everyday behavior that violates certain legal interests, but in a manner acceptable to everyone. In other cases, it would be too broad and, for example, the prohibition of violating bodily inviolability would include participation in cosmetic procedures, and the prohibition of risking the loss of life or health would include participation in car races. The justifications, however, are of a completely different nature. They constitute an exceptional license to undertake generally socially unacceptable behavior. Hence, they should always be specified in a legal act<sup>101</sup>. It is also impossible to agree with the theses advocated by some authors, according to which the justifications also eliminate the social harmfulness of the act. Acting within the justification is sometimes purely tolerated behaviour (a choice of the lesser evil), giving priority by the state to less harmful behaviour in conflict with another harmful act<sup>102</sup>. This does not mean that they should be positively valued. Is it possible to give such an assessment to the act of the defender as part of necessary defense, who causes the death of the attacker by their behaviour? The destruction of a legal interest will never be assessed positively and it cannot constitute a positive value in society.

We cannot equate either situations in which responsibility for a crime cannot be assigned due to a negligible degree of social harmfulness (as in the Republic of Poland) or the subsidiarity clause (as in the Czech Republic). As already mentioned, these are separate, code-based, grounds for exemption from penal liability in particular (petty) cases. They differ from justifications in that the justification concerns general (repetitive) factual states, and the aforementioned circumstance may only be applied *in concreto*. They are the tools of prosecutorial discretion, invoked in situations where there is pointless to commence or continue penal proceedings<sup>103</sup>. The functions of these institutions are completely different. Therefore, one cannot (and the Polish Supreme Court once did<sup>104</sup>, but erroneously) find in these circumstances the sources of non-statutory justifications.

<sup>101</sup> See more GRUDECKI, M. *Kontratypy pozaustawowe w polskim prawie karnym*. Warszawa: C. H. Beck, 2021, pp. 301–303.

<sup>102</sup> HORSKÝ, 2012, op. cit., p. 8.

<sup>103</sup> Judgement of the District Court in Radom of 7. 6. 2018, no. II K 143/17.

<sup>104</sup> Judgement of the Polish Supreme Court of 25. 1. 2000, no. WKN 45/99.

## Conclusions

The Czech and Polish penal law are not based on custom, nor are they a common law; all grounds for incurring penal liability must be included in the statute<sup>105</sup>. The court in continental law system is called on to apply the law, not to create it. It cannot usurp the rights of a legislator whose action is an emanation of the will of the general public, and who, therefore, has the legitimacy to create norms<sup>106</sup>. This would threaten the arbitrariness of judicial authorities and their privilege over the legislature, which decides what behaviour may constitute a justification<sup>107</sup>. The above remarks are valid not only with regard to the Polish or Czech legal system, but also to all the democratic systems of states based on the principles of specificity, the separation of powers and legality. Since the description of prohibited behaviour must be included in the act, so must justification.

One should be aware of the fact that the discussed issue is highly controversial, and the arguments of supporters of the institution of non-statutory justifications may be convincing for some. It seems, however, that the weight of the presented arguments against it speaks in favor of the thesis about the inadmissibility of creating non-statutory justifications.

<sup>105</sup> The Criminal Justice System in the Czech Republic. Available at: <http://www.ok.cz/iksp/en/docs/s279.pdf>; KORDELA, M. Aksjologia źródeł prawa. *Ruch Prawniczy, Ekonomiczny i Socjologiczny*. 2016, Vol. LXXXVIII, no. 2, p. 24. DOI: <https://doi.org/10.14746/rpeis.2016.78.2.3>. Available at: <https://pressto.amu.edu.pl/index.php/rpeis/article/view/5835>; CHROMA, 2003, op. cit., p. 5.

<sup>106</sup> DŁUGOSZ, 2016, op. cit., p. 289.

<sup>107</sup> Ibid., p. 290.