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ON THE INFLUENCE OF THE LAW (AND HISTORY) ON FAMILY RELATIONSHIPS IN SWITZERLAND

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Abstract. The purpose of the paper is to present the fundamental laws regulating family relations in Switzerland. The historically shaped practice of these relations, where over the years the legally and actually dominant role was assigned to the father, as the head of the family, has been rather rapidly rejected on normative grounds in the 1970s. The emancipation of women, initially in the area of suffrage, led to the change of the Swiss family model. The changes in legislation have enabled the phenomenon of constantly rising share of families not based on the traditional structure – ones whose essence no longer is a married couple with children.

Keywords: the Swiss Confederation, family law, spouses, parents, children

INTRODUCTION

Persons participating in discussion on whether the social changes are the reason for amendments to existing laws, or whether the reverse is true – the law stimulates social changes, should not adopt extremely opposing views. In their naiveté the governing elites, including the legislators, harbor the belief of the strictly causative powers of legislation. The reverse view – assuming that the social life takes place beside the law – is also not consistent with reality. The example of Switzerland, proposed in this paper, where for centuries the traditional and seemingly "tested and tried" social structures have been supported, is meant to encourage the readers to reflect over this issue: does the mismatch between the law in force and the social needs inevitably lead to weakening the existing institutions and social practices? In other words: can the long-term suppression of freedom and consent to social inequalities lead to the effect of reveling in the freedom, of the state not only encouraging but perhaps even emboldening its citizens to reject the existing, ossified through lack of reforms, even such fundamental social constructs as the family.

1. HISTORICAL CIRCUMSTANCES

In the Swiss legal literature, a frequent scheme for describing any legal issue is the introduction (sometimes quite extensive), clarifying the historical circumstances (German: *Enstehungsgeschichte*). In this manner, the local authors not only demonstrate their respect for the past normative achievements and doctrinal works on that issue, but also exercise an important educational function for the readers. The information on regulations that preceded the current status and on the factors that contributed to changes of the law allow to preserve in the social consciousness the belief that the law, being a solid foundation for relations between the individual and the state (as well as between individuals) is also a system subject to continuous changes which should be rationally justified, and not result from arbitrary decisions made by those who are in power at the moment. The referral to history enables observation of certain processes which, despite being a collection of "trials and errors," lead (at least according to the assumption) to a "better" social, political and legal order [Kley 2004, 31].

Based on the examples of Swiss literature, referred to above, we should note that until the mid-19th century (with a short break for the period of the so-called Helvetic Republic, the years 1798–1802), Switzerland has been a confederation. Hence the family matters remained for centuries in the hands of the individual cantons which regulated these issues independently. In consequence, those matters were subject to ecclesiastical law applied by episcopal courts (German: *Offizialat*), which has been formally confirmed in an agreement between the cantons, concluded in 1370, the so-called *Pfaffenbrief* [Greyerz von 1991, 33]. The social changes of the Reformation period did not change much in that respect. In the Catholic cantons, the practice followed the decisions of the Council of Trent (1545–1563), which recognized as valid a marriage concluded before a priest, while incest, adultery or cohabitation could be punished by excommunication. Divorces were not foreseen. In the Protestant cantons, the former episcopal courts were replaced by the so-called *Sittengerichte* (German), where both the clergymen and laymen sat.

For example, since 1525 in Zurich the Protestant court was composed of two clergymen and two representatives of municipal authorities. Similar solutions were applied in St. Gallen (since 1526), in Bern (since 1528), Basel and Schaffhausen (since 1529) [Hubler 2010]. The moral rigors of the Protestant law were as strict (or perhaps even stricter) as the Catholic laws, however, due to acceptance of the statement by Martin Luther that "the marriage is after all a lay matter" (German: *Die Ehe ist ein äußerlich, weltlich Ding*), divorces were permitted. In practice, they did not occur frequently (for example, in Lausanne, which has been a Protestant city after all, in the years

1754–1763 there have been 489 marriages concluded, and only 3 divorces granted) [Reusser 2006].

The traditional Swiss family seemed a strongly hierarchical structure, with the dominant figure of the father, the independent master of the house – head of the family. The father was endowed with powers of authority over all members of the household (German: *Haus- und Schirmgewalt*), which stemmed primarily from his economic domination over other family members. The father's authority covered thus his supervision over the religious life of the family and included the application of corporal punishment towards his wife, children and house servants. The master of the house decided upon the marriages of his daughters and represented persons subordinate to his authority in all proceedings before courts [Dubler 2006].

Point-blank revolutionary, although short-lived changes to the legal situation of a family were introduced during the period of the Helvetic Republic. The constitution,[1] imposed by the French occupier, introduced a centralized system for state management. The cantons were deprived of their sovereign nature and turned into administrative units. The whole legislation was transferred under the exclusive competence of state-wide parliament. In a short period of time, by way of legislation all properties held by religious orders were transferred under state administration, and the clerical judiciary was closed down (both Catholic and Protestant). Churches, including the Catholic church, were to be treated only as private associations. The constitution directly, *expressis verbis* forbade the "sects" to have such ties to their foreign superiors that could influence the public matters, the welfare and education of the people (Article 6). A secular (civilian) form of marriage was introduced [Kölz 1992, 108].

Due to the unstable social and military situation, the political system of the Helvetic Republic has turned out to be both ineffective and unsustainable. when the French army left the country, the young republic collapsed, having survived barely four years. Its experience became a point of reference for reforms introduced on the level of individual cantons through the coming decades. It has also turned out to be an inspiration for state-wide systemic changes, which were introduced only after several dozens of years. But the wait for first reforms in the area of family law was even longer, as it took more than a hundred years.

[1] Constitution of the Helvetic Republic of 12 April 1798 [*Verfassung der helvetischen Republik vom 12. April 1798*], source text in German: A. Kölz, *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*. Vol. 1: *Vom Ende der Alten Eidgenossenschaft bis 1848*, Verlag Stämpfli+Cie AG, Bern 1992, item 126–52.

With the coming into force of the Constitution of 1848,[2] Switzerland formally became a federal state. Thus, family matters continued to be the responsibility of individual cantons, which in turn recognized the jurisdiction of the church. The text of the constitution did contain certain (although rather offhand) references to family. The constitution forbade any privileges based on family background (Article 4) and allowed only the citizens of Switzerland to settle freely in the territory of the whole state, under certain conditions, including being able to provide for one's family (Article 41(1)(c)).

Another federal constitution in the history of Switzerland – adopted in 1874[3] – transferred regulations of marital law and thus, family law, to the state-wide level (Articles 53 and 54). The federal legislature made civil marriages universally obligatory, a practice that continues to this day (the civil marriage precedes the church marriage). Church obstacles to a marriage were abolished (of course from the standpoint of the state law), replacing them with civil regulations. The possibility for divorce was introduced (and also the institution of marital separation, which has been known for centuries). The obligation to maintain civil registry books was introduced throughout the country, and was performed by secular authorities [Lalive 1969, 1057, 1064–1068, 1088–101]. Amendment of the constitution in 1898 enabled a state-wide codification of civil law. In 1907, the civil code (ZGB)[4] was adopted, which came into force on 1st January 1912.

Provisions of this code did not depart from the paternalistic family model, but introduced certain novelties. For example, in lieu of the traditional paternal authority of the master of the house, the Code introduced (in Article 273 ZGB o.v.) the concept of parental authority (German: *elterliche Gewalt*). The parents were obligated (Article 275(1) ZGB o.v.) to raise and educate their children, to ensure them conditions for appropriate physical and mental development (during the period up to the age of legal majority[5]), and also religious development (up to the age of 16). The children were obliged to obey and respect their parents, who in turn could punish them as part of the upbringing process. Article 278 ZGB o.v. directly authorized each of the parents to apply

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[2] Federal Constitution of the Swiss Confederation of 12 September 1848 [*Bundesverfassung der Schweizerischen Eidgenossenschaft vom 12. September 1848*], source text in German: A. Kölz, *Quellenbuch*, vol. 1, item 447–91.

[3] Federal Constitution of the Swiss Confederation 29 May 1874 [*Bundesverfassung der Schweizerischen Eidgenossenschaft*], source text in German: A. Kölz, *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*. Vol. 2: *Von 1848 bis in die Gegenwart*, Verlag Stämpfli+Cie AG, Bern 1996, item 151–86.

[4] Swiss Civil Code of 10 December 1907 [*Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907*], SR 210. SR 101. The original version of the ZGB [henceforth: ZGB o.v.], author's own resources.

[5] As a rule (the exception was an earlier marriage) up to the age of 20; only in 1996 the age was reduced to 18 years – see Article 14 ZGB o.v., and ZGB (the current status).

the necessary disciplinary measures (German: *nötige Züchtigungsmittel*). The limit to the use of such measures was the causing of physical or psychological harm to the child, which was prohibited under criminal law.[6]

On the basis of the ZGB o.v., it was possible to interpret the norm which guaranteed the principle that decisions concerning important matters of the child should be made jointly by both parents (but only while their marriage lasted). This norm stemmed from the provision on joint upbringing of the child and on the exercise of parental authority (Article 274(1) ZGB o.v.). It could appear that from this provision, it was just a step towards formulating the principle of equal rights of each of the parents (spouses) towards the child. The next provision, Article 274(2) ZGB o.v., extinguished all hopes or doubts in that respect. In the event of lack of agreement between the parents, the will of the father was final (in German: *Stichentscheid – Sind die Eltern nicht einig, so entscheidet der Wille des Vaters*). According to the literal wording of Article 160(1) ZGB o.v., the father was after all the head of the family. This function was associated with certain statutory obligations, especially as regards fulfillment of family needs with respect to housing and exercising due care for the upkeep of the wife and children. In consequence, the husband/father managed the family assets, could effectively contract obligations encumbering the family and represented the family in relations with third parties. In particular, the husband had to grant consent for his wife to engage in gainful employment or business activity. He could also represent the wife in court proceedings. The wife was expected to support the husband, provide him with assistance and advice, and to run the household (Articles 162, 200, 167 and 168 and 161 ZGB o.v., respectively).

The ZGB in the original version clearly differentiated the legal status of legitimate and illegitimate children. This was associated with the rule that the wife adopted the homeland law (German: *Heimatrecht*) of her husband (Article 54(4) of the Swiss constitution of 1874), including his citizenship (which was reflected in sequence on the level of citizenship of a municipality, a canton and finally – of the federation). A child born out of wedlock, as a rule, remained with the mother's homeland law. By way of an exception, it was possible for an (unmarried) Swiss citizen to acknowledge such a child, with implications for the child's state rights (German: *Anerkennung mit Standesfolge*), or if paternity was established with such implications by a court (Article 307 and following of the ZGB o.v.).

The financial situation of illegitimate children was another issue of moral nature. A solution was introduced on the federal level, which from the perspective of the 21st century may seem rather cruel, but which in the beginning of the 20th century was a small step on the road to protection of illegitimate

[6] See for example the verdict of the Federal Tribunal of 15 May 1959, BGE 85 IV 125.

children [Meskina 2016, 193]. If a man acknowledged a child without the implications of *Anerkennung mit Standesfolge*, it was possible to apply the solution of the so-called *Zahlvaterschaft*. This institution merits special attention also due to the fact that it remained in operation for many years (until 1978), and its legal consequences are experienced to this day [Meier 2018]. Under the *Zahlvaterschaft* it was possible to claim alimony from the actual father of the illegitimate (natural) child (as a rule until the child came of age) and compensation for the mother (coverage of costs of delivery and upkeep for at least four weeks preceding the birth, and four weeks following the birth of the child). The *Zahlvaterschaft* did not result in a legal relationship between the payer and the child (and the child did not receive the father's surname). Thus, the child was eliminated from the circle of potential heirs of their biological father [Zwahlen 1977, 74]. It is worth noting that pursuant to Article 315 ZGB o.v., neither the alimony nor the compensation were due if the woman, during the time of conception, led a "lewd lifestyle" (German: *unzüchtiger Lebenswandel*).

Another issue was the parental authority over an illegitimate child. As a matter of fact, the court could grant the parental authority only to the mother, but then only in the case where the child remained with her (Article 324(1) and (3) ZGB o.v.). In practice, usually the court established guardianship for such child (German: *Vormundschaft*) to be exercised by another person, even the actual, biological father, to whom – in the event of *Zahlvaterschaft* – the child was not related from the legal perspective [Davaz–Angehrn 2019, 31].

Adoption (both of minors and children of legal age) as a rule (provided that the condition of minimum age difference for the adopters and the adoptees, which was set at eighteen years, was fulfilled) was allowed only for persons who were at least forty years old and had no children from their marriage. Joint adoption was possible only for childless married couples (Article 264 and Article 266(2) ZGB o.v.).

As already mentioned, since the Reformation the legal systems of Protestant cantons allowed the dissolution of marriage through divorce. Under the original version of the ZGB, divorce (or separation) were also permitted. The premise for awarding divorce, as a rule, could include only grave faults (German: *Verschulden*) of one of the spouses (Articles 137–142 ZGB o.v.). These faults included: betrayal, continuous harassment, grave abuse or insult, a committed crime, or in general, "dishonorable conduct" (German: *unehrenhafter Lebenswandel*) [Aleksandrowicz 2017, 122–25].

It should be stressed that women held no suffrage rights during the whole period of Swiss history, described above. The cantons have traditionally been non-monarchical. Both in the cantons where authority belonged to Large and Small Councils (substitutes of future parliaments and executive authorities), and in cantons with the system based on the German *Landsgemeinde*, where

power was exercised directly during meetings, political rights could be vested in men only (observing, of course, additional specific conditions regarding social background, or resulting from economic factors). Even during the time of the Helvetic Republic, suffrage was granted only to men who were at least twenty years old. The issue of women's participation in the settlement of general social matters was regulated similarly in the federal constitutions of 1848 (Article 63) and of 1874 (Article 74) – every Swiss man at least twenty years old was entitled to vote (provided that his right to vote was not excluded under the laws of the given canton). The interpretation of these regulations and election practice were clear: women were not entitled to vote.

Social movements, in the second half of the 19th century and in the first half of the 20th century, demanding equal rights for women, which initially engaged in action on cantonal level, to move later to the national level, were relatively weak. Hence the family law remained unchanged.

2. CHANGES IN WOMEN'S SUFFRAGE AND THEIR CONSEQUENCES IN REGULATIONS REGARDING FAMILIES

Switzerland was not directly affected by consequences of World War 2. The post-war years were pragmatically used for dynamic economic growth. The goodbye to the consequences of the 1930s economic crisis, which affected also Switzerland, opened the way to a wealthier society. The possibilities for gainful employment increased, and this applied to women too. They could achieve a level of income which allowed them relatively independent financial existence (without the care of the master of the house). In such circumstances, the laws regulating family life, based on the traditional model dating back to the Middle Ages, were not in line with social reality. As already stated in section 1 of this paper, the emancipation movement in Switzerland was not very effective. However, it would be untrue to claim that it did not occur at all. The efforts to achieve equal rights for women in the social life in Switzerland date back to the end of the 1860s. Women formed associations, with activity usually limited to the canton level, whose goal was to improve women's situation, especially in terms of social security or access to education (including tertiary education). In 1896 Geneva was the site of the first national Swiss Women's Congress (German: *Schweizerische Kongress für die Interessen der Frau*). The debates of representatives of social organizations are nowadays seen as the beginning of serious political presence of women in the national arena [EKF 2009, 7]. The early twentieth century saw a rising activity of groups with social-democratic roots, but this did not bring any clear result in the legal sphere. The legal solutions proposed for women (favorable primarily for women) were not implemented on cantonal level until the second half of the twentieth century. Neither the federal government nor the

parliament (both consisting of men only) have not shown during that period any initiative to reform the laws regarding women [Musiał–Karg 2012, 117].

The anachronism of the Swiss solutions regarding women's suffrage rights, which led to inequality in social and family life, was made even deeper by the fact that in almost all neighbor countries of the Swiss Federation, women had voting rights (in Germany and Austria – since 1918, in France since 1944 and in Italy since 1945; the only exception was Liechtenstein, where women were accorded voting rights only in 1984).

In 1957, voting rights were granted to women in the Riehen municipality (in the Basel-Stadt canton). In 1959, a nationwide referendum was held, on granting women active and passive voting rights on federal matters. The referendum (in which of course participated only men) was a crushing defeat for the proponents of political emancipation of women. More than twice as many votes were cast against giving women the right to vote than for it. Votes counted in individual cantons have shown even worse results: only 3 cantons (Waadt, Neuenburg and Geneva) supported this change, all other were against.[7]

The failure of those favoring women's suffrage on a state-wide level did not stand in the way of gradually granting it in individual cantons. The process began in the already mentioned cantons: Waadt and Neuenburg (1959) and Geneva (1960), next Basel-Stadt (1966), Basel-Country (1968), Ticino (1969) and Valais and Zurich (1970). As a side note, it is worth mentioning that the idea met with the strongest resistance in Appenzell Innerrhoden, where men voting at the *Landsgemeinde* rejected women's rights. They have been forced to acknowledge women's voting rights only in 1990, by the Federal Supreme Court, which declared as binding its own interpretation of the local canton's constitution [Musiał–Karg 2012, 121, 127–28]. According to the verdict of the court, the existing provisions of the cantonal constitution allowed women to participate in elections, therefore they did not require a direct legislative intervention.[8]

On the state-wide level, the granting of active and passive voting rights to women was finally decided in a universal vote held in 1971.[9] According to the amended Article 74 of the Swiss constitution of 1874, Swiss men and women have equal rights and obligations in federal elections and voting.

The ZGB was amended on areas of adoption law and child's law, in 1972 and next in 1976. Henceforth, concepts such as the explicit recognition of the individual legal subjectivity of the child, the principle of primacy of the child's welfare, the legal equality of children born in and out of wedlock,

[7] Detailed results of the referendum of 1 February 1959 are available in the Federal Journal – BBl 1959 I 370.

[8] See the verdict of the Federal Tribunal of 27 November 1990, BGE 116 Ia 359.

[9] Detailed results of the referendum of 7 February 1971 – BBl 1971 I 482.

the inadmissibility of terminating the adoption relationship and protection of the rights of the child have been introduced in Swiss family law. The conditions for adoption of (underage) children by individuals and married couples were made less severe (e.g. the minimum age of adoptive parents was reduced to 35 years, and the condition for no own children was lifted). The institutions of *Stichentscheid* and *Zahlvaterschaft*, described above, were removed. However, it should be noted that this did not change, by force of the law, the legal status of existing natural children as regarded their potential inheritance from their natural fathers. Persons born before 1978 could count on receiving inheritance from their father, with whom they were bound by *Zahlvaterschaft*, only if they have been officially recognized (according to the new regulations), or if they were included in the will (with deduction of already incurred expenses). If those conditions were not met, inheritance was not possible (and is still not possible) [Meier 2018].

It should be added that changes to the family law, introduced in the 1970s, brought about the statutory granting of parental authority to unwed mothers (in the form of the so-called parental care, German: *elterliche Sorge*). The continuation of these reforms was the guarantee of joint parental care (based on the principle of equality of both parents, regardless of whether they were married or not), but this was introduced much later, only in 2014 (Article 133 ZGB in its current wording).

The 1981 referendum[10] brought about a change in the federal constitution of 1874. The formula that all Swiss are equal before the law (copied from the 1848 constitution) was replaced with the provision (Article 4) that man and woman have equal rights (German: *gleichberechtigt*). The following sentence was also important, ordering the legislator to ensure care for their equal position, especially in the family, access to education and employment. So it was only the decision made by the sovereign that opened the way for further reforms of the family law at the statutory, state-wide level. These changes were enacted in 1988. Most importantly, the ZGB no longer supported the principle of dominant role of the father – the former master of the house – with all the consequences it entailed. This principle was replaced by a modern family model, based on partnership relations between equal spouses (formally in every possible respect – even the equal minimum age for marriage, which has been set at 18 years since 1996) [Aleksandrowicz 2017, 126–27].

[10] Results of the referendum of 14 June 1981 – BBl 1981 II 1267.

3. LAWS REGULATING FAMILY RELATIONS IN CONTEMPORARY SWITZERLAND

As of 1997, the Swiss Confederation is bound by the provisions of the Convention on the Rights of the Child of 1989[11] and the Convention on the Elimination of All Forms of Discrimination against Women of 1979.[12] In 2000, the current federal constitution[13] came into force, which repeated the provisions regarding equality of both genders before the law, also with respect to family relations (Article 8(3)). This means the definitive rejection (at least in normative terms) of the centuries-old principle determining a woman's position in the family, which was formulated rather bluntly as "dreimal K – Kinder, Küche, Kirche" (children, cooking, church). It should be noted that the departure from the classical division of social roles in marriage with the father as the head of the family (i.e. the one who provides the means of subsistence) enabled the change in the model of upbringing. It no longer primarily involves enforcing obedience, discipline and admonition (even punishment) or instilling rules of etiquette (in the form of parental authority). Rather, the focus is now on participating in the creation (shaping) of the child's independent personality, based on partnership and integration (within the family), which includes the child's responsibility and opportunities for involvement in society. These are the elements of parental care understood in the contemporary way. In 2000 the statutory requirement of fault of one of the spouses, as the sole grounds for divorce, was also waived. The divorced parents (as well as unwed parents) have the same rights and obligations in relations with their children [Büchler 2020].

The phenomenon of registered civil partnerships (German: *eingetragene Partnerschaft*) merits special attention. The main issue – which, given the generally conservative Swiss society has been regulated almost instantaneously- is that of same-sex unions. In Switzerland, homosexual relations have been legalized in 1942 (the legal age of consent for both heterosexual and homosexual relations has been equalized in 1992 and set at 16 years). The present federal constitution forbids discrimination based on sexual orientation (Article 8(2)). Initially, regulations for same-sex couples were decided on cantonal level. The first canton to adopt them was Geneva (in 2001, as the so-called *Pacte civil de solidarité*). Next came Zurich (2002) and Neuenburg (2004).

[11] Übereinkommen über die Rechte des Kindes, SR 0.107.

[12] Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, SR 0.108.

[13] Federal Constitution of the Swiss Confederation of 18 April 1999 [*Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999*], SR 101.

In 2004 the Swiss parliament adopted the act on registered same-sex partnerships.[14] The conservatives, using the procedure of popular veto, led to a nation-wide referendum regarding the application of this act. The referendum was carried out in June 2005 and ended in a defeat for opponents of same-sex unions. The act came into force on 1 January 2007.[15]

The Swiss partnerships offer same-sex couples rights similar to those of married couples. There is an important difference regarding matters defined in article 28 of the act. Same-sex couples are not legally permitted to use reproductive medical procedures (especially in-vitro fertilization). Joint adoption by such couples is also forbidden. However, it is worth noting that in a situation where one of the partners has a child, his or her partner is obliged to joint responsibility for that child, which includes providing for the child and performing parental tasks [Schulze 2011]. As of 2013, it is possible to take on partner's surname. It should also be added that homosexual marriages contracted abroad are treated by the law in Switzerland as domestic partnerships.

It is impossible to overlook a certain temporal correlation between changes in family law and the Swiss demographics.[16] It is worth examining some statistical coefficients that define the situation of families across the state. The average age of a woman giving birth to her first child was 25.3 in 1970, 31.7 in 2014, and 31 in 2019 [Büchler 2020]. The average number of marriages per thousand inhabitants was 7.6 in 1970, 5.1 in 2014 and 4.5 in 2019 [ibid.], with the average age of a woman entering her first marriage in 1960 being 24.9, in 1980 25.0, in 2000 27.9 and in 2019 30.1 [Höpflinger 2020, 18]. This was reflected to some extent in the fertility rate, except that the share of children born out of wedlock increased markedly and stood at 3.75% in 1970, 21.7% in 2014 and 26.5% in 2019 [Büchler 2020]. Considering all children born (regardless of origin), it is worth noting that in the mid-1960s, a woman in Switzerland gave birth to an average of just over 2.5 children [Höpflinger 2020, 34]. According to the data of the Federal Statistical Office[17] in 1971 – 2.04 child, in 1985 – 1.52, in 2000 – 1.5, while in 2019 this rate dropped to 1.48 (here it is worth noting that the average female Swiss citizen gave birth to 1.37 child, while a legal immigrant – 1.80). It is also necessary to consider the so-called alternative family forms (German: *alternative Familienformen*). They include broadly defined family structures which do not fit inside the classical formula of family, consisting of parents and child (children). Their

[14] Federal Act of 18 June 2004 on registered partnerships of same-sex couples [*Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare vom 18. Juni 2004*], SR 211.231.

[15] Results of the referendum of 5 June 2005 – BBl 2005 5183.

[16] This issue was already discussed in the Polish literature on Helvetic matters, see: Aleksandrowicz 2017, 130. The statistical data used in this paper was verified, supplemented and updated.

[17] *Bundesamt für Statistik*, https://www.bfs.admin.ch/bfs/de/home.html [accessed: 24.01.2021] [henceforth: BFS].

share among households consisting of at least two persons amounted to: in 1970 – 15.4%, in 2014 – 40.9% and in 2019 – 40.1% [Büchler 2020].

Assuming that the Swiss sociological research and statistical data is as meticulous and reliable as everything else that is Swiss, we see a picture of a society in which the disparity between legal solutions and social reality resulted in a sudden, and permanent in terms of effects, tendency to remodel the family structure. The stubbornness of those in power in not allowing women the right to vote has caused an unusually strong public reaction, as the lack of these rights had a real influence on the legal situation of women, men and children in Switzerland. The legislator's refusal to acknowledge social changes (including the overall increase in the level of living and in the financial situation of women), external influences (information on women emancipation in Europe and in the world), or finally the sense of social injustice, resulting from the legal and factual inequality of spouses were bound to lead to a breakthrough in family relations. Legal regulations, initiated by the reforms of the 1970s, brought to light family issues which for centuries have been settled within the families, by the master of the house. Social consequences resulting from the reaction to "freedom of" the family are rather difficult to assess. One of the factors that appeal to the imagination is the growing problem of people living alone. According to the most recent data of the BFS, in 2018 Switzerland had 3 755 689 of households, of which as much as 1 340 255 (36%) were single-person households. This is of course a trend that affects not only Switzerland, it is encountered in numerous countries of the broadly defined Western civilization, but it shows the severity of the problem. The weakening of the traditional family is a factor that contributes to the disintegration of the community; in the extreme, the most pessimistic perspective – even to atomization of the society.

CONCLUSION

The absence of gender equality in political life, especially the lack of women's suffrage, inevitably led to the strengthening of sense of social injustice, including in family relations. Even if we engage in the intellectually risky attempt to divert from foundations of social life of the broadly defined Western civilization, such as the freedom and dignity of every human being, we should note that, as far as the traditional division of family roles between the husband (father of the family) who provides for the family and the wife (mother) taking care of the household and children could have been justified (at least to some extent) by cultural conditions or even the pragmatic nature of the Swiss, the subordination of a woman who was capable of economic independence, to the will of the master of the house was, in an affluent society, doomed to a decidedly negative assessment. Men in Switzerland stubbornly did not want to

relinquish their superiority, including in the legal sphere, over the women (and other family members) subordinated to them. It turned out that care for the safety (including financial safety) of the wife cannot result in her enslavement.

Their impaired political presence prevented Swiss women from breaking out of centuries-old bonds of patriarchal relations. Thus, it must be concluded that social democracy (including equal treatment of persons even in family relations) or economic democracy (including, for example, the right to choose and pursue a profession and freely dispose of property) are not possible where the condition of equal participation in the institutions of political democracy is not fulfilled. Giving women the right to vote determined the transformation of family rights – within its traditional interpretation, children's rights, and regulated the rights of those living in alternative family forms.

The dynamic percentage increase in the number of communities which fit within the family relations category, but are not strictly based on relationships between spouses and children, has become a fact in Switzerland. Is the weakening of the traditional family the effect of changes in the law, enacted with the participation of women, or is it rather a reaction to the historically conditioned disappointment in the institution of family with the superior role of husband/father? This question remains open. It does seem that a certain side effect of changes in family relations is the high number of single-family households, with all its societal consequences.

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FULL COMPENSATION FOR DAMAGE IN INTERNATIONAL CARRIAGE LAW WITH REGARD TO THE CARRIAGE OF GOODS – RULE OR EXCEPTION?

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Abstract. The purpose of this article it to outline the legal nature of limitations of the amount of compensation stipulated in international carriage conventions. The paper tries to answer the question whether these limitations in an array of cases of carrier liability allow a conclusion that the principle of limited compensation applies here or whether perhaps the principle of full compensation remains valid and limitation of the amount of compensation is still an exception. Having analysed the legal character of limits to the amount of compensation, having demonstrated derogations from the application of provisions that limit the sum of the compensation and having taken into account the incomplete regulation under international carriage conventions and its lack of autonomy (falling under the civil law), the author points out that limiting the sum of compensation, despite being applied in the majority of cases of carrier liability, is not a rule but an exception from the full compensation principle. An answer to the fundamental question allows appropriate interpretation of provisions on establishing the amount of compensation due from the carrier. If one were to assume that these regulations maintain their exceptional nature, they will need to be interpreted in a restrictive manner, according to the *exceptiones non sunt extendendae* principle, and any doubts will have to be settled according to the full compensation principle.

Keywords: international carriage conventions, compensation for damage to goods, limitation of compensation, full compensation

INTRODUCTORY REMARKS

Provisions of international conventions[1] that regulate the contract for international carriage of goods in individual branches of transport do not have

[1] These are the following conventions: Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956, supplemented by Protocol of 5 July 1978 and supplemented by Protocol of 20 February 2008; Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, Appendix B. Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) – CIM RU; Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 – Montreal Convention; International Convention for the Unification of Certain

general provisions that refer to the principles of carrier liability for failure to perform or improper performance of the carriage contract and to determining the amount of compensation due from him. They regulate individual cases of damages that constitute the most frequent consequences of failure to perform or improper performance of a carriage contract.[2] In such situations the amount of compensation is limited in various ways. When establishing upper limits of compensation due from the carrier, provisions of international carriage conventions refer to the value of the shipment (determined on the basis of different criteria), to limits expressed in figures, to the amount of the carriage charge and its multiplication, to the declaration of the value of the goods, to the declaration of special interest in delivery or to the value of the loss. There are also other derogations from general rules for determining the amount of compensation which put the carrier in a privileged position compared to other debtors. This involves in particular the rule that the value of the lost or damaged goods is determined according to their prices at the place and date of shipment.

Liability for the condition of the goods and for a delay in delivery are the most important titles of carrier liability. Liability for loss or damage to the goods is first limited by their market value, which in practice makes it impossible to claim compensation from the carrier for the damage that resulted from the damage caused directly to the goods.

Under international carriage conventions carrier liability is restricted by limits of the amount of compensation. These limits fundamentally concern compensation for damage to the goods, though air conventions stipulate uniform amounts of limits of compensation to cover both damage to the goods and other damage that results from a delay. In other international carriage conventions, damage other than damage to the goods that results from delay in carriage is limited in a different way, that is by reference to the value of the carriage charges (Article 23(5) CMR) or their multiplicity (e.g. four times the carriage charges – Article 33(1) CIM UR).

The limitation sums of the amount of compensation have been laid down in individual conventions at a varying level. Traditionally the following rules apply in maritime law. The provision of Article 4(5) of The Hague-Visby Rules stipulates that unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of

Rules of Law relating to Bills of Lading of 25 August 1924, as amended by Protocol of 23 February 1968, as amended by Protocol of 21 December 1979 – The Hague-Visby Rules.

[2] See Wesołowski 2013, 315–16; Thume and Riemer 2013, 362; Jesser–Huβ 2009, 976; Stec 2005, 245; Stec 2018, 1104, Szanciło 2013, 160; the scope of regulation in individual conventions is demonstrated in Ambrożuk 2011, 53–55.

666.67 units of account (SDR – Special Drawing Rights) per package or unit or 2 units of account (SDR – Special Drawing Rights) per kilo of gross weight of the goods lost or damaged, whichever is the higher.

Much higher limits apply carriage by road. Pursuant to Article 23(3) CMR, compensation due from the carrier for damage to the goods, which takes the form of total or partial loss of the goods, cannot exceed 8.33 units of account (SDR) per kilogram of gross weight short. Even higher limits of the amount of compensation for damage to goods result from rail carriage law. The provision of Article 30(2) CIM UR lays down that in the case of total or partial loss of goods, compensation shall not exceed 17 units of account (SDR) per kilogramme of gross mass short. The same limit applies in international carriage by air (Article 22(3) of the Montreal Convention).

Given the numerous limits of the amount of compensation, the problem introduced in the title of this study becomes valid. This issue has practical importance from the point of view of interpretation of provisions on determining the amount of compensation. If one were to assume that provisions on establishing the amount of compensation due from the carrier, despite referring to the vast majority of compensation claims, maintain their special character, a restrictive interpretation according to the *exceptiones non sunt extendendae* principle will be necessary [Zieliński 2017, 302] and all doubts will have to be resolved according to the full compensation rule.

1. LEGAL NATURE OF LIMITATION OF THE AMOUNT OF COMPENSATION

Limits of the amount of compensation in international carriage conventions are often called limitation of liability. This applies to legislative acts (such as Article 29 CMR, Article 36 CIM RU, Article 4(5)(e) of The Hague-Visby Rules) and to the views of legal scholars and commentators alike [Dragun 1984; Kwaśniewski 1989, 174; Ogiegło 2013, 966]. Nevertheless, such an approach is criticised by some representatives of the science of the law [Młynarczyk 1983], who indicate that it is not about limiting the possibility of forced recovery of compensation, but about limiting the debt borne by the carrier. Determining the amount of compensation due from the carrier is the next stage, occurring after the carrier's liability has been established. This is because compensation is a derivative of the occurrence of the state of liability [Szanciło 2013, 157] and determination of the legally relevant damage. The distinction between debt and liability – following German legal scholarship – was adopted in the majority of continental legal systems. Debt (German *Schuld*, French *obligation*) expresses the debtor's responsibility, that is it refers to the debtor's obligation itself to pay the performance. Liability (German *Haftung*, French *Responsabilité*), in turn, does not refer to

the debtor's responsibility itself, but to the covering of the debt related to the compulsory execution of the performance. Debt is dependent on the will of the debtor, while liability is not [Radwański and Olejniczak 2020, 19–20].

A distinction between debt and liability in this meaning is practically absent from the Anglo-Saxon legal systems, where the term "limitation of liability" refers to limitation of the premises for liability and to the amount of compensation alike [Dragun 1984, 16]. Moreover, the literature points out that there is a strict relationship between limitation of debt and limitation of liability and its final result is the effect it has on the application of the full compensation principle [Warkałło 1972, 139–40]. The size of the indemnity debt translates directly into the scope of liability [Kaliński 2018, 201]. One cannot forget that the term "liability" has multiple meanings [Kaliński 2021, 3–9]. The understanding of this terms as reference to the compulsory execution of the performance is one of a few of its meanings [Longchamps de Bérier 1948, 21; Warkałło 1972, 77ff; Stelmachowski 1998, 209ff].

In the literature addressing liability for damages the term "liability" refers mostly to the debtor's responsibility, that is the debtor's performance [Kaliński 2021, 1]. In this scope we are dealing with premises of liability, scope of liability and causes that free from liability. Within such understanding of the term "liability," the boundaries of liability are determined by laws which limit the amount of compensation and which specify the scope of the debtor's (carrier's) responsibility, as well as laws that lay down incidents and their effects (legally relevant damage) [Idem 2018, 201–203], that a carrier is liable for. However, this designation is secondary. Original importance lies with the specification of legally relevant damage for which the carrier is liable. None of the analysed international conventions include provisions that limit the scope of damage for which the carrier is liable. It is assumed that even where a provision stipulates liability for the enumerated forms of damage to the goods (total or partial loss, damaging), it in fact relates to further damage that is the consequence of the former.[3] However, in practice it is not covered due to limitations of the amount of compensation itself. Nevertheless, in situations described below they may be covered by carrier liability.

2. MOTIVES BEHIND INTRODUCTION OF LIMITS OF AMOUNT OF COMPENSATION

Limits of the amount of compensation contained in carriage conventions are an expression of the levelling out of strict rules of carrier liability. Determining carrier liability based on presumed fault, or even in the strict

[3] See Wesołowski 2013, 342–43 and the literature quoted there.

liability regime[4] ensures compensation for damages associated with transport activity in the majority of cases. If in the case of most frequent damages carriers had to pay compensation determined on general terms, in force in most countries (see Article 361(2) of the Polish Civil Code, Article 1149 of the French Code civile, sections 249–252 of the German Bürgerliches Gesetzbuch), they could easily fall into disrepair. They would be liable for compensating the damage in full even if the damage occurred for reasons independent of them. Any calculation of the risk associated with transport activity would not be possible. Values of carried goods vary greatly and carriers are often not informed thoroughly as to this value (senders do so to avoid higher carriage charges). Damage not to the goods themselves is even more difficult to predict. In such situations it would also not be possible to ensure full insurance protection. Limits to the amount of compensation allow carriers to estimate the risk of their business activity. They facilitate, or even enable, insurance protection [Lewaszkiewicz–Petrykowska 2005, 1082–83; Damar 2011, 11–20]. Compensation limits also make it easier to claim redress, e.g. by elimination of the furnishing of proof for damage caused not to the goods themselves which is often difficult to capture. Some transport branches, e.g. transport by sea, are an expression of a compromise: in return for depriving carriers of the right to apply exonerating clauses or clauses that limit their liability, administrators of the goods shipped resigned from full compensation for damages [Dragun 1984, 20ff; Konert 2010, 250ff].

3. OPTING OUT AND EXCLUSION OF THE RIGHT TO LIMIT THE AMOUNT OF COMPENSATION

International carriage conventions that stipulate amounts of compensation due from the carrier at the same time stipulate the possibility to opt out of these limitations. The first such method consists in the fact that the sender can declare the value of the goods (declaration of the value of goods). However, the requirements for the application of this measure are different in various conventions. Therefore, in international carriage by road, in line with Article 24 CMR, the sender may declare in the consignment note, subject to an additional agreed charge, the value of the goods that exceeds the amount of compensation specified in Article 23(3) CMR. The declared amount in this case replaces the limit. A similar solution was adopted with regard to international carriage of goods by rail (Article 34 CIM RU).

The declaration of the value of goods under both of the above-mentioned conventions does not lead, however, to the emergence of a presumption of the value of the shipment, nor does it transfer onto the carrier the burden of proof

[4] See more in Ambrożuk, Dąbrowski, and Wesołowski 2019, 99–102.

of a different value of the goods that the value declared. An authorised person must, therefore, prove the value of the shipment despite the value having been previously declared in the consignment note. The amount declared in the consignment note only replaces the limits of the amount of compensation that result from provisions of both conventions. Therefore, it allows one to obtain compensation in the amount that exceeds these limits. In consequence, when determining the amount of compensation for damage to goods whose value was declared, only provisions of Article 23(1) and (2) CMR and Article 30(1) CIM RU apply, which order that the value of the goods be determined at the time and place at which they were accepted for carriage and which refer to commodity exchange quotation or current market prices, and if there is neither of these, according to the usual (utility) value of goods of the same kind and quality. Therefore, the declaration of the value of goods does not allow the amount of compensation to cover the sender's specific liking towards the carried object (the so-called *praetium affectionis*), or even specific use of this object and relations it has with other things belonging to the authorised person [Wesołowski 2013, 564–65; Godlewski 2007, 102].

Apart from the declaration of the value of goods, both of these conventions lay down a separate measure of a declaration of the value of a special interest in delivery. Pursuant to Article 26(1) CMR, the sender may, against payment of a surcharge to be agreed upon, fix the amount of a special interest in delivery in the case of loss or damage or of the agreed time-limit being exceeded, by entering such amount in the consignment note. In turn, Article 26(2) stipulates that if a declaration of a special interest in delivery has been made, compensation for the additional damage proved may be claimed, up to the total amount of the interest declared, independently of the compensation provided for in Articles 23, 24 and 25 CMR (that is compensation to cover the damage caused directly to goods under limits resulting from conventions or under the declaration of the value of goods and compensation for damages caused by a delay within the limit, that is the carriage charge). An analogical solution was adopted in Article 35 CIM UR. This means that as much as the declaration of the value of goods allows one to avoid the amount of compensation for damage to the goods themselves expressed in figures (which results from both conventions), placing the amount of the special interest in delivery in the consignment note allows one to obtain compensation whose value will exceed all limitations to the amount of compensation resulting from these conventions. A declaration of the amount a special interest in delivery allows the compensation to cover further economic consequences of damage caused directly to the goods as well as economic consequences of exceeding the time limit for delivery, if it has been fixed [Messent and Glass 1995, 196], where these consequences are expressed in damage not directly related to the goods themselves. However, legal scholars and commentators present divergent

views on whether on the basis of the declared amount of special interest in delivery compensation applies to all consequences of acts and omissions of the carrier [Hardingham 1979, 197], or only to those that are in a relevant causal relationship with failure to deliver the shipment or its part or with exceeding the time limit for delivery [Loewe 1976, 379; Szanciło 2013, 404]. A compromise view has also been expressed which seems to be the most convincing. It holds that the declaration of a special interest in delivery allows compensation also for damages that are not in a regular causal relationship with these circumstances, provided that the sender that declares the special interest in delivery has foreseen such damages and informed the carrier about them [Wesołowski 2013, 566; Koller 2013, 1129; Thume and Riemer 2013, 711; Messent and Glass 1995, 201–2]. A declaration of a special interest in delivery under CMR and CIM UR does not provide any presumption of the value of the damage sustained either. This damage must be proven by the claimant. The authorised person is entitled to compensation in the amount higher that it results from limits adopted in the conventions, but only when further damage that is in a causal relationship with the damage to the goods or with the delay in delivery is proved. However, the upper limit of compensation is always expressed in the amount of the special interest in delivery declared.

In turn, the Montreal Convention only regulates the declaration of a special interest in delivery (Article 22(3)). However, the literature assumes that this interest must be understood broadly, that is that it includes the possibility to declare a special interest expressed by specifying the value of the shipment itself [Polkowska and Szymajda 2004, 69–70; Stec 2017, 1686]. Such a declaration results in the exclusion of the convention-based limit (expressed in an amount) of air carrier liability for damage related to carriage of goods. If such damage occurs, the carrier will be obliged to pay compensation up to the declared amount, unless he proves that this amount exceeds the sender's real interest [Wyrwińska 2018]. Such a declaration creates a presumption of the value of the interest subject to compensation.

Moreover, some conventions give the parties to the carriage contract the right to raise the limit in the contract, at the same time not allowing the limit to be lowered. Therefore, Article 25 of the Montreal Convention stipulates that limits higher that those laid down in the convention may be introduced in a contract or to no limits of liability whatsoever. Setting the limits at a higher amount is also stipulated in The Hague-Visby Rules (Article 4(5)(g)), which lays down that by agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in Article 4(5)(a) of the convention may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in this provision (that is 666.67 units of account per package or unit or 2 units of account per kilo of gross weight of the goods lost or damaged).

The carrier's qualified fault excludes the possibility of invoking the limits of the amount of compensation due from the carrier stipulated in international carriage conventions. This means an intentional fault and serious unintentional fault (gross negligence or recklessness with the awareness of the probability of causing damage) – based on the Anglo-Saxon concept of wilful misconduct.[5] In such a case the entitled person may claim full compensation from the carrier that covers losses (*damnum emergens*) and lost expected benefits which he could have achieved if the damage had not been done (*lucrum cessans*), where as a rule it is intended to compensate direct damage to the goods and further consequences of this damage.

Irrespective of the above exclusions, the so-called theory of deviance has formed on the basis of maritime law. It includes situations in which the carriage was performed in principle contrary to contractual terms (change of carriage route, carrying the goods on the deck contrary to the contract or custom, deliberate delay in shipment). In line with the theory of deviance, in such situations application of contractual terms is excluded, also those that exclude or limit liability of a sea carrier. Therefore, he is fully liable for damage caused during or as a result of deviance [Dragun 1984, 143].

CONCLUSION

The comments presented above make us realise that limits of the amount of compensation do not lead to a restriction of damage that the carrier is liable for (legally relevant damage). They include all economic consequences that are in a causal relationship with the fact for which the carrier is liable (the question about the concept according to which the adequacy of the causal relationship must be assessed is left to the discretion of domestic law applicable to a given contract). Conventions commonly provide for situations in which limits in the amount of compensation are not applicable. It is determined not only by the will of the parties (approved declarations of the sender), but also situations resulting from the will of the legislator (carrier's qualified fault). Irrespective of the above-mentioned circumstances, the nature of provisions that regulate a carriage contract, included in international conventions, is crucial for settling the question posed at the beginning of this paper. There are no doubts that from the substantive point of view these provisions fall under civil law. Laws that regulate a carriage contract, though often defined as carriage law, are not a separate branch of law [Górski 1983, 8]. Therefore, they must be perceived and interpreted in a broader concept outlined by civil law. Even though they introduce specific measures in relation to rules under general laws

[5] Cf. Pepłowska–Dąbrowska 2017, 56; See also Damar 2011; Jesser–Huβ 2009, 1121ff; Harms 2013, 740–813.

for an array of issues, one cannot talk here about an autonomy of carriage law. The fact that these provisions have at the same time (from the point of view of how they are created) an international law nature does not change their civil law character.

It is also important in this context that provisions on carriage contracts that introduce rules for determining the amount of compensation that are different to general rules do not apply to all types of damage resulting from non-performance (improper performance) of the carriage contract, but only to specifically regulated cases. They do not regulate comprehensively the issues of determining the amount of compensation due from the carrier. Therefore, fall-back on general regulations becomes necessary. This applies, in fact, not only to cases of causing damage not regulated under carriage laws (e.g. as a result of unfounded refusal to accept a shipment or failure to bring a vehicle at the agreed place and time), but also, additionally, to situations that have been regulated. This is about e.g. the application of the *compesatio lucri cum damno* principle, the causal relationship concept adopted and the value measures (save for the damage to the goods themselves). *Ius moderandi* may also be applied here.

It all advocates that we take a stance that provisions on determining the amount of compensation included in international carriage conventions do not create a self-contained autonomous system. They include special rules that refer only to certain situations, and only to some questions resulting from them. This means that the regulations included in provisions of carriage law may be interpreted only as introducing exceptions from general rules and not as providing a principle. Therefore, the principle of full compensation, from which carriage laws stipulate a number of exceptions, applies as a rule also to provisions concerning carrier liability. Such an approach orders that provisions on the determination of the amount of compensation included in laws concerning carriage contracts be interpreted strictly and that questionable issues that surface in the course of their application be resolved according to the principle of full compensation.

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WITH *LAUDATO SI'* TOWARDS DEEPENING UNIVERSITY SOCIAL RESPONSIBILITY IN ECOLOGY

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Abstract. "Everything is related," says Pope Francis in his encyclical *Laudato si'* (no. 92) to make us ponder upon whether, as academics, we think globally and act locally in the spirit of university social responsibility, including for ecology. The author discusses (i) the nature and reception of the papal document, including by the academia and lawyers; (ii) foreign initiatives aimed to apply the principles highlighted or reiterated by the pope; (iii) the importance of the law in taking care of "our common home;" and (iv) the need for ecological education of those who will make and implement the law. Regrettably, already a tentative query across the universities of the region reveals the absence of or reduced importance attached to the problems of sustainable development and ecology, both in university strategies and curricula. The establishment of a working group on university social responsibility within the Ministry of Funds and Regional Policy seems to perpetuate the business understanding of the phenomenon. On top of the many years of experience of foreign academic centres and their networks, discussed briefly by the author, a useful tool facilitating ecological education and a deeper understanding of the social responsibility of the academia in the field of sustainable development can be the papal encyclical *Laudato si'*.

