

## ON THE ISSUE OF COMPENSATORY LIABILITY OF CIRCUIT ELECTORAL COMMISSION MEMBERS ACTING AS PUBLIC OFFICIALS

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**Abstract.** The purpose of this paper is to answer the question whether the following can incur civil liability for damage caused by an unlawful act or omission committed by members of circuit electoral commissions: Is it the State Treasury or a local government unit or another legal person exercising public authority under the law? In my opinion it is necessary to verify the hypothesis whether the activity of members of circuit electoral commissions constitutes exercise of public authority. Moreover: Is the manner of appointing their members, their qualifications and competences important for qualifying them in this category? This paper examines the case law of the Supreme Court and common courts of various instances, starting from 2013. This date is justified by the expiry of the relevant deadline since the entry into force of the Electoral Code, which would make it possible to identify matters that are subject to my considerations. I believe the activities of circuit electoral commissions can be said to have a special character because the credibility of the voting process and the determination of its results depend on their work.

**Keywords:** public official, circuit electoral commissions, compensatory liability, judicial decisions, public authority

### INTRODUCTION

The purpose of this paper is to answer the question whether the following entities can be liable under civil liability for damage caused by an unlawful act or omission of circuit electoral commission members: the State Treasury or a unit of local self-government or another legal person exercising public authority by the operation of law (*ex lege*)? In my opinion, it is necessary to verify the hypothesis whether the activity of circuit electoral commission members constitutes exercise of public authority. Also, does the method of appointing members of these commissions, their qualifications and competences have any bearing on their inclusion in this category? In this paper I will examine the Polish jurisprudence of the Supreme Court and common courts of various instances, starting from the year 2013. This date is justified by the expiry of an appropriate term from the entry into force of the Electoral Code, which would enable the examination of cases I am focusing on.

1. DETERMINANTS OF THE FUNCTIONING OF PROTECTIVE SYSTEMS (UNIVERSAL DECLARATION OF HUMAN RIGHTS, HUMAN RIGHTS PACTS) IN LIGHT OF THE STATE'S RESPONSIBILITY FOR UNLAWFUL ACTIONS OF LOWEST-TIER OFFICIALS OF ELECTORAL ADMINISTRATION UNDER POLISH LAW

Pursuant to Article 21(3) of the Universal Declaration of Human Rights, adopted on 10 December 1948 by the United Nations General Assembly, the will of the people underpins the authority of government, and it is manifested in fair and periodic elections based on the principle of universality, equality and secrecy, or other equivalent procedure ensuring freedom of elections [Zubik 2008, 19; Balcerzak 2007, 4].

The Universal Declaration of Human Rights contains “an authoritative catalogue of human rights, that has become a fundamental element of customary international law and binds all states, not just members of the United Nations” [Sohn 1982, 17; Banaszak 2003, 25]. Because of its subject matter, from the very beginning, the Declaration was treated as an act of particular importance for defining the obligations of members of the international community [Kędzia 2018, 16].

The Declaration is important as a foundation of international human rights law [ibid., 14]. All states acknowledge its importance and treat it as a source of obligations on a global scale [ibid., 7]. The document recognizes the right to vote (active and passive) as one of the fundamental political rights [Jaskólska 1998, 54, 79]. Written in 1948, it is of a declarative, and not constitutive character [ibid., 55]. The universal nature of these rights is based on recognizing human rights as the rights of every human being [Bucińska 2003, 128]. The importance of the Universal Declaration of Human Rights was confirmed by the Declaration on Criteria for Free and Fair Elections adopted unanimously by the Interparliamentary Council in Paris on 26 March 1994. This international document with a global reach, elaborated outside the UN structures and having the form of a declaration [Kryszewski 2016, 17–18], recognizes and supports the fundamental principles relating to periodic, free and fair elections. This document emphasizes that “in each state, the power of the government can only come from the will of the citizens, expressed in real, free and fair elections.”<sup>1</sup>

The legal significance of the Declaration stems from the fact that it served as the basis for the International Covenant on Civil and Political Rights [Kędzia 2018, 18] compared to the previously adopted acts, the Covenant was a milestone. Traditional human rights and freedoms were granted protection based on the UDHR. From then on, the ideas, rights and freedoms contained in this document acquired the character of norms of public international law; since the Covenant is an international treaty, it is legally binding [Michalski 2013, 49–50; Połatyńska 2009, 75; Wołpiuk 2014, 111].

