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## ADRES / ADDRESS

01-043 Warszawa ul. Okopowa 59 / 01-043 Warsaw 59 Okopowa St., PL
tel. +48 22 18 24 942
**eppism.ewspa.edu.pl**

## From the Editor

The first issue of this year's quarterly is published entirely in English. In this way, we want to expand our readership and enable the Authors of the texts to reach the international scholarly circuit.

The issue brings numerous articles devoted primarily to new developments in the field of jurisprudence, as well as to events in the field of international relations.

Jerzy Wiatr brings the readers closer to the problem of political transition in Turkey, summarising the scientific output of Ergun Özbudun, political scientist and constitutional lawyer, honorary professor at the European University of Law and Administration, who died at the end of 2023.

Jerzy Jaskiernia explains the problem of the role of immunity of a member of the Parliamentary Assembly of the Council of Europe in the conduct of parliamentary diplomacy.

In another interesting text, Artur Kotowski, in turn, points out similarities and differences in Euro-Atlantic legal culture, while Dominik Bierecki analyses the relationship between civic energy communities and social enterprises in Polish law.

A number of articles are devoted to judicial issues. These include those by: Adam Doliwa, Agnieszka Góra-Błaszczykowska, Igor Zgoliński, Jakub Stelina, Krzysztof Grzesiowski and Beata Stępień-Załucka. The problem raised by the last Author, i.e. the rationale for the use of artificial intelligence in the administration of justice, will probably be the subject of many further analyses and polemics. The text encourages this, as it poses many questions that require answers.

In the review section we bring closer an important work by three prominent Polish researchers – Patrycja Grzebyk, Bartłomiej Krzan and Karolina Wierczyńska – devoted to the presentation of Polish achievements in the subject of shaping international criminal law.

*Prof.Tit. Roman Wieruszewski, DSc,*
*Rector of EULA*

## Od Redakcji

Pierwszy w tym roku numer kwartalnika wydajemy w całości w języku angielskim. W ten sposób chcemy poszerzyć grono naszych czytelników oraz umożliwić autorkom i autorom tekstów dotarcie do międzynarodowego obiegu naukowego.

Numer przynosi liczne artykuły poświęcone przede wszystkim nowym zjawiskom w dziedzinie prawoznawstwa, a także wydarzeniom z zakresu stosunków międzynarodowych.

Jerzy Wiatr przybliża czytelnikom problem przemian ustrojowych w Turcji, podsumowując dorobek naukowy Erguna Özbuduna, politologa oraz prawnika konstytucjonalisty, profesora honorowego Europejskiej Wyższej Szkoły Prawa i Administracji, zmarłego z końcem 2023 roku.

Jerzy Jaskiernia wyjaśnia kwestię roli immunitetu członka Zgromadzenia Parlamentarnego Rady Europy w prowadzeniu dyplomacji parlamentarnej.

W innym ciekawym tekście Artur Kotowski wskazuje z kolei na podobieństwa i różnice w euroatlantyckiej kulturze prawniczej, Dominik Bierecki analizuje natomiast związek między obywatelskimi społecznościami energetycznymi a przedsiębiorstwami społecznymi w prawie polskim.

Szereg artykułów poświęcono problematyce sądowej. Należą do nich te autorstwa: Adama Doliwy, Agnieszki Góry-Błaszczykowskiej, Igora Zgolińskiego, Jakuba Steliny, Krzysztofa Grzesiowskiego oraz Beaty Stępień-Załuckiej. Problem poruszony przez ostatnią autorkę, czyli przesłanek wykorzystania sztucznej inteligencji w wymiarze sprawiedliwości, będzie zapewne przedmiotem wielu dalszych analiz i polemik. Tekst do tego zachęca, gdyż stawia się w nim wiele pytań wymagających odpowiedzi.

W dziale recenzji przybliżamy ważną pracę trojga wybitnych polskich badaczy: Patrycji Grzebyk, Bartłomieja Krzana i Karoliny Wierczyńskiej – poświęconą prezentacji rodzimego dorobku w przedmiocie kształtowania międzynarodowego prawa karnego.

*Prof. zw. dr hab. Roman Wieruszewski,*
*rektor EWSPA*

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Jerzy J. Wiatr*

# Dilemmas of Democratic Transformation in Turkey: Ergun Özbudun's contribution to political science

**[Dylematy demokratycznych przemian w Turcji: wkład Erguna Özbuduna do nauk o polityce]**

**Abstract**

Modern Turkey represents an interesting case of political transformation: from traditional monarchy to military regime, from military regime to parliamentary democracy and, more recently, from parliamentary democracy to a new authoritarianism. One of the most influential Turkish scholars who studied these processes was Ergun Özbudun (1937–2023), a political scientist and constitutional lawyer, honorary professor at the European University of Law and Administration in Warsaw; Özbudun's contribution to the understanding of these transition constitutes the most important part of his scholarly work.

**Keywords:** authoritarianism, constitutionalism, democracy, transition.

Modern Turkey belongs to the broader category of countries which in the twentieth century experienced the transformation from monarchical rule to one-party authoritarianism and later to parliamentary democracy, followed by the rise of a new type of authoritarianism, called 'delegative democracy' (O'Donnell 1994), 'illiberal democracy' (Zakaria 2001), 'electoral authoritarianism' (Turan 2019) or simply 'new authoritarianism' (Wiatr 2019:169–181).

During the life of one generation, Turkey experienced two fundamental regime changes. The first took place in the aftermath of the First World War, in which the Ottoman empire suffered a crushing defeat. In the first few years after the war, the Turkish state fought for its very existence, endangered by

* **Jerzy J. Wiatr** – DSc, Professor of Humanities (Titular), sociologist and political scientist, former Minister of National Education (1996–1997), Honorary Rector of EULA; https://orcid.org/0000-0001 8632-7669; jwiatr@ewspa.edu.pl / prof. dr hab. nauk humanistycznych, socjolog i politolog, b. minister edukacji narodowej (1996–1997), rektor honorowy EWSPA.

the Greek occupation of the Western part of Anatolia and by the rise of Kurdish separatism in the East. In consequence of the Kemalist revolution and of the victory of the new regime in the war for independence, was the creation of modern Turkey as an authoritarian one-party regime (1923). Less than thirty years later, after the passing away of the founder of the Republic (1938), Turkey started the process of gradual democratization from above, which culminated in the coming to power – following the first truly competitive election – of the Democratic Party of prime minister Adnan Menderes in 1950. The conservative rule of the Democratic Party, strongly influenced by the Islamic values, has been terminated by the military *coup d'etat* in 1960, followed by twenty years of more or less normally functioning parliamentary democracy. In 1980, however, the armed forces under General Kenan Evren interrupted the functioning of the parliamentary government, notoriously plagued by growing domestic conflicts, politically motivated terrorism and ethnic separatism. Following the second military *coup*, a new Constitution was adopted and the military rule was replaced by the civilian government. Twenty years later, in 2002, the conservative Justice and Development party (AKP) won the election and since then it remains in power, creating one of the first versions of the new authoritarianism. The new authoritarian regime has been able to put down an abortive military *coup* of 2016 and is now more consolidated than any Turkish regime since the end of the Kemalist rule.

For the Turkish legal and political sciences these developments constituted both a challenge and an opportunity. The first Turkish scholar who undertook a broad, comparatively oriented, study of the democratic transition was Ergun Özbudun (1937–2023). His contribution to the understanding of the dilemmas of democratic transformation, while focused on Turkey, has a broader, comparative importance. Ergun and I were friends for many years and his studies of democracy greatly helped me to understand the dilemmas of countries, which – like his native Turkey – underwent both the process of democratization and the challenge of new authoritarianism.

Like many political scientists of his generation, Ergun Özbudun received his education and started his academic carrier as a constitutional lawyer. To the end of his life he continued writing on constitutional issues and on the problems of human rights. As a constitutional lawyer he belonged to the prestigious Venice Commission (1990–2014) and has been considered one of the most respected authorities, both in his native Turkey and abroad. In 2008, in recognition of his academic work the European University of Law and Administration in Warsaw bestowed upon him the title of honorary professor. He was also a prominent political scientist, president of the Turkish Political Science Association and member of the Executive Committee of the International Political Science Association (for two terms: 1979–1982 and 1982–1985). Such combination of two academic domains was quite common in his gen-

eration of European political scientists who entered academic life before the establishment of separate departments of political science, mostly from departments of law, sociology or history.

Ergun Özbudun's departure from purely legal problematic began quite early, In 1966, he published his first important contribution to the understanding of Turkish military politics, in which he approached the history of Turkish armed forces from a sociological perspective. His main thesis was that the Turkish military became an important channel of upward social mobility with consequences for the role of the military in politics. He suggested that "armies recruited essentially from lower and middle classes are more likely to produce reformist military regimes than armies of feudal or upper class origin" (Özbudun 1966:3). His analysis of the social composition and of the political role of Turkish military was highly appreciated by the father of military sociology Morris Janowitz (Janowitz 1971:301–333). Quite a success for a young scholar in his twenties.

In later years, Özbudun continued his analysis of the role of military in Turkish politics. In 1981, he was the co-editor (with Ali Kazancigil) of the internationally written volume on the role of Ataturk as the founder of modern state (Kazancigil and Özbudun 1981). His chapter on "the nature of the Kemalist political regime" is based on the thesis that the Kemalist regime "is one of the very few cases of a peaceful transition from an authoritarian to a democratic polity" (*ibid.*:79).

Ergun Özbudun was not a Kemalist, but he fully understood and appreciated the historical role of the Kemalist revolution in the transformation of the former Ottoman empire in the direction of secular democratic state, which he studied as "one of the very few cases of a peaceful transition from and authoritarian to a democratic polity" (*ibid.*). Part of his analysis concerned the nature of the one-party regime established after the Turkish victory in the war for independence (1923). He pointed to the emergence of limited political pluralism and the willingness of the leadership of the Republican People's Party to gradually transform the regime. Unlike most of the authoritarian regimes of the period between two world wars, the Turkish one-party system was legitimized by the commitment to the gradual democratization. Turkish transition from Kemalist authoritarianism to parliamentary democracy took place in the first years after Kemal's passing away (1938) and took the form of a controlled democratization from above. Such character of Turkish democratization was possible because the Kemalist elite was strongly affected by the Western values, considered by many as symbolic for modernity. An important characteristics of the Kemalist regime was its strong attachment to progressive reforms, including secularization of the state and adoption of Western models of governance. A prominent Turkish political scientist, and a devoted Kemalist, Suna Kili (1929–2015) emphasized this modernizing aspect of the

Turkish regime in her study of Kemalism (Kili 1969). Unlike her, Ergun Özbudun was far from uncritical acceptance of Kemalism, but he understood the progressive role played by the Kemalist revolution in the formation of modern Turkey. Pointing to the crucial role of the military in Turkish politics, Özbudun defined the post-revolutionary Turkey as the system which "combines elements of military-bureaucratic regimes with those of post-independence mobilizational regimes" (Kazancigil and Özbudun 1981:97). He stressed the importance of the constitutional guaranties of human rights and the lack of totalitarian ideology. Confronted with the troubled history of civil-military relations in Turkey, Özbudun – in a paper written jointly with Serap Yazıcı and published in Poland – stressed the importance of exit guarantees offered the departing generals as one of the conditions of smoothly transfer of power. The Authors pointed to the fact, that "a credible threat of *coup* fundamentally alters the expectations and calculations of civilian political actors, leading them to act in ways that detract from democratic consolidation, such as seeing alliances with the military or inviting them to intervene" (Özbudun and Yazıcı 1966:339). For most of the late twentieth century the main challenge confronting Turkish democracy was the uneasy relationship between civilian politicians and the military, which – in accordance with the Kemalist ideology – considered itself as the guardian of the secular state and exercised a critical political role as a *veto* power" (Turan 2019:60). Two successful military *coups* (1960 and 1980) demonstrated the special role of the Turkish armed forces as the guardian of the Kemalist tradition of a secular republic.

For Ergun Özbudun the chronic instability of the Turkish democracy was an intellectual challenge. His deep commitment to democracy made him concerned with those factors of the Turkish politics which made it highly unstable. In 1988, he edited an important book on perspectives of democracy in Turkey in which he presented his comprehensive analysis of the reasons for which the Turkish process of democracy-building was far from success. He saw the main obstacles to the smooth democratic transformation in the heritage of Ottoman political culture, one of its elements being the "predominance pf status-based values rather than market-derived values" (Özbudun 1988:31). He pointed also to such remnants of history as "a low level of social and cultural integration" and "a predilection for organic theories of the state and society, and solidarist doctrines found easy acceptance among the Young Turks and Kemalist elites" (Özbudun 1988:32,33).

Addressing the issue of leadership, Özbudun accused Turkish political leaders of not being able to contain political conflict and to manage political crises. He blamed civilian political leaders for their unwillingness to compromise and saw "the historical legacy of an exceedingly centralized, overpowering state and the concomitant weakness of civil society" as the most serious obstacles to democratic development (Özbudun 1988:45). Nonetheless,

he remained rather optimistic about the future. In the concluding section of his chapter he wrote, that "Turkey is one of the few countries that are more democratic politically than they ought to have been according to their socio-economic development" and explained this "by the strong elite commitment to democracy" (Özbudun 1988:51). Consequently, he concluded his analysis by saying that "the most likely course of events in the next few years would be the consolidation of democracy, with the expansion of civil and union rights by relatively minor changes in the constitution" (*ibid.*). In late twentieth century – during the third wave of democratization worldwide – such optimism was quite common.

It does not mean that all political scientists were blind to the possibilities of less optimistic scenarios. In 1988, at the initiative of the then president of the IPSA Guillermo O'Donnell, Adam Przeworski and I formed the international study group devoted to democratic transformation (East-South Systems Transformations), composed of 21 scholars from Argentina, Brazil, Hungary, Korea, Poland, Russia, Spain, Turkey and USA. The declared objective of this initiative was to identify factors which could lead to the collapse of democratization. Ergun was the only member of the group from the Middle East and the convener of the first round table conference which took place in Antalya in April 1990. He also contributed an important working paper on the role of constitution-making in processes of democratic stabilization (Özbudun 1991), and co-authored the final report (Przeworski 1995). His main contribution to our interpretation of democratic stabilization was the emphasis he put on the timing and democratic or nondemocratic mechanisms of constitution-making.

In the final ESST report, the main dangers to democratization were identified as socio-economic, particularly the consequences of radical neo-liberal economic strategies, which – in our opinion – could lead to massive disappointment and even to the danger of collective violence. In the properly built democratic state we saw the institution capable of preserving the democratic change and to avoid a violent social and political crisis (Przeworski 1995:107–112).

The study of politics repeatedly informs us of the potential for unexpected developments. In the first decades of the present century it became obvious that democratic transformation and consolidation of new democratic regimes are not the dominant tendencies world-wide. In several states, nascent democracies have been replaced by a new type of authoritarianism, based not on naked military power but on the will of the voters. Turkey is one of the most interesting examples of such development and Ergun Özbudun was one of political scientists who fully comprehended the importance of such turn of events. He identified challenges to democratic consolidation in Turkey and pointed to their roots in the history of Turkey (Özbudun 2000). In the book

written with William Hale he drew attention to the consequences of the rise of militant Islamism (Hale and Özbudun 2009). He also pointed to the consequences of social change, particularly of the center-peripheries relationship, for political participation (Özbudun 2016).

In his view, the electoral victory of the Justice and Development Party (AKP) in 2002 has not changed the character of the Turkish system immediately. It was rather a process of gradual political change which eventually led to the formation of competitive authoritarianism, as Ergun Özbudun defined the present Turkish regime. "Turkish political system – he wrote in summary of his 2020 article – started to acquire the characteristics of such a regime in 2013–14. The process was intensified with the declaration of emergency rule following the failed *coup d'etat* of 15 July 2016, during which many human rights violations were committed. The drift toward authoritarianism reached its peak with the constitutional amendment of 2017, which established a truly one-person government, devoid of all effective control mechanisms. The present system is still reasonably competitive, but increasingly authoritarian" (Özbudun 2020:37).

Political transformations are strongly affected by the heritage of history. Political changes in present-day Turkey can serve as example. "The Turkish ideological scene – wrote Hakan Yılmaz – has recently witnessed a strong comeback of Kemalism in the form of neo-nationalism. The Kemalist neo-nationalism of today basically represents a defensive line of thinking: firstly defending the nation-state in the face of the attacks of ethnic separatism, European integration, and globalization, and, secondly, defending the secular order against the growing tide of Islamic conservatism." (Yılmaz 2008:535). The paradoxical aspect of contemporary Turkish politics is the rivalry of two types of authoritarianism: the Kemalist neo-nationalism and the Islamic conservatism. The electoral victory of the Justice and Development Party (AKP) in 2002 resulted in gradual consolidation of power in the hands of the dominant party and the transition from pluralist democracy to electoral authoritarianism (Turan 2019:57–76). The consequence of this is that the main division in Turkey of today is not between liberal democracy and authoritarianism but between two types of authoritarianism: the conservative and Islamic-oriented electoral authoritarianism of the AKP and the nationalist Kemalist tradition.

In the last years of his life Ergun Özbudun continued his critical analysis of the present Turkish regime. He was uncompromising in his brilliant analysis and in his deep commitment to democratic values. His contribution to the study of democracy confirms the belief – expressed ninety years ago by the great Swedish scholar Gunnar Myrdal – that there is no inevitable conflict between ideological commitment and objectivity in social science research (Myrdal 1944:1027–1034).

My friendship with Ergun Özbudun had its roots in our membership in the Executive Committee of the International Political Science Association. We exchanged numerous visits to our respective universities, Ergun lecturing at University of Warsaw and me in Ankara, at Bikent University. Ergun was the only Turkish political scientist who published some of his studies in Poland. My knowledge of the Turkish political system owes a lot to our long discussions in which Ergun and I compared history and current developments of our nations (Wiatr 2022:164–166). In the current century, political development in Turkey and Poland offered interesting perspectives for comparative analysis. Both countries encountered crises of democracy and the rise of populist, authoritarian parties with strong attachment to religious values. There are, however, important differences. Poland's historical ties with the democratic West have deeper roots that the pro-Western orientation of the part of Turkish elite. Poland is also free from ethnic conflict, which in Turkey is one of the main reasons of the strength of authoritarianism. There is also a factor of time. From the historical comparisons I have learned that the longer is the duration of an authoritarian regime, the more likely is that it will be able to survive. In Turkey the AKP has been in power since 2002 – for more than twenty years – while in Poland the Law and Justice party (PiS) departed from power after barely two parliamentary terms lasting only eight years. A few weeks before Ergun's passing away, Polish parliamentary election had terminated the rule of the Law and Justice party, the closest analogy to the Turkish AKP. Future will tell if this means the end of cross-national analogy between Turkey and Poland.

**Dylematy demokratycznych przemian w Turcji: wkład Erguna Özbuduna do nauk o polityce**

**Abstrakt**

Współczesna Turcja stanowi interesujący przypadek politycznych transformacji: od tradycyjnej monarchii do reżimu wojskowego, od reżimu wojskowego do demokracji parlamentarnej oraz, ostatnimi czasy, od demokracji parlamentarnej do nowego autorytaryzmu. Jednym z najbardziej wpływowych tureckich uczonych, którzy badali te procesy, był Ergun Özbudun (1937–2023), politolog oraz prawnik konstytucjonalista, profesor honorowy Europejskiej Wyższej Szkoły Prawa i Administracji w Warszawie; wkład Özbuduna w zrozumienie tych przemian stanowi najważniejszą część jego pracy naukowej.

**Słowa kluczowe:** autorytaryzm, konstytucjonalizm, demokracja, transformacja.

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Jerzy Jaskiernia*

# Parliamentary Immunity of the Member of Parliamentary Assembly of the Council of Europe As a Condition for Conducting Parliamentary Diplomacy

**[Immunitet parlamentarny członka Zgromadzenia Parlamentarnego Rady Europy jako warunek prowadzenia dyplomacji parlamentarnej]**

**Abstract**

The Author analyzed the problem: to what extent is having parliamentary immunity for a member of the Parliamentary Assembly of the Council of Europe (PACE) a condition for conducting parliamentary diplomacy by the PACE and its members? The assumption by the PACE of new competences in the scope of the control function (accession procedure, monitoring procedure, election monitoring, participation in conflict resolution), which were not available at the time of the establishment of the Council of Europe, resulted in the members of the PACE being involved in conducting parliamentary diplomacy and taking the associated risks for their security. The PACE therefore interprets the prohibition on detaining a member of the PACE to a greater extent than that resulting from legally binding norms (the Statute of the Council of Europe, the General Agreement on the Privileges and Immunities of the Council of Europe), demanding that the PACE must consent to the detention of a member of the PACE. This rule, included in the PACE guidelines, is the so-called „soft law" is valid but should not be abused. Immunity is intended to protect the integrity of the PACE and cannot be a cover for criminal activities.

**Keywords:** Council of Europe, PACE, parliamentary immunity, parliamentary diplomacy.

* **Jerzy Jaskiernia** – DSc, Professor of Law (Titular), chair of the Constitutional, European and International Public Law division at the Faculty of Law and Social Sciences, Jan Kochanowski University of Kielce (affiliation); https://orcid.org/0000-0001-9401-5999; jerzy.jaskiernia@ujk.edu.pl / dr hab., profesor nauk prawnych, kierownik Zakładu Prawa Konstytucyjnego, Europejskiego i Międzynarodowego Publicznego na Wydziale Prawa i Nauk Społecznych, Uniwersytet Jana Kochanowskiego w Kielcach (afiliacja).

## Introduction

The case of the immunity of MP Marcin Romanowski for membership in the Parliamentary Assembly of the Council of Europe (PACE), which was requested in 2024 by the prosecutor's office to be waived in connection with proceedings regarding irregularities in the spending of the Justice Fund, increased the interest of the public and the scientific community in this immunity. It turned out that the scope of this immunity and the procedures for its application were controversial. There was also the question of the motives why PACE members were entitled to such immunity. In this study, I attempted to explain the source of these disputes in the context of the use of both legally binding documents and those of the so-called "soft law".

A special point of reference for this analysis is the phenomenon of parliamentary diplomacy. The study will analyze the issue of whether having parliamentary immunity is a necessary condition for PACE members to conduct parliamentary diplomacy.

The study will analyze the following research hypothesis: "In order to determine the scope of parliamentary immunity of a member of the Parliamentary Assembly of the Council of Europe, it is necessary to take into account both legally binding acts of the nature of international agreements (Statute of the Council of Europe, General Agreement on Privileges and Immunities of the Council of Europe) as well as documents of a nature the so-called «soft law», and especially the guidelines of the Parliamentary Assembly of the Council of Europe. Possession of formal immunity, and especially inviolability, are an essential element in protecting the integrity of the Parliamentary Assembly and enabling its members to perform the duties of membership, including when undertaking parliamentary diplomacy. However, the immunity applies only to PACE activities and cannot be abused to protect criminal activities."

The following research methods will be used in the study: legal-dogmatic, historical and systemic analysis.

## General Characteristics of the Immunity of the Member of the Parliamentary Assembly of the Council of Europe

Parliamentary immunity is the institute of constitutional law, which protects the independence and authority of parliament as the highest authority, and it has developed in two forms: the irresponsibility and inviolability of delegates / MPs.[1] Irresponsibility protects the parliamentarians from respon-

[1] J. Steele, *Immunity of Parliamentary Statements*, 'Nothingam Law Journal' 2012, 1, p. 43.

sibility for expressing opinions, attitudes, gestures or votes in parliament, guaranteeing their freedom of speech in the parliament. On the other hand, inviolability allows for the protection of parliamentarians from arrest and the conducting of criminal proceedings against them even for acts committed outside their parliamentarian duties and office, until the permission for their prosecution is given by the Parliament.[2] The immunity is analyzed in the light of democratic principle[3]. It brings about the most important dilemmas and open questions which arise in these societies regarding parliamentary democracy[4].

The issue of parliamentary immunity is one of the important areas of research interest in the study of constitutional law.[5] This applies both to parliamentary immunity in Polish law[6] and in other political systems.[7] Undoubtedly, the institution of immunity is important for the status of a parliamentarian, but it is also perceived as an important guarantee instrument for the parliament as a body of legislative power, which also exercises a control function in relation to the executive power.[8] The protection afforded to the political expression of parliamentarians in the course of their duties is of fundamental constitutional importance.[9] However, if the institution of immunity itself

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[2] L. Balic, *Parliamentary Immunity in the Parliamentary Law of the Federation of Bosnia and Herzegovina*, 'Godišnjak pravnog fakulteta u Sarajevu' 2013, vol. 56, p. 9.

[3] C. Fasone. N. Lupo, *The Court of Justice on the Junqueras Saga: Interpreting the European parliamentary immunities in light of the democratic principle*, 'Common Market Law Review' 2020, 5, p. 1527.

[4] S. Ševgić, M. Bašić, *Parliamentary Immunity: Theory, legal regulation and practice in modern democratic countries*, 'Zbornik radova Pravnog fakulteta u Splitu' 2012, 3, p. 481.

[5] J. Mordwiłko, *Immunitet parlamentarny (krytyczna analiza instytucji)*, „Państwo i Prawo" 1966, 6, p. 6.

[6] M. Zubik, *Immunitet parlamentarny w nowej Konstytucji RP*, „Państwo i Prawo" 1997, 9, p. 19; K. Grajewski, Immunitet parlamentarny w prawie polskim, Warszawa 2001, p. 49; M. Troć, *Polski immunitet parlamentarny na tle prawno-porównawczym* [!], „Przegląd Prawa Konstytucyjnego" 2013, 4, p. 103; P. Chybalski, Parliamentary Immunity in Poland: In-depth analysis, Luxembourg 2015, p. 9.

[7] P. Uziębło, *Immunitet parlamentarny w państwach Unii Europejskiej*, „Studia Europejskie" 2007, vol. 16, p. 83; S. Wigley, *Parliamentary Immunity in Democratizing Countries: The case of Turkey*, 'Human Rights Quarterly' 2009, 3, p. 567; P. Cerase, *Parliamentary Immunity in Italy: In-depth analysis*, Luxembourg 2015, p. 9; P. Manthenjwa, *The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A comparison with jurisdictions in Britain, Canada and France*, 'The Comparative and International Law Journal of Southern Africa' 2016, 3, p. 387; J. Kysela, M. Antoš, *Czech Constitutional Court: Twists and turns of recent judgments of the highest courts in cases of parliamentary immunity*, 'Vienna Online Journal on International Constitutional Law' 2017, 2, p. 301 ; P. Gruda, *Parliament Immunity and Building Democracy in Kosovo*, 'Acta Universitatis Danubius. Juridica' 2018, 2, p. 133; J. K. S. Alzubi, *Parliamentary Immunity among Arab Constitutions*, 'Journal of Politics and Law' 2020, 2, p. 269. Cf. *Immunitet parlamentarny w państwach Unii Europejskiej*, „Studia Europejskie" 2007, vol. 16, p. 83.

[8] R. Viorescu, *Parliamentary Immunity: Form of protection and care for lawmakers*, 'European Journal of Law and Public Administration' 2015, 3, p. 99.

[9] Cf. decision of the European Court of Justice in 'Aldo Patriciello' (case C-163/10) and its impact on the protection of the freedom of speech of Members of the European Parliament. A modern conception of parliamentary immunity is less attached to the personal status of parliamentarians and focuses instead on a functional assessment of their activities in light of the roles which they are supposed to fulfil. In this approach, courts appear to be taking an increasingly narrow view of what constitutes parliamentary activity without clear principled criteria to identify it. Cf. R. S. Mehta, *Sir Thomas' Blushes: Protecting parliamentary immunity in modern parliamentary democracies*, 'European Human Rights Law Review' 2012, 3, p. 309.

does not raise any fundamental controversy,[10] it is controversial what the scope of immunity should be so that it fulfills its political function and at the same time does not lead to unjustified toleration of illegal actions of members of parliament, unrelated to the political role of parliamentarians.[11]

The subject analyses concentrate on the subjective scope of non-accountability and non-violability and focuses on the time and place in which the protection is provided, and trace the objective scope of the protection and the solutions related to the possibility to lift the parliamentary immunities. They lead to the conclusion that non-accountability is similar in different countries, has undergone few modifications over the years, and it is permanently formed. In the case of non-violability, there are more extensive differences, in particular in the objective scope and the degree of protection. However, various solutions prove that there is not a single universally accepted model of immunity and that the scope of the guaranteed protection can be more diverse, it can be subject to change, and be adapted to the changes in political systems and the political and social expectations.[12] Two stylized models of parliamentary immunity, the Legislative Agency Model & the Authorization Model, are compared to determine the correct balance between protecting representatives from outside interference & limiting their potential to abuse their positions. The Legislative Agency Model only bars the legal questioning of the immediate legislative agency of representatives, while the Authorization Model also requires the consent of the representative assembly before the nonlegislative agency of representatives can be legally questioned.[13]

The analyzes undertaken usually focus on the immunities applicable in national parliaments.[14] However, the issue of immunities held by members of international parliaments (e.g. the European Parliament[15]) or other interna-

[10] W. Kabański, *Rys historyczny immunitetu i ewolucji statusu parlamentarzysty*, „Krakowskie Studia Małopolskie' 2008, 12, p. 75.

[11] R. M. Stefański, *Immunitet parlamentarny w świetle ustawy o wykonywaniu mandatu posła i senatora*, „Prokuratura i Prawo' 1996, 10, p. 63; K. Grajewski, *Zakres polskiego immunitetu parlamentarnego*, „Przegląd Sejmowy' 1995, 3, p. 9; M. Onofrei, S. Gradinaru, *Parliamentary Imm(p)unity*, 'Procedia Economics and Finance' 2015, vol. 20, p. 453.

[12] A. Jackiewicz, *Immunitet parlamentarny we współczesnym świecie: ujęcie prawnoporównawcze*, „Przegląd Europejski' 2019, 1, p. 57.

[13] S. Wigley, *Parliamentary Immunity: Protecting Democracy or Protecting Corruption?*, 'The Journal of Political Philosophy' 2003, 11, p. 23.

[14] Immunitet parlamentarny – zagadnienia podstawowe, W. Odrowąż-Sypniewski (ed.), Warszawa 2007; Immunities in the Age of Global Constitutionalism, A. Peters, E. Lagrange, S. Oeter, C. Tomuschat (eds), Leiden 2015.

[15] M. Crespo Allen, Parliamentary Immunity in the Members States of the European Community and in the European Parliament, Luxembourg 1993, p. 12; D. Lis-Staranowicz, J. Galster, *Immunitet posła do Parlamentu Europejskiego*, „Przegląd Sejmowy" 2006, 6, p. 9; R. Rafaelli, The Immunity of Members of the European Parliament: In-depth analysis, Luxembourg 2014, p. 9; R. Panizza, Immunity of Members of the European Parliament, Brussels 2015, p. 9; E. Pavy, Handbook on the Incompatibilities and Immunity of the Members of the European Parliament, Brussels 2022, p. 12. Comp: Immunitet parlamentarny w państwach członkowskich Wspólnoty Europejskiej i w Parlamencie Europejskim, J. Strzelecka (ed.), Warszawa 1993; Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union, S. McGee, S. Isaacks (eds), Brussels 2001.

tional parliamentary institutions (e.g. Parliamentary Assembly of the Council of Europe) is also discussed. These cases were of interest to the European Court of Human Rights and the Court of Justice of the European Union,[16] which demonstrated a functional approach.[17]

Recently, there has been increased interest in the issue of parliamentary immunity – member of the Parliamentary Assembly of the Council of Europe[18] and former MP, member of the Parliamentary Assembly of the Council of Europe.[19] Piotr Chybalski rightly pointed out that the issue of the scope of immunity of an MP-member of the PACE appears to be exceptionally complex, which is due to, among others, from the overlap of two "immunity regimes" (constitutional and international law) and differences in the provisions binding Polish and foreign authorities.[20]

In addition to national immunities, PACE members benefit from a supranational system of parliamentary immunity granted by the Statute of the Council of Europe[21] and the General Agreement on the Privileges and Immunities of the Council of Europe 1949,[22] which is referred to as "European parliamentary immunity." This regime provides functional protection beyond national borders and opens the scope for parliamentary activities, in accordance with the mission that the Parliamentary Assembly is called to fulfill. The PACE shall regularly review the protection mechanism for its members, taking into account developments or challenges faced by national parliaments in various aspects of parliamentary immunity, in order to ensure the effective protection of its members and therefore the Assembly, in particular in the light of new political threats. Even though the 75-year-old system of immunities has not

[16] On 19 December 2019, the European Court of Justice issued its ruling in the case of Oriol Junqueras Vies, the former vice president of Carles Puigdemont's secessionist regional government of Catalonia. Mr Junqueras had been elected a member of the European Parliament while in preliminary detention for offences related to the unconstitutional Catalan independence referendum of 2017. He was refused prison leave to take the formal oath in front of the central electoral commission as required under Spanish law. Pursuant to the Spanish electoral code, failure to take the oath results in a mandatory declaration of vacancy and thus the forfeiture of the parliamentary mandate. Consequently, Mr Junqueras did not acquire the status of member of the European Parliament according to Spanish law. Mr Junqueras complained against the decision not to grant him leave, arguing that, following his election, he was entitled to parliamentary immunity pursuant to Article 9 of the Protocol (No. 7) on Privileges and Immunities of the European Union. Cf. S. Hardt, *Fault lines of the European parliamentary mandate: The immunity of Oriol Junqueras Vies: ECJ 19 December 2019, Case C-502/19, 'Junqueras', ECLI:EU:C:2019:1115*, 'European Constitutional Law Review' 2020, 1, p. 170.

[17] S. Hardt, Parliamentary Immunity in a European Context, Luxembourg 2015, p. 12.

[18] J. Jaskiernia, *Immunitet parlamentarny członka Zgromadzenia Parlamentarnego Rady Europy* [in:] Zagadnienia prawa konstytucyjnego. Księga jubileuszowa dedykowana Profesorowi Krzysztofowi Skotnickiemu w siedemdziesiątą rocznicę urodzin, vol. 1, ed. A. Domańska, Łódź 2023, p. 554.

[19] P. Chybalski, *Możliwość pociągnięcia do odpowiedzialności prawnej byłego posła, członka Zgromadzenia Parlamentarnego Rady Europy*, „Zeszyty Prawnicze Biura Studiów Sejmowych" 2018, 4, p. 55.

[20] P. Chybalski, *Problem zakresu ochrony immunitetowej posła sprawującego funkcję członka Zgromadzenia Parlamentarnego Rady Europy* [in:] Konstytucjonalizm polski: Refleksje z okazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej profesora Andrzeja Szmyta, Gdańsk 2020, p. 770.

[21] Statute of the Council of Europe, ETS 1.

[22] General Agreement on Privileges and Immunities of the Council of Europe of 1949, ETS 2.

evolved in the convention texts, The Assembly tried to improve it with subsequent resolutions to adapt it to the realities of the work of its members and to take into account activities related to parliamentary diplomacy. It still has a solid legal basis to ensure effective protection for its members and institutions while preventing abuse.

However, the Assembly noted that, in implementing a system to protect its members, it was now necessary to clarify the scope of the current provisions and to define clear and objective criteria to enable privileges and immunities to fulfill their institutional purposes, while preventing possible abuse of privileges by parliamentarians for personal purposes. In this situation, it is worth familiarizing yourself with the *Guidelines on the scope of immunity of members of the Parliamentary Assembly* adopted by the Parliamentary Assembly of the Council of Europe on 27 September 2021.[23] Although they do not solve all the problems indicated by the legal doctrine, they will certainly be important in proceedings to waive the immunity of a PACE member.

Public interest in the construction of the immunity of a PACE member clearly increased when it was invoked in the case of MP Marcin Romanowski, former deputy minister of justice, who was charged by the prosecutor in connection with irregularities in the Justice Fund. When the court analyzed the justification for the detention, the defense pointed out that Romanowski was protected by the immunity of a member of the PACE, which was confirmed by the chairman of the PACE in a letter to the Marshal of the Sejm. Due to the doubts that arose, the court ordered Romanowski's release. The appellate court, considering the prosecutor's complaint, upheld the decision of the first instance court, finding that Romanowski was protected by the immunity of a member of the PACE, and its repeal required the use of an appropriate procedure.

In the context of the application of the immunity of a PACE member, a dispute emerged, especially since the Minister of Justice – Prosecutor General Adam Bodnar revealed that before the prosecutor's decision to detain Marcin Romanowski was made, the opinions of two independent experts (Andrzej Jackiewicz[24] and Joanna Juchniewicz[25]) were reviewed and they saw no obstacles to take such action, although they stipulated that the final interpretation would rest with the court. However, it turned out that the problem of immunity of a PACE member is more complicated, because it is not enough to rely – as these experts did – on legally binding documents, but it is also necessary to take into account the so-called "soft law".

[23] PACE Res. 2392 (2019), *Guidelines of the scope of parliamentary immunities enjoyed by members of the Parliamentary Assembly*, *Assembly debate* on 27 September 2021 (24th sitting). Doc. 15364, report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, rapporteur: Mr Tiny Kox. *Text adopted by the Assembly* on 27 September 2021 (24th sitting).

[24] A. Jackiewicz, Opinia prawna, Białystok 2024, https://monitorkonstytucyjny.eu/archiwa/29274 (accessed: 08.10.2024).

[25] A. Juchniewicz, Opinia prawna w przedmiocie udzielenia odpowiedzi na pytania (Ministerstwa Sprawiedliwości), Olsztyn, 8 lipca 2024, https://monitorkonstytucyjny.eu/archiwa/29274 [accessed: 08.10.2024].

The Statute of the Council of Europe[26] provides in Art. 40a that: 'The Council of Europe, the representatives of the members and the Secretariat shall enjoy, in the territory of the members, the privileges and immunities necessary for the exercise of their functions. By virtue of these immunities, representatives of the Consultative Assembly may not, in particular, be arrested or prosecuted in the territory of the members on account of the views expressed or manner of voting in the Assembly, its committees or commissions.'

The General Agreement on the Privileges and Immunities of the Council of Europe[27] reads: 'Art. 14. The representatives in the Consultative Assembly and their deputies shall enjoy immunity from all official interrogations and from arrest and legal proceedings of any kind in respect of words spoken and votes taken by them in the exercise of their functions.

Article 15. During a session of the Consultative Assembly, the representatives in the Assembly and their alternates, whether or not members of Parliament, shall enjoy: (a) in the territory of their own State the immunities accorded to members of Parliament in that State; (b) in the territories of all other Member States, immunity from arrest and prosecution. This immunity shall also apply to travel to and from the venue of the Consultative Assembly meeting. However, it shall not apply where the representatives or their deputies have been caught in the act of committing a crime, attempting to commit a crime or committing a crime, or in cases where the Consultative Assembly has waived immunity'.

However, the Additional Protocol to the General Agreement on the Privileges and Immunities of the Council of Europe[28] clarifies the scope of parliamentary immunity:

'Article 3. The provisions of Article 15 of the Agreement shall apply to the representatives of the Assembly and their alternates whenever they attend meetings of the Committees or Subcommittees of the Consultative Assembly or travel to and from the place of meeting, whether the Assembly is in session or not at that time neither.

Article 5. Privileges, immunities and facilities are granted to the representatives of the Member States, not for their personal advantage, but in order to ensure their complete independence in the performance of their functions in connection with the Council of Europe.'

A Member State therefore has not only the right but also the obligation to waive the immunity of its representative in any case where that immunity might obstruct the administration of justice and where it can be waived without prejudice to the purpose for which it was granted. However, the practice of functioning of the Council of Europe brought a number of new experiences

[26] CETS, nr 001.
[27] CETS, nr 002.
[28] CETS, nr 010.

that required clarification of the scope of immunity of a member of the PACE. However, this was done by means of the so-called "soft law", which are not legally binding.

In 2021, the Parliamentary Assembly of the Council of Europe adopted *Guidelines on the scope of the parliamentary immunity of members of the Assembly.*[29] It states that:

Members of the Parliamentary Assembly enjoy privileges and immunities that maintain the integrity of the Assembly and ensure the independence of its members in the exercise of office. The purpose of immunity (immunity from arrest and prosecution) is to protect a parliamentarian against unjustified pressure that may be exerted on him in connection with activities that are not part of typical parliamentary activities. As the Guidelines state in point 4: 'Immunity cannot be invoked in cases *in flagrante delicto*. Since the purpose of this provision is to quickly restore public order and reduce the risk of evidence being lost, its application by national authorities should not be inspired by concerns unrelated to the sound administration of justice.' Point 6 of the Guidelines states: 'When considering a request for waiver of immunity, the Assembly must take into account the following elements: judicial proceedings brought against a Member should not jeopardize the proper functioning of the Parliamentary Assembly; the request must be serious, that is, not for reasons other than justice. If neither of these elements can be established, the Assembly should normally propose the waiver of immunity.' Point 7 of the Guidelines deals with procedural issues: 'Immunity may not be waived except by the Assembly at the request of the «competent authority» of the Member State concerned. The competent authority is usually the judge presiding over the case, but may also be the prosecutor or the Minister of Justice. A request for waiver of immunity may be submitted by an authority of a Member State other than that of which the member is a national.'

In a letter of July 16, 2024 to the Speaker of the Sejm, Szymon Hołownia, the Chairman of the PACE, Theodoros Rousopoulos, referring to the case of M. Romanowski, confirmed that members (their deputies) of this Assembly enjoy the immunities and privileges they are entitled to under Art. 40 of the Statute of the Council of Europe, the General Agreement on the privileges and immunities of the Council of Europe and Art. 3 of the Additional Protocol to this Agreement.

In response to the letter of the national prosecutor, Dariusz Korneluk, dated July 17, 2024, in which the prosecutor's office presented the circumstances of the case, the subject of the proceedings regarding MP Romanowski and the charges it wants to present to him, as well as specifying when the events alleged against him took place and whether they were related to the MP's performance of the mandate of the Parliamentary Assembly of the Council of

[29] PACE Res. 2392 (2019).

Europe, the chairman of the PACE, T. Rousopoulos, announced that the PACE would deal with the possible repeal of immunity of former Deputy Minister of Justice M. Romanowski when he receives a formal request in this matter. As Rousopoulos noted, immunity is not a privilege granted to an individual, but rather aims to guarantee respect for democratic institutions. "No one can rely on it to commit a crime, but no one can ignore it" he emphasized. He added that "the immunity granted to a member of the PACE applies unless the Assembly itself waives it. But first a formal request for this must be submitted by the competent authority."

The case of M. Romanowski raised a dispute over the understanding of the scope of immunity of a PACE member. The question arises: how it happened that experts invited by the Ministry of Justice found that immunity does not protect M. Romanowski from the possibility of arrest, and the chairman of the PACE clearly stated that he is protected by immunity and the body that wants to bring charges against him must apply to the PACE to waive immunity?

The controversy seems to be based on the inconsistency of the Council of Europe's legal system in this regard. Both the Statute of the Council of Europe (1949) and the General Agreement on the Privileges and Immunities of the Council of Europe (1949) and its Additional Protocol (1952) were created in the initial phase of the activity of this international organization. The role of the Consultative Assembly (today's Parliamentary Assembly) was perceived differently at that time. It was supposed to be a "discussing body" of the Council of Europe, and as a consequence, the creators of the CoE, with regard to immunity, decided that additional immunity was needed only on the way to and from Strasbourg and during meetings in Strasbourg, since the parliamentarian is otherwise covered by national immunity. Later it was noticed that a PACE member could also take action in other places, during meetings of PACE committees and subcommittees.