Keywords: *Laudato si'*, ecology, university, social responsibility, education of lawyers

INTRODUCTION

24 May 2015 saw the signature by Pope Francis of the Encyclical Letter *Laudato si'* dedicated to people's care for their common home. It was published in eight languages (Arabic, German, English, Spanish, French, Italian, Polish, and Portuguese) on 18 June 2015.[1]

For the correct understanding of the nature and relevance of this document, it enjoys the rank of an encyclical due to its content. *Litterae encyclicae* (Lat.), *encyclos* (Gr.) means a circular, a "circulating" letter. Encyclicals have a general nature and are intended for bishops and the faithful. Since *Pacem in*

[1] Franciscus PP., Litterae encyclicae *Laudato Si'* de communi domo colenda (24.05.2015), AAS 107 (2015), p. 847–945 [hereinafter: LS].

terris by John XXIII, given on 11 April 1964, they have also been addressed to all people of good will around the world, especially when they cover social matters, such as peace, love, or freedom.[2] The purpose of issuing such documents is to explain Christian teaching, to instruct, to warn against errors and dangerous opinions and actions, but also to invite readers to draw practical conclusions and implement them in practice. On the other hand, jurists and canonists use encyclicals as guidance to interpret and apply canonical norms properly, although these documents do not have a statutory capacity [Sitarz 2008, 27–40]. From the viewpoint of the social doctrine of the Church, encyclicals contribute to the development of law and its application in various domains, such as human rights, penal law, family law, and labour law. Pope Francis himself draws attention to this in *Laudato si'* (LS 65) [Espinoza Coila 2015].

1. A MULTI-FACETED AND INTERDISCIPLINARY APPROACH TO THE DOCUMENT

The Encyclical Letter *Laudato si'* is the first papal document of this rank entirely addressing the area of integral ecology (ecology of the natural environment, political, social, educational, ethical, economic, cultural, mental ecology..., it embraces all of them, like in a single, shared conviction) [Poznański and Jaromi 2016; Gatta 2015]. Undoubtedly, it should be ranked among social encyclicals. Yet, already in *Octogesima adveniens* of 14 May 1971, the apostolic letter of Paul VI, degradation of the environment is referred to as "social problem."[3]

Laudato si', as well as a number of related matters, has been widely discussed and commented on across many disciplines and scholarly sessions.[4] Its sources and inspirations are put to analysis, such as its original South American roots, biblical and Catholic social teaching inspirations, Orthodox and liturgical motifs, Franciscan integral ecology, Ignatian and Jesuit influences [Poznański and Jaromi 2016, 17–161], and philosophical and scientific contexts [ibid., 165–258].[5]

The encyclical is marked by dialogue, including an interreligious one. Following the example of St Francis of Assisi, Pope Francis depicts "our

[2] Ioannis PP. XXIII, Litterae encyclicae *Pacem in terris* (11.04.1964), AAS 55 (1963), p. 258–304.

[3] Paulus PP. VI, Epistula apostolica *Octogesima adveniens* (14.05.1971), AAS 63 (1971), p. 401–41; in LS 4, there is a reference to pages 416ff.

[4] See, for example Yáñez 2017; Silecchia 2016, 371ff. Extensive literature in Note 2; in the Polish literature on the subject, see, for example, conference proceedings Poznański and Jaromi 2016; Figueroa 2016.

[5] See also Spadaro 2015, 3–22.

common home" as a beautiful mother who opens her arms to hold us, and as a sister with whom we share our life (LS 1, 10–12).[6] That is why it must be looked at and treated holistically – after all, it is a "common home," and we are all accountable for it, also before the Creator. To demonstrate that this reflection is not only a Catholic domain, Pope Francis referred to the teachings of Patriarch Bartholomew and his firm statement that "a crime against the natural world is a sin against ourselves and a sin against God." (LS 8, notes: 15, 16; see LS 9) [Bar 2020, 7–32].

The encyclical also met with a positive reception from groups of Islamic leaders and scholars. They drew attention to the fact that it had been released during Ramadan, interpreting this as a sign of openness and respect, just like Footnote 159 and its reference to an Islamic source, namely the poet, teacher, and mystic of the 16th century Ali al-Khawas. Although the papal letter does not refer to such fundamental texts as the Quran and the hadith, it is noted that this is a clear attempt to highlight the shared tradition of seeking the truth about the creation as the foundation of moral responsibility for it [Swan 2015; Powell 2017, 1325].[7] Without rejecting some opposing opinions, Imam Omar points out, "It is my sincere hope that more Muslim scholars will take up the dialogical challenge presented in *Laudato si'* in a comparable spirit of reverence and hospitality with which the 12th-century Muslim leader, Sultan al-Kamil, welcomed Saint Francis of Assisi from whom the current Pope takes his name."[8]

It should also be noted that the following encyclical of Pope Francis, *Fratelli tutti*, signed at the tomb of St Francis of Assisi on 3 October 2020 and having an ecological overtone, was inspired, among other things, by *A document on human fraternity for world peace and living together*, signed on 4 February 2019 in Abu Dhabi by His Holiness Pope Francis and Grand Imam of Al-Azhar Ahmad Al-Tayyeb.[9] Pope Francis confirmed the continuity and

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[6] Pope's inspiration by the concept of integral ecology is discussed by, for example, Sadowski 2016, 73–89.

[7] The author points at least to five texts from the Holy Quran, Surahs 59:1; 55:6; 13:13; 17:37; 6:165 and three hadiths [Hadith, in: Sahih Imam Al-Bukhari 24:45; 425], in which the traces and roots of today's environmentalist movements can be identified. They also contain ideas close to LS: balance, sustainability, moderation, common interest [Powell 2017, 1331–333].

[8] After: Powell 2017, 1334. Cf. Pope Francis' address during an interreligious meeting at Ur of the Chaldeans on 6 March 2021; the Polish text available at: "Wyznawcy judaizmu, chrześcijaństwa i islamu w trosce o świat," https://swietostworzenia.pl/2-aktualne/925-wyznawcy-judaizmu-chrzescijanstwa-i-islamu-w-trosce-o-swiat [accessed: 01.06.2021].

[9] *A document on human fraternity for world peace and living together*, https://www.vatican.va/content/francesco/pl/travels/2019/outside/documents/papa-francesco_20190204_documento-fratellanza-umana.html [accessed: 05.06.2021]. A vivid response of the Franciscan families to the encyclical globally and in Poland does not come as a surprise. In Poland, it triggered an interdisciplinary review of Pope Francis' eco-encyclical, as, for example, in the 2016 collective work, *Kościół i nauka w obliczu ekologicznych wyzwań. Źródła, inspiracje i konteksty encykliki*

progress of the idea in his speech during an interreligious meeting at Ur of the Chaldeans on 6 March 2021.[10]

Pope's ecological message is also contained in speeches and documents addressed to the representatives of science. For example, during the plenary session of the Pontifical Academy of Sciences (28 November 2016), by citing no. 53 from Laudato si', Pope Francis emphasized the need for science to be at the service of a global ecological equilibrium. He also called for a renewed partnership between scientists and religious communities in the field of ecology to understand that we are co-operators in protecting and developing the life and biodiversity of the planet and of human life on it. The pope pointed out that it is the duty of scientists, who work free of political, economic, or ideological interests, to develop a cultural model that can help face the crisis of climatic change and its social effects. "Just as the scientific community, through interdisciplinary dialogue, has been able to research and demonstrate our planet's crisis, so too today that same community is called to offer a leadership that provides general and specific solutions [...]."[11] This goal was one of the criteria for the reform of universities and ecclesiastical faculties launched by the 2017 Apostolic Constitution *Veritatis gaudium*.[12]

2. RE-INVITATION TO THE ACADEMIA

During the celebration of the fifth anniversary of publication of *Laudato si'*, the *Laudato Si'* Year was announced (24 May 2020 – 24 May 2021). The aim is to foster eco-development by creating a bottom-up initiative of integral ecology movement for sustainable development, in line with the seven goals of ecological conversion listed in the papal encyclical.[13] Among them, there is environmental education at every level of school programmes. It was taken

Laudato si', addressing the inspirations and philosophical and scholarly contexts of *Laudato si'* [Poznański and Jaromi 2016]. Among the latest publications, *Czyńcie Ziemię kochaną! Ekologia integralna w perspektywie franciszkańskiej*, ed. Stanisław Jaromi, published in the year of *Laudato si'* by the St Francis of Assisi Environmental Movement (Pol. REFA): The same work contains a study, "40 Years of REFA. An Illustrated History," 9–21. Many scholars participate in such movements, but they are attracted out of passion rather than being urged by their university organization.

[10] Text in Polish: "Wyznawcy judaizmu, chrześcijaństwa i islamu w trosce o świat," https://swietostworzenia.pl/2-aktualne/925-wyznawcy-judaizmu-chrzescijanstwa-i-islamu-w-trosce-o-swiat [accessed: 1 June 2021]. See comment: Wojciechowski 2021, 82–84.

[11] See http://www.pas.va/content/accademia/it/magisterium/francis/28november2016.html [accessed: 03.06.2021].

[12] See https://www.vatican.va/content/francesco/pl/apost_constitutions/documents/papa-francesco_costituzione-ap_20171208_veritatis-gaudium.html [accessed: 03.06.2021].

[13] The *Laudato si'* Year programme and its goals resemble the Sustainable Development Goals (*SDG*) adopted by the United Nations. The SDG agenda is a framework plan for the global community with 17 goals to be achieved by 2030, covering a number of thematic areas, such as:

into account by the Dicastery for Promoting Integral Human Development while drawing up the programme *Laudato si'* Action Platform and inviting universities (but not only) to join this seven-year project. When explaining the programme structure, Fr Joshtrom Isaac Kureethadam, coordinator of the Ecology and Creation Section of the dicastery, named three milestones to be achieved in the first year of the project: community building, resource sharing, and developing action plans to attain the seven goals of *Laudato si'*. The following five years will see the implementation of specific and practical actions culminating in the final year devoted to thanksgiving.

How and to what extent are we going to respond to this invitation? Undoubtedly, the encyclical reverberated across the universities of Latin America the most, as they are closer to the pope culture- and language-wise. Among them, the International Association of Jesuit Universities in Latin America (AUSJAL) plays a leading role. Established in 1985, it associates 30 universities from 14 countries of the region. It is one of the six regional networks of the International Association of Jesuit Universities (IAJU) covering over 200 Jesuit universities.[14] The initiatives of the AUSJAL go beyond university boundaries by seeking ways to contribute to the lives of societies better and to a greater extent. Currently, this network only contains 13 working groups made up of scientists, professionals, and authorities of the member universities who readily participate in the implementation of joint projects, such as a university social responsibility network and an environment and sustainable development network.[15] The programmes pursued include human rights and integral ecology schemes, as well as interdisciplinary education in these fields.

In 2016, a university "common home" network was established in Argentine (Red Universitaria para el Cuidado de la Casa Común). It associates 17 universities and organizes annual thematic weeks. In 2018 they convened the first inter-American interdisciplinary congress.[16]

In Europe, from the academic year 2017–2018, students at the pontifical universities in Rome have been able to attend environmental classes structured in six modules and spanning five years of university education. The programme was designed as a response to the appeal conveyed in *Laudato si'* and presented to Pope Francis on 22 June 2017.

Also in Poland, *Laudato si'* has been widely studied and discussed, for example, in a series of conferences, The Integral Ecology of *Laudato si'*. Young Champions of Change (The Pontifical University of John Paul II in Kraków,

poverty, social inequality, peace, hunger, access to clean water, gender equality, clean energy, or climate action.

[14] See https://iaju.org/about [accessed: 01.06.2021].

[15] See https://www.ausjal.org/acerca-de-ausjal/ [accessed: 01.06.2021].

[16] See https://ruc.unlar.edu.ar/ [accessed: 01.06.2021].

starting from 2016), Sustainable Development and *Laudato Si'* (The Sejm, 15 October 2016), initiatives by the Centre for Ecology and Ecophilosophy of Cardinal Stefan Wyszyński University in Warsaw, interdisciplinary and interuniversity scholarly works, e.g. *Wybrane zagadnienia edukacji ekologicznej. Refleksje wokół Laudato si'*, published in Kraków in 2016; grants by the National Science Centre awarded to the Faculty of Humanities of Cardinal Stefan Wyszyński University for the project, The Greening of Catholicism in Poland and Italy? Catholic Organizations on Climate Change and Environmental Crisis (2020), or official adoption of environmental policies on campuses, as at the Ignatianum Academy, whose rector, Fr Prof. Józef Bremer, issued a declaration on the academy's environmental policy to celebrate the fifth anniversary of pope's signature of *Laudato si'*.

Evidently, there are numerous, yet dispersed initiatives. It is likely that the *Laudato si'* platform, which is due to launch on 4 October 2021, will put them together and further their development and better understanding, also including the legal sphere which often surfaces in the papal thought.

3. *LAUDATO SI'* AND LAW

In his 2016 speech to the Pontifical Academy of Sciences, Pope Francis addressed the audience as follows, "It has now become essential to create, with your cooperation, a normative system that includes inviolable limits and ensures the protection of ecosystems, before the new forms of power deriving from the techno-economic model causes irreversible harm not only to the environment, but also to our societies, to democracy, to justice and freedom."[17] In 2019, during an audience with participants of the 20th Congress of the International Association of Penal Law, the Holy Father called for legal protection of the natural environment and recognition of "ecocide" as a crime worldwide, and ensured that the Church would be more involved in this work [Bar 2020, 7–32].

In *Laudato si'* Pope Francis highlights the need for ethics of international relations and the requirement to shape a normative system (no. 58). In Chapter Five, Lines of Approach and Action, he refers to the most relevant international instruments and calls for dialogue on new national and local policies. In other words, each country is to assume its responsibility for planning, coordination, oversight, and enforcement within its respective borders, and for transparency in decision-making (nos 176–183, 186f), which should be fair and free from pressure (no. 183). These processes should be monitored and subject to constant international legal control [Gatta 2015].

[17] http://www.pas.va/content/accademia/it/magisterium/francis/28november2016.html [accessed: 03.06.2021].

Indeed, lawyer groups do not remain indifferent about *Laudato si'*. [Fellegara 2016, 17–23] For example, *Ángel* Ruiz de Apodaca, professor of administrative law at the University of Navarre, is of the opinion that *Laudato si'* is directly linked to environmental protection law, that is, such legal norms and principles that govern those human activities that have (or may have) an adverse impact on nature. He goes so far as to suggest that the encyclical could well serve as a university environmental law coursebook, as it addresses all the current environmental challenges and solutions to be implemented through focusing on "integral ecology." [Ruiz de Apodaca Espinoza 2016, 145–60; Amo 2019, 5–37]. All would-be and active lawyers should study it because ethical reflection on the relationship between people and the environment precedes the legal one [Tallacchini 1996]. It is not enough to become complacent with an EU directive setting up a legal regime concerning environmental liability.[18] The pope notes that laws may be drafted correctly but often remain a dead letter. The power of law should be regarded as sufficient – to achieve the desired results, people themselves must undergo a change. To ensure intergenerational justice, ecological education is needed more than mere information [Balossi and Prada 2021].

Another noteworthy opinion comes from Judge Jorge Franz, president of Division III of the Court of Appeals in penal cases in Buenos Aires. During the Second World Conference on Constitutional Justice (25–28 August 2015), Judge Franz discussed *Laudato si'* from the legal perspective. He pointed out that environmental law had become a thing of the past and had given way to sustainable development law, especially after the 1992 Rio Earth Summit and its declaration. Today's, novel approach is expected to take account of social, economic, and environmental matters and not just "pollution."[19] Pope Francis adopts a similar position.

In Poland Piotr Kroczek has carried out an analysis of the sources of legal norms and the functions of law in the area of ecology. Having identified pope's critical remarks directed at the law, he concludes that "Francis is conversant with legal issues, and his view of the law is very practical" [Kroczek 2015, 55–68].

Undoubtedly, the document may also apply to our legal system. In Sustainable Development Strategy for Poland 2025,[20] among the instruments

[18] Directive 2004/35/EC of the Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. The consolidated version after the amendment is dated 26 June 2019, http://data.europa.eu/eli/dir/2004/35/oj [accessed: 09.06.2021].

[19] "El derecho ambiental pasó a la prehistoria, hoy el enfoque es el derecho del desarrollo sustentable," *iJudicial*, 2 September 2015, https://ijudicial.gob.ar/2015/el-derecho-ambiental-paso-a-la-prehistoria-hoy-el-enfoque-es-el-derecho-del-desarrollo-sustentable/ [accessed: 01.06.2021].

[20] http://snep.edu.pl/sms/materialy/strategia%20zrownowazonego%20rozwoju%20polski%20do%20roku%202025.pdf [accessed: 01.06.2021].

of SD implementation, the authors prioritize education at all school levels (Point 5.5, p. 26) because to implement the principles of such development "set out in the Rio Declaration requires the participation of an informed and well-educated society," also educated ecologically (Point 2, p. 14). Some of the prerequisites for the effective achievement of the strategy's objectives are "to facilitate access to justice in matters relating to sustainable development and the use of the environment" (Point 2, p. 14) and "to develop the national legislation that integrates ecological and development aspects" in accordance with Principle 11 of the Rio Declaration (Point 2, p. 14).

CONCLUSIONS AND PROPOSALS

Given the observations made above, a review and verification of university curricula, including of law and administration, is more than advisable. A general query in the universities of the region revealed the absence of or reduced importance attached to the problems of sustainable development and ecology, both in university strategy documents and programmes. Environmental education provided for in the state's Sustainable Development Strategy 2025 should also be taught outside university establishments focusing on life sciences, biotechnology or paid postgraduate courses.

Sad to say, our country is falling behind in implementing university social responsibility [Bar 2015, 5–18]. If implemented, it is approached through the prism of corporate reality, especially after the recent higher education reforms. The best example of this is the establishment of a working group on university social responsibility within the Task Force for Sustainable Development and Corporate Social Responsibility of the Ministry of Funds and Regional Policy.[21]

Finally, the signatories of the University Social Responsibility Declaration (2017) were primarily private and vocational schools (23 in total). This confirms the North American experience that university social responsibility is misunderstood and primarily seen as a source of prestige and income generation. Fortunately, two years later, a larger group of state establishments joined in, including those offering law and administration programmes (as many as 60 signatories in 2019). The signatories of the declaration undertake "4) To expand curricula to include business ethics and corporate social responsibility, sustainable development, and social innovation."[22]

[21] See "Społeczna odpowiedzialność – znaczenie dla uczelni i sposoby wdrażania," a publication prepared for the Congress of Social Responsibility of Science: Science for You (16–17.09.2019), https://odpowiedzialnybiznes.pl/wp-content/uploads/2019/09/SOU_publikacja.pdf [accessed: 21.06.2021].

[22] https://www.gov.pl/web/fundusze-regiony/grupa-robocza-ds-spolecznej-odpowiedzialnosci-uczelni [accessed: 21.06.2021].

Besides drawing on the many years of experience of foreign academic centres and their networks, discussed elsewhere, a useful tool facilitating ecological education and a deeper understanding of the social responsibility of the academia in the field of sustainable development can be the papal encyclical *Laudato si'*. They are guided by the principle expressed by an American politician (Timothy Wirth) and elaborated in Pope Francis' letter, "think globally, act locally." The authorities of Lubelskie Voivodeship also expect such action to be taken by the universities of the Lublin region. This is clearly voiced in the Development Strategy of Lubelskie until 2030, which goes with a relevant environmental impact assessment.[23]

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THE DEVELOPMENT AND TYPES OF THE INCOME TAX CONSTRUCTION

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INTRODUCTION

Public tribute is one of the elements of a wider category of public burden imposed by the public law norms. Historically, public tributes have evolved in different economic, legal and social conditions. This explains why they do not now constitute a coherent catalogue of financial instruments which could be described with some defined, homogeneous constitutive features. The system of public tributes has evolved for the past centuries from a simple division of tributes into taxes, fees and contributions towards more complex divisions, with two clear main currents of common and specific burdens. Both common and specific burdens are currently collected in monetary form, personal servitude or tribute in kind are excluded from it. The category of common burdens covers only taxes, that is the tribute which finances state's general tasks, not based on the principle of equivalency. Specific tribute does not serve the purpose of financing the state and does not burden all the people capable of paying this performance [Wołowiec 2016, 100–15; Idem 2020, 545–63].

The tax (Latin: *taxare*), means compulsory financial obligation imposed on the taxpayer (an individual or a legal entity) by the state or its legally equal counterpart. Currently, it is mostly collected in a monetary form, though in pre-capitalistic times it was also collected in kind. Regardless of the social and political formation of the state organism, it was first the ruler (prince, king, emperor) and then the state that needed and still needs means (monetary or in other form) to satisfy its needs and to accomplish its tasks (duties) towards its

subordinates or citizens [Kesti 2012–2019; Gajl 1995, 3–60]. The fiscal aim was historically the main aim determining the imposition of taxes and development of the system of fiscal burdens [Grądalski 2004, 10–20; Idem 2006, 5–30; Gomułowicz and Małecki 2011].

1. PURPOSE OF ARTICLE, CRITERIA OF ANALYSIS AND RESEARCH METHODOLOGY

Legal sciences use typical methods encountered in social sciences and humanities, i.e.: examination of documents (legal acts and administrative court decisions), comparative methods (expert opinions, legal opinions, analyses resulting from linguistic, grammatical and historical interpretation) and case studies. The results of cognitive research are new theorems or theories. On the other hand, the result of research for the needs of economic practice is to determine whether and by how much the existing theorems and theories on personal income taxation are useful in the process of modeling and reforming personal income taxation systems in the context of realization of non-fiscal functions of taxation and the processes of globalization and unification of tax solutions.

Induction was used as the main research method. It consists in drawing general conclusions or establishing regularities on the basis of analysis of empirically observed phenomena and processes. It is a type of inference based on details about the general properties of a phenomenon or object. The use of this method requires the assumption that only facts can form the basis of scientific inference. These facts are real existing situations (economic and legal). Inductive methods include various types of legal acts, analyses, expert opinions, and scientific documents used in social research.

2. ALTERNATIVE CONCEPTS OF INCOME TAX

The construction of personal income taxes has been increasingly criticized. The pursuit of the doctrine's principles of taxation has led to a considerable complexity of its construction, making it incomprehensible to taxpayers and difficult and costly to administer for tax authorities. The definition of income for taxation purposes is not an easy task facing the tax authorities. It should be defined in such a way as to distort the decisions of economic agents as little as possible, while ensuring the basic function – which is the provision of public revenue – and possibly non-fiscal functions. Income can be defined in terms of its generation and its consumption. The distinction between these two approaches has become the basis of a multi-threaded discussion, the essence of

which may be summarised in the question what should be taxed – income or consumption?

The definition of income from the side of its generation corresponds to the basic, most widespread, Schanz-Haig-Simons theory, according to which the tax base is formed by income from various sources, regardless of its type and regularity. Looking at tax revenue from the use side, on the other hand, requires making a distinction between consumption and savings. Consumption can be taxed in a variety of ways [Holmes 2000]. Indirect taxes in the form of turnover taxes (structured, for example, as value-added taxes) or selective excise taxes are common in most countries. The concept of consumption-oriented income tax is very capacious, as it includes numerous specific concepts. They use different approaches to the construction of the tax base and other tax variables, but what they have in common is that the part of income allocated to current consumption is taxed, while household savings or corporate investments are excluded.

Consumption-oriented income taxation is justified in two ways. The historically earlier argument refers to the fairness of taxation [Gomułowicz 2001]. According to it, consumption is a better measure of tax capacity than income. Over time, economists began to emphasize the second important feature of this form of taxation, which is the elimination of the so-called double burden of savings. It limits capital accumulation by discouraging savings and investment. Consumption-oriented income taxation has an attractive feature – it does not distort the decisions of economic agents. What is important, based on the feature of tax neutrality at the microeconomic level, it is somehow intuitively concluded that it translates into stimulation of saving and investment processes at the macroeconomic scale. According to this argumentation, a consumption-oriented income tax can be expected to have a pro-growth character. The practical experience to date is small and does not provide clear indications. Most results of simulation studies generally support this assumption. However, they are understandably based on model simplifications, and therefore can only strengthen the argument, not confirm it with absolute certainty [Grądalski 2006].

Therefore, it can be assumed that stimulation of economic growth is a likely consequence of a consumption-oriented income tax. The key element differentiating taxation of earned income and expended income is capital income – or more precisely, its part corresponding to a certain minimum interest rate, referred to as the normal return on capital. In the consumption-oriented approach, this is not taxed, and this applies to both individual income taxation and firm-level taxation [Litwińczuk and Karwat 2008, 22].

3. HISTORY OF PERSONAL INCOME TAXATION (SELECTED ISSUES)

The breakthrough moment in the history of public tribute was the introduction of income tax in England. As we can see, income tax is quite a new invention. General taxes were of property type, consisting in taxing the whole property possessed by someone or its elements. Because such taxes are simple and easy to use and because taxpayers find it more difficult to hide their real estate than other taxable objects, such taxes did not require any complex tax machinery or extensive knowledge of tax collectors (officials). The forerunner of contemporary income tax was the tax imposed in England (except for Ireland) to finance the war with Napoleon, in 1799 by prime minister William Pitt (younger). When introducing this form of taxation, the argument went that it was only temporary and it would be repealed once the war was over [Gomułowicz and Małecki 2011]. The state actually resigned from collecting this tax voluntarily only once – in 1802, after finishing the war with Napoleon, Great Britain abolished this tax, after signing the peace treaty in Amiens, but for a very short period of time, as in 1803 the tax appeared again in the public tribute system at the level of 5% (the income obtained from this tax was at the same level as when the rate was 10%, this was possible by lowering the lower limit from 60 to 50 pounds which doubled the number of taxpayers). In 1806 the 10% rate was reintroduced and it was kept until 1816, when the tax was repealed again by the Parliament, a year after the battle of Waterloo, with 231 votes for and 201 against. After abolishing the tax all the data concerning taxpayers was burned (as it turned out later, copies were stored at the archives – *King's Remembrancer*). For the next 26 years the English system of public tribute did not comprise personal income tax [Simon and Nobes 2012, 10–50; Krajewska 2012, 80–105; De Spenke 2011, 8–31; Zee 2005, 3–58].

The income tax introduced then had been reformed, compared to the 1799 construction, and evolved into historically the first type of income tax, the so-called scheduler tax (analytical). The construction of this tax divided all incomes into 6 schedules – groups (using property, capital, free economic activity, other capital incomes, salaries, wages), divided into 16 categories and assessed in different techniques, which all made up a single income tax, supplemented by the progressive surtax on part of the income which exceeded the statutory minimum level. As a result of these reforms and changes, income tax has been – since 1842 – fiscally the most efficient source of budget income and the most important tax in the English tax system [Wołowiec and Bogacki 2020, 7–32; Żyżyński 2009, 202–27].

The first attempts at introducing this tax in the USA were made in 1812. The British Act from 1798 was followed. Tax rates of 8% and 10% were determined (respectively for incomes exceeding 60 pounds and exceeding 200

pounds). The legislative work had nearly been completed when in 1815 the peace treaty in Ghent was signed and there was no need to introduce this tax any longer. Just as in case of Great Britain, income tax was introduced in 1961 to finance the war operations (Civil War in the United States). Enormous time pressure to find additional sources of budget income did not allow further discussion on the sense of introducing this tax. The tax Law was signed by President Lincoln on 1st July 1982. It imposed a 3% tax on incomes above 600 dollars and 5% on incomes above 10 000 dollars. In 1864 tax rates were increased and the Americans had to pay a 5% tax on incomes above 600 dollars, 7.5% on incomes above 5000 dollars and 10% – above 10 000 dollars. The original construction of the American income tax had low tax rates, simple structure and a large amount of non-taxable income.

Italy introduced income tax in 1864, Germany in 1891, but the German construction of income tax was different from the concept of English scheduler (analytical) tax. Scheduler tax is a type of taxation consisting in separate taxation of each type of taxpayers' incomes. It allows to prefer some while discriminating other types of income by establishing differentiated scales of taxation and rates. However, it makes it difficult to use the progression with reference to taxpayers who obtain their income from a few sources. In 1891 the so-called global income tax was introduced in East Prussia. It covered the whole income of an individual, regardless of its origin. In the global tax there is no division of the tax base into incomes from particular sources, the base is just the sum of all incomes. The tax base in this system was the so-called net income, though in some cases (for example in case of taxing labor and running own economic activity) the way of establishing income from particular sources of revenue could differ. Austria introduced global income tax in its lands in 1896–1898. The Polish state income tax before the 2nd world war as well as the present personal income tax are also global in nature. Other European countries also started to introduce income taxes into their tax systems trying to obtain additional income to finance expenditure during the 1st world war.

In France and the Netherlands the income tax was introduced in 1914, in Belgium – in 1919. In France several sources of revenue were differentiated. They taxed revenues from labor and remunerations and social benefits, industrial and commercial incomes, incomes from farming, revenues from movable capital and revenues from real estate. Each of these categories was taxed separately and proportionally. The universal income tax was introduced in 1917 and was a progressive tax. In 1948 personal income tax was divided into two parts, combining two tax solutions from 1914 and 1917. The proportional rate was applied to particular categories of incomes and revenues, in line with the 1914 solutions (global income tax) and an additional progressive rate was introduced, as in 1917 (scheduler taxes). After the reform of the tax system carried out in 1914–1917, the non-fiscal function of the income tax increased

due to the introduction of various solutions taking into account the family and personal situation of a taxpayer. It was not until 1970 that the taxation of particular revenues was unified, integrating legal solutions into general personal income tax [Wołowiec 2016, 100–15; Idem 2020, 545–63].

4. THE CONCEPT OF INCOME

The concept of income was of vital importance in the development of income tax. We can differentiate two basic concepts of income. The first one is the concept of the theory of revenue sources focused on regular inflow of economic value from particular sources, historically linked to the English income tax. According to this theory, taxable income is a regular surplus coming from regular sources. A much broader concept of income is offered by the theory of net asset growth which combines taxable income with the growth of economic ability to spend the income, whether it is regular or one-off. The essence of this theory is the economic ability of a given individual obtained in a specified period of time and calculated by summing all net revenues (incomes) and benefits, even one-off ones (such as donations, lottery wins, etc.), obtained in one tax year. The presented theories significantly influenced the development of particular types of income tax [Leszczyłowska 2014, 7–40; Wójtowicz 2003, 184–94; Joumard 2002, 91–151].

Summing up our presentation of historical evolution of income taxes in the system of public tributes, we can differentiate three basic types of tax: Roman (mixed), German (global) and British (scheduler). The Roman type was a historical transition from revenue tax to income tax. Its specific feature lies in the fact that particular parts of income are first placed in tax schedules and are taxable according to the progressive or proportional rate, and then the general income is established and taxed according to the progressive rate. This type of income tax can be found mostly in tax systems of France, Italy, Belgium or Portugal [Messere 1998; Litwińczuk 2008].

Also the Polish income tax paid in 1950–1971 by individuals and legal entities which were not units of social economy was of this nature. After tax reforms in 1962, 1963 and 1974 this taxation evolved into the German type of income tax. The German type of income tax originated in East Prussia and then spread into the Netherlands, Switzerland, Austria and Scandinavian countries. In this system the tax is collected from global (general) income, regardless of the source of obtained revenues, using the progressive tax rate. In the British (scheduler) type of income tax, income is not determined globally, but partial incomes are summed, specifically defined in the so-called schedules. The sum of partial incomes gives the total (consolidated) income. Partial incomes are taxed according to proportional or progressive rates. The tax collected from scheduler incomes is treated as an ordinary tax, contrary

to the tax collected from general income using the progressive rate, which is then treated as an additional tax. Schedules determine particular incomes very casuistically, and then, within them further (detailed) division of incomes into particular groups takes place.

The evolutionary development of income tax has led to the development of several specific features dominating contemporary tax systems. The first one consists in basing the income tax construction on the theory of net asset growth, which offers its broad understanding, and, which is connected, adapting global income as the basis for taxation (freeing taxation from sources of obtaining revenue). A contemporary version of the theory of net asset growth is the theory of market income (originating in the German tax doctrine), according to which the income of a particular entity is the asset growth generated and performed by this entity. This means that income is generated only in the economic turnover, as an effect of human work, investment of capital, thus excluding inheritance, donations and other extraordinary incomes. In taxation practice, some elements of the theory of sources are also used, by excluding incomes obtained from determined sources from general income and taxing them according to a separate tax rate (usually the proportional one).

Income tax based on the theory of sources (scheduler) offers far-reaching possibilities of individualizing (personalizing) taxation by determining its size to not only the size of incomes but also to their sources. This is especially visible in the British income tax. The concept of this tax is closer to the essence of income tax than the concept of tax based on the theory of net asset growth, which offers possibilities of implementing the principles of equality and tax justice. In the 20th century, in an attempt to implement these principles, revenue taxes were being replaced with income taxes. The advantage of scheduler income taxes is that they allow to adjust the taxation method and tax rates to the nature of particular income groups. This construction provides generally milder taxation of incomes obtained from work (not funded incomes) than incomes on capital (funded incomes). Using the scheduler taxation we can achieve graduation of tax burden with reference to incomes coming from various sources and to implement the policy of the so-called just taxation [Aksman 2002, 555–73; Bradley 2004].[1]

A drawback of scheduler systems is that they do not take into account the whole financial situation of a taxpayer, that is his ability to carry the tax burden imposed on them. It is not possible to rationally personalize scheduler taxes by applying various reliefs related to particular family burdens of a taxpayer. That is why we can now witness a diversion from constructions based on a classic scheduler tax and movement towards mixed tax, in which proportional scheduler tax on particular categories of income is supplemented

[1] See Inventory of Taxes in the Member States of the European Union, European Commission, Luxembourg 2010–2020, 467.

with global (unified) tax which progressively burdens the sum of taxpayer's incomes [Kalinowski 1996, 46–50]. Moreover, scheduler tax is extremely complicated, which contradicts the requests for transparency and clarity of taxation and, due its specific structure, brings significant costs of imposing and collecting tax. From this perspective, a more appropriate construction is that of income tax based on the theory of net assets growth (global – unified – income tax). Historically this tax covered generally the whole income of an individual, regardless of the type and source of obtaining income (characteristics of particular income groups). In the construction of global (unified) tax there is no preliminary taxation of incomes from various sources, and the tax basis is a sum of incomes, however this can be calculated in different ways. Although the taxation basis was the so-called net income, in some cases (for example taxation of labor and economic activities conducted on one's own), the method of determining incomes from various sources can be differentiated.

Global, unified income tax is a construction that is widely used in OECD countries. In the European Union, the last countries which adopted the system of global tax in 1973 were Great Britain and Italy. The construction of the global (unified) tax is more universal, as its basic elements can be applied to taxation of individuals' incomes and to legal entities incomes. Obviously, adoption of the concept of net asset growth (global income) as a prevailing concept is not tantamount to the elimination of the principle of personalizing taxation. The concept of taxing global income best implements the principle of taxing a taxpayer according to their income potential, accumulating all revenues of a taxpayer from all possible sources, providing a full picture the taxpayer's material situation [O'Donoghue and Sutherland 1998; Torres, Mellbye, and Brys 2012, 1–56]. Personal features of income tax are exposed, using the construction of the so-called existence minimum, using social and extraordinary reliefs, differentiating tax burden with the progressive scale, depending on the size of the obtained income. Personal features of global tax are also implemented by using certain elements of the theory of sources of taxation, in form of a separate taxation for incomes from some sources of revenue [Wołowiec and Kepa 2020, 493–518; Wójtowicz and Smoleń 1999; Messere 1998, 223]. Taxation can be applied only to such incomes which come from regular, permanent sources, which allows to separate non-funded income (from work) from funded income (from capital, assets). For example the tax on income in form of interest on bank deposits is calculated, collected and paid out by banks themselves, thus there is no collection of advance payments and its accumulation with incomes from other sources. We should remember that the current construction of the income tax based on global understanding of income tax introduces several constraints concerning the possibility of covering losses incurred in one source of income (for example: capital investment) with income obtained from other sources (for example

from remuneration), therefore it is necessary to break down the total income into its specific sources [Messere 1998]. For example, many countries do not allow to join losses incurred in high-risk investment with income from other sources. Incomes and losses from this source of revenue are accumulated as a whole and, if there is surplus in form of income – it is then added to incomes from other sources of revenue.

5. PERSONAL INCOME TAX VERSUS CORPORATE INCOME TAX

Income tax is a prototype of personal tax – the tax which reflects the personal ability of the subjects on which it is imposed to pay it. For some time income tax was only paid by individuals, as taxation of individual and legal persons was based on the same principles. For example, the companies' profits were in France (until 1948 – *impot sur les societes*) and in Great Britain (until 1965 – *corporation tax*) taxed with the tax on industrial and trade profits on the same principles as individuals. What only mattered was the fact that the enterprise existed, its legal, collective or individual nature were not taken into account. The forerunner of corporate income tax (from companies) was the construction introduced into the American tax system in 1909. It was only in 1920 that the tax systems in Germany and the United States incorporated the modern construction of corporate income tax (from companies) as a separate form of direct taxation. The introduced taxation form was a classic system of taxing company profits regardless of its destination, with additional taxation of incomes in form of dividend on the shareholder's level. The same income then is double-taxed, firstly as company profit and secondly as the income of an individual. In other European countries this form of taxation developed after the World War Two. The European leader in separate taxation of individuals and companies was France, which introduced a special tax on company profits in 1948. Then the tax was introduced in Great Britain in 1965 and in Italy in 1974. Other European countries began introducing corporate income tax into their tax systems in the 1960s. [Majchrzycka–Guzowska 2011; Cuccia and Karnes 2001, 113–40; Cnossen 2001, 1–89]. The following arguments supported the introduction of separate corporate income tax [Krajewska 2012, 80–105, Messere 1998, 325–26][2]: 1) it reduces disruptions concerning the choice of legal form of conducting business activity (companies versus individuals); 2) with reference to companies, it is impossible to use the elements of personalization, that is adjusting its construction to the individual features of a taxpayer; 3) legal persons have better paying capacity, as concentration of capital allows them to extend the size of a venture, to achieve economies

[2] KPMG's Individual Income Tax and Social Security Rate Survey 2010–2019, KPMG, Swiss 79.

of scale and to improve competitive position compared with other business entities run by individuals; 4) legal persons (companies) are not burdened with handing over property when the owner dies, which increases their income (tax) capacity.

It should be remembered that the most significant features of income tax are revealed in taxation of individuals. It is a tax which best implements the principle of taxation equity, through the idea of taxation equality and universality, both in the subject and in the object aspect (tax ability to pay). The taxation of companies with income tax is a controversial issue. In case of legal persons we cannot talk of "personal paying capacity," they do not have personal needs, they do not have income "for themselves," they are only representatives of individuals. Even in conditions of tax progression there is no possibility of justifying it in the context of the theory of equal sacrifice and softening the effects of indirect tax regression [Torres, Mellbye, and Brys 2012, 1–56].

The capacity to pay tax in case of legal persons boils down to the economic capacity, assuming that taxation cannot lead to limiting the productivity of tax sources – in the short term it should not limit economic development, in the long term – it should be conducive to this development. Therefore the measure of tax capacity of a legal person is not the income that an individual is left with to satisfy their needs, but the profitability understood as a relation of profit to own capital [Gentry and Hubbard 2002, 1–43; Djankov, Ganser, Mc Liesh, et al. 2008, 1–33]. Understood in this way capacity of a legal person to pay tax is firstly related to the variety of legal and organizational forms of conducting economic activity (for example taxation of single enterprises, concerns or holdings) and the purposes of their activity. Analyzing the essence of taxation of legal persons we can notice that tax burden depends on gathering (accumulating) taxable income by a legal person, not by an individual. In order to directly reduce tax burden, such legal person would have to lower its tax base. Therefore, in order to assess its own share, even regardless of its influence on aggregated investments in the legal person sector, an individual must predict how a legal person (as a company) will react to the height of tax burden. So we can state that there is an additional entity between the tax organ and an individual, an entity that makes decisions. We are then faced with the necessity to make new predictions, reflecting the processes of making decisions by companies (legal persons – "intermediary" entities), which are connected with most problems of group decision-making, as opposed to individual decision-making.[3]

The differences between taxation of individuals and corporations do not exclude certain common elements, resulting from the fact that we tax revenues obtained by particular entities in a specific time. Particularly we can

[3] Structures of the taxation systems in the European Union 2012–2020, European Commission Taxation and Customs Union – EUROSTAT, Luxembourg, 416.

notice then analyzing material and legal construction of income tax, as well as its size and collection [Feldstein 2008, 1–20; Auerbach and Hasset 2006, 1–10; Chalk 2001, 1–37].

6. INTERNATIONAL TAX COMPETITION

Assuming that in the international tax competition, the attractiveness of a particular tax system, and as a result – location of investment depends, among other things, on the level of corporate income tax rate, an alternative for lowering the tax rate is not to tax profits retained in a company (reinvested), where we tax only incomes of consumption nature ("getting out" of an enterprise). Another interesting solution may be a system of investment reliefs and exemptions. Apart from the level of effective tax rate, another essential factor may be the coherence of tax regulations and their compliance to accounting regulations (coherence of tax and balance law). International and Polish experience in using investment reliefs allow us to put forward a thesis concerning relatively low economic effectiveness of such reliefs. Costs measured by lost budget inflows are large, effects – moderate, while the greatest beneficiaries of this solution are tax advisors [Jourmard 2002, 124–25, Kesti 2013]. Tax reforms being an effect of the assessment of effectiveness of solutions applied so far and tax competition for capital, aim at lowering rates and simultaneously eliminating reliefs. As a result of such changes, tax base is expanded (shadow economy decreases), which stabilizes budget tax incomes and sometimes (in the longer run) accounts for their growth.[4] Apart from unfavorable influence of reliefs and exemptions on budget incomes from tax, we can identify several other arguments in favor of eliminating various investment preferences from the corporate income tax system [Messere 2000]. For example, differentiation of tax rates is based on the premises related to creating investment incentives.[5] However, it makes the system complicated and does not have to bring the planned effect in form of stimulated investment demand, while generating all kinds of ineffectiveness.

CONCLUSIONS

Collecting tax at source has an unquestionable advantage consisting in the fact that tax payment is made soon after the income was given to the taxpayer's disposal (paid out by the payer). Tax collected at source may be treated as a specific down-payment towards income tax. In this method, the taxpayer

[4] Tax revenue in EU Member States: Trends, level and structure 2005–2019.
[5] Price Waterhouse Coopers, 2011–2019.

is obliged to declare in his annual return form, the size of obtained income and is entitled to lower (reduce) the amount of due tax calculated in this tax return by the amount of tax that was collected at source. The tax collected at source is called "tax paid at source included." Alternatively the tax collected at source may be the final tax collected at source. In this case income recipient (taxpayer) is exempted from an obligation to submit tax declaration and from obligation concerning the amount of collected tax. Taxes collected at source usually have a fixed rate, which is applied to the revenue (not income), which means that we do not take into account any costs of obtaining revenue or personal situation of a taxpayer (income capacity). Therefore we can state that taxes collected at source are examples of scheduler taxes.

With reference to the income related to work remuneration, most countries combine both methods of collection, that is assessment and collection of tax at source, which is known as the "pay as you earn (PAYE) system." In this system, employers (payers) are obliged to collect tax at source from remunerations of their employees. Contrary to taxes collected at source, tax collected from remuneration is not collected at a fixed rate, which is typical for the system of collecting tax at source. Generally, the amount of tax collected at source from remuneration reflects personal situation of taxpayers, and the taxpayer is obliged to inform the employer (payer) of their personal situation if it affects the size of their tax burden, in order to allow the payer to apply appropriate system of down-payment collection. In a situation when the system of collecting tax from remuneration is used properly, taxpayers are exempted from the obligation to submit tax declarations, if they do not obtain any other income or if they obtain income from other sources of revenue which is subject to final tax collected at source. The right of each state to tax incomes generated on its territory is a derivative of sovereignty of this state and, in principle, is only limited by international agreements, especially agreements to avoid double taxation.

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UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND THE STRATIFICATION OF POWERS

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Abstract. The subject of the article is the idea of unconstitutional constitutional amendments. The essay does not concern any specific legal order but takes the perspective of a general theory/philosophy of law. The study is divided into two parts. The first part briefly describes the theory and practice of applying the idea of unconstitutional constitutional amendments. The second part reveals and analyzes the basic assumptions of the theory of unconstitutional constitutional amendments: "the assumption of the stratification of powers" and "the essentialist assumption." As a result of the analysis, it is concluded that on the grounds of democracy and constitutionalism the inadmissibility of amendments to the constitution should be linked not to the difference between the establishment of the constitution and its amendment, but to the difference between the degree of democratic legitimacy of the indicated law-making activities. Therefore, the article also formulates a postulate that the admissibility of declaring the unconstitutionality of constitutional amendments should be limited to cases where the amendments were adopted in a procedure with an evidently lower degree of democratic legitimacy.

Keywords: unconstitutional constitutional amendments, constitutionalism, constituent power, theory of law, normative democratic theory

INTRODUCTION

The issue of unconstitutional constitutional amendments in recent years has attracted more and more attention. This is for both practical and theoretical reasons. The constitutional practice of many countries shows the need and usefulness of the idea of restrictions on the possibility of amending the constitution. In particular, it is necessary to mention India and Turkey, whose constitutional courts have loudly implemented this idea. On the other hand, the idea of unconstitutional constitutional amendments seems to be some kind of conceptual contradiction. According to the common meaning of the term "unconstitutionality" is that an ordinary law, inferior to and bound by the constitution, violates it [Dicey 1982, 371–72]. Therefore, someone may insist that unconstitutionality can't refer to an act carrying the same normative status as the constitution itself. It seems that the discussion on the mere admissibility and

scope of constitutional changes has been going on since the time of the first modern constitutions, i.e. since the 18th century. There are significant efforts in constitutional theory to solve mentioned puzzle – to resolve the apparent contradiction between idea of an unconstitutional constitutional amendment and the unconstrained nature of constituent power. One can say that as a result of these efforts, we are now dealing with a sort of theory of unconstitutional constitutional amendments.

The essay is divided into two parts. The first part briefly describes the basic issues of the theory of unconstitutional amendments to the constitution. The second part is devoted to a critical discussion of its basic assumptions ("the assumption of the stratification of powers" and "the essentialist assumption") and drawing certain normative conclusions from it. This study can be understood as a contribution to the universal theory of unconstitutional constitutional amendments and, at the same time, to a normative theory/philosophy of law and democracy.

In the first place, let's try to briefly describe the theory and practice of applying the idea of unconstitutional constitutional amendments.

1. EXPLICIT AND IMPLICIT UNAMENDABILITY

One can say that the important feature of constitutionalism is that the norms of the constitution must be in some way, and to some degree, be entrenched. The most far-reaching expression of this idea is the phenomenon of the unamendable provisions of the constitution: their amendment would be prohibited [Bezemek 2011, 528–41]. They reflect the idea that certain constitutional regulations ought to be protected from alteration. This kind of extreme entrenchment is (and has been) used in the constitutions of many states,[1] but at the same time many countries do not use such a solution. For example, the Polish constitution of 1997 does not contain unamendable provisions. In turn, under the French constitution of 1958, the republican form of government shall not be subject to amendment, and the amendments to the German Basic Law of 1949 affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 (human dignity, human rights) and 20 (principle of democratic and social federal state) shall be inadmissible.