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<sup>1</sup> See “Przegląd Wyborczy. Biuletyn Informacyjny” [hereinafter: PWBI] 1 (1995), p. 38.

The International Covenant on Political and Civil Rights in Article 25(b) states that: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions [...] to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors” [Zubik 2008, 30; Balcerzak 2007, 6].

Pursuant to Article 25 of the Covenant, the right to elect and be elected to representative bodies belongs to the catalogue of political rights. It is an element of the right to participate in political life; it belongs in the category of the so-called civil rights [Piechowiak 1999, 70; Balcerzak 2010, 457].

As emphasized by A. Patrzalek and L. Gaca, “the elections conform with the requirements of Article 25, if they are «fair» [...]”. This criterion is not sufficiently clear and unambiguous and does not rule out any freedom of interpretation. The most controversial is the interpretation of the principle of fairness in elections [...]” [Patrzalek and Gaca 1991, 652]. On the other hand, as noted by R. Wieruszewski with respect to “honesty,” “it should be remembered that the Covenant was written during the Cold War. One of the conditions that the communist states were most eager to impose during its adoption was the recognition that also one-party elections were fair. This is also how the standard defined under Article 25(b) was construed. [...] Fair elections mean that eligible voters are free to choose between different solutions – parties, programmes, or at least multiple candidates within one party” [Wieruszewski 2012, 623]. According to P. Daranowski, however, “autonomy, semantic independence of terms and concepts must be viewed in the context of the normative system to which these terms and concepts belong; so it may be both a powerful system of domestic law and a system created by a treaty itself” [Daranowski 1993, 242]. Nowadays, Polish legal science recognizes that fairness is a component of the principle of free elections.<sup>2</sup> The functioning of the Polish state and law should be based on the standards of a democratic state of law, including on a democratic electoral system [Pawłowicz 2002, 53]. The freedom of elections forms, in a way, the spirit of their democratism.<sup>3</sup>

Although the Universal Declaration of Human Rights does not expressly refer to the title issue, some references can be drawn from Article 21(3). According to R.L. Pintor, electoral bodies create and strengthen ties between civil society and electable institutions as they voice the interests of large groups while introducing fairness into the political system [Pintor 1999, 51]. As A. Sokala notes, the principle of free elections is supported by the directive of fairness of the electoral process. The electoral process should be conducted by an independent and politically neutral electoral administration [Sokala 2013b, 268]. The declaration contained in Article 21(3) and in the Covenant in Article 25(b) describes the elections as “fair.” According to G. Kryszewski, “fair elections are otherwise reliable elections” [Kryszewski 2016, 9]. Following the author, we should recall that one of the charac-

<sup>2</sup> PWBI, 8–9 (1999), p. 30–31.

<sup>3</sup> PWBI, 5 (2001), p. 22.

teristics making up the definition of fair elections by L. Diamond is that the electoral administration is duly competent and able to take special precautions against fraud in voting and counting votes [Diamond 2002, 29, Kryszewski 2016, 24–25]. In the light of the study prepared under the auspices of the Organization for Security and Cooperation in Europe, the Office for Democratic Institutions and Human Rights and the Council of Europe, fair elections are characterized by, among other things, the performance of its tasks impartially by the electoral administration; holding persons breaking the law accountable [Kryszewski 2016, 25–26]. Thus, the doctrinal and analytical approach causes that the requirement of reliability under Article 25(b) the Covenant may also apply to the work of members of circuit electoral commissions. For they – as the lowest body in the structure of the Polish administration – conduct voting and determine its results.

It should be recalled that the Covenant is a legal expression and development of the UDHR. It has a global reference [Biszyńska 1992, 5]. Poland ratified the Covenant in 1977 and on 18 June 1977 it entered into force. It has a legally binding character and guarantees fundamental human rights and freedoms. According to T. Astramowicz–Leyk, it is “a milestone in the universalization of the international system for the protection of human rights and freedoms” [Astramowicz–Leyk 2009, 20; Tychmańska 2017, 72]. It is assumed that the Covenant is considered to be a global synthesis of humanistic thought. It is the product of many schools of thought and legal views [Biszyńska 1992, 7]. The UDHR together with the Protocol make up the International Charter of Human Rights [Wieruszewski 2007, 4].

In what follows I will examine the Polish case law of the Supreme Court and common courts of various instances, starting from 2013. This date is justified by the expiry of a specific deadline from the entry into force of the Electoral Code, which would enable the examination of cases under our scrutiny.