However, since this initial model, there has been a fundamental change in the PACE function. Its members are involved in control activities in relation to Member States as part of the accession procedure, as part of observing elections in Member States, and, above all, as part of the monitoring procedure, during which it is examined whether Member States fulfill the obligations undertaken at the time of membership in CoE. The immunity of a PACE member is therefore intended to protect the integrity of the PACE and guarantee that its members will be able to freely perform their tasks, without fear of becoming the subject of provocation and harassment. For this reason, PACE broadly interprets the prohibition of inviolability of a PACE member and only excludes the situation of being caught red-handed. If this situation does not occur, the PACE expects that the authority wishing to bring charges and decide on detention should request the PACE to waive

the immunity. PACE wants to have the right to assess whether these are not acts that could be classified as violating the integrity of PACE and preventing it from performing its tasks.

From the axiological point of view, there is no difference between legally binding regulations (Statute, General Agreement on Immunities) and "soft law" regulations, which include the PACE guidelines. All these regulations are based on the assumption that protection is due to activities in the PACE and is intended to protect the integrity of the Assembly. The only difference is who has the right to decide whether immunity applies. The conclusion may be drawn from legally binding documents that the decision on whether a person is protected by the immunity of a member of the PACE rests with the body applying the law, which determines whether the conditions for applying the immunity set out in the Statute of the Council of Europe and the General Agreement on immunities have been met. According to the PACE's interpretation, except in the case of a "red act", the state authority should take into account that the PACE member is protected by immunity and ask the PACE to waive it.

In this context, the problem of the meaning of the so-called "soft law" in the CoE system. Moreover, it is known that the Council of Europe makes extensive use of this instrument, which is more flexible and creates the possibility of quick response to emerging regulatory needs. In particular, the CoE avoids changes to the Statute or the General Agreement on immunities. There is no doubt that the interpretation of the scope of immunity adopted by the PACE deserved to be included in the General Agreement. However, since this did not happen, the question arises whether the Member State is bound by the interpretation adopted by the PACE in this respect. Formally, there is no legal requirement here, but disregarding the PACE interpretation exposes the state to conflict with the Parliamentary Assembly. Moreover, we cannot ignore the fact that member states should also care about protecting the integrity of this important body of the Council of Europe.

## General Characteristics of Parliamentary Diplomacy

The subject of the analysis undertaken in this part of the study is the phenomenon of parliamentary diplomacy. It is observed in the context of the international activity of parliamentarians. This raises the following questions: What is the essence of parliamentary diplomacy? How can it be defined? What is the legal nature of it? How does it influence the perception of the functions of contemporary parliamentarism? What is its significance in the area of international relations?

The importance of the analysis undertaken here is related to the fact that the area of foreign policy is traditionally subject to less democratic control than the areas of domestic policy, hence the involvement of parliamentarians in this area is of particular importance.[30] The same is true in the field of security and defense, where also ensuring democratic control is, in the light of the experience of political system practice, a serious challenge.[31] Thus, if we accept as true the thesis of Joseph S. Nye Jr. on the "globalization of the democratic deficit",[32] then parliamentary diplomacy can be seen as a factor in mitigating the "democratic deficit" perceived in the field of world politics.[33]

Although the parliament's influence on the area of foreign policy has a centuries-old tradition, "parliamentary diplomacy" is a concept that has only begun to make its way in the axiology and institutional system of international organizations over the last three decades[34]. Traditional diplomacy is associated with the activities of the executive power (president, government, minister of foreign affairs, diplomats), and the introduction of the term "parliamentary" must raise questions about the validity of such categorization in the context of understanding the term "diplomacy".

Some trace the origins of parliamentary diplomacy to ancient times, recalling the activities of the Roman Senate in 205 BC, although it was undoubtedly about a certain type of activity, not a specific date.[35] The phenomenon of parliamentary diplomacy was written about in the context of the Scandinavian "political bloc" in the interwar League of Nations. Ludwik Dembiński recalled the figure of the American diplomat and professor of international law Philip Jessup, who in 1956, during a lecture at the Hague Academy of International Law, introduced the term "parliamentary diplomacy" into the dictionary of international law and international relations.[36] In his lecture, Jessup quoted another American politician and diplomat, Secretary of State in the offices of Presidents John F. Kennedy and Lyndon B. Johnson, Dean Rusk, who was probably the first to use this term.[37] Julian Sutor, also citing Jessup, explains that the concept of parliamentary diplomacy was formerly used to describe conference diplomacy. This interchangeable use of terminology results from

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[30] See M. Zürn, *Global Governance and Legitimacy Problems*', 'Government and Opposition' 2004, 2, p. 261.

[31] See W. Wagner, *The Democratic Control of Military Power Europe*, 'Journal of European Public Policy' 2006, 2, p. 214.

[32] J. S. Nye Jr., *Globalization's Democratic Deficit: How to make international institutions more accountable*, 'Foreign Affairs' 2001, 4, p. 2.

[33] A. Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A framework for analysis*, 'Government and Opposition' 2004, 2, p. 336.

[34] S. Stavridis, D. Jančić, *Introduction The Rise of Parliamentary Diplomacy in International Politics*, 'The Hague Journal of Diplomacy' 2016, 2–3, p. 107

[35] D. Fiott, *On the Value of Parliamentary Diplomacy*, 'Madariaga Paper' 2011, 7, p. 1.

[36] L. Dembinski, The Modern Law of Diplomacy. External Missions of States and International Organizations, Dordrecht–Boston–Lancaster 1988, p. 253; P. Jessup, *Parliamentary Diplomacy*, pt. 1, 'Recueil des cours' 1956, 1, The Hague, p. 185.

[37] D. Rusk, *Parliamentary Diplomacy – Debate vs. Negotiation*, 'World Affairs Interpreter' 1955, 2, p. 121.

the similarity of deliberations and negotiations at international conferences to those in parliamentary practice.

Parliamentary diplomacy should be understood as the role played by parliaments national, parliamentary assemblies of international institutions, international interparliamentary associations or parliamentarians acting individually within the framework of international politics. Parliaments often pursue foreign policy that is not necessarily consistent with the foreign policy pursued by the government. Parliamentarians representing national parliaments can act as diplomats on their own behalf during their stay abroad, e.g. by entering into conversations with representatives of the authorities of the visited country, which is often reported by the media and the authorities of that country. From a formal point of view, public statements by parliamentarians do not bind the country they come from. However, public opinion and the authorities of the visited country may suspect that the parliamentarian is acting with the consent of his government. This form of foreign activity of parliamentarians may be a kind of "litmus test", allowing for examining the views or position on a given issue represented by the authorities of the visited country.[38]

Parliamentary diplomacy is a phenomenon that cannot be clearly categorized yet, but it cannot be ignored either, because it has a practical dimension, involving members of national parliaments in the foreign policy of their countries. Parliamentary diplomacy is certainly not an alternative to classic diplomacy, but going beyond the traditional areas of parliamentary work related to legislation and control of the executive power, it is undoubtedly a good complement to foreign policy and classic diplomacy conducted by the governments of individual countries.[39]

Diplomacy in the strict sense means diplomacy undertaken by the state (state diplomacy). However, diplomacy in the broad sense includes both state diplomacy and diplomacy undertaken by other entities active in the sphere of international relations, referred to as "paradiplomacy". Although the concept of "paradiplomacy" was born in the context of the international activity of the constituent elements of federal states, and then was extended to the activity of territorial substructures also of unitary states, it does not seem justified to limit it only to this type of entities. If the term "paradiplomacy" makes sense, it is only when it covers phenomena that take place outside the traditional diplomacy conducted by a state.[40]

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[38] I. Bochenek, *Dyplomacja parlamentarna jako jeden z instrumentów współczesnych stosunków międzynarodowych*, „Przegląd Sejmowy" 2016, 5, p. 239.

[39] B. Surmacz, A. Kuczyńska-Zonik, *Dyplomacja parlamentarna: uwarunkowania, pojęcie, zadania* [in:] Dyplomacja parlamentarna w Europie Środkowej i Wschodniej w latach 2015–2019, B. Surmacz, A. Kuczyńska-Zonik (eds), IEŚ Policy Papers 2019, 2, p. 14.

[40] J. Jaskiernia, Dyplomacja parlamentarna, Toruń 2022, p. 41.

The existence of international parliamentary assemblies naturally gives rise to a tendency for parliamentarians to be active in the sphere of international relations. It usually takes an advisory and controlling form within these organizations, but there is an increasingly visible tendency for members of international parliamentary assemblies to take initiatives outside the organizations in which they operate. The term diplomacy refers to bilateral and multilateral interstate relations, but it seems reasonable to note that elements of such diplomacy also appear in the relations of an international organization with its member states.[41] This may apply to both the "government" segment of these organizations and the parliamentary dimension. Therefore, in connection with an international organization, we can talk about conducting a "parliamentary foreign policy."[42]

In the light of the definition proposed by Frans Weisglas and Gonnie de Boer, parliamentary diplomacy covers the full range of international activities undertaken by parliamentarians in order to increase mutual understanding between countries, mutual assistance in improving the control of governments and the representation of the people, and to increase the democratic legitimacy of intergovernmental institutions.[43]

Philip C. Jessup pointed to the elements that distinguish parliamentary diplomacy from other forms of multilateral negotiations. The first is a permanent organization whose responsibilities and competences extend beyond the agenda of one session. Secondly, they are public and covered by the media. Thirdly, they are implemented on the basis of formalized procedures, according to which one point of view may be accepted and another rejected. The fourth element is that the discussion ends with a resolution adopted by majority vote.[44]

Jerzy J. Wiatr highlighted the following differences between parliamentary diplomacy and classical diplomacy: 1) parliamentary diplomacy is undertaken by a wide spectrum of political forces represented in parliament, while classical diplomacy is undertaken by the ruling majority and reflects its policy (e.g. in the activities of the Parliamentary Union often votes are divided in the national delegation on specific issues, and such a situation is not possible in government diplomacy); 2) parliamentary diplomacy is based on the power of persuasion, especially of a moral nature – so it does not lead to binding decisions; However, in conflicts of a national, ethnic or religious nature, such non-binding influence may bring the expected results in the long run;

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41 F. A. M. Alting von Geusau, European Organizations and the Foreign Relations of States, Leyde 1962, pp. 56 and 57.

42 P. Fischer, Europarat und parlamentarische Aussenpolitik, München 1962, p. 22.

43 F. Weisglas, G. de Boer, *Parliamentary Diplomacy*, 'The Hague Journal of Diplomacy' 2007, vol. 2, pp. 93 and 94.

44 P. C. Jessup, *Parliamentary Diplomacy: An examination of the legal quality of the rules of procedure of organs of the United Nations*, 'Recueil des cours', vol. 89, 1, p. 178.

3) parliamentary diplomacy is undertaken by people who have no professional preparation in this field, but who draw their knowledge from parliamentary experience; however, in this respect, parliamentarians benefit from the help of professional diplomats employed by parliamentary offices; 4) parliamentary diplomacy is undertaken on an *ad hoc* basis, so it does not involve permanent representations abroad; parliamentarians sometimes use embassies, but they usually take action during interparliamentary conferences; 5) because there is a large turnover in the composition of interparliamentary delegations (especially in new democracies), the phenomenon of discontinuation of activities undertaken within the framework of parliamentary diplomacy has a wide scope.[45]

Parliamentary diplomacy, on the one hand, resembles classical diplomacy to some extent (participation in negotiations, searching for ways to resolve conflicts, mediation, etc.), but on the other hand, it is characterized by certain specific features. What is crucial is that it is undertaken not by representatives of governments and professional diplomats, but by the people's mandate holders sitting in international parliamentary assemblies. It is therefore an element of the implementation of the functions of these assemblies, even if this factor is not always highlighted in the classifications of their functions. Parliamentarians therefore engage their authority in solving internal and international conflicts, and a particularly important instrument of conduct is dialogue with parliamentarians from given countries. This is where the "parliamentary dimension" of international relations lies, in which the executive power is not replaced, but rather complements the activities it undertakes in the field of diplomacy.[46]

Parliamentary diplomacy covers various forms of parliamentary activity in the international arena: foreign visits of parliamentary delegations; receiving visits from parliamentarians from other countries, as well as courtesy visits from the highest representatives of other countries officially staying in the country (heads of state, prime ministers, ministers of foreign affairs) and ambassadors accredited in a given country; participation of parliamentarians in the work of parliamentary assemblies of international organizations; organization of bilateral and multilateral parliamentary meetings; organization and activities of bilateral parliamentary friendship groups. A special dimension of parliamentary diplomacy is related to parliamentary procedures regarding the recognition of states.[47]

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[45] J. J. Wiatr, *Parliamentary Diplomacy After Cold War*, 'Romanian Journal of International Affairs' 1995, 5, pp. 99 and 100.

[46] J. Jaskiernia, *Parliamentary Diplomacy – A new dimension of contemporary parliamentarism* [in:] Contemporary Challenges of Parliamentarism: Theory and practice. Special issue devoted to the memory of Professor Wojciech Orłowski (1963–2019), S. Patryra, M. Chrzanowski (eds), 'Studia Iuridica Lublinensia' 2022, 5, pp. 85–102.

[47] C. Loda, J. Doyle, E. Newman, G. Visoka, *Parliamentary Recognition* [in:] Routledge Handbook of State Recognition, G. Visoka, J. Doyle, E. Newman (eds), London 2020, p. 256.

The resolution of the Second World Conference of Speakers of Parliaments, held on 7–9 September 2005 at the UN Headquarters in New York, stated: "We emphasize that parliaments must be active in international affairs not only through interparliamentary cooperation and parliamentary diplomacy, but also by participating in and monitoring international negotiations, supervising and enforcing what has been adopted by governments, and ensuring compliance with national standards and the rule of law. Likewise, parliament must be more vigilant in scrutinizing the activities of international organizations and contributing to their deliberations."[48]

There has been a tendency to include parliamentarians in state delegations undertaking international negotiations. This was noted, for example, in relation to the review conferences on non-proliferation treaties. It is indicated that such behavior is often associated with the intention to weaken the voices opposing the solutions contained in these international documents.[49]

One of the important goals of parliamentary diplomacy is to ensure democratic control in the sphere of foreign affairs, security and defense, which by their nature are subject to weaker parliamentary control than other areas of state activity, and this is due to, among others, from the secret or confidential nature of activities undertaken by state authorities in both bilateral and multilateral relations.[50]

## Is the Parliamentary Immunity of the Member of the Parliamentary Assembly of the Council of Europe a Condition to Conduct of Parliamentary Diplomacy?

There is undoubtedly a causal relationship between the institution of parliamentary immunity of members of the Parliamentary Assembly of the Council of Europe and the ability of PACE members to conduct parliamentary diplomacy. The intention of parliamentary immunity is to ensure the integrity of PACE. The point is for PACE members, when taking action on its behalf, to be convinced that they benefit from special protection provided by parliamentary immunity and the resulting inviolability.

This regularity has been valid since the establishment of the Council of Europe and its Parliamentary Assembly (initially: the Consultative Assembly) in 1949, but it gained importance with the development of the Council of Europe. There was a change in the PACE function. If initially this body was intended only as a "discussion body" and it seemed that it would be enough

[48] Second World Conference of the Speakers of Parliaments, New York, 7–9 September 2005, Geneva 2006, p. 13.
[49] M. Onderco, *Parliamentarians in Government Delegations: An old question still not answered*, 'Cooperation and Conflict' 2018, 3, p. 415.
[50] G. Bono, *Challenges of Democratic Oversight of Security Policies*, 'European Security' 2006, 4, p. 434.

to provide additional protection for PACE members on the way from their places of residence to Strasbourg and back, because they enjoy parliamentary immunity in the country, this model became obsolete with the development of PACE competences. Changes taking place within the PACE control function were of key importance.

The new tasks concern in particular PACE's participation in the accession procedure (deciding on the country's admission to the Council of Europe) and the monitoring procedure (control of the implementation of the country's obligations assumed at the time of gaining membership in the Council of Europe), as well as monitoring of elections and participating in solving an international conflicts. PACE members, taking action under these procedures, are often forced to criticize the governments of member states in such sensitive areas as: violation of the rights of the opposition, inhumane treatment of prisoners in prisons or detention centers, violation of the rights of national, linguistic, religious or sexual minorities, violation of the democratic principles of electoral law, violation of the separation of powers and the principles of pluralism. This means that PACE members carrying out tasks on its behalf are exposed to potential threats, provocations and attempts to discredit them. They must therefore be assured, based on the principle of inviolability, that they will be able to carry out their tasks on behalf of PACE undisturbed and without risk to their personal security.

Therefore, regardless of what definition of "parliamentary diplomacy" we adopt, there is no doubt that the activities of PACE members undertaken in the accession procedure, monitoring procedures, monitoring procedure and attempts to resolve international conflicts should be included in the type of activities that constitute parliamentary diplomacy. There is an analogy here with classical diplomacy. Just as diplomats involved in conducting classical diplomacy enjoy diplomatic immunity, parliamentarians involved in conducting parliamentary diplomacy should enjoy parliamentary immunity, conditioning the success of their mission in this area.

At the same time, however, the immunity of a PACE member, as follows from the documents of the Council of Europe, both legally binding and of the nature of the so-called "soft law" should not be abused to protect against criminal activities. Hence, the requirement for PACE to consent to the detention of a PACE member has the sole purpose of ensuring that the request of the relevant state authorities to detain a PACE member is not related to his activities at PACE. PACE wants to be sure that this is not about actions of state authorities that could weaken the integrity of PACE by taking unjustified actions towards its member. If such a situation is out of the question, PACE agrees to waive immunity.

## Final Observations

As the involvement of members of the Parliamentary Assembly of the Council of Europe in the conduct of parliamentary diplomacy has increased, public opinion and the scientific community have increased interest in the advisability and scope of parliamentary immunity held by PACE members. There is no doubt that without parliamentary immunity and the associated privilege of inviolability, PACE members would not be able to carry out their parliamentary diplomacy tasks in the name of PACE without risk to their security. Immunity therefore serves to protect the integrity of PACE in the sphere of international relations. At the same time, the Council of Europe emphasizes that immunity cannot protect the criminal activities of PACE members. The principled approach of PACE in the procedure for waiving immunity clearly shows that there is no agreement in the Council of Europe to tolerate the abuse of this instrument.

**Immunitet parlamentarny członka Zgromadzenia Parlamentarnego Rady Europy jako warunek prowadzenia dyplomacji parlamentarnej**

**Abstrakt**

Autor poddał analizie problem: w jakiej mierze posiadanie przez członka Zgromadzenia Parlamentarnego Rady Europy (ZPRE) immunitetu parlamentarnego jest warunkiem prowadzenia przez ZPRE i jego członków dyplomacji parlamentarnej? Podjęcie przez ZPRE nowych kompetencji w zakresie funkcji kontrolnej (procedura akcesyjna, procedura monitoringowa, monitorowanie wyborów, udział w rozwiązywaniu konfliktów) – nieznanych w momencie powstawania Rady Europy – spowodowało, że członkowie ZPRE są zaangażowani w prowadzenie dyplomacji parlamentarnej i podejmują ryzyko dla swego bezpieczeństwa z tym związane. ZPRE interpretuje w związku z tym zakaz zatrzymania członka ZPRE szerzej, niż to wynika z norm prawnie wiążących (Statutu Rady Europy, Generalnego Porozumienia w sprawie Przywilejów i Immunitetów Rady Europy) – żądając, by na zatrzymanie członka ZPRE musiało wyrazić zgodę ZPRE. Ta reguła, zawarta w wytycznych ZPRE o charakterze tzw. miękkiego prawa, jest zasadna, ale nie powinna być nadużywana. Immunitet ma chronić integralność ZPRE, nie może jednak być osłoną dla działań kryminalnych.

**Słowa kluczowe**: Rada Europy, ZPRE, immunitet parlamentarny, dyplomacja parlamentarna.

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Artur Kotowski*

# Comparison of Euro-Atlantic Legal Cultures: Short debrief

**[Porównanie euroatlantyckich kultur prawnych – krótkie podsumowanie]**

**Abstract**

The article compares the main features of Euro-Atlantic legal cultures: *civil law* (known also as continental legal culture or statutory law culture) and Anglo-Saxon *common law*. The analysis was conducted from the perspective of the continental culture. An attempt has been made to capture the most important differences between these legal cultures. The fundamental question is: why did England, while being so close to European legal culture, ultimately move so far away from it? And neither the process of globalisation nor the process of cultural convergence has changed this. At the same time, however, these very phenomena determine the importance of the interaction of civil law and common law for almost every modern lawyer. Those who work in international business must therefore be familiar with the peculiarities of these two cultures that dominate the Euro-Atlantic legal space. The topic is also relevant for legal doctrine because of the aforementioned convergence, i.e. the mutual shaping of civil law and common law.

**Keywords:** common law, civil law, civil law tradition, legal theory, legal anthropology.

## Introduction

The term of legal culture is ambiguous and is sometimes used interchangeably with the order or system of law. However, it can be easily sharpened. By adopting the basic criteria for the analysis of law, the legal systems of different countries can be assigned under these categories. It is important

* **Artur Kotowski** – DSc, Professor of Law (Titular), Chair of the Theory and Philosophy of Law Department, Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw (affiliation); https://orcid.org/0000-0001-8284-241X; a.kotowski@uksw.edu.pl / prof. dr hab., kierownik Katedry Teorii i Filozofii Prawa, Wydział Prawa i Administracji, Uniwersytet Kardynała Stefana Wyszyńskiego w Warszawie (afiliacja).

not to treat the concept of legal culture in a strictly anthropological sense, but to adopt only the criteria of legal theory and philosophy.[1] These are: the dominant philosophy of law, the accepted conception of the sources of law (including its creation), the model of the application of law and certain additional features, such as legal propaedeutics, characteristics of legal reasoning or historical genesis. However, the first three factors are the most important and are responsible for the possibility of carrying out a typology into state law and common law cultures. Both, in turn, belong to the notion of Euro-Atlantic legal cultures, although their presence extends far beyond this region of the world. Rather, the name corresponds to their historical origins, as they originate in Europe, Britain and North America and have been adopted almost throughout the world as a result of colonisation or civilisational reception.

Given the concept of legal cultures thus defined, it is still possible to single out the legal culture of Islam.[2] Specific, on the other hand, is the Judaic culture, which is not found outside the State of Israel (it has not been recycled anywhere and is specific to Judea).[3] The legal culture of the Maghreb states, on the other hand, has a disputed status.[4] The degree of reception by the States of north-west Africa of the culture of statute law is so high that it has lost its specificity in this respect. On the other hand, it seems reasonable to continue to maintain the distinctiveness of the Far Eastern legal culture (Japan and some East Asian states), but the region is nevertheless highly differentiated in terms of the adopted conception of the sources of law and the model of its application. A separate issue is the axiology of law and the role of normative orders other than law. Traditionally, Far Eastern culture has been singled out based on the important role of customary rules for law. The relationship of law to social norms, and not, as in Euro-Atlantic cultures, to morality, was therefore crucial.

All these issues cannot be resolved in such a short paper. They are also debated in the literature and the understanding of these concepts depends on the legal culture, legal doctrine, ideology, etc. (As an example of this discussion could be signaled the question of the limits of judicial interpretive activism in civil law and, in common law, the relationship between statute law – quantitatively increasing its reach all the time – and judicial law.) The term of legal culture should be understood by narrowing interpretation of this concept and listing legal cultures based on the precise criteria indicated

[1] Different in the sociological field: R. Cotterrell, The Sociology of Law: an Introduction, London 1984, p. 25.

[2] S. D. Blanch, *Thinking about Islamic Legal Traditions in Multicultural Contexts*, 'Griffith Law Review' 2023, 32, 2, pp. 215–235.

[3] M. Bussani, U. Mattei (eds), Contents. Toc. In The Cambridge Companion to Comparative Law, v–vi. Cambridge Companions to Law, Cambridge: Cambridge University Press, 2012, pp. 278–294.

[4] L. Rosen, *Law and Custom in the Popular Legal Culture of North Africa*, 'Islamic Law and Society' 1995, 2, 2, pp. 194 and 195.

above. This is important because there is often a vague, imprecise use of the concept of legal culture in the literature.[5]

This article will focus on a comparison of the basic features of Anglo-Saxon and continental legal culture. This paper has a reporting and overview character. It may also serve as a teaching aid for law students or on related courses. As this is not an issue paper, limited use has been made of the IMRAD structure. Instead of a separate, general characterisation of the civil and common law cultures, it has been written by chosen comparative study based on the basic subject criteria already indicated. However, the question of the origins of Anglo-Saxon culture has been dealt with in a special way, as it was a combination of specific historical events that was responsible for its emergence and the maintenance of its own identity by England and then the British Dominion.

## Genesis

The first difference of a fundamental nature between civil and common law is the question of their birth. Continental culture is much older. Its birth is linked to the rise of Roman jurisprudence, which the Romans themselves dated to around the second century BC.[6] This is the heyday of the Republic after Hannibal's final expulsion from Italy. Despite the destruction he wrought on the Iberian Peninsula, Rome ultimately emerged victorious from this war. In addition, it became the sole power of the western Mediterranean, which tied in the next hundred years with Rome's rapid economic development, which in turn was consolidated by the destruction of Carthage in 146 BC.[7]

The concept of positive law – therefore rules distinguished from morality and religion – was already known.[8] Without it, the first ancient political organisms would not been established. It is difficult to evaluate the emergence of law as a cultural phenomenon. It is probably varied from one region of the world to another, but one thing is certain – law as a social phenomenon appears with the emergence of the first political organisms (it is not yet appropriate to call them as states) after the Neolithic Revolution. At first, it took the form of a custom sanctioned by coercive power, which made it law and differentiated it from other customary rules. With the invention of writing

[5] M. Van Hoecke, *European Legal Cultures in a Context of Globalization* [in:] T. Gizbert-Studnicki, J. Stelmach (eds), Law and Legal Cultures in the 21th Century: Diversity and unity, Warszawa 2007, pp. 82 and 83.

[6] S. Camilleri, *The Growth of Civil Law*, 'The Law Journal' 1946, 1, 5, pp. 191–193.

[7] R. T. Ridley, *To Be Taken with a Pinch of Salt: The destruction of Carthage*, 'Classical Philology' 1986, 81, 2, pp. 140–46.

[8] Example: Sophocles, Antigone, https://mthoyibi.wordpress.com/wp-content/uploads/2011/05/antigone_2.pdf.

by the Sumerians around 6,000 BC, it took on a written form. In the developed despots of antiquity, state law was already known, although it did not formally resemble its contemporary understanding (lack of procedures for its creation, limited role of promulgation, etc.). In antiquity, customary law dominates, but lawmaking was known to all ancient great civilisations.

Of the ancient civilisations, however, only the Romans produced jurisprudence – a legal doctrine. Moreover, they recognised that what binds a political community together is law, as Cicero emphatically expressed in his timeless work *Res Publica*. The sources of Roman law were not homogeneous.[9] In addition to classical statute law, the Romans treated as law the acts of lawmakers (the so-called Praetorian law) and even the works of eminent jurists, which, when sanctioned by the emperor, acquired the status of universally binding law. Gradually, however, Roman law became codified statute law, based on the prototype of the systematic principle. There is not space here to discuss this process in greater detail and we are condemned to simplifications. The peak of Roman jurisprudence is reached by Justinian, already after the fall of the Western Roman Empire with his Code (528–534 AD). It would become the basis of private law throughout the Christian world till the Napoleonic codification, updated in 1583 as the *Corpus Iuris Civilis*. Roman law and its medieval reception were responsible for the unitarianism of thought in the Christian world and is a fundamental feature of the European legal tradition.[10] For the English, it is such a special feature that they have given a name to this legal culture precisely by emphasising this role, as civil law, by which, in essence, is to be understood what is referred to in the culture of statute law as the Romanist tradition. In English it's just civil law tradition.

Anglo-Saxon culture was born with the rise of English statehood.[11] In 1066, the Norman prince William invaded Britain, and that same year defeated the combined forces of the local kingdoms at the Battle of Hastings.[12] Wiliam did not at first regard England as a permanent conquest, although the impetus for the invasion was that the magnates of England ignored his fief rights, bequeathed to him by King Edward the Confessor of England. In the end, however, after an unsuccessful uprising by those magnates who remained alive after the slaughter at Hastings, William carried out a thorough pacification of the country.[13] During his reign he reorganised the ruling class in England,[14] made new feudal grants and by the 14th century the country's power elite spoke French.

[9] R. Domingo, The New Global Law, Cambridge 2011, p. 18.
[10] S. Camilleri, *The Growth*..., p. 194.
[11] G. B. Adams, *The Origin of the Common Law*, 'The Yale Law Journal' 1924, Dec., vol. 34, 2, pp. 115–128.
[12] M. Sugar, *How the Battle of Hastings Was Lost*, 'Mental Health, Religion & Culture' 2006, 9, 2, pp. 141–154.
[13] T. Manteuffel, Historia powszechna. Średniowiecze [Universal History: Middle Ages], Warszawa 1996, p. 115.
[14] The property and cattle cadastre for the whole of England, drawn up in 1086, played an important role, https://books.google.pl/books?id=lGtm6GSJzQC&dq=doomsday+book&pg=PP1&redir_esc=y#v=onepage&q&f=false [accessed: 26.12.2024].

This situation resulted in a dualism of power, into a locally derived establishment in the provinces and an essentially occupying central authority. Indirectly, this had the effect of detaching thinking about the state and law in unitary terms and the state was conceptually linked to political power, which in the case of England came from conquest. Over the course of the next three centuries of the Middle Ages, there is a reduction in royal power in England (symbolised by the *Magna Carta* – 1215). English rulers were also accused of being more interested in their fiefdoms on the continent (Normandy was a rich province of France) than in their possessions on the island during the first centuries of their reign. England's cultural identity and the crown's attachment to its new fiefdom does not take place until the Hundred Years' War, but unlike on the Continent, where France would be at the forefront of transforming the state monarchy into its *absolute* variety, while in England the absolutist tendencies were short-lived, impermanent and essentially not as strong as on the Continent.

Some argue that if it were not for Roman law, Europe could be England.[15] This is a simplification, for what characterises the ancient political organisms that grew up around the Mediterranean, however, is statute law, whereas in Britain, throughout the Dark Ages, customary law prevailed. The phenomenon of law therefore developed differently in the British area than in continental Europe. Above all, it must be remembered that Roman culture did not have the same impact on the Celtic tribes inhabiting Britain as it did on the Continent.[16] Here, despite infighting and disputes, Roman law was recycled along with the achievements of Roman civilisation. This was facilitated by the ease of communication of the continental territories and the English Channel played an effective barrier to weakening trends in civilisational development (the geographical barrier also excluded Britain from the medieval influence of the papacy and empire and later the 15th and 16th century religious wars.)

Britain became a Roman province late and with much resistance. The first invasion was made by Julius Caesar in 55 BC, but he did so only at the urging of Germanic tribes conspiring with the Romans, who were beset by invasions by the Celts of Britain (the Celts being the indigenous people of Britain.) After the pacification of the south coast, the Romans left the island. It was only for political reasons and not out of military or economic necessity that the invasion of Britain was undertaken by the Caesar Claudius in 43 AD, who, according to legend, was elevated to the imperial dignity by the Praetorians themselves after the assassination of Caligula. Claudius was not considered a contender for the throne and survived a brutal power struggle after the death of Augustus. He was a cripple and a stammerer. He was more interest-

[15] T. Tulejski, *Sir John Fortescue i narodziny angielskiej teorii konstytucyjnej* [Sir John Fortescue and the Birth of English Constitutional Theory], „Przegląd Sejmowy" ['Parliamentary Review'] 2021, 5, 166, p. 135.

[16] P. A. Brunt, *Reflections on British and Roman Imperialism*, 'Comparative Studies in Society and History' 1965, 7, 3, pp. 267–288.

ed in history than politics (we only know his works from handwriting, they have not survived.)[17] Legend has it that he hid behind a curtain while the Praetorians were murdering Caligula's supporters in the palace. The soldiers, however, decided that the emperor was needed because of his opposition to the return of the republican system. So, they put Claudius on the throne – by today's standards – as a 'technical emperor.'

This one to gain a dubious reputation decided to conquer Britain, which had been a challenge for the Empire for a century. So, the invasion came from political rather than economic or military necessity. Britain was inaccessible to the Romans coming from the warm coast and the local population had either fled north (present-day Scotland) or would not submit to Romanisation. It took nearly a century for the Romans to reach the present-day Scottish border and eventually Emperor Hadrian ordered the construction of a wall separating the northern barbarians from the provinces (Hadrian's Wall) in the middle of the second century AD.

In summary – Roman influence in Britain was negligible and the local population did not adopt Roman culture to the same extent as the continental tribes. What was assimilated were the achievements of material culture (who wants to carry water on their back if they can build an aqueduct.) In contrast, the immaterial culture of Rome, including law, was not assimilated. The Empire did not regard Britain as a strategic province. It was not attractive for economic reasons and its remoteness and geographical peculiarities, including its climate, resulted in difficulties in victualing troops. The native population, hostile to the Romans, caused numerous tensions with the occupying power. Eventually, at the beginning of the fifth century, the Romans left Britain.

In the early Middle Ages, Britain became the object of numerous invasions. The Celts in the 5th v. were conquered by the Jutes, Angles and Saxons, Germanic tribes who expanded into the island after it was abandoned by the Romans. However, they soon lost their cultural link with the mainland to form the Britons – Germanised because of the invasion of the Celts, who remained in the south (the Celts of the north – the Scots – consider themselves the correct indigenous people, as they were not conquered by the Romans or the Germans.) In the subsequent Dark Ages, Britain did not develop a strong political body as in the continent did the Frankish state. It was dominated by kingdoms, which varied in number from several to a dozen during the Dark Ages. At the turn of the eighth and ninth centuries Europe experienced migrations of tribes from the north (Vikings.) This was in fact a diverse population. And so, the Normans quickly Romanised, while in Britain the matter was more complicated. In 878 there is a Viking invasion, against which the

[17] B. M. Levick, *Antiquarian or Revolutionary? Claudius Caesar's conception of his principate*, 'The American Journal of Philology' 1978, 99, 1, pp. 79 and 80.

Anglo-Saxons unite (the first king – Alfred.) However, this is more of a union against a common threat and not the building of a unified (according to medieval realities) state as in the case of the Franks.[18]

In summary, centralist and state-building tendencies did not emerge in Britain during the Dark Ages to the same extent as on the Continent. Additionally, the peculiar genesis of the English state, created because of foreign invasion, did not produce the conviction, common on the Continent over time, that the phenomena of law and state were linked. There was a rapid decentralisation of power in England, exacerbated by the absence of absolutism, except for brief episodes. Above all, however, unified Roman law, including the Justinian codification, which provided a single reference point for private law in continental Europe, did not take hold in England. English law was uncodified, based on custom and when it emerged as common law – in the 12th century – its 'writing down' took place primarily in the form not of general rules but of judicial decisions in relation to specific problems. Their replication in similar cases developed the precedent model of law application.

## Precedent vs. Syllogistic Model of Law Application

The fundamental difference between Anglo-Saxon and continental legal culture is the developed model of the application of law and legal reasoning more broadly. These stem from the difference in the accepted system of sources of law.

In continental Europe, with the end of the Middle Ages, statute law displaces custom as a source of law.[19] As already signaled, this was facilitated by the role of the codification of private law and the continued reception of Roman law. Thinking in terms of statute law as an important source of law was thus present in the Continental European area basically from antiquity. This trend, in a centuries-long perspective, was exacerbated and petrified by the transformation of medieval state monarchy into absolute monarchy. The strong monarchical power successfully sought to unify the sources of law. Above all, customary law as such, which is not publicly promulgated, was on its target. The judge, treated as a royal official, therefore ruled over time solely based on statute law, which dominated the catalogue of sources of law in civil law – according to *la bouche de la loi* doctrine.[20] In the Enlightenment, on the other hand, the formalisation of

[18] J. Donne, G. Herbert, R. Lovelace, Ch. Marlowe, A. Marvell, J. Milton, Sir P. Sidney, E. Spenser, Sir T. W. Elder, Medieval, https://sites.udel.edu/britlitwiki/medieval-and-renaissance-literature/ [accessed: 03.01.2025].

[19] T. Tulejski, *Sir John*..., pp. 141 and 142.

[20] I. Barwicka-Tylek, A. Ceglarska, *Does* la bouche de la loi *Have Anything to Say in Democracy? An exercise in legal imagination*, 'Studia Iuridica Lublinensia' 2022, vol. 31, 2, pp. 85–99.

the process of law application results in the formation of the syllogistic model of law application. Beccaria wrote of it thus:

In every case of a crime, the judge should carry out the following correct reasoning (*sillogismo*): the larger premise is the general law, the smaller premise is the illegal or lawful act, and finally the conclusion is freedom or punishment. If the judge, whether under duress or of his own free will, wishes to carry out even just two reasonings instead of one, the road to uncertainty will open up. There is nothing more dangerous than the generally accepted axiom that one must be guided by the spirit of the law. It is tantamount to removing the dyke holding back the turbulent stream of arbitrary views.[21]

In continental legal culture, the model of the application of law grew out of a uniform catalogue of sources of law. It is also often referred to deducting reasoning (thinking from the general to specific), which symbolises the fact that the major premise of the syllogism is the general abstract norm interpreted from normative acts, the minor premise is the assertion of fact carried out on the basis of legally defined evidentiary reasoning and the conclusion is the concrete-individual norm resulting from the congruence or incongruence of the assertion of fact with the assertion of law.[22]

Anglo-Saxons note that continental culture tends to generalise rules, whereas in common law culture the reasoning goes from the specific to general (induction.)[23] The precedent model of law application is responsible for this, being "the life blood of legal systems."[24] It was developed in the late medieval period and refers to something that has happened or that was done in the past, and that serves as a model for future conduct. In the case of the *ratio decidendi*, the precedent set is the principle or reasoning that has been established in a single case that serves as an example or rule to be followed in subsequent cases.[25] Hovewer the *ratio decidendi* (also known for short as the "ratio") refers to the "reason for the decision" and is a principle in common law that demonstrates the reason for a case.[26]

The difference in developed legal reasoning *vis-à-vis* civil law culture is due to the complex structure of legal sources in common law culture. It is about the validation aspect. In the civil law culture, as a result of the development of a homogeneous catalogue of sources of law, validation reasoning boils down

[21] C. Beccaria, O przestępstwach i karach [On Crimes and Punishments], 1766, Polish ed. 1: E. S. Rappaport (transl.), Warszawa 1959, pp. 61–63.

[22] L. Duarte d'Almeida, *On the Legal Syllogism* [in:] D. Plunkett, S. J. Shapiro, K. Toh (eds), Dimensions of Normativity: New essays on metaethics and jurisprudence, New York 2019; online edition, Oxford Academic, 21.02.2019, https://doi.org/10.1093/oso/9780190640408.003.0015 [accessed: 02.01.2025].

[23] J. Wróblewski, *Precedens i jednolitość sądowego stosowania prawa* [Precedent and Uniformity of Judicial Application of the Law], „Państwo i Prawo" ['The State and the Law'] 1971, 10, p. 525.

[24] L. Goldstein, *Introduction* [in:] Precedent in Law, Laurence Goldstein (ed.), Oxford 1987, p. 1.

[25] J. L. Montrose, *The* Ratio Decidendi *of a Case*, 'The Modern Law Review' 1957, vol. 20, 6, pp. 587–595, JSTOR, http://www.jstor.org/stable/1091093 [accessed: 02.01.2025].

[26] C. Manchester, D. Salter, Exploring the Law: The dynamics of precedent and statutory interpretation, London 2006, pp. 8 and 9.

to the selection of a normative act and its editorial fragments as the basis for a decision to apply the law. The main focus is on the interpretation of the selected provisions, which is carried out within the framework of judicial or administrative discretion (depending on the type of law application in which the decision is made.) This is carried out on the basis of the interpretative tradition developed in civil law culture, in Poland on the basis of theories of law interpretation more or less applicable by legal practice (semantic by J. Wróblewski, derivational by M. Zieliński, derivational-validation by L. Leszczyński, etc.)[27]

In common law culture, however, the validation stage in legal reasoning becomes fundamental. The choice of the appropriate source of law is therefore not determined by the general norm, which, because of interpretation, is deemed to cover the subject matter of the case to be decided, but by the characteristics of the factual situation, which is decided on the basis of previous decisions in similar cases. This is why legal reasoning, above all analogy, is so decisive in legal education in common law countries. These conditions are obviously present within the judicial type of application of law, but they radiate in all legal reasoning in the common law culture.

A judge in Anglo-Saxon culture, when qualifying a case for adjudication, has three options to choose from. In the first, he qualifies it for adjudication on the basis of state law; in the second, he qualifies it on the basis of a previous decision in a similar case. The third form is classical jurisprudence, i.e. the formulation of a new norm, but one that is individually binding in the case being decided. Of course, this is a model arrangement. In individual common-law countries, the scheme is sometimes more complex, in particular with respect to the question of the reciprocal bindingness of the courts of each type of previous decision. These issues are detailed and there is neither the need nor the space to go into them in such a short paper.

It is important to remember that *ratio decidendi* involves the choice of the source of the law and how it is to be understood. This is how English private law was developed. And not, as on the Continent, by way of a codification movement. In general, the establishment of common law accelerated after the Second World War and is sometimes pointed to as part of the convergence of Euro-Atlantic legal cultures.

The motives for the decision therefore involve replicating the source of the law and, secondarily, the way it is understood. With precedent being a conservative doctrine.[28] Formally, precedents from decades or even centuries ago are in force and the lack of application is due to a change in the realities of civilisation. If necessary, the court may instead invoke the procedure for

[27] A. Kotowski, Wykładnia sądów kasacyjnych w świetle empirycznych badań orzecznictwa [Interpretation of Cassation Courts in the Light of Empirical Case Law Research], Warszawa 2020.

[28] H. L. A. Hart, Law, Liberty and Morality, Stanford, California, 1963, p. 8.

breaking precedent (overruling), but the courts of appeal in common law are the guardians of precedent and rigorously assess such actions. Historically, the radicalism of the doctrine of precedent has been responsible for the emergence of alternative methods of dispute resolution.

However, the precedent model of applying the law has many advantages. It is beneficial for commerce and business, where predictability of judicial decisions is important. The institution of *de iure* (legally binding) precedent was the cause of the expansion of common law with the development of the British dominion as a maritime trading empire from the mid-16th century through the height of its power in the Victorian era. It is estimated that, just before the outbreak of the First World War, "about two-fifths (c. 19 million tons) were British flagged."[29]

Common law lawyers sometimes emphasise the greater decision-making uncertainty that in civil law arises from the principle of judicial independence. This in turn is the opposite of de jure precedent. The advantage of common law remains the possibility for the court to be legally bound by a precedent not previously issued in a specific case (in civil law, the binding of a precedent occurs, as a rule, only in a given proceeding, as a result of a cassation ruling by the appellate court and the referral of the case back to the court of first instance.)

As already mentioned, the spread of common law around the world accompanied the commercial expansion of the British Dominion. Contracts made in different parts of the globe would have to be drawn up under a uniform law. This, in turn, was the common law with the doctrine of precedent, whereby traders or carriers taking such large risks in ocean shipping could mitigate them in the legal field by preparing the contract well and securing themselves with binding precedents. In a civil law culture, by contrast, a party is always exposed to the court's decision-making autonomy in interpreting the law. Also, the lack of uniformity of the civil law culture, despite the role Roman law played in it, was not conducive to embedding international trade in this legal culture. To this day, the trade of multinational corporations is mainly conducted in common law.