Initially, unchangeable provisions were designed mainly for protection the state's form of government; over time, however, they were extended to protect

[1] According to Roznai "out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143)" [Roznai 2017, 28]. His research shows that we are dealing here with an upward trend in relation to previous historical periods.

many features of a democratic system, including fundamental rights and freedoms [Mohallem 2011, 767]. As the Venice Commission stated, unamendability is a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order. It is worth adding here that the Commission indicated that explicit limits on constitutional amendments are not a necessary element of constitutionalism.[2]

The existence of provisions of the constitution, which the constitution itself proclaims unmendable, explicitly restricts the possibility of changing the constitution. It seems, however, that the "core" of the theory of unconstitutional constitutional amendments is the recognition of the implicit limitations of constitutional changes. Recognition of implicit limitations means that even when the constitution is silent on the subject, we should recognize that some of its amendments are unacceptable.

In my opinion, the theory of unconstitutional constitutional amendments makes sense only if it recognizes the existence of implicit limitations. A simple example proves this. Let us assume that the constitution contains a provision which, by another provision of it, will be declared unamendable. If we allow the existence of only explicit limits, then the act of first repealing the second provision and then changing the first one will be entirely lawful. This, in turn, seems to contradict the basic intuitions related to the idea of unconstitutional constitutional amendments. Therefore, in the following I will refer to the "full-blooded" theory of unconstitutional constitutional amendments, which primarily recognizes implicit restrictions on constitutional amendments and treats explicit restrictions as their "positivized form."

The idea of implicit constraints on making constitutional amendments has been present in modern constitutional thought since the creation of the U. S. Constitution and the first American Congress. Then it appeared in different countries and was conceptualized in different ways. The works of French and German scholars significantly developed this idea (in particular, the findings of Maurice Hauriou and Carl Schmitt should be mentioned). Despite this, until the 1960s, the idea in question was mainly a theoretical construct. At that time, however, in India, the German doctrine was referred to and the so-called "basic structure doctrine" was developed, which the Indian Supreme Court applied in practice canceling the constitutional amendments several times.[3] According to Indian "basic structure doctrine" the amendment power is not unlimited – it does not include the power to abrogate or change the identity of the Constitution or its basic features. The Indian basic structure doctrine

[2] *Report on Constitutional Amendment*. Strasbourg: Council of Europe (2010), https://www.venice.coe.int/WEBFORMS/DOCUMENTS/CDL-AD(2010)001.ASPX [accessed: 15.09.2021], p. 43.

[3] See for example Krishnaswamy 2010, 70–130; Randhawa 2011, 4–35; Mate 2010, 179–208.

was widely echoed in other countries [Ragone 2019, 327–40]. It is widely discussed, and in some countries has significantly influenced the constitutional jurisprudence (e.g. Bangladesh, Pakistan, Kenya, South-Africa). Some have even said that the international trend is moving towards accepting the basic structure doctrine [Dlamini 2009, 10]. However, from the point of view of this study, the most important thing is that this doctrine inspires the development of a universal theory of unconstitutional constitutional amendments,[4] which is the subject of this study.

2. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND CONSTITUENT POWER

It can be said that the only way to logically coherently introduce the concept of unconstitutional constitutional amendments is to distinguish between the power to adopt a constitution and the power to amend it. To consistently "reconcile" the concept of unconstitutional constitutional amendments with the basic assumptions of the legal system, it is necessary to assume that the latter authority is somehow weaker than the first. This type of stratification of powers to give specific content to constitutional provisions justifies the restriction of the possibility of introducing changes to the constitution.

In modern constitutional thought, there is a long tradition of distinguishing constituent power from constituted power (for example Seyes and Schmitt). I short: constituent power is the power to establish the constitutional order of a nation and constituted power is the power created and limited by the constitution. Constituent power belongs to the sovereign. Of course, when adopting democratic legitimacy of power, the people are the sovereign. Constituent power is legally unlimited and has an extra-legal nature. On the one hand, it constitutes all legal power, and on the other it is itself the supreme legal power. In turn, constituted power is a competence granted by positive law. Constituted powers are legal powers somehow derived from the constitution and are limited by it. They owe their existence and validity to the constituent power and depend on it. Constituent power is superior to them.

There are many levels of constituted power. Constituent power, however, is also sometimes stratified. According to a well-known distinction, primary (or original) constituent power and secondary (or derived) constituent power can be distinguished (this distinction originates from the 18th century French doctrine, during the French National Assembly on the 1791 Constitution). In short: primary constituent power is the power to create a constitution and establish a new legal order. Strictly speaking, only this power is legally unlimited, superior and belongs to the people. The secondary constituent power is

[4] See such a highly developed theory in Roznai 2017.

the power exercised under legal circumstances according to rules established by the constitution, but it operates at the constitutional level and is in some sense a reflection of the primary power. The secondary constituent power acts within the constitutional framework and is therefore limited, nevertheless, it operates at a higher level than ordinary legislation. In the light of the above, the obvious question arises: how should the power to amend the constitution be characterized in the light of the above distinctions?

It should be noted that many authors emphasize the difficulties with the unequivocal characteristics of the power to amend the constitution [Preuss 1994, 158; Webber 2009, 49; Roznai 2017, 110–12]. It is indicated that this power has the characteristics of both constituent and constituted power. On the one hand, the amendment power function is very similar to the constituent power function. On the other hand, this power is conferred by the constitution and regulated by it. Obviously, proponents of restrictions on constitutional amendments cannot treat it as pure constituent power because constituent power is legally unlimited. As a result, amendment power is treated as "secondary" constituent power – *sui generis* power sitting between constituent power on the one hand and constituted power on the other [Roznai 2017, 112]. The power to amend the constitution is delegated by those who exercise primary constituent power and the exercise of the amendment power is limited.

3. STRATIFICATION OF POWERS AND DEMOCRATIC LEGITIMACY

At this point I would like to point out that the theory of unconstitutional constitutional amendments implicitly adopts a certain basic assumption which I shall call here "the assumption of the stratification of legal powers" (in short: stratification of powers). Although it has not been clearly formulated, its acceptance seems to be a necessary condition for the acceptance of the aforementioned theory (especially for the idea of unamendability). The basic content of the assumption on the stratification of legal powers can be, in short, expressed as follows: "we can differentiate legal powers at some level of the legal system (also at the highest, constitutional level), even if there are no explicit regulations providing for such differentiation." In such a case, the appropriate differentiation of legal powers must therefore be justified by other arguments. It is not unusual that even in legal cultures with a strong positivist attitude, certain norms are sometimes recognized as valid, although it is difficult to provide a clear basis for them in statutory law (this is often the case, for example, with legal principles). Therefore, there are no fundamental philosophical or theoretical reasons to exclude the possibility of recognizing the validity of the rules introducing stratification of legal powers (stratification without clear grounds in the provisions of positive law). In order to assess whether in a given case the stratification of legal powers is well justified (not

arbitrary), it is necessary to analyze the nature of the arguments presented to justify the stratification.

Let us examine how the stratification of powers is justified in the theory of unconstitutional constitutional amendments. It seems that the main theoretical/philosophical argument is that it is one thing to establish a legal act (in this case – the constitution) and another to change (amend) it. As they are two different legal actions, the legal powers needed to establish them also differ somewhat, with the former being stronger than the latter [Roznai 2017, 105–34]. The power needed to establish a constitution is stronger than the power to change (amend) it – only the first one is primary constituent power. This argument is based on an assumption which I will later refer to as the "essentialist assumption." According to the essentialist assumption, establishing a legal act and changing it are two essentially different activities. The enactment of a legal act gives it a unique legal identity – its essence. By establishing an act, it becomes this and not another legal act, and its legal identity creates a set of the most important norms/regulations contained in it (as well as their mutual relationship). On the other hand, a change (amendment) is an activity whose essence is different. It alters the content of the act, but does not create a new act (i.e. a new legal identity/essence). What leads to the creation of a new act is the repeal of the existing act and the establishment of another one in its place.

At this point, it should be noted that it is obvious that establishing a legal act is something other than amending (change) it. It does not follow from this, however, that in this case we are dealing with the performance of two different powers (and also that the second is weaker than the first). It also does not follow that the second power is delegated power. We can only obtain such conclusions by significantly enriching the premises. These premises must somehow refer to the difference between actors performing two different acts and the legitimacy of these actors to perform them.

The case of unconstitutional constitutional amendments is, of course, a special case. In this case, we are talking about the very top of the legal system and the exercise of the highest legal power. This highest legal power comes from the sovereign and in modern democracies it is "the people." The stratification of the highest power must therefore somehow be based on the difference in legitimacy to express the "authentic will of the people." However, the concept of "people's will," and thus the notion of the exercise of constituent power, is, of course, somewhat elusive. Therefore, answering the question which act better represents the will of the people is sometimes not easy and depends on many additional assumptions. If the concept of "authentic people's will" and the concept of exercising constituent power are to have some normative or practical dimension, they must be related to specific features or circumstances of specific actions. Otherwise, they will remain abstract formal concepts or assumptions needed only to make sense of the constitutional order (some kind of "constitutional myth").

In modern democracies it is quite commonly accepted that "the people" are the subject and the holder of the constituent power and the nation's constitution receives its normative status from the political will of "the people." Any stratification of powers at the highest, constitutional level must therefore refer to the difference in legitimization to express the genuine will of the people. However, there are many philosophical/theoretical and practical doubts associated with the concept of the will of the people (which is why some authors call it a "modern myth" [Weale 2018, 1–29]. Many of these doubts relate to doubts about the very principles of democratic decision-making (in particular, problems related to participation and representation, deliberative decision making, difficulties in social choice theory – difficulties with the aggregation of preferences). It should also be added that the concept of constituent power also has its critics for whom the idea of a founding moment at which the constituent power is exercised holds little descriptive or normative appeal [Dyzenhaus 2008, 129–46].

Regardless of the doubts indicated above, it can generally be said that any justified stratification of powers at the highest level of the legal system must refer to the difference in legitimacy derived from the sovereign. Therefore, in the realities of modern democracies any justified stratification of powers at the highest level must refer to the difference in the degree of "democratic legitimacy," and this democratic legitimacy must take into account the extent to which the decision-making procedures contains inclusive and deliberative mechanisms (which bring us closer to gaining "the authentic will of the people"). The above-mentioned doubts related to the will of the people and democratic decision-making show that in some cases it will be difficult to establish the difference in democratic legitimacy, however, in my opinion, it does not rule out the very idea of such legitimacy. The applicability of this idea can be seen in cases of an evident difference, e.g. when we compare the legitimacy of a constitution imposed by a foreign state with the legitimacy of a fundamental change to this constitution adopted in a popular referendum or when we compare the legitimacy of a constitution established by the assembly which was elected in the exclusion of a significant group of citizens with the legitimacy of essential amendments adopted by the body elected in the elections with the participation of that group (in these cases the question of what will be the execution of primary constituent power seems rhetorical). It seems that on the basis of the assumptions of modern constitutional democracies any stratification of legal powers must be related to the degree of democratic legitimacy (and not to the essentialist assumption). This, in turn, shows that constitutional amendments may, in certain circumstances, have greater legal force than the enactment of the constitution.

As mentioned above, the use of "the democratic legitimacy" indicator may in some cases not provide clear answers (its use is hardly conclusive).

Although in obvious cases we can intuitively indicate the difference in the degree of democratic legitimacy, nevertheless a more detailed definition of this indicator seems to be quite a complex issue in the field of normative democracy theory (therefore it is difficult to discuss it in greater detail in this study). In short, the difficulties with strict determination of the degree of democratic legitimacy of decisions result in particular from the fact that this indicator itself includes at least three others: "degree of deliberativeness," "degree of inclusiveness (participation)," "degree of adequacy of the representation system." Each of them is difficult to define precisely, and moreover, their mutual relationship is not clear (e.g. can we compensate for a lower degree of deliberativeness with a greater degree of inclusiveness? etc.). Hence, in hard cases, identifying a difference in the degree of democratic legitimacy may be highly debatable or even arbitrary (it requires settling controversial problems in the field of normative theory of democracy, and this can always be treated as debatable).

It can be said, however, that from the point of view of this essay, the indicated problems are not of major importance. If we agree that the stratification of powers is the exception rather than the principle, then justifiable stratification can be limited to cases where there is a clear difference in democratic legitimacy. In the case of constitutional amendments, such a solution is additionally justified by the assumption that the act complies with the constitution (used quite often in modern constitutional states). If we apply this assumption to statutes, we should apply it all the more to amendments (changes) to the constitution. In other words, the possibility of recognizing the unconstitutionality of amendments to the constitution should be limited to cases where there is no doubt that the degree of democratic legitimacy of the amendment is lower than the degree of democratic legitimacy of the constitution itself. In case of doubts, the decision should be made in favor of the inadmissibility of limiting the amendments. When assessing the difference in the degree of democratic legitimacy, it will of course be crucial to assess the legislative procedure and participation as well as the representativeness of the relevant legislative body (if they are different in the case of enacting amendments to the constitution and the constitution itself).

Taking into account the above considerations, it can be said that in relation to the enactment of the constitution itself, amendments (changes) to it may have a greater degree of democratic legitimacy, the same (at least approximately) degree, or a lower degree. In the legal cultures of modern constitutional democracies, the possibility of recognizing the unconstitutionality of amendments (changes) to the constitution should be limited to the last case. In difficult cases, when it is difficult to unequivocally decide whether the amendments actually have less democratic legitimacy, the decision should be "in favor of the admissibility of the amendments."

CONCLUSION

Summing up this essay, it should first be noted that the idea of unconstitutionality of amendments to the constitution becomes a very interesting element of contemporary constitutionalism. In some countries, the constitutional courts applied in practice the idea of unconstitutionality of amendments to the constitution, while the theory/philosophy of law developed a conceptual apparatus allowing for the rejection of the thesis about the internal contradiction of this idea. Although this has not been clearly formulated, such a rejection is possible only with the acceptance of the assumption which in this study was called "the assumption of the stratification of legal powers." However, the stratification of legal powers requires appropriate justification. A justification based solely on an essentialist assumption (that an amendment to an act is something essentially different and weaker than the enactment of a new act) seems, at least in contemporary constitutional democracies, insufficient. The essentialist assumption seems controversial from a philosophical point of view, and an effective justification should somehow appeal to the sovereign. In the constitutional orders of modern democracies, this translates into a justification referring to the difference in the degree of democratic legitimacy of law-making decisions at the constitutional level. In other words, the inadmissibility of amending the constitution should be linked not to the difference between the enactment and amendment, but to the difference between the degree of democratic legitimacy of law-making activities.

The degree of democratic legitimacy may be considered a vague concept and the strict determination of the difference in legitimacy may in some cases be questionable. However, in the case of the issue of unamendability of the constitution, this does not cause any major difficulties. Due to the generally recognized presumption of constitutionality of an act, it seems that the inadmissibility of amending the constitution should be limited to cases of an evident difference in the degree of democratic legitimacy between the adoption of the constitution and the adoption of its amendment. In other words, the condition for the admissibility of recognizing an amendment to the constitution as unconstitutional should be the fact that the adoption of the amendment was made in a procedure with a lower degree of democratic legitimacy than the adoption of the constitution. The adoption of the idea of unconstitutional changes to the constitution in a specific legal system depends on many particular factors (e.g. the history of a given legal system, legal culture, arguments of a political and social nature) and does not seem to be a simple consequence of accepting the universal idea of constitutionalism. If, however, we accept the concept of unconstitutionality of the amendments to the constitution, the acceptance of the above-mentioned condition seems necessary in the light of the normative theory of democracy and constitutionalism.

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A CANONICAL ANALYSIS OF CANON 273 OF THE 1983 CODE OF CANON LAW

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Abstract. All clergy have the special canonical obligation to show reverence and obedience to their ordinary and the pope. They bind themselves to this promise freely and publicly during their diaconal or priestly ordination. The ecclesiastical legislator gave the liturgical ceremony a normative form in can. 273 of the 1983 Code of Canon Law. In this paper, the author presents the sources of the canon in question, presents a canonical analysis, places it into canonical context, and defines individual terms according to how the ecclesiastical legislator understood them.

Keywords: clergy, obedience, reverence, obligation, pope, bishop, own ordinary, promise, priesthood ordination

INTRODUCTION

We believe that there is no cleric in existence who cannot remember the two most holy moments of his ordination, these being the laying on of hands by the bishop ordaining him and the prayer of consecration. During the part of the ordination ceremony for diocesan candidates to the diaconate and priesthood that is termed the promises of the elect (*Promissio electorum*), the bishop ordinary lays his hands on the candidate's hand before the last question. Subsequently, the consecrating bishop asks: *Do you promise reverence and obedience to me and my successors?* (*Promittis mihi et successoribus meis reverentiam et oboedientiam?*). The candidate answers: *I promise* (*Promitto*). At the same time, religious candidates for the diaconate and priesthood make the promise of obedience and reverence to the diocesan bishop and their major superior: *Do you promise reverence and obedience to your bishop and your competent superior?* (*Promittis Episcopo dioecesano necnon legitimo Superiori tuo reverentiam et oboedientiam?*) The answer: I promise (*Promitto*).[1] This promise accompanies the clergy for their entire life. There

[1] See: Pontificale Romanum ex decreto Sacrosancti Concilii Vaticani II renovatum auctoritate Pauli PP. VI editum Ioannis Pauli PP. II cura recognitum *De Ordinatione episcope, presby-*

is no cleric at any level of hierarchy who would be released from this promise. The ecclesiastic legislator took this promise from the liturgical books and gave it a normative form in can. 273 CIC/83: "Clerics are bound by a special obligation to show reverence and obedience to the Supreme Pontiff and their own ordinary."

1. THE ORIGINS OF CANON 273 OF THE 1983 CODE OF CANON LAW

The origins of can. 273 from the CIC/83 are found in the 1917 Code of Canon Law,[2] can. 127; a speech by Paul VI.; and the canonical context of CIC/83, can. 274 § 2, 495–502, 1371, 2º [Otaduy de 2002, 318].

1.1. Origins in the 1917 Code of Canon Law

In CIC/17, the ecclesiastical legislator designated the term cleric (*clericus*) to mean one who accepted tonsuring, including bishops (can. 108 § 1), and was not a lay person or a member of a holy order. The clergy, because they belonged to the clerical order, did not acquire only privileges and rights, but also obligations [Bączkowicz, Baron, and Stawinoga 1957, 302].

During their ordination, clerics were obliged to make the promise of obedience to their ordinary, but without oath (can. 127).[3] Namely, this was not the religious vow of obedience, which would have been a vow of the virtue of obedience (*ex virtute religionis*). Secular clerics commit themselves to fidelity (*ex fidelitate*); therefore, they should be obedient to their own ordinary when performing such duties as do not contradict their own competences contained in the canons of CIC/17. Thus, the ecclesiastical legislator established canonical obedience for the secular clergy [ibid., 317–18].

In CIC/17, the ecclesiastical legislator did not allocate a foremost position to the canon on the clerics' obedience and reverence to their own ordinary (can. 127). The canons on obligation to lead a more holy life came before it (can. 124–126). Clergy who violate canonical obedience should be punished with canonical punishments (can. 2331 § 1).

terorum et diaconorum, edition typical altera, Typis Polyglottis Vaticanis 1990; *Codex Iuris Canonici auctoritate Ioannis Pauli PP. promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1–317 [hereinafter: CIC/83], can. 1009 § 2.

[2] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, p. 1–593 [hereinafter: CIC/17].

[3] "Omnes clerici, praesertim vero presbyteri, speciali obligatione tenentur suo quisque Ordinario reverentiam et obedientiam exhibendi."

1.2. The *Allocutio* of Pope Paul VI

On March 1, 1965, Pope Paul VI. gave a speech in the Sistine Chapel to clerics and parish priests from the Roman diocese. As the first thing, he emphasized the importance of personal faith in their vocation and priestly ministry. He reminded them of the words of the Apostle Paul, that they should ministry in order to be regarded as Christ's ministries and the administrators of the mysteries of God (1 Cor 4:1). When the clerics decided to become priests, they thereby gave Christ and his Church the sacrifice of their lives, which they have internally and irrevocably adhered. It is the sacrifice of unrivaled love, the sacrifice of Christ's crucifixion. It is the path of constantly striving for a single and constantly present ideal in the unceasing perfection of one's own self. Namely, God's will is their personal consecration, because God himself called them to their ordination (1 Sol 4:3–7).

The Pope further reminded the clerics that they should not be like those who always want to judge, criticize, or willfully instigate change. He emphasized that they should be open to the renewing Spirit, which is active in the world and also pervades the Church edicts. At the same time, he challenged them to beware of willful innovation, which gives in to fashionable social trends but is not approved of by the Church. The Pope emphasized that obedience lives in the Church and is the source of salvation. It gives testimony to the ministry of these clerics, testimony that is free and masculine and that belongs to many of those who decided to follow Christ, who himself was obedient until his death (Phil 2:8).

The Pope encouraged the clerics to have faith in their superiors and to listen to them. These lead them and watch over their souls, because one day they will account for them. If the clerics listen to their superiors, they will lead them with joy and not with complaint. The opposite situation would be to the disadvantage of all (Heb 13:17). Thus, obedience will flourish in the Church as a whole, and it will not be superficial, illogical, or demeaning – it will not be founded on despotic orders and irresponsibility. Clerical obedience should be deliberate, powerful, good, and mighty, because it originates with God. Through it, God's teachings are given to the people, the ecclesiastical community is built, and, their pastoral love is fulfilled by means of specific tasks. This is so in order for human souls to be freed from doubt and spiritual disease and in order for people, as the children of God, to discover their dignity. And, in this way, there is mutual sanctification for all.[4]

[4] Paulus PP. VI, Allocutio ad Urbis curiones et quadragenarii temporis oratores in Aede Sixtina habita (01.03.1965), AAS 57 (1965), p. 326–27.

1.3. Canonical context

In CIC/83, the ecclesiastical legislator put the canonical context of can. 273 into the context of cooperation between the clergy and their ordinary. The clergy are required to accept and faithfully carry out the offices that have been entrusted to them by their ordinary (can. 274 § 2).

The diocesan bishop is required to establish a presbyteral council to represent and act on behalf of the diocesan presbytery and, according to the legal norms and their own statutes, help the bishop manage the diocese. This is done so that the episcopal pastoral activities are effective for and to the advantage of those of God's people who have been entrusted to him (can. 495 § 1, 496).

The presbyteral council represents the diocesan presbytery. Therefore, roughly half of the representatives are elected by the presbytery themselves. Some are required to be members due to the office they hold in the diocese. Other members are freely named by the diocesan bishop (can. 497). According to the statutes, those who have the right to be elected comprise all the presbytery who have been incardinated into the diocese, the secular presbytery not incardinated into the diocese, and members of a religious institute or society of apostolic life who are staying in the diocese or occupy an office there. This has been done in order to include presbytery from various ministries and parts of the diocese in the presbyteral council. If the council's own rules do not specify otherwise, other presbytery who have permanent or temporary residency in the diocese also have the right to be elected (can. 498, 499).

The diocesan bishop convenes the council of priests, presides over it, suggests inquiries, and specifies points for discussion. The council is an episcopal advisory body; however, its consent is only necessary for cases that establish law (can. 500).[5]

The election period for individual priests is governed by the council's statutes. Those who represent a certain office remain their members for the entire period they hold office. By the power of the same law, the council dissolves in the legal situation of *sede vacante*. If it does not fulfill its function, and is not beneficial to the diocese, the diocesan bishop can dismiss it after consultation with the metropolitan. Naturally, a new council must be established during the upcoming year (can. 501).

The diocesan bishop freely names at least six but no more than twelve members to make up the college of consultors. These are named for five years and carry out duties established by law. The bishop ministries as the head of the college.[6] In the legal situation of *sede vacante* or *sede impedita*, the individual who is the temporary authority of the diocese becomes the head of the

[5] See CIC/83: can. 461, 515, 531, 536, 1215, 1222, 1263, 1742, 1750.

[6] See CIC/83: can. 272, 382, 404, 421, 422, 430, 485, 494, 501, 1018, 1277.

college. When a caretaker has yet to be established, the college is led by the longest-serving priest (can. 502) [Sitarz 2019, 2440–444].

The ecclesiastical legislator stipulated that proper canonical punishment be bestowed on clergy who, even after being admonished, do not heed the legal statutes of the Apostolic See, their ordinary, or another superior (can. 1371, 2º).

2. DEFINING BASIC TERMINOLOGY

In can. 273, the ecclesiastical legislator established that "clergy have a special obligation to show reverence and obedience to the pope and their ordinaries." For correct interpretation, it is necessary to define basic terms as they are understood by the ecclesiastical legislator.

2.1. The clergy in the 1983 Code of Canon Law

In the apostolic letter *Ministeria quaedam*,[7] Pope Paul VI. abolished the minor orders and instituted the ministries of acolyte and lector. He also specified who would be considered a cleric in the Church (*clericus*). One who accepts at least diaconal ordination can be considered a cleric. The ecclesiastical legislator also adopted this papal decision in CIC/83 in can. 207 § 1 and 266 § 1.[8] The canonical term cleric (*clericus*) is exclusively identical with the term sacred minister (*minister sacer*),[9] which indicates bishops, priests, and deacons. Secular clergy (*cleri saecularis*) are incardinated to a local church, or a particular church equivalent to a diocese (can. 265, 368). Religious clergy are incorporated into a community of religious life or society of apostolic

[7] Paulus PP. VI, Litterae apostolicae motu proprio datae *Ministeria quaedam* (18.08.1972), AAS 64 (1972), p. 529–34.

[8] See CIC/83, can. 207 § 1: "By divine institution, there are among the Christian faithful in the Church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons;" can. 266 § 1: "Through the reception of the diaconate, a person becomes a cleric and is incardinated in the particular church or personal prelature for whose service he has been advanced."

[9] Secretary of the Pontifical Commission for the Revision of the Code of Canon Law, Mons. Rosalio Castillo Lara, specified the term *minister sacer* in the following way: "The expression and term *minister sacer* relates only to sacred ministers who have accepted sacred ordination. However, there are other ministers of the church. These are lay persons who are part of the hierarchy by means of their ministry in the church, e.g., lector. For this reason, it is suitable that the term *minister sacer* apply only to the clergy, though the term *minister* may be applied to others. This terminology has already been obligatorily adopted in the definitive schema of the LEF. In the *Code of Canonical Latin Law*, we cannot forget the term *clericus*, which has a long tradition and fully identifies with the term *minister sacer*." See "Communicationes" 14 (1982), 29, c. 81, § 1.

life that has the faculty to incardinate (can. 266 § 2–3)[10] [Chiappetta 1994, 226–27].

In CIC/83, the clergy (*clerici*) are called those who have accepted sacred ordination (can. 207 § 1, 266 § 1). Certain Christian faithful men become sacred ministers by accepting sacred ordination in order for each of them to ministered people of God for a new and specific reason according to the level of sacred ordination they have accepted (can. 1008). Clerics in the Church are not placed in opposition to the lay persons nor are they placed above them. Together, the clergy and the lay persons comprise the whole of God's people, despite not traveling the same path towards holiness (can. 208).[11] The Church of Jesus Christ is not composed clerics alone, so therefore they are not given priority over the lay persons. However, they have a greater commitment to the Church, where their vocational ministry takes place. According to the degree of ordination, ministry, or office that they have been granted, they have authority in leading the Church of Jesus Christ, not the world [Jaworski 2019, 599–601].

2.1.1. Deacons

A deacon (*diaconus*) is consecrated not to the priesthood but to ministry by the bishop ordinary's laying on of hands and by the prayer of consecration. Those who have been ordained as deacons accept from God all the grace necessary to ministered to people of God in the ministries of the liturgy, the word, and charity (can. 1009 § 3). Therefore, they ministry people of God in communion with their bishop and their presbytery according to the offices which the respective authority has assigned them in the name of the Church (LG 29).[12]

Diaconate, as a permanent status in life, is ministry to believers by the catechism of God's word and the administration of remote parishes in the name of a priest or bishop [Wroceński 2019, 337–38].

2.1.2. Presbytery

Priests are also called the presbytery (*sacerdos*) [Tichý 2001, 142]. They participate in the work of Christ, the sole mediator, according to the degree of the ordination they have accepted (1 Tim 2:5). They proclaim the word of God to all people of God. However, their sacred function is executed primarily through Eucharistic worship, acting in the role of Christ (LG 28). They share

[10] See CIC/83: can. 265, 294, 377 § 3, 680, 957, 1016.

[11] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen Gentium* (21.11.1964), AAS 57 (1965), p. 5–67 [hereinafter: LG], no. 32.

[12] Idem, Decretum de activitate missionali Ecclesiae *Ad gentes divinitus* (07.12.1965), AAS 58 (1966), p. 947–90 [hereinafter: AG], no. 16.

in apostolic mission and by God's grace they are ministers of Jesus Christ. The target of their ministry and life is to celebrate God the Father in Jesus Christ. They are selected from the people and for the people, therefore they live with others as their brother and they are assigned to the ministry of God in their matters. The presbytery have spiritual authority, and they do so in order to administer and watch over things belonging to divine cult and to preside over the church ministries.[13]

In CIC/83, the Latin term *presbyter* indicates those who have accepted the second degree of priestly consecration. A presbyter is a priest (*sacerdos*) and a cleric (*cleric*). The expression "cleric" is a legal term (can. 207 § 1). Its theological equivalent is "holy minister."[14] The term *sacerdos* is only used in CIC/83 to indicate bishops and the presbytery (can. 835 § 1–2, 1009 § 3) [Salvatori 2012, 412], not the deacons.

2.1.3. Bishops

Bishops (*episcopus*) hold a Church office that was proposed and established by Jesus Christ and is permanently linked to his spiritual power. Bishops lead their local Church on the basis of their sacred affiliation to the College of Bishops and as a result of their communion with the Pope.

Bishops are representatives of Jesus Christ in the particular church entrusted to them and heirs to that which Jesus entrusted to the Apostles. They are their successors, guardians of the true faith and the Christian tradition. Through episcopal consecration, they do not accept only power over their entrusted local church but also, principally, spiritual duties. Consecration confers the grace of the Holy Spirit so they are able to guide immortal souls, preside over the community of believers, and to be a living witness to Jesus Christ, a living example of faith, and the highest priest in their particular church. When a bishop teaches, rules, and sanctifies, the Holy Spirit – which himself teaches, rules and sanctifies God's people – is working through him. The office of bishop is a spiritual office, and the person who accepts this office rules, teaches, and sanctifies their local church (can. 1009 § 3). In this way, a bishop becomes the spiritual leader of his people, entrusted to him by Jesus Christ so that he can minister to them with all his love (LG 21, 27; can. 375–377)[15] [Krukowski 2019, 293–99].

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[13] Idem, Decretum de presbyterorum ministerio et vita *Presbyterorum ordinis* (07.12.1965), AAS 58 (1966), p. 991–1024 [hereinafter: PO], no. 2–3.

[14] "Communicationes" 14 (1982), Al § 1, 29.

[15] Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum de pastorali episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), p. 673–96 [hereinafter: CD], no. 2, 8.

2.2. Reverence

For a full comprehension of the meaning of the word "reverence," it is necessary to take into account the etymological context of the Latin term *reverentia*. The Latin substantive *reverentia, -ae, f.* – deference, respect, or esteem for someone [Pražák, Novotný, and Sedláček 1937, 1081] – can be described as a social custom or as a virtue. "Respect" is the equivalent of reverence. To behave towards someone with respect means to take someone into account, to approach them with esteem, or to be deferential to them.[16] The expression "respect" is derived from the Latin *respectus, -us, m*. – to glance backwards, to look back. The Latin *respectus* has its root in the verb *re-spicio, -ere, -spexi, -spectum*, which translates as to look backwards, to see behind oneself, to look at something, to pay attention to something, to relate to someone, and to depend on someone [ibid., 1076–77]. To respect someone means to take them into consideration, to look at them with esteem.

From the context of these equivalents, it can be concluded that showing reverence consists of a view one's surroundings with regards to another individual, at whom one is currently looking. Reverence is expressed externally. Primarily, this means that we accept the other person and their characteristics, successes, ambitions, and opinions without regards to whether or not we agree with them.

The external manifestations of reverence are not just an emotional addition to the perception of other people or things. Reverential behavior is an external manifestation in which something extra is expressed, something that an irreverent person does not notice. Thanks to reverence, we are able to perceive the mystery of other people or things, to feel their existential depth and value. With the crossover from irreverent behavior to reverent behavior, people begin to see and perceive another dimension that they had not previously seen or noticed. They perceive how "something" that was previously lacking in people can become visible within them. Specifically, this "something" is their mystery, the value written deep in their core. These are fine bonds through which all people and all things extend beyond into the realm of the invisible. To sever them means to deaden the value of others and to falsify reality. Reverential behavior is an attitude by which these invisible bonds become visible. Where these bonds are missing, the world of values is flat, closed, and meager in nature. Irreverent behavior destroys each incentive to infiltrating the mystery of the life of people and the existence of things. People do not then cultivate deeper incursion into the world [Scheler 1993, 20–21].

The above indicates the type of mutual relationships formed by those who are party to reverence as well as the actual subject matter of reverence. Showing

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[16] *Ottův slovník naučný, XXI R (Ř) – Rozkoš*, Vydavatel a nakladatel J. Otto v Praze, Praha 1904, p. 590.

reverence is a general obligation and differs in its external manifestations. It also depends on the conditions under which the subject matter of reverence is found. Certain of these conditions cannot be influenced directly, for example, age. Naturally, other conditions can be influenced, for example, the results and efforts of work as well as professional position and its execution.

The starting point for the motive to express reverence for another person should be that each person benefits their surroundings. Such benefit can be the subjects' social standing, their expertise, or their specific skill. Everyone who holds public, social, political, or religious office has a right to the expression of reverence. Expressions of reverence have substantiation even within social coexistence. In one of his articles, Professor Hrdina observed that, in contrast to obedience, ordinaries cannot force reverence from their clergy; rather they must achieve it through their charisma. And, if they do not have this charisma, they will not obtain reverence from them [Hrdina 2009, 77].

2.3. Obedience

The Latin substantive *oboedientia* is derived from the verb *audio, -ire, -ivi* meaning to hear [Walde and Hofmann 1954, 195]. In *Black's Law Dictionary*, we can read that obedience is behavioral compliance to a command, prohibition, acknowledged authority, or obligations established by law. Furthermore, obedient behavior is considered to be fulfilling that which has been required or commanded by a superior body or refraining from that which has been forbidden. Moreover, all of this should be in accordance with relevant orders or prohibitions, because obedience is the essence of law [Black 1993, 984].

American social and experimental psychologist Stanley Milgram described obedience as a basic element and constructive principle of life in all societies. No society or even small group of people can circumvent having a clear system connected to authority. Each member of society must submit to the dictates of authority. Disobeying the dictates of authority is only possible for a person who lives in total isolation from others. Milgram understood obedience as a psychological mechanism linking individuals to the goals of society. Obedience is society's glue, binding each person to the respective authorities [Milgram 2017, 20].

2.4. Special obligation

The clergy do not have just any obligation to show reverence and obedience to their ordinary; rather, they have a special obligation (*speciali obligatione*) to demonstrate reverence and obedience to their ordinary. The Latin term *obligatio, -onis, f.* means obligation. The term is derived from *obligo, -are, -avi, -atum* and has many meanings: to tie, to bind, to wrap around, to tie

up, to stake something, and to render guilty [Pražák, Novotný, and Sedláček 1937, 844–45].

From the legal perspective, this term expresses the legal relationship between a creditor (*creditor*) and a debtor (*debitor*). The terms of the relationship are specifically set as the thing that the debtor must carry out to the benefit of the creditor. This is a unique legal relationship that in all cases excludes a third person. It is also unthinkable that the contractual terms of the relationship could be modified. The debtor cannot be excused from the relationship and must unconditionally carry out the contractual terms of the relationship to the benefit of the creditor [Dębiński 2019, 1892–894].

The Latin adjective *specialis, -is, -e* is composed of the Latin *species+-alis*. Literally, we can translate it as something that is completely different than it seems, than what it looks like at first glance. "Special" means very different, individual, and in opposition to what is common. That which is special has a totally different nature than that which is common.[17]

The Latin gerund *exhibendi* occurs in the text of the canon in question. This is the gerundivum of *exhibeo, -ere, -ui, -itum*. It also has many meanings: to present, to furnish, to show, to be seen, to offer up for recognition, to demonstrate, and to exhibit [Pražák, Novotný, and Sedláček 1937, 481–82]. *Exhibendi* thus expresses necessary action, which must be occurring continuously. From the above, it follows that all clergy are continuously responsible to demonstrate reverence and obedience to their ordinaries and to the pope.

2.5. The pope

The clergy have a special obligation to show reverence and obedience to the pope, because the bishop of Rome is the direct successor of Peter the Apostle, to whom Christ entrusted the care of all people.[18] The *episcopatus* and *primatus* of the pope are mutually and indivisibly connected and coexist by the appointment of God. In the process of the Church's development and growth, however, a human organizational structure has also arisen, in which the *primatus* has come into being and is honored (LG 22–23).[19]

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[17] *Oxford Latin Dictionary*, Oxford University Press, Oxford 1968, p. 1799.

[18] See: Mt 16:19; Lc 11:52; John 21:15–19, 20–23; Act 1:15–26; 2:14–37; 4:5–22; 5:3–11; 10:1n.; 15:6–7; 1 Cor 1:12; 3:22; 9:5; 15:3–8; Gal 2:7–8; CIC/83, can. 331: "The bishop of the Roman Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely."

[19] Congregatio pro Doctrina Fidei, Considerazioni su *Il Primato del successore di Pietro nel mistero della Chiesa*, "Communicationes" 2 (1998), p. 207–16, no. 4.

The office of Supreme Pontiff is endowed with the charisma of universal grace, which urges him to ministered all in united faith and in the single community of the Church. Christ entrusted this ministry to Peter and his successors in order for the Church's tasks to be fulfilled, unity preserved, and the one faith professed.[20]

The pope's power in the Church as a whole is supreme, full, immediate, and universal. This power is ordinary episcopal above all churches and church communities and above all people who believe in Christ and belong to the Church community. The pope can exercise this power freely. It is an ordinary power, because it belongs to the pope (CD 2, can. 131 § 1, 332 § 1, 333, 1273, 1417 § 1) [Brinda 2019, 22–27].

From the power of his office, the pope is the ordinary and pastor of the universal Church. Therefore, if he deems it suitable, he can remove selected communities from under the jurisdiction of their local ordinary and make them subordinate directly to himself for the good of the faithful (LG 13, 22, 45; AG 5–6; can. 591, 782 § 1).

2.6. A cleric's own ordinary

According to can. 134 § 1,[21] the pope is the ordinary of all the clergy (*ordinarius proprius*) as well as the ordinary of the Church as a whole (can. 331) and the head of the Roman dicasteries (can. 334, 360), such as the cardinal prefect, cardinal president, and archbishop president.[22]

The diocesan clergy have the canonical obligation of incardination (can. 265, 266 § 1) and the obligation of reverence and obedience to their ordinaries. Diocesan bishops are the personal ordinaries of the clergy belonging to their particular church (can. 368). The ecclesiastical legislator has further stipulated that the clergy's own ordinaries are as follows: vicar general, episcopal vicar, coadjutor bishop, and the auxiliary bishop – if the diocesan Bishop has entrusted them with the office of general or at least episcopal vicar (can. 134 § 1, 406 § 1). In the legal situation of *sede impedita* or *sede vacante*, the ordinary

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[20] Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum de oecumenismo *Unitatis redintegratio* (21.11.1964), AAS 57 (1965), p. 90–107, no. 2.

[21] "In addition to the Roman Pontiff, by the title of ordinary are understood in the law diocesan bishops and others who, even if only temporarily, are placed over some particular church or a community equivalent to it according to the norm of can. 368 as well as those who possess general ordinary executive power in them, namely, vicars general and episcopal vicars; likewise, for their own members, major superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right who at least possess ordinary executive power."

[22] Ioannes Paulus PP. II, Constitutio apostolica de Romana Curia *Pastor Bonus* (28.06.1988), AAS 80 (1988), p. 841–912, no. 3 § 1, 4, 14; Idem, *Regolamento generale della Curia Romana* (01.07.1999), AAS 91(1999), p. 629–87, no. 2, 125, 131, 135.

is the one selected by the administrator of the diocese or the individual who is temporarily governing the diocese (can. 413, 419, 421).

The clerics who have been incardinated into a particular church equivalent to a diocese (can. 368) have the obligation of reverence and obedience to their proper ordinary, who is equivalent to a diocesan bishop (can. 381 § 2). The proper ordinaries of these churches are the prelate (can. 295 § 1), territorial abbot, apostolic vicar, apostolic prefect, apostolic administrator, the head of a mission *sui iuris* [Franceschi 2002, 868], a military ordinary (can. 569),[23] and an ordinary of the personal ordinariate.[24]

For the clergy of clerical religious communities, the members of institutes of consecrated life, and clergy from a society of apostolic life under papal law, the highest ranking member of these is their personal ordinary. In the Church, abbot primates and the heads of monastic congregations are also considered to be ordinaries (can. 266 § 1–2, 620).

In can. 134 § 1 and other normative acts, the ecclesiastical legislator acknowledged that particular churches equivalent to a diocese, major religious superior, and even their religious societies and pastoral activities in accordance with the conclusions the conciliar fathers adopted at the Second Vatican Council have a marked degree of autonomy. However, despite this, they are not independent of the pope (can. 590), and they are subject to the powers of the diocesan bishop in their pastoral activities. The particular church was entrusted to their care under the authority of the pope, and he is their own, proper, and immediate pastor (can. 381 § 1).[25]

The clergy have promised reverence and obedience to the pope and their ordinaries. If, however, they work elsewhere than at their own particular church, they have a canonical obligation of reverence and obedience to the ordinaries of that place.

3. THE CANONICAL PROMISE – *PROMISSIO CANONICA*

The clergy's promise of obedience and reverence to the pope and their ordinary is a canonical promise, because it is required directly by canonical law. Clerics fulfill it according to the scope established by the ecclesiastical legislator. The Latin term *promissio, -onis, f.* is generally translated as a promising, a pledging, or a promise. *Promissio* is derived from the Latin *pro-mitto, -ere, -misi, -missum,* with the original meaning being to put a hand on something

[23] Ioannes Paulus PP. II, Constitutio apostolica *Spirituali militum curae* (21.04.1986), AAS 78 (1986), p. 481–86.

[24] Benedictus PP. XVI, Constitutiones apostolicae *Anglicanorum coetibus* qua Personales Ordinariatus pro Anglicanis conduntur qui plenam communionem cum Catholica Ecclesia ineunt (04.11.2009), AAS 101 (2009), p. 985–90.

[25] See LG 45; CD 11, 35; CIC/83, can. 375, 376, 678 § 1.

or someone and pledge or vow something [Pražák, Novotný, and Sedláček 1937, 1006].

We can define this type of promise as a manifestation of free will whereby a given individual commits themselves to carrying out or renouncing something. On its own, the promise does not have legal effect if it has not been properly accepted by the other party, in whose interest it was made. A contractual relationship results at the moment the promise is accepted. A legal obligation arises for the one doing the promising when all the legally established conditions have been met.[26] The party in whose interest the promise was made cannot enforce it arbitrarily, but only by such means and in such a scope as set by law [Ernst 2006, 731].

To understand the clergy's promise of obedience (*promissio oboedientiae*) means to thoroughly understand the context of the ministerial priesthood and the cooperation between the clergy's various hierarchical stations. Each of these participates in ministering Jesus Christ. With their promise of obedience, the clergy publicly swear their desire to be the co-workers of their ordinaries and the pope and that they want carry out their directives and assignments among God's people in their particular church for the good of the Church as a whole in the spirit of mutual love and respect. Thus, all the clergy are mutually bound to their ordinary and the pope by the bond of faith. They do not want to carry out just their own will but also the will of Jesus Christ, who summoned them and sent them into the world to ministered (Jn 6:38).

By accepting the gesture of obedience and reverence during diaconal or priestly ordination, the bishop ordinary publicly undertakes to guard the hand of the ordained, which he took into his own hand.[27]

4. THE CANONICAL PROMISE ACCORDING TO CANON 273

The canonical promise of reverence and obedience that bonds the clergy begins with their acceptance of diaconal consecration (can. 266 § 1) and continues throughout the rest of their lives. No clergy, regardless of their hierarchical station, have been released from this promise [Lynch 2000, 345–46]. This obedience is considered canonical because it has been required directly by the ecclesiastical legislator in can. 273 CIC/83, and it is founded on the sacrament of the priesthood.

The ecclesiastical legislator established that all clergy have the special obligation of reverence and obedience to their ordinaries (can. 134 § 1) and to

[26] *Ottův slovník naučný*, *XXIII Schlossar – Starowolski*, Vydavatel a nakladatel J. Otto v Praze, Praha 1995, p. 389.

[27] Ioannes Paulus PP. II, Adhortatio apostolica post-synodalis de Episcopo ministro evangelii Iesu Christi pro mundi spe *Pastores gregis* (16.10.2003), AAS 96 (2004), p. 825–924, no. 47.

the pope (can. 331).[28] This particular canon, can. 273, emphasizes the perspective of universal validity. Special obedience is required, which is not the same as the obedience of all Christians (can. 212 § 1, 218). This means that keeping this promise requires a much greater strength from the clergy, one that touches their entire being, both human as well as Christian, priestly, clerical, and intellectual. The clergy's canonical obedience is also tightly connected with their canonical deployment, which is derived from their relationship to incardination (can. 265, 274).

The obligation is a legal as well as moral relationship that binds both parties to honor their agreement, one to which they have freely bound themselves [Gałkowski 2019, 1895–901]. One party of this legal, moral relationship is the creditor, who is the pope and the cleric's personal ordinary in our case. They have the right to request that the other party in the relationship, i.e., their cleric, carry out its specific execution. It is not only the debtor's obligation to show special reverence and obedience. It is also the creditor's right to the demonstration of reverence and obedience on the part of the debtor. If the obligation is not discharged, the debtor becomes guilty, delinquent. Subsequently, he can atone for this sin through the punishment established by legal norms [Black 1993, 985–87].

The clerical promise of reverence and obedience (*promissio*) is not the same as the promise of the evangelical counsel of obedience by the religious (*votum*).[29] For the diocesan clergy, this is not a promise given directly to God, but a legal obligation in which they freely and voluntarily decide to accept the obligation of obedience to the pope and their ordinary. It is a promise that binds them both morally as well as juridically. The promise is given in public and it is publicly accepted by the bishop ordinary in front of the Church as a whole. Expressing and accepting the promise is a celebratory and sacred occasion for all participants. With this promise, clerics renew their calling to sacramental ministering, which God himself embedded into their lives. The promise of obedience is a very intense task of faith, therefore it binds them within their conscience. And, it manifests itself in their life and ministerial ministry both internally and externally [Ghirlanda 1983, 527–28].

The clergy's required obedience and reverence to the pope and their ordinary has its foundation in the same saintly priesthood held by all clergy, even if they participate in apostolic ministering in different ways (LG 28). Within the hierarchy of the Church, this is performed by means of incardination (PO 7, 15). Matters concerning the clergy's personal internal life and their earthly interests are not included in the promise of obedience; they have freedom in these things [Chiappetta 2011, 358–59].

[28] The pope is not named in can. 127 CIC/17. Obedience was required exclusively from priests.

[29] See CIC/83: can. 573 § 2, 590 § 2, 601, 607 § 2.