## 2. ANALYSIS OF THE JUDICIAL DECISIONS CONCERNING THE CONDITIONS FOR COMPENSATORY LIABILITY UNDER ARTICLE 417(1) OF THE CIVIL CODE

Pursuant to Article 417(1) of the Polish Civil Code,<sup>4</sup> “liability for damage caused by an unlawful act or omission in the exercise of public authority rests with the State Treasury or a local government unit or other legal person exercising this authority under the law.”

As noted in 2013 by the Supreme Court, “CC Article 417(1), in force from 1 September 2004 in the current wording, stipulates that the State Treasury is liable for damage caused by unlawful action or omission in the exercise of public authority. This concept should be understood as a violation of an order or prohibition resulting only from a legal norm, and not from the principles of social inter-

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<sup>4</sup> Act of 23 April 1964, the Civil Code, Journal of Laws of 2019, item 1145 as amended [hereinafter: CC].

course.”<sup>5</sup> For reasons of space, let me only mention that the body of court judgment indicate that unlawfulness is pre-condition for the occurrence of damage understood as a normal consequence in particular circumstances;<sup>6</sup> unlawfulness is understood objectively as non-compliance or omission of an action with the constitutionally understood sources of law;<sup>7</sup> the basis for compensatory liability is the public-law nature of legal relationship.<sup>8</sup>

In light of the foregoing, we may ask whether the subjective right to vote exemplifies an allegation of infringement of a personal interest enabling the attribution of responsibility to the State Treasury pursuant to Article 417(1) CC?

In its judgment, the Court of Appeal in Katowice ruled that “to assign responsibility to the State Treasury pursuant to Article 417(1) CC it is necessary to prove the damage. It may be a non-pecuniary damage, a so-called personal injury, or a property damage. The Constitution of the Republic of Poland<sup>9</sup> provides for a number of other rights and freedoms, for example, the active electoral right. This does not mean that a violation of this type of law, for example, when a particular person is omitted from the electoral roll, means a personal interest infringement justifying a claim for compensation.”<sup>10</sup> Therefore, we could legitimately ask whether people with disabilities could claim compensation from the State Treasury for damage caused by acts or omissions of circuit electoral commission members? The Court of Appeal in Łódź stated in one of its decisions: “Since the assessment of an infringement of personal rights is objective in nature, the spe-

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<sup>5</sup> Judgment of the Supreme Court of 7 November 2013, ref. no. V CSK 519/12, Lex no. 1391709.

<sup>6</sup> Judgment of the Court of Appeal in Szczecin of 23 May 2013, ref. no. I ACa 44/13, Lex no. 1400477; judgment of the Court of Appeal in Gdańsk of 30 January 2014, ref. no. V ACa 790/13, Lex nr 1455551; judgment of the Supreme Court of 14 December 2016, ref. no. I CSK 707/15, Lex no. 2151401; judgment of the Court of Appeal in Szczecin of 23 May 2018, ref. no. I ACa 20/18, Lex no. 2529549; ref. no. V CSK 519/12; judgment of the Court of Appeal in Warsaw of 15 February 2018, ref. no. VI ACa 1538/16, Lex no. 2514659; judgment of the District Court in Siedlce of 30 September 2013, ref. no. I C 1225/12, Lex no. 1717837; judgment the Court of Appeal in Szczecin of 25 April 2018, ref. no. I ACa 959/17, Lex no. 2507717; judgment of the Court of Appeal in Łódź of 6 February 2013, ref. no. I ACa 1149/12, Lex no. 1344143.

<sup>7</sup> Judgment of the Court of Appeal in Poznań of 23 May 2013, ref. no. I ACa 351/13, Lex no. 1363331; judgment of the Supreme Court of 13 June 2013, ref. no. V CSK 328/12, Lex no. 1381041; judgment of the Court of Appeal in Katowice of 20 February 2014, ref. no. I ACa 1111/13, Lex no. 1451631; judgment of the Court of Appeal in Łódź of 20 April 2017, ref. no. I ACa 1372/16, Lex no. 2310605; judgment of the Court of Appeal in Szczecin of 28 June 2017, ref. no. I ACa 133/17, Lex no. 2402405; judgment of the Court of Appeal in Cracow of 6 November 2013, ref. no. I ACa 298/13, Lex no. 1483749; judgment of Court of Appeal in Warszawa of 5 November 2015, ref. no. VI ACa 1593/14, Lex no. 1979340; judgment of the Supreme Court of 13 September 2019, ref. no. II CSK 374/18, Lex no. 2746916.