## Additional Differences

The remaining differences between civil and common law culture boil down to more specific, but equally important, issues. In fact, if we compare

[29] M. B. Miller: *Sea Transport and Supply* [in:] 1914–1918 [online], International Encyclopedia of the First World War, ed. by Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer, and Bill Nasson, issued by Freie Universität Berlin, Berlin 2016-08-24. DOI: 10.15463/ie1418.10950.

the basic common-law issues, they all present distinctions between the two. Identity occurs within the accepted axiology of law. A common feature of Euro-Atlantic legal cultures is to link the law to the value of the absolute good and to derive from it a series of related values, which take the form of principles of law whose object of protection is primarily the human being and the properties belonging to him (life, dignity, property, etc.)[30] The conception of law in terms of egalitarianism and utilitarianism is common in the Western world.

The second common issue is the opposition of law to other normative orders. This is an important feature that distinguishes Euro-Atlantic legal cultures from Islamic cultures, which treat religious norms as a source of law in their own right. Social custom (norms of custom), on the other hand, show a validating connection with law in Far Eastern cultures. In civil law, the process of emancipation of law from other normative orders has continued with varying intensity over the centuries. It culminated, however, during the late Middle Ages and culminated in the developed Middle Ages. The following can be cited as cut-off dates, albeit conventional: the sudden coronation of Charlemagne by the Pope Leo III in Rome on 25 December 800, without the agreement of Charles, making the clerical authority the dispenser of the imperial crown, the papacy movement and the theocratic tendencies of Gregory VII and finally his conflict with Emperor Henry IV, ending with the Concordat of Worms in 1122.[31]

Then, during the late Middle Ages, a strong scholarly movement emerges in Western Europe leading to the development of the legal basis for a secular, strong central authority. With the transformation of state monarchy into absolute monarchy, law becomes a social phenomenon linked to state political power. It is to this day contrasted with other normative orders.

In common law, the process was more complex. Because, when equity and justice require it, courts are entitled to treat moral values as sources of law in their own right, as Dworkin put it in the form of principles in his integral theory of law, the social phenomenon of law is not as strongly opposed to morality as in the culture of statute law. Nonetheless, it also treats the law as a separate normative order and its validating relationship with morality occurs only at the level of legal principles concerning the fundamental values of a democratic society.

Apart from these two issues, numerous differences are easily diagnosed between civil and common law. Continental legal culture is dominated by a positivist narrative within the philosophy of law. In common law culture, it is a non-positivist form with an important role for legal realism. It has already

[30] Y. Dror, *Values and the Law*, 'The Antioch Review' 1957, 17, 4, pp. 440–454, https://doi.org/10.2307/4610000 [accessed: 02.01.2025].

[31] T. Manteuffel, Historia..., pp. 90 and 167–174.

been signalled that legal reasoning is subject to differentiation. In civil law, lawyers tend to generalise rules, as a result of the centuries-old tradition of state law. Legal thinking is sometimes summarised as proceeding from the general to the particular, reflecting a subsimilar model of law application. The reasoning carried out in doctrinal interpretation must mirror that of judicial operative interpretation.

By contrast, the common law in the private law area is dominated by the search for the most optimal solution in relation to the contextual case. As a result of the invocation of the *ratio decidendi*, the inference and legal qualification of the case is multiplied (duplicated.) This gives rise to reasoning from the particular to the general.

The study of law in the legal cultures under discussion took a different form. First of all, in civil law jurisprudence is much older and goes back to the aforementioned ancient Roman law. The systematisation and unification of legal concepts in the common law culture, on the other hand, comes only with the achievements of Jeremy Bentham and, above all, John Austin, thus at the turn of the 18th and 19th centuries. Of course, the modern study of law in civil law is also only in the 19th century, or more precisely its second half, i.e. the rise of continental, originally Prussian legal positivism.

Generally speaking, common law culture has long been alien to this systematisation of legal concepts, with which the concept of a system of law is associated. Treating the law as a set of rules with strong content and formal relations based on a uniform axiological foundation is rather a civil law concept. Systemicity of law as a paradigm of legal thinking is an element of civil rather than common law. By contrast, the precedent culture speaks of legal order, which does not emphasise such strong formal relations between rules. This is of course due to the dualistic structure of the sources of law and the law-making powers of the courts, which makes law a catalogue in its own way. Even Herbert Hart, an advocate of the formalisation of legal reasoning, treated law as a union rather than a system of rules.[32]

Another issue is the propaedeutic of law. It could be assessed as a not important matter, but it shows how legal reasonings are taught from the beginning of legal education. It also reveals the overall conception of law, as how the curriculum, the individual didactic contents and the order in which the academic subjects are taught are arranged reflects the adopted structure of jurisprudence and reflects in some way the specifics of legal practice. Of course, we are condemned to major simplifications when analysing these issues, as higher education is organised on a country-by-country basis. However, it is possible to look for some very general characteristics.

[32] H. L. A. Hart, The Concept of Law, Sec. Ed., Oxford 1964, pp. 79–99.

Thus, in general, continental culture is dominated by theoretical (dogmatic, doctrinal) teaching, while common law is dominated by a practical approach. In civil law, legal studies in public universities are often free of charge (this is the case in Poland, for example), while in common law the opposite is true – universities operate entirely on a commercial basis. This gives rise to a greater emphasis on practical teaching, as the graduate of the course has specific expectations of the studies so that the investment he or she has made pays off. At least in the European Union area, the teaching of law follows a uniform pattern. It is a 10-semester course of study, organised in two semesters per year. The first year consists of introductory subjects such as introduction to legal studies, legal reasoning (logic for lawyers), Roman law and legal history (general, national, doctrines, etc.) The crux of legal studies, however, is the dogmatic disciplines, therefore correlated with the different branches of law. These usually occupy min. 3 years of legal studies. At the end of their training, students usually choose specialisation subjects. The teaching of law is primarily reduced to knowledge of the regulations in force and secondarily to the training of legal skills and reasoning, the learning of which is mostly postponed to the practical apprenticeship stage.

It is also noted that law as a social phenomenon is perceived differently in the compared legal cultures. Lawyers from continental cultures tend to generalise, treating law as a coherent set of norms and contrasting the process of law-making with other forms of the phenomenon of law; primarily its application and interpretation. Legal doctrine also plays a very important role in civil law, which has a centuries-old historical tradition.

Common law, on the other hand, is characterised by a practical way of thinking, less focus on the doctrinal basis of the law and not treating it as a coherent, uniform set of norms. There is also a perceived greater difference between public and private law. The former is nowadays closer to its counterpart in continental culture, but private law has basically no tradition of codification. It has developed 'bottom-up', as a result of judicial decisions.

Perhaps the most significant difference, however, is the archetype of law. That is, its historically established social vision, common belief, idea. The different historical origins of civil and common law are revealed here. As already mentioned, continental culture was dominated early on by statute law, created exclusively by the political sovereign. The saying about the genetic connection between state and law, 19th century legal positivism only made use of, but as an archetype of law it is strongly fused with continental culture. In common law, by contrast, the social phenomenon of law is not so strongly linked to the idea of the state.

## Conclusions

The fundamental question of the future of Euro-Atlantic legal cultures is related to the already mentioned phenomenon of convergence – that is, the interpenetration of their characteristics. In the area of the European Union, the evolution of state law culture has been weakened by the UK's exit from the Union, although it has indirectly accelerated federation processes in the legal field. Britain, with its different understanding of legal institutions in civil law and its greater economic liberalism, could not accept the strongly etatist proposals of the current European establishment (interference in the market in connection with the Green Deal, reduction of the competitiveness of its own industry, etc.)[33] With Brexit, the institutional link between the established law culture and common law disappeared.[34] Convergence processes are therefore now embedded solely in general-civilisational processes, namely globalisation and the communications revolution.

Only a decade ago, with the popularity of the concept of multicentrism, legal theorists wondered whether the 21st century would see a gradual unification of Euro-Atlantic legal cultures.[35] Brexit was, of course, not the only event to undermine this process, but a significant one – even if treated as a local and essentially symbolic in nature. Consideration of the evolution of state law and common law cultures must also be limited to the geographical space of the Western world (mainly Europe, North America.) More broadly, the process is too complex to make generalisations. The basic conclusion of the comparative study comes down to the observation that, despite the identical axiological perspective of the layer and role of law, the other features of the civil and common law cultures differ significantly. In my opinion, with the progressive federalisation of the European Union, the convergence processes will weaken or be muted by political measures. The construction of a single European state, which is explicitly declared by the European establishment, is favoured by a monocentric catalogue of legal sources, with a single law-making centre located in the European institutions.[36] The current emancipation of the judiciary is treated instrumentally in Europe, especially as the election of judges of the CJEU or the ECtHR takes place according to political procedures. It is justifiably questionable that these courts pronounce on the standards of independence and independence of national courts by themselves being appointed on the basis of non-transparent, discretionary political decisions. With the above in mind, I would be inclined to take the view that the convergence of

[33] M. Van Hoecke, *European*..., pp. 89 and 90.
[34] M. Van Hoecke, *European*..., p. 87.
[35] As a mix of civil law and common law, H. Schepel, R. Wesseling, *The Legal Community: Judges, lawyers, officials and clerks in the writing of Europe*, 'European Law Journal' 1997, 3, 2, p. 165.
[36] Law is an object but also as an instrument of European integration. R. Dehousse, The European Court of Justice: The politics of judicial integration, New York 1998, p. 1.

civil and common law cultures will at least weaken rather than accelerate in the coming decades, and there is no prospect of convergence within the next century.

**Porównanie euroatlantyckich kultur prawnych – krótkie podsumowanie**

**Abstrakt**

W artykule porównano główne cechy euroatlantyckich kultur prawnych: kontynentalnej (prawa stanowionego, ang. *civil law*) i anglosaskiej (*common law*). Analizę przeprowadzono z perspektywy kultury kontynentalnej. Starano się uchwycić najważniejsze różnice pomiędzy tymi kulturami prawnymi. Zasadnicze pytanie jest następujące: dlaczego Anglia, będąc tak blisko europejskiej kultury prawnej, ostatecznie tak bardzo się od niej oddaliła? I nie zmieniły tego ani proces globalizacji, ani proces konwergencji kultur. Zarazem jednak te właśnie zjawiska decydują o znaczeniu interakcji *civil law* i *common law* dla każdego niemal współczesnego prawnika. Ci, którzy pracują w międzynarodowym biznesie, muszą być więc zaznajomieni ze specyfiką tych dwóch kultur, które zdominowały euroatlantycką przestrzeń prawną. Temat ten jest również istotny dla doktryny prawa – ze względu na wspomnianą już konwergencję, czyli wzajemne kształtowanie się prawa cywilnego i *common law*.

**Słowa kluczowe:** *common law*, *civil law*, tradycja *civil law*, teoria prawa, antropologia prawa.

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Adam Doliwa*

# Notes on the Invalidity of a Legal Transaction Contrary to the Principles of Community Life in Polish Civil Law – Against the Background of Court Jurisprudence

**[Uwagi o nieważności czynności prawnej sprzecznej z zasadami współżycia społecznego w polskim prawie cywilnym – na tle orzecznictwa sądowego]**

**Abstract**

The purpose of this article is to analyze the judicial application of civil law in assessing the content of legal transactions from the point of view of the general clause of principles of community life. The starting point for detailed consideration is to determine the system of extra-legal values on which Polish civil law is based. The importance of equity and justice in civil law relations becomes apparent through judicial review of the content of legal transactions. The consequence of the contradiction of the content or purpose of a legal transaction with the fundamental values referred to in the clause of principles of community life is the invalidity of such a transaction. The main conclusion of the article is that when the need to protect the social interest falls away and the legal transaction – which is an expression of the subject's private law autonomy – is in accordance with positive law, it is in principle not subject to review from the point of view of compliance with the principles of community life. The conclusions also emphasize that the role of the court is to perceive and articulate in a given case the fundamental social values of truth, goodness and justice, the realization of which civil law is also supposed to serve.

**Keywords:** legal transaction, civil law, principles of community life, general clause, invalidity of a legal transaction, court jurisprudence.

## Preliminary Notes

Civil law is based on a foundation of values that include the autonomy of private subjects, the guarantee and protection of property and personal inte-

* **Adam Doliwa** – DSc, Professor of Law (Titular), University of Bialystok (affiliation); https://orcid.org/0000-0002-0752-7708; adoliwa@uwb.edu.pl / prof. dr hab. nauk prawnych, Uniwersytet w Białymstoku (afiliacja).

rests through subjective rights (powers), and the pursuit of equity in civil-law relations.[1] The latter value materializes through courts' application of the general clause of principles of community life, also as a tool to control the conduct of legal subjects performing legal transactions.[2] In cases covered by Article 58(2) of the Civil Code, which stipulates that a legal transaction contrary to the principles of community life is invalid, certain ethical assumptions of the civil law system are the basis for the control of declarations of intent from the point of view of compliance with extra-legal norms. Judicial review of legal transactions involves verification of their content and purpose combined with the application of the sanction of invalidity. The basis for ruling on the invalidity of a legal transaction is the court's finding[3] that the transaction contradicts the principles of community life, that is, contradicts the essential values covered by that general clause.[4] Any attempts to draft a list of values or moral norms that implement them, which should be taken into account when determining whether a legal transaction contradicts the principles of community life, is inevitably doomed to failure. This is primarily because the values to which the principles of community life refer evolve with changes in social relations and consciousness, and because filling in the content of the principles of community life must be limited in scope, as general clauses are introduced to break away from the rigidity of positive law.[5] In addition, an evaluation of a legal transaction through the lens of the principles of community life requires taking into account several different values that, if a given legal transaction contradicts them, cause that transaction to be discredited morally.[6]

The review of legal transactions under Article 58(2) of the Civil Code constitutes an application of positive law; however, due to the reference contained

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[1] See: K. Doliwa, *Pozytywizm prawniczy a zasada słuszności* [Legal Positivism and the Principle of Equity], 'Białostockie Studia Prawnicze' 2014, book 17, pp. 89ff.

[2] See: A. Doliwa, Funkcje zasad współżycia społecznego w prawie cywilnym [The Functions of the Principles of Community Life in Civil Law], Warszawa 2021, pp. 127ff.

[3] Article 58(2) of the Civil Code is also binding on notaries, who should refuse to perform a notarial transaction if they considers that the transaction is contrary to the principles of community life. At the same time, it is not advisable for a notary's actions in this regard to go too far, since the proceedings conducted by him or her do not in every case provide a basis for a sound decision to take into account Article 58(2) of the Civil Code. A notary should therefore limit his or her actions to cases where the contradiction to the principles of community life is obvious and unambiguous; see: resolution of the Supreme Court of December 18, 2013, III CZP 82/13.

[4] In the doctrine, the thesis is posed that Polish law contains a global norm that imposes *ipso iure* the sanction of invalidity in cases where "a legal transaction contrary to the law or morality" is performed; see: P. Skorupka, Nieważność czynności prawnej w prawie polskim na tle porównawczym [Invalidity of a Legal Transaction in Polish Law in a Comparative Approach], Warszawa 2019, p. 425.

[5] See: A. Stelmachowski, Zarys teorii prawa cywilnego [An Outline of the Theory of Civil Law], Warszawa 1998, pp. 109ff.

[6] For information on a catalog of values protected under Article 58(2) of the Civil Code, see: Z. Radwański, R. Trzaskowski (in:) Z. Radwański, A. Olejniczak (eds), System prawa prywatnego, tom 2, Prawo cywilne – część ogólna [Private Law System, vol. 2. Civil Law: general part], Warszawa 2019, pp. 319–330; M. Gutowski, Nieważność czynności prawnej [Invalidity of a Legal Transaction], Warszawa 2006, pp. 339ff.

in that article, it also constitutes a review on the basis of an extra-legal norm arising from the principles of community life. Such review can lead to the correction of a civil-law relationship by ruling on the invalidity of the legal transaction that is its source, and any threat to the security of legal transactions and to a sort of predictability of its functioning caused by that correction is justified and "compensated" by the fair result of the application of law.

Contradiction to the principles of community life as a basis for declaring a legal transaction invalid must arise from circumstances already taking place when the transaction was performed. When assessing the compatibility of a contract with the principles of community life, the reasons for concluding that contract and the circumstances surrounding its conclusion must not be overlooked.[7] At the same time, the validity of a legal transaction must not be assessed on the basis of the behavior of the parties to that transaction after it was performed.[8] This is because the subject of review is the legal transaction that takes place at the time of the declaration of intent and not the subsequent behavior (omissions), such as payment of the price or delivery of the goods, which are merely events that are manifestations of the performance of the contract.[9] The subject of review under Article 58(2) of the Civil Code, in addition to the content of a legal transaction, is also the purpose and effect of that transaction. As an exception, a legal transaction may also be considered contradictory to the principles of community life due to the circumstances surrounding its performance, including, in particular, the motives of the parties.[10] On the other hand, circumstances that occur after the conclusion of a contract, for example, the defendants' failure to repay a loan, are not relevant to the assessment of the validity of the contract.[11]

Examination of the compatibility of a legal transaction with the principles of community life is not only possible, but also necessary; however, it must always be carried out taking into account the facts of the specific case (a situation-based rather than abstract assessment). As a result of such an examination, the validity of the legal transaction may be challenged.[12] Principles of community life can be invoked on an individual basis, and in applying the general clause of principles of community life, all circumstances of the case must be evaluated in detail.[13]

The jurisprudence of the Supreme Court emphasizes that in assuming that a legal transaction is contradictory to the principles of community life, it should be determined what the contradiction consists in, by whom and how

[7] See: judgment of the Supreme Court of December 8, 2010, V CSK 157/10.
[8] See: grounds for the judgment of the Administrative Court in Szczecin of April 25, 2018, I ACa 1022/17, Legalis.
[9] See: judgment of the Supreme Court of September 14, 2016, III CSK 339/15.
[10] See: judgment of the Administrative Court in Szczecin of April 25, 2018, I ACa 1022/17.
[11] See: judgment of the Supreme Court of January 23, 2002, II CKN 698/99.
[12] See: resolution of the Supreme Court of December 13, 2013, III CZP 79/13.
[13] See: decision of the Supreme Court of June 20, 2018, I UK 381/17.

it was caused, and what the violation itself involves. A general reference to general clauses or the values protected by them can lead to unacceptable arbitrariness in the application of law and, as a result, cause a violation of the principle of certainty of transactions, which is essential in a market economy. A contract contradicts the principles of community life only when it does not respect a certain prohibition that is deeply justified axiologically and morally, i.e. its content or purpose is morally prohibited or its content does not result from a moral norm, e.g. it violates human freedom, freedom of economic activity, equality of the parties, or free competition, or harms the family or the welfare of a child.[14]

Basing a claim on Article 58(2) of the Civil Code, which makes contradiction of the principles of community life by a legal transaction the basis for the invalidity of that transaction, precludes the application of Article 5 of the Civil Code to assess the compliance of a legal transaction with these principles. The latter article concerns a situation where a legal relationship already exists and the existing entitlement included in its content is valid, but during the course of the legal relationship such new circumstances have arisen that, in the light of principles of community life, oppose the assertion of the entitlement for as long as these circumstances persist. On the other hand, Article 58 of the Civil Code concerns the contradiction of a law by a legal transaction, a transaction intended to circumvent a law, or a contradiction of the principles of community life by a transaction. These are situations where a legal transaction is invalid from the beginning.[15]

The jurisprudence indicates that Article 58(2) of the Civil Code should be applied with restraint and not more freely than Article 5 of the Civil Code, which follows from an *a fortiori* reasoning: since the determination of abuse of a right that does not eliminate that right (does not have a permanent – peremptory effect) is allowed only in strictly established cases, the determination of the invalidity of a legal transaction that causes a permanent effect all the more so requires meeting at least the same evaluation criteria.[16]

## The Object, Purpose, and Criteria for a Review of Legal Transactions

Only legal transactions, i.e., civil-law (private-law) declarations of intent (see Articles 60 and 56 of the Civil Code) of natural and legal persons and other organizational units with legal personalities are subject to review under

[14] See: judgment of the Supreme Court of October 12, 2017, IV CSK 660/16.
[15] See: judgment of the Supreme Court of March 5, 2002, I CKN 934/00; judgment of the Supreme Court of January 9, 2004, IV CK 338/02.
[16] See: judgment of the Administrative Court in Warsaw of January 23, 2014, VI ACa 706/13.

Article 58(2) of the Civil Code. On the other hand, if some behavior of a subject is not a civil-law transaction (e.g., the commencement, suspension, or termination of business activities) or when the acquisition of some property right by a subject is not the result of a legal transaction, i.e., is not the result of a declaration of intent (e.g., the acquisition of the right to maternity benefits), then invoking Article 58(2) of the Civil Code in such a case is pointless and misguided.[17]

The application of Article 58(2) of the Civil Code is also permissible with regard to legal transactions creating economic relations; one can even put forward the thesis that this norm is particularly important for the creation of conditions conducive to an ethical way of doing business, and it is impossible to assume that the status of an entrepreneur or the professional nature of a large-scale business activity is an obstacle in this case.[18] In relations between entrepreneurs, the principles of community life should be understood as the principles of reliability and loyalty to the partner in a contract. Of particular importance here are the rules of honesty and mercantile reliability (the honesty and reliability of entrepreneurs in business and professional activities), which should be required of an entrepreneur as a professional conducting activities in the market. This involves the requirement to adhere to good morals and the principles of fair transactions, reliable conduct, loyalty, and trust.[19]

The jurisprudence emphasizes that any contract, including one that complies with law, is subject to evaluation from the point of view of Article 58(2) of the Civil Code. This evaluation should always be made with reference to the circumstances of each individual case.

As a rule, the jurisprudence rejects the view that the warranty of public credibility of land and mortgage registers prevents challenging the validity of a contract on the basis of Article 58(2) of the Civil Code if the contract contradicts the principles of community life, if a right (e.g., ownership) to a property was disclosed in the land and mortgage register on the basis of the contract. At the same time, the jurisprudence recognizes the need to weigh the values and protect the interests and rights of parties to subsequent contracts concluded in the course of further trading in the property.[20]

It must be emphasized that in view of the need to preserve the security and certainty of legal transactions, the general clause of principles of community life as a basis for reviewing a legal transaction and declaring it invalid should be used in exceptional cases in which this has a strong axiological justification. There must be special circumstances in favor of declaring the invalidity of a legal transaction on the grounds that it is inconsistent with the principles

[17] See: judgment of the Supreme Court of October 24, 2017, I UK 220/17.

[18] See: judgment of the Supreme Court of February 24, 2016, I CSK 269/15.

[19] See: K. I. Kopaczyńska-Pieczniak, *Zasada uczciwości kupieckiej jako zasada prawa handlowego* [The Principle of Mercantile Honesty as the Principle of Commercial Law], 'Studia Iuridica Lublinensia' 2016, 1, pp. 168ff.

[20] See: judgment of the Supreme Court of January 24, 2004, III CKN 405/99.

of community life. This is a situation where the invalidity of a contract due to its contradiction to the principles of community life, in particular to the principle of fairness, is quite evident and apparent *prima facie*. This conclusion may arise from a glaring imbalance in the equivalence of the services provided by the parties to a contract, which is visible even at first glance.[21]

The incompatibility of a legal transaction with the principles of community life takes place when the content or purpose of the legal transaction and its legal effects are irreconcilable with these principles, as well as when the transaction is performed in order to circumvent the principles of community life.[22] It is not enough to cite a violation of the principles of community life in general, but also it is not necessary to indicate which specific principle has been violated;[23] instead, it is necessary, by reference to the circumstances of the case, to specify which element of the case (the motive for the behavior of the parties to the legal transaction, the content of that transaction or its purpose and effect) is contrary to the values that are generally recognized and accepted in the society and that determine the principles of decent and fair community life.[24]

In the jurisprudence of the Supreme Court, it is a well-established view that setting an abnormally high salary for work may be considered invalid in specific circumstances as having been made in violation of the principles of community life, which consists in the intentional achievement of unjustified benefits from the social security system at the expense of other participants in that system.[25] The general clause of principles of community life is also violated by a contract to the extent that it restricts a party's freedom of business activity, which makes it invalid.[26] Therefore, a contradiction to the principles of community life may consist in a violation of the fundamental structural principle of civil-law relations, i.e. the principle of entrepreneurial freedom. Also, stipulating an excessively high interest rate in a loan agreement between individuals that is not justified either by inflation or by the profits earned in a normal, reasonably run business may contradict the principles of community life.[27] Such a burden on the borrower may turn out to be ruinous for him or her, while the lender gains benefits that cannot be justified by any rationale. A glaring imbalance in the equivalence of services determines the presence of a contradiction to the principles of community life.[28]

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[21] See: judgment of the Supreme Court of October 13, 2005, IV CSK 162/05.
[22] See judgment of the Administrative Court in Cracow of September 7, 2018, I AGa 178/18.
[23] Cf. the judgment of the Supreme Court of October 12, 2017, IV CSK 660/16.
[24] Cf. the grounds for the judgment of the Administrative Court in Katowice of February 6, 2018, I ACa 907/17.
[25] See: resolution of the Supreme Court of April 27, 2005, II UZP 2/05; judgment of the Supreme Court of August 4, 2005, II UK 16/05; judgment of the Supreme Court of August 9, 2005, III UK 89/05; judgment of the Supreme Court of October 18, 2005, II UK 43/05; judgment of the Supreme Court of June 1, 2017, I UK 253/16; judgment of the Supreme Court of June 13, 2017, I UK 259/16.
[26] See: judgment of the Supreme Court of May 20, 2004, II CK 354/03.
[27] See: judgment of the SA in Łódź of July 1, 2016, I ACa 39/16.
[28] See: judgment of the Supreme Court of October 13, 2005, IV CSK 162/05.

## An Assessment of the Content or Purpose (Effects) of a Legal Transaction

A review under Article 58(2) of the Civil Code concerns primarily the content of a legal transaction. However, when assessing the inconsistency of a legal transaction with the principles of community life, the content of the transaction cannot be separated from the reasons that caused it. The content of a legal transaction may not contradict the principles of community life, but due to the circumstances surrounding its performance, including in particular the motives of the parties, the legal transaction may be considered inconsistent with the principles of community life.[29] For example, if an assessment of the facts and reasons for the conclusion of a donation agreement leads to a finding that the powers vested by virtue of the performance of public tasks were abused and an administrative decision that was favorable to a party and conditional on a material benefit for the administrative body was made, then this should be considered a violation of such accepted principles (and the values they protect) as the principle of equality of parties and, most importantly, the principle of loyalty and fairness to citizens, which are binding on public authorities. In accordance with the legally accepted general clause of the principles of community life, such an action cannot be approved of (socially and legally), which provides a basis for finding the donation agreement invalid.[30] Usually, however, it is not the motivation of the parties but the content of the contract or agreement that determines its validity from the point of view of Article 58(2) of the Civil Code. It should be emphasized that the motives may be relevant to the validity of a legal transaction insofar as they merit a particularly negative evaluation from the point of view of the principles of community life (or other legislation providing for the sanction of invalidity; see, e.g., Article 83 of the Civil Code).[31] For example, the exercise by a pro-environmental association of its right to appeal against decisions in administrative proceedings in order to prolong the procedure for obtaining the relevant permits so as to induce the entrepreneur concerned to donate money for a purpose specified by the association results in the invalidity of the agreement concluded on this subject, as it contradicts the principles of community life (Article 58[2] of the Civil Code).[32]

In addition to the content of the legal transaction, what is also important to the assessment of whether the case referred to in Article 58(2) of the Civil Code is taking place is the purpose and effect of the transaction, and in particular whether the transaction results in an entitlement or obligation, the fulfill-

[29] See: judgment of the Administrative Court in Szczecin of April 25, 2018, I ACa 1022/17.
[30] See: judgment of the Supreme Court of September 13, 2001, IV CKN 475/00.
[31] See: judgment of the Administrative in Warsaw of December 20, 2013, VI ACa 740/13.
[32] See: judgment of the Supreme Court of November 10, 2004, II CK 202/04.

ment of which creates a state of affairs that is inconsistent with the principles of community life. Thus, the parties to a legal transaction are expected to act honestly, loyally, and in accordance with the purposes that their declarations of intent are to serve.[33] However, the incompatibility of the purpose of a transaction with the principles of community life leads to the invalidity of that transaction when that purpose was known to both parties to the transaction and the parties accepted the fact that the transaction would have consequences that violate moral norms.[34]

The incompatibility of a legal transaction with the principles of community life occurs when the parties have shaped the content of the transaction in a manner that is aimed at achieving an objective that, although it falls within the scope of the legal effects produced by the transaction on the basis of substantive law (a provision of a statute), must be found unacceptable from the point of view of justice. It should be assumed that, as in the case of a transaction aimed to circumvent the law, the awareness of the participants in a legal transaction is necessary and must include at least the inevitability of the occurrence of an effect that is contradictory to the principles of community life.[35]

Another example of an inconsistence of the purpose of a contract with the principles of community life is the use by the parties to the contract of a collateral assignment agreement to achieve an objective different from that for which the contract was concluded. In that agreement, the debtor transfers ownership of an item to the creditor to secure the performance of an obligation, and not to enable the creditor to acquire ownership of the item in exchange for the secured claim corresponding to only a portion of the item's value without an appropriate settlement and in excess of a value that satisfies the creditor's interest, and thus in a way that provides the creditor with grossly excessive and unjustifiable profits. In other words, the construction of the security rights cannot serve the purpose of the creditor taking ownership of the collateral in order to make a profit on its sale or to retain its ownership for a price that is much lower than its market value. Such an attitude on the part of the creditor would have to be found reprehensible from the point of view of the principles of fair transactions, since it is aimed to gain unjustified profits at the expense of the debtor whose economic situation forces him or her to take up a loan from a source other than a bank, using the dwelling where he or she resides as collateral.[36]

Therefore, in order to assess whether the case referred to in Article 58(2) of the Civil Code has occurred, in addition to the content of the legal act, its purpose and effect are also relevant, and in particular such assessment requires

[33] See: judgment of the Supreme Court of February 25, 2004, II CK 34/03.
[34] See: Z. Radwański [in:] Z. Radwański (ed.), System prawa prywatnego, tom 2, Prawo cywilne – część ogólna [Private Law System, vol. 2. Civil Law: general part], Warszawa 2002, pp. 243–244.
[35] See judgment of the Administrative Court in Cracow of September 7, 2018, I AGa 178/18.
[36] See: judgment of the Supreme Court of March 31, 2016, IV CSK 372/15.

the determination of whether the performance of the legal transaction results in an entitlement or obligation, the fulfillment of which creates a state of affairs that contradicts the principles of community life.[37]

## A Review of Legal Transactions on the Basis of Criteria Other than the Principles of Community Life

The wording of Article 58 of the Civil Code indicates that in the course of its application it is necessary to follow the sequence of grounds for a review of legal transactions adopted therein. A disputed legal transaction should therefore first be evaluated to determine whether it violates a law or is intended to circumvent a law, and only later, in the event of a negative result of the first evaluation, can it be reviewed to determine whether it contradicts the principles of community life.[38] If it is found that the prerequisites for the invalidity of a legal transaction due to its non-compliance with a law are met, it is no longer necessary to determine whether the transaction contradicts the principles of community life.[39] For example, an assessment under Article 58(2) of the Civil Code can be made only for an actual contract, and not a sham contract; invalidity due to the circumstances listed in Article 58(2) of the Civil Code does not include the sham nature of legal transactions, since a separate regulation is provided for this characteristic as a cause of invalidity in Article 83(1) of the Civil Code. [40]

The jurisprudence also includes many comments on the relationship between the constructs of invalidity of a legal transaction due to its inconsistence with the principles of community life (Article 58[2] of the Civil Code) and exploitation (Article 388 of the Civil Code). Generally speaking, two positions are presented in these cases: the first is that the prerequisites of the two institutions cannot intersect,[41] and the second is that the Article 388 of the Civil Code is special and may be subject to "absorption" into Article 58 of the Civil Code.[42] As for the first position, it can be pointed out, by way of example, that the unequal distribution of the risks and benefits in a currency option contract and the inequality of the services of the parties, one of which is a bank, does not automatically mean a violation of the principles of contractual equity and fair transactions that would cause the contract to be invalid under Article 58(2) of the Civil Code. The Supreme Court held that the facts of the case lac-

[37] See judgment of the Administrative Court in Cracow of September 7, 2018, I AGa 178/18.
[38] See: P. Skorupka, Nieważność [Invalidity...], p. 478.
[39] See: decision of the Supreme Court of November 28, 2000, IV CKN 17/00.
[40] See: judgment of the Supreme Court of November 9, 2004, II CK 194/04.
[41] See: judgment of the Supreme Court of September 19, 2013, I CSK 651/12.
[42] See: judgment of the Supreme Court of January 14, 2010, IV CSK 432/09.

ked grounds for the application of Article 388 of the Civil Code, i.e. there was no exploitation on the part of the defendant, due to the plaintiff's failure to meet the subjective prerequisites of this defect in the legal transaction. In the opinion of the Supreme Court, this opens the possibility of applying Article 58(2) of the Civil Code, if the prerequisites provided for by that article are met, since, by definition, the scopes of application of exploitation and absolute invalidity of a legal transaction that is contradictory to the principles of community life cannot intersect.[43] In contrast, the second position is based on the reasoning that a contract that violates the principle of equivalence, in the case of a gross disproportion between the services provided by each party, can be assessed in light of the provisions of Article 58(2) of the Civil Code, especially when not all the prerequisites of exploitation provided for in Article 388(1) of the Civil Code have been met. Consequently, if the prerequisites of exploitation are not met, it is possible to consider the application of Article 58(2) of the Civil Code, if the legal conditions for the application of that article are met. In such cases, it is assumed that Article 388(1) of the Civil Code constitutes *lex specialis* in relation to the general Article 58(2) of the Civil Code.[44] Therefore, in principle, a contract can be assessed as invalid under Article 58(2) of the Civil Code, even though not all the prerequisites of exploitation, as defined in Article 388(1) of the Civil Code, have been met. However, this depends on the demonstration of such factual circumstances that would allow the parties' contract to be considered contradictory to the principles of community life, in particular consisting in such a violation of the principle of fairness and reliability of contracts, by taking advantage of the forced position of the counterparty, that they would result in the invalidity of the legal transaction.[45]

In principle, the provisions of Article 388 of the Civil Code should be considered special in relation to Article 58(2) of the Civil Code,[46] which also applies to cases in which there is a gross disproportion between the main services provided by each party.[47] This is based on the assumption that the sanction of revocability provided for in Article 388 of the Civil Code is more favorable to the exploited person, who may want to maintain the validity of the contract and keep the service received. On the other hand, in courts' practice, a wider use of Article 58(2) of the Civil Code and the related marginalization of the special regulation are noticeable, which is dictated by the need to provide the weaker party with more effective protection than that provided by Article 388 of the Civil Code. Indeed, the protective value of the latter article can

[43] See: judgment of the Supreme Court of September 19, 2013, I CSK 651/12.
[44] See: judgment of the Supreme Court of October 8, 2009, II CSK 160/09 and the judgment of the Supreme Court of January 14, 2010, IV CSK 432/09.
[45] See: judgment of the Administrative Court in Cracow of January 15, 2014, I ACa 1363/13; cf. the judgment of the Administrative Court of May 22, 2012, I ACa 1020/11.
[46] See: judgment of the Supreme Court of October 8, 2009, II CSK 160/09.
[47] See: judgment of the Supreme Court of June 15, 2018, I CSK 491/17.

only materialize if the weaker party becomes aware within an appropriate, relatively short period of time of the occurrence of the prerequisites of exploitation and the rights to which it is entitled as a result, and demonstrates the required procedural activity. In many cases, it is already clear at the time of the conclusion of the contract that such activity cannot be counted on (e.g., the subjective weakness of the exploited party is permanent or the gross contractual imbalance is difficult to see and its negative effects become evident only in the long term), which may justify recourse to Article 58(2) of the Civil Code and the application of more effective sanctions, starting with invalidity, which does not necessarily have to harm the interest of the exploited party (e.g., when the contract was concluded on the initiative of the exploiting party and in his or her interest, and the benefit due to the exploited party was not – and was not to become – indispensable to it). This means, therefore, that there may be a situation in which the same contract contains provisions that are contradictory to the principles of community life and have the characteristics of exploitation.

## The Effects of the Inconsistency of a Legal Transaction with the Principles of Community Life

The effect of the inconsistency of a legal transaction with the principles of community life provided for in Article 58(2) of the Civil Code is its invalidity (absolute invalidity).[48] In this case, the legislature applied the most severe sanction of defectiveness of a legal transaction, with the aim to prevent the emergence of legal relations whose content is incompatible with the basic moral norms prevailing in the society, and thus also to protect the interests and values covered by the principles of community life clause.[49] The invalidity of a legal transaction occurs from the moment of its performance (*ab initio*), so that an invalid legal transaction does not produce the legal effects intended by the parties, arising from a law or established customs. It should be noted at the same time that if a legal transaction contradicts the principles of community life then, unlike Article 58(1) of the Civil Code with regard to violation of a law by a legal transaction, Article 58(2) of the Civil Code does not stipulate the possibility of an effect other than invalidity of the transaction. However, according to the principle of interpretation *lex specialis derogat legi generali*, the sanction of invalidity of a legal transaction that contradicts the

[48] See: M. Gutowski, Z. Radwański [in:] Z. Radwański, A. Olejniczak (eds), System..., tom 2 [Private..., vol. 2], pp. 543ff; P. Skorupka, Nieważność... [Invalidity...], pp. 313ff.

[49] See: J. Preussner-Zamorska, Nieważność czynności prawnej w prawie cywilnym [Invalidity of a Legal Transaction in Civil Law], Warszawa 1983, p. 76; M. Wilejczyk, Zagadnienia etyczne części ogólnej prawa cywilnego [Ethical Issues in the General Part of Civil Law], Warszawa 2014, pp. 350ff.

principles of community life is ruled out by regulations providing for a sanction other than absolute invalidity of the transaction, such as the sanction of relative ineffectiveness (see Articles 59 and 527 of the Civil Code). However, the application of the sanction of absolute invalidity is justified in certain real situations that are suitable for subsumption under the norms set forth in Articles 59 or 527 of the Civil Code in the event of significant intensity of the gross harm to the other party, and thus gross violation of the principles of community life.[50]

Absolute invalidity of a legal transaction may be invoked by anyone whose interest is violated by a concluded contract that is subject to the sanction of invalidity.[51] The invalidity of a legal transaction is taken into account by courts *ex officio*, even if such a claim is not made in a party's procedural action (action, appeal). A judgment establishing the absolute legal invalidity of a legal transaction (or an element of the content of that transaction) at the time of its performance is declaratory and has retroactive effect (*ex tunc*). The invalidity of a legal transaction due to its inconsistence with the principles of community life may also be declared in a ruling issued in a trial aimed to establish such invalidity (Article 189 of the Code of Civil Procedure). In such a trial, the substantive-law prerequisite for an lawsuit is the demonstration of a legal interest understood as an objective (i.e., actually existing), and not merely hypothetical (i.e., existing in the subjective opinion of a party), legal need to obtain a judgment of appropriate content, which occurs when a situation of actual violation or threat of violation of a specific legal norm has arisen. A legal interest occurs when the very effect produced by the finality of the judgment establishing invalidity ensures the protection of the plaintiff's legally protected interests, i.e. definitively ends an existing dispute or prevents the emergence of such a dispute in the future, and at the same time this interest is not subject to protection by any other means.[52]

## Summary and Conclusions

The controlling function of the principles of community life in relation to legal transactions, as outlined above, consists in the individualized intervention of equity in the specific behavior of the parties to civil-law relations, rather than in an abstract intervention directed against the content of law. A review of legal transactions through the lens of the criteria embodied in

[50] See: judgment of the Supreme Court of April 18, 2013, II CSK 557/12; judgment of the Supreme Court of September 14, 2016, III CSK 339/15.

[51] See: judgment of the Supreme Court of December 17, 2015, I CSK 1033/14.

[52] See: judgment of the Administrative in Warsaw of July 24, 2017, VI ACa 577/16; judgment of the Administrative Court in Gdańsk of March 8, 2016, I ACa 961/15.

the principles of community life involves recourse to morality; the role of the reviewing court is to notice and articulate in a given case the fundamental values of truth, goodness, and justice, the realization of which the law is supposed to serve.[53]

Any legal transaction is subject to such review; this judicial review is conducted on the basis of a legal norm that limits the validity of a legal transaction depending on the relationship between that transaction and the principles of community life. The review function of the principles of community life in relation to legal transactions consists in distinguishing between valid and invalid transactions, depending on whether the legal transaction under review is in conflict with these principles.[54] The sanction of invalidity results from a violation of the principles of community life by the entity under civil law that performed the challenged legal transaction. The court examines both the content and purpose of the challenged legal transaction, as well as its effects.[55] In such cases, the need to act in accordance with non-statutory (moral) norms or standards implies a legitimate limitation placed on the autonomy of will.[56] Article 58(2) of the Civil Code allows the implementation of the review function of the principles of community life, which is carried out both in the individual interest of the affected party to a civil law relationship (as a form of protection of his or her subjective rights) and in the general (social, public) interest.[57] If, on the other hand, the need to protect the public interest no longer exists and the legal transaction, which is an expression of the private-law autonomy of the subject who performed it, complies with positive law, then as a rule the transaction is not subject to a review from the point of view of its compliance with the principles of community life.[58] This implies the assumption of axiological consistency of the legal system, from which it follows that, as a rule, a legal transaction that complies with law also complies with the principles of community life. The refutation of such an assumption, leading to the determination of the inconsistency of a specific legal transaction with the principles of community life, is only possible after examining the premises and effects of the declarations of intent made and the situational context in which the parties' declarations were made.[59]

Article 58(2) of the Civil Code refers to an equitable right determined *ad hoc* by the court hearing the case. This is a general clause that appeals to the judge's reasonableness, decency, and good taste without specifying *a priori*

[53] See: A. Doliwa, Funkcje... [The Functions...], *ibid.*
[54] See: M. Gutowski, Nieważność czynności prawnej [Invalidity of a Legal Transaction], pp. 330ff.
[55] See: judgment of the Administrative Court in Szczecin of April 25, 2018, I ACa 1022/17.
[56] See: P. Skorupka, Nieważność... [Invalidity...], p. 478.
[57] See: judgment of the Supreme Court of October 12, 2017, IV CSK 660/16.
[58] See: judgment of the Supreme Court of March 16, 2018, IV CSK 302/17.
[59] See: judgment of the Supreme Court of March 2, 2012, II CSK 351/11.

the content of the principles of community life. The scope of transactions that are inconsistent with the principles of community life is therefore indefinite and variable, just as the social environment in which legal transactions, and subsequently their axiological evaluation, are conducted. As the Supreme Court put it, this is "a question of factual context, i.e. the circumstances of a particular case, and any attempt to make generalizations that are relevant to every situation would be doomed to failure in advance."[60] It should be emphasized that the *sine qua non* condition for examining a legal transaction in terms of its inconsistence with the principles of community life (Article 58[2]) of the Civil Code) is establishing the legality of the transaction (Article 58[1]) of the Civil Code).[61]

**Uwagi o nieważności czynności prawnej sprzecznej z zasadami współżycia społecznego w polskim prawie cywilnym – na tle orzecznictwa sądowego**

**Abstrakt**

Celem artykułu jest analiza sądowego stosowania prawa cywilnego w zakresie oceny treści czynności prawnych z punktu widzenia klauzuli generalnej zasad współżycia społecznego. Punktem wyjścia do szczegółowych rozważań jest ustalenie systemu wartości pozaprawnych, na których opiera się polskie prawo cywilne. Znaczenie słuszności i sprawiedliwości w stosunkach cywilnoprawnych uwidacznia się przez sądową kontrolę treści czynności prawnych. Następstwem sprzeczności treści lub celu czynności prawnej z podstawowymi wartościami, do których odwołuje się klauzula zasad współżycia społecznego, jest nieważność takiej czynności. Zasadniczą konkluzją artykułu jest to, że gdy odpada potrzeba ochrony interesu społecznego, a czynność prawna – będąca wyrazem autonomiczności prywatnoprawnej podmiotu – jest zgodna z prawem pozytywnym, to w zasadzie nie podlega ona weryfikacji z punktu widzenia zgodności z zasadami współżycia społecznego. We wnioskach podkreślono ponadto, że rolą sądu jest dostrzeżenie i wyartykułowanie w danej sprawie fundamentalnych wartości społecznych: prawdy, dobra i sprawiedliwości, których urzeczywistnieniu ma także służyć prawo cywilne.