CONCLUSION

During the liturgical ceremony, the candidates for diaconal or priestly ordination place their hand into the hand of their bishop ordinary and then publicly promise him reverence and obedience. The bishop ordinary publicly accepts the promise and promises to watch over their hands. This promise accompanies the clergy through their entire life in clerical ministering, even if they become a bishop or pope.

In CIC/83, the promise of the clergy is put into canonical context, from which it is clear that the clergy are the co-workers of their diocesan bishops and the other ordinaries of the particular church. They help them to carry out their ministerial tasks for the good of God's people and the Church as a whole.

The promise is a legal relationship from which arises obligation on behalf of both the creditor as well as the debtor. It is the obligation of both parties to keep this promise, to which they are voluntarily and publicly bound. The clergy have special canonical obligation to show reverence to their ordinaries and the pope and to be obedient to them. However, the reverse is also true. The pope and the ordinaries have the right to request reverence and obedience from their clergy. It is an obligation that binds both parties legally as well as morally.

Ordinaries can force obedience from their clergy by legitimate canonical means. However, both the clergy as well as the ordinaries must constantly practice reverential behavior to each other. In truth, it is not easy to perceive the mystery of the other, to feel their depth and the value that is written deep inside each person.

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THE ASSESSMENT OF LEGAL CONSTRUCTS PROTECTING TAXPAYERS AGAINST OF INFLATION IN THE PERSONAL INCOME TAX AND THE INHERITANCE AND DONATION TAX

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Abstract. One of the factors negatively influencing an assessment of the tax liability is inflation. An increase in prices of goods and services without simultaneous adjustment for inflation of the construction elements sensitive to erosion, or lack of application of an effective corrective mechanism, leads to a gradual reduction in the taxpayer's ability to pay. This results in a violation of the principle of tax justice, even in a situation where the provisions of tax law are formally correct. The aim of this article is to answer the question whether there are any legal constructs in Poland that protect taxpayers against the negative impact of inflation and, if so, whether they protect them effectively. The article analyses legal regulations contained in the Personal Income Tax Act and the Inheritance and Donation Tax Act which refer to structural elements of taxes expressed as an amount. The research covers the period of over thirty years, i.e. from the beginning of social and economic changes in Poland, characterised by high inflation, to the present day.

Keywords: inflation, inflation adjustment mechanism, personal income tax, inheritance and donation tax

INTRODUCTION

In the Polish legal system, the basis for levying taxes is Article 84 and Article 217 of the Constitution.[1] According to Article 84, everyone is obliged to comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. Article 217 stipulates that imposition of taxes and other levies, including the determination of the subject and object of taxation, tax rates and the application of reliefs, exemptions and remissions shall be made exclusively by statute. It should be noted, however, that within the

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

existing obligation to bear public levies, including taxes, the ability to pay of the entity bearing a given burden should be taken into account each time. Without going into further detail here, the above means that taxpayers should be taxed according to their individual capacity to bear the tax burden. Thus, imposed taxes should not constitute a greater burden than necessary. In this context, it should be noted that the legislator, imposing on the taxpayer the obligation to bear the tax burden, should protect him or her by shaping the legal provisions in a way that strengthens his or her ability to bear this burden. Indeed, it is desirable that, in accordance with the provisions of the law, a tax liability is correctly created, which corresponds to the taxpayer's ability to pay. It should be stressed that the above protection in relation to the taxpayer should refer to phenomena of an economic nature, which include, *inter alia*, inflation. The relevant literature indicates that inflation can have a negative impact in the field of taxes, as it erodes the structural elements of the tax expressed as an amount in the Act; it erodes the value of the tax liability; and affects the size of the tax base [Thuronyi 1996, 435–40; Aaron 1976, 5–9]. Therefore, it should be noted that from the point of view of the taxpayer, it is extremely important that the tax liabilities borne by him or her are secured against the negative phenomenon of inflation. The lack of measures taken by the legislator in this respect leads to a gradual decrease in the taxpayer's ability to pay. This in turn leads to a breach of the principle of tax justice, even in a situation where the provisions of tax law are correct in formal terms.

The aim of this article is to answer the question whether there are any legal constructs in Poland that protect taxpayers against the negative impact of inflation, and if so, whether they effectively protect them. The article analyses the legal regulations contained in the Personal Income Tax Act[2] and the Inheritance and Donation Tax Act,[3] which refer to structural elements of taxes expressed as an amount. The author deliberately ignored the issue of adjustment for inflation of expenses borne by a taxpayer in a situation where there is a large time span between their payment and the moment of deducting them from the obtained income. In the structure of the Polish income tax, such a situation may concern tax deductible costs in the case of obtaining income from the sale of real property against payment or depreciation of fixed assets made by taxpayers conducting business activity. The problems occurring in this context are so complex that the formal framework of the article does not allow for a thorough presentation of the problem. Hence, also the final conclusions, including the suggested *de lege ferenda* proposals, do not address the issues indicated above. The research covers the period of over thirty years, i.e.

[2] Act of 26 July 1991 on Personal Income Tax, Journal of Laws of 2020, item 1426 as amended.
[3] Act of 28 July 1983 on Inheritance and Donation Tax Act, Journal of Laws of 2019, item 1813 as amended [hereinafter: Inheritance and Donation Tax Act].

from the beginning of social and economic changes in Poland, characterised by high inflation, until now.

1. THE IMPACT OF INFLATION ON THE STRUCTURAL ELEMENTS OF TAX

In the minds of most Polish taxpayers, the problem of inflation does not play a significant role. After all, compared to the beginning of the economic transformation at the turn of 1990s, inflation, from the record level of 585.8%, in 1990, decreased to 2.3% in 2019. In addition, it should be noted that in 2014 there was no increase in the prices of goods and services at all, while in 2015 and 2016 the problem of those in power as well as most economists was the occurrence of deflation, which amounted to -0.9% and -0.6%, respectively. In order to achieve the objective of this article it is necessary to briefly present how the level of inflation has evolved over more than thirty years. It is necessary because it will allow an assessment of actions taken by the Polish legislator in order to introduce elements correcting by the level of inflation these structural elements of tax, which affect the amount of tax liability in the personal income tax and the inheritance and donation tax. There is no doubt that correct actions of the Polish legislator in the above-mentioned scope determine whether we can say that certain taxes are determined in a fair manner. Or whether perhaps that lack of comprehensive solutions or inadequate legal regulations results in the phenomenon about which J.M. Keynes wrote over 100 years ago; that "by a continuing process of inflation, governments can confiscate, secretly and unobserved, an important part of the wealth of their citizens" [Keynes 1919].

When analysing the phenomenon of inflation in Poland from the beginning of the implementation of socio-economic reforms in 1989 until the present day, three periods can be distinguished. The first one took place in 1989–1995, a period characterised by inflation ranging from several hundred (in 1989 and 1990) to under 50 percent annually (1992–1995). The second period covered the years 1996–2000, during which inflation was stabilised at a level of several percent annually. A breakthrough in the fight against price increases occurred in 2001, when for the first time from 1982 (with an annual exception in 1999) a single-digit increase in the prices of consumer goods and services was recorded. Since then, inflation has ranged between 0% and 3%, with slight deviations such as in 2011 and 2012 (4.3% and 3.7% respectively) or in 2015 and 2016 (-0.9% and -0.6% respectively). Currently, inflation oscillating around 2% has been recorded since 2017. At the same time, in the coming years, according to the forecasts of the National Bank of Poland, there will increase in the prices of goods and services compared to previous years.

The table presents changes in the annual inflation in Poland in the years 1989–2021[4]

Year	Inflation (%)	Year	Inflation (%)	Year	Inflation (%)
1989	251,1	2000	10,1	2011	4,3
1990	585,8	2001	5,5	2012	3,7
1991	70,3	2002	1,9	2013	0,9
1992	43,0	2003	0,8	2014	0,0
1993	35,3	2004	3,5	2015	-0,9
1994	32,2	2005	2,1	2016	-0,6
1995	27,8	2006	1,0	2017	2,0
1996	19,9	2007	2,5	2018	1,6
1997	14,9	2008	4,2	2019	2,3
1998	11,8	2009	3,5	2020	3,4
1999	7,3	2010	2,6	2021	4,9 (estimated)

Source: data from Statistics Poland and National Bank of Poland

It is on the basis of the above data on the increase in the prices of goods and services in Poland over more than thirty years that it is possible to analyse the solutions introduced by the legislator to protect taxpayers of the personal income tax and the inheritance and donation tax against inflation.

There are essentially two mechanisms used by states to make inflation adjustment to the structural elements of taxes which are sensitive to erosion. The first one is the possibility to refer directly to inflation. Accordingly, the adjustment of the structural elements of taxes expressed as an amount is based on the consumer price index. The other mechanism concerns economic values other than inflation. These values include legal minimum wages, earnings of industrial workers and the cost of living index [Tanzi 2009, 19–50; Idem 1976, 408–35]. However, it should be emphasised that the mechanism of inflation adjustment based on criteria other than the consumer price index does not always turn out to be appropriate. It is because basing the adjustment of the structural elements of tax sensitive to erosion on other economic values sometimes results in a deviation from the actual increase in the prices of goods and services. This may occasionally be beneficial for the taxpayer, as legal minimum wages or earnings of industrial workers often increase faster than the increase in prices of goods and services. These mechanisms can usually be used in the structure of income tax. Nonetheless, due to the fact that inflation is low in many states, especially OECD member states, legal regulations containing

[4] *Yearly price indices of consumer goods and services from 1950*, Statistics Poland, https://stat.gov.pl/en/topics/prices-trade/price-indices/price-indices-of-consumer-goods-and-services/yearly-price-indices-of-consumer-goods-and-services-from-1950/ [accessed: 21.12.2020].

inflation adjustments are often abandoned [Thuronyi 2003, 300–301]. In such a situation an important problem from the point of view of taxpayers' safety is whether a given legislator will, on a relatively regular basis, adjust the structural elements of the tax expressed as amount, which under the influence of erosion significantly distort the final amount of the tax liability. Indeed, it should be noted that even low inflation is a significant problem, because when accumulated over several years it causes an increase in the tax burden.

As it has already been indicated above, inflation leads to erosion of those structural elements of tax which are expressed as an amount. These include, in particular, tax reliefs and exemptions limited to a statutorily determined amount or the tax-free amount in the structure of personal income tax, as well as in some inheritance and donation taxes. Inflation also negatively affects the erosion of tax thresholds in taxes with a progressive tax scale, i.e. also in the income tax and usually in the inheritance and donation tax. In the case of the income tax, this problem mainly, although not only, concerns taxpayers earning income from paid employment. Periodic salary increases by employers resulting, *inter alia*, also from increases in the prices of goods and services, with the simultaneous lack of application of inflation adjustment by the legislator for several years, causes the income obtained by employees to exceed tax brackets, thus increasing the amount of tax liability. In addition, it should be noted that the problem of inflation also relates to the appropriate formation of the tax base. This situation occurs mainly in relation to lump-sum deductible costs, which are determined in terms of a monetary amount. The more so as in many legislations it is common to apply deductible costs expressed as an amount when determining income from paid employment. A kind of remedy for such problems may be the adoption of deductible costs in percentage terms. However, it may be questionable whether it is fair to set costs in this way. Especially as this could lead to little perceptible tax regression for higher income taxpayers. In addition, many countries struggle with the problem of the so-called tax wedge. The adoption of unlimited tax deductible costs in percentage terms may have the undesirable effect of increasing it. Therefore, if legislators set tax deductible costs in percentage terms, they often limit their amount to a certain limit based on relatively fixed values (e.g. the limit of the lower tax threshold). It should be noted, however, that deductible costs set in this way may be vulnerable to depreciation. Such a situation usually occurs when the legislator introduces restrictions on the deduction of deductible costs by making it dependent on the amount values expressed in an act as an amount, if no systematic adjustment is made in relation to them [Burzec 2016, 34–36].

3. THE ASSESSMENT OF LEGAL REGULATIONS CONCERNING INFLATION ADJUSTMENT IN THE PERSONAL INCOME TAX AND THE INHERITANCE AND DONATION TAX

In the structure of the Polish personal income tax until 31 December 2003, i.e. in the period of high inflation, the problem of lump-sum tax deductible costs was resolved in such a way that they were determined as a percentage. For the most part, such costs were applicable to income obtained from employment relationship (and related relationships). A taxpayer could monthly deduct 0.25% of the amount constituting the upper limit of the first bracket of the tax scale, which was subject to annual adjustment. It was only after inflation had stabilised that the legislator decided to adopt deductible costs expressed as an amount [Ofiarski 2018, 119–21]. One of the main arguments in favour of this way of determining costs was, *inter alia*, the desire to broaden the tax base.[5] The main problem of the adopted solutions is the fact that since 1 January 2004 the Polish legislator has only twice adjusted the tax deductible costs expressed as an amount. This was first done in 2006 and the adjusted costs took effect from 1 January 2007,[6] while the second time – new amounts were introduced on 1 October 2019.[7] It should be noted that for less than 13 years (from 2007 to 2019), taxpayers earning income from employment as well as certain income from personal activities, in order to determine their taxable income, determined deductible expenses based on a historical amount, depreciated by inflation, which, when accumulated over 13 years, amounted to 27.5%. It also seems that an increase in deductible costs, made at the end of 2019, was aimed at reducing the tax wedge for the lowest paid persons earning income from paid employment. This may be evidenced by the fact of the simultaneous reduction by one percentage point of the personal income tax rate provided for the first threshold of the tax scale while there was no increase in the tax-free amount and no adjustment of tax threshold.

The Polish legislator should also be criticised in the context of solving problems related to the adjustment of tax thresholds and the tax-free amount. While until 1 January 2004 actions taken by the legislator were relatively consistent and rational, actions taken after that date should be assessed negatively. Until 31 December 2003, there were two types of mechanisms in force regarding automatic adjustment of tax brackets and the tax-free amount. In the period of high inflation, the indexation of tax threshold and the tax-free amount

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[5] Justification of the project of the Act of 12 November 2003 on amendments to the Act on Personal Income Tax, Journal of Laws No. 200, item 1956.

[6] Pursuant to the PIT Act of 2006, the rate of the monthly tax deductible costs was set at PLN 111.25.

[7] Pursuant to the PIT Act of 2019, the rate of the monthly tax deductible costs was set at PLN 250.00.

was based on the growth rate of the average monthly salary in the national economy in the three quarters of the year preceding the tax year compared to the corresponding period of the previous year. The solution adopted at that time was beneficial for taxpayers due to the fact that the growth rate of average remuneration did not differ too much from the annual inflation rate, and the tax thresholds indexed on its basis as well as the tax-free amount increased year by year faster than the inflation rate [Burzec 2016, 39–40]. This method of adjustment was applicable until 31 December 2001. As of 1 January 2002, indexation based on the index of growth of average monthly remuneration in the national economy was replaced by the consumer price index in the three quarters of the year preceding the tax year compared to the corresponding period of the previous year. This mechanism did not last very long, as it was only in force until the end of 2003. During this time, only the indirectly determined so-called tax-free amount was adjusted. The current tax thresholds in the structure of the personal income tax have been in force since 1 January 2007 [Kucia–Guściora 2012, 24–29]. It should be emphasised that it has not been adjusted so far. Although in 2019 the legislator lowered the tax rate for income falling within the first tax bracket from 18% to 17%, which could be a kind of compensation for the lack of adjustment of the only tax bracket, such action served more to reduce the tax wedge. One should assess in a similar way the behaviour of the legislator with regard to the lack of adjustment of the tax-free amount, with which the tax-reducing amount is closely related in the structure of the Polish personal income tax [Duda–Hyz 2016, 53–57]. Importantly, it was only as a result of the judgment of the Constitutional Tribunal, which decided that the low tax-free amount, which is additionally not subject to adjustment, does not correspond to the so-called living wage, and therefore the current legislation was found to be incompatible with Articles 2 and 32 of the Constitution.[8] As a result of this judgment, as of 1 January 2017, the manner of determining the tax-free amount was slightly modified. This was done, however, in such a way that the tax-reducing amount and thus the tax-free amount were increased for a marginal group of taxpayer earning income up to PLN 11,000.00. For other taxpayers it remained at the same level. According to the regulations at that time, taxpayers with income exceeding PLN 127,000.00 were deprived of the possibility to take advantage of the tax-reducing amount. These solutions should be assessed critically – although the legislator by its actions referred to the judgment of the Constitutional Tribunal, it did so in such a way that the result of the introduced solutions benefited the smallest possible number of taxpayers. In practice, only those persons whose annual income is not sufficient to function properly may benefit from the higher tax-reducing amount [Flis 2019, 15–17]. The amendments that entered into

[8] Judgement of the Constitutional Tribunal of 28 October 2015, ref. no. K 21/14.

force on 1 January 2017 authorised the Minister of Finance to review the tax-reducing amount annually in the event of a significant increase in the amount of the living wage for a one-person household determined by the Institute of Labour and Social Affairs. However, the above regulation authorising a potential change of the tax-reducing amount should be regarded as superficial.

It should be emphasised that work on the Polish personal income tax act was conducted in the conditions of high inflation. Therefore, the legal regulations that were applied ensured that the remaining structural elements of the tax, affecting the amount of tax liability, were protected against erosion. The measures adopted for such structural elements as tax exemptions, deductions or tax reliefs did not relate to the level of inflation. In the structure of the personal income tax, the legislator deliberately omitted the possibility to directly express the amount of tax preferences by means of monetary amounts, which would have to be subject to adjustment – their amount was set as a percentage. The base value was the taxpayer's income,[9] the amount of the average monthly remuneration in the national economy[10] or a reference to the upper limit of the first tax bracket[11] or the lowest remuneration for work.[12] It was not until 1 January 2003, i.e. after inflation had been brought down to a low level, that limits on tax preferences expressed in terms of amounts were introduced into the income tax system. However, since then, the Polish legislator has been very reluctant to increase the limits expressed as an amount by the increase in the prices of goods and services. In practice, some amounts have not been changed since their introduction on 1 January 2003. Such a situation concerns the amount of PLN 2,280.00 that can be deducted from income in a tax year for expenses incurred by a taxpayer to pay for guides for the blind. Since 1 January 2004, there has been in force an amount of PLN 2,280.00, which has not been adjusted to date, constituting an annual limit of expenses incurred by a disabled person or a taxpayer who has a disabled person as

[9] Based on the value of the taxpayer's income, a limit is calculated on deducible expenditure through donation. The limit changed in time. Since 1 January 2005, taxpayers can deduce donations up to 6% of their income, yet by the end of 2003, this limit could be up to 10 or even 15%, depending on the objective of the donation. For one year only, in 2004, the limit was defined as an amount of money and equalled PLN 350.

[10] In the period from 1 January 1993 until 31 December 1994, the taxpayers were entitled to deduce the expenses for education of children and youth at private (non-public) schools that had the official status (curricula) identical to public schools. The upper limit of this tax preference was set at 1/5 of an average monthly pay in domestic economy per child.

[11] This was the case when the taxpayer deduced from their income the expenses to refurbish the house or flat, or the shared costs of modernization or refurbishment of a block of flats and the like. The amount deduced in this way could not exceed 15% of the amount marking the upper limit of the first tax bracket for a given tax year.

[12] The criterion of minimal wage was used in the years 2001–2002 for the purposes of the so-called rehabilitation tax allowance. It was used to calculate the upper limit of the amount deducible from the tax base, owing to expenditure on medicaments.

a dependent in respect of the use of a passenger car which is his or her property or co-ownership.

Another tax imposed on natural persons is the inheritance and donation tax. It should be noted that some of the elements in its structure are also expressed as an amount. In this way the legislator determined the amount of exemption in the case of acquisition by way of a donation of money or other items for housing purposes by a person classified in tax group I (Article 4(1)(5) of the Inheritance and Donation Tax Act), tax-free amounts for taxpayers classified in one of the three tax groups (Article 9(1) of the Inheritance and Donation Tax Act), and thresholds in the progressive tax scale (Article 15(1) of the Inheritance and Donation Tax Act). It must be emphasised that although the provisions of the Inheritance and Donation Tax Act provide for the possibility of the adjustment of the above-mentioned structural elements, the last adjustment took place as a result of an amendment that came into force on 1 January 2003.[13] This situation is largely due to incorrectly adopted methods of adjustment. Under the current regulations, the amounts mentioned above are increased in the event of a rise in the prices of non-food durable goods of more than 6%, to the extent corresponding to the increase in those prices. Their increase is calculated on the basis of a cumulative index of quarterly published indices. In this context, it should be noted that the solution whereby the increase in prices is calculated on the basis of a cumulative index of quarterly indices was rightly adopted. However, the adjustment based on the increase in the price of non-food durable goods should be critically assessed. As a result of the reference to the above-mentioned index, despite the fact that the accumulated inflation since 2003 has reached a high level, the legislator has not been able to perform adjustment so far. Perhaps the intention of the legislator in referring to the above value was most appropriate. The inheritance and donation tax is a property tax, therefore setting the price increase only with reference to the prices of non-food goods seemed to be reasonable. Nonetheless, the adopted solutions mean that adjustment based on prices of non-food goods is not possible due to their low growth. Meanwhile, other economic indicators have increased since 2003 by more than well over ten or even by several hundred percent. This concerns mainly the cumulative increase in the prices of goods and services, the increase in the average salary in the enterprise sector, the minimum salary, and the increase in the prices of real estate, which is very often the subject of gratuitous transfer as a result of *mortis causa* or *inter vivos* transactions. It is worth noting that in the United Kingdom, for example, the adjustment in the inheritance tax is based on the consumer prices index (Article 8(1) of the Inheritance Tax Act 1984), and not on the increase in the price of non-food goods.

[13] Act of 12 November 2003 on amendments to the Inheritance and Donation Tax Act of 28 October 2002, Journal of Laws No. 200, item 1681.

CONCLUSIONS

To sum up, one can conclude that the provisions of Polish tax law on the personal income tax and the inheritance and donation tax do not protect taxpayers against negative consequences of inflation. This has been the case since the inflation was brought under control, which resulted in abandoning the mechanism of the automatic adjustment of amount limits of structural elements of the personal income tax. As far the structure of the inheritance and donation tax in concerned, the legislator included legal regulations aimed at protecting the taxpayer from the phenomenon of inflation, which should be assessed negatively. The main reason for this is that the provisions regulating the mechanism of an automatic adjustment were constructed in such a way that they have never had a chance to work in practice. As was noted earlier, the regulations were based on economic values, the value of which, in comparison to the increase in the price of goods and services (consumer price index) over a dozen or so years, has practically not changed. Therefore, regulations in this area should be assessed negatively.

The problems presented in the article suggest *de lege ferenda* conclusions relating both to the legal regulations of the personal income tax and the inheritance and donation tax. Firstly, as it has already been shown, the Polish legislator, in contrast to for example the French one,[14] is reluctant to perform the adjustment of the elements of the tax structure expressed as an amount. Therefore, it is reasonable to introduce into the structure of the personal income tax a mechanism of an automatic adjustment of amount limits, such as tax deductible costs, tax reliefs and exemptions, tax thresholds and the tax-free amount. Secondly, the provisions relating to the adjustment of the amount of exemption from housing donations, the tax-free amount and tax thresholds for the inheritance and donation tax should be amended. Thirdly, the structure of the introduced adjustment mechanism should be the same and apply both to the personal income tax and the inheritance and donation tax. Fourthly, this mechanism should be based solely on the index of price increases for goods and services (consumer price index). This means that the current automatic adjustment mechanisms, which apply mainly to the inheritance and donation tax, should be abandoned. Fifthly, the automatic adjustment mechanism should apply when the cumulative increase in the price of goods and services in relation to the previous adjustment exceedes 3%. Based on this value, it would be in line with the inflation target of the Polish central bank, which is 2.5% with a possible deviation of 1 percentage point. In addition, the application of the above correction mechanism means that in the case of inflation

[14] "Projet de loi de finances pour 2021: Les conditions générales de l'équilibre financier", Sénat, http://www.senat.fr/rap/l20-138-21/l20-138-212.html [accessed: 22.12.2020].

below the inflation target, there will be no need for annual adjustment. Instead, it will be done in the event of significant changes in the prices of goods and services.

Only after the above proposals have been fulfilled will it be possible to give a positive answer to the question of whether the legislator, by imposing obligations on the taxpayer to bear the tax burden, at the same time secures him or her through legal regulations in such a way as to strengthen his or her ability to bear this burden. The above solutions are important in view of the noticeable high inflation recorded in 2021 in Poland, resulting mainly from external factors (e.g. an increase in gas and fuel prices) but also the disruption of the supply chain and the resulting shortages of goods. Additionally, the above mentioned proposals are important in the context of the adoption by the Council on 11 February 2021 of a regulation establishing The Recovery and Resilience Facility, with a budget of EUR 672.5 billion. There is great concern that the above measures, which aim to help Member States counter the socio-economic impact of the pandemic, will contribute to an increase in the price of goods and services.

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HYBRID THREATS – MEANS OF DESTABILIZATION OF LAW AND ORDER IN MODERN DEMOCRATICS SOCIETES. IDEA AND METHODOLOGY OF PROPOSED RESEARCH

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Abstract. Threats are one of the most serious threats to the legal order of a democratic state. Their non-linear, asymmetric nature makes them more dangerous than other threats to the legal order. The use of multifaceted measures as a weapon disrupts, above all, the legal order of the state. Hybrid threats rely heavily on non-military domains. Civilian populations are central to the hybrid threat scenarios as sources for potential socio-political vulnerabilities and as targets for non-military threats and attacks, not least disinformation campaigns. A significant part of the hybrid threat phenomena is psychological. Actors targeting communities/societies to exacerbate weaknesses do not necessarily create social vulnerabilities themselves but make use of divisions that already exist in civil society. Using disinformation, populations are targeted and used as potential weapons within the state/society in question. This paper shows a concrete scientific approach to the study to of this issue.

Keywords: hybrid threats, law, security, information, democracy, state

INTRODUCTION

Hybrid threats is one of the most crucial issues confronting contemporary democratic societies and heavily impacting rule of law. Potential future crises in Europe and globally will be dominated by a complex, hybrid form of challenges that target populations, in turn creating instability [Major and Mölling

2015; O'Loughlin 2015; Giegerich 2016]. Perception for rule of law, citizen trust, loyalties, values, and politics are central to understanding these challenges to stability. Sustainable and legitimate governance relies upon trust between government institutions enforcing rule of law and their citizens, and sustainable government is weakened if trust is weak. Destabilization, characterized by the purposeful use of primarily non-violent means, results from the reduced trust, beyond the healthy skepticism of an informed populace, between citizens and the state [Gashi and Maqedonci 2017; Cusumano and Corbe 2017].

Though there is no agreed definition of hybrid threats, we can characterize its main features, as: 1) an amalgam of multiple means including military, political, economic, legal, cultural, social, infrastructure, cyber and information domains; 2) a hostile actor aims to avoid detection and tries to diffuse/confuse the situational awareness; 3) a hostile actor can be state, nonstate or proxy actors, or all of them; 4) creation of a situation where existing societal differences and grievances are consciously exacerbated, causing public harm. This is especially done by mixing information with intentional disinformation, through the distribution of misleading or fake news on already contentious social issues (e.g. migration); 5) structural breaking of the rule of law in order for hostile takeover of social resources (e.g. voters), material resources, diminishing democratic process, or even questioning independence of a given territory (e.g. case of Crimea).

1. RESEARCH IDEA

Hybrid threats rely heavily on non-military domains. Civilian populations are central to the hybrid threat scenarios as sources for potential socio-political vulnerabilities and as targets for non-military threats and attacks, not least disinformation campaigns. While misinforming others might be unintentional, the intentional act of misinforming someone constitutes disinformation, defined as "verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm".[1]

A significant part of the hybrid threat phenomena is psychological. Actors targeting communities/societies to exacerbate weaknesses do not necessarily create social vulnerabilities themselves but make use of divisions that already exist in civil society. Using disinformation, populations are targeted and used

[1] Joint Communication to the European Parliament and the Council: A Strategic Approach to Resilience in the EU's external action. High Representative of the Union for Foreign Affairs and Security Policy: European Union, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52017JC0021 [accessed: 19.11.2021].

as potential weapons within the state/society in question. Inequalities within a society can be used to exacerbate dissatisfaction to the advantage of an enemy that wishes to create an unstable environment. The resulting insecurity can increase mistrust in society [Roell 2016].

While cooperation between civilian and military authorities or organizations is assumed, this approach takes little account of the general population. Who are "we" today? Would we respond to a crisis together? Or would we be fragmented according to our sense of belonging to the interests of our community or the state? The delivery of "preparedness" brochures in some countries of the world attempts to mitigate insecurity amongst civilians, as well as control the civilian response, to guide it as much as possible through civilian authorities to ensure that civilian responses are predictable and unified.

To assume such unity within the civilian population can be problematic, however. In a podcast broadcasting a roundtable session at the annual Chatham House London Conference,[2] participants discussed the disconnect between governments and their populaces, the rise of populism and rejection of elites fostering destabilization, and the challenges of reconnecting political processes to the everyday concerns of average people. It is increasingly clear that we still lack understanding about the civilian landscape that is and will continue to be a target for possible disinformation but is also potentially a center of gravity for conflict resolution.

Trust processes and levels between the governed and government need re-examination. Having a better understanding of where the potential vulnerabilities lie within possible target societies enables these same societies – and the diverse civilians within them – to develop measures that can build trust and solidarity within them, making them less vulnerable to destabilization. Disinformation/propagation of fear of certain groups of people with the purpose of destabilizing a society are understood as hybrid threats, however we want to better understand how this is a hybrid threat, and how to mitigate it, if and when necessary. Disinformation has gained increasing attention as a feature of hybrid warfare which employs military and non-military tools to destabilize a society [Reichborn–Kjennerud and Cullen 2016]. There is still a gap however in how these threats can and should be understood in hybrid contexts, including how emotions like fear or anger, which are difficult to measure or control, resulting from disinformation become threats in and of themselves. What are we missing before emotions become grievances expressed as nationalist/religious populism or extremism?

When it comes to malicious or criminal acts in cyberspace – from attacking critical infrastructure to disseminating false or misleading information – it has been noted that one long-term impact might be social discontent and unrest,

[2] See *How Can Political Elites Reconnect with Voters?* Undercurrents. A. Frimston and B. Horton, Chatham House, London (29 June 2018).

including the loss of public confidence in the government, even if the actual damage caused by the cyber-criminal activities was minimal [Choo 2011]. How does disinformation become a threat and what can be done to enhance societal trust as a response? Societal trust is a key target for destabilization, which in turn affects civilian capabilities during a crisis or conflict.[3] The potential for insecurity increases as societal trust decreases [Bilgic 2013]. From previous conflicts (from WWII Europe to former Yugoslavia, Afghanistan, Iraq, Georgia, Ukraine and Syria) we know that civilians have influenced the direction and nature of security/insecurity [Hoogensen 2014]. Both national and multilateral institutions (NATO/EU) are either developing or reviving defense systems that combine both military and civilian efforts [Shea 2016]. There is nevertheless a significant research and practical gap in knowledge regarding how, and to what extent, societal trust and civilian capabilities can affect institutional planning, preparedness, and responses to emerging crisis situations, and through which mechanisms, in particular to threats in hybrid warfare scenarios.

The research is required paying attention to military and civilian authorities' role in combating hybrid threats but puts a hitherto neglected focus on the effects that disinformation has on civilian agency (capabilities) in the evolution of a crisis or conflict. Civilian agency is generally understood as the capacities of individual citizens as well as civil society and its organizations at large. It is not fully understood how civilian capacities are influenced during crises, and how different authorities coordinate their action in this rather new hybrid security field. We should ask: How does civilian agency affect societal trust – crucial to cooperation and security – in the face of hybrid threats to security? We should examine these threats which appear intangible but have high trigger responses amongst civilians, affecting civilian capabilities.

The scientific problem raised is a socio-political-legal question, that asks how we can understand people's actions and reactions in crisis better. To answer this, however, needs more than one conduit to knowledge. We need to know more about people's reactions in crisis (security studies including cybersecurity, media studies, sociology, social psychology) as well as how states have prepared for and control people's actions and behaviors through law and order (law, societal security policy). But the relationship between civilians and their government agencies during a crisis remains unclear. It is often taken for granted that civilians are the passive element in crisis, following the lead of authorities, but research from other conflict settings (outside of Europe) demonstrate this is not the case [Parashar 2016; Hoogensen 2014].

[3] See Støtte og samarbeid: En beskrivelse av totalforsvaret i dag (Support and Cooperation: A description of total defence today), Department of Defence/Department of Justice and Preparedness, Oslo 2015.

The overall goal is to improve societal level abilities to manage crises (where hostile actor is irrelevant or difficult to determine) and conflicts (identifiable hostile counterpart), as well as expand possibilities for open dialogue for civilians.

The primary ambition should be to increase research-based knowledge about the role of civilians and civilian agency – what people do – in crisis and conflict, that are also in accordance with legal obligations. Increased knowledge on civilian agency in relation to trust during times of destabilization or crisis will assist both civilian and state actors to mitigate vulnerability and increase the scope of non-militarized solutions to conflict.

The innovative in the emphasis on interdisciplinary "bottom up" methodologies (intersectionality) applied to law and societal security, which have otherwise been heavily approached by "top-down," state-centric focus. Such state-centric approaches are nevertheless not ignored, as authorities play an important role also from the societal security perspective. Thus we should cooperate heavily with relevant end users who can benefit immediately from the ongoing research and at the same time provide important information, to authorities, private actors (e.g. critical infrastructure operators), and civil society organizations, while at the same time maintaining our focus on citizens to inform us, guide us through our research (open lectures/debates), and receive results.

2. RESEARCH METHODOLOGY AND MILESTONES

Objective 1: Investigation of the current state-of-the-art. A thorough literature review should be performed at the start of the research, with ongoing literature review as needed. The review will identify the best methods available for achieving other project objectives.

Objective 2: Development of fundamental conceptual framework. Since there are no commonly agreed definitions of basic concepts, including but not limited to, "hybrid threats" and "disinformation," research will be performed on both national and international basis in order to develop common conceptual system, taking into account specificity of Poland and CEE countries. It shall enable common understanding and scope of researched data sets – prerequisites for proper comparative analysis, as well as provide contribution to theoretical concept framework.

Objective 3: Provision of novel theoretical scientific contribution. Within scholarly rich environment, the research will develop "bottom-up" – grounded (civilian-oriented), innovative theoretical contributions on societal trust research and the impact of civilian agency on destabilization or crisis/conflict scenarios, without omitting the more traditional state-centered approaches.

Objective 4: Contribution to the development of legal regulations, policies, interventions and doctrines. The research will provide contribution to development of laws, policies, interventions and doctrines relevant to human and societal security planning – especially focusing on resilience strategies of trust, taking into consideration legal obligations of the state and maximization of civilian capacities and nonmilitary responses to threat scenarios. The empirical data gathered will also provide a solid basis for further research on the complex relations between civilians and authorities during crises.

Objective 5: Open engagement with society. To this end, the research will ensure its relevance and benefit to society, as well as inclusion of civil society actors, through open public debate of draft project deliverables including, but not limited to, public evaluation of proposed theoretical framework, possible absorption of research results and in particular making visible different threat perceptions in particular counties. Most importantly, this research has as an objective aim to increase trust between people and their authorities and increase knowledge about non-militarized solutions to conflicts.

Objective 6: Based on the ready-to-use web crawlers developed at Forensic Software Laboratory or Cybersecurity Centre a dedicated service will be developed, focused on finding texts (e.g. blog posts, tweets etc) which may be perceived as traces of hybrid threat. This search will be encoded following the knowledge on discovering the hybrid threats and know-how related to Natural Language Processing will be utilized in order to implement components of this web crawler. The prototype of the constructed software solution will be made available on the web and configured to work on selected, popular information and blog services, Twitter etc.

Objective 7: Knowledge-building and dissemination. Research results will be presented at conferences and published in proceedings and journals, with contributions in pop-sci media if appropriate. Deliverables and resources will be made publicly available as far as possible.

To better understand the civilian landscape, it is crucial to understand the various positions or identities within civilian communities that can be vulnerable or resistant to threats of disinformation. Identity plays a crucial role in trust. Intersectionality focuses on the experiences of individuals/civilians, and how identities shape experiences including fear, anger, belonging, etc. It finds its roots in a critique of feminist approaches that were insensitive or blind to the different experiences of women on the basis of race, class, orientation, ethnicity, and other markers of positionality that impacted their power and agency. Coined by Kimberlé Crenshaw in the late 1980s [Crenshaw 1991], the term "intersectionality" was designed to critically assess the intersection between race and gender, and at its core has a "nonpositivistic, non-essentialist understanding of differences among people as produced in on-going, context-specific social processes" [Marfelt 2016, 32]. As such, intersectionality is an

important analytical tool when examining the power dynamics of civilians in relation to the creation/maintenance/strengthening of trust in a society, and in relation to the articulations of state actors who have a particular influence on how trust is understood and perpetuated socially.

Intersectionality infuses research approaches in two ways. Establishing an interdisciplinary "checklist" of questions we need to ask while designing our respective research methods – asking what assumptions of power and identity are made about the populations we are investigating both within our methods as well as the sources of data we explore (ie: current law and legal documents). Thereafter we will investigate cases by gathering data and empirical evidence via intersectionality-informed quantitative and qualitative methods including surveys (EUSurvey) and semi-structured interviews with civilians and civil societies, and document analysis of laws, white papers and political strategies.

This includes examining disinformation, different hybrid threat methods and motivations, and target groups utilizing comparative analysis, content analysis, statistical analysis, interdependency analysis, among others. The methods and tools will include textual and audio-visual document studies, in-depth interviews, targeted social media and media observations and data gathering, large-n online surveys among NGOs, citizen cafés, and, when possible, participating observation and small-scale experimental tabletop tests. We further apply the modified positivist approach, assessing the relevant domestic and international legal regulations (eg. International agreements and international customary law), complementing with additional arguments sought in case law and legal literature. The research on emergency laws will be undertaken in the doctrinal tradition. The collected data with thereafter be triangulated and assessed again through intersectional lenses that both unpack and expose our data according to the way various identities are created, changed, or distorted, as well as present possible solutions to maintaining societal integrity (stability) while allowing for diverse identities.

All the aforementioned Tasks will be performed in parallel within all three established Research Areas, that together constitute a comprehensive interdisciplinary research project:

3. PROPOSED RESEARCH AREAS

3.1. Research Area 1 – Social Science perspectives

The task will address the question of societal trust. In a preparatory literature review, the research will critically determine what precisely trust is and how it functions in democracies. Is trust always a good thing? Or, might there be good reasons to embrace a certain dose of distrust as a sign for functioning

democracy? Researchers will inquire into the sources of contemporary distrust in state institutions. Through initial surveys, relevant candidates for in-depth qualitative interviews will be identified. Intersectional lenses will be applied throughout selection. Informants will be interviewed twice during the project to address possible changes over time and through our scholarly engagement. Main hypothesis is that potential growing distrust has a multiplicity of reasons intertwined with identities, many of them home-grown. The second issue that will be addressed is threat perception and the formation in contemporary commercial and noncommercial social media. Recently, economic incentives and algorithmic trajectories have been identified as main drivers of radicalization and distrust in digital environments [Fuchs 2017]. Through quantitative assessments and qualitative content analyses of social media content, the research will: a) map what content exists and how certain profiles and sites connect, b) qualitative interviews will assess how users react to content received and why certain items are passed on before, c) identities, technological logics and economic incentives will be connected to the data and a comprehensive picture of contemporary socio-technical networks will be drawn up.

Main hypothesis is that technological and economic factors constitute tacit frames for civilian agency that privilege radicalizing and distrusting content. The third issue is susceptibility of society to digital threats in general and disinformation in particular, including relevant assessment of present standing of society in general and impact of demographics. Research should provide answers to number of questions related to e.g. current common values shared by society, information sphere, cultural awareness, or lack of it. Analysis and evaluation of common social values that are most endangered by hybrid threats is a prerequisite for correct determination of dangers posed by threats. Proposed research should not only identify such values and categorize them, but also reveal strongest and weakest elements. Analysis regarding social consciousness of threats in question should be also conducted, in particular in CEE context and new phenomena – immigration and expansion of Islam, military and terrorist threats. A map of topography of information impact on society should be taken into account in research program too.

3.2. Research Area 2 – Societal security/technological perspectives

This task will address cyber space as a forum of social action, having its own rules however which are not always regulated. What are the technological elements that make civil societies, or individual citizens, and through them democratic societies, especially vulnerable for malicious efforts to destabilize the traditional democratic order? Does, and if so, how does, identity play a role in these efforts? What are the defensive strategies, technological and non-technological, that can be used again this? The second issue that will be addressed concerns reactions of civil society and citizens in light of attacks

disrupting critical infrastructure and vital societal functions embedded in it, such as information, transport, electricity, water, health care, emergency services and so forth. How do we understand "resilience" in these cases, and what is the tolerance and societal resilience level of the society and its citizens? Does resilience change according to identity markers (gender, race, ethnicity, socio-economic class, etc)? How does technology address this threat, by enabling and/or limiting it? Analysis and evaluation of susceptibility of e-space to cyber and electronic threats, will be also undertaken in context of vulnerability to particular hybrid threats identified.

3.3. Research Area 3 – Legal perspectives

This task will address the issue of legal possibilities and limitations for the state in protecting societal security and maintaining/building/rebuilding trust in the face of cyberattacks of a non-military character. Such interference may be undertaken by a government (e.g. espionage, propaganda, or more subtle disinformation operations in order to influence an election), or by private, non-state entities (e.g. industrial espionage or political opposition groups). The second issue that will be addressed concerns legal responses to non-military intervention in the internal affairs of a state by (a) foreign state(s) or non-state entities, with a special focus on hybrid threats. Clarity regarding legal and efficient responses, including what kind of intervention is legal under international law, and which responses thereto may the target state legally undertake, alone or in concert with other states. Emphasis will be placed on how the law recognizes the ways in which different population groups may be targeted based on specific identities, and how law can mitigate this. Assessment of current shape and state of regulations enabling and supporting fight with hybrid threats will be dedicated to evaluation of present and future of regulations governing public security issues, in particular relevant to protection of citizen rights in fight with threats of hybrid nature. RA1 and RA2 will inform this particular RA with civilian (bottom-up) and technological perspectives that need to be taken account by law.

The safety of respondents and the research team for each case study is paramount and will guide all research decisions. Protecting confidentiality is essential to ensure both informants' safety and data quality. Ethical guidelines insist on elaborate procedures for procuring informed consent and assuring the voluntariness of the participation so participants will not become mere "objects" of study.

Fundamental issues shaping modern societies, especially the ones of Western democracy type, are being addressed, going beyond mere multidisciplinary by combining the different perspectives into a holistic, intersectional analysis, performed in the context of comparative research providing selected national perspectives. Proposed research evaluated in the present paper is

innovative in its focus on both the state and civilian levels in studying hybrid threats and how they interact together, and it takes into account fundamental issues of various paths of development of democracy in Europe. Research outcomes, therefore, might be appreciated by different communities in Social Sciences, Humanities and Computer Sciences.

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THE IMPACT OF LEGAL SELF-RELIANCE OF MUNICIPALITIES ON THE DECENTRALISATION OF PUBLIC AUTHORITY IN POLAND

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Abstract. The literature emphasizes that decentralization signifies self-reliance. Several conditions must be fulfilled to speak of decentralization. They include: equipping of bodies with their own competencies, absence of hierarchic subordination, financial self-reliance (a decentralized body has own sources of income and independently decides how to spend its financial resources). Self-reliance in disposal of property and organizational (statutory) self-reliance are also noteworthy.

Keywords: territorial self-government, self-reliance of municipalities, decentralisation of public authority in Poland

INTRODUCTION

Various factors affect the form and development of the apparatus of a government administration within a territory. These factors include model of the political system [Wiktorowska 2011, 357], as well as model of the economic system derived from it. The legal system is also not without importance, particularly the constitutional and administrative law. Technical factors such as professionalism, efficiency, coordination of activities, rationality and proper work organisation [Jaroszyński 1964, 33] have also been listed among the factors determining the model of territorial administration.

Two basic models of territorial administration have taken shape over the course of historical development – the model of uniform administration [Starościak 1969, 116] and the model of dualistic administration. The dualistic administration model is based on a combination of the principle of centralisation and decentralisation in the process of shaping the state's territorial system of governance. With a strict hierarchy and based on a bureaucratic factor, the principle of centralisation determines the formation of the apparatus of governmental administration, representing the state and totally dependent on

the state. Yet, the principle of decentralisation allows for the formation of an apparatus of decentralised administration in the form of a territorial self-government – based on a social (civic) factor. A self-government created in such way enjoys the attribute of self-reliance [Frankiewicz 2003, 95].

A self-reliance is inscribed in the essence of self-government. The definition of a self-government shows that it is organisationally and legally distinct within the structure of the state, an institution of the local community arising from the law, appointed for self-reliant performance of state administration, equipped with the material resources enabling the realisation of the tasks within its purview [Zawora 2008, 14].

In the legal science of administrative, and constitutional law, in administrative science and many other sciences, including politology, it is generally assumed that the fundamental and intrinsic characteristic of the municipality, deciding the essence of this unit of territorial self-government as an entity of public administration, is its self-reliance [Bąkowski, Brzeski, and Laskowska 2010, 17]. The self-reliance of territorial self-government units is identified with the constitutional normative principle of establishing and applying legal norms forming the expansion and specification of the wording of the Constitution of the Republic of Poland [Szewczyk 2002, 105].

Precisely these factors have led to the choice of the subject above. Under the laws, local governments have been given the authority to perform administrative tasks, both local and regional. The work of local governments units is associated with the subsidiarity rule of the local council. This principle assumes that the exercise of power shall be in the hands of the institutions in subject. In the first instance, the local councils should be assigned tasks and competences as well as appropriate monetary resources to implement these. Tasks which can be performed by local councils should not be assigned to other units (district, voivodeship). Delegating these tasks to the upper level should occur only in instances in which the execution of these exceeds the capability of the local council. The government administration should only deal with the tasks which cannot be completed by the local councils. The principle of subsidiarity gives citizens the opportunity to deal with individual matters in their local communes, in places of their residence and through authorities they have chosen.

1. EXPLANATION OF THE SELF-RELIANCE OF TERRITORIAL SELF-GOVERNMENT

Three perspectives on the essence of the self-reliance of territorial self-government emerge from the literature. The first postulates a very high degree of a self-government's self-reliance. However, strong decentralisation and financial independence are the conditions for its actual independence.

The second approach recognises the overriding role of the state in the public sector and the strong dependence of territorial self-government on central authorities. Whereas the third approach accounts for the realities upon which a determination of the scope of self-reliance is dependent, i.e. the level of income, types of sources of income and their yields, the real impacts and methods of action of territorial self-government units in the direction of increasing their income, and the scope and types of expenses that such units may incur [Jastrzębska 2003, 100].

The essence of a municipality's self-reliance is grounded in its decision-making capacity, within the framework of the binding legal order, with respect to all local (regional) affairs, allocation of communal property, rules of using public facilities, zoning, the scope of investments, the order, methods and resources by which they are implemented, as well as with respect to all associated financial and material expenditures [Jagoda 2011, 21]. The essence of self-reliance also manifests in the fact that public tasks are performed by entities that are independent (self-reliant) and dispose of their own subjective rights. No body of governmental administration has such attributes at its disposal. Neither body of state administration has its own subjective rights, nor benefits from self-reliance granted *a priori*, so to speak, nor has its own legal personality [Błaś 2002, 101].