<sup>8</sup> Judgment of the Court of Appeal in Łódź of 20 January 2016, ref. no. I ACa 1005/15, Lex no. 1979409; judgment of the Court of Appeal in Białystok of 31 January 2017, ref. no. I ACa 241/16, Lex no. 2249924.

<sup>9</sup> Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

<sup>10</sup> Judgment of the Court of Appeal in Katowice of 8 December 2016, ref. no. I ACa 656/16, Lex no. 2229155.

cific qualities of the victim (e.g., hypersensitivity or a mental illness) are not taken into account in the assessment of the infringement. This does not mean, however, that the victim's feelings may be completely ignored, but they certainly cannot be said to be decisive."<sup>11</sup> Thus, the legal assessment of a given situation should be made by the court *in concreto*.

As the Supreme Court ruled in 2013, "the exercise of public authority cannot be limited only to a strictly understood *imperium* but covers all forms of public task performance, even those devoid of the imperative element but affecting the legal situation of the individual."<sup>12</sup>

This conclusion would make it possible to subject activities of circuit electoral commissions, performed as part of public tasks, to compensatory liability under Article 417 CC. These activities affect the legal situation of an individual by enabling them to implement their basic political entitlement: the active and the passive voting right.

The Court of Appeal in Szczecin ruled in 2013: "There is no universal public-law relationship between the state and an individual, but rather a multiplicity of such relations. As a consequence, any unlawful act or omission in the exercise of public authority must be assessed each time on the basis of those norms that govern a given relationship. This means that unlawfulness must be determined each time on the basis of norms regulating a specific public law relationship."<sup>13</sup> Thus, this finding opens up the possibility for the court to examine *in concreto* the issue of compensatory liability for unlawful acts or omissions in the course of exercising public authority. The qualification of this action or omission as an exercise of public authority seems problematic. However, the phrase "in course of exercising" might indicate a departure from the requirement of a direct interpretation of the concept of "public authority."

We should recall at this point that the Supreme Court, in its judgment of 7 November 2013,<sup>14</sup> construed the concept of "exercise of public authority." As the Supreme Court rightly pointed out, the judiciary practice has given rise to the view that of decisive importance is the aim of the action taken by an official. Therefore, if this aim is purely private, personal, it can be said that damage occurred "in the course of" exercising public authority. The analysis of the Supreme Court's ruling permits a conclusion that the Court considered activities carried out using official equipment, databases, etc. and constituting statutory tasks (this case concerned the Police) to be the exercise of public authority within the meaning of Article 417 CC. In its statement of reasons, the Supreme Court underscored that the concept of "public authority" is not the same as the concept of "exercising public authority." The exercise of public authority means taking actions of an or-

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<sup>11</sup> Ref. no. I ACa 1372/16.

<sup>12</sup> Judgment of the Supreme Court of 7 March 2013, ref. no. II CSK 364/12, Lex no. 1303229.

<sup>13</sup> Judgment of the Court of Appeal in Szczecin of 8 May 2013, ref. no. I ACa 23/13, Lex no. 1378883.

<sup>14</sup> Ref. no. V CSK 519/12.

ganizational, controlling, supervisory or order-imposing character. Thus, this concept covers the unilateral and regulatory determination of the legal position of subjects of public life (citizens).

### 3. ANALYSIS OF JUDICIAL DECISIONS CONCERNING THE CONDITIONS FOR COMPENSATORY LIABILITY UNDER ARTICLE 77(1) OF THE POLISH CONSTITUTION