**Słowa kluczowe:** czynność prawna, prawo cywilne, zasady współżycia społecznego, klauzula generalna, nieważność czynności prawnej, orzecznictwo sądowe.

[60] See: resolution of the Supreme Court of September 29, 1987, III CZP 51/87.
[61] See: judgment of the Supreme Court of April 19, 2006, II CSK 306/05.

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Agnieszka Góra-Błaszczykowska*

# Judicial Activism in India: Some remarks from Polish perspective

**[Aktywizm sędziowski w Indiach – kilka uwag z polskiej perspektywy]**

**Abstract**

Judicial activism in India has been a transformative force in the country's legal and social landscape. From its origins in the post-Emergency era to its current manifestations, it has significantly expanded access to justice, protected fundamental rights, and addressed critical socio-economic issues.

The Indian experience of judicial activism demonstrates the potential of an activist judiciary to check executive and legislative excesses, protect marginalized groups and advance constitutional values. However, it also highlights the challenges of balancing judicial activism with the principles of separation of powers and democratic governance.

The perceived lack of contribution of Polish judges to the realization of social justice significantly affects public trust in the judiciary. A combination of political, institutional and social factors has undermined confidence in the judicial system. The politicization of part of the judiciary has led a significant segment of Polish society to believe that this part of the judiciary is no longer an independent arbiter of justice, but rather a tool of the ruling party.

**Keywords:** judges, courts, activism, judicial activism, judgements.

## Introduction

Judicial activism has emerged as a powerful force in shaping India's legal and social landscape since the country's independence. This phenomenon, characterized by the courts' proactive role in interpreting laws and safeguarding constitutional values, has been both praised for its contributions

* **Agnieszka Góra-Błaszczykowska** – DSc, Associate Professor, War Studies University, Warsaw, Poland (affiliation); Supreme Court Justice, Civil Chamber; https://orcid.org/0000-0002-6862-3840; a.blaszczykowska@akademia.mil.pl / dr hab. nauk prawnych, profesor uczelni, Akademia Sztuki Wojennej (afiliacja); sędzia SN w Izbie Cywilnej.

to social justice and criticized for potentially overstepping judicial boundaries.

The concept of judicial activism in India can be traced back to the mid-1970s, with justices like V. R. Krishna Iyer, P. N. Bhagwati, O. Chinnappa Reddy, and D. A. Desai laying its foundation.[1] These jurists recognized the need for a more dynamic judiciary that could address the socio-economic challenges facing the nation and protect the rights of marginalized groups.

At its core, judicial activism in India represents the judiciary's proactive stance in promoting social, economic, and political justice for the people, often stepping in where the legislative and executive branches have failed to act effectively.[2] This approach is rooted in the constitutional framework, particularly Articles 32 and 226, which empower the Supreme Court and High Courts, respectively, to issue writs for the enforcement of fundamental rights.[3]

The evolution of judicial activism in India has been closely tied to the country's political and social developments. The Emergency period (1975–1977) marked a crucial turning point, as it exposed the vulnerabilities of democratic institutions and highlighted the need for a strong, independent judiciary to safeguard citizens' rights[4]. In the post-Emergency era, the courts began to assert themselves more forcefully, leading to the emergence of Public Interest Litigation (PIL) as a powerful tool for social change.

Public Interest Litigation, introduced in the late 1970s, revolutionized access to justice in India. It allowed any person to approach the Supreme Court under Article 32 or the High Courts under Article 226 for matters concerning public welfare.[5] This innovation significantly expanded the scope of judicial intervention and made the courts more accessible to disadvantaged sections of society.

The constitutional foundations of judicial activism in India are further strengthened by Article 142 of Constitution of India, which grants the Supreme Court the power to issue any order necessary to ensure complete justice in a case. This provision has been instrumental in allowing the courts to address complex social issues and provide innovative remedies. However, the rise of judicial activism has not been without controversy. Critics argue that it sometimes leads to the judiciary encroaching upon the domains of the legislature and executive, potentially upsetting the delicate balance of powers

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1 See more: M. Abdul Mujeef, R. Mamtha, *Judicial Activism in India: A critical study*, 'International Journal of Research Publication and Reviews' 2024, vol. 5, 4, pp. 187–191, https://ijrpr.com/uploads/V5ISSUE4/IJRPR24523.pdf [accessed: 07.01.2025]; N. Talwar, Judicial Activism, IP leaders, 2022, Aug. 5, https://blog.ipleaders.in/judicial-activism/ [accessed: 07.01.2025].

2 N. Jaswal, L. Singh *Judicial Activism in India*, 'Bharati Law Review' 2017 Jan.–Mar., pp. 1–11, https://docs.manupatra.in/newsline/articles/Upload/0BD8AAF5-4031-484F-AB92-2B84EFE0ABCA.pdf [accessed: 07.01.2025].

3 S. P. Sathe, *Judicial Activism: The Indian Experience*, 'Washington University Journal of Law & Policy' 2001, 6, 1, pp. 30ff.

4 U. Baxi, The Indian Supreme Court and Politics, 1980, pp. 79–120.

5 M. Rao, Public Interest Litigation, Lucknow: Eastern Book Company 2002.

envisioned in the Constitution.[6] Supporters, on the other hand, contend that judicial activism is a necessary corrective mechanism in a democracy where other institutions may fail to fulfill their constitutional obligations.

As India continues to grapple with complex social, economic, and political challenges, the role of judicial activism remains crucial. It serves as a vital tool for ensuring accountability, protecting fundamental rights, and advancing the constitutional vision of justice, liberty, equality, and fraternity. The ongoing debate surrounding judicial activism reflects the dynamic nature of India's constitutional democracy and the evolving relationship between the judiciary and other branches of government.[7]

Judicial activism in Poland is understand differently and it has significantly influenced the political landscape, particularly in the context of democratic backsliding and the rule of law. Last 8 years some judges have mobilized both on and off the bench to counteract governmental encroachments on judicial independence, demonstrating a strategic approach to activism. This activism manifests through various means, including public protests, and lobbying efforts directed at European institutions, highlighting the judiciary's role as a defender of democratic principles.[8]

Recent developments have seen judges engaging in "judicial resistance", a concept that encompasses actions taken to uphold judicial independence against political pressures. This resistance is viewed as essential for maintaining the rule of law, particularly in light of increasing governmental overreach.[9] Judicial activism in Poland can be seen as a response to political challenges, critics argue that it risks politicizing the judiciary and undermining its impartiality. This tension highlights the delicate balance between judicial independence and political influence in Poland's evolving democratic framework.

According to Polish Constitution only The Polish Constitutional Tribunal (PCT) has historically acted as a political actor, often restricting parliamentary maneuverability, especially when no clear majority exists . The Tribunal's activism has been characterized by a shift from a "negative legislator" to a more proactive role, sometimes exceeding its constitutional mandate.[10]

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[6] A. Chintala, Introduction to Judicial Activism and Judicial Reforms, 2020, Oct. 30, https://blog.ipleaders.in/introduction-to-judicial-activism-and-judicial-reforms/ [accessed: 07.01.2025].

[7] See more: S. P. Sathe, *Judicial*..., pp. 43ff, N. Mittal, T. Aggarwal, *Judicial Activism in India*, 'The Indian Journal of Law & Public Policy' (IJLPP) 2014–2015, vol. 1.1, pp. 86–96, https://www.soolegal.com/cdn.dynamic.soolegal.com/document-center/90184/other/ijlpp_1_1.pdf [accessed: 06.01.2025].

[8] C. Y. Matthes, Judges as Activists: How Polish judges mobilise to defend the rule of law, 'East European Politics' 2022, vol. 38, 3, pp. 468–487, https://typeset.io/papers/judges-as-activists-how-polish-judges-mobilise-to-defend-the-1zv6e91t [accessed: 07.01.2025].

[9] Ł. Bojarski, Judicial Resistance: Missing Part of Judicial Independence? The case of Poland and beyond, Oñati Socio-Legal Series 20.09.2024,. doi: 10.35295/osls.iisl.1893.

[10] B. Banaszak, *Constitutional Tribunals' Judicial Review of Public Power in Poland* [in:] R. Arnold, J.I. Martinez-Estay, Rule of Law, Human Rights and Judicial Control of Power: Some reflections from national and international law, Springer 2017, vol. 61, pp. 243–257, https://link.springer.com/book/10.1007/978-3-319-55186-9 [accessed: 06.01.2025].

Common courts and even The Supreme Court judges are not supposed to highlights any judicial activism.

## Historical Development of Judicial Activism in India

The evolution of judicial activism in India can be traced through distinct phases, each marked by significant events and landmark cases that shaped the judiciary's role in governance and social justice.

### Post-independence era: Initial conservative approach

In the early years after independence, the Indian judiciary adopted a largely conservative and technocratic approach. The courts were primarily concerned with adhering to established procedures rather than actively pursuing broader goals of justice.[11] This period was characterized by a reluctance to challenge the executive and legislative branches, reflecting the judiciary's initial deference to the other organs of government in a newly independent nation.

### The emergency period (1975–1977): Judiciary's response and limitations

The Emergency period marked a critical juncture in the development of judicial activism in India. Declared by Prime Minister Indira Gandhi in 1975, this period saw significant curtailment of civil liberties and democratic processes. The judiciary's response during this time was mixed and often criticized for its lack of assertiveness in protecting fundamental rights.[12]

A pivotal case during this period was ADM Jabalpur v. Shivkant Shukla (1976), also known as the *Habeas Corpus* Case. In this controversial decision, the majority of the Supreme Court bench held that during a declared emergency, even the right to life could be suspended[13]. This judgment is often cited as a low point in the Indian judiciary's history, highlighting the limitations of judicial power in the face of executive overreach.

[11] See more: M. Abdul Mujeef, R. Mamtha, *Judicial Activism*... pp. 187–191, N. Talwar, Judicial activism, IPleaders August 5, 2022, https://blog.ipleaders.in/judicial-activism/ [accessed: 07.01.2025].
[12] U. Baxi, The Indian Supreme Court and Politics, as cited in the search results.
[13] ADM Jabalpur v. Shivkant Shukla, 1976, 2, SCC 521.

## Post-emergency era: Emergence of public interest litigation (PIL)

The post-Emergency period witnessed a significant shift in the judiciary's approach, marked by the emergence of Public Interest Litigation (PIL). This innovative legal tool, introduced in the late 1970s, revolutionized access to justice in India.[14] PILs allowed any person to approach the Supreme Court under Article 32 or the High Courts under Article 226 for matters concerning public welfare, significantly expanding the scope of judicial intervention.

Key figures in shaping this new era of judicial activism included Justices P. N. Bhagwati and V. R. Krishna Iyer. Their judgments laid the foundation for a more proactive judiciary that sought to address social injustices and governance failures.[15]

## Landmark cases and expanding judicial role

Several landmark cases during this period exemplify the expanding role of judicial activism:

1. Hussainara Khatoon v. State of Bihar (1979): Often regarded as the first PIL case in India, this judgment recognized the right to speedy trial as a fundamental right and led to the release of thousands of undertrial prisoners.[16]
2. Maneka Gandhi v. Union of India (1978): This case expanded the interpretation of Article 21 (right to life and personal liberty), incorporating principles of reasonableness and fairness in governmental actions.[17]
3. S. P. Gupta v. Union of India (1981): Known as the "Judges' Transfer Case", this decision further expanded the concept of *locus standi*, allowing greater public access to the courts for matters of public importance.[18]

## Evolving phases of judicial activism

The evolution of judicial activism in India can be broadly categorized into three phases:

1. 1950–1970: The period of classical judiciary with minimal activism.
2. 1970–2000: The era when judicial activism was established and gained popularity.

[14] S. P. Sathe, *Judicial*..., pp. 43ff.
[15] V. Jain, Judicial Activism, as referenced in the search results.
[16] Hussainara Khatoon v. State of Bihar, 1980, 1, SCC 81, https://testbook.com/landmark-judgements/hussainara-khatoon-vs-state-of-bihar [accessed: 06.01.2025].
[17] Maneka Gandhi v. Union of India, 1978, 1, SCC 248.
[18] S. P. Gupta v. Union of India, AIR, 1982, SC 149.

3. 2000–present: A period of flourishing judicial activism, albeit with concerns about potential overreach.[19]

This historical development reflects the Indian judiciary's transformation from a conservative institution to an active participant in governance and social reform, significantly shaping the country's legal and social landscape.[20]

## Public Interest Litigation as a Tool of Judicial Activism

Public Interest Litigation (PIL) emerged as a powerful instrument of judicial activism in India during the post-Emergency era. This innovative legal mechanism revolutionized access to justice and significantly expanded the scope of judicial intervention in matters of public importance.

### Origin and development of PIL

The concept of PIL was introduced in the late 1970s, primarily through the efforts of Justices P. N. Bhagwati and V. R. Krishna Iyer.[21] It was conceived as a means to provide access to justice for marginalized and disadvantaged sections of society who were unable to approach the courts due to poverty, ignorance, or social and economic disabilities.[22]

PIL marked a departure from traditional *locus standi* requirements, allowing any person to approach the Supreme Court under Article 32 or the High Courts under Article 226 for matters concerning public welfare.[23] This relaxation of procedural technicalities enabled courts to address a wide range of social issues and human rights violations.

[19] Information derived from the search results provided, specifically the iPleaders blog on judicial activism.

[20] See more [in:] M. Mate, The Rise of Judicial Governance in the Supreme Court of India, https://www.bu.edu/ilj/files/2015/01/Mate-Rise-of-Judicial-Governance.pdf [accessed: 06.01.2025]; N. Mittal, T. Aggarwal, *Judicial Activism in India*, 'The Indian Journal of Law & Public Policy' (IJLPP) 2014–2015, vol. 1.1, pp. 86–96, https://www.soolegal.com/cdn.dynamic.soolegal.com/documentcenter/90184/other/ijlpp_1_1.pdf [accessed: 06.01.2025]; Landmark PIL Cases of India: Changing the Course of History, https://legalstixlawschool.com/blog/Landmark-PIL-Cases-of-India:-Changing-the-Course-of-History [accessed: 06.01.2025]; A. Sethi, *The Justiciability Of Economic, Social And Cultural Rights In India* [in:] A. Nussberger, D. Landau (eds), The Justiciability of Economic, Social and Cultural Rights, pp. 483–503, 25 pages posted: 23 Feb 2024 [accessed: 06.01.2025].

[21] S. P. Sathe, *Judicial*..., pp. 30ff.

[22] U. Baxi, *Taking Suffering Seriously: Social action litigation in the Supreme Court of India*, 'Third World Legal Studies' 1985, 4, pp. 107–132.

[23] S. P. Gupta v. Union of India, AIR, 1982, SC 149.

## Landmark PIL cases and their impact

Several landmark PIL cases have had a profound impact on Indian jurisprudence and social reform:

1. Hussainara Khatoon v. State of Bihar (1979): Often regarded as the first PIL case in India, this judgment recognized the right to speedy trial as a fundamental right and led to the release of thousands of undertrial prisoners.[24]
2. M. C. Mehta v. Union of India (Oleum Gas Leak Case, 1987): This case led to the development of the principle of absolute liability for industries engaged in hazardous activities.[25]
3. Vishaka v. State of Rajasthan (1997): The Supreme Court issued guidelines to prevent sexual harassment of women at the workplace, which later formed the basis for legislative action.[26]

## Expansion of access to justice

PIL has significantly expanded access to justice for marginalized groups by: relaxing procedural requirements for filing cases; allowing courts to take *suo motu* cognizance of issues; appointing fact-finding commissions and amicus curiae to assist the court; developing innovative remedies and monitoring mechanisms. As Upendra Baxi notes, "PIL led to pro-people renovation of judicial process and led to the rejuvenation of a special kind of confidence in the judiciary in its unequal battle with administrative deviance and crystallization of informed consensus on the need for fundamental reform of the legal system."[27]

## Criticisms and challenges

Despite its successes, PIL has faced criticism and challenges:

a. Misuse for private interests: Some PILs are filed to fulfill private agendas rather than genuine public interest.[28]
b. Judicial overreach: Critics argue that PIL sometimes leads to the judiciary encroaching upon the domains of the legislature and executive.[29]

[24] Hussainara Khatoon v. State of Bihar, 1980, 1, SCC 81.
[25] M. C. Mehta v. Union of India, AIR, 1987, SC 1965.
[26] Vishaka v. State of Rajasthan, 1997, 6, SCC 241.
[27] U. Baxi, *Law, Struggle and Change: An agendum for activists*, 'Social Action' 1985, 35, pp. 65–89.
[28] S. Deva, *Public Interest Litigation in India: A critical review*, 'Civil Justice Quarterly' 2009, 28, 1, pp. 19–40.
[29] A. Bhuwania, *Courting the People: Public interest litigation in post-emergency India*, 'Comparative Studies of South Asia, Africa and the Middle East' 2014, 34, 2, pp. 314–335.

c. Strain on judicial resources: The large number of PILs filed can lead to delays in the justice system.[30]
d. Selective activism: There are concerns that courts may prioritize popular cases over equally important but less publicized issues.[31]

In conclusion, while PIL has been a powerful tool for judicial activism and social change in India, it requires careful balancing to maintain its effectiveness and legitimacy within the constitutional framework.

## The Supreme Court's Role in Judicial Activism

The Supreme Court of India has played a pivotal role in shaping judicial activism through landmark judgments that have expanded the scope of fundamental rights and addressed critical socio-economic issues.

### Expansion of fundamental rights through interpretation

One of the most significant contributions of the Supreme Court has been the expansive interpretation of Article 21 (Right to Life and Personal Liberty). In the landmark case of Maneka Gandhi v. Union of India (1978), the Court held that the right to life encompasses not merely animal existence, but the right to live with human dignity.[32] This judgment paved the way for reading various unenumerated rights into Article 21, including the right to health, education, and a clean environment.

The Court further expanded the scope of fundamental rights in Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (1981), where it held that the right to life includes the right to live with human dignity and all that goes along with it, including the bare necessities of life such as adequate nutrition, clothing, and shelter.[33]

### The doctrine of basic structure: Kesavananda Bharati Case

The landmark judgment in Kesavananda Bharati v. State of Kerala (1973) established the "basic structure doctrine," which asserts that while Parliament

[30] N. Robinson, *Expanding Judiciaries: India and the rise of the good governance court*, 'Washington University Global Studies Law Review' 2009, 8, 1, pp. 1–70.
[31] V. Gauri, *Public Interest Litigation in India: Overreaching or underachieving?* 'The World Bank Policy Research Working Paper' 2009, 5109.
[32] Maneka Gandhi v. Union of India, 1978, 1, SCC 248.
[33] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, 1981, 1 SCC 608.

has the power to amend the Constitution, it cannot alter its basic structure.[34] This doctrine has been instrumental in preserving the core principles of the Constitution and has served as a check on legislative overreach.

## Activism in socio-economic rights

The Supreme Court has been particularly active in the realm of socio-economic rights, often issuing directives to the government to implement policies and programs. In People's Union for Civil Liberties v. Union of India (2001), the Court recognized the right to food as a fundamental right and issued orders for the implementation of food security schemes.[35]

Similarly, in Mohini Jain v. State of Karnataka (1992) and Unni Krishnan J. P. v. State of Andhra Pradesh (1993), the Court interpreted the right to education as a fundamental right, which eventually led to the enactment of the Right to Education Act, 2009.[36]

## Environmental protection

The Supreme Court has been at the forefront of environmental protection through judicial activism. In M. C. Mehta v. Union of India (1987), also known as the Oleum Gas Leak Case, the Court developed the principle of absolute liability for industries engaged in hazardous activities.[37] This judgment significantly strengthened environmental jurisprudence in India.

## Public interest litigation and access to justice

The Court's activism has been particularly evident in its approach to Public Interest Litigation (PIL). In S.P. Gupta v. Union of India (1981), the Court relaxed the traditional rules of *locus standi*, allowing any member of the public to approach the Court for the enforcement of constitutional rights.[38] This has greatly enhanced access to justice for marginalized sections of society.

While the Supreme Court's activism has been praised for addressing governance gaps and protecting citizens' rights, it has also faced criticism for potentially overstepping its constitutional boundaries. The balance between

[34] Kesavananda Bharati v. State of Kerala, 1973, 4, SCC 225.
[35] People's Union for Civil Liberties v. Union of India, 2001, 5, SCALE 303.
[36] Mohini Jain v. State of Karnataka, 1992, 3, SCC 666; Unni Krishnan J.P. v. State of Andhra Pradesh, 1993, 1, SCC 645.
[37] M. C. Mehta v. Union of India, 1987, 1, SCC 395.
[38] S. P. Gupta v. Union of India, AIR, 1982, SC 149.

judicial activism and restraint remains a subject of ongoing debate in India's constitutional jurisprudence.[39]

## High Courts and Judicial Activism

The High Courts of India have played a significant role in shaping judicial activism, often complementing and sometimes even leading the efforts of the Supreme Court. Their powers under Article 226 of the Constitution have been instrumental in this regard.

### Powers under Article 226 of the Indian Constitution

Article 226 of the Indian Constitution empowers High Courts to issue writs for the enforcement of fundamental rights and for any other purpose. This provision has been liberally interpreted by the courts to expand their jurisdiction and address a wide range of issues affecting public interest.

The scope of Article 226 is wider than that of Article 32 (which applies to the Supreme Court), as it allows High Courts to issue writs not only for the enforcement of fundamental rights but also for "any other purpose".[40] This expansive interpretation has enabled High Courts to intervene in matters of administrative action, environmental protection, and social justice.

### Notable High Court decisions influencing policy and governance

High Courts across India have delivered several landmark judgments that have significantly influenced policy and governance:

a. Environmental Protection: In the M. C. Mehta v. Union of India case (Oleum Gas Leak Case), the Delhi High Court's proactive approach led to the development of the principle of absolute liability for industries engaged in hazardous activities.[41]
b. Women's Rights: High Courts have been instrumental in advancing women's rights. For instance, in Vishaka v. State of Rajasthan, the Rajasthan High Court's guidelines on sexual harassment at the workplace

[39] See also: M. Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an evolved debate*, 32 Hastings Int'l & Comp. L. Rev. 2009, 55, pp. 55–99, https://scholarship.law.columbia.edu/faculty_scholarship/3344 [accessed: 06.01.2025]; N. Mittal, T. Aggarwal, *Judicial…*, pp. 86–96.
[40] S. P. Sathe, *Judicial…*, pp. 43ff.
[41] M. C. Mehta v. Union of India, AIR, 1987, SC 1965.

were later adopted by the Supreme Court, eventually leading to legislative action.[42]

c. Public Interest Litigation: High Courts have been at the forefront of expanding the scope of Public Interest Litigation (PIL). In many cases, they have taken *suo motu* cognizance of issues affecting public welfare, demonstrating a high degree of judicial activism.[43]

## Interaction between High Courts and Supreme Court in activism

The relationship between High Courts and the Supreme Court in the context of judicial activism has been characterized by both cooperation and occasional tension:

a. Complementary Roles: Often, High Courts have complemented the Supreme Court's efforts in judicial activism. For instance, in environmental cases, both the Supreme Court and various High Courts have issued directives to protect the environment and wildlife.[44]

b. Pioneering Judgments: In some cases, High Courts have delivered pioneering judgments that were later affirmed or expanded upon by the Supreme Court. This has been particularly evident in cases related to social justice and human rights.[45]

c. Jurisdictional Issues: Occasionally, there have been instances of jurisdictional overlap between High Courts and the Supreme Court, especially in matters of national importance. In such cases, the Supreme Court's decisions generally prevail.[46]

d. Diversity in Approaches: Given India's diverse socio-cultural landscape, different High Courts have sometimes adopted varying approaches to similar issues. This diversity has contributed to the richness of India's jurisprudence, though it has also occasionally led to conflicting judgments.[47]

In conclusion, the High Courts have been vital partners in India's journey of judicial activism. Their proximity to local issues, combined with their constitutional powers, has enabled them to address a wide range of social, economic, and environmental concerns, often complementing and sometimes even leading the efforts of the Supreme Court.

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[42] Vishaka v. State of Rajasthan, 1997, 6, SCC 241.

[43] U. Baxi, *Taking Suffering Seriously: Social action litigation in the Supreme Court of India*, 'Third World Legal Studies' 1985, 4, pp. 107–132.

[44] L. Rajamani, *Public Interest Environmental Litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability*, 'Journal of Environmental Law' 2007, 19, 3, pp. 293–321.

[45] S. P. Sathe, Judicial Activism in India: Transgressing borders and enforcing limits, New Delhi: Oxford University Press, 2002, pp. 25ff.

[46] N. Robinson, *Structure Matters: The impact of court structure on the Indian and U.S. supreme courts*, 'American Journal of Comparative Law' 2013, 61, 1, pp. 173–208.

[47] M. Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 'Boston University International Law Journal' 2015, 33, pp. 169–224.

## Key Areas of Judicial Activism

The Indian judiciary has demonstrated activism in several crucial areas, significantly impacting policy and governance. Three key areas where judicial activism has been particularly prominent are:

### Environmental protection

The Supreme Court has played a pivotal role in environmental protection through judicial activism. In the landmark M. C. Mehta v. Union of India case, also known as the Oleum Gas Leak Case, the Court developed the principle of absolute liability for industries engaged in hazardous activities.[48] This judgment significantly strengthened environmental jurisprudence in India and set a precedent for holding industries accountable for environmental damage.

### Women's rights and gender justice

Judicial activism has been instrumental in advancing women's rights in India. In the case of Vishaka v. State of Rajasthan, the Supreme Court issued guidelines to prevent sexual harassment of women at the workplace, which later formed the basis for legislative action.[49] Another significant case was Mohd. Ahmed Khan v. Shah Bano Begum, where the Court overruled Muslim personal law to extend the period of maintenance for divorced Muslim women.[50]

### Governance reforms and anti-corruption measures

The judiciary has also been active in promoting governance reforms and combating corruption. Through Public Interest Litigation (PIL), the courts have intervened in matters of public administration and policy implementation. For instance, in S. P. Gupta v. Union of India, the Court expanded the scope of judicial review to include the appointment process of judges, thereby promoting transparency in the judiciary itself.[51]

[48] M. C. Mehta v. Union of India, AIR, 1987, SC 1965.
[49] Vishaka v. State of Rajasthan, 1997, 6, SCC 241.
[50] Mohd. Ahmed Khan v. Shah Bano Begum, 1985, 2, SCC 556.
[51] S. P. Gupta v. Union of India, AIR, 1982, SC 149.

## Impacts and Criticisms of Judicial Activism in India

### Positive impacts

Judicial activism has had several positive impacts on Indian society which are: advancement of social justice and human rights; enhanced accountability of the executive and legislature; strengthening of constitutional values and the rule of law.

As Upendra Baxi notes, "PIL led to pro-people renovation of judicial process and led to the rejuvenation of a special kind of confidence in the judiciary in its unequal battle with administrative deviance and crystallization of informed consensus on the need for fundamental reform of the legal system."[52]

### Criticisms

However, judicial activism has also faced criticism: allegations of judicial overreach and encroachment on legislative and executive domains; concerns about the separation of powers; issues of judicial accountability and subjectivity in decision-making.

Critics argue that excessive judicial activism may lead to the judiciary stepping beyond its constitutional role, potentially upsetting the delicate balance of powers envisioned in the Constitution.[53]

## Balancing Judicial Activism and Restraint

The need for balancing judicial activism with judicial restraint is a crucial consideration in India's constitutional framework. While judicial activism has played a vital role in advancing social justice and protecting fundamental rights, there are concerns about potential overreach and its impact on the separation of powers.

[52] U. Baxi, *Law, Struggle*..., pp. 65–89.

[53] A. Chintala, Introduction to judicial activism and judicial reforms, https://blog.ipleaders.in/introduction-to-judicial-activism-and-judicial-reforms/.

## The need for judicial self-restraint

Judicial self-restraint is essential to maintain the delicate balance of power between the judiciary, legislature, and executive. Critics argue that excessive judicial activism may lead to the judiciary stepping beyond its constitutional role, potentially upsetting this balance.[54] The courts must be cautious not to encroach upon the domains of the other branches of government, particularly in matters of policy-making and governance.

## Strategies for maintaining constitutional balance

To maintain a constitutional balance while engaging in judicial activism, courts can adopt several strategies:

a. Adhering to the doctrine of constitutional avoidance, where courts refrain from deciding constitutional questions unless absolutely necessary.
b. Respecting legislative intent and giving due deference to the expertise of administrative agencies.
c. Ensuring that judicial interventions are based on sound legal principles and constitutional interpretations.
d. Limiting the scope of Public Interest Litigation (PIL) to genuine cases of public importance and preventing its misuse for private interests.

# Polish Perspective About Judicial Activism

While judicial activism has been a significant feature of the Indian legal system, it is instructive to briefly compare it with judicial activism in Poland.

1. In Poland, judicial activism has taken a different trajectory compared to India. The Polish Constitutional Tribunal, established in 1982, has played a crucial role in shaping the country's legal landscape, particularly during the post-communist transition.[55] However, the scope and nature of judicial activism in Poland have been more limited compared to India, primarily due to differences in constitutional structures and historical contexts. Unlike India's expansive fundamental rights provisions, Poland's constitution provides a more limited scope for judicial interpretation. Indian courts have

[54] A. Chintala, *ibid.*
[55] L. Garlicki, *Constitutional Courts vs. Supreme Courts*, 'International Journal of Constitutional Law' 2007, 5, 1, pp. 44–68.

been more proactive in enforcing socio-economic rights, whereas Polish courts have generally shown greater deference to the legislature in such matters.[56] Both countries have faced challenges to judicial independence, albeit in different forms and contexts. Despite these differences, both Indian and Polish judiciaries have played important roles in safeguarding constitutional values and promoting the rule of law in their respective countries.

2. India's constitution provides expansive fundamental rights provisions, allowing for broader judicial interpretation. The Indian Supreme Court has the power to issue writs for the enforcement of fundamental rights under Articles 32 and 226, which has been instrumental in shaping its activist approach. In contrast, Poland's constitution offers a more limited scope for judicial interpretation.
3. Indian courts have been notably proactive in enforcing socio-economic rights. The Indian Supreme Court has been particularly active in areas such as environmental protection, women's rights, and governance reforms. Polish courts, in contrast, have generally shown greater deference to the legislature in matters of socio-economic rights, reflecting a more restrained approach to judicial activism.
4. The trajectory of judicial activism in both countries has been shaped by their respective historical and political contexts. In India, judicial activism emerged prominently in the 1980s, pioneered by justices like P. N. Bhagwati and Krishna Iyer. In Poland, the CT's activism has evolved through distinct periods, with significant changes occurring after the 2015 constitutional crisis. The Polish judiciary's activism has been more focused on institutional independence and the preservation of democratic norms.
5. While both judiciaries have engaged in law-making activities to some extent, their approaches differ. The Indian Supreme Court has been more assertive in its interpretative role, often expanding the scope of fundamental rights through innovative judicial reasoning. The Polish CT has shown varying degrees of judicial activism over time, influencing the existing legal order through its judgments. This includes clarifying the effects of its judgments and addressing the scope of legislative freedom in regulating the CT's position.
6. Both countries have faced challenges to judicial independence, albeit in different forms and contexts. In Poland, recent years have seen attempts to limit the CT's powers and influence its composition, leading to concerns about its independence. In India, while the judiciary has maintained a strong independent stance, it has faced criticism for alleged overreach in certain cases.

[56] W. Osiatyński, *Paradoxes of Constitutional Borrowing*, 'International Journal of Constitutional Law' 2003, 1, 2, pp. 244–268.

## Conclusion

In conclusion, while both India and Poland have experienced judicial activism, the scope, nature, and impact of this activism have been shaped by their unique historical, political, and constitutional contexts. The Indian experience demonstrates a more expansive and interventionist approach, particularly in socio-economic matters, while the Polish judiciary has shown a more restrained form of activism within the constraints of its constitutional framework.

Judicial activism in India has been a transformative force in the country's legal and social landscape. From its origins in the post-Emergency era to its current manifestations, it has significantly expanded access to justice, protected fundamental rights, and addressed critical socio-economic issues.

The Indian experience of judicial activism demonstrates the potential of an activist judiciary to act as a check on executive and legislative excesses, protect marginalized groups, and advance constitutional values. However, it also highlights the challenges of balancing judicial activism with the principles of separation of powers and democratic governance.

As India continues to grapple with complex social, economic, and political challenges, the role of judicial activism remains crucial. The ongoing debate surrounding judicial activism reflects the dynamic nature of India's constitutional democracy and the evolving relationship between the judiciary and other branches of government.

The perceived lack of contribution to social justice by Polish judges significantly impacts public trust in the judiciary. This perception is shaped by a combination of political, institutional, and social factors that have eroded confidence in the judicial system. The politicization of the part of judiciary, has led some part of Polish society to a belief that this part of the judiciary is no longer an independent arbiter of justice but rather a tool of the ruling party.

**Aktywizm sędziowski w Indiach – kilka uwag z polskiej perspektywy**

**Abstrakt**
Aktywizm sędziowski w Indiach okazał się nader istotny dla prawa i warunków społecznych w tym kraju. Znacznie rozszerzył on dostęp do wymiaru sprawiedliwości, chronił prawa podstawowe i zajął się ważnymi kwestiami społeczno-gospodarczymi.
Indyjskie doświadczenie aktywizmu sędziowskiego ukazuje potencjał aktywistycznego sądownictwa w zakresie kontroli nadużyć władzy wykonawczej i legislacyjnej, ochrony grup marginalizowanych i wspierania wartości konstytucyjnych. Podkreśla się również wyzwania związane z równoważeniem działalności sądów z uwagi na zasady podziału władzy i demokratycznych rządów.

Zauważalny brak wkładu polskich sędziów w urzeczywistnianie sprawiedliwości społecznej znacząco wpływa na zaufanie społeczne do wymiaru sprawiedliwości. Połączenie czynników politycznych, instytucjonalnych i społecznych podważyło zaufanie do systemu sądownictwa. Upolitycznienie części wymiaru sprawiedliwości doprowadziło znaczący odłam polskiego społeczeństwa do przekonania, że ta część sądownictwa nie jest już niezależnym arbitrem sprawiedliwości, ale narzędziem partii rządzącej.

**Słowa kluczowe:** sędziowie, sądy, aktywizm, aktywizm sędziowski (sądowy), orzeczenia.

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Dominik Bierecki*

# Energy Transformation and the Social Economy: The nexus between citizen energy communities and social enterprises under Polish Law

**[Transformacja energetyczna a ekonomia społeczna – związek między obywatelskimi społecznościami energetycznymi a przedsiębiorstwami społecznymi w prawie polskim]**

**Abstract**

Under Polish law, citizen energy communities and social enterprises can be established in the legal form of a cooperative. The features of the citizen energy communities and social enterprises are similar and one can argue that they derive from the characteristics of cooperatives which are integral to the social economy. Therefore, a research question arises if a single cooperative can obtain both statuses: of a citizen energy community and a social enterprise. The article goal is to answer this research question. The research thesis states that energy transformation can be developed under the social economy and pursued by the cooperative social enterprise. Therefore, the social economy is a part of the twin transition – as part of the green transition.
The article was prepared by the dogmatic-legal method of research.

**Keywords:** citizen energy community, social enterprise, social economy, cooperative, EU law.

## Introduction

The Directive 2019/944[1] introduced to the EU law the legal institution of a citizen energy community (article 2 item 11.)[2] This directive was implement-

* Dominik Bierecki – DSc, Associate Professor, Pomeranian University in Słupsk (affiliation); https://orcid.org/0000-0001-6993-3974; dominik.bierecki@upsl.edu.pl / dr hab. nauk prawnych, profesor uczelni, Uniwersytet Pomorski w Słupsku (afiliacja).

[1] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.06.2019, pp. 125–199.

[2] See: P. Lissoń, Czy obywatelska społeczność energetyczna to społeczność lokalna? Uwagi na tle nowych regulacji prawa unijnego i prawa polskiego, 'Prawo i Więź' 2021, 4, pp. 464–482.

ed to Polish law by the amendment of 28th of July 2023[3] to the Polish Act on Energy Law[4] (AEL). Among others, the amendment introduced regulation on citizen energy communities (CEC), including a list of entities that are eligible to obtain the status of this type of community. The list includes cooperatives (in general) and specifically housing cooperatives.

A year earlier, the Polish legislator introduced the Act of 5th of August 2022 on the Social Economy[5] (ASE). This act list the organisations that are considered as social economy entities. The list directly includes social cooperatives, workers' cooperatives and agricultural production cooperatives. However, it also provides that social economy entities are non-government organisations and that includes cooperatives (in general) if they do not pay dividends for the members. Social economy entities are eligible to acquire the status of a social enterprise (SE).

Both of the concepts: citizen energy communities and social economy entities or social enterprises are of umbrella construct, which means that they are not limited to certain types of organisations but allow different types if given legal conditions are made. Because cooperatives are included on both lists of eligible entities, the research question arises whether a cooperative can be at the same time a citizen energy community (CEC) and a social enterprise (SE)? The article aims to answer this question. The research thesis states that energy transformation can be developed under the social economy and pursued by the cooperative social enterprise. Legal requirements for a CEC and a SE overlap and cooperatives are entities that fulfil all of them. It can be even considered that the requirements for the CEC and SE were modelled after principles that govern cooperatives. One must remember that historically and comparatively, cooperatives are integral to the social economy, regardless of their legal form or business sector in which they operate.[6]

The research thesis takes also into account the legal requirements for the CEC and SE from the perspective of internationally recognised Cooperative Principles.[7] In this account, cooperatives which take a form of the CEC or SE became a general or public interest cooperatives. This means that they do not conduct their activity solely in the interest of their members but also for the interest of other groups or a community.

The article was prepared by the dogmatic-legal method of research. It is a result of interpretation of the Act on Energy Law (AEL) and the Act on the Social Economy (ASE) and of the Directive 2019/944.

[3] Act of 28th of July 2023 on amending the Energy Law Act and certain other acts, Official Journal of Laws 2024, item 859 with changes.

[4] Official Journal of Laws 2024, item 266 uniform text with changes.

[5] Official Journal of Laws 2024, item 113 uniform text with changes.

[6] C. Naett, *The Making of the Social and Solidarity Act from the Cooperative Perspective*, RECMA 2015, vol. 335, p. 11.

[7] The Cooperative Principles according to the Statement on the Cooperative Identity of 1995, included as Appendix "A" to the Articles of Association of the Internation Cooperative Alliance, available at: https://ica.coop/en/about-us/our-structure/alliance-rules-and-laws [accessed: 11.01.2025].

## Citizen Energy Communities (CEC)

According to article 2 item 11 A–C of the Directive 2019/944, the citizen energy community is characterized by features that are: 1) open and democratic character, 2) purpose other than profit, 3) and activity within the energy transformation policy. First of all, CEC must be based on voluntary and open participation and be effectively controlled by members or shareholders that are natural persons, local authorities, including municipalities, or small enterprises. Secondly, the primary purpose of the CEC should be provision of environmental, economic or social community benefits to its members or shareholders or to the local areas where it operates rather than to generate financial profits. Thirdly, the CEC may engage in energy generation, including from renewable sources; distribution, supply, consumption, aggregation of energy; energy storage, energy efficiency services or charging services for electric vehicles or provide other energy services to its members or shareholders.

These features of CEC are not directly applicable in EU members states due to the nature of a directive (article 288 paragraph 3 of the TFUE[8]). The transposition of the CEC legal character to Polish law was made by a definition included in article 3 item 13f A–C of AEL.[9] According to this definition, the CEC should meet specific legal conditions in terms of legal structure and business purpose. The conditions regarding the legal structure are laid down in the article 3 item 13f A of the AEL and include the feature of voluntary and open membership (participation) and the granting of decision-making powers to members who are only natural persons, local government units, micro-entrepreneurs or small entrepreneurs within the meaning of article 7 section 1 item 1 of Act of 6th of March 2018 Entrepreneurs Law.[10] For these members, the business activity in the energy sector must not constitute the subject of their basic business activity defined in accordance with the regulations issued under article 40 paragraph 2 of the Act of 29th of June 1995 on public statistics.[11] This restriction should preserve the CEC from being controlled by traditional energy market participants which are most often state owned commercial companies. This maintains the citizen character of the CEC and also brings their concept closely to the legal nature of a SE. The SE cannot be controlled by the state or local government or by state owned or municipal companies (article 3 section 2 of the ASE in conjunction with

[8] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

[9] J. Kmieć, M. Pawełczyk, Różnice między społecznościami energetycznymi a tradycyjnymi uczestnikami rynku energii, IKAR 2024, vol. 13, 3, pp. 14–16.

[10] Official Journal of Laws 2024, item 236 uniform text with changes.

[11] Official Journal of Laws 2024, item 1799 uniform text.

article 4 item 4 of Act of 16th of February 2007 on competition and consumer protection.)[12]

In terms of the purpose of the activity, the definition of CEC by article 3 item 13f B of AEL states that the legal conditions concern: ensuring environmental, economic or social benefits for members or the local areas in which the activity of the CEC is carried out. Article 3 item 13f B of AEL provides that this should be the main purpose of the CEC. However, it must not be the only purpose of the CEC and profit can achieved by these type of organisation. According to article 3 item 13f C of the AEL, the CEC makes profit on:

(1) distribution, sale trade, aggregation or storage of electricity,
(2) provision of electric vehicle charging services referred to in the Act of 11th January 2018 on Electromobility and Alternative Fuels,[13]
(3) provision of other services on electricity markets including system services or flexibility services,
(4) storage or sale of biogas, agricultural biogas, biomass and biomass of agricultural origin within the meaning of Art. 2 item 1, 2, 3 and 3b of the Act of 20th February 2015 on renewable energy sources.[14]

However, profits from this activities should be used to achieve the main purpose of the CEC (article 3 item 13f B of the AEL). Such a conclusion derives from the gradation of goals of the CEC, since the social, environmental or economic benefits for the members or the local areas are the main purpose. However, there is no prohibition of paying dividends for the CEC members or shareholders. Yet, one of the main purposes of the CEC is ensuring economic benefits for the members. Some of the legal forms eligible to acquire the status of the CEC do not pay dividends to their members. Those are housing cooperatives, housing communities and associations (article 11zi section 1 item 1–3 of the AEL). Other are meant to bring profits to their members, and those are partnerships, farmers' cooperatives, agricultural cooperatives and workers' cooperatives (article 11zi section 1 item 1, 4 and 5 of the AEL).