The semantic scope of self-reliance can be interpreted in two ways: positive and negative. The former involves studying, based on binding laws, situations in which bodies of territorial self-government have a legally defined scope of decision-making freedom. Meanwhile, the negative aspect involves reconstructing of the scope of the legally permissible influence on territorial self-government of state authorities situated outside of the given self-government's system, particularly from bodies exercising so-called monitoring over the territorial self-government [Daniluk 2020, 36–70].

Self-reliance as a positive aspect is made visible in the sphere of creating self-government structures and shaping their human resources, in the realm of lawmaking and management of communal resources. The negative aspect is related to judicial protection of self-reliance. Hence, the case law of courts, reacting to the violations of the principle of self-reliance, determines the legally protected area of a territorial self-government's self-reliance negatively, as it does so through elimination of such violations. The self-reliance of territorial self-government receives protection within the framework of the case law of administrative courts, and with respect to affairs related to management of communal property, the case law of general civil courts. The case law of the Constitutional Tribunal plays a special role in protecting the self-reliance of territorial self-government, by eliminating laws that violate the constitutional principle of self-reliance from the legal system. The protection of self-reliance afforded by administrative courts involves, above all, protection against

unauthorised interference of monitoring bodies, appointed to control the legality of actions and activities of self-government bodies. A self-government unit has the right to file a complaint against these acts to the administrative court for the purpose of investigation by the court of whether monitoring intervention was legal and whether the sphere of self-reliance of the self-government unit was infringed upon illegally. Within the scope of disposal and management, self-reliance is protected by general civil and commercial courts resolving disputes arising over the course of such activity [Bojanowski 2009, 16–17].

2. INTERPRETATION OF THE PRINCIPLE OF DECENTRALIZATION IN POLISH CONSTITUTION

The principle of decentralisation corresponds directly to the concept of self-reliance. The concept of decentralisation itself is deemed one of the key concepts in the theory of administrative law. The oldest view concerning decentralisation in the Polish literature can be found in the first Polish textbook of administrative law by A. Okolski [Okolski 1880]. The author sought a decentralisation in self-government bodies, to which he ascribed the right to "handle the interests of a given place," in contrast to the centralised government bodies to which he left general affairs [ibid., 98].

Administrative legal science of the 19th and early 20th century linked the subject matter of decentralisation with the institution of self-government, considered the elementary form of decentralisation.[1]

Discussions on the subject of the idea of territorial self-government and its place in the system of the state's administrative authorities led to the emergence of two theories: the naturalistic and state theories. These theories reached a full maturity at the end of the 18th century, at a time when anti-absolutist tendencies prevailed in Europe, as best expressed in the revolutionary doctrine of France (1789). It was then that the theory of the so-called natural rights of a municipality was formed on the foundation of the idea of "natural law." According to this theory, the municipality, as the fundamental cell of self-government, has "natural" rights to self-governance, not originating from the state. The state may neither trespass into the domain of these rights nor violate them without fear of standing in contradiction to the natural development of social relations. The second theory, which decidedly differs, is the so-called state theory of self-governance, reflecting the view that a self-government should be totally subordinated to the state. Any freedom of the self-government, including its independence from the state, may only have such boundaries as drawn by the state's legislation. Both theories, present in

[1] This subject matter was also discussed by: Bigo 1928; Panejko 1926; Dembiński 1934.

the legal doctrines of many countries in 19th-century Europe, clashed with each other and affected the form of concrete legal and systemic solutions. This also pertained to the Republic of Poland, where the second theory ultimately prevailed. In the opinion of a contemporary author concerned with the study of the concept of territorial self-government in the 2nd Republic of Poland, "[...] the first assumed – in the most general of terms – that territorial self-government is a natural political institution, belonging to the category of public, not only legal phenomena. *A contrario*, the second theory most commonly sought the essence of self-government in the established order of the state, or at the least, in the equipping of self-government with legal instruments by the power of the will and authority of the state. Neither of the theories were accepted without criticism by theoreticians of territorial self-government, which is why one may occasionally encounter the naturalistic state theory, sometimes described as the evolution of the naturalistic theory of self-government or a modification of the state theory" [Bosiacki 2006, 9].

One of the foundations of the naturalistic theory was the conviction of the superiority of individual personal rights above the rights of the state. It was assumed that a municipality, as a local authority, the earlier form of organisation than the state, is the primordial form preceding the creation of the composite organism of the state. Thus, the municipality should be treated as a category of natural law – an entity that possesses intrinsic and inviolable rights and is completely independent of the state. Personalities such as Aleksander Kroński were advocates of this concept.

The systemic transformation into the Polish People's Republic and the abolition of territorial self-government brought about a new understanding of the decentralisation. It ceased to be linked to the institution of self-government and began to be associated with the state apparatus. J. Starośniak presented a detailed analysis of the decentralisation. For this author, the basic criterion of the decentralisation is legal self-reliance. He introduces the concept of a legal decentralisation, by which he understands decentralisation based on laws that are inviolable by direct monitoring bodies [ibid., 10].

In turn, T. Rabska observes that "decentralisation [...] defines the sphere of activity established by way of legal regulations by assigning competencies while simultaneously ruling out interference of units higher in the hierarchy in this activity. This means waiving forms of direct top-down management, however it does not rule out monitoring of how these competencies are exercised. Monitoring may be permitted solely within the scope and in the forms provided for by laws [Rabska 1977, 21–24].

The concept of decentralisation has evolved greatly; from being identified with self-government as a legal subject, separate from the state, through to the accretion of many new forms of its implementation in the Polish People's Republic and its constant subordination to systemic political needs, up to its

establishment as an institution of positive law, acting within the framework of a uniform administrative apparatus in the Polish People's Republic as one of the forms of democratisation of this apparatus, and as a means of facilitating the realisation of administrative tasks and the process of administration itself. Here, the fact that administrative legal science never detached decentralisation from the institution of self-government and always sought the essence of decentralisation in self-reliance [Wiktorowska 2002, 49], is worthy of note.

Today, a decentralisation is defined as a method of organising the executive apparatus in a state in which territorial or other units have legally sanctioned self-reliance, and interference in the scope of this self-reliance may take place only on legal grounds and in the forms provided for by the law, with verificative monitoring being the basic form, based on the criterion of legal compliance [Boć 2000, 209]. An inherent feature of decentralisation is a free disposal of financial resources, albeit within the confines of the law [Gilowska 1996, 42].

3. RELATION BETWEEN DECENTRALIZATION AND SELF-RELIANCE OF TERRITORIAL SELF-GOVERNANCE

It is generally emphasised in the literature that a decentralisation signifies self-reliance [Ochendowski 1999, 197–201]. Several conditions must be fulfilled in order to speak of decentralisation. These include: equipping of the body with its own competencies and the absence of hierarchic subordination, financial self-reliance (a decentralised body has its own sources of income and independently decides the method of expending financial resources in its possession). A self-reliance in the disposal of property and organisational (statutory) self-reliance are also noteworthy [Wierzbowski and Wiktorowska 2001, 101–102].

In foreign literature, decentralisation and centralisation are among the most controversial subjects in the practice of and literature on administration. It is highlighted that decentralisation of public administration may not be achieved without a strong and operational self-governing municipal administration [Leidinger 1992, 58]. The Dutch administrative law attorneys say decentralisation is the transfer of rights to make binding decisions to a subordinate body. The dynamic version of decentralisation as a process rather than a static phenomenon relates to the continuous flow of tasks and authority between various rungs in the administrative structure [Raadschelders 1994, 4–5]. In turn, the German literature speaks of political decentralisation as a shift of legal decision-making authority to parts of the system or to lower echelons in the multi-level administrative structure, and decentralisation of administration refers not to the transfer of decision-making authority but to the performance of specific tasks [Mayntz 1978].

Taking inspiration from the past[2] [Niewiadomski 2002, 3] the Legislator did not define the form of the Republic of Poland's territorial system in the Constitution of 1997. They did, however, impose the obligation of shaping the territorial system in such a way that it ensures decentralisation of public authority.

The principle of decentralisation was formulated in Article 15(1) of the Constitution of the Republic of Poland: "The territorial system of the Republic of Poland ensures decentralisation of public authority." This principle signifies the transfer of power to entities distinct from the state as a legal person in public law (e.g. to the municipalities) and equipping of these entities with authoritative competencies, freeing them from the system of hierarchic subordination [Daniluk 2015, 3]. The promise of legal self-reliance for municipalities also stems from the decentralisation principle. Among the legal elements determining the self-reliance of a municipality in the context of the decentralisation principle, one should indicate, among other things, the scope of the competencies of municipal bodies, creating a zone of so-called self-reliance of competency, i.e. the subordination of municipal bodies to other units of the state solely in the form of verificative monitoring, exercised according to the criterion of legality, thus creating so-called organisational self-reliance. Endowment of the municipality with municipal property, securing its so-called self-reliance in the disposal of property, and the municipality's endowment with its own sources of income and the ability to independently expend owned financial resources are no less significant, since, along with the ability to impose local taxes, these elements form the sphere of so-called financial self-reliance and the sphere of tax authority. The legal self-reliance of a municipality shaped in this way is subject to judicial protection [Wiktorowska 2002, 56].

A self-government is one of the forms of decentralised administration. In the spirit of this principle, legal regulations should therefore guarantee specific social groups and the bodies appointed by them the right to manage their own affairs. These groups participate in the exercise of self-governance obligatorily under the law (one becomes a member of self-government by the power of the relevant act, not voluntarily by the power of one's own declaration of

[2] The Constitutions of 1921 and 1935 did not mandate distinct decentralisation of public authority, although such an intent of the Legislator could be inferred from their wording. Both of these documents, however, were decisive to the territorial structure of the 2nd Republic of Poland. The Constitution of 1921 divided the state into voivodeships, poviats, urban and rural municipalities, assigning them the status of territorial self-government units, with the reservation that the division was to be enacted by way of an act (Article 65). The Constitution of 1935 maintained the division into voivodeships, poviats and municipalities but did not guarantee their self-governing nature. Moreover, it did not require a division of the state at the poviat and municipality level (Article 73). Later constitutional provisions did not regulate the shape of the state's territorial system further.

will) and perform tasks within the purview of public administration[3] (OTK ZU 1998, No. 3/18, item 31). Management itself occurs according to the principles of self-reliance (decentralisation), which means that interference, in the form of monitoring, in the activity of a self-government is possible solely in the forms provided for by the relevant laws, without violation of these areas of self-reliance [Leoński 2006, 6].

However, self-government in Poland is not an autonomous institution. Its self-reliance is based on determining when and in what forms state bodies may interfere in the sphere reserved for the independent activities of territorial self-governing bodies. As part of ensuring implementation of the decentralisation principle, it is necessary to transfer not only executive but also lawmaking competencies, to the territorial units [Dąbek and Zimmermann 2005, 10].

A decentralisation of the public authority through territorial self-government is defined in Article 16 as participation in exercising this authority, involving performance of a significant part of public tasks. Territorial self-government communities have the nature of authoritative entities, and their activity should be based on disposing of components of this authority. Their decisions may be binding in nature, may be subject to compulsory enforcement, and refusal to implement these may result in sanctions against one's own person. Territorial self-government units become an integral element of the structure of public authority in the state of which they are a part, within the scope defined by law. The scope of public authority remaining at their disposal is therefore not their own authority, but a manifestation of the decentralised state authority [Garlicki 2005, 3].

The Constitutional Tribunal has also referred to the decentralisation principle in its case law. In the ruling of 4 May 1998, it recognised the legal self-reliance of the territorial self-government as an element of the decentralisation principle. This self-reliance, being the essence of self-government, need not be enshrined in the constitution, and only requires legal measures and the guarantee of protection. The Legislator's interference in the sphere of self-reliance should not be excessive and should find justification in constitutionally defined goals and constitutionally protected values, which override the principle of protecting the self-reliance of municipalities depending on the Legislator's assessment (OTK ZU 1998, No. 3, item 31, p. 183–84). In another ruling (of 24 March 1998, K 40/97), the Constitutional Tribunal emphasises that the

[3] The Constitutional Tribunal has devoted much attention to the principle of decentralisation of public authority. In ruling K 38/97 the CT discerned the decentralisation principle in the organisation of the entire state's system, not just of territorial self-government. This means that the constitutionally guaranteed decentralisation of public authority is broadly protected by the Constitutional Tribunal, which protection is, in turn, detailed in the case law of the Supreme Administrative Court and Supreme Court.

principle of self-reliance concerns all aspects of a municipality's activity, including the financial sphere (OTK ZU 1998, No. 2, item 12, p. 69–70).

CONCLUSION

A decentralisation of the public authority signifies the process of permanently broadening the rights of lower-level units of public authority by way of transferring tasks, competencies and the resources indispensable for realising them to these units. The Constitutional Tribunal stresses that decentralisation of the state is an idea with the goal of transferring the competencies of public authority to the bodies of territorial self-governing units, elected democratically by local communities. At the same time, it indicates the fact that, the broader the transfer of the state's competencies to territorial self-government, while the territorial self-government benefits from universal self-reliance limited only by binding law, the better the idea of decentralisation of the state will be implemented.

A decentralisation of the state authority cannot be construed with respect to just one subject, as it pertains not only to territorial self-government but also covers a substantially broader catalog of bodies that have been granted attributes of public authority [Jaworska–Dębska, Olejniczak–Szałowska, and Budzisz 2019].

One of the first and fundamental features of decentralised public authority is its exercising in a self-reliant manner, understood as endowment with the right to relatively autonomous action within legally permissible limits, as well as independence understood as freedom from interference in its affairs by bodies at a higher level. The self-reliance of the decentralised public authority, including of self-government, is not an attribute that is absolute in nature. The framer of the Constitution does not rule out the possibility of adopting such solutions that require the disqualification of certain affairs from among the competencies of self-government bodies and their transfer to other authorities. However, it should be specified as to the form and circumstances when state body is allowed to intervene with local governments. The state acts as an overseer, delegating responsibilities, rights and monetary resources to the local council. Nevertheless it is the local governments, on their own behalf, which undertake a series of activities and tasks to fulfil the needs of a local community.

Potential delimitations of the boundaries of decentralisation should be drawn within the scope defined by law, with respect for the requirement of rationality. A change in the boundaries of decentralisation may be determined by the evolution of national politics, the condition of the local economy, and by the possibilities of adapting the administration for performing public service in accordance with the principle of subsidiarity. Always, however,

in accordance with the stipulations of the European Charter of Local Self-Government, the location of the public authority realising its tasks should be situated as close as possible to the citizen, after in-depth assessment of all socioeconomic circumstances.

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DIGITALISATION OF THE FUNCTIONING OF BODIES OF CORPORATE AND NON-CORPORATE ENTITIES IN THE LIGHT OF COVID-19 REGULATIONS

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Abstract. The purpose of the article is to compare the regulations governing remote participation in the meetings of bodies of corporate and non-corporate entities, which were introduced to the Polish legal system during the COVID-19 pandemic. On this basis, the optimal solution is chosen. Comparison of regulations of the Code of Commercial Companies, Cooperative Law, Law of Associations, Law of Foundations and Apartment Ownership Act leads to a conclusion that the solutions contained in the Code of Commercial Companies should be assessed as the best. This act to the greatest extent takes into account the need of ensuring remote participation in the meetings of the bodies and at the same time meets the principle of technological neutrality and provides an appropriate level of security. Due to the need to introduce permanent regulations ensuring remote participation in the meetings of the bodies of corporate and non-corporate entities, the regulations of the Code of Commercial Companies can be used as a starting point for creating similar regulations that are adapted to the specific characteristics of particular entities. Therefore, the article presents possible directions of development of the national law in relation to the discussed issue.

Keywords: electronic means of communication, companies, associations, cooperatives, foundations, housing communities

INTRODUCTION

The outbreak of the COVID-19 pandemic resulted in significant impediments to the day-to-day functioning of many kinds of legal entities. At the same time, the pandemic provided an impetus for the introduction of changes aimed at improving the functioning of these entities in new and more difficult conditions. The need to introduce some of these changes has been apparent for a long time, and the state of the pandemic only accelerated their implementation. These certainly include the new regulations on the possibility for bodies of corporate and non-corporate entities to operate using means of distance communication.

Some regulations related to this issue have been already present in the Polish legal system, but the state of pandemic has shown the need for new solutions, with a wider range of applications. There is no doubt that the possibility to operate by means of distance communication is fully justified, because it significantly facilitates and speeds up the functioning of entities and at the same time, with today's technological achievements, it is possible to ensure an adequate level of security and reliability of such methods of operation. However, the measures introduced are not uniform and different regulations have been introduced in relation to specific categories of entities.

The aim of the article is to compare those regulations, to evaluate them and to choose the best solution. The choice will be made on the assumption that optimal regulations should meet two basic requirements. First, they should be flexible and implement the postulate of technological neutrality of law, according to which the law should not impose too specific technological solutions on legal entities and should treat all available technologies equally.[1] Secondly, this solution should also maintain an adequate level of security and minimize the risk of abuse.

1. CHANGES IN THE FUNCTIONING OF COMPANIES UNDER THE COMMERCIAL COMPANIES CODE

One of the most important changes concerning the subject matter are the amendments introduced to the Act of 15 September 2000, the Code of Commercial Companies[2]. These changes allow internal corporate decisions to be made by means of electronic communication. Although the provisions of the Code of Commercial Companies already allowed for such a possibility, it applied only to some company bodies and this possibility had to be regulated in the company's articles of association. As part of the so-called anti-crisis shield, two bills were introduced that reversed the previous rules. These were: the Act of 30 March 2020 on amending the Act on special solutions related to preventing, counteracting and combating Covid-19, other infectious diseases and crisis situations caused by them, as well as some other acts[3] and Act of 16 April 2020 on specific support instruments in relation to the spread of SARS-COV-2.[4] Currently, the default solution under CCC is that decisions can be made by means of remote communication, and the articles of association may exclude such possibility. This rule applies to all of the bodies of both types of

[1] See more: Greenberg 2016; Maxwell, Lovells, and Bourreau 2014; Reed 2007.

[2] Journal of Laws of 2000, No. 94, item 1037 [hereinafter: Code of Commercial Companies or CCC].

[3] Journal of Laws item 568.

[4] Journal of Laws item 695.

capital companies described in CCC, i.e. a limited liability and a joint-stock company.[5]

First of all, the above-mentioned rules apply to the functioning of the most important bodies of a limited liability company (meeting of shareholders) and a joint-stock company (general assembly). According to Article 234[1](1) CCC, a shareholder of a limited liability company may participate in the meeting of shareholders by means of electronic communication, unless the articles of association provide otherwise. Participation in the meeting in the manner referred to in the first sentence shall be decided by the convener of such a meeting, which in most of the cases is the management board. This may suggest unrestricted discretion in determining such a possibility, but the literature rightly points out that hindering or preventing participation in a shareholders' meeting remotely may constitute grounds for challenging resolutions [Pabis 2020b]. Moreover, Article 234[1](2) CCC stipulates that participation in the meeting of shareholders in a described manner should cover two-way real-time communication of all persons attending the shareholders' meeting, whereby they may speak in the course of the shareholders' meeting from a place other than the venue of the shareholders' meeting. It should also allow the exercise of voting rights before or during the shareholders' meeting. Detailed rules for participation in the shareholders' meeting shall be set forth in the bylaws adopted by the supervisory board or by the shareholders, but the bylaws may not set forth requirements and limitations which are not necessary for identifying shareholders and ensuring security of electronic communication (Article 234[1](3) CCC). Analogous solutions with regard to joint stock companies are contained in the regulations of Article 406[5](2) and (3) CCC.

The regulations that were in force before the discussed amendments provided for the requirement that the shareholders' meeting of a limited liability company and the general assembly of a joint-stock company must be broadcast in real time.[6] Currently this requirement is retained only for a joint-stock company. However, this does not change the fact that for both types of companies the traditional concept of a shareholders' meeting and a general assembly has not been abandoned. In particular, the shareholders' meeting and the general assembly have not become virtual meetings [Pabis 2020b].[7] This is due to the fact that meetings can still only be held on the territory of the Republic of Poland at places stipulated in Article 234 CCC and Article 403 CCC [Pabis 2020b; Krysik 2020; Leśniak 2020]. The place where the meeting is held is,

[5] This article does not cover the issue of a simple joint stock company, because currently the regulations on this type of company are not in force yet.

[6] Article 234[1](2) CCC as amended on 3 September 2019 by the Act of 19 July 2019, Journal of Laws item 1453, Article 406[5](4) CCC.

[7] See also: Herbet 2013; Horwath 2007; Krysik 2020.

therefore, the place where the chairman and the recording clerk are located, although some or even all of the other participants may participate remotely.

In the case of the management board of a limited liability company and a joint-stock company, the possibility of participating in the meeting and of adopting resolutions by means of direct remote communication arises from Articles 208(5^1) – (5^2) and Articles 371(3^1) – (3^3) CCC, which allow for this possibility, unless the articles of association provide otherwise. The current regulations directly confirm the admissibility of the solution which has long been postulated by legal scholars and commentators, despite the lack of a relevant statutory provision. It has been stressed that in view of the possibility to freely shape the internal organization of the management board and the lack of a clear prohibition of what follows, it was permissible to introduce a procedure for adopting resolutions remotely [Pabis 2020a; Bieniak 2020; Opalski 2016; Szumański 2013].

Similar principles apply to the supervisory board of a limited liability company and a joint-stock company, whose meetings may also be attended by means of direct remote communication, unless the articles of association provide otherwise (Article 222(1^1), Article 388(1^1) CCC). Resolutions may be adopted in the same manner (Article 222(4), Article 388(3) CCC). However, there is a specific limitation that, in matters requiring a secret ballot, remote voting is only possible if no member objects (Article 222(4^1), Article 388(3) CCC).

The changes introduced in the CCC deserve credit due to the far-reaching and undoubtedly much-needed liberalization. It can be seen primarily in the fact that currently the main principle is that it is possible to participate in meetings of the company's bodies remotely. At the same time, this right may be limited, e.g. if the shareholders agree in the articles of association to allow only personal participation in all or certain matters or if they limit the permitted means of electronic communication. Admittedly, in both cases the traditional concept of a shareholders' meeting/general assembly has not been abandoned in favour of a virtual assembly, but this can be justified by the argument that, despite the widespread digitisation of communication, there is still a need to ensure the possibility to attend meetings of the most important bodies in person. However, regardless of this, the right to remote participation in the meetings of all of the bodies should be a rule and in this context the solutions adopted in CCC are correct. It is also important to note that the changes introduced in CCC are permanent and none of the provisions provide for any time limit of validity of this amendment of the CCC.

2. CHANGES IN THE FUNCTIONING OF COOPERATIVES

The already mentioned Act of 30 March 2020 has also influenced regulations of the Act of 16 September 1982 Cooperative Law,[8] that govern the functioning of cooperatives as voluntary associations of an unlimited number of persons, of variable membership and variable share fund, which conduct joint economic activity in the interest of their members (Article 1(1) CL). Currently a member of the supervisory board or management board may demand that a meeting of the supervisory board or the management board be convened, providing the proposed agenda, or that a specific resolution be passed in writing or by means of direct remote communication (Article 35(4^1) CL). If a meeting is not convened within one week from the day of receiving the request, the requesting party may convene the meeting on their own, providing its date and place, or order voting in writing or by means of direct remote communication (Article 35(4^2) CL). The detailed procedure for convening meetings of the bodies, as well as the manner and procedures for the adoption of resolutions by these bodies, shall be defined in the statute or in the rules of procedure of these bodies provided for in the statute (Article 35(5) CL).

Although the wording of the CL regulations is different than the wording of the relevant regulations of CCC, the results are similar. Under both acts members of the management board and supervisory board are entitled to participate in the meetings by means of electronic communication. However, under CCC it is possible to exclude this right, which is a more flexible solution. It seems that according to CL it would only be possible to provide for some particular requirements for adopting resolutions in this manner (Article 35(5) CL), but it would not be possible to exclude the right to participate in the meeting by means of electronic communication.

Moreover, the Act of 16 April 2020 introduced another amendment to the Cooperative Law. According to the current wording of Article 36(9) – (12) CL, it is possible for the management board or supervisory board to order that a specific resolution of the general meeting be passed by means of direct remote communication (Article 36(9) CL). The possibility of disabling this procedure is directly excluded, since Article 36(12) CL provides that the voting in this manner may be held irrespective of the provisions of the cooperative's statute. Moreover, these regulations are temporary and according to Article 36(13) CL they apply only during the introduction of the epidemic emergency or the state of epidemic referred to in the Act of 5 December 2008 on the prevention of and combating human infections and infectious diseases.[9]

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[8] Journal of Laws No. 30, item 210 [hereinafter: Cooperative Law or CL].

[9] Journal of Laws of 2019, items 1239 and 1495; Journal of Laws of 2020, items 284, 322, 374 and 567.

In comparison to the CCC, the cited Cooperative Law regulations have some disadvantages. First, the decision to adopt a resolution of a general meeting by means of remote communication is left entirely to the management board or the supervisory board. This raises the risk of violating the rule of equal rights and obligations of cooperative members (Article 18(1) CL), some of whom may be unwilling or unable to use means of remote communication [Zbiegień–Turzańska 2020]. This problem does not arise under the CCC, regulations of which, at least in relation to the governing bodies, always provide for the possibility of personal participation in the shareholders' meeting/general assembly. Second, the regulations allowing remote voting during the general meeting will not apply once the state of pandemic ceases. Such a solution is not justified, because, as in the case of the governing bodies of companies, also in this situation there is a clear need to ensure a permanent possibility of participation in the general meeting by means of electronic communication. Admittedly, the objectives and principles of the operation of cooperatives and companies are not the same, but from this perspective there are no reasons for differentiating their situation and making it impossible for a cooperative's governing body to adopt resolutions using means of direct remote communication.

3. ASSOCIATIONS AND FOUNDATIONS

Some changes related to the digitalization of the functioning of the authorities have also been introduced in the Act of 7 April 1989 Law of Associations.[10] The aforementioned Act of 16 April 2020 amended Article 10 of the Law of Associations in such a way that the possibility of voting outside the meetings of the authorities of the association by means of electronic means of communication was introduced, if the members of the authority of the association agree to it in a document form (Article 10(1a) of the Law of Associations).[11] Furthermore, the possibility of such participation in the meeting should be indicated in the notice of the meeting, containing a detailed description of the manner of participation and the method of the exercise of voting rights (Article 10(1b) of the Law of Associations). In addition, if such a procedure is used, it is necessary to provide for a real-time transmission of the meeting, real-time two-way communication whereby a member of the association's governing body may speak during the meeting, and the exercise of voting rights in

[10] Journal of Laws No. 20, item 104 [hereinafter: Law of Associations].

[11] According to Article 77[2] of Act of 23 April 1965, the Civil Code (Journal of Laws of 2020, item 1740), in order to observe the document form of an act in law it shall be sufficient to make a declaration of intent in the form of a document, in the manner enabling to determine who made such declaration. Because of this, the document form does not require a written signature.

person or by proxy before or during the meeting (Article 10(1c) of the Law of Associations). The use of electronic means of communication in voting at and outside the meetings of the association's authorities may be subject to different regulations, including restrictions stipulated in the articles of association. The articles of association may also explicitly exclude the application of the above regulations (Article 10(1d) of the Law of Associations). Moreover, according to Article 10(1e) of the Law of Associations, these regulations are applied only in the event of the introduction of the state of epidemic threat or the state of epidemic referred to in the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans.[12] Pursuant to Article 16 of the Act of 16 April 2020, all of the above-mentioned rules relating to associations apply accordingly to foundations, regulated by the Act of 6 April 1984 Law of Foundations.[13]

The regulations of the Law of Associations and the Law of Foundations are significantly different from the other two acts. Although, like the CCC, the Law of Associations and the Law of Foundations allow for the possibility of limiting or excluding remote participation in the meetings of the authorities in the articles of association, at the same time, in order for the remote participation to be admissible, the prior consent of the members of the authorities is necessary. Importantly, the provision does not determine whether such consent should relate to a specific meeting or whether it should be a general consent for all future meetings. In the absence of an unambiguous regulation, both solutions should be allowed. It is also unclear whether the consent should be unanimous or whether a majority vote is sufficient, but the wording of the regulation rather suggests that unanimity is necessary. Such a solution, however, may be difficult to apply in practice, because even if none of the members of the body object to remote voting, in some situations obtaining the consent of each of these persons may prove impossible (e.g. due to absence and/or lack of contact with one of the members of the body). This may lead to a situation where the lack of consent of an absent person makes it impossible to conduct the meeting by means of remote communication. In this context, the solution provided for in the CCC and CL, which introduces the general principle of permissibility of remote meetings, is more justified. In addition to this defect of the Law of Associations and the Law of Foundations, these acts have other, minor imperfections. First of all, they provide for an unnecessarily strict requirement of real-time transmission of the proceedings. This requirement had been also present in the CCC, but was eventually rightly abandoned in relation to a limited liability company. In case of associations and foundations, it is also unnecessary and it would be enough to leave this issue to the discretion of the authorities of the particular association or foundation, depending on

[12] Journal of Laws of 2020, item 1845.
[13] Journal of laws No. 21, item 97.

the scale and character of its activities. The Law of Associations and the Law of Foundations also unnecessarily introduce a time limit for the authorities to meet remotely. As in the case of companies and cooperatives, also in this situation, due to technological progress and the need to make the functioning of various organizational units more efficient, it is reasonable to provide for a permanent possibility of remote meetings.

4. HOUSING COMMUNITIES

The next act that requires discussion is the Apartment Ownership Act of 24 June 1994,[14] which regulates, inter alia, the issue of management of common parts of real estate in multi-apartment buildings. All owners of premises located in such buildings form a housing community (Article 6 of the Apartment Ownership Act), which is considered to be a legal entity[15]. These persons make the most important decisions connected with the functioning of a housing community in the form of resolutions (Article 23(1) of the Apartment Ownership Act). Despite this, the amendments introduced in connection with the COVID-19 pandemic did not provide for the possibility to adopt resolutions of the owners of premises by means of distance communication. The reason for the lack of such an amendment is not clear, since such right was expressly provided for in the case of the meeting of shareholders of a limited liability company, the general meeting of a joint-stock company, the general meeting of a cooperative and of the authorities of associations and foundations. Certainly neither the importance of the decisions to be made, nor the large number of persons entitled to vote can be regarded as such a reason, because under corporate, cooperative, associations and foundations laws the number of persons entitled to vote may be equally large and the importance of the matters to be discussed at least equally high. Nor can the reason be the question of security, because under Apartment Ownership Act there already is a possibility of voting in writing (without personal presence at the meeting), which guarantees a similar level of security. Moreover, as can be seen from the example of the CCC regulations, ensuring an adequate level of security is also possible with remote voting.

However, the Apartment Ownership Act currently provides for a possibility to use the means of remote communication for a management board of the housing community. As a result of the introduction of Act of 30 March 2020, the Apartment Ownership Act was amended by adding Article 21(4), which allows for the possibility to adopt resolutions of the management board if

[14] Journal of Laws No. 85, item 388 [hereinafter: Apartment Ownership Act].

[15] Resolution of Seven Judges of the Supreme Court – Civil Chamber – Legal principle of 21 December 2007, ref. no. III CZP 65/07.

all members of the management board have been duly notified of the meeting or of the vote in writing or by means of direct remote communication. With reference to Article 21(4) of the Apartment Ownership Act, legal scholars and commentators emphasize that its addition was unnecessary, because the possibility of holding remote meetings was already allowed earlier, in the absence of such prohibition [Berek 2020]. Moreover, this provision is much less precise than its counterpart in CCC, because it does not explicitly grant the possibility to participate in meetings via electronic means of communication [Doliwa 2021], but only stipulates that sending a notice in one of the described ways is a condition for the possibility of adopting a resolution of the management board. Additionally, reading this regulation literally, one may come to a conclusion that the notice is effective if it is sent to a member of the management board in any of the described ways (in writing or by means of remote communication), regardless of whether such person consented to a given method of communication. The intention is understandable, however, and it should be recognized that the legislator intended to grant the possibility to participate in meetings by means of remote communication, if the members of the body agree to it. This does not change the fact that in this respect the regulations contained in Article $208(5^1) – (5^2)$ CCC and Article $371(3^1) – (3^3)$ CCC are much clearer.

It should be also noted that pursuant to Article 5 of Act of 10 December 2020 amending certain acts supporting the development of housing,[16] the entire Article 21(4) of the Apartment Ownership Act was repealed. The explanatory memorandum to the act indicates that such a change "is aimed at improving the functioning of housing community boards, which will result in better functioning of entire communities and their members. The change is particularly important in the context of the efficient functioning of the management board during and after the state of emergency, so that the residents of the communities are provided with fast and efficient service [...]."[17] One can guess that the legislator intended to liberalize the procedure of adopting resolutions of the management board, resigning from the requirement of carrying out the procedure of notifying about the meeting or voting. Leaving aside the question whether such a solution is justified and applying the rules of historical interpretation one may come to a conclusion that currently resolutions cannot be passed by electronic means since the provision allowing for such a possibility has been repealed. However, it should rather be assumed that the purpose was to simplify the functioning of the management board and to maintain the possibility to operate with the means of remote communication, while abandoning the requirement of prior notification of the meeting or vote

[16] Journal of Laws of 2021, item 11.

[17] Parliamentary print 534 – Government draft act on amending certain acts supporting the development of housing.

of the management board. However, this is another circumstance confirming the lack of precision in the regulations of the Apartment Ownership Act.

SUMMARY AND CONCLUDING COMMENTS

Regulations introduced during the COVID-19 pandemic in relation to remote meetings of bodies of corporate and non-corporate entities are similar at the core, but the detailed solutions adopted in particular cases are different. Their comparison shows that the optimal regulation was adopted in the Code of Commercial Companies. It may be said that these solutions, particularly in relation to a limited liability company, take into account the possibilities offered by modern technology, but at the same time they do not impose overly stringent requirements. Moreover, the rules adopted in relation to a limited liability company guarantee an appropriate level of security and, thanks to the reference to internal regulations, allow the introduction of solutions that take into account the specificity of the functioning of a given entity. The instruments relating to a joint stock company also deserve credit, as in their vast majority they are identical to those concerning a limited liability company. Admittedly, in some cases they provide for stricter requirements, but they might be justified by the higher level of complexity of this type of entity.

The regulations included in the remaining acts are marked by various disadvantages, which include above all the provisional character of the solutions introduced (Cooperative Law, Law of Associations and Law of Foundations), and in some cases even a lack of any regulations allowing for the possibility of holding a meeting remotely (e.g. a resolution of a housing community). There are also other, less significant defects, which together make the regulations of the remaining acts discussed much less elaborated than the regulations of the Code of Commercial Companies. Of course, this does not mean that the solutions adopted in the CCC contain a universal formula that can be applied to all other types of entities. Nevertheless, the regulations included in this act may be a good starting point for developing lasting measures that will allow for remote functioning of the discussed categories of entities in the future.

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JOHN PAUL II – THE POPE OF THE FAMILY

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Abstract. Karol Wojtyła, from the very beginning of his episcopal ministry, expressed the conviction that marriage and family are among the most valuable assets of mankind. No wonder that the issues of these two institutions (closely related to each other) remained at the center of his attention as pope. His pastoral concern for marriage and family, as well as his great contribution to promoting them, earned him the title of "Pope of the Family." This was confirmed by Pope Francis on April 27, 2014 during the canonization of John Paul II. The activity of the Polish Pope in the service of marriage and family covered a wide spectrum: legislation, education and the organizational and administrative sphere. This commitment of the great Legislator, Teacher and Shepherd, lasting nearly 27 years, significantly enriched the existing treasury of the Church in such a socially important field. The testimony of the tireless successor of St. Peter, who recognized that "the family is the cradle of life and love, where man is born and grows" and that "the mainstream of the civilization of love flows through the family."

Keywords: marriage, family, John Paul II, Pope of the Family

"The happiness of a human, social community as well as Christian community is closely related to successful life of marriage and family community."[1] This statement contained in the Pastoral Constitution on the Church in the Modern World *Gaudium et spes* of the Second Vatican Council seems to clearly indicate the role of marriage and the family that arises on its soil. "The Church, will say sixteen years after the adoption of the above-mentioned document, John Paul II, aware of the fact that marriage and the family are one of the most valuable goods of humanity, wants to teach and help those who, knowing the values of marriage and family, try to remain faithful to them."[2]

The future Pope has expressed his conviction that marriage and the family are among the most precious goods of humanity since the beginning of his

[1] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025–115 [hereinafter: GS], no. 47.

[2] Ioannes Paulus PP. II, Adhortatio apostolica de Familiae Christianae muneribus in mundo huius temporis *Familiaris consortio* (22.11.1981), AAS 74 (1982), p. 81–191 [hereinafter: FC], no. 1.

episcopal work. Already in the first edition of the pioneering work "Miłość i odpowiedzialność" [Love and Responsibility] (Lublin 1960), the Auxiliary Bishop of the Archdiocese of Krakow at the time states: "The family itself is already a community, a small society on which every great society depends in its existence, e.g. nation, state, Church [...] The family is the most complementary institution, related to the foundations of human existence [...] The family is an institution based on marriage" [Wojtyła 1962, 210]. The problems of marriage and family then remained at the centre of Karol Wojtyła's attention as Archbishop of Krakow.[3]

The former Metropolitan of Krakow continued – from the very beginning – his special commitment to promoting a family based on marriage as Bishop of Rome. No wonder that the title "Pope of the Family" was increasingly attributed to him. This was confirmed by Pope Francis in the homily delivered on 27th April 2014 during the canonisation of the Polish Pope, stating: "In the service of the People of God he was the Pope of the Family. He once said himself that he would like to be remembered as the Pope of the Family."[4]

Concern for the family, which held a special place in the pastoral service of John Paul II, found its expression in his laws, teaching (several significant documents and numerous speeches), as well as in the organisational and administrative sphere.

1. LAWS

The 1983 Code of Canon Law[5] defines marriage as follows: "The covenant by which a man and a woman form with each other a community of life, directed by its nature to the good of the spouses and to the begetting and rearing of offspring, raised by Christ – between the baptised – to the dignity of a sacrament" (can. 1055 § 1).

Emphasising that marriage is a whole-life community means that it is not a community only in the area of intimate (sexual) life, as has often been thought, but that it is a community also in all other areas of life: social, cultural, spiritual, etc. The whole-life community of the spouses is by its nature directed towards two objectives: the good of the spouses and the birth and education of children. This twofold orientation of the marital community stems from its very nature, i.e. from its very purpose, intended by God. This was

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[3] See *Małżeństwo chrześcijańskie*, in: *Duszpasterski synod archidiecezji krakowskiej 1972–1979*, vol 1: *Przebieg prac synodalnych. Dokumenty synodu*, Kuria Metropolitalna, Kraków 1985, p. 323–33.

[4] See https://misericors.org/kanonizacja-jana-pawla-ii-i-jana-xxii-homilia-papieza-franciszka-27-kwietnia-2014/ [accessed: 29.02.2020].

[5] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1–317 [hereinafter: CIC/83].

emphasised by the Second Vatican Council when it noted that "marriage has been endowed by the Creator with various goods and purposes" (GS 48) and that "mutual love between spouses must be adequately expressed, developed and matured" (GS 50).

The good of the spouses, towards which marriage is directed, consists in the spouses helping each other in every area of the community of life, in developing and perfecting their personalities in terms of human values, shaped in union with Christ, that is, in the search for holiness. It can be said to be the individual goal of marriage, the heart of which is the marital love of the parties.

The last element of the definition of marriage relates to the sacramental dignity of this relationship. Referring to the statement in the Constitution *Gaudium et spes* (no. 48), the Legislator adds that "in Christian marriage the spouses are furthermore strengthened by a special sacrament and, as it were, consecrated to the duties of their state and dignity" (can. 1134 CIC/83). The descriptive definition of marriage presented above is supplemented in a way by can. 1056 CIC/83 listing two essential attributes of this relationship: unity (or exclusivity) and indissolubility.

2. TEACHING

2.1. The Creators idea for marriage and family and the need to resist attempts to contest this idea

First of all, it should be made clear that marriage and the resulting family are essentially inseparable realities [Sefrrano Ruiz 2000, 94–96]. For the importance of a truly marital union between a man and a woman is revealed in the function of the family they intend to establish. And *vice versa*: the family is constituted by virtue of marriage, and therefore the same relationship between the spouses is by nature a truly family relationship [Errázuriz 2016, 29–30]. The fundamental idea in the field of marriage and family was taken up by John Paul II on many occasions. He emphasised above all that marriage and the family are institutions of natural law, and its features are inscribed in the very existence of a man and a woman (FC 11–12).

Noting that in todays world there is an ever decreasing sense of the natural and religious meaning of marriage, both in personal and public life, when not only the qualities and purposes of this union are called into question, but even the value and usefulness of the institution of marriage itself, and when the number of de facto unions, even between persons of the same sex, is on the increase, John Paul II considers it necessary to recall, not only to the followers of the Church, but also to all concerned with true human progress, certain

principles fundamental to humanity which safeguard the dignity of every human being (FC 11–12).

As the focal point and also the basic element of these principles, the Pope considers the correct concept of love between two persons of the same dignity, but different and complementary in their sexuality. He therefore notes that, in accordance with the doctrine of the Second Vatican Council (GS 49), which is also taken into account in the post-conciliar codes of canon law (CIC/83 and the Code of Canons of Oriental Churches[6]), effective love of another, permeated by a sincere desire for his good, is not to be confused with mere affection or psychical and physical attraction (FC 11).

"The total gift of the body, proclaims the papal apostolic exhortation *Familiaris consortio* of 22th November 1981, would be a hypocrisy if it were not the sign and fruit of full personal devotion" (FC 11).

In the light of these principles, assumes the Roman Bishop, it is possible to establish and understand the essential difference between a simple de facto union, even if it arises out of love, and marriage, in which love "translates" into obligation: not only moral, but also strictly legal. The spousal relationship, mutually undertaken by the parties, subsequently strengthens the love from which it is derived, fostering its permanence in relation to the partner, the children and the community itself. With these principles in mind, how wrong it is to give same-sex unions the character of "marriage." This is opposed first of all by the objective impossibility of realising the fruit of marriage through the transmission of life, in accordance with the Creators design for the very structure of human existence. Besides, the obstacle here is the lack of possibility for that interpersonal complementation and perfection intended by God, both on a physical and biological level and on a strictly psychological level, between man and woman. In this perspective, love is not an end in itself, and is not reduced to the bodily union of two beings, but is a profound interpersonal relationship which reaches its culmination in full mutual self-giving and in cooperation with God the Creator, the ultimate source of all new human existence.[7]

Referring to the theme of any attempt to deviate from the natural law inscribed by God in the nature of the person, the Holy Father notes that attempts are made to justify it by the freedom available to man. However, this is a mere excuse. For every believer knows that freedom is a great gift which God has made in his generosity and goodness, a gift which must be properly understood and which must not be an obstacle to human dignity.[8]

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[6] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1045–353.

[7] Giovanni Paolo II, *L'allocuzione alla Rota Romana del 21 gennaio 1999*, AAS 91 (1999), p. 625.

[8] Ibid., p. 626.

Driven by the need to decisively disavow ideas and views opposed to the concept of marriage derived from the Creator's plan, John Paul II regards as "dangerous and insidious attacks" any attempt to deny the irreplaceable value of the family based on marriage. In an address to participants at the Plenary Assembly of the Pontifical Council for the Family on 4th June 1999, he said: "Even false alternatives to the family are proposed and demanded to be recognised by legislation. However, when laws that should serve the family as the basic good of society turn against it, they become a dangerous agent of destruction."[9]

2.2. The goals of marriage

As mentioned above, marriage is for the good of the spouses and for the birth and education of offspring (can. 1055 § 1 CIC/83). These two goals, closely related to each other, create unity in multiplicity. The well-being of the spouses means that they help each other in every area of life and take care to build up a community of love; in fact, the latter task implies the realisation of the former.

The theology of conjugal love outlined in the perspective of the biblical "beginning," allows the characteristic features of such love to be recognised in full light. According to John Paul II, conjugal love is above all fully personal. This is determined by the radical commitment of the spouses, i.e. in the spheres of spirituality, sensuality and affection (FC 13). *Amor coniugalis*, aiming at deeply personal unity, "not only unites one body, but forms one heart and one soul" (FC 13).

The Holy Father's statement is significant that an adequate understanding of conjugal *communio personarum* is the perception of it *in Trinitate*, that is, according to the measure of the "image of God" [Styczeń 1981, 50]. In the apostolic brief on the Dignity and Vocation of Women, *Mulieris dignitatem* of 15th August 1988, the Successor of St. Peter writes: "The God who makes himself known to people through Christ is a unity of the Trinity: unity in communion. In this way, new light is also shed on that likeness and image of God in man mentioned in Genesis."[10]

In the Letter to Families, the Holy Father discusses the topic of demanding love. Love is true when it creates the good of people and communities and when it is able to give this good to the other people. At the same time, it is

[9] See https://www.jp2w.pl/42833/O/W_obronie_rodziny_i_jej_praw (html) [accessed: 05.03. 2020].

[10] Ioannes Paulus PP. II, Litterae apostolicae de dignitate ac vocatione mulieris Anno Mariali vertente *Mulieris dignitatem* (15.08.1988), AAS 80 (1988), p. 1653–729, no. 7. See Pastwa 2007, 66–67.

demanding, especially for those who are open to Evangelisation. Demanding love is at the heart of the family.[11]

With regard to procreation, the Holy Father presents spouses as co-workers in the love of God the Creator, recalling – following the Encyclical *Humnae vitae* of Paul VI of 25th July 968 – that "conjugal love must be fully human, exclusive and open to new life."[12]

In the Letter to Families, the Pope reminds us that man cannot fully find himself except "through the gratuitous gift of itself". Conjugal communion becomes parental communion through the gift of love. The new man, born in marriage, appears as a gift, "he is the Creator's first gift to creation" (GrS 11). The genealogy of a person is inscribed in the genealogy of a family. A child, however, as the Holy Father notices, means the new difficulties and new needs and costs for parents. So there maybe a temptation of not to have a child. The child, however is a gift for parents and siblings – "the gift of life becomes a gift for the ones who gave the life" (GrS 11).

The topic of responsible parenthood has been presented extensively, John Paul II reminds in the encyclical of Paul VI *Humanae vitae*, at the Synod of Bishops in 1980, in the Apostolic Exhortation *Familiaris Consortio*, and in in Structures of the Congregation for the Doctrine of the Faith *Donum vitae.* By proclaiming the teaching contained in these documents, "the Church teaches the moral truth about responsible parenthood and defends it in the face of the contrary trends of the present day" (GrS 11)[13]

When it comes to parenting, Pope Wojtyła is definitely in defense of life. It regards as dangerous and reprehensible any legislation that promotes the deprivation of life of the unborn. "No human legislator, he states, can say: you are allowed to kill, you have the right to kill, you have the right to kill or even you should kill" (GrS 21). After all, God says categorically: "Do not kill." The civilisation of love, as he will say another time, means rejoicing, among other things, that "man is born into the world" (J 16, 21). It also means "rejoicing in the truth" (1 Kor 13, 6). The civilisation of love is opposed by a civilisation that results in a consumerist and anti-natalist mentality. This is a serious threat to the family (GrS 13).

With regard, in turn, to the upbringing of offspring, the Holy Father points out that it is a process in which the mutual communion of persons is revealed in a special way. It is a two-way bestowal of humanity and a form

[11] Idem, Litterae Familiis datae ipso volvente sacro Familiae anno MCMXCTV *Gratissimam sane* (02.02.1994), AAS 86 (1994), p. 868–925 [hereinafter: GrS], no. 13.