Pursuant to Article 77(1) of the Constitution of the Republic of Poland “everyone shall have the right to compensation for any harm done to him by action of an organ of public authority contrary to law.” The Court of Appeal in Cracow noted in 2018: “The obligation to redress the damage resulting from a tort is of a private-law character, because the legal relationship from which the liability based on this norm arises retains its public and legal nature.”<sup>15</sup> In the Supreme Court’s opinion of 2015 and the jurisprudence of common courts, “unlawfulness” in the light of Article 77(1) of the Polish Constitution must be understood strictly, in accordance with the constitutional approach to the sources of law (Article 87–94 of the Constitution). It is therefore narrower than the traditional approach to unlawfulness under civil law.”<sup>16</sup> Similarly, the Court of Appeal in Białystok noted in 2018 that “not only Article 77(1) of the Constitution but also Article 417(1) of the Civil Code provides for liability based on the premise of an objectively unlawful act or omission in the exercise of public authority, and the guilt remains outside the premises constituting the obligation to compensate.”<sup>17</sup> Summing up this part of our considerations, we should state that the jurisprudence of the court conforms with the premises of compensatory liability based on Article 77(1) of the Constitution and Article 417 CC. The public-law nature of a legal relationship as giving rise to liability based on these norms is emphasized. Moreover, the concept of unlawfulness applied in Article 77(1) of the Constitution and Article 417(1) CC has a narrower scope than the concept of unlawfulness commonly accepted in civil law. The premise of compensatory liability is an objectively unlawful act or omission in the exercise of public authority.

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<sup>15</sup> Judgment of the Court of Appeal in Cracow of 27 March 2018, ref. no. I ACa 1131/17, Lex no. 2577088.

<sup>16</sup> Judgment of the Supreme Court of 20 March 2015, ref. no. II CSK 218/14, Lex no. 1711681; ref. no. I ACa 133/17; judgment of the Court of Appeal in Białystok of 10 October 2018, ref. no. I ACa 345/18, Lex no. 2627848.

<sup>17</sup> Ref. no. I ACa 345/18.

#### 4. THE BASIS OF PROPERTY LIABILITY OF PUBLIC OFFICIALS FOR A GROSS VIOLATION OF THE LAW

Pursuant to Article 5 of the Act on Property Liability of Public Officials for Gross Violation of the Law,<sup>18</sup> a public official is held financially liable in the event of the cumulative occurrence of the following conditions: 1) when by virtue of a final court decision or settlement compensation has been paid by the responsible entity for damage caused in the exercise of public authority in gross violation of the law; 2) when a gross violation of the law referred to in point 1 was caused by a culpable act or omission of a public official; 3) when a gross violation of the law referred to in point 1 has been found in accordance with Article 6.

The cumulative requirement for the conditions under Article 5 PL for incurring financial liability by a public official was confirmed by court judgment.<sup>19</sup> As B. Baran noted, Article 5 of the cited act regulates the premises of liability of public officials in the exercise of public authority, and thus the objective aspect [Baran 2013, 231]. Pursuant to Article 2(1)(1) of the cited act, “a public official is a person acting as a public administration body or under its authority, or as a member of a collective public administration body or a person performing work in a public administration body under an employment relationship, service relationship or contract of civil law, participating in the conduct of a case resolved by a decision or order by such an authority.”

The above-cited point 1 of the Act excludes the possibility of qualifying members of circuit electoral commissions as public officials because they do not perform work in the office of a public administration body as part of an employment relationship, nor do they take part in the conduct of a matter resolved by a decision or order issued by such an authority. Circuit electoral commissions are collegial and social [Czaplicki 2000, 48] non-permanent bodies in all kinds of elections [Sokala 2013a, 144] representing the lowest tier [Idem 2010, 153, 200] in the structure of the Polish electoral administration [Idem 2018, 49]. Thus, the social character of circuit electoral commissions makes it impossible to qualify them as public administration bodies. Moreover, members of circuit electoral commissions do not issue decisions in individual administrative matters.

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<sup>18</sup> Act of 20 January 2011 on Property Liability of Public Officials for Gross Violation of the Law, Journal of Laws of 2016, item 1169 [hereinafter: PL].

<sup>19</sup> Judgment of the Provincial Administrative Court in Białystok of 30 July 2013, ref. no. II SA/Bk 4/13, Legalis no. 765044; judgment of the Supreme Administrative Court of 21 October 2014, ref. no. II OSK 1166/14, Legalis no. 1915757; judgment of the Provincial Administrative Court in Bydgoszcz of 1 April 2015, ref. no. II SA/Bd 45/15, Legalis no. 1259012; judgment of the Provincial Administrative Court in Bydgoszcz of 2 April 2015, ref. no. II SA/Bd 28/15, Legalis no. 1259008; judgment of the Provincial Administrative Court in Bydgoszcz of 15 April 2015, ref. no. II SA/Bd 44/15, Legalis no. 1259075; judgment of the Provincial Administrative Court in Bydgoszcz of 6 May 2015, ref. no. II SA/Bd 89/15, Legalis no. 1338248; judgment of the Provincial Administrative Court in Kielce of 25 October 2018, ref. no. II SA/Ke 591/18, Legalis no. 1854824; judgment of the Provincial Administrative Court in Kielce of 20 February 2019, ref. no. II SA/Ke 628/18, Legalis no. 1883954.