## Social Enterprises (SE)

The concepts of the social economy and the SE are recognised worldwide. Many international organisations had provided definitions of the social economy and the social enterprise and appreciate their role in the global, domestic and regional economy. The United National acknowledged the social (and

[12] Official Journal of Laws 2024, item 1616 uniform text.
[13] Official Journal of Laws 2024, item 1289 uniform text with changes.
[14] Official Journal of Laws 2024, item 1361 uniform text with changes.

solidarity[15]) economy in two of the latest resolutions of General Assembly: the Resolution of 20th of November 2024: *Promoting the social and solidarity economy for sustainable development* (A/C.2/79/L.22/Rev.1)[16] and the Resolution of 18th of April 2023, also titled: *Promoting the social and solidarity economy for sustainable development* (A/77/L.60).[17]

The International Labour Organisation acknowledged and defined the social (and solidarity) economy in the *Resolution concerning decent work and the social and solidarity economy* of General Conference of the International Labour Organization of 10th of June 2022.[18] Under this definition: *The SSE encompasses enterprises, organizations and other entities that are engaged in economic, social, and environmental activities to serve the collective and/or general interest, which are based on the principles of voluntary cooperation and mutual aid, democratic and/or participatory governance, autonomy and independence, and the primacy of people and social purpose over capital in the distribution and use of surpluses and/or profits as well as assets. SSE entities aspire to long-term viability and sustainability, and to the transition from the informal to the formal economy and operate in all sectors of the economy. They put into practice a set of values which are intrinsic to their functioning and consistent with care for people and planet, equality and fairness, interdependence, self-governance, transparency and accountability, and the attainment of decent work and livelihoods. According to national circumstances, the SSE includes cooperatives, associations, mutual societies, foundations, social enterprises, self-help groups and other entities operating in accordance with the values and principles of the SSE.*

The Organisation for Economic Co-operation and Development defined the social economy and the social enterprise in the *Recommendation of the Council on the Social and Solidarity Economy and Social Innovation* of 10th of June 2022.[19] According to those definitions:

1. Social economy, also referred to in some countries as solidarity economy and/or social and solidarity economy, is made up of a set of organisations such as associations, cooperatives, mutual organisations, foundations, and, more recently, social enterprises. In some cases, community-based, grassroots and spontaneous initiatives are part of the social economy in addition to non-profit organisations, the latter group often being referred to as the solidarity economy. The activity of these entities is typically driv-

[15] The solidarity economy is a related concept to the social economy, focused on distribution of social or merit goods which are essential to decent life and should be available to the entire population. The organisations of the solidarity economy have plural roots of market, non-market and non-monetary economies, Recent Evolutions of the Social Economy in the European Union: Study, pp. 18 and 19. https://www.eesc.europa.eu/sites/default/files/files/qe-04-17-875-en-n.pdf [accessed: 11.01.2025].

[16] https://acrobat.adobe.com/id/urn:aaid:sc:EU:d9c464f7-f2ff-48a3-8f6e-930de63cf104 [accessed: 11.01.2025].

[17] https://unsse.org/wp-content/uploads/2023/04/A-77-L60.pdf [accessed: 11.01.2025].

[18] https://www.ilo.org/resource/ilc/110/resolution-concerning-decent-work-and-social-and-solidarity-economy [accessed: 11.01.2025].

[19] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0472%20 [accessed: 11.01.2025].

en by societal objectives, values of solidarity, the primacy of people over capital and, in most cases, by democratic and participative governance.
2. A social enterprise is an entity, which trades goods and services, that fulfils a societal objective and whose main purpose is not the maximisation of profit for the owners but its reinvestment for the continued attainment of its societal goals.

Within the EU, the social economy and the SE were recognised and defined by a number of organisations and committees. The Social Economy Europe, i.e. the European-level association that represents the social economy, defines the principles and characteristics of the social economy in the *Social Economy Charter* of 10th of April 2002[20] (revised version approved on 25th of June 2015). Next, a definition of the social economy was presented in the 2012 report for the European Economic and Social Committee by the International Centre of Research and Information on the Public, Social and Cooperative Economy (CIRIEC): *The Social Economy in the European Union*.[21]

The European Commission described the SE in the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Social Business Initiative* (COM/2011/0682 final of 25/10/2011).[22]

In 2021, the European Commission (EC) included definitions of the social economy and the SE in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Building an economy that works for people: an action plan for the social economy' (COM [2021] 778 final).[23]

Also, the Council of the European Union defined social economy and SE in the Council Recommendation of 27 November 2023 on developing social economy framework conditions (C [2023] 1344).[24]

In the EU law, the SE definitions were included in 2 regulations.
1. Regulation (EU) No 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Programme for Employment and Social Innovation ("EaSI") and amending Decision No 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion.[25] However, this regulation was in force until 31/12/2020.
2. Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013.[26]

[20] https://www.socialeconomy.eu.org/the-social-economy/the-social-economy-charter/ [accessed: 11.01.2025].
[21] https://www.eesc.europa.eu/sites/default/files/resources/docs/12_368-gr3-env2.pdf [accessed: 11.01.2025].
[22] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0682:FIN:en:PDF [accessed: 11.01.2025].
[23] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0778 [accessed: 11.01.2025].
[24] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ%3AC_202301344 [accessed: 11.01.2025].
[25] OJ L 347, 20.12.2013, pp. 238–252.
[26] OJ L 231, 30.06.2021, pp. 21–59.

Article 2 section 1 item 13 of the Regulation (EU) 2021/1057 defines a social enterprise as an undertaking, regardless of its legal form, including social economy enterprises, or a natural person which:

(a) in accordance with its articles of association, statutes or with any other legal document that may result in liability under the rules of the Member State where a social enterprise is located, has the achievement of measurable, positive social impacts, which may include environmental impacts, as its primary social objective rather than the generation of profit for other purposes, and which provides services or goods that generate a social return or employs methods of production of goods or services that embody social objectives;

(b) uses its profits first and foremost to achieve its primary social objective, and has predefined procedures and rules that ensure that the distribution of profits does not undermine the primary social objective;

(c) is managed in an entrepreneurial, participatory, accountable and transparent manner, in particular by involving workers, customers and stakeholders on whom its business activities have an impact.

However, definition included in the Regulation (EU) 2021/1057 is only for the purposes of this legal act. Therefore, this definition is not biding in extend beyond the Regulation (EU) 2021/1057 purpose. Moreover, it has to be stressed that the term social enterprise is used in the Regulation (EU) 2021/1057 for funding purposes.[27]

The features that are included in all of the definitions and acknowledgments of the social economy and the SE by the listed international organisations and the EU are:

(1) primacy of organisation's people and social purpose, which includes serving the collective or general interest, over capital in the distribution and use of surpluses;
(2) principle of voluntary cooperation;
(3) principles of democratic and participatory governance;
(4) principles of autonomy and independence;
(5) operating on market principles and using the profit generated to achieve a social goal.[28]

The SE is considered an operator within the social economy.[29] It is an entity that complies with the listed characteristics. It bridges the gap between pri-

[27] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Building an economy that works for people: an action plan for the social economy' (COM (2021) 778 final), 3.

[28] In Polish literature compare: M. Małecka-Łyszczek, A. Pacut [in:] Ustawa o ekonomii społecznej. Komentarz, ed. M. Małecka-Łyszczek, R. Mędrzycki, Warszawa 2023, pp. 28–36.

[29] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Social Business Initiative* (COM/2011/0682 final of 25/10/2011).

vate and public sector by using business to achieve social goals.[30] Its legal form in not restricted to any specific type of entity. Nor is its activity limited to any specific market. It's because the social economy is determined by the purpose of the activity of its entities (social enterprises), not by the field of such an activity. Therefore, the social economy is referred to as an umbrella construct.[31]

In Polish law, the ASE, provides the purpose and the subject of the social economy, and lists the conditions for a status of a SE. According to the legal definition of the social economy, it is an economic activity, public benefit activity and other paid activity carried out for the local community in the field of social and professional reintegration, creating jobs for people at risk of social exclusion and providing social services (article 2 item 1 of the ASE). An entity can acquire the status of a SE if it fulfils the conditions regarding its activity, ownership and organisational structure. It should perform economic activity, public benefit activity or other paid activity and have a purpose of serving local development by social and professional reintegration of people at risk of social exclusion or the implementation of social services (article 3 section 1 item 1–3 and article 4 section 1 item 1–2 of the ASE). Therefore, organisations eligible to receive the status of a SE are designed to perform economic activity (cooperatives, including social and workers' and agricultural production cooperatives), public benefit activity and other paid activity (non-government organisations which have a purpose other than profit).

Moreover, an entity should be independent from the state, state owned commercial company, local government or municipal company (article 3 section 2 of the ASE). In the SE, a consultative and advisory body should be established, composed of all the employees of the social enterprise (article 7 section 1 of the ASE).

## Cumulation of the Statuses of a Citizen Energy Community and a Social Enterprise

The AEL and the ASE includes cooperatives as entities eligible to acquire the status of the CEC and SE. Article 11zi section 1 item 1 of the AEL states that CEC can be a cooperative in the meaning of article 1 paragraph 1 of the Act of 16th of September 1982 – Cooperative Law[32] (ACL) and a housing cooperative regulated by the Act of 15th of December 2000 on housing cooperatives.[33] In Poland the ALC 1st Chapter is a *lex generalis* for all types of cooperatives.

[30] P. Mahommadi, K. S. S. AlHattali, I. N. S. Alghatrifi, Rethinking the Boundaries and Definition of Social Entrepreneurship: A Critical Literature Review, 'Business Management and Strategy' 2024, vol. 15, 1, pp. 226–240.
[31] K. Nagel, Teoretyczne i definicyjne ujęcie ekonomii społecznej, 'Studia Ekonomiczne' 2013, 129, p. 68.
[32] Official Journal of Laws 2024, item 593 uniform text.
[33] Official Journal of Laws 2024, item 558 uniform text.

The regulation of *lex specialis* character on specific types of cooperatives: workers' cooperatives and agricultural production cooperatives is included in 2nd Chapter of the ACL and in a number of separate legal acts. These separate legal acts are:

1. Act of 7th of December 2000 on the functioning of cooperative banks, their associations and affiliating banks,[34]
2. Act of 15th of December 2000 on housing cooperatives,
3. Act of 27th of April 2006 on social cooperatives,[35]
4. Act of 22nd of July 2006 on European Cooperative Society,[36] which is the transposition of the Council Directive 2003/72/EC of 22nd July 2003 supplementing the Statute of an European Cooperative Society with regard to the involvement of employees,[37]
5. Act of 5th of November 2009 on credit unions,[38]
6. Act of 4th of October 2018 on farmers' cooperatives,[39]
7. also the Act of 20th February 2015 on renewable energy sources contains regulation of energy cooperatives, and
8. Act of 22nd of March 1989 on craft[40] contains regulation of craft cooperatives.

Also, 2nd Chapter of the ACL contains regulation on second tier cooperatives that are: cooperatives' revision associations and cooperatives' economic associations. The regulation on another type of a second tier cooperative, i.e. farmers' cooperatives associations is also included in the Act of 4th of October 2018 on farmers' cooperatives (article 9).

As a cooperative in the meaning of article 1 paragraph 1 ACL can be considered every type of a cooperative, including those regulated by *lex specialis* laws to the ACL. The definition included in article 1 paragraph 1 of the ACL is universally applicable to every of those types of cooperatives: social cooperatives, farmers' cooperatives, housing cooperatives, credit unions, cooperative banks, energy cooperatives and craft cooperatives. It also covers agricultural production cooperatives and workers' cooperatives, regulated respectfully by articles 138 and 180, and article 181 of the ACL. Within the structure of the system of cooperative law there is a phenomenon referred to as typology of cooperatives. It is a situation when legal provisions allow a single cooperative to fulfil the features of two types of cooperatives. It happens in the case of types of: farmers' and energy cooperative; agricultural production cooperative and energy cooperative; workers' cooperative and energy cooperative.[41]

[34] Official Journal of Laws 2024, item 352 uniform text with changes.
[35] Official Journal of Laws 2023, item 802 uniform text with changes.
[36] Official Journal of Laws 2018, item 2043 uniform text with changes.
[37] OJ L 207, 18.08.2003, pp. 25–36.
[38] Official Journal of Laws 2024, item 512 uniform text with changes.
[39] Official Journal of Laws 2024, item 372 uniform text with changes.
[40] Official Journal of Laws 2020, item 2159 uniform text with changes.
[41] Zob. D. Bierecki, *Energy Cooperatives in the System of Polish Cooperative Law*, 'Review of Institute of the Grand Duchy of Lithuania' 2021, vol. 1, pp. 7–16.

Similarly, according to the ASE, a SE status can be acquired by a social cooperative, workers' cooperative and agricultural production cooperative (article 2 item 5 A and D in conjunction with article 3 section 1 of the ASE). Moreover, a SE status can be obtained by the nongovernmental organisation and cooperatives of different types but cooperative banks are qualified (article 2 item 5 E of the ASE). The conditions are that a cooperative does not operate for the purpose of making a profit and is not a bank (article 3 section 2 of Act of 24th of April 2003 on public benefit activities and volunteering.)[42]

Also, the CEC status can be obtained by a cooperative in the meaning of article 1 paragraph 1 ACL, a housing cooperative and a farmers' cooperative (article 11zi section 1 item 1 and 5 of the AEL).

Therefore, a single cooperative can be eligible to acquire the status of a CEC under the AEL and the status of a SE under ASE. This is the result of umbrella concepts of both the CEC and the SE. This finding is supported by the grammatic interpretation of article 11zi section 1 item 1 of the AEL and article 2 item 5 A and D, and E in conjunction with article 3 section 1 of the ASE. However, it should be considered if this finding complies with the concepts of the CEC and the SE, and the social economy.

First of all, in both cases, the grassroot and voluntary character of the organisation is stressed. In the 44 motive of the Directive 2019/944 and article 16 section 1 A–B of the Directive 2019/944 it is indicated that citizen energy communities are a category of cooperation of citizens and of voluntary character, open to all kinds of entities. However, in the case of the SE, the grassroot and voluntary character derives from the cooperative identity of the enterprise. So it is not the umbrella concept that carries these features of character but rather it results from historical and natural connection of cooperatives and the social economy.

Secondly, in cases of both CEC and SE, the organisations are controlled by the members. These members are private law entities for whom the concepts of CEC and SE are legally dedicated. Members of the CEC have to have control over these type of organisation and cannot be entities whose activity in the energy sector is the subject of their core business. This concept complies with the idea that CEC are consumer empowerment organisations (motive 43 of the Directive 2019/944). The CEC member can be a natural person, local government unit, micro-entrepreneur or small entrepreneur (however, the latter covers both natural and legal persons). As already mentioned, in the SE, a consultative and advisory body should be established, composed of all the employees of the social enterprise (article 7 section 1 of the ASE). It does not only concern employees who are SE's members, who can also be legal persons, including local governments units but all of the employed people in the

[42] Official Journal of Laws 2024, item 1391 uniform text.

organisation.[43] Because SE purpose is to provide professional reintegration and social services which include combating unemployment, again it can stated that control over the SE lies with the people for whom the organization is intended.

Thirdly, the activity of both the CEC and the SE can be meant to benefit the environment. One of the CEC objectives is to provide environmental benefits for their members or local area (article 3 item 13f B of the AEL). Similarly, the SE serves local area development by providing social services (article 4 section 1 of the ASE). Social services mean, *inter alia* environmental protection activities (article 2 section 1 item 13 of Act of 19th of July 2019 on the provision of social services by the social services centre[44] in conjunction with article 2 item 9 of the ASE). The Act of 19th of July 2019 on the provision of social services by the social services centre does not limits the ways of providing social services and only by way of example lists the legal basis for their provision (article 2 section 2). Moreover, reference in the article 2 item 1 and article 4 section 1 item 2 of the ASE that social economy and the SE is about providing social services gives a legal basis to conclude that social services can be provided by the SE in in a manner other than in accordance with the Act of 19th of July 2019 on the provision of social services by the social services centre. Therefore, cumulation of statuses if the CEC and the SE by a single cooperative must result in providing social services of environmental protection by energy or biogas or biomass related services (listed in the article 3 item 13f C of the AEL). This activity shall be the economic activity that the SE is obligated to perform (article 3 section 1 item 2 of the ASE). However, one can argue that social services are provided in the nonmaterial manner directly to their beneficiaries (article 2 section 1 *in fine* of Act of 19th of July 2019 on the provision of social services by the social services centre). This restriction is applicable only to the way local governments (communes) or social services centres (municipal budget units) provides social services. This conclusion results from the grammatic interpretation of article 2 section 1 *in fine* and article 3 section 1 of Act of 19th of July 2019 on the provision of social services by the social services centre. The ASE refers to the of Act of 19th of July 2019 on the provision of social services by the social services centre only to the extent of defining social services but not to the extent of a way of providing this kind of services (article 2 item 9 of the ASE). Nonmaterial manner of providing social services would be contrary to the way in which social services are implemented by social enterprises and within the social economy. Article 2 item 2 of the ASE states that in the social economy, the activities of social economy entities (including social enterprises) for the provision of social services are carried out in the form of economic activity.

[43] D. Bierecki, *Cooperative Principles in the Concepts of Social Economy and Social Enterprise in Polish Law*, 'Prawo i Więź' 2024, 3, pp. 84 and 85.

[44] Official Journal of Laws 2019, item 1818.

Fourthly, the cooperative which acquires statuses of both the CEC and the SE complies with the 7th Cooperative Principle. According to this principle, cooperatives work for the sustainable development of their communities. It has been explained that under this principle cooperatives activity evolved from working for sustainable development of their local communities to wider work for communities nationally, regionally and globally. The wording of the 7th Cooperative Principle was agreed in 1995 in the context of the debate over sustainable development goals held at that time in the United Nations.[45] However, under Polish legal definition of a cooperative, included in the article 1 paragraph 1 and 2 of the ACL, the purpose of a cooperative is to conduct business and social activity in the interest of its members. In the literature it is stressed that a cooperative cannot perform activities for the benefit of the community.[46] However, this view is outdated because it does not take into account the result of obtaining the status of the SE by the cooperative. As a result of this kind of status the characteristics of the cooperative change and its starts to pursue objectives for the benefit of the local community (article 4 section 1 of the ASE). According to the social services fields, the cooperative begins to pursue social and public interests (article 2 of the Act of 19th of July 2019 on the provision of social services by the social services centre). It becomes a so-called "general or public interest cooperative". The ASE introduced the institution of "general or public interest cooperative" into Polish law.[47] According to foreign literature: French and Portuguese, such a cooperative corresponds with the Cooperative Principles.[48]

## Conclusion

Within the social economy there is a field of common activity for the SE and the CEC in the environmental sphere. Therefore, the social economy is a part of the twin transition, as part of the green transition.[49] The grassroot concepts of both: the SE and the CEC, their voluntary character, democratic governance, autonomy from the state and local government, and economic activity for the benefit of the local area or community are also common under

[45] D. Cracogna, *Principle* 7 [in:] Guidance Notes to the Co-operative Development, Brussels 2015, pp. 85 and 86.
[46] P. Zakrzewski, *Legalna definicja spółdzielni* [in:] Państwo–Konstytucja–Prawo. Księga pamiątkowa poświęcona Sędziemu Trybunału Konstytucyjnego Profesorowi Henrykowi Ciochowi, Warszawa 2018, p. 544.
[47] D. Bierecki, *Cooperative*..., p. 86.
[48] D. Hiez, The General Interest Cooperatives: A challenge for cooperative law, 'International Journal of Cooperative Law' 2018, vol. 1, pp. 93–110; D. Meira, The Portuguese Social Solidarity Cooperative Versus The PECOL General Interest Cooperative, 'International Journal of Cooperative Law' 2019, vol. 2, pp. 57–71.
[49] On the twin transition see: D. Czyżewska-Misztal, J. Cabańska, Podwójna transformacja *w* UE – stan obecny i wyzwania dla cyfrowej i zielonej Europy, 'Zeszyty Naukowe Polskiego Towarzystwa Ekonomicznego w Zielonej Górze' 2023, 19, pp. 108123.

the AEL and the ASE. Legally, those similarities come together in the form of a cooperative, which can simultaneously acquire statuses of the CEC and the SE. These similarities comply with the consumer owned concept of the CEC and social economy which is a sphere of activity between private and public sectors. The social economy brings together the business approach of the private sector and social goals pursued by the public sector and third sector entities. However, the difference between the SE and the third sector entities, commonly referred as non-governmental organisations (NGOs)[50] is the importance of the economic activity (business) of the organisation. The economic activity conducted by the SE is a form of pursuing the goals of the social economy. It is therefore a different model than that applicable to non-governmental organizations with the status of public benefit organisations, which can only conduct economic activity in an auxiliary manner, in order to realize statutory goals (article 20 section 1 item 2 of the Act of 24th of April 2003 on public benefit activities and volunteering).

**Transformacja energetyczna a ekonomia społeczna – związek między obywatelskimi społecznościami energetycznymi a przedsiębiorstwami społecznymi w prawie polskim**

**Abstrakt**
Na gruncie prawa polskiego obywatelskie społeczności energetyczne i przedsiębiorstwa społeczne mogą funkcjonować w formie prawnej spółdzielni. Cechy charakterystyczne obywatelskich społeczności energetycznych i przedsiębiorstw społecznych są podobne. Wynikają one z konstytutywnych cech spółdzielni, które są integralne z ekonomią społeczną, Dlatego powstaje pytanie badawcze: czy dana spółdzielnia może uzyskać jednocześnie status prawny obywatelskiej społeczności energetycznej i przedsiębiorstwa społecznego? Celem artykułu jest udzielenie odpowiedzi na tak postawione pytanie. Teza badawcza artykułu stanowi, że transformacja energetyczna może następować w ramach ekonomii społecznej i być realizowana przez spółdzielcze przedsiębiorstwa społeczne. Dlatego ekonomia społeczna jest częścią podwójnej transformacji – w ramach transformacji ekologicznej.
Artykuł został przygotowany metodą dogmatycznoprawną.

**Słowa kluczowe:** obywatelska społeczność energetyczna, przedsiębiorstwo społeczne, ekonomia społeczna, spółdzielnia, prawo UE.

[50] The division of activity segments into public, private (economic) and non-governmental is established in Polish and foreign literature. See: A. Breczko, A. Miruć, Swoboda zrzeszeń w kontekście społeczeństwa obywatelskiego, [w:] Trzeci sektor i ekonomia społeczna. Uwarunkowania prawne. Kierunki działań, red. J. Blicharz, L. Zacharko, Wrocław 2017, p. 15.

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Igor Zgoliński*

# Technology and Criminal Proceedings: An attempt to systematize the issue and determine the main directions of implementation

**[Technologia a postępowanie karne – próba usystematyzowania problematyki i określenia głównych kierunków wdrażania]**

**Abstract**

The article covers topics related to the implementation of new technologies in the framework of the criminal process in the broadest sense. The Author focuses his considerations on the current needs of the Polish justice system, known to him from his autopsy. He points out priority areas for technological implementations, areas of follow-up and directions of other potential planes of change. He analyzes in this prism the criminal process at all stages of its duration, from pre-trial to executive criminal proceedings, and moreover the range of necessary changes in substantive criminal law.

**Keywords:** technology, criminal procedure, computerization, digitization, electronification, courses of action.

## Introduction

The issue of the presence of new technologies in law is currently being raised with increasing frequency in scientific discourse. Even a cursory analysis of the issue, however, indicates that the problem is extremely complex and does not boil down solely to the implementation of certain technological advances already present on the market into the process itself. Here, however, the field of implementation actually appears to be the largest. Technique has

* **Igor Zgoliński** – DSc, Associate Professor, Kujawy and Pomorze University in Bydgoszcz (affiliation); Supreme Court Justice; https://orcid.org/0000-0002-5097-6170; i.zgolinski@akp.bydgoszcz.pl / dr hab. nauk prawnych, profesor uczelni, Akademia Kujawsko-Pomorska, Bydgoszcz (afiliacja), sędzia SN.

the property that it has many fields of creation and use, which also translates into the process of its implementations into law. It is, in fact, a range of various instruments, the common denominator of which becomes the permissibility of use in the process of administering justice. It should be added at once that the entry of new technologies into this field is not only necessary and needed, but also inevitable. The only unknown here is only the question of when it will realistically occur. Technology, on the other hand, can be used in criminal proceedings at all stages. A potential area of use, of course, is also in criminal fiscal proceedings, vetting proceedings and executive criminal proceedings. Moreover, a place for the implementation of the technique also exists in substantive criminal law, where it can be successfully implemented within the framework of several institutions located in the general part of the Criminal Code, and within the provisions of the special part. In doing so, it will be indispensable to introduce new types of crime, where the causative actions will involve new technologies. Already glaringly apparent, moreover, is the need to create a universal information system, serving the entire "criminal division" in the administration of justice , understood as a certain electronic process module used by many authorities. So far, activities in this field are not the result of some strategy or in-depth analysis. They are selective in nature, when in the meantime they should be systemic and long-term.

Just a cursory analysis of the above issues indicates that it is worth attempting a kind of systematization of the various areas of implementation, with the identification of those that appear to be priorities over others. The activity of implementing technology is, however, complicated insofar as, in addition to the arduous legislative and technological paths for this type of endeavor, the path of answering the question of what will be most beneficial to the judiciary in the current reality may become equally difficult to traverse. This state of affairs is further compounded by certain nuances regarding procedural solutions in the various branches of law. Such attempts have been made for almost 20 years,[1] however without spectacular success. How complex this process is and how difficult to achieve the conjunction of all the above-mentioned factors can be, is recently indicated, for example, by the process of allowing the filing of pleadings electronically in civil proceedings. On the grounds of these proceedings, on September 8, 2016, the provisions of the Act of July 10, 2015 on amending the Act – Civil Code, the Act – Civil Procedure Code and certain other acts (Journal of Laws 2015 item 1311) – the Act of July 22, 2016 on amending the Act – Civil Procedure Code, the Act – Notary Law and the Act on amending the Act – Civil Code, the Act – Civil Procedure Code and certain other acts (Journal of Laws 2016 item1358) came into force. They adopted the

[1] See e.g.: Government Draft Law on Informatization of Activities of Certain Entities Performing Public Tasks, Drug no. 1934 of August 26, 2003, Regulation of the Minister of Justice on Detailed Rules and Procedures for Service of Court Letters in Criminal Proceedings of June 18, 2003 (Journal of Laws no. 108, item 1022).

admissibility of electronic correspondence in the field of pleadings by means of an ICT system supporting court proceedings. The problem, however, is that although a corresponding causa appeared in the law, the system itself was not introduced in parallel with its entry into force. The legislature provided as much as three years for its creation and implementation. Parallel implementation, that is, the prior creation of the tool, its extra-procedural testing and its entry into force including the legal basis for this, would be good practice. Such an action results in fewer complications and explanations on the part of representatives of the judiciary, and strengthens the citizen's trust in the state, in whose eyes the latter acquires professionalism. A certain gateway in the case in question is the Electronic Platform for Public Administration Services [ePUAP], while it is not a substitute for this system, but a tool that exists alongside it. In accordance with the Act of February 17, 2005 on Informatization of the Activities of Entities Performing Public Tasks (Journal of Laws 2013 item 235), the Act of September 18, 2001 on Electronic Signature (unified text, Journal of Laws 2013 item 262) and the Ordinance of the President of the Council of Ministers of September 14, 2011 on preparing letters in the form of electronic documents, serving electronic documents and providing access to forms, templates and copies of electronic documents (Journal of Laws of 2011 no. 206 item 1216), the option of serving electronic documents to courts through the platform has appeared. However, the disadvantage is the significantly limited scope of use. This is because the ePUAP platform can only be used for petitions, complaints, applications and other letters filed outside of the relevant court proceedings. Thus, it is a *de facto* 'periprocedural' tool, as formal pleadings still cannot be filed electronically. In a situation where a party to the proceedings, however, decides to file a pleading in this manner, it will not have any legal effect.[2] This is confirmed by recent case law. It is indicated there,[3] that in accordance with Article 125 § $2^1$ of the Code of Civil Procedure, pleadings shall be filed with the court by means of an ICT system, if a special provision so provides. Correlated with this provision is Article 165(4) of the Code of Civil Procedure, which provides that the entry of a pleading into an ICT system is equivalent to the filing of a pleading with the court. In turn, according to Article 165 § 2 of the Code of Civil Procedure, the handing over of a pleading in the form of registered mail at a Polish postal facility of a 4 postal operator postal law within the meaning of the Postal Law Act or at a facility of an entity engaged in the delivery of correspondence within the European Union is equivalent to bringing it to court. Article 165 § 3 of the Code of Civil Procedure equates the filing of a letter with the court with the filing of a letter by a soldier with the command of a military unit or by a person deprived of

[2] A separate regulation governs the so-called electronic writ-of-payment procedure.
[3] Decision of the Supreme Court of 29.03.2023, III CZ 427/22, decision of the SA in Katowice of 12.07.2023, III AUz 88/23.

liberty with the administration of a penitentiary institution, and by a member of the crew of a Polish sea vessel with the captain of the vessel. It follows from the above exceptions that the principal permissible way of filing a pleading is to bring it to court. The rules of a formal nature do not provide for any other way of filing a pleading with the court other than filing it at the seat of the court (at the registry office), through a specific postal operator or, in situations provided for in special regulations, through an ICT system or another (other than a postal operator) authorized entity (e.g., a ship's captain). Since these are exceptions to the general rule of filing pleadings, they cannot be interpreted broadly. The detailed procedure for dealing with letters received by the court – directly, in an envelope, through the teleinformation system – is regulated by the provisions of the Order of the Minister of Justice of June 19, 2019 on the organization and scope of activities of court secretariats and other departments of court administration (§ 14–16). They do not stipulate how to deal with letters received by email or through the e-PUAP platform. In turn, the manner of filing pleadings through the ICT system is regulated in the Order of the Minister of Justice of October 20, 2015 on the manner of filing pleadings through the ICT system supporting court proceedings, issued pursuant to Article 125 § 31 of the Code of Civil Procedure. The ICT system through which a pleading may be filed is a special system serving a specific court proceeding, e.g., writ of payment proceedings, registration proceedings. The electronic Platform of Public Administration Services e-PUAP, used for communication of citizens with public administration units, is not such a system. This platform is not provided for in the regulations governing civil proceedings as a way for parties to contact the court in judicial proceedings. 5 In this state of affairs, one should share the views expressed in the doctrine and case law that – as a general rule – the effective filing of a pleading with the court must be in traditional (material) written form and should contain a machine-readable text. Only the fulfillment of this condition triggers the initiation of court proceedings and a possible remedial procedure aimed at eliminating the formal deficiencies of the pleading. A pleading filed in electronic form – to the extent not regulated by specific provisions – does not produce the legal effects that the law associates with the filing of a pleading, whereby it is not the formal deficiency of the pleading that is at issue, but its original, irremovable ineffectiveness caused by the use of unauthorized technology (see Supreme Court decisions: of March 26, 2009, I KZP 39/08, OSNKW 2009, no. 5, item 36; of July 15, 2010, III SW 87/10, OSNP 2011, no. 3-4, item 53; of October 25, 2011, III SW 70/11, OSNP 2012, no. 11–12, item 144).

Another aspect of this matter should be noted in passing, namely the scale of the complexity of access to the aforementioned system and, in general, all the technological tools that would appear in the administration of justice. In order to use the ePUAP platform, it is necessary to have a user account and an

electronic signature, which is verified using a certificate. However, not all of society is an information society, proficient in the use of and access to technological innovations. The right to a court is available to everyone. A sizable group of society is still – for various reasons – digitally excluded. Only 44% of citizens have at least basic digital skills, one of the lowest scores in the European Union.[4] Digital exclusion, on the other hand, is associated with mere access to the Internet, but also the lack of skills to take advantage of available technological ones. This leads to social rejection of people of all ages and to various types of exclusion, especially of a competence nature.[5] It is therefore necessary, on the one hand, to maintain maximum simplification of access to individual IT tools for the citizen, and on the other hand, to preserve the existing traditional solutions. Technology cannot yet "supplant" current forms of communication with the court, as this would be to the detriment of citizens. From the legal side, this would violate Article 45 of the Polish Constitution, which states that everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial and independent court. Indeed, the right to a court consists of three elements, in the form of the right of access to a court (to initiate the procedure before the court, the right to a court procedure that complies with the requirements of fairness and openness, and the resolution of the case.[6]

It is aptly pointed out in the literature on the subject that it is necessary to identify systemic measures that would be orderly enough to ensure in the long term to reach the optimal state, which will enable the efficient conduct of criminal proceedings.[7] Looking at the overall implementation related to the interference of new technologies in criminal proceedings, it should also be noted that all tools should be so universal that it is possible to use them at any stage of criminal proceedings, so in the following scheme: pre-trial proceedings /jurisdictional proceedings/ executive proceedings. The idea is that, for example, a court (also an executive court, a penitentiary judge or certain other bodies of executive proceedings) may, at the stage of its proceedings, use a tool intended essentially for law enforcement agencies at the pre-trial stage. This is because it may sometimes be necessary and of vital importance to the evidence proceedings in progress. As a rule, it will also lead to its acceleration. Moreover, these tools should allow the transfer of various types of data between the different stages of the proceedings, which entails the creation of a path for the transfer of data between different public

[4] https://www.gov.pl/web/cyfryzacja/prawie-400-mln-zl-na-rozwoj-umiejetnosci-cyfrowych-polakow.

[5] https://instytutpiastow.pl/wp-content/uploads/2023/11/raport-wykluczenie-cyfrowe.pdf.

[6] P. Tuleja, *Commentary to Article 45* [in:] P. Tuleja (ed.), Constitution of the Republic of Poland. Commentary, LEX/el. 2023.

[7] J. Kosowski, *Directions of Effective Electronization of the Criminal Process*, 'Bulletin of the Association of Graduates and Friends of the Faculty of Law of the Catholic University of Lublin', vol. XVII, 2022, 19, 1, pp. 161 and 162.

authorities (prosecutors' offices, other law enforcement bodies, financial and non-financial pre-trial investigation bodies, branch IPN Lustration Offices, etc.) and common courts and the Supreme Court. Such a system should therefore be multi-layered and multi-channel, with the scope of access to it from the subjective side being thoroughly analyzed at the stage of creation. The key to access, it seems, should be first of all the actual procedural needs and systemic conditions of a given body, as they determine the actual use of such a system. In this way, the national internal justice system should function. The only open question is when we will reach the moment of full creation of an appropriate nationwide internal system and what costs this will require. Once it is created, the field of follow-up opens up, for the wider use of this system within the countries of the European Union and within the framework of international criminal law. However, these aspects of the issue require a separate study, where the already implemented national system and its capabilities, as well as the coherence of individual system capabilities in other European Union countries, should be taken as a reference. However, it can be predicted that this will not happen soon, if such a system is not a pipe dream at all. Instead, it seems that on a truncated scale it would be beneficial for EU countries.

## New Technologies in Criminal Proceedings

Turning to the criminal proceedings, two stages should be distinguished, as they are characterized by separate needs from the side of the potential use of technology. This follows directly from the objectives of these proceedings, although full coherence should be maintained at both stages. It should be pointed out here that the aftermath of the statutory changes[8] is that since December 2021, a nationwide ICT system PROK-SYS has been in operation in the common organizational units of the prosecutor's office. It is designed, among other things, to digitize files of pre-trial proceedings and make them available to authorized entities. However, the digitization of files is not being implemented in a holistic manner, hence it cannot be said to have already become a reality. Access to viewing digitized case files is possible through a special portal.[9] It is rated as unreadable and time-consuming.[10] In order to use it, one must apply for access at the prosecutor's office unit that conducts the pre-trial investigation, and before that obtain information on whether

[8] Law of March 11, 2016 on amending the Law – Criminal Procedure Code and some other laws, Journal of Laws, item 437.

[9] https://portalzewnetrzny.prokuratura.gov.pl/.

[10] P. Przybyłowicz, *Issues of Obtaining Evidence from Personal Evidence Sources and the Computerization of the Criminal Process*, 'Annals of Administration and Law' 2024, 3, p. 250.

the case file is digitized. After that, you need to apply for access to the case file, which is possible in both traditional forms, that is, in writing or orally (for the record). After granting permission to inspect the file, the prosecutor should issue an order specifying the scope of access. A good solution here is the possibility to log in to the portal also through the login.gov.pl service, i.e. without the need to receive or obtain a separate login and password. An authorized person to log in using the login.gov.pl service must have a trusted profile. However, the condition for using this access is to provide the prosecutor with the PESEL number. Consent to access the file is temporary in nature. This solution should nevertheless be evaluated positively and treated as a kind of test for a future, more extensive instrument. If it is created, it will be possible to avoid the shortcomings that are evident today.

This, however, is only one sliver of the possibilities drawn in pretrial proceedings. The initial differentiation will undoubtedly require the identification of the necessary areas of need within the framework of exploratory activities and within the area of procedural activities. In terms of communication, it would also be worthwhile to create a system that is coherent with all the entities involved (prosecutor, police, tax authorities, General Inspector of Financial Information, etc.), obviously taking into account the nature of the tasks of the various entities and adjusting their access rights to the system. This would undoubtedly improve the course of individual procedural activities and the collection of evidence itself.[11] The aim here should be to shorten the path of obtaining all data as much as possible. However, the issue of data acquisition and recording, due to its scope and complexity, goes far beyond the scope of this paper. It is only necessary to emphasize here that it is necessary to develop detailed legal acts regulating the sphere of acquisition of data fixed in electronic form, and concerning so-called sensitive data at the stage of national law. In particular, it is necessary to normatively implement rules for installing programs with keys for encrypted messages and for remote searching of devices, as well as the rights of entities interfering with data, conditions for protecting data integrity, etc.[12] The adoption of these statutory solutions will only pave the way for further activities of a strictly technical nature.

[11] See more extensively: A. Lach, Electronic Evidence in the Criminal Process, Toruń 2004, *passim*, M. Kusak, *Access to Electronic Data on Content in Criminal Proceedings: Domestic and international challenges*, 'Gdańskie Studia Prawnicze' 2024, 2, p. 72 *et seq.*, M. Rogalski, *Controlling and Recording the Content of Other Conversations or Transmissions of Information* [in:] System prawa karnego procesowego, vol. 8. Dowody, pt 3, J. Skorupka (ed.), Warszawa 2019, p. 4059 *et seq.*; the same Author, *The European Commission's E-Evidence Proposal: Critical remarks and proposals for changes*, 'European Journal of Crime, Criminal Law and Criminal Justice' 2020, vol. 28, 4, https://doi.org/10.1163/15718174-BJA10018; A. Grzelak, K. Zielińska, *Between the Right to Privacy and Personal Data Protection and Ensuring Public Security and Fighting Crime. The Problem of Data Retention Continues: A gloss on the judgments of the Court of Justice of 6.10.2020: C-623/17, Privacy International, and in joined cases C-511/18, C-512/18, C-520/18,* La Quadrature du Net and others, EPS 2021, 8, pp. 28–36.

[12] M. Kusak, *Access...*, pp. 84 and 85.

On the grounds of the judicial stage, considerations should begin with an act that already exists in the form of the Ordinance of the Minister of Justice of March 12, 2024 on the service of letters in electronic form in criminal proceedings, which came into force on March 14, 2024. Its appearance should be seen in terms of positives, as it fits in with the need to modernize the course of proceedings. However, it has a narrowly defined scope, as it applies to attorneys, legal advisors, and only to those for whom an account has been established in the information portal referred to in Article 53e § 1 of the Law of July 27, 2001 – Law on the system of common courts (Journal of Laws of 2024, item 334), and, moreover, for the prosecutor and the General Prosecutor's Office of the Republic of Poland, for whom an institutional account has been established. The foundation for the electronification of service has already been normatively created, for it is contained in the provisions of the Law of 18.11.2020 on electronic service.[13] The legislator in criminal proceedings, however, provided for too distant *vacatio legis* for their entry into force (01.10.2029), which was rightly criticized.[14]

In the criminal process at the jurisdictional stage, however, there is already a growing presence of technological innovations. One of them is the e-protocol, however, still in the implementation stage. Where it has been successfully implemented (misdemeanor proceedings), however, there is a visible lack of use of its full capabilities by some judges, distortion of the actions performed, and, moreover, frequent equipment failures are observable, preventing its preparation. It should be postulated here to intensify activities aimed at implementing e-protocols in the framework of criminal proceedings and providing an efficient tool for transcription, which should be introduced as mandatory. Without going into details, it is only necessary to point out that this will make it much easier for both parties and courts to analyze the course of procedural actions.

Videoconferencing also continues to be a novelty. Their importance is steadily increasing. It seems that already in simpler cases they should be the norm, from which the traditional trial, combined then with the mandatory participation of the accused, will become a deviation. The need for wider use of this institution and simplification of the course of activities is perceived here.[15] After all, they can (and even should) take place without the participation of certain entities in the place of the witness. However, this requires the introduction of a separate procedure for verification of the identity of these persons, which should take place during the preparation for the trial (hearing), and in principle immediately before it begins. The abandonment of these steps would be mandatory for persons deprived of liberty and others, staying,

[13] Journal of Laws item 230.

[14] F. Radoniewicz, *Commentary to Article 82* [in:] K. Chałubińska-Jentkiewicz, J. Kurek (ed.), Ustawa o doręczeniach elektronicznych. Commentary, Warszawa 2022, pp. 245–248.

[15] A pertinent postulation in this regard is made by J. Kosowski, *Directions...*, pp. 165 and 166.

for example, in hospitals, embassies, consular offices or other institutions that guarantee adequate verification. This solution should not violate the right to defense.[16]

As part of the postulates, it can also be proposed that electronic supervision solutions be introduced into the criminal process, if only on the model of Portuguese solutions.[17] The supervision will work in several situations, but above all it can be an alternative to pretrial detention. The value of electronic supervision is great. It is a versatile, even chameleon-like institution – it adapts to different legal situations. Thus, it would increase the procedural palette of instruments, providing the needed flexibility of proceedings. This fits in with correct criminal policy. The power of the use of electronic surveillance and the constant technological advances dictate that electronic surveillance should sooner or later be an essential tool.

Similarly, it is worthwhile to carry out the electronification of warrant proceedings. These cases involve lesser crime and are generally less complicated. With simple digitization of files (scanning) and streamlining the courts' remote communication with the parties, this could be done relatively quickly and easily, up to the stage of filing an objection to the warrant judgment. An analogous picture emerges in criminal fiscal proceedings conducted under the voluntary surrender of responsibility procedure. In contrast, this is about half of criminal fiscal cases.[18]

## New Technologies in Executive Criminal Proceedings

The field of use of technological advances in the framework of executive criminal proceedings is similar to that which occurs at the stage of exploratory proceedings. This is primarily due to the fact that it is, in fact, a subsequent judicial proceeding in which the provisions of the Code of Criminal Procedure apply (to the extent not regulated) accordingly. Thus, the issue of contact with the parties and the possibility of filing and sending pleadings electronically comes to the fore. Another aspect is the full digitization of criminal files at the executive stage, with the possibility of accessing the main file, containing not only files created at the exploratory stage, but also at the pre-trial stage. Areas where technological advances can be used, moreover, are the various aspects of proceedings involving the implementation of electronic surveillance and probationary measures, headed by early release. The field for the use of tech-

[16] See: C. Kulesza, *Remote Hearing and Remote Custody Hearing in Light of the Convention Standard of the Rights of the Accused*, 'Białystok Legal Studies' 2021, 26, 3, pp. 205–221.