[12] Paulus PP. VI, Littarae encyclicae de propagatione humanae prolis recte ordinanda *Humanae vitae* (25.07.1968), AAS 60 (1968), p. 481–503, no. 9–12.

[13] John Paul II, *Homilia w czasie Mszy św. odprawionej dla rodzin* (Szczecin, 11.06.1987), in: *Jan Paweł II. Pielgrzymki do Ojczyzny: 1979, 1983, 1987, 1991,1995, 1997. Przemówienia, homilie*, ed. J. Poniewierski, Znak, Kraków 1997, p. 455.

of apostolate, for the educator "gives birth" in a spiritual sense [Luber 2004, 56–66]. Through education, parents participate, states John Paul II, in Gods "paternal and yet maternal pedagogy" [ibid.].

In Article 5 The Charter of the Rights of the Family of the Holy See, approved by John Paul II on 22nd October 1983, recognises the right of parents to bring up their children (in accordance with their religious and moral convictions) as a primary and inalienable right, since it flows from the fact of the transmission of life.[14]

2.3. Essential attributes of marriage and the sacramentality of marriage for the baptised

As stated in can. 1056 CIC/83, the essential qualities of marriage are unity and indissolubility. John Paul II reminds us that the essential qualities of marriage are inherent in the very existence of that union, without being in any way external to it. The reinforcement of these qualities in Christian marriage through the sacrament, as stated in the canon referred to, rests on the foundation of natural law. Omitting the latter would not allow one to understand the redemptive work and the glorification of marital reality by Christ.

The Holy Father pays special attention to the attribute of the indissolubility of marriage, stressing that the good of indissolubility is the good of marriage itself. It is therefore completely wrong to claim that this quality has been imposed by human law; the latter's task is only to explain and defend the natural law itself, which is always a liberating truth.[15] "Rooted in the personal and total endowment of the spouses and required for the good of the children, the indissolubility of marriage, states the Pope of the family, finds its ultimate truth in Gods intention expressed in Revelation: God wills the indissolubility of marriage and gives it as a fruit, as a sign and requirement of the absolutely faithful love which He gives to man and which Christ the Lord nourishes for His Church" (FC 20).

With a view to questioning the indissolubility of marriage, the Pope states: "To those who in our time find it difficult or impossible to be bound to one person for life, and to those who hold views distorted by a culture that rejects the indissolubility of marriage and even ridicules the spouses' commitment to fidelity, it is necessary to recall anew the joyful message of the absolutely binding power of that conjugal love which finds its foundation and its strength in Jesus Christ" (FC 20).

[14] Carta dei Dirtti della Famiglia presentata dalla Sante Sede a tutte le persone, istituzioni ed autorita ed autorita interessate alla missione della famiglia nel mondo di oggi (22.10.1983), "Communicationes" 15 (1983), no. 2, p. 140-52 [hereinafter: Carta dei Dirtti].

[15] Giovanni Paolo II, *L'allocuzione alla Rota Romana del 1 febbraio 2001*, AAS 93 (2001), p. 362.

By Christ's will, the natural marriage of the baptised was raised to the dignity of a sacrament. In Christian marriage, the legislator states in can. 1134 CIC/83, that the spouses are strengthened by a special sacrament and, as it were, consecrated to the duties of their state and dignity.

The question of the sacramental nature of baptised marriage was addressed by John Paul II in an address to the Roman Rota on 1st February 2001.[16] He pointed to the fact that since the Second Vatican Council there have been attempts, often incompatible with tradition, to strengthen the supernatural dimension of marriage with theological, pastoral and juridical proposals, such as the one requiring faith for marriage.

In addressing this last issue, the Holy Father recalls at the very beginning of his Pontificate, after the Synod of Bishops in 1980 dedicated to the family, he discussed the matter in the Apostolic Exhortation *Familiaris consortio*, when he pointed out: "Among the sacraments, marriage has the characteristic which distinguishes it from the others, that it is a sacrament of a reality already existing in the economy of creation, that it is the same matrimonial covenant established by the Creator «from the beginning»" (FC 68).

Requiring faith, a condition that goes beyond the mere intention to marry according to God's plan taken "at the beginning," would not only create the serious dangers indicated in the Apostolic Exhortation *Familiaris consortio* (unjustified and discriminatory judgements or doubts about the validity of already contracted marriages, especially by baptised non-Catholics), but could also inevitably lead to the separation of marriage between Christians and other people. This, in turn, would be profoundly contrary to the true meaning of God's design, according to which it is created reality that is the "great mystery" in relation to Christ and the Church.[17] The same problem was addressed by John Paul II in his allocution to the Roman Rota of 30th January 2003. And here he makes it clear that raising by Christ the natural reality to the dignity of a sacrament did not in any way change its nature.[18]

2.4. Relationships in the family

The family, the basic unit of social life, is a community that includes spouses and children, and often other people. Members of the family community should strive to ensure that their mutual relations are proper.

John Paul II sees the need for the co-creators of the family to be inspired by the "law of selflessness" which, "respecting and strengthening in everyone and in everyone personal dignity as the only reason for value, takes the form

[16] Ibid., p. 353–65.

[17] Ibid., p. 364–65.

[18] Giovanni Paolo II, *L'allocuzione alla Rota Romana del 30 gennaio 2003*, AAS 95 (2003), p. 393–97. See Góralski 2008, 92–108.

of cordial openness, encounter and dialogue, disinterested readiness to serve, generous service and profound solidarity" (FC 43). The strengthening of an authentic and mature community of persons in the family is an irreplaceable school of social life, teaching the establishment of wider social contacts in a spirit of respect, justice, dialogue and love. Recalling the statement of the Pastoral Constitution *Gaudium et spes* (no. 52), the Holy Father notes that "in the family, different generations meet and help each other in achieving fuller wisdom in life and in reconciling the rights of individual people with the requirements of social life" (FC 43). In the family, in this *communio personarum*, "a whole set of interpersonal references emerges: spousal, fatherhood-motherhood, sonship, brotherhood" (FC 15).

The Polish Pope draws attention to the value and importance of the multi-generational family although there is a contemporary tendency to limit family ties only to two-generation relationships; it is not conducive to sharing the common good. Against this background, the words of the Pope sound bitter: "There is little human life in our modern families" (FC 10).

Deploring the high number of divorces, the conflict in many families, the prolonged separation of spouses when one of them goes abroad, the closing of many families around their own affairs, the lack of openness to others, the disappearance of the true family bond, the lack of love between parents and children and the abuse of alcohol by some members of the family, the Holy Father calls for "forming people in love, practising love in all references to our neighbours, so that love embraces the whole community."[19]

2.5. The mission of the family in the Church

Each person in the family "is born and gradually, through education, is introduced into the human community, but also through baptismal rebirth and education in faith is introduced into the family of God, which is the Church," we read in the Apostolic Exhortation *Familiaris consortio* (no. 15). "The Church finds in the family, born of the sacrament, her birthplace and the place where she enters into human generations and where they enter into the Church" (FC 15).

Every Christian family, says the document, is called to build up the Kingdom of God by participating in the life and mission of the Church. The ties that bind the Church to the Christian family make it "a kind of Church in miniature (the domestic Church) and make it a kind of living reflection and historical presentation of the mystery of the Church" (FC 49).[20]

[19] John Paul II, *Homilia w czasie Mszy św.* (03.06.1991), in: *Jan Paweł II. Pielgrzymki do Ojczyzny*, p. 616.

[20] John Paul II, *Czym jesteś rodzino chrześcijańska. Przemówienie Ojca świętego 8 października 1994 roku*, in: *Jan Paweł II, Rodzino, co mówisz o sobie? Dokumenty i przemówienia papieskie*

Opening the World Meeting of Families in Rome on 8th October 1994, John Paul II began with a powerful question: "Family, Christian family: what are you ?" And then he said: "We find the answer already in the beginnings of Christianity, in the apostolic period: «I am the domestic Church». In other words: I am a little Church, a Church at home."[21] And he added: "The Church and the family come from the same sources. They have the same origins in God: in God the Father, the Son and the Holy Spirit."[22]

It is the Mother-Church, according to the Pope, that gives birth to, educates and builds the Christian family, fulfilling towards it the salvific mission received from Christ. On the other hand, the Christian family "is so much a part of the Church's mystery that it becomes, in its own way, a participant in the salvific mission of the Church herself" (FC 50) [Styczeń 1987, 119–20].

John Paul II stresses that the Christian family, the center and heart of the civilisation of love, is called to a living and responsible participation in the mission of the Church; its participation in this mission should take place in a communal way, so the spouses-parents and children should serve the ecclesial community – through conjugal and family love. This participation is expressed and realised in the prophetic, priestly and royal mission of Jesus Christ and his Church (FC 50) [Dec 1994, 7–14].

The family's participation in the prophetic mission is realised in receiving and proclaiming the God's Word, which implies their obedience to faith [Góralski 2015, 42–44, 47–54]. By carrying out these duties, the family becomes an evangelising community. Spouses-parents are called to a special evangelisation testimony to be "the conscience of family culture and active subjects in building an authentic humanism of *familie*" (FC 7). Participation in the royal mission should be expressed in serving the other man. The Christian family, enlivened and sustained by the new commandment of love, lives with hospitality, respect and service to every human being. This is to be done primarily "inside and for the good of marriage and the family, through the daily effort of creating an authentic community of people, the foundation of which is and nourished by an internal communion of love" (FC 64). Thanks to the love of the family, the author of *Familiaris consortio* emphasises, the Church should take on a more family character, becoming more human and fraternal (FC 64).

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w Roku Rodziny, Wydział Duszpasterstwa Rodzin Kurii Metropolitalnej „Czuwajmy", Kraków 1995, p. 234. See also Pastwa 2015, 103–105.

[21] John Paul II, *Czym jesteś rodzino chrześcijańska*, p. 234.

[22] Ibid.

2.6. The mission of the family in the secular community

The family, which is a community of persons, this smallest unit of social life, is "the basic institution for the life of every society" (GrS 17). By virtue of its nature and vocation, the family, "far from going into its shell, opens itself up to other families and to society, taking up its social task" (FC 42). "As a community of love and life, it is a community most strongly «grounded» and in its own way a sovereign community, although at the same time it is a multi-dependent community" (GrS 17). The Charter of Family Rights emphasises that the family, a natural union, is "primary in relation to the state or any other community" (Carta dei Dirtti, Introduction, point D).

As John Paul II points out in his Letter to Families, a family-institution expects society to recognise its identity and to accept its own social subjectivity (GrS 17). Social recognition can only be given to the marriage through which "a man and a woman form a community of life with each other, directed by their nature towards the good of the spouses and towards the birth and raising the offspring" (can. 1055 § l CIC/83).

When it comes to family sovereignty, which is ultimately in the foundation of marriage and conjugal fertility [Carrers 2012, 919], it should be recognised by all institutions, both social and ecclesiastical. Neither the Church nor the state can create any family relationship, because their power is limited to recognising the sole right of the spouses (sovereign decision) to establish the family and all family relationships.

In the Letter to Families, John Paul II notices that there is an almost organic bond between the family and the nation or ethnic group, and its basis is primarily participation in culture. Parents also bear children for the nation, so that they can be members and can participate in its historical and cultural heritage. From the very beginning, the identity of the family appears to a certain extent on the foundation of the identity of the nation to which the family belongs. By participating in the cultural patrimony of the nation, the family contributes to the specific sovereignty that flows from its own culture and language. Not only the nation but also each family finds its spiritual sovereignty through culture and language. The family is very organically united with the nation, and the nation with the family (GrS 17). "John Paul II will say in Nowy Targ on 8th June 1979: the nation depends on what the family is like, because man depends on it."[23]

In the Apostolic Exhortation *Familiaris consortio*, John Paul II notes that although the family and society complement each other in the function of defending and developing the good of all people and of every human being, "society, or more precisely the state, should recognise that the family [according

[23] John Paul II, *Homilia w czasie Mszy św.* (08.06.1979), in: *Jan Paweł II. Pielgrzymki do Ojczyzny*, p. 161.

to the teaching of the Second Vatican Council – W.G.] is «a community enjoying its own and original right»[24] and therefore that it is strictly obliged to respect the principle of subsidiarity in relation to the family" (FC 45). Public authorities, as per the following document, convinced that the good of the family is an irreplaceable and indispensable value in the community of citizens, should do everything possible to secure all aid – economic, social, pedagogical, political, cultural – necessary for the families, so they could meet their responsible tasks in a dignified way" (FC 45).

The Letter to Families further emphasises that the family is at the centre of all these problems and tasks: to relegate it to an assigned and secondary role and to remove it from its position in society would seriously harm the true growth of the whole social substance (GrS 17).

The Charter of Family Rights states that "public authorities should recognise and promote the dignity, legitimate independence, intimacy, integrity and stability of each family" (Carta dei Dirtti, Introduction, Article 6a) and in the Apostolic Exhortation *Christifideles Laici* of 30th December 1988, John Paul II emphasises that Christians should make sure that the family, which is "the first place of «humanisation» of a person and society," is aware of its own identity and becomes more and more an active and responsible promoter of its own development and participation in social life.[25]

2.7. Family Ministry

Recognising the need for the Ministry, the presence of the Church to support the family, John Paul II devotes much attention to the Family Ministry. In his speech at the opening of the Synod of Bishops on 26th September 1980, John Paul II said that "it is the family that gives life to society. After all, it is there, where the core of humanity of every human being on earth is formed through the great work of education."[26] It is therefore up to the Ministers to make every effort to ensure that the spouses consider it a special task to guard this love, fidelity and honesty and all the goods that flow from it for the spouses themselves and for society.[27]

The area of the Family Ministry is the subject of the fourth part of the Apostolic Exhortation *Familiaris consortio*, where it speaks successively

[24] Sacrosanctum Concilium Oecumenicum Vaticanum II, Declaratio de libertate religiosa *Dignitatis humamae* (07.12.1965), AAS 58 (1966), p. 929–46, no. 5.

[25] Ioannes Paulus PP. II, Adhortatio apostolica post-synodalis de vocatione et missione Laicorum in Ecclesia et in mundo *Christifideles laici* (30.12.1988), AAS 81 (1989), p. 393–521, no. 40.

[26] Idem, *Przemówienie na otwarcie Synodu Biskupów* (26.09.1980), in: *Jan Paweł II o małżeństwie i rodzinie 1978–1982*, Warszawa 1983, no. 5.

[27] Idem, *Homilia podczas Mszy św. dla Rodzin* (12.10.1980), w: *Jan Paweł II o małżeństwie i rodzinie 1978–1982*, p. 18–21.

about the stages of the Family Ministry, its organisation, employees and special circumstances. With regard to the stages of the Family Ministry, the Holy Father first indicates preparation for marriage – further, closer, immediate (FC 66). Then, on the basis of this preparation, he gives indications regarding the wedding rite, evangelisation of baptised non-believers (FC 68) and the Family Ministry of married couples (FC 69).

The papal teaching on the latter issue seems particularly significant here, where the need for multiple support of young families is emphasised, which "in the context of new values and new responsibilities are more exposed than others, especially in the first years after the wedding, to possible difficulties, such as those related to adapting to a common life or the birth of children" (FC 69). When it comes to the organisation of the Family Ministry, the Author of the Exhortation draws attention to the necessity to create the structures of this Ministry, which should include: the church community, in particular the parish, Christian families and associations of families for families (FC 70–72) [Kamiński 2013, 295–308].

With regard to the Family Ministry workers, the aforementioned papal document, first of all, indicates bishops and priests, and then monks and nouns, lay specialists and recipients and workers of social communication (FC 73–76).

Finally, when it comes to the Family Ministry in difficult cases, the former Archbishop of Kraków refers to the category of people and families who – for various reasons – need more care and support, e.g. "ideologically divided" families, elderly spouses, mixed marriages or people in "abnormal" situations (trial marriage, real free relationships, Catholics only married by civil marriage, separated and divorced, who have not remarried, divorced, who entered into a new relationship), deprived of a family (FC 77–85).

3. ACTIVITY IN THE ORGANISATIONAL AND ADMINISTRATIVE SPHERE

Apart from the activity of the Holy Father in the legislative and teaching spheres, it is not difficult to notice his involvement also in the organisational and administrative area.

Bearing in mind the need for a more thorough and institutional treatment of the family and its affairs, John Paul II established the motu proprio *Familia a Deo instituta* of 9th May 1981, a new organ of the Roman Curia: the Pontifical Council for the Family[28] which replaced the Paul VI Committee for the Family established on 11th March 1973 [Kukołowicz 1985, 53].

[28] Ioannes Paulus II, Littarae apostolicae motu proprio datae Pontificium Consilium pro Familia constituitur *Familia a Deo constituta* (09.05.1981), AAS 73 (1981), p. 441–44.

By virtue of *Pope Francis motu proprio Sedula Mater* of 15th August 2016[29] The Pontifical Council for the Family became part of the newly created Dicastery for the Laity, Family and Life (it was headed by Archbishop K.J. Farrell). The Council was responsible for transmitting the Church's teaching on marriage and the family, initiating and coordinating Ministerial activities for the family, animating Catholic associations related to the family and defending human life, and cooperation with non-Catholic pro-family organisations [Kamiński 2013, 296]. Members of this authority of the Roman Curia have formed the core of the Holy See's delegation to international conferences on the family, presenting there the Christian vision of marriage and the family and defending it against "ideological attacks by circles that in various ways try to undermine their value" [ibid.].

A significant form of promoting the family were the World Meetings of Families organised by the Pontifical Council – on the initiative of John Paul.[30] It was also on the initiative of the Polish Pope that the Institute for the Study of Marriage and the Family at the Pontifical Lateran University, founded on 13th May 1981, was created, later transformed by Francis (19th September 2007) into the Theological Institute for the Study of Marriage and the Family.

FINAL REMARKS

The most succinctly presented activity of Pope John Paul II in the sphere of his pastoral care for the family (based on marriage) seems to clearly indicate how extraordinary this commitment was and how rich it brought. Concern for this basic social unit, deeply lying at the heart of the great Humanist, made itself felt in every possible level of his activity: legislative, teaching and administrative. This creative and tireless activity of the great Legislator, Teacher and Shepherd, lasting almost 27 years, immeasurably enriched the existing treasury of the Church in such a socially important field. Imbued with the idea of Christian personalism and firmly embedded in the tradition of Mediterranean culture, the axiological "project" of emphasizing human dignity, promoting the dignity of the human body, shaping virtues and character as well as education for freedom and love, addressed to the Christian family, can be considered timeless. The integral connection of the "civilization of love" with the institution of the family, which is the "center and heart" of this civilization, allowed "the Pope from a distant country" to assume that the family is "the first way of the Church." The relationship of the civilization of love shown by him

[29] Franciscus PP., Litterae apostolicae motu proprio datae *Sedula Mater* quibus Dicasterium pro Laicis, Familia et Vita constituitur (15.08.2016), AAS 108 (2016), p. 963–67.

[30] See https://stacja7.pl/ze-swiata/swiatowe-spotkania-rodzin-maja-juz-ponad-20-lat/ [accessed: 14.03.2020].

with the "community of persons," which is the family, enabled him to state that "the family is the cradle of life and love, where man is born and grows" and that "through the family flows the mainstream of the civilization of love."

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PRINCIPLES OF CIVIL SERVICE AS AN ELEMENT OF THE MODERN STATE

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Abstract. The paper deals with the need for legal regulation and application of legal principles as leading legal concepts in civil service and civil service relationships in the Slovak Republic. The paper points at the central importance and content of individual civil service principles whose regulation and application are to considerably contribute to the development of modern and functioning civil service as a crucial personal element of the functioning of civil service in the Slovak Republic.

Keywords: Public service, civil service, legal principles, Board for Civil Service

INTRODUCTION

Good functioning of every advanced democracy requires for the institution of civil and/or public service that must be embodied in the legal order of the State. Independent and professional state apparatus is a necessary condition of the modern democratic state, and its primary interest is the respect for Constitution, constitutional laws and other applicable laws and the only aim is to honour the rights and freedoms of citizens. The state apparatus plays a fundamental and irreplaceable role in the exercise of the functions of the State, placing particular emphasis, in the never-ending process of its improvement, on the strengthening of the role of law which, although applied with other factors, has its specific and irreplaceable role.

Civil service is an institution which, by its nature, has a special mission in the process of performing the duties of the State which are fulfilled in the hierarchic system of the state apparatus bodies by a special category of people who carry out this activity professionally.

1. PUBLIC AND CIVIL SERVICE – LEGAL DEFINITION

The term "public service" defines legal status and activity of employees in public service, i.e. employees of the public sector (State, regional self-governments, in the area of public services).[1] It is an umbrella legal term, larger than the term "civil service". The term "civil service" defines legal status and activity of civil servants – natural persons whose employment relationships is established with the State (i.e. they are in the civil service employment relationship). It is a group of employees whose subject of activity is always connected with the exercise of state power (e.g. employees in civil service, service relationship of members of armed forces).

The particularity of employment relationships in public service causes that public service represents a special type of administrative and employment relationships. The reason behind special "clerical" service right are both special nature of the employer and special nature of the work of the employee (exercise of public service). The level of particularity of legal regulations can, however, vary – depending on whether it is an employee within civil service, self-government or within other public service. If his or her activity is the exercise of authoritarian public service, the level of particularities of the employment relationship is higher and the employment relationship is largely influenced by public elements.

In general, public service employment relationships have, in the legal regulation of the European countries, either private character (with public elements) or public character (the service right is fully separated from general contract (private) employment regime, and are regulated by specific laws governing specifically the status of public servants). Public elements in employment relationships are conditioned by the need to fulfil personnel requirements for the exercise of public service as a special type of activity (it includes mainly the specification of conditions for the selection of employees and for the exercise of service), larger extent of legal duties of employees and even stricter legal liability of employees (as compared to the employees in private sector).[2]

[1] Technical literature defines public service differently. The most comprehensive definition of public service can be understood in several meanings: (a) from the perspective of its organisation, i.e. as a part of the organisational system of the State, as a part of the national apparatus; (b) from the perspective of certain activity: it is an activity of civil servants in the exercise of the functions of the State; (c) as a group of persons: it defines a certain category of persons (civil servants) serving the State; (d) as a legal regime: it expresses the way of organising legal regulation of civil servants; (e) as a legal relationship, it represents legal relationship of civil servants with the State; or (f) as a legal institution, i.e. a list of legal norms regulating specific, homogenous category of social relationships [Kuril 2018, 74].

[2] Compare Košičiarová 2017, 151.

The terms "public service" and "civil service" are not clearly defined by legal theory. The term "public service" is certainly broader in the Slovak Republic, comprising both civil service and the so-called execution of work of public interest. Therefore, a public servant is also an employee performing civil service, but also an employee performing work of public interest. According to the applicable legal regulation, public service is performed as civil service which is performed only within civil service employment relationship (*civil servants*) or within service relationship (employees of Police Corps, Slovak Intelligence Service, National Security Authority, Prison and Court Guard Service, customs officers, employees of Financial Administration, professional soldiers, employees of Fire Rescue Service and employees of Mountain Rescue Service) and the so-called execution of work within public interest[3] performed within employment relationship.

Civil service is connected only to the bodies of the State, and therefore, it is separated from public service. The terms "civil service" and "public service" are widely alternated, because they are very close. However, it must be noted that the alternation of these two terms – in the Slovak Republic – is not correct (although there are countries where this difference is blurred, either as a result of language similarities or broad application of civil service (France, Belgium, Slovenia, etc.).

The term "civil service" is defined by Act no. 55/2017 Z. z. "on civil service and on amendment to certain acts" as amended[4] which regulates civil service. Section 6 of the Act defines civil service as "an activity by which civil servant [i.e. citizen that performs civil service in civil service employment relationship in the Service Authority in the relevant field of service or without determination of the field of service – Section 7] in the extent prescribed by act on civil service or special law, performs the tasks of a national body in the exercise of civil service or performs the tasks in performing national matters in the Service Authority in the relevant field of service or without determination of the field of service and which comprises: (a) management, (b) decision-making, (c) technical drafting of laws, other applicable laws including technical activities relating to discussing, approving and signing, and technical activities relating to the drafts returned by the President, (d) technical drafting of conceptual and strategic documents, (e) technical drafting of

[3] In the Slovak Republic, it is incorrect to apply the term "public service" only to activities performed by the bodies of regional self-government and interest self-government, and/or activities performed partially by self-government institutions and non-self-government institutions or persons upon which the exercise of public service has been conferred to (third part of public service - the so-called "other public service"). In this case, the term "public service" should not be used, but rather the term "work of public interest." This area is currently regulated by two acts: Act no. 552/2003 Z. z. "on execution of work of public interest" as amended and Act no. 553/2003 Z. z. "on remuneration of employees in public sector" as amended.

[4] Hereinafter: Act no. 55/2017 Z. z.

documents for the exercise of national matters, (f) legal representation, (g) control, supervision or inspection, (h) internal audit or national audit, or (i) technical drafting of decisions."

A specific term which the law-maker uses in determining civil service is the performance of national matters. Performance of national matters is an activity that is not "performance of the tasks of civil service, but it is an activity performed by a civil servant (a) only within national interest in relation to the performance of the tasks of a national body or the Service Authority for a national body, (b) by which a civil servant creates conditions for proper exercise of the judiciary or contributes to the exercise of the judiciary, (c) by which a civil servant creates conditions for proper performance of the tasks of the prosecution, or (d) by which a civil servant performs the tasks of Personal Office according to Act no 55/2017 Z. z."

Even the judgments of the European Court of Justice offer the definition of the term "public (civil) service." In the Court's judgment of 17 December 1980, which is legally binding also upon the Slovak Republic, the public (civil service) is defined as "[...] a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities."[5] An earlier judgment of the Court, in case C–152/73, Sotgiu, defined that "[...] public or private nature of the legal relationship is of no consequence for purposes of applying Article 48(4) of the EEC Treaty (Article 45(4) of the Treaty on the Functioning of the European Union). According to Article 45(5) of TFEU, the concept of public service within the meaning of Article 39(4) EC must be given uniform interpretation and application throughout the Community and cannot therefore be left entirely to the discretion of the Member States." Other judgment of the Court, case C–290/94, Commission v Greece, defined that "[...] according to Article 48(4) of the EEC Treaty (Article 45(4) of TFEU), the term public service or civil service covers posts which involves direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the States or of other public authorities and thus presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality." Also, the judgment of the Court, case C–405/01, Colegio de Oficiales de la Marina Mercante Española, limited the application of the exception provided for in Article 39(4) of the EC Treaty (Article 45(4) of TFEU), and therefore "[…] EC exception does not cover posts which, whilst coming under the State or other bodies governed by public law, still do not involve any association with tasks belonging to the public service properly so

[5] The Court's judgment, Commission v Belgium, case C–149/79.

called." The said definitions can be applied to the civil service in our country by analogue, since the differences between the terms "civil service" and "public service" are often removed in the EU law, often due to language differences.

2. PRINCIPLES OF CIVIL SERVICE: LEGAL AND THEORETICAL DEFINITION

Currently, the principles get the top place among the institution in many legal branches of the Slovak legal order (constitutional law, civil procedure law, penal law, administrative law etc.), due to certain persisting crisis in law-making, which can be, in individual cases, overcome by the argumentation of legal principles (argumentation by the principles of rule of law in constitutional law is a typical example). In the application practice, legal principles are designed, *inter alia*, to overcome inconsistencies of specific legal regulation or fill the so-called "loopholes in the law."

The principles of civil service represent a certain value framework or idea principles and background for the application of specific provisions of Act on Civil Service. By their connection to the values resulting from the Constitution of the Slovak republic, they help explain individual institutions of the Act in which they are reflected and presents foundations on which professional, credible, efficient and stable civil service should be built.

Civil service is built on principles that are followed by public officials in the exercise of civil service and by Service Authorities in decision-making in civil service employment relationships. A certain value-added of the principles of civil service is the fact that they enable connection to more general values and principles resulting from the Constitution and individual administrative and legal norms, ensuring consistency and harmony between certain "legal philosophy of State" and conduct of its representatives.

Creating laws on civil service based on principles is something common in the world. Countries such as Great Britain, Ireland, France, Poland, Belgium and US have introduced the principles for civil service and apply them. Their importance as regards other administrative principles is emphasised even by OECD (1999) in European Principles for Public Administration.

Public service just like the organisation of public administration in the EU member states is not regulated by the European Union law. The principle of free movement of persons is of crucial importance for access to employment within public service in the European Union.

However, the question of legal principles in civil service employment relationships is explicitly dealt with by the Council of Europe. The Council supports the concept that public administration must have suitable employees for the exercise of its activities. The Council does not dictate the member states which system of public service to choose. It is only important that the states

respect the principles that represent a solid starting point for efficient public service focusing on citizens. The principles defining the status of public officials in the Recommendation of the Committee of Ministers R (2000) 6 on the status of public officials of Europe and Recommendation of the Committee of Ministers R (2000) 10 on code of conduct for public officials [Trykar 2008].

Principles of civil service which should by followed by legal regulation and legal practice in the member states of the Council of Europe are, according to the Recommendation of the Committee of Ministers R (2000) 6, as follows: 1) the legal framework and general principles concerning the status of public officials should be established by law (and/or collective agreements); 2) the management policies (strategies) relating to public officials should, in general, be the responsibility of the government;[6] 3) recruitment of public officials should be defined by equality of access to public posts and selection based on merit, fair and open competition and an absence of discrimination (this applies to service procedure too); 4) rights, particularly political and trade union rights, should only be lawfully restricted in so far as it is necessary for the proper exercise of their public functions; 5) non discrimination; 6) participation of public officials in the organisation and management of civil service; 7) social protection of public officials by means of the general social security or by means of specific schemes; 8) remuneration commensurate with their responsibilities and function, sufficient so as to ensure that public officials are not put at risk of corruption; 9) duty and right of public officials to relevant training within in the frame of an appropriate training; 10) possibility of protecting their rights (in particular in case of unlawful employment or disciplinary penalty) before a court or other independent institution.[7]

The Recommendation of the Committee of Ministers R (2000) 6 explicitly underlines the responsibility of public officials for discharging the tasks entrusted to them. It is in line with the requirement for good governance. Failure by public officials to fulfil their duties, which can have serious impact on public interest, may lead to the institution of disciplinary proceedings. The disciplinary proceedings must be adversarial and the officials concerned should be entitled to be assisted by a representative of their choice. Public officials should have a legal remedy against disciplinary action.

According to the Recommendation of the Committee of Ministers R (2006), the right of public official to protection include, in general, legal remedies for the protection of their rights against unlawful acts of their employers and the right to protection against illegal acts by third parties, if they promote its interests within their performance. The principle of termination of civil service

[6] Principles of civil service should be stipulated by a law-making body, however their application based on valid legal regulations should be ensured by the supreme body of executive power, or implemented through the relevant bodies of national administration.
[7] See also Košičiarová 2012, 431ff.

employment relationships only for reasons provided for by law is a part of protection of civil servants and the guarantee of protection of civil service against its politicisation and misuse of authority. Considering the serious consequences of civil service employment relationship termination on a person, public officials should have the right to legal remedy and the possibility of defending themselves before court or other independent institutions, also in order to prevent from misuse of powers of civil service.[8]

3. PRINCIPLES OF CIVIL SERVICE IN SLOVAK LEGISLATION

Principles of civil service is nothing new in the Slovak legal order. First time, they were defined in Act no. 312/2001 Z. z. "on civil service and on amendments to certain Acts," and included professionalism, political neutrality, effectiveness, flexibility, impartiality and ethics. However, the explanatory memorandum itself to this Act did not describe in detail the role of these principles and the provisions of the act were not sufficiently connected to the principles, and even contradicted each other in some cases. Act no. 400/2009 Z. z. "on civil service and on amendment to certain acts" replaced the principle of flexibility by the principle of stability of civil service employment relationship. The explanatory memorandum contained specific provisions of this Act, by which these principles should be applied. Because the principles represent value framework for the interpretation of the Act, its makers considered suitable to embody them directly in the introductory articles. These articles contain provisions explaining the meaning of individual principles and their reflection in specific institutions and provisions of the Act.

New act on civil service, i.e. Act no. 55/2017 Z. z., is founded on the principles of political neutrality, lawfulness, transparent employment, efficient management, impartiality, professionalism, transparent and equal remuneration, stability and equal treatment. As compared to the principles defined in Act no. 400/2009 Z. z., the number of principles went up from six to nine. "The principle of ethics" brings more details and was reflected in the "principle of professionalism," however it closely relates to transparent employment, remuneration and, last but not least, fair treatment. The "principle of lawfulness" is a new principle, emphasising the duty of applying lawful procedure by a civil servant in the exercise of civil service and by Service Authorities in decision-making about civil service employment relationships respectively.

Principles of civil service are reflected in individual institutions and provisions of the Act. Principles of civil service define recruitment of civil servants, stability of their civil service employment relationship, career, performance assessment and remuneration. In general, their aim is to ensure maximum

[8] Compare Košičiarová 2017, 153–54.

efficiency and cost effectiveness in providing services to the public. The principles of civil service are currently contained in Articles 1 to 9 of Act no. 55/2017 and include: a) political neutrality (Article 1), b) lawfulness (Article 2), c) transparent employment (Article 3), d) efficient management (Article 4), e) impartiality (Article 5), f) professionalism (Article 6), g) transparent and fair remuneration (Article 7), h) stability (Article 8), i) equal treatment (Article 9).

Political neutrality. The principle of political neutrality prefers public interest to political interests of a civil servant in the exercise of his or her civil functions. Similarly, it applies to Service Authorities which are required to decide politically neutrally on the issues relating the employment relationships. This principle is applied through the performance of relevant duties of civil servants and Service Authorities too.[9]

Lawfulness. The principle of lawfulness means that a civil servant shall, in the exercise of civil service, proceed always in line with applicable laws, internal regulations and service regulations. Similarly, Service Authority must always proceed in line with law. In relation to the Service Authority, civil servants enjoy the rights which allow them to defend themselves against unlawful acts of the Service Authority. For example, civil servants may file a complaint, make a request for examination of the notice and lodge an inquiryto the Service Authority Board.[10]

Transparent employment. The principle of transparent employment ensures equal opportunities for the appointment to the civil service. Candidates for the civil service have public access, guaranteed by law, to information about selection procedure and equal opportunity to apply for a position thanks to the centralisation of information about selection procedures through a central information system of civil service – the so-called "Central Information System." Due to the electronisation of civil service, Act on Civil Service introduces Civil Service Central Information System, consisting of several registers

[9] "Civil servants and Service Authority shall, in the exercise of civil service and civil service employment relationships respectively, prefer public interest to political interest and act in a way that does not raise doubts that they favour a political party or political movement. The principle of political neutrality shall be applied, in particular, through the duty of civil servants to act politically neutrally, refrain from actions which could lead to conflict of interests of the Service Authority with personal interests, not to misuse information gained in relation to the performance of civil service for the benefit of a political party or political movement, and, through the duty of the Service Authority, act politically neutrally in decision-making" (Article 1 of Act no. 55/2017 Z. z.).

[10] "Civil servants and Service Authority shall, in the exercise of civil service and civil service employment relationships respectively, proceed in conformity with the Constitution of the Slovak Republic, legal acts of the European Union, applicable laws of the Slovak Republic, service regulations and other internal regulations. Protection of a civil servant against acts which are considered illegal shall be guaranteed by the rights provided for by law" (Article 2 of Act no. 55/2017 Z. z.).

(register of selection procedures, register of successful candidates, register of redundant civil servants, register of civil service posts and register of civil servants). The implementation of substantial changes in the management of civil service requires for change to human resources management, which is possible only with qualified information. Through this information system, individual Service Authorities and the Office of the Government get comprehensive personnel database for successful implementation of the human resources management strategy, leading to efficient, stable and professional Service Authorities in Slovakia. Common basis for developing Civil Service Central Information System is personal development at all levels of civil service, optimisation of economic activities, informatisation and cost-saving.

If a citizen wishes to be appointed to a permanent or temporary civil service post, he or she must undergo a selection procedure,[11] except for cases when it concerns a civil servant performing public function, constitutional officer expert or a statutory body, with regard to the form of their appointment to the office these employees discharge (appointment, selection) and the institution that appoints to the function (e.g. National Council, President, Government). Exception from selection procedures, whose aim is to speed up the appointment, applies to candidates for temporary deputising of a civil servant, e.g. during his or her long sick-leave. The said categories of civil servants that are appointed to civil service without selection procedure perform civil service for a temporary period, i.e. temporary civil service. The period of temporary civil service lasts during the time over which the public function, function of a statutory body, function of a constitutional officer are exercised or if the reason for deputising of a public official lasts.

The aim of the current legal regulation in the area of selection procedures and winning civil servant as compared to Act no. 400/2009 Z. z., is to ensure higher transparency of selection procedures. The current act precises the process of selection procedure, in particular it defines a single point of access to information about open selection procedures, regulates the composition of the selection committee and appointment of its members, opening the selection procedures and publication of results. With respect to the new concept of staffing, the act defines and introduces restricted internal selection procedure, enlarged internal selection procedure, external selection procedure and a new institution – mass selection procedure which is, partly, a centralised way of filling the vacancies suitable for graduates and larger number of vacancies

[11] "Service Authority shall provide access to information about selection procedure and candidates for civil service shall have the right to public access to this information. All candidates for civil service have equal opportunity to apply for a civil service post and when they meet conditions for appointment to civil service prescribed by law, they have the right to be appointed to civil service. The Service Authority opens, announces, performs and cancels selection procedure under conditions and in a way defined by this Act" (Article 3 of Act no. 55/2017 Z. z.).

in individual Service Authorities. (Similar system functions in the European Union institutions and in countries such as France, Belgium. Ireland, Portugal, Spain, Greece, Luxembourg. In Great Britain, vacancies in the "fast stream" programme are filled this way, enabling fast career for successful candidates, and its aim is to fill civil service posts by the most suitable candidates, especially graduates. The aim of mass selection procedures is to ensure, in particular, observance of uniform standards for appointing candidates to civil service by graduates and creating same competition conditions for these groups of candidates in order to facilitate access to civil service posts).

Efficient management. The principle of efficient management provides for efficiency and cost-effectiveness in the management of civil servants through systemisation of civil service posts and the institution of service appraisal. The systemisation should ensure efficient planning of posts and give an overview of the number of civil service posts in Service Authorities. The principles of systemisation are published by the Office of the Government of the Slovak Republic. Service appraisal introduces the duty to monitor and appraise efficiency of work of civil servants by their superiors.[12]

Impartiality. The principle of impartiality prefers public interest to political interest of a civil servant in the exercise of his or her civil functions, and of Service Authority in decision-making about civil service employment. This principle should be implemented through performance of duties of the civil servant to act and make decisions impartially, refrain from actions which could lead to conflict of interests of the Service Authority with personal interests of a civil servant and do not misuse information gained in relation to the performance of civil service for his or her own benefit of benefit of a third. On the other side, the Service Authority has the duty to act and make decisions about employment without bias and with no consideration of personal interests of individuals who make and publish decisions on behalf the Service Authority.[13]

Professionalism. The principle of professionalism refers to technical, conscientious and ethical performance of service.[14] For this purpose, Service

[12] "Service Authority shall manage civil servants efficiently and cost-effectively. The principle of efficient management of civil servants shall be applied, in particular, by managing and inspecting civil servants by their superiors, creating conditions for proper performance of civil service through the systemisation of civil service posts and service appraisal" (Article 4 of Act no. 55/2017 Z. z.).

[13] "Civil servants, in the exercise of civil service, shall prefer public interest to personal interest and the Service Authority shall, in decision-making about civil service employment relationships, act impartially. The principle of impartiality shall be applied, in particular, through the duty of civil servants to act and take decision impartially, refrain from actions which could lead to conflict of interests of the Service Authority with personal interests, not to misuse information gained in relation to the performance of civil service for their own benefit or for a benefit of a third" (Article 5 of Act no. 55/2017 Z. z.).

[14] "Civil servants shall, in the exercise of civil service, proceed professionally, consciously and in line with the Code of Conduct of Civil Servants, and the Service Authority shall provide them

Authority provides civil servants with required training and gives them room for long-term professional development. The training is ensured through the right and duty of civil servants to be trained and the duty of the Service Authority to provide for the training, while the aim is to reach the level of professional competencies which enable a civil servant to properly perform civil service. The training of civil servants is directly related to the professional, efficient and quality performance of civil service. The current law responds to knowledge gained from the application of Act no. 400/2009 Z. z. By introducing the principle of training, their primary importance for the entire system of the training of civil servants is declared. The new act on civil service replaces the term "increasing competence" by the term "continuous training," which conforms the terminology of Act no. 568/2009 Z. z. "on lifelong learning and on amendment to certain acts" as amended, placing emphasis on comprehensiveness of objectives of the training, professional and personal development and continuity of the training process throughout the entire professional career of a civil servant. Furthermore, the terms "continuous training" and "specific training" were replaced by the term "competence training," focusing on integral professional and personal development of civil servants with emphasis on their efficiency and performance growth. Adaptation training is to be undergone by civil servants during probation period; it is led by a mentor that plays a key role in the adaptation process. The conditions for the performance of a mentor are precisely defined, so the adaptation training reaches qualitatively higher level.

A long-term professional development is based on the institutions of internal selection procedures and service appraisals. Internal selection procedures lead to career development of employees through a closed competition for which only civil servants are allowed to apply and which can take into consideration of their service appraisal. This fact can significantly motivate employees in improving their performance and be promoted within the organisational hierarchy. The performance is assessed by service appraisal. The regular appraisal shall be carried out by direct superior once a year, except for partial service appraisal (change to civil service employment due to transfer of a civil servant) and repeated service appraisal (if the performance is not satisfactory). The relevant superior shall assess expertise and skills of civil servants, their performance, abilities and competences, and their approach to the personal development and willingness to learn. The service appraisal includes appraisal

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with relevant training so that they can reach the level of technical competences allowing them to deliver quality exercise of civil service. The principle of professionalism shall be applied, in particular, through a long-term professional training of civil servants, support of career development, regular service appraisal, right and obligations of civil servants to get training and the Service Authority´s obligation to provide civil servants with the training" (Article 6 of Act no. 55/2017 Z. z.).

interview. A civil servant may raise objections to the appraisal´s results within three days after he or she learns the results of the appraisal.[15]

Transparent and fair remuneration. The principle of transparent and fair remuneration means that civil servants are remunerated based on the conditions provided for by law. The Act (re)defines salary grades and, based on analysis, grades 1 and 2 are cancelled since they were below the limit of the minimum wage and were used only to a minimum extent.[16]

The principle of transparency is applied by the possibility of granting or taking away personal supplementary allowance based on the outcome of appraisal, thus clarifying and objectifying criteria for its granting or taking away, since the criteria and other details about the appraisal are specified by the Decree published by the Office of the Government. The Act specifies the possibility of granting and/or increasing, reducing or taking away personal supplementary allowance not only based on quality performance of service tasks, but also based on the outcome of service appraisal.

The Act regulates the allowance for the performance of mentor and defines the rules for its granting.

Stability. The principle of stability provides for protection of civil servants against dismissal from other reasons than those provided for by law.[17] The aim of this principle is to eliminate dismissal of civil servants on personal or political grounds which the environment of civil service is prone to – considering the political cycles. Such cycles contribute also to high fluctuation of civil servants in the Slovak Republic, and the European Union points at it too.

The Act on Civil Service upholds the principle of stability by the institution of permanent civil service, considering the fact that is for indefinite period. The institution of internal selection procedure helps create, through career possibilities, stable environment and avoid the fluctuation of employees upon their own decision.

The institution of redundant civil servant refers to those employees whose employment relationship ended due to the organisational changes. Redundant employees are allowed, when their civil service employment relationship ends, to apply for a post within internal selection procedure, if their outcomes of the appraisal are good. In this way the principle of stability is supported. The principle of stability is supported by the fact that the employment relationship may be ended only upon reasons provided for by law. The new legal

[15] Details about service appraisals can be found in the implementing law.

[16] "In remunerating civil servants, the Service Authority shall be obliged to proceed only based on conditions provided for by law" (Article 7 of Act no. 55/2017 Z. z.).

[17] "Civil servants are protected against the termination of civil service employment for reasons other than those provided by law. The principle of stability is applied, in particular, through the permanent civil service, removal from the office of a superior civil servant only for reasons provided for by law and the institution of redundant civil servant" (Article 8 of Act no. 55/2017 Z. z.).

regulation does not give the possibility of removing certain category of superior employees without reason.

Equal treatment. The principle of equal treatment means that the Service Authority proceeds, in civil service employment relationships in relation to civil servants and candidates for civil service, impartially and respects their right to privacy, constitutional and statutory rights.[18] The principle of equal treatment is regulated in relevant provisions of anti-discrimination act (Act no 365/2004 Z. z. "on equal treatment in certain areas and on protection against discrimination and on amendment to certain acts (anti-discrimination act)" as amended.

This principle is supported by the provision relating to ban of discrimination under conditions of performing civil service and in appointing, remunerating, career development, training and terminating employment relationship. According to the Act, discrimination is disadvantaging a civil servant or a candidate for civil service on grounds of "sex, sexual orientation, religion or belief, race, nationality of ethnic origin, colour of skin, language, social origin, property, family lineage, unfavourable health condition or a handicap, age, marital or family status, political affiliation, membership or activity in trade unions, in other association or on grounds of other status or of reporting crime or any other wrongdoing (e.g. according to Act no 583/2008 Z. z. on prevention from criminality and other anti-social activity and on amendment to certain acts as amended) or other anti-social activity" (Act no. 54/2019 Z. z. "on protection of whistle-blowers and on amendment to certain acts").

Discrimination includes also a situation when a civil servant is disadvantaged because he or she claims, in a legal way, their rights resulting from their civil service status. Civil servants who file an action against other employees or other superior employees, report on crime or other anti-social activity may not be discriminated against for it in the matters concerning the exercise of civil service or employment relationship. In case of violation of the principle of equal treatment, civil servants or citizens applying for civil service may address the relevant Service Authority or go the court.

4. OBSERVANCE OF CIVIL SERVICE PRINCIPLES AND SUPERVISION OVER THEIR OBSERVANCE

Supervision over the observance of Act on Civil Service is divided, in terms of competences, between the Office of the Government of the Slovak

[18] "Service Authority shall proceed, in civil service employment relationships in relation to civil servants and candidates for civil service according to the principle of equal treatment, and respect their privacy, constitutional rights and statutory rights" (Article 9 of Act no. 55/2017 Z. z.).

Republic as the central body of civil service and the Board for Civil Service as an independent, coordinating and monitoring body of civil service for the protection of principles of civil service ("Board"). Observance of provisions of Act no. 55/2017 Z. z. including civil service principles is guaranteed by the procedural right of individual entities to use instruments of protection (guaranteed by law). These instruments include a complaint, motion to inspect, proposal for assessment of the service discipline violation, complaint about the violation civil service principles and the right to court protection.

The supervision over the observance of civil service principles is exercised by the Board and can be exercised on its own initiative or based on the complaint about the violation of civil service principles. Act no. 55/2017 Z. z. defines who (citizen or civil servant), in which form (in writing) and in what matter (specific violation of civil service principles) may lodge a complaint. Unless the complainant meets all requirements, the information provided by him/her may be used by the Board at least for its own investigation activity, however it will not be an official handling of the complaint. In dealing with the complaint, the Board may require cooperation from the Service Authorities, use information from the complainant or other relevant sources.