## 5. POWERS OF CIRCUIT ELECTORAL COMMISSIONS, THE METHOD OF APPOINTING CIRCUIT ELECTORAL COMMISSIONS IN THE COUNTRY, AND QUALIFICATIONS OF THEIR MEMBERS

As noted by A. Sokala, by virtue of the 11 January 2018 act amending certain acts to increase the participation of citizens in the process of electing, operating, and controlling certain public authorities,<sup>20</sup> the legislator decided to appoint two commissions for each voting circuit (not one, as so far had been the case): a circuit electoral commission for the conduct of voting in the circuit and a circuit electoral commission for determining the results of voting in the circuit [ibid., 50].

Pursuant to Article 181a(1) of the Electoral Code<sup>21</sup> in each voting circuit are to be appointed: 1) a circuit electoral commission – in elections to the Sejm and the Senate, presidential elections, elections to the European Parliament held in the Republic of Poland, and supplementary elections to the Senate, as well as in elections to organs of local government units carried out during the term of office, excluding re-election to the bodies of these units; 2) a circuit electoral commission for the conduct of voting in the circuit and a circuit electoral commission for the determination of voting results in the circuit – in elections to the bodies of local government units carried out in connection with the expired term of councils and in re-election to the bodies of these units. Pursuant to Article 181a(2) EC, in the case of the elections referred to in paragraph 1 point 1, the tasks provided for in the EC for the circuit electoral commission for the conduct of voting in the circuit and the circuit electoral commission for determining the results of voting in the circuit are performed by the circuit electoral commission referred to in paragraph 1 point 1. As pointed out by Sokala, each circuit electoral commission (in permanent circuits voting) is to have nine members appointed by the electoral commissioner (and not the head of the commune or the territorial electoral commission – as it has been the case) from among the candidates proposed by electoral proxies or persons authorized by them [ibid., 51]. According to W. Hermeliński, “the legislator assumed that the grounds for notifying persons who are to be members of circuit commissions is the relationship of trust that individual election committees have in them. This is one of the statutory guarantees of fair elections” [Hermeliński 2020, 15]. This statement can hardly be contested. Pursuant to Article 182(1) EC, “the circuit electoral commission shall be appointed from among the voters, no later than on the 21st day before the election day, by an electoral commissioner, subject to the provisions of Article 183.” However, the commissioner undertakes many other activities in relation to the creation of circuit electoral commissions. He conducts the draw,<sup>22</sup> completes the composition

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<sup>20</sup> Journal of Laws of 2018, item 130.

<sup>21</sup> Act of 5 January 2011, the Electoral Code, Journal of Laws of 2019, item 684 as amended [hereinafter: EC].

<sup>22</sup> Pursuant to Article 182(8) EC, the draw referred to in paragraph 7 is carried out by the election commissioner.

of electoral commissions – obligatorily<sup>23</sup> or optionally,<sup>24</sup> convenes the first meeting of the circuit electoral commission immediately after it has been appointed (Article 182(9) EC).

The EC imposes only two requirements on candidates for members of circuit electoral commissions. The first concerns the age of 18 to be reached on the date of filing the application at the latest (Article 182(4)(1) EC). The second refers to the domicile of a candidate for the commission located the part of the voivodeship (province) in which he resides (Article 182(4)(2) EC). The candidate must be aware of his eligibility, therefore the submission of his candidacy for the circuit electoral commission is conditional on his or her consent.<sup>25</sup> It is worth noting that its members take part in the making thereof for at the first meeting they elect a chairman and a deputy from among themselves.<sup>26</sup> Of course, this does not entail arbitrary action because the National Electoral Commission determines the method of proposing candidates for members of circuit electoral commissions, the application template, and the rules for appointing these commissions, including the procedure for conducting the draw referred to in paragraph 7 (Article 182(11) EC).