[17] I. Zgoliński, *The Institution of Electronic Surveillance: The Polish and Portuguese experience*, 'Revista Ibérica do Direito' 2024, *in print*.

[18] I. Zgoliński, Voluntary Surrender to Liability in Fiscal Penal Law, Warszawa 2011, pp. 234–254.

nology also appears in the new institution, to come into force from January 1, 2026, in the form of a break in the execution of the sentence deprivation of liberty provided for a certain category of convicts combined with electronic control of their whereabouts.[19]

The key to all these novelties should be rapid communication between all participants in the proceedings. After all, it should be mentioned that within the framework of the national system of internal justice, understood as a kind of system of data transfer between various public authorities related to the administration of justice, perhaps the largest number of actors will appear at this stage of the proceedings. This is determined by the multiplicity of entities performing various enforcement activities, sometimes even fragmentary. Among them, only a portion constitute the internal structures of the judiciary. However, they also include bodies that supervise the execution of punishment, non-judicial bodies that execute judgments, and others that merely cooperate in the execution of judgments, and otherwise have their own, and separate, responsibilities.[20] Therefore, it is necessary to create such a module that ensures the smooth participation and mutual cooperation of these entities.

## New Technologies in Substantive Criminal Law

A different field of use of new technologies appears in substantive criminal law, although they can and should also penetrate into this area. Criminal law is the law of last resort, which is applied when other branches of law have proved insufficient (*ultima ratio*). Its specifics are therefore different. What comes to the fore here, however, are possibilities related to various types of calculations such as for statutes of limitations (with the introduction of a variable in the form of amendments to the statutes of limitations in the current regulation, as well as in the 1969 Criminal Code), the statute of limitations for the execution of a sentence and the erasure of a conviction. This would seem to be a simpler solution, as it requires the introduction of this kind of computational facility, for example, into an information system serving the entire "criminal division" in the judiciary. However, this information would need to be updated periodically, according to the progress of the proceedings, and thus the modification of charges and the assignment of the perpetration of a particular act. Similarly, a simple procedure would

[19] See: I. Zgoliński, *The Scope of Changes in the Area of Criminal Executive Law Made Under the Act of July 7, 2022 on Amendments to the Act – Criminal Code and Some Other Acts*, 'Quarterly of the National School of Judiciary and Public Prosecution' 2024, 1, p. 90.

[20] More extensively L. Osiński, *Commentary to Article 2* [in:] J. Lachowski (ed.), Executive Penal Code. Commentary, Warszawa 2023, pp. 13–17.

be to equip all courts (criminal divisions) with direct access to the National Criminal Register, thus without any intermediate links, including in courtrooms, of course, without the possibility of editing the data contained therein. This will accelerate the establishment and verification of recidivism. Within the framework of the institutions located in the general part, a system signaling the existence of conditions for the issuance of a combined sentence, correlated with the relevant procedural and executive regulations (*de lege lata*, the court should examine the prerequisites for the issuance of a combined sentence *ex officio*) seems to be more complex. This tool should also be equipped with the option of creating drafts of joint sentences. This would significantly facilitate work in the extremely complicated conditions of regulation of this institution. This tool would undoubtedly contribute to the optimization of convictions and offset the costs of executing sentences from the very beginning. The institution of electronic surveillance, possible to be adjudicated as a protective measure, is also being actualized in substantive law. Here it becomes potentially possible to use the latest technology used in this field.

As for the special part, first of all, it is also important to have in mind here the new technologies that are entering society and at the same time implying new crime phenomena. These are relatively new behaviors of perpetrators who use technology as a causal tool for their acts. The palette of this type of behavior is quite large. Just for the sake of illustration, it is worth pointing out that it already seems necessary to criminalize, for example, fraud carried out through automated store checkouts as a separate type of criminal act. However, the field for the use of technological achievements also exists here on several other levels. The multitude of these behaviors, however, requires a separate, detailed study.

Among other demands, it is worth pointing out, moreover, the need to create a module for various types of court announcements, which would not be limited to the area of a single court or district. After all, as time goes by, the traditional press, i.e. the paper press, in which such announcements are usually made, will lose importance. The issue, however, does not only involve announcements. The issue also concerns the specific criminal measure of making a judgment public (Art. 39[8], 215 of the Criminal Code). The same is true of the institution of apology to the victim, used with probationary measures (Art. 67 § 3, 72 § 1 item 2 of the Penal Code).

## Conclusions

Criminal proceedings are characterized by the lowest degree of electronization among court procedures.[21] Two elements emerge as priority areas in the implementation of new technologies into criminal proceedings.[22] The first is the full and ongoing digitization of files, both at the pre-trial stage and at both stages of jurisdictional proceedings (exploratory and executive). A drawback of the activities currently underway is the failure to define a clear threshold from which the full digitization of files would take effect. Such a move, i.e., indicating in the law a cut-off date for the introduction of full digitization, would, on the one hand, intensify the efforts of the authorities responsible for its implementation, and, on the other hand, avoid logistical chaos and the maintenance of mixed files, consisting in part of traditional (paper) documents and electronic documents. The second priority area is the introduction of electronic communication of courts and prosecutors with parties to proceedings. This aspect has already been recognized, as one of the draft amendments to the Code of Criminal Procedure provides,[23] that prosecutors, attorneys, legal advisors and representatives of the Attorney General's Office will be able to send letters to the court via an information portal. Although this is another step in the right direction, it is a half-hearted solution at best. This is because it does not apply to all parties to the proceedings. What's more, it covers only some of the pleadings, in the form of motions for a statement of reasons for a judgment, appeals (appeals and complaints), responses to appeals and other letters drafted in appeal proceedings. It is to be implemented in a cautious manner, for there is concern about disrupting proceedings. The assumption is that the letter, once sent through the information portal, will go to a specific case. It will then not be necessary to send the letters by traditional mail, or to forward them through the registry office to the relevant court department.

Once these priority areas have been fully implemented, we will face the next challenge, albeit a more important one because it is of systemic importance. It will be the creation of a universal electronic justice module, so to speak, "linking" the activities of all bodies involved in the criminal process. Then an internal information system of justice will be created. Its closer details can, of course, be presented only after the first two priority elements are

[21] J. Kosowski, *Directions*..., p. 151.

[22] See: B. Pilitowski, B. Kociołowicz-Wisniewska, Z. Branicka, Courts Accessible Through the Internet: Opportunities and threats, Toruń 2020, https://courtwatch.pl/wp-content/uploads/2020/12/FCWP_raport_sady_dostepne_przez_internet_szanse_i_zagrozenia.pdf.

[23] Draft Law on Amendments to the Law – Code of Criminal Procedure and Some Other Laws, UD143, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy---kodeks-postepowania-karnego-i-ustawy---prawo-o-ustroju-sadow-powszechnych.

in place. As a last resort, it seems, the legislature will have to face the challenge of digitizing the archives, that is, the files of completed cases. This, of course, requires a huge investment in storage equipment as well. A parallel, but necessary, activity is already the cyclical adjustment of IT systems, training in their use and ensuring IT security. As the electronic development of criminal proceedings progresses, it will also be necessary to create a special system of assistance for the digitally excluded.

The process of implementing new technologies into criminal proceedings in the broadest sense is therefore a highly complex issue. It has many areas of commonality between the various bodies that appear at its various stages. It is also structurally complex, as the needs of these bodies are sometimes different. In some ways, the need for the necessary technological implementations was forced by the COVID-19 pandemic, forcing courts and penitentiary units and other authorities to at least cooperate in this regard. However, there were also issues that caused controversy at the time, such as e-custody.[24] However, the pandemic has undoubtedly nevertheless broken the previous, rather distanced, thinking about new technologies in judicial proceedings. It can also be pointed out that on the needs side, the nature of technological implementations will be two-way. It will be internal in terms of the needs of the authorities. If, on the other hand, it concerns forms of communication between the actors involved in the process, and especially with the parties to it, then it will be a package of implementations of an external nature. All of this needs to be taken into account during the work on technical facilities, whether undertaken as part of a universal system or as part of individual streamlining implementations. However, this is an inevitable process, and it is only a matter of time when and how it will occur. It is also apparent that the standard of digitization is at a much higher level in pre-trial proceedings than in later stages of the proceedings. Any implementation, on the other hand, should be carried out using previous, albeit still meager, experience, with the indispensable support of legal, forensic and criminological knowledge. This will help to set the right directions and areas of implementation. The challenge, so to speak, is the interface of social, humanistic and technical knowledge. The main technical operation must deal with data in the form of various types of information. It is the production of information, its collection and then its various types of use that is essential for the proper execution of justice. It would seem that the easiest area to introduce is the use of such technological advances as digitization of files or pleadings. This, by the way, is a process of fundamental importance. However, it is currently very sluggish, and so far it is difficult for a citizen to communicate, for example, with a court via e-mail, or to review a digitized file. Incidentally, email correspondence or the use of pdf files can hardly be considered new technologies anymore.

[24] J. Mierzwińska-Lorencka, E-Trial in Criminal Cases in Connection with Shield 4.0 Regulations, LEX 2020.

Still, they are almost absent from criminal proceedings. It is gratifying to see that we have moved away from the raft that until recently linked documents within individual file volumes. We have also (partially) achieved the standard of recording hearings, computerized preparation of minutes and e-protocols in misdemeanor proceedings. However, there is still a lot of work to be done in this field, which gives rise to the assertion that we are still (and have been for almost several decades) at the threshold of the path of technological implementations. A completely separate issue, however, is the question of adequately preparing the staff to handle such facilities and the public itself to take full advantage of these tools, which will gradually be dedicated to them. All these aspects and related tasks have a certain feature in common, which at the same time, it can be assumed, also significantly delays the process of entry of technology into criminal proceedings. These are high financial expenditures.

**Technologia a postępowanie karne – próba usystematyzowania problematyki i określenia głównych kierunków wdrażania**

**Abstrakt**

Artykuł obejmuje problematykę związaną z wdrażaniem nowych technologii w ramach szeroko rozumianego procesu karnego. Autor koncentruje rozważania na obecnych potrzebach polskiego wymiaru sprawiedliwości, znanych mu z autopsji. Wskazuje priorytetowe obszary wdrożeń technologicznych, obszary dalszych działań oraz kierunki innych potencjalnych płaszczyzn zmian. Przez ten pryzmat analizuje proces karny na wszystkich etapach jego trwania – od postępowania przygotowawczego po postępowanie karne wykonawcze – a ponadto zakres koniecznych zmian w prawie karnym materialnym.

**Słowa kluczowe:** technologia, procedura karna, informatyzacja, cyfryzacja, elektronizacja, kierunki działań.

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Jakub Stelina*

# On Persons "Not Authorized to Adjudicate" as Referred to in the 2024 Acts Concerning the Constitutional Tribunal

**[O osobach „nieuprawnionych do orzekania", o których mowa w ustawach dotyczących Trybunału Konstytucyjnego z 2024 roku]**

**Abstract**

On September 13, 2024, the *Sejm* of the Republic of Poland adopted two new acts regulating the status of the Polish constitutional court – the Constitutional Tribunal Act and the Act on Provisions Implementing the said Act. Neither of these acts entered into force because the President of the Republic of Poland, before signing them, referred the acts to the Constitutional Tribunal under the so-called preventive control procedure. One of the declared goals of the laws in question is to fix up the constitutional court, in particular to solve the problem of the so-called "persons not authorized to adjudicate" – people elected in December 2015 (including people who replaced them later) to fill the previously already filled positions. The Author analyzes the situation that led to the recognition of some Constitutional Tribunal judges as defectively appointed and comes to the conclusion that there do not exist grounds for qualifying them as such. However, the sharp political dispute that accompanies the current situation can only be resolved if a broad political consensus is reached, which requires making an amendment to the Constitution.

**Keywords:** Constitutional Tribunal, judges of the Constitutional Tribunal, persons not authorised to adjudicate.

## I

On September 13, 2024 *Sejm* (the first chamber of the Parliament) of the Republic of Poland adopted two new acts providing for the status of the Polish constitutional court – the Constitutional Tribunal Act and the Act on Provi-

* **Jakub Stelina** – DSc, Professor of Law (Titular), University of Gdańsk (affiliation); judge of the Constitutional Tribunal; https://orcid.org/0000-0003-2871-1413; jstelina@prawo.ug.edu.pl / prof. dr hab. nauk prawnych, Uniwersytet Gdański (afiliacja), sędzia TK.

sions Implementing the aforementioned one.[1] Neither of the acts entered into force since the President of the Republic of Poland, instead of signing them, referred the acts to the Constitutional Tribunal (TK), alleging inconsistency of a number of provisions contained therein with the Constitution. Substantive proceedings are currently underway to assess the allegations made by the President against both acts.[2] The purpose of this study is not to evaluate the motion made by the head of state, nor to provide a comprehensive analysis of the new schemes regarding the Constitutional Tribunal, adopted by the Parliament. The Author intends to focus only on one problem, important for the operation of the Tribunal, the proposed solution of which problem has been dealt with by the acts questioned by the President. It must be noted that the declared goal set by the political authorities for the new laws is to fix the constitutional court, being accused by some legal circles and certain political forces, of permanent dysfunctionality resulting from the fact that the Tribunal includes people not authorized to adjudicate. Consequently, judgments issued by this court with the participation of such persons are affected by a legal defect. This is tantamount to actual non-recognition of the Constitutional Tribunal by the political authorities, and results, *inter alia*, in the government not publishing tribunal judgments despite the legal obligation to do so, in the resignation from electing new judges to replace those whose terms have expired, and – recently – in cutting down financial resources earmarked for the judges' remuneration.

One of the corrective measures is therefore aimed at solving the problem of "persons not authorized to adjudicate", as sitting on the Constitutional Tribunal. Such purpose is believed to be achieved by the special regulations that directly apply to such persons. These are Articles 10 and 15 of the Act on Provisions Implementing the Constitutional Tribunal Act, which state that:

- judgments of the Constitutional Tribunal adopted by an adjudicating panel in which a person not authorized to adjudicate was sitting are invalid and do not have legal effects, including those specified in Art. 190 sections 1 and 3 of the Constitution.[3] Procedural activities performed under proceedings before the Tribunal, which were completed by such judgments, require repetition. However, court judgments and final administrative decisions, valid on the date of provisions implementing the Constitutional Tribunal Act entering into force, and issued in individual cases under the legal status formed by the judgments of the Tribunal that were declared invalid, remain in force. Within 1 month, the Court shall draw up and make public a list of invalid judgments

[1] Further on quoted as the „Provisions Implementing the Constitutional Tribunal Act".
[2] File reference number: Kp 3/24.
[3] The rules provide that judgments of the Constitutional Tribunal are ones of universally binding force, are final, and enter into force on the date of their announcement.

(Art. 10). Nevertheless, in some cases, judgments issued by unauthorized persons actually remain in force. These are situations when proceedings before the Tribunal were discontinued for formal reasons and where a decision was taken under the so-called preliminary review of constitutional applications and complaints. If the decision to discontinue or refuse to accept the case concerned a constitutional complaint, the complainant may re-submit the constitutional complaint within 3 months from the date of entry into force of the provisions implementing the Constitutional Tribunal Act;[4]

- persons that are not authorized to adjudicate will not be able to exercise the right to leave the service early (i.e. to retire as judges). Provisions implementing the Constitutional Tribunal Act state, in their Art. 15, that a judge of the Tribunal whose term of office began before the date of their entry into force may, within one month, submit to the President of the Tribunal a declaration that due to the introduction of new rules for the performance of the duties of a judge of the Tribunal during his/her term of office, he or she is retiring. However, this provision does not apply to persons who are not authorized to adjudicate.

As can be seen, the problem of the status of persons considered unauthorised to adjudicate is becoming one of the main problems related to the functioning of the Constitutional Tribunal in its current shape, therefore further attention will be devoted to the issue of whom the legislator considers a "person not authorised to adjudicate" in the Constitutional Tribunal and where the idea of distinguishing such a conceptual category comes from.

## II

The starting point must therefore be to clarify the concept of the "person not authorized to adjudicate." Pursuant to Art. 10 sec. 1 of the provisions implementing the Act on the Constitutional Tribunal, such a person is a person appointed to the position of a judge of the Tribunal in violation of the provisions of the Act of 25 June 2015 on the Constitutional Tribunal[5] and judgments of the Tribunal of December 3, 2015[6] and of December 9, 2015[7], and also a person elected to replace him or her. To understand the origins of this regulation,

[4] The proposals are discussed in detail by P. Uziębło, *Co dalej z Trybunałem Konstytucyjnym? Refleksje na gruncie projektu ustawy wprowadzającej ustawę o Trybunale Konstytucyjnym* [w:] *Ad quem*. Księga jubileuszowa z okazji 70. urodzin Profesora Jerzego Zajadło [What's Next for the Tribunal? Reflections on the draft act implementing the Constitutional Tribunal Act (in:) *Ad Quem*: A Jubilee Book to Commemorate the 70th Birthday of Professor Jerzy Zajadło], collective work, K. Zeidler, S. Sykuna i J. Kamień (eds), Gdańsk–Warszawa 2024, pp. 781ff.

[5] Journal of Laws of 2016, item 293 and of 2018, item 1077.

[6] K 34/15 with a gloss by M. Wiącek, „Przegląd Sejmowy" ['Parliamentary Review'] 2016, 2, pp. 124ff.

[7] K 35/15.

we must go back to the year 2015, i.e. the beginning of what is now referred to as the "Polish Constitutional Tribunal crisis."[8]

On June 25, 2015, the *Sejm* of the 7th term adopted a new Act on the Constitutional Tribunal. The draft of this act, developed by several former judges of the Constitutional Tribunal[9], was submitted to the *Sejm* in mid-2013, almost two years before its adoption.

Originally, the work was carried out very slowly, but it accelerated rapidly after the loss of the presidential elections in May 2015 by the then President of Poland being part of the political camp ruling the country at that time. It can therefore be said that the actual legislative process before both houses of the parliament was carried out at an express pace and was completed within a month. In its original version, the draft act on the Constitutional Tribunal took into account the demands of the legal community for the establishment of a new procedure of appointing judges of the constitutional court. The idea was to change the current system to allow nomination of candidates for judges by various legal bodies, e.g. university law faculties or a bar association, and not only – as before – by the Presidium of the *Sejm* or a group of 50 deputies to it; consequently, the procedure based entirely on the political mechanism was to be broadened to include elements of civic (social) participation. Instead, at the stage of the hastened legislative work, this idea was dropped, and a return to the previous scheme was undertaken, that of a purely political procedure for selecting judges.

At the same time, the then president-elect's appeal not to introduce any fundamental changes of a political nature before the parliamentary elections scheduled for October 2015, so as not to generate problems later on, was ignored. And since the amendment to the Act on the Constitutional Tribunal was undoubtedly an important political change, pushing the bill through in an accelerated way just before power being handed over violated a certain democratic standard. The situation could be compared to one when a manager leaving his position with a company grants himself some additional benefits. What was, however, of key importance for the ensuing political crisis was the setting, under a transitional rule (Article 137), a deadline of 30 days from the date of entry into force of the Act for submitting candidates to the positions of

[8] The issue has been discussed more broadly by, among others, A. Bień-Kacała, *Konstytucjonalizm nieliberalny w Polsce po 2015 roku* [w:] Sądownictwo konstytucyjne: teoria i praktyka [Non-Liberal Constitutionalism in Poland after 2015 (in:) Constitutional Judiciary: Theory and practice], vol. 3, collective work], M. Granat (ed.), Warszawa 2020, pp. 43ff, L Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen*? [*Disabling the Constitutional Court in Poland*?] (in:) Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015, ed. A. Szmyt, B. Banaszak, Gdańsk 2016, pp. 63ff, M. Muszyński, *Anatomia „spisku". Analiza prawna procesu wyboru sędziów Trybunału Konstytucyjnego jesienią 2015 roku* [The Anatomy of 'Conspiracy': A legal analysis of the process of election of Constitutional Tribunal judges in autumn 2015], „Przegląd Sejmowy" ['Parliamentary Review'] 2017, 2, pp. 75ff.

[9] M. Jackowski, *Shall Constitutional Crisis in Poland Influence Changes of the Judicial Review Paradigm*? [in:] Constitutional Justice and Politics, R. Arnold, A. Bröstl, G. Dobrovičová (eds), Košice 2020, p. 162.

those Constitutional Tribunal judges whose terms ended in 2015. The idea was thus to create a legal possibility for the *Sejm* ending its term to elect new judges.

The new Act on the Constitutional Tribunal was signed by the outgoing President despite appeals addressed to him not to do so but to verify whether the Act was consistent with the Constitution by submitting it to the Constitutional Tribunal (these concerns were – as it later turned out – justified, because in December 2015 the Constitutional Tribunal ruled that the law was, in fact, partially inconsistent with the Constitution). Needless to say, refusing to sign the Act would delay its entry into force, hence the President did not take advantage of these opportunities and signed the piece of legislation. It entered into force on August 30, 2015.

After the new Constitutional Tribunal Act entered into force on October 6, 2015, five new judges were elected to fill the seats made vacant on November 6, December 3 and 9 of that year. The new judges were nominated by the outgoing parliamentary majority, which lost the elections at the end of October. This meant violation of the Rules of Procedure of the *Sejm*, which – in accordance with the Constitution – determine the procedure for the work of the *Sejm*.[10] The Regulations state that candidates must be nominated 30 days before a judge's position becomes vacant. In the meantime, the provisions of the new Act, including its Art. 137, were appealed against to the Constitutional Tribunal, which passed the ruling on December 3, 2015 (case K34/15).

In accordance with the Constitution, new judges of the Tribunal are supposed to take an oath before the President of the Republic of Poland, which, however, was not taken.[11] After the convention of the *Sejm* of the 8th term, the new government coalition formed as a result of the October elections, "annulled" the election of five judges of October 6 by the resolution of November 25, 2015 , and appointed its candidates on December 2 of that year. On December 3, even before the start of the hearing scheduled for that day before the Constitutional Tribunal in case K 34/15, four of them were sworn in.

The political context of the situation was quite obvious – the outgoing government wanted to maintain a majority in the Tribunal for as long as possible[12], which the new authorities prevented. This is how the Constitutional Tribunal crisis began, lasting to this day and involving legal doubts as to the status of

[10] M. Muszyński, *Anatomia*..., p. 81.

[11] R. Balicki, *Odpowiedzialność konstytucyjna Prezydenta RP w związku z brakiem przyjęcia ślubowania od wybranych sędziów Trybunału Konstytucyjnego* [w:] Konstytucjonalizm polski: refleksje z okazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej profesora Andrzeja Szmyta [Constitutional Liability of the President of the Republic of Poland in Connection with the Failure to Accept Oath of Selected Judges of the Constitutional Tribunal (in:) Polish Constitutionalism: Reflections on the occasion of the 70th anniversary of Professor Andrzej Szmyt birth and 45th anniversary of academic work], collective work, A. Gajda, K. Grajewski, A. Rytel-Warzocha, P. Uziębło and M. Wiszowaty (eds), Gdańsk 2020, pp. 945ff.

[12] The actions that were taken to that end, i.e. the accelerated legislative procedure and the election of judges in advance, are sometimes referred to as the "original sin" that triggered the constitutional crisis (L. Garlicki, *Die Ausschaltung*..., p. 65).

some judges. Since the Constitution provides for a fifteen-member composition of the Tribunal, according to some lawyers, after the election of judges on October 6, 2015, that very situation was achieved, and therefore persons elected on December 2 of that year by the *Sejm* of the 8th term became surplus judges, elected illegally. After the judgment of the Constitutional Tribunal of December 3, 2015 (K 34/15), a view became widespread that the *Sejm* of the 7th term had excessively elected only two judges who were to take up their positions in December 2015, and that the Tribunal was composed of three people who were not authorized to adjudicate since they occupied previously properly filled seats (they are contemptuously dubbed "judges-doubles" by some). In the years that followed, two of the judges died, yet the new judges elected to replace them are also considered to be ones "unauthorized to adjudicate." In such a way, three judges were recognized as such persons, and from December 3, 2024 – after the expiry of the term of office of one of them – two judges.

## III

However, the concept of "persons not authorized to adjudicate", as adopted under the provisions implementing the Constitutional Tribunal Act is not undisputed. Considering the context of the discussed problem, the axis of the dispute runs primarily along the lines of political divisions. From the point of view of these considerations, however, the legal context is of key importance, and this seems to indicate the need to consider two issues of capital importance for the discussed problem.

## IV

The first is related to the legal basis for recognizing some judges of the Constitutional Tribunal as persons not authorized to adjudicate. The above-mentioned judgment of the Constitutional Tribunal of December 3, 2015 (K 34/15) cannot be viewed as such authorisation The Tribunal then ruled, among other things, which way of understanding the provisions on the appointment of judges at the turn of the parliamentary term was consistent with the Constitution, and in particular, the *Sejm* of which term was entitled under the Constitution to elect new judges of the Constitutional Tribunal. It follows from this judgment that new judges of the Tribunal may be elected by the *Sejm* of the term during which the vacancy has occurred (or the *Sejm* of the next term, never the preceding one). Although the judgment concerns specific transi-

tional provisions, and therefore specific facts of the case, the constitutional principle derived by the Tribunal is actually one of a general value. In the specific situation of autumn 2015, the terms of office of three judges expired on November 6 of that year, and the new term of office of the *Sejm* began on November 12, as for that very day the first meeting of the parliament elected on October 25 was convened. And thus, according to the judgment K 34/15, three judges could be elected to the seats vacated in November by the *Sejm* of the 7th term, which is from where the concept of the "three doubles" derives its "legitimacy".

The problem, however, is that the judgment in question could not refer to the analyzed situation, and even less could it state who was and who was not a judge of the Constitutional Tribunal. Apart from the fact that the Tribunal made the competence of the *Sejm* to elect judges of the Constitutional Tribunal dependent on an event that is moveable, because it is connected with the President's decision (the term of office of the new *Sejm* could begin between October 26 and November 26, 2015), it should be noted that that the Constitutional Tribunal's judgments: firstly, have the *ex nunc* force, i.e. are valid for the future (we know now how to proceed in similar situations henceforward), secondly – they do not concern individual cases, so they do not verify activities of individual and specific nature (this was confirmed by the Tribunal itself in its decision of January 7, 2016).[13] The above said leads us to the conclusion that either all persons elected to the Constitutional Tribunal by the outgoing *Sejm* were appointed correctly (which means that there were five unauthorized persons in the Constitutional Tribunal),[14] or all these people were elected illegally (as it was interpreted at that time), so there have never been (nor currently are) members of the Constitutional Tribunal unauthorized to adjudicate. Of course, the very act of appointing persons to the Constitutional Tribunal by the *Sejm* of the 7 term in October 2015 cannot be questioned, but a problem may arise regarding the effectiveness of that election. After the judgment K 34/15, we are aware that a resolution on the election of a judge to the Constitutional Tribunal may be invalid, as it was assumed that the election by the *Sejm* of a specific term of persons to the Constitutional Tribunal to fill seats vacated in the next term of Parliament may be invalidated. However, before December 3, 2015, the situation was different, the new parliamentary majority found that the election of all judges made on October 6, 2015 was invalid because it simply interpreted the provisions differently than the Constitutional Tribunal did in the judgment K 34/15. Thus the problem can be essentially reduced to the issue of the validity of the resolutions of the *Sejm* of October 6, 2015, in which the *Sejm* of the outgoing term elected judges to the positions vacant on November 6, December 3 and December 9, 2015.

[13] U 8/15.

[14] Such a position is represented by, *inter alia*, P. Uziębło, *Co dalej*..., p. 782.

The key question is how many of these resolutions were valid. In fact, three different interpretations conflicting with one another may be proposed: a) all the resolutions were valid, which means that as of December 2015 there were as many as five people in the Tribunal who were not authorized to adjudicate, b) the resolutions regarding the filling of positions vacated in November 2015 were valid, which means that since December 2015, three people not authorized to adjudicate sat on the Tribunal, c) all those resolutions were invalid, meaning that since December 2015, there have been no persons in the Tribunal that would be not authorized to adjudicate, so all judges of the Constitutional Tribunal are appointed in accordance with the law.

As observed above, the view assuming the existence of three unauthorized persons has become widespread, which was also confirmed in the case law of the European Court of Human Rights. The basis for such a view is, of course, the already cited judgment of the Constitutional Tribunal of December 3, 2015 (ref. number K 34/15). However, for reasons quoted above, this judgment does not apply to the case in question, and law does not provide for any procedure to verify actions taken by the *Sejm* in respect of the election of judges. In such a situation, nothing else but reference to the practice followed at that time should be done, including the stance taken by various entities involved in the electoral procedure (the *Sejm* and the President of the Republic of Poland). Since on December 2, 2015, the *Sejm* elected new judges who were then sworn in by the President of the Republic of Poland, took up judicial duties and were included in the Constitutional Tribunal, it should be considered, despite some doubts, that they have obtained the status of full-fledged judges of the Constitutional Tribunal. And *vice versa* – if the President had not changed in 2015 or the existing government had prolonged its parliamentary and governmental mandate, all the people elected on October 6, 2015 – even though some of them "as spare ones" – would have taken up their duties in the Constitutional Tribunal, with nobody questioning it.

For these reasons, I believe that there are no persons in the Constitutional Tribunal who are not authorized to adjudicate, so it is unnecessary to regulate their status in the provisions implementing the Constitutional Tribunal Act. This does not mean, however, that the case should be considered definitively closed. On the one hand, a sharp political dispute actually precludes the adoption of a solution that would gain universal approval. On the other hand, the personal context must not be ignored, i.e. the situation of people who were elected to the Tribunal on October 6, 2015, and whose election was subsequently invalidated. In my opinion, solutions should be proposed that will somehow compensate for the harm those people have suffered.[15]

[15] A proposal taking into consideration that aspect of the discussed problem has been presented by me in the paper *Kryzys wokół Trybunału Konstytucyjnego – politycy zepsuli, politycy powinni naprawić* [The Constitutional Court Crisis: Once caused by politicians, it should be also fixed by them], www.rp.pl.

## V

The other of the two issues mentioned above raised concerns about the status of persons considered unauthorized to adjudicate in the Constitutional Tribunal. The provisions that implement the Constitutional Tribunal Act do not provide a clear answer in this respect. On the one hand, their judicial status is questioned because these people were appointed to the Tribunal illegally. Therefore, as one might assume, if they are not authorized to adjudicate, they are not judges, either. On the other hand, the legislator expressly excluded their right to leave service under extraordinary procedure pursuant to Art. 15 provisions introducing the Constitutional Tribunal Act. If the right to leave (under the judge retirement scheme) applies only to judges, it means that people who do not have such a status cannot take advantage of the right. Then why were "persons not authorized to adjudicate" expressly deprived of the right to retire as judges, unless only because they are judges after all! It is really difficult to understand that inconsistency of the legislator. In this way, we come to the conclusion that the provisions introducing the Constitutional Tribunal Act created – unknown to the Constitution – a group intermediate between full judges of the Constitutional Tribunal and non-judges (i.e. all other people). That group includes judges who are deprived of the right to perform judicial functions. I guess it has little to do with logic.

## VI

The considerations made so far lead to the conclusion that the concept of "persons not authorized to adjudicate" in the Constitutional Tribunal raises a number of doubts, both from the point of view of its legal basis and logic. Therefore, it does not seem that the solutions proposed in that respect by the provisions implementing the Constitutional Tribunal Act could contribute to solving the crisis around the Polish constitutional court. They are likely to find the listening ear only with part of the legal and – even more importantly – political circles. As I attempted to present it above, this crisis was based on political reasons, hence it can only be alleviated by a broad political consensus on the Constitutional Tribunal. And this would require changing the Constitution, which is currently impossible,[16] all the more that the conflict is bound to escalate in the near future. As announced by the Marshal (Speaker) of the *Sejm*, the judicial positions vacant since the end of 2024 will not be filled with new people until the autumn of 2025 when, with the change of the President, the political environment will also change to become – as some believe – one

[16] J. Stelina, *Kryzys...*, *ibid.*

that will favour the current parliamentary majority. and its ideas concerning the Constitutional Tribunal. It should thus be emphasized that any legal solution proposed to put an end to the Constitutional Tribunal crisis must be consistent with the constitutional order. Otherwise, the solutions adopted are bound to be only temporary and will not stand the test of time during subsequent changes within the structure of the political power. And we need solid institutions, including a constitutional court that will guard the values and standards arising from the Constitution. A stable constitutional court is needed, not one changing from election to election, from one reset to another. The Venice Commission goes even further, and in its opinion of December 2024, it strongly opposed the idea of the so-called constitutional reset in the case of Poland's constitutional court. It should be noted, however, that in the case of the so-called persons not authorized to adjudicate, the Commission adopted a position – contrary to what the Author tried to present in this study – that such persons are currently members of the Constitutional Tribunal and that they can be removed from it without changing the Constitution, i.e. by means of ordinary legislative changes.[17]

**O osobach „nieuprawnionych do orzekania", o których mowa w ustawach dotyczących Trybunału Konstytucyjnego z 2024 roku**

**Abstrakt**

W dniu 13 września 2024 r. *Sejm* Rzeczypospolitej Polskiej przyjął dwie nowe ustawy regulujące status polskiego sądu konstytucyjnego: ustawę o Trybunale Konstytucyjnym oraz ustawę Przepisy wprowadzające ustawę o Trybunale Konstytucyjnym. Żadna z tych ustaw nie weszła w życie, ponieważ Prezydent RP przed ich podpisaniem skierował je do Trybunału Konstytucyjnego w trybie tzw. kontroli prewencyjnej. Jednym z deklarowanych celów przedmiotowych ustaw jest naprawa Trybunału Konstytucyjnego, w szczególności rozwiązanie problemu tzw. „osób nieuprawnionych do orzekania" – osób wybranych w grudniu 2015 r. (w tym osób, które je później zastąpiły) na obsadzone wcześniej stanowiska. Autor analizuje sytuację, która doprowadziła do uznania niektórych sędziów Trybunału Konstytucyjnego za wadliwie powołanych – i dochodzi do wniosku, że nie ma podstaw do zakwalifikowania ich w ten sposób. Ostry spór polityczny towarzyszący obecnej sytuacji może być jednak rozwiązany jedynie w przypadku osiągnięcia szerokiego konsensusu politycznego, co wymaga dokonania zmiany Konstytucji.

**Słowa kluczowe:** Trybunał Konstytucyjny, sędziowie Trybunału Konstytucyjnego, osoby nieuprawnione do orzekania.

[17] Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two draft laws on the Constitutional Tribunal, adopted by the Venice Commission at its 141st Plenary Session (Venice, 6–7 December 2024), thesis 70 (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD[2024]035-e).

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Krzysztof Grzesiowski*

# *Sententia Non Existens*: Another voice in the debate on non-existent judgments

**[*Sententia non existens*, czyli kolejny głos w dyskusji dotyczącej wyroków nieistniejących]**

**Abstract**

A judicial judgment constitutes a highly formalized procedural act, where compliance with statutory requirements ensures its correctness, i.e., its validity. Procedural violations in the issuance process, along with substantive or formal errors within the judgment, may serve as grounds for appeal or rectification. In certain cases, defects may be so severe that the judgment cannot be considered to exist at all (*sententia non existens*). The issue of non-existent judgments has long been a source of substantial debate and controversy within legal doctrine and jurisprudence, recently reignited, with heightened urgency, due to the CJEU's case law. Hence, there arises a need to contribute to this crucial and complex discourse.

**Keywords:** non-existent judgment, *sententia non existens*, nullity of proceedings, validity of judgment.

## Introduction

A judgment[1] as a legal and procedural act is a highly formalised action regulated in detail by the provisions of the Code of Civil Procedure.[2] The observance of all statutory requirements determines the correctness, i.e. non-defectiveness, of this act. Defects in the procedure of issuing a judgment, as well as mistakes in the content or form of a judgment may be the basis for its

* **Krzysztof Grzesiowski** – PhD, Assistant Professor at the Faculty of Law and Administration, University of Szczecin (affiliation); https://orcid.org/0000-0003-3287-7790; krzysztof.grzesiowski@usz.edu.pl / dr nauk prawnych, adiunkt na Wydziale Prawa i Administracji, Uniwersytet Szczeciński (afiliacja).

[1] For more on judgments see K. Grzesiowski [in:] System postępowania cywilnego. Orzeczenia sądowe, vol. 4, A. Góra-Błaszczykowska, P. Osowy (eds), Warszawa 2025, chapter 3.1.

[2] Dz.U. z 2024 r., poz. 1568 ze zm.

appeal or rectification.[3] In specific situations, the defects may be so serious that there can be no judgment at all (*sententia non existens*). The non-existence of a judgment is the most serious 'sanction'[4] resulting from the violation of the rules constituting this conventional action (the so-called rules of conventionalization indicating the constitutive elements for a given conventional action, the observance of which is a necessary condition for the attribution of the sense of performance of a particular conventional action to certain actions).[5] Indeed, a non-existent judgment has no legal effect because – in the procedural sense – it does not exist. At the outset of the considerations, it should be emphasised that the provisions of the Code of Civil Procedure do not use the concept (sanction) of a non-existent judgment, and the concept is entirely an output of the science of procedural law and the jurisprudence of the Supreme Court. The lack of statutory regulation has contributed to the emergence of many, sometimes contradictory views and has made it difficult to build a coherent (universally accepted) concept, which has a negative impact on judicial practice and poses a significant threat to the legal security of citizens, the stability of the legal system and the permanence of final judgments.[6] Despite many years of development of the Polish procedural science, there is no clear concept of the status of non-existent judgments and there is still a serious problem with determining the scope of this concept, as well as with determining the proper procedure for challenging judgments affected by this defect (sanction). It is even pointed out in the doctrine[7] of procedural law that the institution of *sententia non existens* reflects a construction rejected in the process of historical transformations of procedural law. The evolution of the institution of nullity *ex lege* towards the recognition of the invalidity of proceedings as a defect justifying the challenge to a judgment, constitutes

[3] The provisions of the Code of Civil Procedure do not provide for the invalidity of judgments, but only for the invalidity of proceedings (Article 379 of the Code of Civil Procedure) and only in this sense, as a certain 'mental shortcut', it is possible to speak of an 'invalid judgment' as a judgment issued in proceedings affected by invalidity (Resolution of the Supreme Court of 26.09.2000, III CZP 29/00, Legalis). For the most extensive recent discussion of the invalidity of civil proceedings, see T. Zembrzuski, Nieważność postępowania w procesie cywilnym, Warszawa 2017.

[4] According to H. L. A. Hart's conception of *secondary rules* (H. L. A. Hart, Pojęcie prawa, transl. J. Woleński, Warszawa 1998, pp. 54–57), the 'announcement of nullity' does not function as an ailment sanction as in the case of *primary* rules, but is part of the secondary rules ('sanction of nullity' even determines the existence of secondary rules).

[5] S. Czepita, *Zagadnienie orzeczeń nieistniejących w postępowaniu cywilnym w świetle koncepcji czynności konwencjonalnych* [in:] Konwencjonalne i formalne aspekty prawa, Studia i materiały, S. Czepita (ed.), Szczecin 2006, 629, p. 139; S. Czepita, G. Szacoń, *Teoretyczne i praktyczny aspekty zagadnienia tak zwanych wyroków nieistniejących w procesie cywilnym* [in:] Proces cywilny. Nauka–kodyfikacja–praktyka. Księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi, P. Grzegorczyk, K. Knoppek, M. Walasik (eds), Warszawa 2012, p. 99.

[6] It is pointed out in journalism that the concept of non-existent verdicts may lead to 'legal anarchy' (see T. Pietryga, 'Dariusz Barski i nieuznany wyrok. demokracja walcząca przeszła od słów do czynów', „Rzeczpospolita" 2024, Sept. 29, https://www.rp.pl/opinie-prawne/art41212301-tomasz-pietryga-dariusz-barski-i-nieuznany-wyrok-demokracja-walczaca-przeszla-od-slow-do-czynow [accessed: 01.11.2024]).

[7] T. Zembrzuski, Nieważność..., p. 201.

a negation of the construction of a non-existent judgment.[8] The issue of non-existent judgements has been causing numerous disputes and controversies in the doctrine[9] and judicature[10] for years. Recently, they have been revived

[8] *Ibid*.

[9] See in particular: B. Bladowski, *Orzeczenia nieistniejące w cywilnym postępowaniu odwoławczym*, NP 1991, 1–3, pp. 79–85; Ł. Błaszczak, *Orzeczenia nieistniejące* (sententia non existens) *w sądowym postępowaniu cywilnym* [in:] Wokół problematyki orzeczeń, Ł. Błaszczak (ed.), Toruń 2007, p. 7; Ł. Błaszczak, *Wybrane przypadki orzeczeń nieistniejących* (sententia non existens) *w procesie cywilnym na przykładzie orzecznictwa Sądu Najwyższego*, „Radca Prawny" 2012, 130, suppl., p. 2; W. Broniewicz, Postępowanie cywilne w zarysie, Warszawa 1996; W. Broniewicz, A Marciniak, I. Kunicki, Postępowanie cywilne w zarysie, Warszawa 2016; S. Czepita, *Zagadnienie orzeczeń nieistniejących w postępowaniu cywilnym w świetle koncepcji czynności konwencjonalnych* [in:] Konwencjonalne i formalne aspekty prawa, S. Czepita (ed.), Studia i materiały, Szczecin 2006, 629, p. 139; S. Czepita, G. Szacoń, *Teoretyczne i praktyczne aspekty zagadnienia tak zwanych wyroków nieistniejących w procesie cywilnym* [in:] Proces cywilny. Nauka–kodyfikacja–praktyka. Księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi, P. Grzegorczyk, K. Knoppek, M. Walasik (eds), Warszawa 2012, p. 99; E. Gapska, *Ewolucja koncepcji orzeczeń prawnie nieistniejących w postępowaniu cywilnym* [in:] Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego, Szczecin–Niechorze, 28–30 Sept. 2007, H. Dolecki, K. Flaga-Gieruszyńska (eds), Warszawa 2009, p. 351; E. Gapska, Wady orzeczeń sądowych w postępowaniu cywilnym, Warszawa 2009; A. Góra-Błaszczykowska, *Nieistnienie orzeczenia – kilka uwag na temat praktycznych konsekwencji uznania orzeczenia za nieistniejące* [in:] Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego, Szczecin–Niechorze, 28–30 Sept. 2007, H. Dolecki, K. Flaga-Gieruszyńska (eds), Warszawa 2009, p. 183; A. Góra-Błaszczykowska, Orzeczenia w procesie cywilnym. Komentarz do art. 316–366 k.p.c., Warszawa 2020; K. Grzesiowski [in:] System postępowania cywilnego. Orzeczenia sądowe, vol. 4, A. Góra-Błaszczykowska, P. Osowy (eds), Warszawa 2025, chapter 3.1; J. Gudowski, Iudex impurus *(sędzia skażony) Wyłączenie z mocy samej ustawy sędziego objętego zarzutem wadliwego powołania lub przejścia na wyższe stanowisko sędziowskie*, PS 2022, 5, p. 7; S. Hanausek, Orzeczenie sądu rewizyjnego w procesie cywilnym, Warszawa 1966; K. Korzan, *Wyroki nieistniejące*, PPiA 1976, 7, Acta UWr., ss. 185–198; J. Jankowski, *Wadliwa postać orzeczenia sądu I instancji w procesie cywilnym*, Pal. 1987, 12, p. 15; K. Markiewicz, *Problem* sententia non existens *na tle orzecznictwa Sądu Najwyższego*, Rej. 2002, 11, pp. 92–117; K. Markiewicz, A. Torbus, *Zagadnienie* 'sententia non existens' *w postępowaniu cywilnym a problem kompetencji do orzekania nieprawidłowo powołanych sędziów sądów powszechnych* [in:] Symbolae Andreae Marciniak dedicatae. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Marciniakowi, J. Jagieła, R. Kulski (eds), Warszawa 2022, p. 329; K. Markiewicz, *Niezawisłość i niezależność sądu jako gwarancja dostępu do ochrony prawnej* [in:] K. Flaga-Gieruszyńska, R. Flejszar, E. Marszałkowska-Krześ (eds), Dostęp do ochrony prawnej w postępowaniu cywilnym, Warszawa 2021; A. Miączyński, *Faktyczne i prawne istnienie orzeczenia w sądowym postępowaniu cywilnym*, ZN UJ, Prace Prawnicze [Legal Works] 1972, 55, pp. 103–118; K. Piasecki [in:] System prawa procesowego cywilnego. Postępowanie rozpoznawcze przed sądami pierwszej instancji, Z. Resich (ed.), Warszawa 1987, vol. 2, pp. 244–247; M. Sawczuk, Wznowienie postępowania cywilnego, Warszawa 1970; W. Siedlecki, *Zaskarżalność orzeczeń w sądowym postępowaniu cywilnym* [in:] Studia z prawa postępowania cywilnego. Księga pamiątkowa ku czci Zbigniewa Resicha, M. Jędrzejewska, T. Ereciński (eds), Warszawa 1985; K. Zaradkiewicz, *Abusive Constitutionalism in Poland: On the self-delegitimisation of the judiciary*, JoMS 2024, 59 (special issue 5), pp. 265–299; F. Zedler, Glosa do uchwały SN z 7 lutego 1997 r. (III CZP 125/96), OSP 1997, 12, 225; T. Zembrzuski, Nieważność postępowania w procesie cywilnym, Warszawa 2017; T. Zembrzuski, Glosa do postanowienia SN z 31 sierpnia 2018 r., I CSK 300/18, OSP 2019/04, p. 34.