If the Board finds out any violation it recommends that the Service Authority take a corrective measure, and informs the Office of the Government of such procedure, which can undertake an inspection under Act no. 10/1996 Z. z. "on inspection in civil service" as amended, and considers further actions (methodological guideline for Service Authorities, bills etc.). The Board's conclusions can be also useful for civil servants so as to protect their rights, for example before court.

The conclusions resulting from the process of handling the inquiries do not serve only for the correction in a specific case. The Board can refer to them when formulating general recommendations aimed at the improvement of civil service through Report on the Civil Service Status Report, elaborating technical studies or drafting law drafts.

CONCLUSION

In the end, we can come to a conclusion that, from the perspective of the current application practice, the most important entity that contributes to the protection of the civil service principles is the Board. The Board, as an independent, coordinating and monitoring body seeking the protection of civil service principles, deals with the complaints of civil servants filed against Service Authorities the most (Service Authorities failed to handle complaints of civil servants within the statutory period of 60 working days, thus violating the principle of lawfulness), service appraisals (the principle of lawfulness was violated by the Service Authorities mainly as a result of incorrect

application of legal provisions regarding this principle), imposition of disciplinary measures upon civil servants, organisational changes, termination of civil service employment, changes to salary grades, granting personal supplementary allowance and selection procedures.

In cases where the Board, following the examination of the facts, found out the violation of any of the civil service principles, recommended the relevant Service Authority that it adopt corrective measures to remove unlawful state and ensure that such undesired state does not occur again. According to the statement of the Board, the violation of the civil service principles was a consequence of incorrect interpretation of some provisions of the Act, unprofessional or careless procedure applied by the civil servants in charge. There have been cases which raised suspicion that Service Authorities or specific employees proceeded deliberately in contradiction to law and civil service principles and even the measure recommended by the Board have not been received positively by a Service Authority. There is no doubt that majority of shortcomings by the Service Authorities can be avoided in the future, according to the Board. It requires for trainings in the problematic areas of legal regulations, professional approach to the performance of service duties, inspections by superiors and continuous development of skills and knowledge of civil servants.

The inquiries referring to the violation of civil service principles are, according to the Board, a good aid on the way to improve the functioning of civil service, since they offer data about specific problems based on direct experience. Their solutions can then help not only handle the case itself but they can reflect in the targeted measures in legislations or methodological guidelines. In assessing the number and types of inquires, it must be taken into account that it is relatively a new functioning of the institution and new element in the system of protection of civil service employment relationships and individual entities do not have sufficient experience with it. The experience of the Board shows that the inquiries are very different in terms of facts and legal matters, which can lead to various levels of difficulty and lengths of their handling. Some inquiries often contain allegations of violation of several principles concurrently. In 2018, the total number of submissions was 41, of which 22 were justified complaints. The Board found out the violation of civil service principles in six cases. In cases like this, it recommended that corrective measures be adopted, and in one case the Service Authority adopted other measures than those recommended by the Board. The number of unjustified complaints (request for interpretation of the provisions of the Act on Civil Service, submissions concerning employment relationships according to other laws etc.) is still high, however, it may be expected that the number of inquiries will even go up.

However, the main requirement of the Board remains that the Service Authorities fail and violate the civil services principles as less as possible, and

that in cases when such failures occur, the employees be not afraid to report them, thus contributing to better functioning of civil service.[19]

The Board also recommends civil servants that they use, in cases of any suspicion, means of protection in the Service Authority (e.g. a complaint in the matters relating to the exercise of civil service) and that they support their allegations by relevant evidence. In fact, investigation and handling of the complaint and its follow-up check by the Office of the Government or court proceedings are hindered by the time period from the moment of violation and its insufficient documentation.[20]

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[19] From the beginning of its activity, the Board actively guided civil servants and citizens on how to lodge a complaint. At its website, it published a guideline for those who file a complaint and a form to file a complaint. Also, the Board adopted an internal procedure for the handling of complaints, which is to be followed by its members and experts. The Board Office provided e-mail and telephone consultations too.

[20] See also Civil Service Status Report 2018, https://radaprestatnusluzbu.vlada.gov.sk/data/files/7194_sprava-o-stave-a-vyvoji-ss-2018.pdf [accessed: 30.05.2021] and Civil Service Status Report 2019, https://radaprestatnusluzbu.vlada.gov.sk/data/files/7564_sprava-o-stave-a-vyvoji-ss-2019.pdf [accessed: 30.05.2021].

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SERVICE OF COURT DOCUMENTS IN CIVIL PROCEEDINGS TO ATTORNEYS DURING THE COVID PANDEMIC – ANALYSIS OF SELECTED ISSUES

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Abstract. The serving of court documents on parties to civil proceedings and their attorneys-at-law is primarily regulated under the Act of 17 November 1964, the Code of Civil Procedure. However, in response to the COVID-19 pandemic some temporary solutions have been implemented by the legislator. Their role is to expedite communications between common courts and attorneys by using IT-based technology, and specifically, an e-service platform for serving court documents electronically. The aim of this paper is to analyze electronic service on attorneys in civil cases, and in particular, such issues as: which court papers may be delivered via the e-service platform, when should a document be deemed as served considering exceptions from the e-service rule, application of Article 134 of the Code of Civil Procedure to e-service of court documents and e-service in case of a multiple power of attorney.

Keywords: civil proceedings, service of court documents, COVID-19, electronic service platform, information platform, e-service

INTRODUCTION

Since the state of pandemic was declared in Poland[1] in response to the growing number of SARS-CoV-2 infections, organs of public government, including common courts, have been struggling to provide continuity to their operations under these extraordinary circumstances. Over a span of one year, the Polish legislator has implemented a number of temporary solutions pertaining to civil procedures in order to ensure safe, uninterrupted access to courts and uphold access to justice in general. To that end, some principles of civil procedural law were modified, i.a., public court sessions and open hearings were suspended and moved to operate remotely, thus amending the principle of local jurisdiction [Litowski 2021, 70–71]. The legislator pushed for digital transformation of courts by amending the Act of 2 March 2020 on

[1] Regulation of the Minister of Health of 20 March 2020 on announcing the state of pandemic in the Republic of Poland, Journal of Laws item 491 as amended.

specific solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations,[2] which introduced new ways of service of court documents to attorneys via an electronic service platform (information platform). The rule of electronic serving of court documents will remain in place until the pandemic threat or the state of COVID-19 pandemic is revoked, and for one year after the last of the two states is revoked.

For some years now representatives of the legal doctrine have been emphasizing the urgent need to expand the use of technology in civil procedures, including e-service of process as much faster and cheaper than traditional service by mail [Szostek 2015, 61]. The legislator acknowledged the need to expand avenues of electronic filing of documents to enable, i.a., initiation of court proceedings. This was made possible by amending Article 125 of the Code of Civil Procedure[3] by adding para. 2, which enabled filing digital documents, i.e. recorded on electronic devices, subject to specific provision.[4] In view of reservations with regard to terminology and absence of a specific regulation, further amendments to laws and regulations were necessary for civil proceedings to be conducted remotely [Kościółek 2017, 4–5]. Essential changes were introduced by amendments to the laws in 2015,[5] enabling parties to the proceedings to choose how they prefer to file documents, either by "traditional," registered mail or via the e-service platform (Article 125(22[1]) CCP). The new regulations provided that documents are to be served by the court via the e-service platform (electronic service) if this is how the document was initially filed or if the party ticked "e-service" as preferred method of filing and sharing documents (Article 131[1] CCP). However, ultimately, the e-service platform (teleinformatic platform) for filing of documents was never created.

To be clear, at present, there are several electronic systems that can be used for electronic serving of documents. Besides the Electronic Writ of Payment Procedure (EPU), the following electronic systems are in place: a) Electronic Land and Mortgage Register (Article 626[4] CCP – accessible only for notaries and bailiffs); b) electronic National Court Register Portal (Article 3a of the

[2] Journal of Laws item 1842 as amended [hereinafter: Act on counteracting Covid].

[3] Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2020, item 1575 as amended [hereinafter: CCP].

[4] This provision was implemented by the Act of 24 May 2000 amending the Act – the Code of Civil Procedure, the Act on Registered Pledge and the Pledge Register, the Act on Court Fees in civil proceedings and the Act on Court Bailiffs and Execution, Journal of Laws No. 48, item 554, which entered into force on 1 July 2000.

[5] Act of 15 January 2015 amending the act – the Code of Civil Procedure and some other acts, Journal of Laws item 218 and Act of 10 July 2015 amending the act –the Civil Code, the act – the Code of Civil Procedure and some other acts, Journal of Laws item 1311.

Act on National Court Register[6]) and c) electronic Register of Pledges (Article 43a of the Act on Registered Pledges and the Register of Pledges[7]). Another platform facilitating communication between courts and Polish citizens is the Common Courts Information Portal.[8] Though it supports only certain legal actions, the Portal provides authorized persons with access to information regarding their case. Until recently, the Portal provided information only about actions taken by the court and the date of hearings, electronic case files, cases connected to the case pending before the court, and access to electronic transcript of the hearing, with an audio-option. However, the Information Portal did not support e-filing of documents by either party (except for filing a request to participate remotely in scheduled court hearing – the so-called "delocalized" virtual hearing, on the grounds of Article 151(2) CCP).

Despite positive reception of online information portals [Mikołajczuk 2020, 43–44], representatives of the doctrine advocated adding an electronic serving functionality to the Information Portal [Gołaczyński and Zalesińska 2020, 640–41; Hajduk 2020, 276–87; Szostek 2015, 69–70]. Doubtlessly, the reform introduced by the Act on counteracting COVID, i.e. electronic service of court papers via an online platform (Information Platform) addresses the expectations of representatives of the judiciary and academics voiced prior to the pandemic. Although, the initiators of the project originally intended to use professional email as means of electronic communication between courts and attorneys, with the email address identified in the first court paper,[9] ultimately, faced with negative reception of such a solution by the National Council of Legal Advisors and the Supreme Bar Council, the legislator decided to expand the Information Portal and add the desired functionality: e-service of court documents to attorneys, legal counsels, patent attorneys and the Office of the Prosecutor General.

In the context of digitization of the justice system, it should be noted that the Act on electronic service of documents[10] also lays down the rules for correspondence exchanged via the registered public e-service and by using the hybrid model of filing and serving documents. The legislator has introduced the possibility to use electronic email address as service address, to be used further on for correspondence with other entities that also use the e-service

[6] Act of 20 August 1997 on the National Court Register, Journal of Laws of 2021, item 112 as amended.

[7] Act of 6 December 1996 on Registered Pledge and the Register of Pledges, Journal of Laws of 2018, item 2017 as amended.

[8] Further on referred to as: the Information Portal or Portal.

[9] Draft amendment of the Act – the Code of Civil Procedure and some other acts, doc. no. 899 with substantiation can be accessed at: https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=899 [accessed: 12.07.2021].

[10] Act of 18 November 2020 on electronic service of documents, Journal of Laws item 2320 as amended.

platform. The Act puts an obligation on attorneys to have an electronic service address listed in the electronic address database which is connected to the registered public e-service or is qualified as registered e-service (Article 9(1)(1) and (2) of the Act on electronic service of documents). The provisions imposing the obligation to have an email address for electronic service will come into force as of 5 July 2022, yet parallel regulations set forth in the Act on legal advisors[11] (Article 22^{10}) and the Law on the Bar[12] (Article 37c) entered into force on 5 October 2021. Based on the wording of the said self-government regulations, it seems therefore that legal advisors and attorneys are already obliged to have an e-service address listed in the electronic address database. However, since the courts will be bound to apply the provisions of the Act on electronic service with respect to any correspondence served via the registered public e-service or hybrid service as of 1 October 2029, serving of correspondence regulated under the said Act is beyond the scope of this paper and will not be considered.

The aim of this paper is to discuss selected issues regarding application of the new e-service rules to attorneys in civil proceedings. The author shall focus, in particular, on the kind of court documents that are subject to e-service, including exceptions, and a list thereof, application of Article 134 CCP to e-service of court documents and the appointment of multiple attorneys.

1. DOCUMENTS SUBJECT TO ELECTRONIC SERVICE

Article 15 Draft amendment to CCP^1, section 2 of the Act on counteracting COVID, provides that documents to be served electronically via the Information Portal are "court documents." However, in reference to the subject of e-service, two different terms have been used in the Code of Civil Procedure, section 2, title 6, i.e. "court document" (Article 131(2), 133(3), 135(2), 136(2), 138(1), 141(2) CCP) and "pleadings and other papers" (Article 132(1), 133(2) and (2^1) and (2^2) and (2^3) CCP). Moreover, on several occasions, the term "document" is used without specifying the type of document (Article 131^1(1–2), 139(1) and (1^1) and (2) CCP). In the doctrine on civil proceedings, several different standpoints can be found with regard to the understanding of the term "court document" used by the legislator also in the Act on counteracting COVID. Some authors claim that the term "court document" embraces notices, summons and judicial decisions intended for parties to proceedings, their attorneys and witnesses, expert witnesses and other participants in civil proceedings [Siedlecki 1966, 165]. Thus, these are solely documents that are filed and generated by the court. An alternative view is that

[11] Act of 6 July 1982 on legal advisors, Journal of Laws 2020, item 75 as amended.
[12] Act of 26 May 1982, the Law on the Bar, Journal of Laws 2020, item 1651 as amended.

a "court document" should be understood as all documents sent to the parties by the court [Wolwiak 2015, 43–50]. Notwithstanding the foregoing, the view that the term encapsulates both court documents (including summons, notices, judicial decisions and orders) and pleadings is rather well-established [Weitz 2012a, 600]. Although the above statement considers the subject matter of e-service to be both documents produced by court and documents drawn up by parties, but transmitted in copies to other parties, the term "court document" should apply only to the former. In turn, this conclusion allows to assert that the subject matter of e-service pursuant to Article 15 of the Draft amendment to the CCP[9] of the Act on counteracting COVID are only documents from the court, and generated by the court, i.e., court-issued documents.

The analysis of the subject-matter scope of e-service provided by the Information Portal has to include the Ordinance of the Minister of Justice of 19 June 2019 on the organization and scope of responsibilities of court secretariats and other departments of the court administration.[13] According to the rules for drawing up documents provided therein, court documents and certified true of court documents should, in principle, be certified true copies, i.e. they should bear a signature of a certifying person (justice, judge, clerk, attorney) along with specific data, such as the court's name, file reference number, date of signing the document, the position or authority and the full name of the document signatory (para. 31(4) of the Instruction). In turn, court documents listed in Appendix no. 3 to the Instruction, included in the electronic court system and recorded as "issued" by the system, may be sent without a signature, and do not require an official stamp and do not have to be certified as true copy of the original document. The list of court documents that may be served without a signature (thus subject to e-service via Information Portal pursuant to Article 15 Draft amendment[9] Act on counteracting COVID) embraces: a) summons, b) notices, c) return of documents requests, including statement of claim and procedural motion, d) orders of payment under the writ of debt proceedings pursuant to the provisions of CCP, e) non-appealable decisions (i.e. the decision was not and is not subject to any measures of appeal – except appealable decisions in which case appeal remedies have been exhausted, in result of which appeal measures do not apply anymore), f) covering documents along with copies of documents served by court, and g) instructions, notes of guidance and cautions. Most importantly, president of a court may extend the list of documents that do not require signing beyond the ones enumerated in Appendix no. 3 to the Instruction, subject to the rule that such an extension cannot include copies of judicial decisions being enforcement orders and decisions in criminal cases and non-execution of enforceable judicial decisions (para. 21(6) of the Instruction). However, it should be noted that, in

[13] Official Gazette of 2019, item 138 as amended [hereinafter: "the Instruction regarding court office administration" or "Instruction"].

fact, presidents of courts use these powers when issuing orders to extend the list of signature-exempt documents.[14] In consequence, for professional representatives and attorneys it becomes more difficult to determine the effects of opening and reading the documents added to the Information Portal, since they are required to check in a specific court whether an extending decision to the list of documents served electronically has or has not been issued. It seems that in order to ensure efficiency of proceedings and to secure interests of parties represented by attorneys, it would be necessary to harmonize the rules of document service across Poland, or else, introduce a requirement that every document should mention the legal grounds for electronic service – CCP or Article 15 Draft amendment[9] section 2 sentence 1 Act on counteracting COVID.

The legislator provided for two exemptions from the rule of e-service of court documents via the Information Portal. The first exemption embraces documents which should be served along with copies of the parties' pleadings or other documents which did not come from the court (Article 15 Draft amendment[9] section 2 sentence 2 Act on counteracting COVID). Hence, it refers to situations in which a court document is served along with e.g. a copy of pleadings of the adverse party or expert testimony as a document not coming from the court. In such case, documents should be served by traditional registered mail. The second exemption includes situations in which president of the court issued an order waiving the use of the Information Portal for e-service (Article 15 Draft amendment[9] section 5 Act on counteracting COVID). The latter refers only to circumstances in which e-service is inadmissible in view of the nature of the document. However, the legislator did not provide a definition of "nature of document." It is only rational to assume that this term should refer to documents which have specific characteristics, function or purpose. Nonetheless, it must be emphasized that judges themselves have their reservations about the said regulation, since they often issue waivers of filing via the Information Portal in all civil law cases they preside over.[15] However, the practice for document service is different from court to court, and even between departments of a court or judges in one department, so it definitely lack uniformity. However, the interpretation of Article 15 Draft amendment[9] Act on counteracting COVID leads to the conclusion that there is no legal basis

[14] Such decisions were taken, i.a., by the President of the District Court of Warsaw-Praga in Warsaw http://warszawapraga.so.gov.pl/uploads/files/zarz%C4%85dzenia/83-21.pdf [accessed: 19.07.2021], or the President of the Court of Appeal in Szczecin, https://www.szczecin.sa.gov.pl/zarzadzenie-wysylania-pism-sadowych-bez-podpisu-wlasnorecznego-w-sadzie-apelacyjnym-w-szczecinie,new,mg,103.html,637 [accessed: 19.07.2021].

[15] Such decisions have been issued, i.a., in the District Court in Cracow: http://www.krakow.so.gov.pl/container/struktura-organizacyjna/aktualnosci/komunikaty/2021/Komunikat%20Prezesa%20Sadu%20Okregowego%20w%20Krakowie%20z%20dnia%209%20lipca%202021%20r-.pdf [accessed: 19.07.2021].

for issuing decisions to waive electronic service of documents pertaining to all cases processed by a given judge, department or court. Such waivers may be issued only if electronic service of documents via the Portal is not possible in view of the nature of document.

It is worth to note that an attorney's lack of account on the Information Platform or lack of access to a given case is not considered to be circumstances that justify service by post. The legislator has not expressly stipulated that attorneys are obligated to have accounts on the Information Portal, as it was the case with mandatory provision of email addresses for electronic service, required under the law since 5 October 2021, pursuant to Article 2(1) of the Act on electronic service of documents. This obligation was imposed on, i.a., legal counsels, attorneys and patent attorneys. In fact, obligatory electronic service via the Information Portal implies that every attorney is required to have an account on the Portal. Hence, it might be concluded that an attorney is obligated to register an account on the Portal since Article 15 Draft amendment[9] Act on counteracting COVID entered into force.

Editing of Article 15 Draft amendment[9] Act on counteracting COVID states beyond doubt that the rule for serving court documents specified in Appendix no. 3 to the Instruction on court offices or documents specifically referred to in an order of the president of the court, shall be electronic service, provided that it will be a document addressed to an attorney, legal counsel, patent attorney or the Office of the Prosecutor General of the Republic of Poland.

2. DATE OF DEEMED SERVICE

Initially, the Draft amendment to the Act on counteracting COVID assumed that digital representation of documents will be deemed as served on the following working day from the moment they are uploaded to the electronic platform by the court in a way that enables the addressee to read the documents.[16] However, this solution was justly criticized (mostly by lawyers and attorneys) as undermining fundamental process guarantees and violating the right to a fair trial set forth in Article 35(1) of the Constitution of the Republic of Poland [Gołaczyński and Zalesińska 2020, 640–41]. Eventually, pursuant to Article 15 Draft amendment[9] section 3 Act on counteracting COVID, the deemed date of service to an attorney is the date the attorney reads the document uploaded on the Information Portal. Mere logging into the attorney's account will not be deemed as "read and understood," as the latter requires the attorney to download a document. This means that an attorney may log into his/her account and use other functionalities of the Information Platform (e.g. sittings, legal actions, motions) without worrying that the moment of

[16] Draft amendment to the Act – the Code of Civil Procedure and some other acts.

logging will automatically be considered the moment of getting acquainted with the documents. It is thus unequivocal that only downloading of the document shall be interpreted as deemed service with procedural consequences stipulated in CCP.

In response to critical reception of the first draft, the legislator provided for a 14-day notice of service. The notice period starts running as of the day of uploading the document to the Information Portal. Document upload should be understood as the day the document is published on the Platform (the date of online publication in the system), although some inconsistency can be noticed between the term used by the legislator ("uploading to the Portal") and the term used by the Platform ("publication on the IP"). In light of Article 15 Draft amendment[9] section 3 of the Act on counteracting COVID, it seems that in case the upload date on the Portal is earlier than account registration date or date of gaining access by a professional attorney, the 14-day notice period starts running as of the upload date (online publication) on the Platform. This is quite an issue since these days courts are swamped by cases, so it happens that attorneys are not provided electronic access to a given case.[17] In consequence, the 14-day notice starts to run the moment a document is uploaded to the Portal, and keeps running whilst an attorney has no access to the case, which creates many problems. As mentioned before, the legislator made only two exceptions to the rule of electronic service of court documents via the Portal, i.e. service of documents along with copies of the parties' pleadings or other documents not coming from the court, and waiver of electronic service via the Portal based on an order of president of the court.

According to the doctrine and case law, the regulations regarding service are absolutely mandatory provisions of law, and thus leave no free choice to the courts as to selection of the document service method [Uliasz 2017, 32; Weitz 2012a, 603]. The Act on counteracting COVID provides that the service will be effective if the attorney has not received access to the case on the Information Portal. Any infringement of the deadline for actions on the attorney's part and any adverse effects resulting from lack of access may be grounds to file a motion for reinstatement of deadline for procedural actions for which the deadline was set or for nullity of the proceedings due to the party's being deprived of the ability to defend its rights (Article 379(5) CCP). While the mere construct of "substituted service" is admissible and does not infringe the right to a fair trial [Weitz 2012c, 661], both the doctrine and case law underline that it must provide parties with a guarantee that documents are delivered to the addressee and he has a chance to get acquainted with

[17] In principle, it is the court that should automatically provide attorneys with access to case files, from time to time it happens that no access is granted. In such case, attorneys have to file a motion for access to the case. Instruction on how to gain Access is provided here: https://www.gov.pl/web/sprawiedliwosc/instrukcje-obslugi-portal-informacyjnego [accessed: 21.07.2021].

them.[18] Definitely, electronic service to a professional attorney who has not been granted access to the case on the Information Portal cannot be considered a "guarantee."

Hence, with regard to the two exceptions to the rule of service of court via the Portal, i.e. documents served with copies of pleadings or other documents not generated by court, and waiver of e-service via the Information Portal based on the order of president of court, documents should be served in a traditional way, by post. To conclude, upload of these documents to the Portal will have no procedural consequences and only play an informative role.

3. SERVICE AT NIGHT AND ON HOLIDAYS

Provisions of the CCP determine the time limit for service. The rule is that court documents cannot be served on bank holidays and weekends, and at night (Article 134(1) CCP). The exception refers to "exceptional cases" and situations requiring that a relevant order of the president of the court is issued before documents are served. In the context of Article 15 Draft amendment[9] section 2 to the Act on counteracting COVID, it is worth to pause and consider a situation when the uploaded document is opened and read at night or on a bank holiday. Since enforcement of Article 134 CCP is not suspended, it can be reasonably claimed that the provision shall apply to electronic service. However, on the other hand, the Information Portal is a "teleinformatic system" referred to in Article 9(1) CCP since it supports court proceedings by enabling performance of some actions. Hence, in fact, Article 131[1](2) sentence 2 CCP which excludes the application of Article 134(1) CCP, should be applied.

It is only logical that the same should apply to attorneys-at-law. The fact that an attorney reads a document on the Portal at night or on a Polish bank holiday should have a procedural consequence, i.e. start the running of the time limit for taking action. Moreover, attorneys are free to choose when to read court documents. Hence, reading a specific document in the evening or on bank holidays should be considered a voluntary consent to receipt of documents, which renders the e-service effective [Weitz 2012b, 633]. Nonetheless, rules set by Article 115 CC shall apply even if the time limit ends on a Saturday or any bank holiday, the running period shall end on the consecutive day which is not a bank holiday or a Saturday. Therefore, if a document is opened and read on a Saturday or Sunday, the last day of the 7-day limit for taking action will fall on a Monday. Henceforth, as it is the attorney who decides when to read a particular document, thereby starting the running of the period, it cannot be

[18] Judgment of the Constitutional Tribunal of 17 September 2002, ref. no. SK 35/01, Legalis no. 55383; judgment of the Constitutional Tribunal of 15 October 2002, ref. no. SK 6/02, Legalis no. 55388.

maintained that any of the attorney's or party's rights are thereby violated. In conclusion, for avoidance of doubt among legal scholars as to whether the Information Portal should be treated as a "teleinformatic system" or not, it would be legitimate to expressly exclude the application of Article 134(1) CCP. This is a *de lege ferenda* postulate.

4. SERVICE OF DOCUMENTS IN CASE OF MULTIPLE ATTORNEYS

Besides the aforementioned issues relating to the application of Article 15 Draft amendment[9] Act on counteracting COVID, the situation in which documents must be served to a party's multiple attorneys is worth looking into. Since the Code of Civil Procedure does not foresee any limitations in this regard, a party may be represented in civil proceedings by more than one attorney.

In case of traditional mail service, the legislature provides that if multiple attorneys are appointed to represent a party, legal correspondence should be served to one of the attorneys (Article 141(3) CCP). The Code of Civil Procedure provides for two kinds of power of attorney: power of attorney *ad litem* (general POA for representation in court proceedings,) and limited (specific) POA (for performing specific legal actions). The scope of the general power of attorney is determined by Article 91 CCP and it covers, i.a., all actions relating to the case. The doctrine suggests that the scope of the general POA is subject to modification either. by extension or limitation [Gawrylczyk 2001, 85ff; Krzemiński 1967, 4]. Henceforth, in the POA document or possibly, in a different document, a party can clearly identify the attorney to whom court documents should be transferred. However, if there is no clear identification of the attorney, the choice shall be made by the president of the court[19] [Krzemiński 1956, 51; Weitz 2012d, 678; Żyznowski 2013, 508]. In such case, the legal correspondence is delivered at the president's discretion.

A similar situation occurs when a substitute attorney (replacement attorney) is being appointed. Pursuant to Article 91(3) CCP, the original attorney has the right to appoint another attorney in their place. Moreover, a substitute attorney – as it transpires from the doctrine and the case law – has authority to act o behalf of the grantor, and is not a "deputy" or assistant of the primary attorney [Gawrylczyk 2001, 85ff; Gudowski 2012, 468; Krzemiński 1967, 10].[20] It must be ascertained that this is true in cases when the primary attor-

[19] Order of the Supreme Court of 19 December 2019, ref. no. IV CZ 112/19, Legalis no. 2269164; order of the Supreme Court of 12 December 2017, ref. no. IV CZ 89/17, Legalis no. 1733697; order of the Supreme Court of 07 June 2017, ref. no. II PZ 6/17, Legalis no. 1637275; order of the Supreme Court of 22 October 1999, ref. no. III CZ 109/99, Legalis no. 57684.

[20] Order of the Supreme Court of 21 October 2010, ref. no. IV CZ 79/10, Legalis no. 1825559.

ney grants power of attorney with the same scope of authority as the one he was originally granted. However, the substitution may be only for a specific purpose, i.e. the original attorney may limit the substitute power to specific some legal actions being part of the POA he himself was given [Smyk 2010; Pietrzykowski 2020, 50–53]. However, there are some conflicting views in this regard [Turczynowicz–Kieryło and Cajsel 2003, 3ff], which emphasize that substitute power of attorney cannot be limited.

With regard to putting the above to practice, i.e. serving of documents on attorneys via the Information Portal, Article 5 Draft amendment[9] Act on counteracting COVID does not regulate the methods of service in case of multiple attorneys appointed by a party. Hence, Article 141(3) CCP is applicable here, save in so far the POA letter or another document expressly identifies the attorney to be served. If not, the document will be served to only one attorney. In fact, a court document to a party will be uploaded on the Portal, and posted on accounts of all attorneys representing the party, but the service is deemed effective upon first reading of the document by any of them. The same rule applies to accounts of substitute attorneys if their scope of substitute POA has not been limited only to specific legal actions. Therefore, the date of viewing a document, which shows on the Portal, is considered the date of reading the document by the given account user. Thus, it would be judicious to add to the Portal a functionality that would inform other co-representing attorneys of that fact, including the document opening date. Alternatively, automatically generated and posted confirmation that the document has been read would also be very useful. In case of multiple power of attorneys, such functionalities would enable other attorneys to easily identify when the period for taking actions starts to run if such a deadline was set in the document.

CONCLUSIONS

The amendment enabling one-way electronic service of court documents to attorneys-at-law can definitely be perceived as a step towards digitalization of courts. The use of communication technology for communications regarding civil lawsuits between courts and attorneys is a long-expected novelty, and a push for technological innovation in the Polish judicial system. However, despite the fact that the legal basis for a two-way electronic communication has been in place for quite a time, until today no comprehensive solutions have been implemented to digitize civil proceedings and develop an e-judiciary system. At present, information systems that support judicial proceedings allow only for electronic writ-of-payment proceedings, real estate register proceedings (in a limited way), and registration procedures. Alongside these, there was the Information Portal used mostly as means to transfer information, i.e. providing authorized persons with online access to communications

regarding pending civil lawsuits. Despite the many appeals of representatives of the doctrine and legal professionals to add new functionalities to the Portal, the system has been improved, enabling e-communication, very recently, that is a year after the pandemic was declared. Additionally, the institution of electronic service introduced under Article 15 Draft amendment[9] Act on counteracting COVID is limited in scope as it includes only court documents served by the court to the attorney-at-law, i.e. legally qualified lawyers, legal counsels, patent attorneys or Office of the Prosecutor General of the Republic of Poland. Undoubtedly, prolonged pandemic restrictions have brought to the forefront the urgent need for informatization of communication between attorneys and courts. However, the changes seem to be too hastily made, without proper modernization of the Information Portal to ensure its compatibility with the systems used in common courts of law. Moreover, the legislator did not ensure cohesion of the terms used in Article 15 Draft amendment[9] act on counteracting COVID with the terminology used on the Information Portal. Inconsistent terminology is a source of confusion regarding many basic issues, e.g. when does the 14-day advice period start in case of documents available online? It seems that a big part of interpretative doubts and discussions could have been avoided if consultation with associations of lawyers or representative of courts had been held. At present, in result of the insufficient integration of court systems with the Information Portal, to avoid complications, some courts simply do not use the e-service.

In the context of the development of „smart courts," it is important to support the demands of some scholars [Wójcik–Krokowska 2021, 135–36] to fully embrace modern technologies and extend the functionalities of the Information Portal so that, as an teleinformatic system, it enables electronic civil court proceedings, including e-filing of documents by attorneys, as it is the case with the National Court Register Portal. In view of the constitutional principle of democratic state of law and to ensure equal access to justice, the teleinformatic system could be dedicated solely to professional attorneys (which is the case of the registration procedure), while retaining the option for parties to file process papers traditionally. Such a solution would streamline the work of courts and attorneys, and significantly contribute to the development of e-justice and improvement of judicial efficiency.

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PARTICIPATION OF A PARTY TO THE ADMINISTRATIVE PROCEEDINGS IN THE ISSUING OF AN ADMINISTRATIVE DECISION

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Abstract. The model of jurisdictional procedure created by the provisions of the Code of Administrative Proceedings is accused of being inadequate for the implementation of certain tasks set for the modern public administration. In particular, it is noticed that the code solutions favour the abuse of strictly perceived power when considering and settling administrative matters. The legislator's reaction to the thus diagnosed dysfunctionality in activities of public administration authorities is an attempt to remodel the administrative procedure in order to guarantee a more partnership-based approach of the administration to the citizens. The postulate of "partnership administration" in administrative procedure may be realised first of all by strengthening the guarantee of party's participation in proceedings. This participation should be understood as a possibility of influencing the course of the process by the party. The research undertaken in this article focuses on the issues of character, admissible scope, degree of intensity and legal consequences of this influence in the light of new normative solutions. Influence on the course of proceedings and settling the case will be different depending on the stage at which the procedural actions are taken. In the most intensive way a party may influence the content of the resolution of the case by participating in the activities of taking evidence. Only in this sense it is possible to speak of participation in the creation of a decision. The participation of a party to the administrative proceedings in the issuance of an administrative decision should not be identified with the participation in the phase when the authority takes a decision and puts it in the form of a formalised judgment.

Keywords: administrative proceedings, party of the proceedings, administrative decision, procedural guarantees

INTRODUCTION

One of the main reasons for the amendment of the Code of Administrative Proceedings,[1] made in 2017,[2] was to introduce into the administrative proce-

[1] Act of 14 June 1960, the Code of Administrative Proceedings, Journal of Laws of 2021, item 735 as amended [hereinafter: the Code].
[2] Act of 7 April 2017 amending the Act – the Code of Administrative Proceedings and some other acts, Journal of Laws item 935.

dure such legal-procedural solutions that should contribute to "a more partnership approach of the administration to citizens," in particular by providing principles and detailed regulations allowing for a more effective implementation of the procedural directive of protecting citizens' trust in public authority. "Excessive formalism and rigorously considered authority in resolving administrative matters" were at the same time recognised by the drafters of the new regulations as dysfunctions of administrative procedure.[3] It is not difficult to notice that the weakness of the administrative process were found in its model assumptions. One of those assumptions is procedural formalism, which is an immanent attribute of every legal procedure, and the other is the exercise of procedural authority, which determines the nature of the relationship between the public administration authority and the party to administrative proceedings conducted in an individual case.

The research undertaken in the article aims at determining whether and to what extent the procedural solutions of the Code actually implement the postulate of "partner administration" in the use of legal and procedural tools by the subjects of administrative proceedings. The point of reference for the conducted analysis is the general principle of active participation of a party in administrative proceedings, perceived as a structural principle of these proceedings, constituting the implementation of the constitutional right to a trial [Adamiak 2012, 72]. There is no doubt that administrative decisions are created with more or less intensive participation of their addressees, but it is necessary to consider to what extent a party to administrative proceedings by its actions may influence the course of the proceedings and, consequently, also determine the content of an administrative decision defining its rights or obligations.

1. ADMINISTRATIVE POWER IN THE PROCEDURAL SPHERE

Administrative (public) power is manifested in unilateral and binding creation of a legal situation of an individual by a public administration authority. The source of this authority is the binding force of a legal norm, which determines the obligation of the addressee of an administrative authority's act to comply with the content of this act and the possibility to enforce it without the necessity of obtaining by the authority a consent to perform the act [Radziewicz 2005, 143]. Among the prerequisites of administrative power the jurisprudence enumerates: 1) the authoritative nature of the concretization of the law made by the public administration authority, 2) the presumption of

[3] See Explanatory statement for the draft Act on amending the Code of Administrative Proceedings and some other acts, Sejm of the Republic of Poland, 8th Term, Sejm Paper No. 1183 of 28 December 2016 r, p. 4–5 [hereinafter: Explanatory statement].

the legality of an act of administration, 3) the possibility of using administrative coercion in the event of a voluntary failure to perform the obligations deriving from an act of administration – both a general and an individual act [Chróścielewski 1995, 51; Borkowski 1972, 46, 49].

A special category of administrative power is procedural power. It is derived from a procedural relationship established between a public administration authority and an individual in the course of proceedings whose aim is to concretise individual rights or obligations. The general administrative proceedings regulated by the Code are of the jurisdictional type, which means that administrative power as a determining feature is inherent in the nature and character of the procedural acts undertaken by the public administration body conducting the proceedings. Administrative power, actualizing in the course of proceedings, is characterized both by organizational-technical, orderly and disciplinary procedural acts, as well as by evidential and adjudicatory acts of the public administration authority. The administrative decision that ends the proceedings is an expression of administrative jurisdiction, i.e. a sovereign, unilateral manner of applying administrative law, which consists in "issuing an act concretising the rights or obligations of its addressee" [Zimmermann 1996, 10–11]. Administrative power appears in this case as an inseparable attribute of a judicial form of acting of a public administration authority [Radziewicz 2005, 125–26]. Whereas the unilateral nature of an administrative decision is manifested in the fact that it is a declaration of intent by the authority which, irrespective of any reaction on the part of the addressee, acquires legal force [Starościak 1970, 200].

Nevertheless, in the very construction of administrative power the importance of the subject administered, towards whom the authoritative acts of the administrative authority are directed, is perceived. Administrative power is thus constituted by the temporal succession of acts of will of the parties to an administrative legal relationship, i.e. an act of will of an individual in which a proposal is contained to shape the content of a future substantive legal relationship, and an act of will of an administrative authority which is decisive for the final shape of this relationship. This decisive act of will, creating the content of administrative rights and obligations, is further strengthened by the presumption of legality [Borkowski 1972, 46, 49].

2. NORMATIVE ASSUMPTIONS OF PARTICIPATION OF A PARTY IN ADMINISTRATIVE PROCEEDINGS

The static construction of an administrative case and, consequently, of an administrative proceeding has been shaped as a two-subject structure. One of the subjects of the proceedings is always a public administration authority, equipped with the ability to authoritatively concretise the rights and

obligations set out in legal provisions, and the other one is a party to the proceedings, within the meaning of Article 28 of the Code, basing its legitimacy in legal proceedings on a legal interest, whose rights and obligations are to be authoritatively concretised [Kiełkowski 2004, 49–52]. The two-sided nature of the administrative process does not, of course, preclude more than one person from being a party to the proceedings [Skóra 2009, 94]. The subjective scope of the administrative case, and thus the number of parties to the proceedings in this case, are determined by the content of the substantive law provisions, which are the source of the legal interests of the parties. In a situation where the legal interests of the parties to the proceedings are not identical, the public administration authority, entering into an additional role of an "arbitrator," nevertheless invariably retains its essential function aimed at issuing a ruling on the legal situation of the parties [ibid., 103].

The relations which occur between the public administration authority and the party in the course of the process belong to the dynamic dimension of the administrative proceedings. The content of these relations (interactions) is determined by the norms of administrative proceedings, giving them, in accordance with the requirements of procedural formalism, the form of procedural acts. In a dynamic meaning, administrative proceedings are thus an orderly sequence of procedural acts taken by the subjects of these proceedings for the purpose set out by the law. The proceedings take place within a specific legal framework and in a manner dictated by the logic of procedural acts. Thanks to this the proceedings gain a very important for their participants feature of structural and functional stability. A participant of the proceedings may take actions prescribed by law and exercise procedural rights adequate to the state of the proceedings. Also the authority conducting the proceedings orders its course in accordance with the logic imposed by normative criteria. In particular, when initiating administrative proceedings at the request of a party, the public administration authority to which the application has been submitted shall assess in turn: the capacity to conduct the proceedings, as determined by the provisions on jurisdiction and exclusion from the case, the completeness and formal correctness of the application submitted and, finally, the admissibility of the proceedings, after which, in the event of a positive result of the assessment made, it shall determine the scope of the subject matter of the proceedings and notify all parties of its initiation. A negative result of the assessment in any of its aspects implies the necessity for the authority to take appropriate actions, such as: transferring the application to the competent authority and simultaneously notifying the applicant of this act and its consequences (Article 65 of the Code), returning the application to the applicant (Article 66(3) of the Code), leaving the application unprocessed, after a possible earlier request for rectification of its formal defects (Article 64 of the Code), or refusal to initiate proceedings (Article 61a of the Code). On the other hand,

the applicant is provided by the procedural law with an adequate legal remedy (complaint to an authority of higher level, reminder, complaint to the administrative court), which enables him to react to the action taken by the authority.

Participation of a party in administrative proceedings should obviously not be understood as including it in the subjective structure of the process, but it should be read in a dynamic sense – as granting to the party the status of a subject, which by its actions may influence the course of the process. However, the questions about the nature, admissible scope, intensity and legal effects of this influence remain open.

The right of a party to participate actively in administrative proceedings has been raised in Article 10 of the Code to the rank of a general principle of proceedings. The general principles of administrative proceedings, regulated in the provisions of Articles 6 to 16 of the Code, construct – in a static dimension – a procedural model, indicating the values to which the legislator refers when creating an administrative procedure of the jurisdictional type. The general principle of active participation of a party in the proceedings originates "from the rational conviction that no one is able to watch over the proper settlement of cases in the proceedings like the one to whom the case pertains" [Służewski 1982, 36]. However, this principle, like other procedural principles, must be actualised and realised in the dynamics of the proceedings, through the procedural acts undertaken by the subjects of the proceedings.

It should first of all be assumed that the party's influence on the course of the proceedings and the resolution of the case will vary depending on the stage at which the procedural actions are taken. At the stage of initiation of the proceedings, the scope of the administrative matter constituting the subject matter of the proceedings is determined. "In proceedings initiated at the request of a party, the substance of the decision will depend on the content of the request, taking into account the peremptory norms of substantive administrative law" [Knysiak–Molczyk 2004, 55]. Participation of a party in the evidentiary stage of the procedure which precedes issuing of the decision shall be regarded as "participation in the decision-making process" through the joint finding and evaluation with the authority of the facts relevant to the case [Iserzon 1970, 58]. The participation of a party in the proceedings is even considered to be "the right to determine, together with the authority, the course of the proceedings and their outcome – the decision" [Janowicz 1999, 86].

3. IMPLEMENTATION OF THE PROCEDURAL STANDARD OF PARTICIPATION OF A PARTY IN ADMINISTRATIVE PROCEEDINGS

The principle of active participation of a party in administrative proceedings was formulated in Article 10(1) of the Code as procedural obligations whose addressee is the public administration authority conducting proceedings

in an individual case. The first of them is the obligation to ensure active participation of a party at each stage of proceedings, the second – the obligation to enable a party to express its opinion about collected evidence and materials and submitted demands. The way the normative formula of the principle in question was articulated means that the right to active participation of the party in the proceedings should be reconstructed as a reflexive right, correlated with the procedural obligations of the authority towards the party. Thus, a party has, firstly, the right to active participation at each stage of the administrative proceedings – from the moment the proceedings are initiated until their completion with an administrative decision, within the scope and under the principles set forth provisions of the code regulating the course of proceedings [Adamiak 2012, 72]. Second, the general rule grants a party the right to be heard on the results of the evidence, the facts established, the material gathered and the demands made.

The general principle formula expressed in Article 10(1) of the Code cannot be read as an entitlement to license an active participation of a party in the proceedings by a public administration authority. Instead, the authority is obliged to create conditions in the course of the proceedings to guarantee the party the possibility to participate in the proceedings to the extent expected by the party, within the limits set by the provisions of procedural law. In particular, the authority is not authorised to assess whether the participation of a party in a procedural action is necessary in the situation when the party expresses its will to participate in that action. This does not mean, however, that the party should demonstrate sufficient activity to ensure its active participation in the proceedings. Such an interpretation of Article 10(1) of the Code would be contrary to the content of the obligations of the authority as set forth in this provision.[4] The consequence of violation by a public administration authority of the general principle of active participation of a party in proceedings is a qualified defectiveness of the administrative proceedings, which constitutes grounds for its resumption, pursuant to Article 145(1)(4) of the Code.

On the basis of the code provisions establishing procedural guarantees of a party's participation in proceedings, two levels of functioning and implementation of the principle in question can be decoded.

Firstly, the standard of active participation of a party in the proceedings is based on the right to information about the administrative proceedings conducted in a given case and about its course. The condition of active participation in the proceedings is the knowledge of the activities undertaken therein, implying the possibility of controlling its course. In this sense, the obligations of the public administration authority related to ensuring a party's participation in the proceedings are inseparably connected with its procedural

[4] See judgment of the Voivodship Administrative Court in Warsaw of 30 September 2004, ref. no. I SA/Wa 149/03, in: Central Database of Administrative Court Decisions [hereinafter: CDACD].

information obligations. Pursuant to the general principle of information laid down in Article 9 of the Code, public administration authorities are obliged to duly and comprehensively inform parties about factual and legal circumstances which may affect the establishment of rights and obligations being the subject matter of administrative proceedings, as well as to ensure that parties and other persons participating in the proceedings do not suffer any losses due to ignorance of the law. Therefore, the authority conducting the proceedings is obliged to provide the parties with any information connected with the settlement of an administrative case. This concerns both the information on substantive and procedural law provisions, which result in the rights and obligations of the parties influencing the outcome of the case, as well as the explanations on the manner of interpretation of the content of the binding provisions and guidelines on the manner of proceeding that will enable to prevent damages that may arise due to ignorance of the provisions and unawareness of the consequences of their violation.

Secondly, the party's right to be actively involved in the proceedings can be decoded in the content of the right to be heard (*audi et alteram partem*), which in the broadest sense includes the initiative of taking evidence, the right to request information, to give explanations in the course of taking evidence, to ask questions to the authority and other participants in the proceedings, to make statements, to express an opinion on the evidence taken and on the totality of the evidence. "In particular, the right of a party to be heard is exposed as a highly emotionally charged right, related to the naturally rooted need to speak, justify, prove, which is to be matched by the obligation to hear, consider, respond. This right is a procedural guarantee of the legal security of the individual, of the sense of trust in the state and the law, of the protection of the individual against the omnipotence of power and of the respect of his dignity in the course of proceedings" [Gajda–Durlik 2019, 98]. In this aspect of the implementation of the right to participate in the proceedings, support should be sought for the postulate of co-administration of the administrative authority and the individual (party to the proceedings), as well as for the criteria for clearly distinguishing the exercise of public power by the authority from the arbitrary conduct of the public authority.

4. STRENGTHENING THE PROCEDURAL GUARANTEES ON THE RIGHT OF THE PARTY TO PARTICIPATE IN ADMINISTRATIVE PROCEEDINGS

In the most intensive way a party may influence the content of the future resolution of the case by participating in the activities of taking evidence. "A party's participation in the taking of evidence is significant not only from the standpoint of his individual interest, but also from that of the general

interest. A party is by nature well informed about the facts of his case, and since he is also in a position to know the positive law to the extent necessary for the case, he is able to think thoroughly and assess the facts from the legal standpoint. By expressing its views in this regard, a party can assist the authority in arriving at a decision based on facts that are well established and well judged in law" [Iserzon 1970, 58].

The provisions of the Code of Administrative Proceedings regulating the course of evidence proceedings were supplemented under the 2017 amendment, in particular by the provision of Article 79a, which provides in para. 1 that in proceedings initiated at the request of a party, when informing about the opportunity to comment on the collected evidence and materials and the submitted demands, the public administration authority is obliged to indicate the premises dependent on the party that have not been fulfilled or demonstrated as at the date of sending the information, which may result in issuing a decision inconsistent with the party's demand. The purpose of the adopted solution, as it results from the explanatory statement of the draft amendment, is to "prevent situations in which a party has additional evidence of circumstances essential for proving the legitimacy of its request or can easily obtain it, but due to lack of appropriate knowledge about the necessary evidence or the way in which previously submitted evidence was assessed – does not take advantage of such an opportunity. In such cases, the party will be surprised by a negative resolution of the case and will be forced to challenge the decision and to present this additional evidence only at the appeal stage. In this context, it is insufficient to inform the party about the possibility to become acquainted with the case file and to express its opinion on the collected evidence and materials as well as its demands."[5]

The obligation of the public administration authority provided for in Article 79a of the Code was harmonised with the obligation laid down in Article 10(1) of the Code to give the party an opportunity to express its opinion, before a decision is issued, on the collected evidence and materials and its demands.