## 6. THE QUESTION OF PROFESSIONAL PREPARATION OF CIRCUIT ELECTORAL COMMISSION MEMBERS

In 1999, while the preparation and conduct of elections were analyzed, some electoral law practitioners expressed the view that it was frequently the case that commission members were unaware of their duties. In this light the need to increase the responsibility of electoral committees for the proposed candidates was emphasized. It was also proposed that electoral commissions have more members who would enhance the professionalism of circuit electoral commissions.<sup>27</sup> A similar proposal was made in 2005. It was a synthetic proposal to professionalize the conduct of elections at the circuit level. The idea was justified by the problems with the efficiency of circuit commissions resulting from the fact that, despite undergoing training before the elections, these individuals were often not prepared to perform a function of responsibility. However, J. Jaskółka said in 2005: “To ensure the ‘professionalization’ of these electoral commissions for a long time,

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<sup>23</sup> If the number of proposed candidates is lower than the minimum number of the constituency electoral commission (Article 182(8b)(1) EC).

<sup>24</sup> Pursuant to Article 182(8b)(2) EC, if the number of proposed candidates is smaller than the statutory number of the constituency electoral commission – from among voters meeting the condition referred to in paragraph 4. The provision of paragraph 6 shall apply accordingly.

<sup>25</sup> Pursuant to Article 182(6) EC, “submission for membership in the circuit electoral commission takes place after obtaining the consent of the person it is to concern.”

<sup>26</sup> Pursuant to Article 182(10) EC, “the circuit electoral commission shall elect from among its members a chairman and his deputy at its first meeting.”

<sup>27</sup> PWBI, 1–2 (1999), p. 32–33. In 2001 it was stated that “circuit electoral commissions are the weakest link in the electoral apparatus,” see PWBI 5 (2001), p. 25.

the participation of one person in the committee indicated by the commune head, mayor and city president must suffice” [Jaskółka 2005, 115]. It was argued that the amendment should account for a more responsible submission of candidates for circuit electoral commissions. It was pointed out that electoral committees of political parties should name candidates to circuit electoral commissions who would understand the electoral procedures [ibid., 116]. In 2007 attention was drawn to the fact that some people are motivated by the desire to obtain a flat-rate daily allowance and not the correct performance of electoral tasks.<sup>28</sup> In 2009 it was argued that “people with different knowledge of the legal procedure or qualifications participate in the electoral process.”<sup>29</sup> We should recall that the National Electoral Commission in its letter of 21 January 2019<sup>30</sup> called for the introduction of a requirement that the chairpersons and deputies of circuit electoral commissions should be individuals who had obtained a certificate confirming their competence to perform this function. Thus, the above statements emphasize the importance of adequate preparation for membership in circuit electoral commissions.

#### 7. VIEWS OF THE DOCTRINE ON THE COMPENSATORY LIABILITY OF MEMBERS OF CIRCUIT ELECTORAL COMMISSIONS UNDER ARTICLE 417 EC

According to A. Kisielewicz and J. Zbieranek, members of electoral commissions do not bear civil compensatory liability caused during the performance of electoral activities [Kisielewicz and Zbieranek 2018, 366–67]. It should be noted that, in accordance with the Polish Civil Code currently in force members of the circuit electoral commissions enjoy legal protection provided for public officials and are held accountable as the same when: 1) at the polling station, 2) activities are carried out by the circuit electoral commission, 3) preparations for the work of the circuit electoral commission take place (Article 154(5a) EC). Thus, the above-mentioned activities of circuit commission members may be regarded as falling within the scope of duties of public officials. As S. Gebethner emphasized, “members of electoral commissions are treated as public officials. Therefore, they enjoy legally guaranteed protection” [Gebethner 2001, 48–48].<sup>31</sup> Therefore, it is not the qualification of circuit electoral commission members as public officials

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<sup>28</sup> PWBI, 9–10 (2007), p. 17. In 2007 the efficiency of voting was perceived in a large number of members of circuit electoral commissions, see PWBI, 11–12 (2007), p. 26.

<sup>29</sup> PWBI, 9–10 (2009), p. 11; PWBI, 8–9 (2010), p. 17–20.

<sup>30</sup> Information of the NEC on the implementation of the provisions of the Electoral Code and proposals for their amendment. NEC letter of 21 January 2019, ZPOW 502–1/19, p. 5.