[10] See in particular: Decision of the Supreme Court of 27.09.1955, III CR 1029/54, NP 1956 no. 1, p. 126; Judgment of the Supreme Court of 27.02.1964, II CR 226/62, RPEiS 1965, 3; Decision of the Supreme Court of 09.04.1969, II CR 112/68, Legalis; Resolution of the Supreme Court of 17.10.1978, III CZP 62/78, Legalis; Judgment of the Supreme Court of 18.04.1979, III CRN 60/79, Legalis; Resolution of the Supreme Court of 07.02.1997, III CZP 125/96, Legalis; Resolution of the Supreme Court of 26.09.2000, III CZP 29/00, Legalis; Resolution of the Supreme Court of 13.03.2002, III CZP 12/02, Legalis; Decision of the Supreme Court of 07.02.2003, III CZP 94/02, Legalis; Decision of the Supreme Court of 17.11.2005, I CK 298/05, Legalis; Decision of the Supreme Court of 27.06.2012, IV CZ 39/12, Legalis; Judgment of the Supreme Court of 20.12.2012, IV CSK 219/12, Legalis; Decision of the Supreme Court of 12.12.2013, III CSK 300/13, Legalis; Judgment of the Supreme Court of 11.12.2014,

with increased force due to the jurisprudence of the CJEU[11] concerning the problem of the rule of law in the Polish justice system in the broad sense. Hence, there was a need to take the floor in this extremely important discussion. The aim of the presented considerations is an attempt to sort out the classes of judgments covered by the notion *of sententia non existens*, which should contribute to preventing legal chaos in the judiciary.

## The Most Important Doctrinal Views on Non-Existent Judgments

Among the many views expressed in the doctrine on the subject of non-existent judgments, it is worth presenting in more detail those positions which have had a significant impact on the shaping of legal and procedural thought in this respect. At the same time, it should be emphasised that the very term 'non-existent judgment', which is also referred to as 'non-judgment' or 'semblance of judgment',[12] is disputed in science. As F. Zedler aptly pointed out, 'there is in fact agreement in doctrine on only one thing, that non-existent judgments in our law exist'.[13]

According to the classical definition by K. Korzan,[14] a non-existent judgment is a judgment that does not comply with formal requirements to the extent depriving it of legal existence, and the criterion distinguishing non-existent judgments from defective judgments is the impossibility to remove the defects of the judgment by any means provided for by procedural law,

SNO 61/14, Legalis; Decision of the Supreme Court of 25.11.2015, II CZ 79/15, Legalis; Decision of the Supreme Court of 26.07.2017, III CZ 25/17, Legalis; Decision of the Supreme Court of 31.08.2018, I CSK 300/18, Legalis; Judgment of the Supreme Court of 07.02.2023, II CSKP 432/22, Legalis.

[11] In its judgment of 06.10.2021. CJEU in Case C-487/19 (theses: 155, 159, 160, 161) indicated that a decision of a court may be deemed 'inexistent' (which corresponds to the institution of *sententia non existens* in the Polish literature on the subject) if it is from the totality of the conditions and circumstances under which the process of appointing a judge was carried out that the appointment was made in flagrant breach of the fundamental norms forming an integral part of the and functioning of the judiciary, and that the correctness of the effect to which the said process led, so that, in the opinion of the individuals, reasonable doubts may have arisen as to the independence and impartiality of the judge, which means that such a judicial decision cannot be regarded as having been handed down by an independent and impartial court previously established by law within the meaning of Art. 19(1), second subparagraph, of the Treaty on European Union.

[12] M. Sawczuk (Wznowienie..., p. 71) alleged that this notion is internally contradictory, because a judgment cannot simultaneously exist ('judgment') and not exist ('non-existence'). This view was agreed with, *inter alia*, by A. Miączyński (*Faktyczne*..., p. 105), who stressed that he used the term because of the accepted practice of its use. These reservations, however, were not shared by, *inter alia*, K. Korzan (*Wyroki*..., p. 189), who reasonably pointed out that the notion of a 'non-existent judgment' refers only to a judgment in the legal sense, and not to a judgment as a factual event. Hence, there seems to be no need, as suggested by some doctrine representatives, supplementing the notion of 'non-existent judgment' with the attribute 'legally' (E. Gapska, *Ewolucja*..., pp. 351 and 352; E. Gapska, *Wady*..., pp. 147 and 148).

[13] F. Zedler, Glosa do uchwały SN z 7 lutego 1997 r. (III CZP 125/96), OSP 1997/12/225.

[14] K. Korzan, *Wyroki*..., pp. 185–198.

neither by way of rectification of the judgment nor by way of appeal measures (ordinary and extraordinary). Among the requirements determining the existence of a judgment, the Author includes:

- issuance of a written judgment by the court in an existing trial,
- identification of the parties,
- resolution of the subject matter of the dispute,
- the announcement of the judgment and, where this is not mandatory, the signing of the judgment by the deciding judges.

According to W. Broniewicz,[15] writing down and signing the operative part of a judgment and its announcement (except in cases when this is not required) are constitutive elements of issuing a judgment. In the absence of one of these elements, no judgment is issued at all within the meaning of the provisions of the Code of Civil Procedure. Thus, no judgment will be rendered if the operative part of the judgment is formed without being signed and promulgated, or with signing but without promulgation, as well as if the operative part of the judgment is promulgated without being written down first or if an unsigned operative part is promulgated.

According to the view of A. Marciniak[16] and A. Góra-Błaszczykowska[17] for the existence of a judgment it is necessary that it was issued by the court in the existing proceedings, that it contains a ruling and that it was drawn up in writing. On the other hand, improper composition of the court, defects as to the commencement and course of the proceedings, ambiguity (contradiction) of the ruling, as well as the lack of signing and announcing the operative part cause only a defect in the issued judgment allowing for its appeal in the proper procedure or rectification. In this sense, a non-existent judgment is therefore only a judgment rendered not by a court or in non-existent proceedings, not containing any decision, as well as a judgment whose operative part was not written down.

On the other hand, B. Bladowski[18] includes judgments to non-existent judgments:

(1) issued by a person or team not representing a judicial authority;
(2) issued in a non-existent trial, i.e. one in which there is no opposing party;
(3) lacking the essential elements provided for by law;
(4) unsigned by the members of the panel;
(5) in which there is no adjudication on the claims of the parties;
(6) which is unlawful or which awards a benefit so defective that it is unenforceable.

[15] W. Broniewicz, Postępowanie..., p. 219.
[16] A. Marciniak [in:] W. Broniewicz, A. Marciniak, I. Kunicki, Postępowanie..., p. 296.
[17] A. Góra-Błaszczykowska, Orzeczenia..., kom. do art. 316, pt. 3, Nt 14.
[18] B. Bladowski, *Orzeczenia*..., pp. 79–85.

K. Piasecki[19] submits that the term 'non-judgment' should be referred exclusively to judgments issued by an organ which is not a court in the constitutional sense (i.e. by an organ which does not have the features of a jurisdictional organ appointed to resolve civil cases). Such 'non-judgments' cannot be the subject of an appeal by means of legal remedies regulated by the Code of Civil Procedure, as they do not exist in the procedural legal sense. On the other hand, in the case of a defect in the judgment consisting in the absence of signatures of all members of the adjudicating panel or the absence of an announcement, such a 'non-existent judgment' may be subject to appeal, as the question of its procedural existence must be clarified. In addition, the deciding court cannot itself remedy the situation and deliver a new judgment in place of the judgment affected by the indicated defects.

A. Miączyński[20] emphasises that judgments are legal acts and should be made in a strictly prescribed form. Any deviation from the statutory conditions causes the judgment to be defective. However, these irregularities do not yet invalidate the factual and legal existence of a judgment as a legal act. In order for this to occur, it is the Author's opinion that one of the essential constitutional elements of a legal action must be missing (the absence of an element which determines the meaning of a legal action). The non-existent judgment is thus a procedural action which, for lack of the essential features required by the law, cannot be regarded as a procedural action in the legal sense (i.e. it is a semblance of a judgment deprived of its external essence).

According to Ł. Błaszczak,[21] a non-existent judgment in the legal sense refers to a situation in which one of the constitutive elements constituting the existence of a judgment in the legal procedural sense is missing. In the Author's opinion, in addition to the issuance of a judgment by a court in an existing proceeding, signing and announcement are also constitutive elements that create the legal existence of a judgment. The announcement (when required) determines the legal existence of the judgment, but nevertheless cannot effectively take place in relation to a judgment that has not been previously written down and signed. Both the signing of the judgment and its announcement (as constitutive elements) will therefore determine the legal existence of a court judgment. In the absence of either of these, we are always dealing with a *sententia non existens*.

[19] K. Piasecki [in:] System..., Z. Resich (ed.), pp. 244–247.
[20] A. Miączyński, *Faktyczne*..., pp. 103–118.
[21] Ł. Błaszczak, *Orzeczenia*..., ss. 7–29; Ł. Błaszczak, *Wybrane*..., p. 2.

## Supreme Court Case Law on Non-Existent Judgments

The jurisprudence of the Supreme Court, which, besides not being uniform, has also been changing over the years, is also comparatively diverse in terms of determining the class of non-existent judgments. The Supreme Court first recognised the defect consisting in the lack of promulgation as resulting in the revocation of the contested judgment,[22] and then took a different position[23] and held that a judgment subject to promulgation and not promulgated is a non-existent judgment in the legal procedural sense.

Also on the issue of the consequences of the lack of signatures on a judgment, the Supreme Court has expressed its opinion on several occasions, albeit inconsistently. According to one position, the absence of the signature of any of the judges on a judgment is grounds for the 'nullity' of the judgment, mandating its annulment in the course of the instance.[24] A second position holds that the absence of signatures, irremovable by any means, renders the judgment in a legal sense to be considered non-existent.[25] According to the third view, on the other hand, despite the absence of signatures on the operative part, the judgment binds the court from the moment of its promulgation and cannot be considered non-existent, but if it is challenged, it is subject to annulment.[26]

In a decision[27] of 25 November 2015. The Supreme Court took the view that in the event that a judgment rendered in a collegial composition is signed only by some members of that composition, such a judgment is nevertheless an existing judgment, but the lack of signatures of some of the judges ruling in the collegial composition only subtracts from such a judgment the jurisdictional force to the extent of the missing signature. However, the jurisdictional force of the judgment is retained to the extent covered by the existing signatures on the operative part, but this means that the judgment was issued under the conditions of nullity of proceedings specified in Article 379(4) of the Code of Civil Procedure, i.e. contradiction of the composition of the court with the provisions of the law. The judgment is therefore subject to appeal and must be removed from legal circulation by the higher court by setting it aside and quashing the proceedings in the part affected by the invalidity.

[22] Resolution of the Supreme Court of 17.10.1978, III CZP 62/78, Legalis.
[23] Decision of the Supreme Court of 17.11.2005, I CK 298/05, Legalis.
[24] Judgment of the Supreme Court of 27.02.1964, 2 CR 226/62, RPEiS 1965, 3.
[25] Decision of the Supreme Court of 9.04.1969, II CR 112/68, Legalis; Judgment of the Supreme Court of 11.12.2014, SNO 61/14, Legalis.
[26] Resolution of the Supreme Court of 17.10.1978, III CZP 62/78, Legalis; Judgment of the Supreme Court of 18.04.1979, III CRN 60/79, Legalis.
[27] Decision of the Supreme Court of 25.11.2015, II CZ 79/15, Legalis.

In contrast, in a decision[28] of 31 August 2018. The Supreme Court reiterated the opposite view that a judgment whose operative part has not been signed by all the judges constituting the court ultimately does not exist in the legal procedural sense and this regardless of whether it is a single or multi-member composition. The signatures of all the judges on the operative part of the verdict are the constitutive elements that give a judicial act in a trial the value of a jurisdictional act. The absence of the signatures of all judges therefore deprives the 'non-judgment' of its jurisdictional force and renders it non-existent in the legal-procedural sense.

In the jurisprudence[29] of the Supreme Court, it is a well-established view that there is non-existent judgment where the signature is under the justification and not under the operative part of the judgment. However, in one of the most recent judgments[30] addressing this issue, the Supreme Court held that it is not a non-existent judgment that was issued by a common court prior to the formation of this line of jurisprudence determined by the resolution of the Supreme Court of 13 March 2002 (III CZP 12/02) and the decision of the Supreme Court of 7 February 2003 (III CZP 94/02), in such a way that the signature under the judgment was affixed not under the operative part, but under the entire document including the justification of the judgment. In the Supreme Court's view, it is inadmissible to undermine the effectiveness of rulings which do not subsequently meet formal requirements resulting from the establishment (decoding) of a specific content of the legal-procedural norm, and which, at the time of their issuance, in the light of common practice, corresponded to the accepted requirements deemed to result from the content of the provisions of procedural law. With this decision, the Supreme Court considered as existing judgements which, in the light of the current views of the jurisprudence, are non-existent.

## An attempt to define *sententia non existens*

A non-existent judgment is a judgment that does not legally exist, i.e. such a judgment exists as a factual event (it took place objectively in reality), but due to a certain defect in this (conventional) act, it does not produce legal effects (it has no legal existence, although it creates the appearance of an existing judgment). A judgment that does not actually exist, on the other hand, is a judgment that was not even a fact in reality. *De facto* non-existence of a judgment in whole or in part we deal with when the court did not issue a judgment (no factual event in the form of a judgment) or when it issued a judgment in

[28] Decision of the Supreme Court of 31.08.2018, I CSK 300/18, Legalis.
[29] Resolution of the Supreme Court of 13.03.2002, III CZP 12/02, Legalis; Decision of the Supreme Court of 7.02.2003, III CZP 94/02, Legalis.
[30] Judgment of the Supreme Court of 07.02.2023, II CSKP 432/22, Legalis.

which it ruled only on a part of the claim or on some of the claims (i.e. *de facto* and *de iure* the court issued a partial judgment, which it wrongly qualifies as a full judgment).[31] In the latter situation, the judgment does not actually exist only in part – to the extent of the adjudication that was not there.

The classification of genuinely non-existent judgments is unlikely to cause any doubt in science and case law.[32] What is disputed, however, is the distinction of (legally) non-existent judgments from defective judgments. Such a criterion should be the impossibility to remove the shortcomings of a judgment by way of rectification of the judgment or by way of appeals (ordinary and extraordinary).[33] A non-existent judgment is thus the result of irregularities that have not been (and cannot be) eliminated by means of the available legal remedies, i.e. when all the available rectification mechanisms have not led to the elimination of the deficiencies and healing of the judgment.[34] In such a situation, when a judgment actually exists but has a defect then it should be a legally existing judgment. Of course, there remains the problem of defining (the degree or type) of defects in a judgment which allow the implementation of rectification or appeal procedures from those defects which, due to the violation of (constitutive) rules (features), prevent the application of these procedures. The provisions of the Code of Civil Procedure do not explicitly indicate the elements that are essential for the legal existence of a judgment, leaving this issue open to clarification in the process of interpretation. As can be seen from the views of the doctrine and case law presented earlier, there is no consensus in establishing a catalogue of requirements determining the existence of a judgment.

## Issuing a judgment as a conventional act

It may be helpful in this respect to refer to the concept of passing a judgment as a conventional action.[35] The legal norms decoded from the provisions of the Code of Civil Procedure shaping the activity of issuing a judgment indicate constitutive elements and formal elements. Constitutive elements are regulated by the so-called rules of conventionalization and only their correct implementation justifies assigning to certain actions the sense of making the

[31] B. Bladowski, *Orzeczenia*..., pp. 79–85.

[32] According to K. Markiewicz (*Problem*..., pp. 103–105), a partial lack of a ruling does not mean that a judgment in this respect does not exist. In the Author's opinion, a judgment which does not contain the missing settlement exists from a legal and factual point of view. Similarly, E. Gapska (*Ewolucja*..., pp. 357 and 358), according to which a breach of the requirement to write down the operative part of a judgement results in the non-existence of a judgement only when it concerns a failure to write down the judgement in its entirety, because omitting only some of the decisions makes it possible to supplement the judgement, which exists despite the lack of a decision that should have been included in it.

[33] K. Korzan, *Wyroki*..., p. 192; Ł. Błaszczak, *Orzeczenia*..., p. 16.

[34] T. Zembrzuski, Nieważność..., p. 195.

[35] S. Czepita, *Zagadnienie*..., p. 139; S. Czepita, G. Szacoń, *Teoretyczne*..., p. 99.

act of judgment as a conventional action, i.e. the existence of a judgment. Formal elements, on the other hand, are regulated by the so-called rules of formalisation, which define the correct way of performing a certain conventional act, the violation of which results in the defect of the judgment, but does not determine the existence of the given act as a conventional act. Thus, the rules of convention constitute a determinant of the conditions (elements, features) necessary (constitutive) for the attribution of a certain action as a conventional action. The rules of formalisation, on the other hand, indicate 'only' the manner in which the conventional act is performed.

Therefore, on the basis of the concept of conventional acts, we will call a non-existent judgment the product of the sentencing act, which has been produced in violation of the relevant rules of conventionalization. There is no doubt that it is problematic to distinguish which legal norms formulate the rules of conventionalization and which the rules of formalization.[36] For the analysis of the issue of a non-existent judgment, the starting point, as aptly pointed out by S. Czepita,[37] should be the analysis of the very concept of a judgment. Since a judgment is a ruling that decides the case on the merits in a trial, then, based on the definition of a conventional action,[38] it may be assumed that from the provisions of the Code of Civil Procedure, as well as the Constitution, which is a specific source of rules of conventionalization, three necessary (constitutive) features (elements) arise, which should make up a judgment as a legal act being the substrate of a complex action of adjudication.[39] The constitutive features of a judgment thus include: (1) the issuance of a judgment by the court, (2) in a trial, (3) having a settlement of the case.[40] The other issues concerning the act of issuing a judgment (especially its recording, signing or announcement), as well as those concerning the proper form and content of the judgment itself, appear to be formalising rules defining the correct way of performing the act of sentencing, the violation of which entails 'only' a defect in the judgment. The issue of binding the court to the issued judgment and determination of the

[36] The most telling example that the distinction between the rules of conventionalization and the rules of formalization in the case of the act of passing judgment is highly problematic is shown by the evolution of the views of S. Czepita. In 2006 (see S. Czepita, *Zagadnienie*..., p. 148), the Author stated that it does not follow from the provisions of the Code of Civil Procedure whether the requirement to sign a judgment and announce it is a constitutive element of issuing a judgment. This issue is not obvious, since the provisions of the Code of Civil Procedure may be understood as designating certain formalisations of the conventional act of issuing a judgment, rather than its additional conventionalisations. In contrast, in 2012 (see S. Czepita, G. Szacoń, *Teoretyczne*..., pp. 122 and 123), the Author took the view that the signing of the judgment and its announcement are, however, constitutive elements of the activity of issuing a judgment, although it is not obvious and does not follow directly from the wording of the provisions of the Code of Civil Procedure. The last position of the Author is based on subtle semiotic analyses, with which one may argue.

[37] S. Czepita, G. Szacoń, *Teoretyczne*..., p. 109.

[38] L. Nowak, S. Wronkowska, M. Zieliński, Z. Ziembiński, *Czynności konwencjonalne w prawie*, SP 1972, 2, p. 33.

[39] K. Korzan, *Wyroki*..., pp. 185–198; A. Miączyński, *Faktyczne*..., pp. 103–118; S. Czepita, G. Szacoń, *Teoretyczne*..., p. 110.

[40] These are peculiar *essentialia negotii* of a judgment, as E. Gapska (Wady..., p. 162) stated about the constitutive formal requirements for the existence of a judgment.

decisive moment for the judgment to acquire binding force (Article 332 § 1 of the Code of Civil Proceedings) is also irrelevant for determining the prerequisites for the legal existence (existence) of the judgment.[41] Thus, the criterion of acquiring legal force is not a necessary (constitutive) element for the existence of a judgment, but only a formal element of the sentencing activity. It should be emphasised that not every defect in the judgment resulting from violation of the formalising rules implies the necessity to set it aside. Some defects are of a merely 'cosmetic' nature, which do not cause any negative consequences and may be removed by way of rectification of the judgment (Article 350 of the Code of Civil Procedure). On the other hand, more serious defects, including invalidity of proceedings give grounds to challenge the judgment by way of appeals (ordinary and extraordinary). Irregularities that can be removed by way of rectification or by way of appeals do not, therefore, deprive the judgment of its legal existence, and the judgments rendered are existing judgments, albeit defective ones. Even the invalidity of the proceedings does not deprive the judgment of its legal effect, but only justifies challenging it. This is because the fundamental effect of any procedural defect of the court – due to violation of formalising rules – is that the judgements issued are appealable. This is the rule under the Code of Civil Procedure, and an exception to this rule is the non-existence of a judgment as a consequence of a qualified defect resulting from a breach of the rules of convention.[42]

## Types (Groups) of Non-Existent Sentences

Hence, it is necessary to follow the views of the doctrine, in particular those of A. Góra-Błaszczykowska[43] advocating a narrow view of the concept of *sententia non existens* and to consider that the class of non-existent judgments includes only the following types of judgments:

(1) a judgment rendered not by the court;
(2) a judgment rendered in a non-existent trial;
(3) a judgment whose operative part has not been recorded (fixed);
(4) a judgment that does not contain any adjudication.

[41] For a different view see, *inter alia*, A. Miączyński (*Faktyczne*..., pp. 103–118), who points out that when a statute binds the legal force of a judgment to its announcement, this fact conditions the legal existence of the judgment. If, on the other hand, a judgment rendered in closed session acquires binding force from the moment it is signed, then the signing itself is a necessary prerequisite for the legal existence of the judgment; B. Bladowski (*Orzeczenia*..., pp. 79–85), who emphasises that the acquisition of legal force (binding) by a judgment from the moment it is announced or signed means that these acts are prerequisites for the legal existence of the judgment.

[42] K. Markiewicz, *Problem*..., p. 98.

[43] A. Góra-Błaszczykowska, *Nieistnienie*..., pp. 183–188.

The first group of non-existent judgments refers to the feature defined as 'the issuance of a judgment by a court'. Among the accepted constitutive features (elements) of a judgment, it is the court as the competent authority to issue a judgment that is of fundamental importance. There is no doubt in the thesis that a non-existent judgment is a judgment issued by an organ which is not a court.[44] This premise refers to the court as an organ of judicial power. Whether an organ is a court is determined by the constitutional provisions. Within the meaning of Article 177 of the Constitution, a court is an organ of public authority consisting of judges appointed in accordance with the procedure provided for in Article 179, and therefore appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary. The Constitution independently defines 'court' as well as 'judge' in the Polish model of the judiciary, setting requirements for the assessment of these concepts.[45] Appointment by the President at the request of the National Council of the Judiciary, is a necessary and sufficient condition for the effective recognition of the appointee as a judge. The constitutive elements of the acquisition of judicial investiture in the light of constitutional norms are therefore only two: the proposal of the National Council of the Judiciary and the appointment by the President. The dispute concerning the National Council of the Judiciary shaped by the provisions of the Act of 08.12.2017 in terms of the manner of selection of the judicial members of the council has no impact on the effectiveness and irrevocability of the appointment of judges by the President[46]. Hence persons appointed to the office of judge by the President on the proposal of the National Council of the Judiciary shaped by the provisions of the Act of 08.12.2017 are judges and the court with their participation is a court within the meaning of the Constitution.[47] The constitutional position of the President means that the appointment of judges, as the staffing of the judicial bodies (courts), adjudicating on behalf of the Republic of Poland, is not subject to the control of any other body, including the court.[48] The powers of the President derive directly from the Constitution and the fact of winning the presidential election, which is an emanation of

[44] For example, a 'judgment' issued by the National Council of the Judiciary will not be a judgment, as the NCJ is not a court. Neither will a 'judgment' issued by a court, as an organisational unit of the judiciary, but with the participation of persons who do not represent the judiciary, i.e. employees of the court secretariat, a court reporter or an assistant judge, be a judgment.

[45] Decision of the Supreme Court of 01.07.2019, IV CSK 176/19, Legalis.

[46] The Constitutional Court, in its judgment of 25.03.2019 (K 12/18, Legalis) confirmed the constitutionality of the current method of electing the members of the NCJ (based on the so-called democratic legitimacy model as opposed to the previous system of election based on the co-optation-corporate model), thereby strengthening the presumption of constitutionality of the relevant provisions of the Act on the National Council of the Judiciary (see K. Zaradkiewicz, *Abusive*..., pp. 265–299).

[47] Panel of the Supreme Administrative Court of 13.08.2024, https://www.nsa.gov.pl/ogloszenia/stanowisko-kolegium-naczelnego-sadu-administracyjnego-w-sprawie-statusu-asesorow-sadowych-w-wojewodzkich-sadach-administracyjnych,news,182,1079.php [accessed: 01.11.2024].

[48] Decision of the Supreme Administrative Court of 09.10.2012, I OSK 1891/12, Legalis.

the will of the Nation expressed in a direct form. Therefore, encroachment on these presidential prerogatives by any other organ is impermissible, as every organ, including the court, acts within the powers granted to it on the basis and within the limits of the law.[49]

Thus, if a judgment has been formally issued by a court within the meaning of the applicable constitutional provisions, it is an existing judgment and there are no grounds for challenging its legal existence. The fact that the composition of the court was irregular has no effect on the recognition of the judgment as existing.[50] In the case where the composition of the court was inconsistent with the provisions of the law (including if an unauthorised person participated in the composition of the court), the judgment issued exists, although the proceedings are null and void and it is only by means of appeals that such a judgment may be deprived of its legal effect (Article 379 pt. 4 and Article 401 pt. 1 of the Code of Civil Procedure). It is clear that the adjudicating court should also comply with the requirements set out in Article 45(1) of the Constitution of the Republic of Poland, Article 267 of the Treaty on the Functioning of the European Union conjunction with the second paragraph of Article 19(1) of the Treaty on European Union conjunction with Article 47 of the Charter of Fundamental Rights and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950. as subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2. However, a violation by the adjudicating court of the constitutional, treaty or convention standards indicated does not deprive the judgment rendered, which exists as a legal fact and event (*sententia existens*).[51]

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[49] Decision of the WSA in Warsaw of 29.10.2024, VI SA/Wa 3316/24, Legalis.

[50] A. Miączyński, *Faktyczne*..., p. 109.

[51] At this point, it should be emphasised that possible defects in the nomination process of a judge do not have any impact on the status of the person concerned as a judge, who from the moment he or she takes office may effectively exercise his or her function in the administration of justice (investiture). Judgments of the Court of Justice of the European Union or of the European Court of Human Rights do not have direct legal effect and cannot automatically deprive a specific body of the status of a court within the meaning of the Polish constitutional provisions (see opinion of the Venice Commission of 14.10.2024, CDL-AD(2024)029; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2024)029-e [accessed: 01.11.2024]). Hence, any emerging views on the non-existence of judgments, issued by judges appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary shaped by the provisions of the Act of 08.12.2017 amending the Act on the National Council of the Judiciary and certain other acts (Dz.U. z 2018 r., poz. 3 ze zm.), should be treated in terms of journalistic statements (see K. Markiewicz, A. Torbus, *Zagadnienie*..., p. 329; K. Markiewicz, *Niezawisłość i niezależność sądu jako gwarancja dostępu do ochrony prawnej* [in:] Dostęp do ochrony prawnej w postępowaniu cywilnym, K. Flaga-Gieruszyńska, R. Flejszar, E. Marszałkowska-Krześ [eds], Warszawa 2021, *passim*). In the resolution of the combined Chambers – Civil, Criminal and Labour and Social Insurance of 23.01.2020 (BSA I-4110-1/20), the Supreme Court unequivocally pointed to the effect of the invalidity of civil proceedings and not the non-existence of the judgment, as it expressed the position that the contradiction of the composition of the court with the law within the meaning of Article 379 pt. 4 of the Code of Civil Procedure may also occur when the composition of the court includes a judge appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary shaped by the provisions of the Act of 08.12.2017. The literature on the subject (see J. Gudowski, Iudex

The second group of non-existent judgments consists of judgments rendered in a non-existent trial. This distinction refers to the constitutive feature of a judgment referred to as 'in trial'. Any trial can only take place with opposing litigants (plaintiff and defendant). The absence of both or one of the parties means that civil proceedings do not exist in the legal sense.[52] Legally non-existent proceedings will also be proceedings taking place without a lawsuit.[53] Any judgment rendered in non-existent proceedings is therefore a non-existent judgment. Every non-existent proceeding involves the non-existence of a judgment because a non-existent proceeding cannot end in an existing judgment.[54] An example of a non-existent process is a situation where the plaintiff as sole heir brought an action against the guardian of the estate and thus litigated with himself, i.e. there was no defendant.[55] Only the absence of a litigant and of a primary nature, i.e. from the very beginning, leads to the non-existence of the trial and the judgment rendered. On the other hand, the lack of legal or procedural capacity of a party is a cause of nullity of the proceedings (Article 379 pt. 2 of the Code of Civil Procedure) and may constitute only grounds for challenging the judgment, and not for declaring the judgment non-existent.

The third group of non-existent judgments comprises judgments that have not been recorded. The last group, on the other hand, concerns judgments that have been recorded but have no adjudication. The basis for the distinction between these two types of non-existent judgments is the constitutive feature of the judgment referred to as 'having an adjudication of the case'. It is worth emphasising that these groups of judgments are made in existing proceedings (trials). The constitutive feature of a judgment is that its content must be recorded (fixed). As long as the content of the judgment is only in the realm of imagination (in the minds of the members of the adjudicating panel), such a judgment does not exist. Pursuant to Article 324 § 1 of the Code of Civil Procedure, as a rule, a judgment should be recorded in writing by 'writing down the operative part of the judgment'. In the case of proceedings initiated via an ICT (Information and Communication Technology) system, the judgment should be recorded in electronic form in the ICT system (Article 324 § 4 of the Code of Civil Procedure). It follows from this regulation that the judgment must exist as a fact (factual event), as the content of the sentence should be recorded on paper or in the ICT system in the form of a digital record. From this provision, it is possible to decode the legal norm requiring the content of the operative part of the judgment to be fixed in written or electronic form.

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impurus..., p. 7) also indicates that the participation of such a judge in the cognizance of a case may only be the basis for a challenge to an existing judgment on the grounds of invalidity of the proceedings.

[52] K. Korzan, *Wyroki*..., p. 193; B. Bladowski, *Orzeczenia*..., pp. 79–85.

[53] Ł. Błaszczak, *Orzeczenia*..., p. 12.

[54] T. Zembrzuski, Nieważność..., p. 197.

[55] K. Korzan, Wyroki..., *ibid.*; Ł. Błaszczak, *Orzeczenia*..., *ibid.*

The recording of the content of the operative part is thus an element constituting the judgment as a conventional act. On the other hand, the obligatory written form (or electronic form in the case of proceedings initiated *via* an ICT system) is merely a formalising requirement, the breach of which no longer affects the legal existence of the judgment. The judgment may therefore be recorded (fixed) in any way. Such fixed judgment (e.g. a file stored in the memory of a device) is already an existing judgment, and a breach of the obligatory written form may only constitute the basis for an appeal. The judgment must have a settlement of the case, i.e. in addition to being recorded, it should also contain a specific formula. The absence of a decision in the operative part of the judgment means that the judgment does not exist. Since a judgment has to decide the case on its merits, the absence of any decision in the operative part of the judgment must mean that there is no judgment. A judgment on the file which contains only *rubrum* (introductory part), even if signed by the members of the formation of the court, but no *tenor* (the actual decision) is therefore not a judgment. Such a judgment, even if it attains formal validity, still does not acquire *res iudicata*, because a final judgment enjoys *res iudicata* only as regards what, in connection with the cause of action, was the subject of the decision.[56] Thus, only the absence of any adjudication at all can cause a judgment to be declared non-existent. Possible vagueness, incomprehensibility or contradiction of the decision no longer deprives the judgment of its legal existence.

## Defects in the judgment which do not result in a non-existent judgment

Other defects or shortcomings of the judgment, in particular ambiguity (contradiction) of the decision, lack of formal elements in the operative part, lack of signature or announcement of the operative part do not deprive the judgment of its existence, but cause 'only' a defect in the judgment, allowing it to be challenged or rectified (depending on the type of defect, there may be a rectification of the judgment, clarification by interpretation or challenge by means of legal remedies provided for by law).[57] In particular, it is necessary to move away from the view that signing and announcement are among the constitutive elements of the act of issuing a judgment. Rather, they are requirements arising from procedural formalism (the so-called formalising rules), the violation of which does not deprive the judgment issued of its legal force.

[56] Ł. Błaszczak, *Orzeczenia*..., p. 18.

[57] Defects in the content of the operative part of the judgment may be rectified. In particular, irregularities in the wording of the operative part do not render the judgment null and void. Errors, including contradictions in the operative part (*tenor*) may also be rectified by rectification (rectification or interpretation of the judgment). Hence, these defects can in no way prove the non-existence of the judgment.

If the court has issued a judgment that has been recorded, the judgment exists not only as factual but also as legal events. The absence of the signature of all or part of the members of the bench, as well as the failure to announce the judgment, are qualified defects that should constitute grounds for challenging the judgment. These defects may result in the invalidity of the proceedings, referred to in art. 379 pt. 4 and 5 of the Code of Civil Procedure being the basis for obligatory revocation of the appealed judgment, or for resumption of the proceedings (Article 401 pt. 1 and 2 of the Code of Civil Procedure). Where a judgment has been written down and subsequently signed by all members of the panel and has not been announced in a situation where a rule required its announcement, such a judgment undoubtedly exists in legal terms. The failure to promulgate the judgment constitutes a defect in the judgment, which may constitute grounds for an appeal against the judgment. In the case of the promulgation of a judgment that has not been signed beforehand, we are also dealing with an existing judgment[58]. The absence of the signature of all or part of the members of the panel under the judgment announced is a defect in the judgment that allows it to be challenged.[59] On the other hand, it is indisputable that the lack of a written justification of the judgment or the lack of signatures under the justification of the judgment, even if the court is obliged to prepare this justification *ex officio*, does not deprive the judgment of its existence, as the justification is not one of the constitutive elements of the judgment.[60]

From the considerations presented, it follows that in typical procedural situations (in which the case is decided by the court in existing proceedings), the non-existence of the judgment is only dealt with in the case of the announcement of a judgment that has not been previously recorded (the court announces the judgment 'off the top of its head'). However, the subsequent rectification of this deficiency will not restore the legal existence of the judgment.[61] If, on the other hand, there has been a prior recording of the judgment (in any form, e.g. the court reads out the judgment from a computer monitor), the deficiencies concerning its signing or announcement no longer deprive it of the power of a jurisdictional act. The judgment, as a procedural act ending the proceedings, has been made and exists as a fact and a legal event.[62] Such a judgment, in spite of the misconduct committed by the court, exists from the moment it is made as a procedural act, i.e. as an act that is the culmination

[58] A. Miączyński, *Faktyczne*..., p. 112.
[59] B. Bladowski, *Orzeczenia*..., pp. 79–85; T. Zembrzuski, Glosa do postanowienia SN z 31 sierpnia 2018 r., I CSK 300/18, OSP 2019/04, p. 34.
[60] A. Miączyński, *Faktyczne*..., p. 111; Ł. Błaszczak, *Orzeczenia*..., p. 24.
[61] K. Korzan, *Wyroki*..., p. 195.
[62] Following W. Siedlecki (*Czynności procesowe*, PiP 1951, 11, p. 704), we can define a procedural action as an action of a procedural entity (court) which, according to the applicable regulations, can have an effect on a civil trial as a complex legal act.

of proceedings that existed both in fact and in law.[63] Therefore – in typical procedural situations – it is necessary to narrow the concept of non-existent judgments to judgments that have not been recorded at all (not fixed). A non-existent judgment should be regarded as only the 'physical' absence of a judgment. All defects and errors in a recorded judgment (with the exception of the absence of any adjudication) are defects removable by means of appeal or rectification. The risk of the existence of defective judgments is inscribed in the provisions of the Code of Civil Procedure and the legislator accepts this fact, which is why it has introduced a system of reviewing judgments by ordinary and extraordinary means of appeal.[64] A recorded judgment is therefore a judgment that actually and legally exists. The institution of *sententia non existens* should only to situations in which the irregularities are not eliminated by available legal means, i.e. when all remedial mechanisms are not capable of eliminating the perceived deficiencies. Annulment of proceedings as an adequate remedial instrument is one such solution.[65]

## Elimination of a Non-Existent Judgment from the Legal System

The legislator has not introduced any 'special' procedure for eliminating non-existent judgments from legal circulation.[66] A non-existent judgment does not have any legal effect, hence, as a rule, there is no need to set it aside or amend it in the course of an instance, as the non-existence of a judgment excludes the possibility of challenging it at all.[67] The judicature considers inadmissible an application to initiate proceedings for a declaration of non-existence of a judgment.[68] An action for determination under Article 189 of the Code of Civil Procedure is also inapplicable, since a non-existent judgment is not a legal relationship, nor does it have the form of law.[69] The consequence of the non-existence of a judgment is therefore the necessity to establish this fact on every procedural occasion (in this or any other case), as the provisions

[63] T. Zembrzuski, Nieważność..., p. 199.
[64] A. Góra-Błaszczykowska, *Nieistnienie*..., p. 187.
[65] T. Zembrzuski, Glosa..., *ibid.*
[66] According to A. Góra-Błaszczykowska (*Nieistnienie*..., pp. 187 and 188) is an additional argument in favour of narrowing the conceptual scope of a non-existent judgment. Since the legislator does not mention non-existent judgments in the provisions of the Code of Civil Procedure, it may mean that he did not provide for the possibility of the existence of such judgments at all. Consequently, in the Author's opinion, creating a catalogue of non-existent judgments or a general conceptual scope of non-existent judgments may have no normative basis.
[67] K. Korzan, *Wyroki*..., pp. 196 and 197.
[68] Decision of the Supreme Court of 26.7.2017, III CZ 25/17, Legalis.
[69] K. Korzan, *Wyroki*..., p. 197; Ł. Błaszczak, *Wybrane*..., p. 2.

of the Code of Civil Procedure do not provide for any specific procedure in this respect.[70] The non-existence of the judgment should be taken into account by the court at every stage of the case in which the judgment was issued, as well as in all other cases. Thus, this may involve rejecting an appeal against a non-existent judgment, refusing to give it an enforceability clause, or disregarding a plea of *res iudicata* arising from such a judgment. A party may also file a motion to open a closed hearing and continue the existing trial (Article 225 of the Code of Civil Procedure), as there is a procedural obstacle to the commencement of a new trial in the form of a *lis pendens*.[71] Since there is no judgment, the trial has not formally ended and a new lawsuit for the same claim is subject to dismissal, as the case between the same parties is still pending (Article 199 § 1 pt. 2 of the Code of Civil Procedure). In the case of a non-existent judgment rendered in non-existent proceedings, there are no formal obstacles to the initiation of new proper proceedings, as there is neither *res iudicata* nor *lis pendens*.[72]

A judgment which is factually non-existent in part, i.e. with regard to the lack of a decision on a part of the claim or on certain claims, may be rectified by means of a rectification measure, i.e. supplementing the judgment (Article 351 of the Code of Civil Procedure). On the other hand, a judgment in the part that does not actually exist may not be appealed, as it does not have a substrate (subject) of appeal. If such an appeal is lodged, it is subject to rejection due to its inadmissibility. In such a situation, a party may bring a new action, as *res iudicata* applies only to the existing decision.

## Summary

The presented views of science as well as the position of jurisprudence confirm that the development of a uniform concept of non-existent sentences seems to be impossible. The complexity of the problem of *sententia non existens* and its legal significance requires, in my opinion, the intervention of the legislator. However, until legislative changes are made, a narrow position should be advocated, which allows for a precise definition of the classes of non-existent judgments, which include: a judgment rendered not by a court (and only in the formal sense); a judgment rendered in non-existent proceedings; judgment whose sentence has not been recorded (in any way) or a judgment that does not contain any decision. Such non-existent judgments have no legal effect and this fact should be taken into account by every court. On the other

[70] Decision of the Supreme Court of 26.7.2017, III CZ 25/17, Legalis.
[71] B. Bladowski, *Orzeczenia*..., pp. 79–85; E. Gapska, Wady..., s. 182; Ł. Błaszczak, *Orzeczenia*..., p. 29.
[72] E. Gapska, Wady..., *ibid.*; Ł. Błaszczak, *Orzeczenia*..., *ibid.*

hand, defects in the judgment in the form of failure to sign the judgment or to announce it may result in a qualified defect in the proceedings (nullity) allowing it to be challenged. Such a judgment exists as a factual event (it actually took place) as well as a legal event (it is a procedural act performed by the court).[73] However, such a judgment may be challenged only in accordance with the applicable regulations by way of an appeal, and the court of second instance or the Supreme Court hearing a cassation appeal should decide to overturn the challenged judgment so as to eliminate it from legal circulation. The admissibility of challenging such a defective judgment as non-existent at any stage of the case in which the judgment was issued, as well as in all other cases, undermines the security of legal transactions as well as the stability of court judgments. Adopting the concept of non-existent judgments to a large extent limits *de facto* the possibility to appeal against them (a non-existent judgment is not appealable, as one cannot appeal against 'something' that does not exist), thus the institution of appeals, which serve precisely the purpose of eliminating a defective judgment from legal circulation (a party may appeal against such a judgment, while against a non-existent judgment it cannot), would lose its significance.[74]

On the other hand, the possibility of declaring sentences issued with the participation of judges appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary shaped by the provisions of the Act[75] of 08.12.2017 as non-existent even threatens anarchy, which any 'non-tribal lawyer' trialist must not agree with.[76] The concept of *sententia non existens* should not be instrumentally used, and cases of non-existent judgments should be narrowed down to final situations, as 'issuing' such a judgment is an embarrassment to the judiciary and to the Republic of Poland as a state.[77] Undoubtedly, therefore, this institution should be of limited use in procedural law, as it is difficult to define and determine the scope of application of something that is not reflected in a clear legal norm.[78]

[73] K. Grzesiowski [in:] System..., A. Góra-Błaszczykowska, P. Osowy (eds), chapter 3, 284.
[74] A. Góra-Błaszczykowska, *Nieistnienie*..., p. 186.
[75] Dz.U. z 2018 r., poz. 3 ze zm.
[76] The notion of a 'non-tribal lawyer' was used by B. Pilitowski in an interview by G. Sroczynski entitled: 'Bodnar i fanatycy: 90 procent sędziów w głowę się puka', Gazeta.pl, 23.10.2024, https://wiadomosci.gazeta.pl/wiadomosci/7,114884,31405917,bodnar-i-fanatycy-90-procent-sedziow-w-glowe-sie-puka-wywiady.html [accessed: 01.11.2024].
[77] As aptly pointed out by K. Korzan (*Wyroki*..., p. 191) non-existent sentences are a pathological phenomenon. Whereas K. Markiewicz (*Problem*..., p. 117) rightly appealed that the scope of non-existent judgments should not be extended to cases that are not clearly supported by the law.
[78] T. Zembrzuski, Glosa..., p. 34.

***Sententia non existens*, czyli kolejny głos w dyskusji dotyczącej wyroków nieistniejących**

**Abstrakt**

Wyrok sądowy jest czynnością procesową wysoce sformalizowaną. Dopiero zachowanie wszystkich ustawowych wymagań warunkuje prawidłowość, czyli niewadliwość tej czynności. Zarówno uchybienia w procedurze wydania wyroku, jak i błędy w zakresie treści lub formy wyroku mogą być podstawą jego zaskarżenia lub rektyfikacji. W szczególnych sytuacjach wadliwości mogą być na tyle poważne, że w ogóle nie może być mowy o wyroku (***sententia non existens***). Kwestia wyroków nieistniejących od lat wywołuje w doktrynie i judykaturze liczne spory i kontrowersje, które na nowo odżyły ostatnio – i to ze wzmożoną siłą – z uwagi na orzecznictwo TSUE. Stąd też potrzeba zabrania głosu w tej niezwykle ważkiej dyskusji.

**Słowa kluczowe**: wyrok nieistniejący, *sententia non existens*, nieważność postępowania, wadliwość wyroku.

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Beata Stępień-Załucka*

# *LegalTech 3.0*. Some Reflections on the Constitutional Prerequisites for the Use of Artificial Intelligence in the Administration of Justice

**[*LegalTech 3.0*. Kilka refleksji na temat konstytucyjnych przesłanek wykorzystania sztucznej inteligencji w wymiarze sprawiedliwości]**

**Abstract**

New technologies are increasingly present in the administration of justice. Recognised for their effectiveness and diverse possibilities, they are becoming increasingly important tools to support the functioning of the justice system. Due to their continuous development, the idea has emerged in the scientific space that tools based on one of them – artificial intelligence – should no longer be used as merely supporting judges, but as those that could replace the judge in fulfilling his or her tasks. Shaping the judiciary in this way, with an algorithmic judge – for this is essentially what the proposal is aiming at – raises constitutional questions. Indeed, constitutional law to date has developed certain standards to which a modern court must conform. The fulfilment of these standards by artificial intelligence is debatable; the analysis devoted to it is the subject of the article. The Author's goal is to answer the question of whether constitutional law today is ready for artificial intelligence in the administration of justice.

**Keywords:** artificial intelligence, judiciary, courts, judge, algorithmic judge.

## General Remarks

When it comes to the administration of justice and the implementation of the right to a court (to a fair trial),[1] efficiency of proceedings is an important value. In many legal systems, this is a major concern of the justice system.

* **Beata Stępień-Załucka** – DSc, Associate Professor, Institute of Legal Studies, University of Rzeszow; Attorney-at-law (Rzeszow Bar Association); https://orcid.org/0000-0003-1802-680X; bestepien@ur.edu.pl / dr hab. nauk prawnych, profesor uczelni, Instytut Nauk Prawnych, Uniwersytet Rzeszowski; adwokatka (Izba Adwokacka w Rzeszowie).

[1] P. Tuleja, *Kształtowanie się prawa do sądu w Polsce* [in:] S. Grodziski *et al.* (eds), *Vetera novis augere*: studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi, Kraków 2010, p. 1043ff.

Court proceedings are taking longer and longer, the number of cases is increasing and the scope of jurisdiction is widening. Therefore, it should come as no surprise that solutions to speed up the functioning of the courts are being sought worldwide.[2]

The experience of recent years shows that one of the solutions is the artificial intelligence included in the so-called LegalTech 3.0, serving no longer only as a tool to assist the judge, but also – which is increasingly boldly advocated – as a tool to decide cases.[3] However, in individual legal systems, especially those with a strong constitutional tradition, a properly formed court as a component of the constitutional right to a court is a court with human judges.[4] Thus, in spite of the technological possibilities, such substitutive administration of justice by artificial intelligence, consisting of autonomous adjudication of disputes between parties, is not universally accepted or is strongly contested.[5] Indeed, technological developments have been so rapid in recent years that, among other things, they have created great distrust in certain sectors, one of which is precisely the judicial sphere. This distrust is probably still pervasive, which is part of a general tendency to downgrade the usefulness of artificial intelligence, questioning its capabilities or suitability for use where at first sight it would seem desirable.[6] There are many sceptics, worried about the very rapid progress and the lack of legal or social tools to deal with the negative effects of the massive use of AI systems in all spheres.

This raises important questions about, among other things, the future of justice, the need for changes in the mentality of the public, trust in algorithmic justice or the possible constitutional changes needed to create the right conditions for the operation of modern justice using artificial intelligence, if at all possible in the future, on a large scale.

This article focuses on an analysis of the application of artificial intelligence in the field of justice and, in particular, in the exercise of the judicial function, based on an analysis of the constitutional configuration of judges' powers to seek judicial protection by citizens. Among other things, its aim is to answer the question of whether artificial intelligence, *LegalTech* 3.0, can be – in the light of constitutional standards – a tool used for the automatic adjudication of disputes.

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[2] R. Susskind, Online Courts and the Future of Justice, Oxford 2019, *passim*.

[3] M. Załucki, *Computers in Gowns and Wigs. Some remarks about a new era of judiciary*? [in:] L. M. Martin, M. Załucki (eds), Artificial Intelligence and Human Rights, Madrid 2021, p. 13ff.

[4] T. Szanciło, B. Stępień-Załucka, *Sędzia robotem a robot sędzią w postępowaniu cywilnym w ujęciu konstytucyjnym i procesowym*, 'Prawo i Więź' 2023, vol. 47, 4, pp. 224–228.

[5] Y. Razmetaeva, Y. Barabash, D. Lukianov, *The Concept of Human Rights in the Digital Era: Changes and consequences for judicial practice*, 'Access to Justice in Eastern Europe' 2022, vol. 5, 3, pp. 41–56.

[6] A. T. Ester Sánchez, *El desafío de la Inteligencia Artificial a la vigencia de los derechos fundamentales*, 'Cuadernos Electronicos de Filosofia del Derecho' 2023, vol. 48, pp. 111–139.

## Artificial Intelligence

Artificial intelligence is all around us and is already so commonplace that we often do not notice its existence.[7] Systems that offer the most suitable product for our preferences show that artificial intelligence is omnipresent in our consumer behaviour. Similarly, we have intelligent navigation mechanisms that help us every day to find the shortest and fastest route to where we are going.[8] From this unquestioning dependence on computers and other machines, the idea of autonomous technology has emerged to mimic human cognitive activity and replicate human behaviour.[9] Since the mid-20th century, complex machines and sophisticated computer systems have emerged that mimic the natural and unique reasoning of human beings. Thanks to logical and mathematical processes, artificial intelligence processes and analyses data at dizzying speeds. It is also able to learn on the fly, which offers extraordinary opportunities for improvement, in the sense of improving its own system. The fear of artificial intelligence systems replacing humans in many professions causes great concern and rejection.[10] The use of automation systems *via* artificial intelligence has already led to significant protests in various professional sectors on more than one occasion. Perhaps this is also the reason for the scepticism of some lawyers.

Meanwhile, the literature points to the desirability of using artificial intelligence in the legal services sector, including in the administration of justice.[11] However, this is no longer just about the use of technological mechanisms to speed up the search for jurisprudence or as a consultative tool for risk assessment in decision-making related to individual legal proceedings, but also as an automatic mechanism for judicial decision-making in which the human factor loses its leading role and is relegated to the background.[12] It is emphasised that the legal world should not distance itself from technological developments. Lawyers must participate in and benefit from technological advances. Huge social and legal changes are on the horizon due to the possible future widespread use of this technology. Indeed, as can be expected, the traditional, archaic and essentially conservative nature of the law will be transformed in the future as a result of the large-scale entry of artificial intelligence into the

[7] L. Lai, M. Świerczyński (eds), Prawo sztucznej inteligencji, Warszawa 2020, *passim*.

[8] H. Miranda Bonilla, *Algoritmos y Derechos Humanos*, 'Revista de la Facultad de Derecho de México' 2021, vol. 71, 280–2, p. 705 ff.

[9] P. B. Marrow, M. Karol, S. Kuyan, *Artificial Intelligence and Arbitration: The Computer as an arbitrator — are we there yet* ?, 'Dispute Resolution Journal' 2020, vol. 74, 40, pp. 35–76.

[10] E. P. Polo, *El Juez-Robot y su encaje en la Constitución Española. La inteligencia artificial utilizada en el ámbito de la toma de decisiones por los tribunales*, 'Revista de Derecho Público' 2024, vol. 72, 1, pp. 56 and 57.

[11] Y. Cui, Shanghai Intelligent Assistive Case-Handling System for Criminal Cases – System 206, Springer 2020, *passim*.

[12] M. Załucki, *Computers...*, pp. 18–20.

legal world.[13] And although, according to some, the 'mechanisation' of the judiciary is 'a step before the world is ruled by machines', because 'humans will gradually lose their free will as they become increasingly dependent on technology', and the presence of AI in the judiciary will displace the 'human' judge, limiting judicial discretion and the judge's power to decide a case based on individual knowledge, judgement and experience,[14] there seems to be no turning back from the use of AI in the judiciary.

## Artificial Intelligence in the Judiciary – Selected Applications

As one might think, the impetus for basing the judiciary on new technologies came from, among other things, two high-profile incidents around the world specifically related to the use of artificial intelligence. In 2016, 584 cases pending before the European Court of Human Rights were subjected to an experiment involving artificial intelligence. The algorithm, after analysing the case documents, predicted 79% of the decisions of this court. These settlements concerned claims under Article 3 (prohibition of torture, inhuman and degrading treatment), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights.[15] In contrast, in 2017, a similar test was conducted in the United States of America, among others. There, in turn, artificial intelligence analysed, on the basis of a created algorithm, more than 28,000 cases pending before the Supreme Court there. Cases decided between 1816 and 2015 were studied. The algorithm was able to predict 70.2 % of the decisions.[16] In doing so, the spectrum of cases was much broader than the test for applying the standards of the European Convention on Human Rights to specific cases. It is therefore perhaps not surprising that the results of these experiments have resonated in the scientific space.[17]

The above experience with predictive systems (because this is the application of artificial intelligence that was used) shows that changes in the admin-

[13] D. F. Engstrom, *Post COVID Courts*, 'UCLA Law Review Discourse' 2020, vol. 68, p. 246 ff.

[14] S. Chen, *China's Court AI Reaches Every Corner of Justice System, Advising Judges and Streamlining Punishment* [at:] https://www.scmp.com/news/china/science/article/3185140/chinas-court-ai-reaches-every-corner-justice-system-advising [accessed: 21.01.2025].

[15] N. Aletras *et al.*, *Predicting Judicial Decisions of the European Court of Human Rights: A natural language processing perspective*, 'PeerJ Computer Science' 2016, vol. 19, 2, p. 93ff.

[16] D. M. Katz, M. J. Bommarito II, J. Blackman, *A General Approach for Predicting the Behavior of the Supreme Court of the United States*, 'Plos One' 2017, vol. 12, 4, *passim*.

[17] M. Medvedeva, M. Vols, M. Wieling, *Using Machine Learning to Predict Decisions of the European Court of Human Rights*, 'Artificial Intelligence and Law' 2020, vol. 28, 2, pp. 237–266.

istration of justice are possible.[18] New technologies have, moreover, already taken over the justice system. Just as simple solutions used to be applied in the past (so-called LegalTech 1.0), today probably no one can imagine further work in the judiciary without extensive legal information systems containing not only legislation, but also case law, commentaries and broad statements of doctrine and other instruments to support the work of judges (so-called LegalTech 2.0).[19] All this, in the form of relevant data systematised in an appropriate way, is an important tool to support the judiciary. This trend will continue to grow, especially as it is predicted that around 2050, developments in technology will result in the average computer having more data processing capacity than the combined brains of all the inhabitants of the earth.[20] So there will certainly be a further transfer of information resources to the digital world, which will slowly replace the use of traditional tools. Will artificial intelligence replace judges? Does it have the aptitude to do so?

Questions posed in this way no longer surprise anyone today, and the answers seem obvious, at least at first glance. Indeed, examples of the use of artificial intelligence in individual legal systems in the judiciary are already widely known today.[21] American law, Chinese law,[22] but also the law of some European countries, have so far faced various challenges in this area, applying or testing the use of various solutions. The results are interesting in this respect, mobilising further research. Today, therefore, in many countries, the need for the use of artificial intelligence in the adjudication of certain categories of cases is being anticipated (artificial intelligence is to replace the traditional judge) and the various implications of this are being considered.[23]

The use of an algorithm – for that is indeed what artificial intelligence is – could have, at least as it appears at first glance, significant advantages in the field of justice. It should be clarified here that an algorithm is a mathematical term that refers to an ordered and finite set of operations that, in turn, enable a solution to a problem to be reached. As is well known, AI systems use algorithms, using logical-mathematical operations designed by a computer engineer or programmer to process previously stored data in order to provide an answer to the question we want to solve with AI systems.[24] These questions may also relate to the law and serve not only to make a prediction, but also to

[18] A. Garapon, *Les enjeux de la justice prédictive*, 'La Semaine Juridique' 2017, 1–2, p. 47.

[19] D. Szostek (ed.), *LegalTech*. Czyli jak bezpiecznie korzystać z narzędzi informatycznych w organizacji, w tym w kancelarii oraz dziale prawnym, Warszawa 2021, *passim*.

[20] R. Susskind, Online..., p. 37.

[21] H. Zhong *et al.*, *Legal Judgment Prediction via Topological Learning*, 'Proceedings of the 2018 Conference on Empirical Methods in Natural Language Processing' 2018, vol. 1, *passim*.

[22] K. Latek, *„Roboty w togach" i rozprawy na WeChatcie? (!) Analiza przyczyn i sposobów wykorzystania nowych technologii w chińskim sądownictwie oraz charakterystyka zagrożeń z tym związanych*, „Gdańskie Studia Azji Wschodniej" 2023, vol. 23, 1, pp. 224–240.

[23] E. P. Polo, *El Juez-Robot*..., p. 55ff.

[24] *Ibid*.

make a decision regarding the application of a specific legal norm in a predetermined state of facts. The role of the AI system technician in such a case is to translate the question concerning the application of the law into the language of the computer, creating as many mathematical equations as necessary.

Thanks to the tremendous evolution of the capabilities of today's machines, in a short period of time this technology is able to answer essentially any question asked about the application of the law. At the same time, this technology is so complex and advanced that it has the capacity to autonomously improve itself through its own action (self-learning).[25] This is because, in reality, AI systems learn independently. Artificial intelligence is thus able, for example, to detect jurisprudential patterns in order to automatically create models that offer predictions and even just make decisions, the subject of which may be the application of the law. It is therefore not just a matter of making a prediction as to how a case is likely to be decided by the courts, but of proposing the decision itself for a particular case. In doing so, these are constantly evolving processes that aim to deliver better results, which AI systems achieve through their own activity.[26]

However, as pointed out in the doctrine, the algorithm often operates like a so-called 'black box', i.e. with great opacity.[27] Because of the huge amount of data it handles, and because the correlation detection and model-building operations used to process the data are so fast, it is not possible to explain the significance of the various factors used to generate a forecast or decision. This cognitive technology cuts through the data using artificial neural networks so quickly that we cannot identify the elements that led the machine to the final proposed result. Here, there is an element of mistrust in the computer system, and the lack of sensitivity of this system or the equivalent of life experience is raised, all of which are important in the fair adjudication of cases.[28]

Therefore, as it is sometimes argued, in the context of AI case-handling, there is an 'apparent neutrality and objectivity' of AI systems, which gives rise to a number of controversies, particularly of a constitutional nature, as to the qualities that today's courts and judges are supposed to have.[29] Nonetheless, some suggest that in the future it is necessary to use AI to achieve the goal of deciding cases, and the first step should be, among other things, to select cases that have the capacity to be decided in this way. This seems tempting, especially in the context of the efficiency of proceedings, the elimination of case queues in courts, the acceleration of the functioning of the justice system. But

[25] M. Medvedeva, M. Vols, M. Wieling, *Using*..., p. 237ff.
[26] P. Księżak, S. Wojtczak, Toward a Conceptual Network for the Private Law of Artificial Intelligence, Cham 2023, p. 53ff.
[27] D. F. Engstrom, Post..., p. 12.
[28] E. P. Polo, El *Juez-Robot*..., p. 60ff.
[29] *Ibid*.

is the justice system, especially its beneficiaries, an area ready for algorithms and algorithmic judges? This area can and should be looked at more closely.

## The Right to a Court and Artificial Intelligence in Current Regulations

There is no doubt that the judiciary, in the course of several centuries of evolution, has developed a specific model for the organisation of the judiciary, which is now reflected primarily in the provisions of the fundamental laws, as well as in the subordinate legal regulations defining the system of the judiciary in a given state.[30] In order for the courts to function properly in the system of state organs, it is necessary to ensure respect and observance of the independence of the judiciary and the related independence and impartiality of judges, which is, *inter alia*, the duty of state organs.[31]

When looking at the various constitutional solutions, the relevant standards can be observed. They have been constructed in such a way as to ensure the independence of the judiciary exercised by people who, as judges, must enjoy the qualities of independence and impartiality, which is primarily related to procedural guarantees for the parties to judicial proceedings.[32] There are, therefore, constitutional rules for the appointment of judges and, subsequently, for their exercise of judicial power and the settlement of disputes between parties.[33] These rules, it may be thought, are not, as of today, fit for the implementation of artificial intelligence as an element of judicial power, a tool for the exercise of judicial power, i.e. the adjudication of citizens' cases.

By way of example, it may be pointed out that according to the law in Poland, under the provisions of the Polish Constitution, the Republic of Poland is the common good of all citizens (Article 1), a democratic state governed by the rule of law, implementing the principles of social justice (Article 2), in which supreme power belongs to the Nation (Article 4[1] of the Polish Constitution). At the same time, the Constitution is the supreme law of the Republic of Poland (Article 8[1]) and the Republic of Poland observes international law binding upon it (Article 9). The system of government of the Republic of Poland is based on the division and balance of legislative, executive and judicial

[30] McNollgast, *Conditions for Judicial Independence*, 'Journal of Contemporary Legal Issues' 2006, vol. 15, 15, p. 106ff.

[31] K. Olszak, *Niezawisłość, niezależność i bezstronność w sądownictwie w świetle regulacji prawnych oraz orzecznictwa*, „Głos Prawa. Przegląd Prawniczy Allerhanda" 2019, vol. 4, 2, pp. 319–344.

[32] P. Nihoul, *L'indépendance et l'impartialité du juge*, 'Annales de Droit de Louvain' 2011, vol. 71, 3, pp. 201–264.

[33] P. Bernier, *Analyse comparée sur la sélection et la nomination des Juges en régime parlementaire: éléments pour la constitution d'un «idéal type»*, 'Éthique Publique' 2011, vol. 13, 1, pp. 139–158.

powers (Article 10[1]). The latter, in turn, is exercised by courts and tribunals (Article 10[2] of the Constitution of the Republic of Poland *in fine*). In Polish law, courts and tribunals are a separate and independent authority from other authorities (Article 173 of the Polish Constitution).[34] The administration of justice in Poland is exercised by the Supreme Court, common courts, administrative courts and military courts (Article 175 of the Polish Constitution). The Polish Constitution provides for the existence of the National Council of the Judiciary of Poland [*Krajowa Rada Sądownictwa*], a body intended to safeguard the independence of the courts and the independence of judges (Article 186[1] of the Polish Constitution), the proposal of which is necessary for the appointment of a judge, which is made each time in Poland by the President of the Republic of Poland on the proposal of this Council (Article 179 of the Polish Constitution).[35]

It follows, at least indirectly, from the above that if the Constitution talks about judges it is about humans. Polish law is silent on the possibility of someone other than a human being exercising judicial power, so in the current legal regulations – despite the occasional dissenting voices – there is no possibility of an artificial intelligence exercising judicial power and administering justice. In Poland, this is a competence constitutionally reserved for humans. It is currently they, as impartial and independent judges, who can exercise the administration of justice.

In Spain, on the other hand, it follows, for example, from the constitution there, which of course respects the tri-partite of powers, *inter alia*, that the jurisdictional power is vested in the judges and that the state – which has a monopoly of jurisdiction (Article 117 of the Spanish Constitution) is to ensure the right to receive effective protection of judges and courts in the exercise of their rights and legitimate interests (Article 24 of the Spanish Constitution).[36] The principle of the reservation of jurisdiction is enshrined in Article 117(3) of the Spanish Constitution and reserves exclusively to the courts and tribunals determined by law the exercise of jurisdictional power in all types of proceedings.[37] Only this type of body is able to judge and enforce what has been judged. The aim of the Constitution was to prevent other types of bodies, which carry out their work without the protection of the constitutional guarantees. In doing so, the Spanish judiciary is aware of a judicial council (General Council for the Judiciary – *Consejo General del Poder Judicial*) to which it entrusts certain functions, in particular with regard to appointment,

[34] B. Stępień-Załucka, Sprawowanie wymiaru sprawiedliwości przez Sąd Najwyższy w Polsce, Warszawa 2016, *passim*.

[35] R. Piotrowski, *Sędziowie i granice władzy demokratycznej w świetle Konstyytucji RP*, „Ruch Prawniczy Ekonomiczny i Socjologiczny" 2018, vol. 80, 1, p. 215ff.

[36] J. L. Granda Alonso, La autonomía judicial en el constitucionalismo español, Madrid 2015, *passim*.

[37] I. Díez-Picazo Giménez, *Artículo 117* [in:] M. Rodríguez-Piñeiro y Bravo Ferrer, M. E. Casas Baamonde (eds), Comentarios a la Constitución Española XL aniversario, Madrid: Boletín Oficial del Estado 2018, pp. 646–670.

promotion, supervision and disciplinary responsibility (Article 122[2] of the Spanish Constitution).[38] Judges are thus appointed with the participation of the *Consejo General del Poder Judicial*, from which it also follows indirectly – as in Poland – that the legislator, when speaking of judges, means human judges, as only independent and impartial judges are entrusted with the provision of judicial protection. The idea of the algorithmic judge therefore also in Spain conflicts with the constitutional principles that define the judicial function. The Spanish constitution constitutes the jurisdiction as a human judicial system, designed for the people and managed by the people.[39]

The situation is similar to that in the two countries mentioned above elsewhere in the world, although there are of course some attempts to change this. There is an ongoing discussion from which, however, as of today, no coherent concept (at least not yet) emerges for the placement of artificial intelligence in constitutional justice structures.

This does not mean that things could not be different in the future. It is possible to imagine, whether in Poland, Spain or other countries, such constitutional amendments that could lay the foundations for the constitutionally compliant administration of justice by or with the use of artificial intelligence. For this, however, it is necessary to build on (and possibly evolve) the existing standards of the right to justice, which, over the course of the development of the law in this area, have grown into international standards, rather widely accepted in many parts of the world.

## The European Standard of the Right to a Court and the Future of Artificial Intelligence in the Judiciary

In this light, it must be recalled that the resolution of court cases is an indispensable element of the standard of the right to a court. This standard is often referred to as the so-called fair trial,[40] which is related to the case law appearing against the background of individual Constitutions (e.g. Article 45 of the Polish Constitution, Article 24 of the Spanish Constitution), but also – at least from the point of view of the European member states of the Council of Europe – to the views expressed against the background of Article 6 of the European Convention for the Protection of Human Rights and Fundamental

[38] L. M. Díez-Picazo Giménez, *Artículo 122* [in:] P. P. Tremps, A. S. Arnaiz, C. M. Padilla (eds), Comentario a la Constitución Española. 40 Aniversario. Libro-Homenaje a Luis López Guerra, tomo 2, Valencia 2018, p. 1720ff.

[39] E. P. Polo, *El Juez-Robot*..., pp. 66–68.

[40] J. Daci, *Right to a Fair Trial Under International Human Rights Law*, 'South East European University Review' 2008, vol. 4, 2, p. 95.

Freedoms.[41] It is primarily from this Strasbourg standard that one can read the necessity of ensuring a party's right to an independent court, formed by an independent and impartial panel of judges. This standard, in the context of the consideration of artificial intelligence, is primarily concerned with the right to a fair trial and the associated qualities of a court.

It should be made clear that the essence of the right to a fair trial is the concept of fairness of the judicial procedure, in accordance with the requirements of fairness and publicity, which consists in providing the parties with procedural rights adequate to the subject matter of the proceedings. In practice, this means that litigants must have a real opportunity to present their arguments and the court has a duty to consider them. This right has so far been correlated with, *inter alia*, the right to have the case heard by a 'duly seated' court, i.e. a court characterised by specific qualities.[42]

According to widely accepted positions in democratic countries, an independent court is one in which, on the one hand, the judge has a sense of his or her independence and, on the other hand, in which the judge is perceived by the participants in the justice system as impartial.[43]

At the moment, it seems that the algorithms used in practice so far, an algorithm acting as a judge, is not able to meet the above criteria (yet). In this respect, a number of doubts can be pointed out in relation to current solutions, without which the use of artificial intelligence systems as a substitute for a judge will be difficult, if not impossible, to resolve and guarantee in the future.

Firstly, it is about the judge's impartiality towards the case, the parties and the participants in the proceedings.[44] Impartiality establishes the obligation to objectively resolve the conflict without taking part in it, i.e. without any personal or professional connection with the parties or the subject of the

[41] M. Kuijer, *The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings*, 'Human Rights Law Review' 2013, vol. 13, 4, pp. 777–794.

[42] A. Clooney, P. Webb, The Right to a Fair Trial in International Law, Oxford 2021, *passim*.

[43] M. Ch. Okpaluba, T. Ch. Maloka, *The Fundamental Principles of Recusal of a Judge At Common Law: Recent developments*, 'Obiter' 2022, vol. 43, 2, pp. 88–112.this translates into the requirement that a judge or anyone under a duty to decide anything must be impartial, which is, in turn, the foundation for the recusal of a judge in adjudication. This cardinal principle of adjudication has produced an abundant case law indicating the circumstances in which a judge should, or ought to, recuse him- or herself on the ground of bias or reasonable apprehension of bias in common-law jurisdictions. This article focuses on the fundamental principles guiding the notion of recusal in the common-law courts. There is, first, a presumption of judicial impartiality, which is the preliminary but important hurdle an applicant for recusal of a judge must overcome. The inquiry proceeds no further if this presumption is not successfully rebutted early in the proceeding. The second hurdle is the test for recusal that the facts put forward in support of the allegation of bias or apparent bias must meet. This test is a two-dimensional reasonable standard test of a reasonably informed observer who would reasonably entertain an apprehension that the judge would (not might

[44] Y .C. Sánchez, *La independencia de los jueces internacionales: análisis y valoración de las reformas adoptadas en el marco del Tribunal Europeo de Derechos Humanos*, 'Revista Electronica de Estudios Internacionales' 2021, vol. 12, 42, pp. 1–44.

dispute.[45] Traditionally, it stems from the judge's internal conviction, attitude or ethics. In the case of an algorithm, on the other hand, this impartiality will derive primarily from the statistics of the cases on which the algorithm has learned. While it is possible to envisage a tool that will be constructed in such a way as to formally realise the principle of impartiality, it is difficult at the moment to guarantee that the technicians-creators of the artificial intelligence system will not leave their views reflected in the system.[46] With this comes the risk of violating the impartiality standard, which, at least at present, is a barrier for which legislation has not (yet) found an apt solution.

Secondly, the same can in principle be seen in the context of the independence of the judge, as it does not seem entirely possible to separate artificial intelligence from the interference of other authorities.[47] This is due to the fact that in its creation, the algorithm has certain indications as to the methodology of conduct and may be susceptible to take into account biases imposed by the legislative or executive authority, in terms of, for example, higher criminalisation of certain groups of persons.[48] AI technicians can also smuggle their preferences into these systems. The necessary independence cannot, under current law, be extended to them; there are no adequate mechanisms for this. Judges, on the other hand, must be absolutely sovereign in the exercise of their judicial function. In exercising their authority, they can only be subject to the law. In this sense, one wonders whether it is possible for a data scientist or a whole team of professional programmers involved in the development of a system to develop an algorithm that is completely free of the influence of any of the three authorities. Artificial intelligence technology is developed by private entrepreneurs who do not necessarily operate transparently and whose product is protected by copyright. The employees employed by these entities are subject to the general labour system and therefore subject to the ideology, needs and organisational structure defined by their employer. As things stand, this seems to be a significant problem, precisely in the context of the possible independence of the algorithmic judge.[49] It is also a barrier that legislation must break out of in order to freely use artificial intelligence systems for the purposes described here.

Thirdly, it is difficult to speak of a judge's independence when it is to be based on the statistical conduct of a category of cases, as one would expect the conduct of an algorithmic judge to be.[50] For it must be borne in mind that each case differs from the others in details, but sometimes it is these details

[45] T. Szanciło, B. Stępień-Załucka, *Sędzia*..., p. 227.
[46] E. P. Polo, *El Juez-Robot*..., p. 68ff.
[47] L. Verzelloni, *El debate europeo sobre la independencia de la magistratura: la propuesta de la Red Europea de Consejos de Justicia*, 'Jueces para la Democracia. Información y Debate' 2017, vol. 88, p. 113 ff.
[48] T. Szanciło, B. Stępień-Załucka, *Sędzia*..., p. 228.
[49] E. P. Polo, *El Juez-Robot*..., p. 70ff.
[50] T. Szanciło, B. Stępień-Załucka, *Sędzia*..., p. 228.

that make it unique. A judge has a moral conscience, social experience, common sense and empathy. If the judge is a human being, there is a chance that he or she will notice these details, in the case of an algorithm such a chance is unlikely to exist, because its database will never take into account every possible factual situation, it will not realise the mechanism of human sensitivity necessary in this area.[51] Meanwhile, the subjective and individual perspective of the judge, his/her feelings and sensitivity are essential elements at the moment when the judge decides the controversy. The intellectual operations carried out by the judge to apply the general law to a particular case are not automatic on the basis of his or her knowledge and experience, but on the contrary. The choice of the most just solution is a manifestation of the judge's commitment to society, to the legal system he serves. Indeed, the judge's decision represents his commitment of a specific nature to the parties and of a general nature to society as a whole. His or her decision resolves the conflict, providing the required judicial protection, all in a responsible manner, as the judge is accountable for his or her decisions. The artificial intelligence system, on the other hand, decides without the shadow of an emotional component.[52] Artificial cognitive operations are performed in the complete absence of feelings and emotions. The algorithmic judge is unemotional, unmoved by what it perceives from the outside, because it perceives nothing from the outside, nothing that is not present in the databases that serve as sustenance. An artificial intelligence system offers its predictions or solutions based on the analysis of an infinite number of previous cases in similar circumstances, looking for patterns that it applies automatically. In this context, it is also possible to speak of a kind of barrier inhibiting the application of AI in the judiciary.

Finally, among the legal guarantees of judicial independence, the non-removal of judges deserves special attention.[53] The Constitution establishes the impossibility of dismissal, suspension or transfer except in cases expressly provided for by law. Thanks to irremovability, those exercising judicial power can exercise their function without fear that the direction of their decisions may affect their careers. In the context of artificial intelligence, it is difficult to have such guarantees, which also – at least *prima facie* – seems to be a significant obstacle that needs to be addressed (a new approach).

All these doubts, directed at algorithms known from practice so far, may constitute, at least for some time, a significant barrier to the introduction of changes in legal systems and the admission of artificial intelligence algorithms to administer justice. However, it is very likely that machines will continue to develop technically and will soon fulfil most of the expectations outlined above, as indicated by the results of AI functionality studies. It there-

[51] E. P. Polo, El *Juez-Robot*..., p. 68ff.

[52] *Ibid.*

[53] B. Stępień-Załucka, *Niezawisłość sądownictwa a niezależność sądów i niezawisłość sędziów*, „Przegląd Prawa i Administracji" 2011, vol. 85, pp. 135–159.

fore seems necessary to continue searching for the optimal solution, to create the optimal mechanism that would have a chance to gain the trust of citizens, which at the moment seems to be an extremely difficult task.

## What Next? Some Comments Rather than Conclusions

There is no doubt that in the discussion on the future shape of the judiciary, the issue of new technologies is coming up more and more frequently and boldly, especially in the context of the opportunities and threats that these, for the judiciary, may bring.[54] In doing so, technological changes can already be seen in individual court procedures. In fact, the procedural rules have undergone significant transformations and the typically "analogue" court proceedings are already becoming "digital" proceedings. Since in the not too distant future it is envisaged that artificial intelligence may be used to adjudicate certain categories of cases where artificial intelligence is to replace the traditional judge, such possible transformations of court proceedings using artificial intelligence must raise questions about the standard of the right to a court and its satisfaction. After all, the efficiency of the judiciary is stimulated at various levels and the effect of various judicial stimulus measures is not always correct. Therefore, it is important to bear in mind that, when dealing with court cases, speed of proceedings should not overshadow other procedural guarantees of the parties.

As of today, machines have not been able to properly imitate human emotions in solutions known to the justice system. However, this may change soon, and new algorithms may solve this problem. In light of the very rapid development of this technology, the ability of humanoids to imitate human emotions will improve significantly in the near future, as research results indicate. Perhaps, for this reason alone, the use of artificial intelligence in the judiciary for the adjudication of cases should be postponed for some time, postponed, given a chance for this technology to improve. For, as one may think, the implementation of artificial intelligence for the purposes of dispute resolution is an inevitable matter, although it should be carried out in a gradual and slow manner, it seems, as gradually and slowly as possible.

[54] See e.g. report: Study on the Use of Innovative Technologies in the Justice Field. Final Report, Brussels 2020. See also the publications of R. Susskind, an Author who has been dealing with issues of new technologies in the work of lawyers for more than three decades, including: R. Susskind, Tomorrow's Lawyers. An Introduction to Your Future, Oxford 2017, and especially, Online Courts and the Future of Justice, Oxford 2019.

In turn, technological solutions will evolve – because they must – legal solutions, which this time, in order for the justice system to take full advantage of the technological possibilities, must be introduced in time, to keep up. The standards of the right to justice, as traditionally understood, must therefore evolve in this direction. What this should look like should be discussed in the near future, so as to try to outline a new framework for the standard of the right to court with algorithmic judges. Until then, the law will have to look at technological solutions, applying them on a large scale to date (*LegalTech* 1.0 and 2.0). However, the time will also come for *LegalTech* 3.0. For this to happen, the data feeding the AI system must be collected with great care, in a secure technological environment, with clear storage parameters,[55] and its future use must meet the same standards.

***LegalTech 3.0*. Kilka refleksji na temat konstytucyjnych przesłanek wykorzystania sztucznej inteligencji w wymiarze sprawiedliwości**

**Abstrakt**

Nowe technologie są coraz częściej obecne w wymiarze sprawiedliwości. Dostrzega się ich skuteczność i różnorodne możliwości, stają się one coraz ważniejszymi narzędziami wspierającymi funkcjonowanie wymiaru sprawiedliwości. W związku z ich ciągłym rozwojem w przestrzeni naukowej pojawiła się idea, aby narzędzia oparte na jednej z nich – sztucznej inteligencji – nie były już wykorzystywane jako jedynie wspierające sędziów, ale jako te, które mogłyby zastąpić sędziego w wypełnianiu jego zadań. Takie ukształtowanie sądownictwa, z sędzią algorytmicznym – bo do tego w istocie zmierza ta propozycja – rodzi pytania natury konstytucyjnej. Dotychczasowe prawo konstytucyjne wypracowało bowiem pewne standardy, którym musi odpowiadać nowoczesny sąd. Spełnienie tych standardów przez sztuczną inteligencję jest dyskusyjne; poświęcona temu analiza jest przedmiotem niniejszego artykułu. Celem, jaki stawia sobie autorka, jest odpowiedź na pytanie, czy prawo konstytucyjne jest dziś gotowe na sztuczną inteligencję w wymiarze sprawiedliwości.

**Słowa kluczowe:** sztuczna inteligencja, sądownictwo, sądy, sędzia, sędzia algorytmiczny.

[55] There are even proposals in the doctrine to create a European agency to monitor the quality of artificial intelligence systems, as well as the strict application of data protection rules, which seems to be the next step in the discussion in this context. This could lead to greater public confidence in artificial intelligence tools.

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## Reviews / Recenzje

Patrycja Grzebyk,
Bartłomiej Krzan,
Karolina Wierczyńska

# Polski dorobek w zakresie międzynarodowego prawa karnego w latach 1918–2018

[Polish Achievements in the Field of International Criminal Law in the Years 1918–2018], Wydawnictwo Instytutu Wymiaru Sprawiedliwości [Publishing House of the Institute of Justice], Warszawa 2023, pp. 532

International criminal law has quite a long origins, although a somewhat faster development of this branch of international law did not occur until after the World War II. The last few decades have seen a very dynamic development of this law also in the institutional dimension, which is associated with the establishment of the International Criminal Court. Although the doctrine, including the Authors of this publication, has devoted much attention to the development of international criminal law, there has been a lack of perspective on the role of Polish experts, scholars and diplomats in this process. For various reasons, this issue – also in Polish legal writing – has been neglected. A classic example would be that the achievements and merits of Rafał Lemkin were much better known in the world than in his home country. Therefore, I believe that making the effort to present the Polish contribution to this field of law in a documented manner deserves great appreciation and respect.

The publication, as the Authors explain, 'is intended to shed new light on the development of international criminal law, emphasising the achievements of Polish diplomacy, science and the judiciary in the field of international criminal law, with the identification of the individuals involved.' Already at the outset of this review, I would like to state that this intention has been fully implemented.

The work is divided into two parts. The first is historical in nature and illustrates Polish involvement in the development of international criminal law from 1918 to the present. The second is devoted to a problematic analysis of international crimes and the principles of their prosecution and punishment.

The first part presents not only Polish involvement in initiating the work and shaping individual acts of international law in the discussed area, but also the extent to which Poland is bound – or not bound – by individual international treaties.

The analysis of the activity of Polish lawyers in the years 1918–1939 is very interesting and detailed. Karolina Wierczyńska has meticulously documented this activity, presenting also to an appropriate extent the academic life. An interesting observation is that criminal lawyers were more active in international forums than those specialising in public international law. It is also important to conclude that the protection of civil rights, the protection of the rights of groups and the principle of humanitarianism were important elements in the debates of the time.

Discussing the years 1945–1989, Patrycja Grzebyk points out that the Polish authorities were active in establishing judicial accountability of war crime suspects. It was during this period that the fundamental works of Rafał Lemkin and Manfred Lachs were written, which had an overwhelming impact on the formation of international law.

Presenting the period 1945–1989, special attention is paid to Polish accents in the Nuremberg Trials. Commenting on Polish activity during this period, the Author rightly points out that Polish diplomats were completely dependent on the 'Soviet voting machine'. At the same time, she emphasizes that – in spite of this factor – research on international criminal law and international humanitarian law was actively conducted in many Polish research centers.

The period from 1989 to 2018, a time in which Poland embarked on the path of building a democratic state under the rule of law, brought a significant increase in diplomatic – as well as research – activity in the area in question. In describing this period, Karolina Wierczyńska emphasises the role played by Tadeusz Mazowiecki's reports and recommendations from his time as Special Rapporteur of the UN Commission on Human Rights on human rights violations in the former Yugoslavia and his role in the process of establishing the International Criminal Tribunal for the former Yugoslavia. The Author also argues that Poland was one of the main architects of the establishment of a permanent International Criminal Court. I may add

from myself that, in this context, the election in 2021 of Prof. Piotr Hofmański as President of the said Tribunal was, in a sense, the culmination of this activity. These years bring the activity of Polish scholars in the area of international criminal law, which is very well documented in the presented work. At the same time, the Author aptly accuses Polish courts of reluctance to base domestic criminal jurisdiction in this area on the universal principle.

The second part of that monograph is a substantive and problematic analysis of such issues as: international crimes and their prosecution (Bartłomiej Krzan), the crime of aggression (Patrycja Grzebyk), war crimes (Patrycja Grzebyk), crimes against humanity (Bartłomiej Krzan), the crime of genocide (Karolina Wierczyńska), the statute of limitations on crimes (Karolina Wierczyńska), criminal jurisdiction and its enforcement (Bartłomiej Krzan), and the principles of individual criminal responsibility (Bartłomiej Krzan).

In the conclusion, the Authors emphasise that their intention was, among other things, to present 'a panorama of research on international criminal law conducted by Poles'. In my opinion, this excellent work has gone far beyond such a goal. For the reader is provided with a full, well-documented picture of international criminal law on the one hand, and the development of Polish doctrine and diplomatic activity in this area on the other. The Authors have not overlooked the role of the judiciary either.

The work is written in accessible yet precise language. It reads with great interest. It significantly enriches our knowledge of this issue.

**Roman Wieruszewski***

* **Roman Wieruszewski** – DSc, Professor of Law (Titular); political scientist; Rector and Chair of Constitutional Law and Human Rights of the EULA (affiliation); https://orcid.org/0000-0001-8602-7594; rwieruszewski@ewspa.edu.pl / dr hab., profesor nauk prawnych, politolog, rektor oraz kierownik Katedry Prawa Konstytucyjnego i Praw Człowieka EWSPA (afiliacja).

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[3] ECtHR judgment of 25 March 1998, Belziuk v. Poland, Application no. 23103/93, § 37. Subsequent citations of the same judgment omit either the ECL (CJEU) or the complaint number (ECtHR).

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[2] Order of the Constitutional Court of 27 September 2005, U 2/05, OTK ZU-A 2005, no. 8, item 96, part II, point 2.

[3] Judgment of the Constitutional Court of 3 December 2015, K 34/15, OTK ZU-A 2015, no. 11, item 185, part III, point 6.12.

[4] Judgment of the Supreme Administrative Court of 24 October 2000, V SA 613/00, OSP 2001, no. 5, item 82.

[5] Judgment of the Court of Appeal in Kraków of 23 April 1998, II AKa 48/98, LEX no 35155.

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[4] Wyrok NSA z 24 października 2000 r., V SA 613/00, OSP 2001, nr 5, poz. 82.

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