<sup>31</sup> However, it should be noted that the said Article 35(4), in the legal situation as of 26 July 2001, was worded as follows: “persons who are members of electoral commissions enjoy legal protection provided for public officials and are liable as public officials” (ibid., p. 47). Act of 12 April 2001, the Electoral Ordinance to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, Journal of Laws No. 46, item 499; No. 74, item 786.

that would not prevent them from incurring civil liability for damage caused in the course of performing election activities. It is of great importance whether the activities of public officials can be classified as performance of sovereign activities. At this point, it is worth repeating the judgment of the Supreme Court, according to which: “the exercise of public authority may not be limited only to a strictly understood empire, but covers all forms of performance of public tasks, even without an imperative element, but affecting the legal situation of the individual.”<sup>32</sup>

The activity of circuit electoral commissions may cause specific damage because “in practice, the only real threat to the credibility of the voting process and the determination of its results may occur in the work of the circuit electoral commission” [Sypniewski 2005, 291]. They participate in all kinds of elections. In the opinion of G. Majerowska-Dudek, “undoubtedly, the weight of individual electoral activities implies a lot of responsibility” [Majerowska–Dudek 2005, 214]. I believe the credibility of the voting process and the determination of its results depend on the quality of their work.<sup>33</sup> The result of their work is that “policymakers act on the mandate granted to them by citizens who elect them” [Słodowa–Hełpa and Jurewicz 2019, 475]. As P. Sypniewski noted, “the participation of committee members in individual elections is preceded by detailed training based on the guidelines of the National Electoral Commission. The participants are instructed about their legal and moral responsibility for the consequences of their actions” [Sypniewski 2005, 288]. Therefore, the above findings emphasize the importance of the activities of circuit electoral commissions and the awareness of their importance among the members of the commission. In my opinion, this constitutes an argument for the claim that circuit electoral commission members perform imperative tasks. Moreover, another motive supporting this thesis is that they use their seal, which plays an important role in the entire electoral procedure (Article 40(4), 42(1), 47(3)(4), 51(3), 52(2), 53g(1a), 70(1), 70(1a), 73, 75(2a)(5), 79(1)(2), 100(1)(6) EC).

## CONCLUSIONS

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not expressly refer to the subject of this paper. However, their content indirectly implies reasons why certain conclusions could be drawn in relation to the issues discussed here. Both the Declaration and the Covenant emphasize the requirement that voting be conducted in accordance with procedures that guarantee the fairness of elections. The principle of free elections has not been explicitly expressed in the Polish electoral law. However, the Polish

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<sup>32</sup> Ref. no. II CSK 364/12.

<sup>33</sup> The exclusive competence of circuit electoral commissions in this respect was emphasized by the Supreme Court in its decision of 4 November 1997, ref. no. III SW 519/97; quoted after “PWBI Wydanie specjalne. Wybory do Sejmu i Senatu RP 21 września 1997 r.,” p. 257.

doctrine's construal of its essence implies the postulate of organizing and carrying out the electoral procedures in an honest manner. I believe this means the possibility of enforcing compensatory liability against the actions or omissions of circuit electoral commissions. An argument in favour of this thesis is the importance of the tasks performed by the members of these commissions. Legal practice suggests that "the exercise of public authority cannot be limited only to a strictly defined *imperium* but covers all forms of public task performance, even those devoid of an imperative but affecting the legal situation of the individual." This statement would allow compensatory liability provided for under Article 417 CC to be extended to the activities of circuit electoral commissions performed as part of public tasks, affecting the legal situation of the individual by enabling them to implement their basic political right: the active and the passive electoral right. As regards the possibility of disabled persons claiming compensation from the State Treasury for damage caused by the actions or omissions of members of circuit electoral commissions, a particular situation should be assessed by the court *in concreto*. Members of circuit electoral commissions may not be covered by the term "public official" resulting from the Act on property liability of public officials for gross infringement of the law, because they do not perform work in the office of a public administration body as part of an employment relationship, and do not participate in the conduct of the case resolved by way of decision or order issued by such an authority. Members of circuit electoral commissions are not required by law to have special qualifications. The social nature of circuit electoral commissions makes it impossible to qualify them as public administration bodies. However, they perform public administration tasks because they use their seal. It seems problematic to classify the activities of members of circuit electoral commissions as "performing acts of an imperative nature." They participate in elections to the Sejm and the Senate, presidential elections, elections to the European Parliament held in Poland, and elections to bodies of units of local government.

The above-presented court findings were made in specific cases. They can be considered as outlining a certain concept which, if defended, will give rise to a more stable legal practice. However, in view of our considerations so far, several generalizations can be made. In my opinion, the activities of circuit electoral commissions – *lege non distinguente* – including the two kinds established by the Act of 11 January 2018 – can be attributed a special significance because their work determines the credibility of the voting process and the determination of its results.

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