The provision of Article 10(1) of the Code creates the procedural right of a party to express its position with respect to all evidence, materials and demands included in the case file, and the effective implementation of this right requires that the authority inform the party of its rights, set an appropriate time limit for reading the case file and for submitting a final statement, and refrain from issuing a decision until the party submits its statement within the set time limit [Dawidowicz 1983, 93–94]. The formal connection of the obligation provided for in Article 79a of the Code with the obligation laid down in Article 10(1) of the Code is expressed by simultaneous fulfilment of both these obligations – in one notification addressed to the party, and also by

[5] Explanatory statement, p. 28.

establishing a single deadline for the party to take a position both in relation to the collected evidence, and in relation to the information of the authority formulated pursuant to Article 79a of the Code. Moreover, the provisions of Article 10(2–3) of the Code, providing for the possibility to abandon its implementation in cases whose resolution is urgent due to the protection of human life or health or to prevent the threat of irreparable material damage, are also applicable with regard to the obligation established in Article 79a of the Code.

The provision of Article 79a of the Code provides for concretisation and supplementation of the content of the notification addressed to the party after the completion of the investigation procedure and before the public administration authority issues a decision. The implementation of this additional obligation of the authority consists in indicating to the party the premises, dependent on it and based on the provisions of substantive law, which were not fulfilled or demonstrated as at the date of sending the information, which may result, in particular, in issuing a decision refusing the party's request or accepting it only in part. In the light of that provision, it is therefore not sufficient to set out in general terms the statutory grounds for granting the request, but it is necessary to set out the specific conditions which, given the circumstances of the case, must be fulfilled or demonstrated in order for the request to be granted.[6]

As a result of fulfilling the obligation provided for in Article 79a of the Code, a party to the proceedings obtains knowledge about how the public administration authority assesses evidence collected in the case. In other words, the authority presents the party with a preliminary assessment of the collected evidence in terms of the possibility to accept the request. The party is given the opportunity not only to comment on the results of the evidence-gathering procedure, but also to influence the way the case is decided by the authority and the content of the administrative decision, in particular by supplementing the evidence, submitting additional explanations or correcting the request. Provision 79a of the Code should therefore be seen in terms of a procedural guarantee – as a directive on how to implement the party's right to active participation in the proceedings by strengthening the party's ability to influence the content of the decision at the last procedural stage before the authority takes adjudicatory actions closing the proceedings. It cannot, however, be assumed that a party thereby obtains an authorisation to participate with the authority in issuing an administrative act, despite the fact that activities at the decision-making stage of the proceedings, as a result of fulfilment of the obligation under Article 79a of the Code, are to a certain extent included in the instructional stage of the process [Wegner 2019, 468].

[6] See judgment of the Supreme Administrative Court of 1 October 2019, ref. no. II OSK 985/19, CDACD.

The judicature also emphasises another effect of Article 79a of the Code, deriving from this provision an argument in favour of expecting a broader evidential initiative from a party in proceedings initiated upon request.[7] In those proceedings in which, in view of their subject-matter, the possibility for the administrative authority to independently determine the facts of the case remains significantly limited, it is established in the judicature that the evidential initiative should be demonstrated by the party in its own interest.[8] A party to the proceedings may not, however, be obliged to undertake actions indicated to it, pursuant to Article 79a of the Code, by the authority, which may influence the way the case is settled. If the party does not react, a decision will be issued on the basis of evidence and materials held by the authority. Such a decision may then be subject to instance and administrative court control. If the party submits additional evidence in order to obtain a resolution consistent with its demand, the public administration authority will have to assess this evidence comprehensively, pursuant to Article 80 of the Code, i.e. in accordance with the principle of free evaluation of evidence. When issuing a decision on the basis of evidence supplemented by a party in accordance with the information presented to it about the state of the case, the authority should also take into account the directives following from the general principle of proceedings provided for in Article 8 of the Code, and in particular – the requirement to protect a party to proceedings acting in trust for the public administration authority.

CONCLUSIONS

The postulate of "partnership administration" in administrative procedure may be implemented first of all by strengthening the guarantees of the party's participation in the procedure. Of particular importance for the implementation of this postulate is the standard of procedural information transfer between the party and the authority conducting the proceedings. Exercising the right to be heard must assume full knowledge of the participant of the proceedings about the state of the process and legal effects of actions taken by him. The participation of a party to the administrative proceedings in the issuance of an administrative decision should not be identified with the participation in the phase when the authority takes a decision and puts it in the form of a formalised judgment. At this stage of the procedure the party's possibilities of influencing the body are not founded in the provisions of procedural law.

[7] See judgment of the Supreme Administrative Court of 16 May 2019, ref. no. I OSK 1901/17, CDACD.

[8] See judgment of the Supreme Administrative Court of 15 December 2017, ref. no. II OSK 603/16, CDACD.

The rights and obligations of the parties towards the State are decided by the public administration authority with administrative power, and thus only the body "decides" on the content of the administrative-legal relationship created by the decision. Hence, no procedural guarantees of the party's participation in the proceedings can go as far as allowing the party to formulate the content of the act of jurisdiction [Zimmermann 2017, 60]. Involving the party in the decision-making activities of the proceedings would mean a change of the procedural paradigm in public administration. Nevertheless, procedural power should not be equated with arbitrariness in the actions of a public authority. Therefore, in the system of procedural law there is a need for guarantees balancing the procedural position of the authority conducting the proceedings and the individual whose rights and obligations the authority decides on, allowing for co-shaping of the ruling as regards the findings of facts of the case, but preserving separate procedural roles of the subjects of the proceedings.

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A MILITARY ORDER AS A SOURCE OF INFORMATION ABOUT REQUISITIONS ON POLISH SOIL IN 1919–1920

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Abstract. The article analyses issues related to the civic duty to bear the burdens for the defence of the State. These burdens have a centuries-long tradition and in the period discussed by the author they were also often used by the Polish Army through forced requisitions, which, however, were often of an illegal nature and even took the form of looting and plundering, i.e. criminal acts. Numerous military abuses by the army in the course of requisitioning became the subject of interest of the Supreme Command, including in particular the Minister of Military Affairs. By giving the relevant orders to military units, he tried to put an end to this illegal practice of requisitioning abuses, often referring to the dignity of a Polish soldier's uniform and forcing the commanders of units to apply absolute discipline and punishment for these abuses during requisitioning operations. The author discusses requisitioning activities through the prism of the analysis of requisitioning legislation and the attitude of the supreme military authorities to these activities in the light of the content of the orders sent by the Minister of Military Affairs to military units subordinate to him.

Keywords: Second Polish Republic, administrative law, public burdens, wartime duties, Ministry of Military Affairs, military order, law of war, requisitions

INTRODUCTION

The aim of this article is to analyse issues relating to war requisitions through the prism of military orders given by the Minister of Military Affairs to military units under his authority in the area of military operations, within the period of time specified in the title of this article. Thus the thesis of my research assumes a logical relationship between the institutions of a military order and a war requisition, and as we shall see further on, these orders mainly concerned orders and prohibitions[1] given to Polish troops in order to prevent

[1] For more about orders and prohibitions as administrative obligations, see Górski 2012, 221–33.

and put an end to unlawful requisitions that they often carried out.[2] It should be noted that the issues I will deal with – i.e. a military order and requisitions – are of interest to several branches of law, and therefore legal norms relating to requisitioning enjoy the attention of constitutional law, administrative law, criminal law and public international law.

As in the past, the notion of a military order is at present a notion in the field of substantive criminal law and, in accordance with Article 115(18) of the Penal Code currently in force in Poland, it means a command to undertake or refrain from taking a specified action issued officially to a soldier by his superior or an authorised soldier of a superior rank.[3] It is impossible here to analyse more broadly the numerous theories related to the institution of an order, and to characterise the various types of military orders (operation, training, daily, personal, etc.). For the purposes of this discussion, however, I assume that an order is the obligation of obedience of the addressee of an order to the will of the party issuing the order, dictated by legal authority, law and a social sense of obligation [Starzewski 1922, 193–94; Ziewiński 1964, 278–92; Idem 1986, 9–13, 23; Van Voorden 2013, 222–39; Idem 2014, 63–73; Kubica and Pietras 2016, 56–65; Kural 2017, 119–31; Skrzypek 2020, 97–105].[4]

The source and basis for my further analysis will therefore mainly be the military orders issued by the Minister of Military Affairs[5] and published in the

[2] The institution of war requisition, understood as a way of obtaining items of vital importance for the supply of troops, has probably existed in the form of the "right of spoils" since the times when people started to fight with each other for the first time [Srogosz 1990, 3–33; Łopatecki 2016, 59–88].

[3] Act of 6 June 1997, the Penal Code, Journal of Laws No. 88, item 553. In the light of the provisions of the German Military Penal Code of 20 June 1872, which was introduced in the reborn Poland by the Act of 29 July 1919 on Temporary Military Justice (Journal of Laws No. 65, item 389) and the Regulation of the Council of Ministers of 10 May 1920 on the implementation of the Military Penal Code (Journal of Laws No. 59, item 369), and was in force until 1 August 1928, i.e., in the analysed period, the right to issue orders served as a means for authorized persons to fulfil the military tasks entrusted to military personnel. This meant that it could be used wherever the need for an order was based on the nature and organisation of the army and aimed at fulfilling it. The Code contained a number of references to the institution of an order, such as: non-execution or alteration, refusal to execute, obstruction of execution or abuse, see para. 47, 58, 92–95, 111, 113–114, 120, 160 of the *German Military Penal Code of 20 June 1872*, according to the translation of the Legal-Military Committee of the Provisional Council of State, Warsaw 1920, 13, 16, 23–25 and 29–31, 40 [Makowski 1921, 191–94, 345–62, 397–400, 408–10, 416–21, 435–38].

[4] Cf. Austin 1993, 550, 576–702; Hart 1998, 36–37.

[5] The office of Minister of Military Affairs was created by decree of the Regency Council of 26 October 1918 as a result of the transformation of the Military Committee to the President of Ministers, which existed from 26 October 1918, see the Decree of the Regency Council of 26 October 1918 on the creation of Ministries of: Foreign Affairs, Military Affairs, Transport and Provisions, see the Journal of Laws of the Kingdom of Poland No.14, item 30 [hereinafter:

Journal of Military Orders,[6] as well as the military orders of the Command of Corps District No. 8 – Kielce,[7] which either confirmed the former or made it more detailed. Many of these orders are descriptive in nature and contain numerous interesting facts and news, which led to their issuance by the chief military authorities. As a result, they constitute valuable research material for the assessment of the requisitions carried out, the abuses of requisitioning and their illegal performance on Polish soil in the years 1919–1920.

As far as the notion of requisition is concerned, this institution belongs to the matter related to the constitutional obligation to defend the Fatherland, and the obligation to bear the burdens and to make personal and material contributions [Okolski 1884, 41–43; Bartoszewicz 1925, 669–70; Kasznica 1946, 123–24; Viel 1995, 60–61, 42–43; Huchla 2010, 141–46; Szalewska 2012, 525–26; Konarski 2020b, 43–46]. The burden of requisition means the obligation to make a natural, non-monetary contribution for a certain specific administrative purpose, and the subject of these burdens are either the personal contributions mentioned above or contributions in kind. In the scholarship of constitutional and administrative law, public burdens (including requisitioning burdens) are assumed to be obligations imposed on entities that are contributions of something to the public administration. This means that such a contribution may consist in performing certain works, providing certain services involving any human (physical and mental) work, or providing the public administration (e.g. the military administration) with certain items for use, which often took place and still does by means of requisitioning.

As far as the importance of the institution of requisitioning in public international law is concerned, in the light of the norms of this branch of law, it remains connected with the occupation of a certain territory [Cybichowski 1945, 3; Flemming 1981, 21, 42–57; Bierzanek 1982, 227–75; Konarski 2012, 308–13; Kwiecień 2013, 65–80; Haberland 2017, 353–407; Nowak 2017, 382–91, Kołodziej 2018, 62–64, 78-96; Dinstein 2019, 228–56], when various types of services and deliveries required by the occupier take place, e.g. the supply of military quarters, the supply of military *podvodas*, construction and repair work on roads and railways, aircraft runways, etc. [Konic 1906, 177–89; Grabski 1908, 5–8; Gąsiorowska 1917, 103–27; Wise 1944, 47–62; Hyczko 1965, 80, 83, 96–98; Przygodzki 2001; Taźbirek 2009, 103–14;

JLKP]; Decree of the Regency Council of 3 January 1918 on the temporary organisation of the Highest Authorities in the Kingdom of Poland, JLKP No. 1, item 1.

[6] Hereinafter: JOMMA.

[7] Hereinafter: CCD. In the years 1918–1921, the general district commands (from 1921 – the corps district commands) were the field administrative apparatus of the Polish Army. An example of military orders issued in the field of requisitioning were those issued by the Command of the General Kielce District (Corps) on the grounds that they were comprehensively prepared. For more on the establishment of local administrative bodies of the Polish Army [Ostanek 2014, 186–87].

125–40; Filipiak 2011, 215–29; Sierakowska 2019, 356–68; Konarski 2019a, 63–86; Idem 2019b, 113–35; Idem 2019c, 111–31; Idem 2020a, 99–128, Idem 2020b, 46–51]. Under the norms of international law, an occupying power may requisition foodstuffs and medical supplies on the occupied territory only for the occupying armed forces and administration, taking into account the needs of the civilian population and issuing the necessary orders to ensure fair compensation for all requisitions.[8]

Requisitions were most often carried out during or immediately after military operations. The underlying reason for their use is always the need to provide the State with goods or services by means of imposing an obligation to bear public burdens, which lies in the fact that there are situations during an armed conflict, when a certain number of human hands and a certain amount of material means are required to meet a certain need, while the uniqueness and dynamism of a war situation does not allow for looking for, hiring or buying them. This means that such a need can only be met by means of enforced requisition and not by contract [Jaworski 1924, 169–71; Hauser 2010, 193–212].

1. REQUISITIONG LEGISLATION ON POLISH SOIL AFTER 1918

The basis of the system of wartime contributions, including requisitioning, which gives the State, through authorised bodies, the right to demand these contributions from the population, and in particular handing over to the State, in return for payment, of ownership or the right to use movable and immovable property directly or indirectly needed for the purpose of supplying the army and defending the State, but only when the war broke out or when a partial or general mobilisation was ordered,[9] was the Act on Wartime In-Kind Contributions adopted on 11 April 1919.[10] The Act was to be in force provi-

[8] Regulations concerning the laws and customs of land war annexed to the Fourth Convention adopted in The Hague on 18 October 1907, Journal of Laws of 1927, No. 21, item 161; Geneva Convention of 12 August 1949 for the Protection of Civilian Persons in Time of War, Journal of Laws of 1956, No. 38, item 171. Cf. Cybichowski 1914, 71–76. The famous Enlightenment philosopher Immanuel Kant (1724–1804) emphasised that "During a war it is permissible to impose forced deliveries and contributions on the defeated enemy. However, it is not permissible to plunder people, i.e. to take away from individuals what belongs to them (this would be plundering, as the war was not led by a defeated nation, but by a State under whose power it remained). Rather, it should be done by issuing orders of payment so that, once peace has been made, the burden imposed on a country or a province can be shared proportionately" [Kant 2006, 152].

[9] For more about mobilisation systems, see Zakrzewski 1938, 89-90; Berman 1964, 5–6; Koch 1980, 4–20; Stankiewicz 1981, 69–72; Orzechowski 1986, 91–94, 203–205.

[10] The Act on Wartime In-Kind Contributions of 11 April 1919, Journal of Laws of the Polish State No. 32, item 264 [hereinafter: JLPS]. The regulation introducing the obligation to provide

sionally for a period of one year[11] and when it came into force, all other acts and regulations on requisition and war duties ceased to be in force, provided, however, that these were requisition and wartime contributions to be ordered from the moment the Act came into force.

The introduction of the obligation to provide wartime contributions, the establishment of a deadline for the creation and cessation of this obligation, as well as the indication of items subject to obligatory provision, took place as a result of a joint Regulation of the Minister of Military Affairs and the Minister of Internal Affairs, which was issued on 29 April 1919.[12] In accordance with the provisions contained in this Regulation, the obligation of compulsory provision covered movables (draught animals and all means of transport, regardless of the force they are moved by, together with all tools, equipment and facilities necessary for their use),[13] as well as real estate (e.g. for accommodation purposes).[14]

wartime contributions on 1 May 1919 was published on 29 April, see the regulation of the Ministry of Military Affairs and the Ministry of the Internal Affairs on introducing the obligation to provide wartime contributions, "Monitor Polski" No. 98 [hereinafter: M.P.].

[11] When the Act ceased to be in force, an act restoring its binding force was issued as early as on 23 April 1920, see the Act of 23 April on Restoring the Binding Force and Partial Amendment of the Act on Wartime In-Kind Contributions of 11 April 1919, Journal of Laws of 1920, No. 37, item 212.

[12] The Regulation of the Ministry of Military Affairs and the Ministry of Internal Affairs of 29 April 1919 on the introduction of compulsory wartime contributions, M.P. No. 98.

[13] This Regulation was then supplemented by two regulations issued on 1 November 1919, see the Regulation of the Minister of Military Affairs and the Minister of Internal Affairs on the introduction of the obligation to provide wartime contributions (supplement to the Regulation of 29 April 1919 – M.P. No. 98), National Library, ref. no. DŻS IA 6a6 Cim.; the Regulation of the Minister of Internal Affairs of 1 November 1919 on the declaration of possession of items necessary to supply the army with clothes, M.P. No. 246. Cf. the announcement of the Government Commissioner for the City of Warsaw of 13 July 1920 on the declaration of possession of items necessary to supply the army with clothes, Official Journal of the Government Commissioner for the City of Warsaw of 16 July 1920, No. 14. Another order for compulsory provision of the above mentioned items took place on 22 March 1920 by way of the Regulation of the Minister of Military Affairs and the Minister of Internal Affairs on the introduction of compulsory wartime contributions, Journal of Laws No. 30, item 177.

[14] See the Decree on the requisitioning of premises for the needs of public offices, JLPS. No. 14, item 197; Act of 8 April 1919 on the provision of housing for the needs of the army, JLPS No. 31, item 262; Act of 27 November 1919 on the obligation of municipal councils to provide premises, Journal of Laws No. 92, item 498; Act of 23 April 1920 on the extension of the Law of 3 April 1919 on the provision of housing for the army Journal of Laws No. 37, item 211; Order of the Ministry of Military Affairs of 22 February 1920 on the requisition of furniture seized by courts, Journal of Orders of the Ministry of Military Affairs [hereinafter: JOMMA] No. 7 of 9 March 1920, item 147; Order of the Ministry of Military Affairs of 10 April 1920 on the powers to requisition and manage premises for military purposes, JOMMA No. 13 of 27 April 1920, item 314.

On the basis of the provisions of the above-mentioned Act of 11 April 1919, the Central Army Supply Office was established at the Ministry of Military Affairs.[15] Its responsibilities included centralising and covering the general needs of the army. Demanding wartime contributions was effected by means of requisition orders, issued by competent administrative offices on the basis of demand documents, issued by military authorities, i.e. to the Minister of Military Affairs and to bodies authorised by him.[16]

As regards remuneration for wartime contributions, the Act on Wartime In-Kind Contributions provided that the rule should be immediate remuneration in the form of cash paid at prices set by the Ministry of Military Affairs in agreement with the Ministry of Treasury and other ministries concerned,[17] on the basis of an opinion issued by representatives of agricultural, handicraft, commercial and industrial organisations. In the event that payment was not possible immediately, the possessors were to receive requisition vouchers prepared according to the model determined by the Ministry of Military Affairs.[18] The payment against the requisition vouchers was to be made by the commissariat of the nearest general military district.[19] In the event of non-payment, no one could be held liable to fulfil the obligation to provide wartime contributions if the requisition voucher was not given to him.[20] Notification of requisition vouchers or receivables for effected war contributions was to take place under pain of losing the claim within 6 months from the date on which the general obligation to provide wartime contributions ceased. If the military

[15] Act of 11 April 1919 on the establishment of the Central Army Supply Office, JLPS No. 32, item 265.

[16] As a result of warfare, the Council for State Defence issued a number of normative acts which separated the competences of civil and military authorities to secure and maintain public peace and order and to enforce material and personal contributions of the population. In areas considered by the Ministry of Military Affairs to be at war risk, a military governor could be appointed as Military Commander once executive power had been transferred to such areas. For the broad powers vested in the military governor, see the Regulation of the State Defence Council of 6 August 1920 on the establishment of a state of siege, Journal of Laws No. 69, item 460. For more on the legislative activities of the State Defence Council, see Marszałek 1995, 116–42; Idem 2011, 154–19.

[17] Cf. Order of the Command of Corps District No. 8 (Kielce) [hereinafter: CCD] on the requisition of hay and straw of 24 August 1920, Order of CCD No. 76, item 909, p. 4, which stipulated that until the date of commencement of the requisition (of hay and straw) purchases of these products were permitted at market prices.

[18] Order of CCD on the requisition of cattle of 14 October 1920, Order of CCD No. 104, item 10, 3; Order of the Ministry of Military Affairs of 21 December 1920 on the model of requisition receipt, JOMMA No. 48, item 1002.

[19] Order of CCD of 10 October 1920 on cashing requisition receipts, Order of CCD No. 102, item 22, 9.

[20] On payment for requisitions covered by informal receipts, see The Order of the Ministry of Military Affairs of 3 November 1920 on the payment for requisitions covered by informal receipts, JOMMA No. 40, item 868.

authorities, or military units, could not cover their needs by means of direct purchase or rental, they could ask the administrative authorities to order the population to deliver the necessary items.[21]

The owner of items subject to wartime contributions who did not receive payment for their contributions or for any reason felt aggrieved, had the right of complaint to the Regional Requisitioning Commission at the Military District Command. The decision of the Commission was also subject to the right of appeal to the Main Requisitioning Commission at the Ministry of Military Affairs within one month.[22] These commissions, together with the wartime contributions commissions operating at the *powiat* (municipal) level,[23] were collegiate bodies whose purpose was to assist in the enforcement of contributions or to resolve disputed issues arising from the enforcement.[24]

Let me add at the end of this thread of this analysis that, in view of the mass abuses of the army in the form of numerous robberies, looting and unlawful requisitions both during and, above all, after military operations, all military and civilian authorities were obliged to inform the nearest division's command or stage district command (outside the war zone: the command of general districts or military regions) of these criminal acts known to the civilian

[21] The authorities and bodies entitled to demand wartime contributions, the entities on which the wartime contributions were to be imposed, the place, date and manner in which the contributions were to be provided, and the question of the excess of powers were set out in the Executive Regulation of the Minister of Military Affairs and the Minister of Internal Affairs to the Act on In-Kind War Contributions of 11 April 1919, Journal of Laws No. 32, item 264. These provisions were further specified in the Executive Regulation of the Minister of Military Affairs and the Minister of internal Affairs to the Act on In-Kind War Contributions of 11 April 1919, Journal of Laws No. 32, item 264; M.P No. 100–101. During the Polish-Bolshevik war in 1920, there were known examples of the provision of means of transport in the form of horses, and there were few instances of refusal to provide them [Juszkiewicz 1997, 276–77]. Cf. Order of the Ministry of Military Affairs of 21 December 1920 on the collection of horses by military units, JOMMA No. 48, item 995.

[22] The executive Regulation of the Minister of Military Affairs and the Minister of Internal Affairs of 12 December 1919 to Articles 10(3), 11 and 12 of the Act on In-Kind War Contributions of 11 April 1919, concerning the establishment of Main and District Requisition Committees, Journal of Laws No. 97, item 514. The rules of District Requisition Commission and the Main Requisition Commission were regulated on 1 October 1920, see the Regulation of the Minister of Military Affairs and the Minister of Internal Affairs on the rules of Main and District Requisition Commissions, M.P. No. 270, Cf. Zdziechowski 1928, 22–25.

[23] The appointment and remuneration of members of *powiat* (municipal) committees were governed by the Regulation of the Ministry of Military Affairs and the Ministry of Internal Affairs of 17 May 1919 on *powiat committees* for wartime contributions, M.P. No. 118.

[24] For more about the problems of the requisition practice, the activity of requisition commissions and appeals against the decisions of the Main Requisition Commission to the Supreme Administrative Tribunal, see Podolska–Meducka 2011, 324–88.

population or authorities, free of charge and as fast as possible.[25] Situations of abuse by the army were therefore a serious problem which, as we will see in a moment, the highest military authorities tried to limit by disciplining soldiers by military orders.

2. REQUISITIONING PRACTICE IN THE LIGHT OF ORDERS OF THE MINISTER OF MILITARY AFFAIRS

Since time immemorial, warfare has generated pathological phenomena behind the front line in the form of mass robberies, looting, arbitrary and illegal requisitions which, in the guise of the enforcement of contributions, have given rise to criminal behaviour.[26]

Polish military formations, as I have mentioned above, did not avoid numerous requisitioning abuses with features of prohibited acts between 1919 and 1920. The supreme State authorities tried, as far as possible, to curb acts of this nature, by means of a dynamic process of disciplining military troops by publishing detailed military orders, the subject of which were obligations, prohibitions and standards of responsibility for carrying out requisitions.

In one of the orders – dated 5 November 1920, i.e. almost a month after the signing of the armistice of Riga (12 October) between Poland and Soviet Russia – the Minister of Military Affairs outlined in an extremely poignant and emotional way the circumstances of the requisitioning abuses by Polish troops, while at the same time trying to stimulate the spirit of patriotism and national unity in Polish troops committing criminal acts.[27] It is worth recalling here a longer fragment of this interesting, noteworthy disquisition by the Minister of Military Affairs, which is thought-provoking as regards the extent of the arbitrary and unlawful requisitions of that time: “I have received complaints about repeated incidents of improper behaviour by individual units and military personnel, both on the front and inside the country, towards citizens,

[25] Regulation of the Ministers of Military Affairs, Internal Affairs, Posts and Telegraphs and Railway of 23 October 1920 on facilitating the reporting of information by civilians relating to illegal requisitioning and looting by military personnel, Journal of Laws No. 98, item 658.

[26] Under the provisions of the German Military Penal Code of 20 June 1872, “looting” fell into the category of offences against property. The subject of this crime was the private property of the population, but, as W. Makowski pointed out, “at the same time, however, there is a military duty to maintain the dignity of the army, hence looting is a military crime, although it has features in common with similar common crimes against private property” [Makowski 1921, 235]. This Code, in Chapter VIII (para. 127–36), entirely devoted to “crimes committed in the field against persons or property,” penalised behaviours related to wilful leaving a military unit for the purpose of robbery, looting things, plundering, destroying things in the field, etc., see the *German Military Penal Code*, 33–35.

[27] Order of 16 November 1920 on putting an end to abuses against the civilian population, JOMMA. No. 42, item 903.

through illegal requisitions and taking over their property. If war operations could, in some very exceptional cases, justify the omission of legal formalities when at stake was the success of combat operations or, directly related to them, the needs of the army and maintaining its efficiency and combativeness, then outside the combat area and taking into account the end of warfare, such conduct not only cannot be justified, but deserves the harshest condemnation. Any lawless or wilful acts, even if only committed by individual members of the military personnel, not only harm the population, which, in the face of economic difficulties, often has to endure severe privation, but also makes civilians averse to the army in general and causes a hundred times more serious harm to the public interest, of which the army must be a representative and defender. The aggrieved population, often deprived of food or farming tools, suffers on its own, loses the ability to provide agricultural produce, the scarcity of which may be a disaster for the entire nation – and morally, the population loses confidence in the army and in the ideals of freedom it represents, through the fault of the wilful and demoralised individuals who are becoming harmful enemies of the population, the army and the Homeland. A Polish soldier, who was able to fight for an independent and free Homeland under the most difficult conditions, should be a brother and a defender of the people. The people must have complete confidence in him and turn to him for help and care. I therefore demand that all soldiers, understanding their soldierly and civic dignity, stop all the excesses of wilfulness harming, and I trust that the civic feeling in the Polish Army will be strong enough to put an end to wilfulness and abuses, which harm so much the army itself."[28]

In Order No. 904 – issued one day after the previous one, i.e. on 6 November[29]– the Minister pointed out that speed and repression of robberies and looting had not been up to the task, which inevitably means that for many months of warfare this problem was unsolvable in the Polish army. In view of the above, the Minister "demanded and ordered" that cases of robbery and looting should be prosecuted on an ad hoc basis, and that the right of clemency held by commanders should be exercised in truly exceptional cases. As can be seen, these were not isolated situations, but they happened on a significant scale.

It should be noted that problems related to requisitioning were known in independent Poland before the start of the conflict with Bolshevik Russia, and concerned the requisitioning of items by the occupying authorities, which, as we will see later, also became the subject of judicial decisions of

[28] Ibid. The concept of "wilful acts," mentioned several times in the Order, was understood as a pointless, unjustified by any interest, abuse of military force, which was subject to the same punishment as looting [Makowski 1921, 469–71]. Cf. Podolska–Meducka 2019, 25–42.

[29] Order of the Ministry of Military Affairs of 16 November 1920 on ad hoc proceedings in the event of robberies and looting, JOMMA No. 42, item 904.

administrative courts. Before I proceed to analysing these issues, however, I will draw attention to issues related to the requisitioning practice – mainly during the war with Bolshevik Russia, which often had pathological features and became the subject of legal regulations in the form of numerous military orders announced by the Minister of Military Affairs, aimed at putting an end to the practice of abuse and arbitrariness by the Polish army when carrying out requisitions.

Let me first mention at this point that already in the Order of the Minister of Military Affairs No. 698 of 25 February 1919, i.e. issued at the very beginning of the war, attention was drawn to the fact that commands of some military units carried out arbitrary requisitioning of privately-owned horses, while stressing that such requisitioning can only be carried out on the basis of the regulations of the relevant state authorities, and it was pointed out that until 18 February 1919 no regulations allowing for the requisitioning of horses had been announced.[30]

Therefore, in this Order, the Minister of Military Affairs categorically prohibited, under the personal responsibility of the commanders of individual military units, any requisitioning of horses or any other items that were private property.[31] However, the ban on requisitioning did not apply to horses, which by the occupying authorities were gathered in larger numbers in some parts of the country and at the beginning of the formation of Polish military units, after the exit of the occupants, they were given for safekeeping and temporary use by farmers due to the fact that it was not possible to take care of them. Those horses were the property of the military treasury and, being in the records of the military authorities, were to be returned to the army, and the number of such horses had to be notified to the Remount Section, specifying the troops in which the horses were included.[32]

In Order No. 79 of the Minister of Military Affairs of 1920, it was pointed out that although the ban on the requisitioning of state property under Order No. 1657 of 15 May 1919 was announced, there were incidents of requisitioning of foodstuffs intended for prisons. Therefore, it was decided that a certificate from the competent President of the Regional Court should be regarded as proof that the transport in question is intended for prisons, and, in the case

[30] Cf. Requisitions of horses, State Archives in Poznań, fonds no. 295 files no. 197 (all cards), 198 (all cards), 199 (all cards), 651 (all cards); cf. requisition of horses, State Archives in Poznań, fonds no. 295, files no. 197, 198, 199 and 651; Order of CCD of 31 December 1920 on proceedings in cases of requisitioning horses during war operations in summer and autumn this year, the Order of CCD No. 140, item 8, 7.

[31] Cf. Order of CCD of 17 February 1920 prohibiting the requisitioning of any foodstuffs intended for food supply in prisons, The Order of CCD No. 24, item 28, ref. no. 4476/X, 6.

[32] Order of the Ministry of Military Affairs on the prohibition of arbitrary requisition of horses and other items, JOMMA No. 21, item 698. Cf. Order of CCD of 8 April 1920 on the resumption of activities of Remount Committees, No. 32, ref. no. 1726/VIII, 14–16.

of rail transports, waybills bearing the official signature and stamp of that Court. In the event of failure to comply with this Order, such conduct should be punished in the strongest possible terms.[33]

On 28 August 1920 – in view of the increasing scale of abuses by the Polish army carrying out arbitrary requisitions, and the fact that various abuses were committed in the course of the requisition, as well as illegal takeover of people's property under the guise of requisition[34] – the Minister of Military Affairs regulated in detail the responsibility for arbitrary and unlawful conduct of requisitions in the form of Order No. 728.[35]

The Minister for Military Affairs stressed in this Order that the behaviour of Polish troops, which was the reason for the Order, could not be tolerated in any state under the rule of law and in any regular army as incompatible with law, order, rigour and discipline.[36]

In accordance with the provisions of the Order, commanders of all ranks were obliged to instruct their subordinates, especially the privates, that the dignity of a soldier was high and honourable and that a soldier, under the pain of the most severe penalties, including the death penalty, must not reduce himself to the level of a robber or a bandit, because he was a defender of the

[33] Order of the Ministry of Military Affairs of 17 February 1920 on the prohibition of requisitioning foodstuffs intended for use in prisons, JOMMA No. 4, item 79. More about field and summary proceedings in the Second Polish Republic [Szczygieł 2016, 59–81].

[34] "Illegal takeover of property" means the seizure, i.e. the removal of an item from the possession of another person, which is "simulated externally as a legitimate act of demanding wartime contributions, and consists in the fact that a military person, contrary to his or her own powers, or exceeding the limits of his or her powers, orders the population to provide in-kind contributions in ostensibly for the benefit of the army, but in fact for his or her own benefit" [Makowski 1921, 463–64].

[35] Order of the Ministry of Military Affairs of 14 September 1920 on requisition and the responsibility for arbitrary and illegal requisitioning, JOMMA No. 33, item 728. Cf. Order of CCD of 5 December on the arbitrary requisitioning of wood for coal mines by military units, The Order of CCD No. 128, item 11, 4–5.

[36] In Orders of the Minister of Military Affairs No. 797 and 798 of 1 October 1920, issued in order to categorically put an end to cases of robbery, looting and illegal requisitioning, it was provided that: (a) any officer who notices a robbery, looting or illegal requisitioning, even if he is not the official superior of a soldier who fulfils these crimes, shall be obliged to step in actively and prevent the crime; (b) in the course of these activities, any officer who steps in shall be subject to all the rights of the superior in relation to disobedient soldiers, including the right to enforce obedience by the use of weapons (para. 124 of the Military Penal Code); (c) an officer who, having observed that soldiers committed robbery, looted or illegally requisitioned, contrary to the said Order, has not actively entered and has not taken appropriate measures to stop the crime, will be considered guilty of failure to comply with an official order, resulting in a sentence of imprisonment of up to three years and expulsion from the army, see Order of the Ministry of Military Affairs of 12 October 1920 on combatting widespread abuse by soldiers, JOMMA No. 37, item 797; Order of the Ministry of Military Affairs of 12 October 1920 against robbery, looting and illegal requisitioning, JOMMA No. 37, item 798.

Homeland and of the civilian population, which should receive help and care from the soldier. The commanders were also to instruct their subordinates that the illegal and arbitrary removal of property from the population would in all cases, without exception, entail the most severe penalties, including the death penalty, and that lower and higher commanders were also to be punished if they did not immediately hold responsible those of abusing the requisitioning or illegal removal of property from the population.[37]

The way, which was supposed to protect Polish military units from arbitrariness during requisitioning to some small extent, was to provide the Supreme Command and General District Commands with laced books containing numbered requisition forms of receipts, prepared according to a prescribed model.[38] However, as D. Rodziewicz points out, the problem in the everyday practice of requisitioning activities was "writing requisition receipts by representatives of military units on informal prints, or rather on ordinary sheets of paper, which usually resulted in problems for people making the contributions when they wanted to cash them in commissariats" [Rodziewicz 2017, 55]. A way out of this situation was to allow, in the form of an order of the Minister of Military Affairs, the possibility of carrying out requisitions on non-formalised forms.[39]

As I have just mentioned, the Minister of Military Affairs in Order 728 regulated the personal scope and the requisition procedure,[40] repeating earlier

[37] Cf. Announcement of the Lublin Voivode on combatting abuse during purchases and requisitions for the army from the civilian population, Official Journal of the Lublin Voivodeship of 12 November 1920, No. 5, item 100 [hereinafter: OJLV]; Announcement of the *Starostwo* of Radom concerning the order of the Minsters of Military Affairs and Internal Affairs "on combatting robberies, looting and illegal requisitioning committed by members of the military," State Archives in Radom, fonds no. 206, ref. no. 271, card 1 [hereinafter: SAR].

[38] The requisition receipts were ordered by Department VII of the Ministry of Military Affairs in books of 50 pieces each, which were marked with serial numbers and individual receipts in a book were numbered in order from 1 to 25, so that two consecutive receipts were given one number. According to the instructions, the receipts were to be filled with a chemical pencil through carbon paper. One copy was then given to the provider and the other was left in the book, see Order of the Ministry of Military Affairs on the model requisition receipt, JOMMA No. 48, item 1002. In addition, all officers carrying out requisitioning were to have the appropriate identity cards. These identity cards were considered necessary in order to avoid likely misunderstandings with civil authorities, see Order of CCD of 28 February 1920 on identity cards for requisitioning officers, the Order of CCD No. 16 item 23, ref. no. 3718/X, 6.

[39] The phrase "not completely formal receipts" was understood to mean receipts either not written on the prescribed form, or without a date or stamp of the requisitioning unit, but bearing at least the signature of the requisitioning authority, as long as it did not raise doubts as to the authenticity of the signature and the existence of the requisitioning unit, see Order of the Ministry of Military Affairs of 3 November 1920 on the payment for requisitions covered by informal receipts, JOMMA No. 40, item 868.

[40] Order of CCD of 17 September 1920 on the procedure for carrying out requisitions, the Order of CCD No. 88, item 1135.

statutory provisions. The requisitioning procedure could only be ordered: (a) domestically, by the Minister of Military Affairs, General District Commands, and other military authorities, provided they were authorised by the Minister of Military Affairs; (b) in war zones, by the Main Quartermaster Department, Stage District Commands, and in cases of a direct emergency, by all commanders (military units, offices and institutions), provided they had their own economic committee.[41]

The order stressed that requisitions were not carried out by military authorities but, at their request by civil administrative authorities, such as: (a) *powiat* offices; (b) municipal offices of towns/cities with their own statutes and towns/cities with their own self-government, and in Warsaw, Lublin and Łódź, government commissioners; (c) *gmina* offices.[42] Exceptionally, the military authorities could carry out requisitions themselves, without the involvement of the civilian authorities, only in the following situations: (a) when, on a special basis in each individual case, they received a permit from the Minister of Military Affairs; (b) when in the immediate area of war operations, in the absence of the administrative authorities there, or in cases where there is a danger of a delay in war operation. In these cases, however, the commanders of units carrying out requisitions were obliged to select two persons of trust from among the local population, and the signatures of these persons had to appear on the requisition receipt, if one was issued.

The person conducting the requisition was obliged to immediately pay the total amount due for the requisitioned item, and if the payment could not be made, he was obliged to immediately issue a requisition receipt according to the agreed model. If no requisition form was available, the person conducting the requisition was obliged to immediately issue a requisition receipt with a stamp and signature on plain paper, with a precise indication of all the data provided for in the sections of a requisition receipt, i.e. the title, seal of the requisitioning unit, date, town, name and surname of the person making a contribution, type of the contribution – item, quantity, measure, weight, etc., indicate the payment office which was to make the payment, include the data of witnesses, provided that they assisted in the requisition, and include a legible signature of the person issuing the receipt. In addition to these data, each requisition receipt had to include the exact identification of the requisitioning

[41] Cf. Order of the Ministry of Internal Affairs of 28 September 1920 concerning the relation of military authorities subordinate to the Ministry of Military Affairs to authorities subordinate to the Supreme Command of the Polish Army, concerning wartime contributions, JOMMA No. 35, item 765.

[42] Cf. Regulation of the Lublin Voivode of 25 June 1920 on the requisition of blade weapons in the Lublin Voivodeship, Official Journal of the Lublin Voivodeship of 15 July 1920 No. 3, item 49 [hereinafter: OJLV]; Regulation of the Lublin Voivode of 27 July 1920 on the requisition of saddles in the Lublin Voivodeship, OJLV of 31 July 1920 No. 4, item 59.

unit and the rank, assignment and name of the commander or the member of the military conducting the requisition.

The order provided that the forcible seizure of private property by military units or individual members of the military, made with the omission or violation of the regulations in question, constitutes an illegal act of arbitrariness. They were subject to disciplinary sanctions, and regardless of this, they were to be brought to court and punished for abuse of official authority, provided that the act did not have features of a more serious crime (theft, robbery with violence). In the latter case, the *ad hoc* procedure could involve the harshest penalties, including the death penalty.

At the same time as the Order was issued, it was ordered that all the following persons should be brought to court: (a) those who ordered or conducted a requisition in violation of that Order; (b) those who, under the guise of requisition, committed an offence; (c) commanders who did not immediately punish and bring to justice their subordinates who were guilty of the above-mentioned offences and abuses.

On 6 September 1920, the Minister of Military Affairs issued further orders aimed at stopping arbitrary and unlawful requisitions.[43] This time he forbade the requisitioning of livestock and horses both in the villages that had been occupied by the enemy and from individual refugees. This ban resulted from the factual circumstances faced by the Polish authorities, namely the situation in which the Bolsheviks almost completely stripped large areas of the Republic of Poland of their livestock, especially horses. As is well known, the lack of horses, especially during the autumn sowing season – as the Minister emphasised in the Order in question – created extraordinary difficulties for farmers, because it made it difficult, delayed and even prevented the cultivation of land for sowing, with the ultimate result of losses and, above all, hunger.

Incidentally, a similar ban was included in another order issued on the same day, which stipulated that all stocks of petrol and lubricants held in agricultural syndicates and purchased by them were not subject to requisitioning.[44]

In Order of the Minister of Military Affairs No. 1021 of 1920, all military bodies and units which had been from 12 July onwards requisitioning passenger cars, trucks, motorbikes, bicycles, and their spare or component parts were ordered immediately to: (1) transfer all files on the requisitioning of the above-mentioned items to the Requisitioning Commission of the Ministry of Military Affairs, Department II of the Motorised Forces Section, which was

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[43] See Order of the Ministry of Military Affairs of 21 September 1920 on the prohibition of the requisitioning of livestock and horses in the villages affected by the invasion of the enemy and from refugees, JOMMA No. 34, item 742. Cf. Order of CCD of 27 September 1920 on the prohibition of incorrect requisitioning, the Order of CCD No. 95, item 11, 5.

[44] See Order of the Ministry of the Internal Affairs of 21 September 1920 on the prohibition of requisitioning of petrol and lubricants in agricultural syndicates, JOMMA No. 34, item 743.

to receive them from individual committees of military formations for further processing; (2) conduct the valuation the requisitioned cars and motorbikes on the basis of the data presented and verified by the Requisitioning Commission of the Ministry of Military Affairs, to be carried out by the already existing and Interministerial Valuation Committee at the Motorised Troops Section, Department II of the Ministry of Military Affairs, on the basis of its competence and instructions, and the payment of the estimated sums for cars and motorbikes should be made each time to the budget account of the units of the Ministry of Military Affairs for which the requisition was conducted; (3) complaints concerning such requisitions were to be submitted to and dealt with by the Interministerial Committee for Complaints already functioning at the Motorised Troops Section of Department II.[45]

It should be remembered that after the end of World War I there were no manufacturers of automotive equipment in Poland, and just after the war the need for transport was met by vehicles (mainly trucks) from the military surplus of various armies. For patriotic reasons, and also because of the lack of regulated trade relations, purchases from Germany were avoided. Therefore, the army was often forced to supply itself with civilian equipment through requisitioning. In addition, in the early days of reborn Poland, "a common means of transporting goods and people was the railway, which provided more mass-scale and economic transport opportunities than cars that were just beginning to appear in the country. However, they required an efficient road network, the condition of which was lamentable in the first years of independence. Car traffic was concentrated in cities, but moving between them was not easy" [Szelichowski 2012, 14]. Thus, the main burden of transport services, apart from horse transport, was borne by the railway transport.[46]

In conclusion, it should be stressed that the Polish army during the Polish-Bolshevik war did not, as I demonstrated above, avoid numerous abuses in the field against civilians. Nevertheless, the fast reaction of the Supreme

[45] See Order of the Ministry of Military Affairs of 28 December 1920 on the requisitioning of cars, motorbikes, bicycles and spare parts, JOMMA No. 49, item 1021. Cf. Announcement on the requisitioning of cars and motorbikes for military purposes, SAR, fonds no. 206, ref. no. 1668, card 1. In July 1920, the Polish Army owned 1,584 cars of various types (mainly German, Austrian, French and American-made), which came to Poland together with General Józef Haller's army, or were purchased from French and American military surplus [Popławski 2008, 76; Jarno 2017, 233].

[46] See Act of 27 March 1920 on railways during war, Journal of Laws No. 27, item 160; executive Regulation of the Minister of Military Affairs and Minister of Railways of 25 June 1920 to the Act of 27 March 1920 on railways during war, Journal of Laws No. 55, item 342; executive Regulation of the Minister of Military Affairs, Minister of Railways and Minister of Treasury of 8 August 1920 on the implementation of the Act on Railways during the War, Journal of Laws No. 79, item 533; Order of the Ministry of Military Affairs of 21 December 1920 on the Temporary Instruction on Railway Services for the Army and the Principle of Mutual Settlement of Military and Railway Authorities, JOMMA No. 40, item 1000.

Command, which disciplined soldiers through a system of orders and penalties for these criminal behaviours, made it possible, at least to a small extent, to prevent illegal or defective requisitions.

CONCLUSION

The analysis carried out above shows that requisitions on Polish soil by the Polish Army during the Polish-Bolshevik conflict were frequent and sometimes took on the form of illegal requisitions, looting and plundering of property. There is no doubt that the presence of military troops in a given operational area inhabited by local people was becoming an increasingly difficult burden to bear over time, mainly due to the scourge of various types of requisitions, which, sometimes took the form of common robbery. Requisitioning *podvodas*, often unpaid, was most bothersome and proved to be one of the most frequent causes of tensions between the stationed or marching army and the local population. This was, of course, due to the fact that requisitions of *podvodas* made work in the fields impossible. In addition to these abuses, there were also those that consisted in paying for the purchased (requisitioned) goods much below their market value, which resulted in not only the dissatisfaction of agricultural workers, but also in numerous complaints of landowners about the presence of Polish troops in their estates. However it should be stressed that there were situations in which the landowners asked the local military commanders to ensure security during periods of economic conflicts between the manor and the village [Cichoracki 2018, 276–77].

As I noted at the beginning my analysis, despite the existence of a fairly consistent system of requisitioning legislation during the period under consideration, the Polish Army did not manage to avoid, in the face of armed conflict, numerous requisitioning abuses, which the already heavily deprived Polish society had to suffer. Complaints by the population of eastern Poland about the repeated incidents of improper and illegal behaviour of individual military units to the chief military authorities resulted in the only rational reaction possible, namely the issuing of various relevant orders, the aim of which was to put an end to the wilfulness and abuse of the Polish army.

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LEGAL ASPECTS OF THE EVOLUTION OF EU SECURITY IN THE CONTEXT OF INTERNATIONAL LAW REGULATIONS ON SECURITY

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Abstract. The global legal order governing the security of states, international organizations or individuals is heterogeneous and multifaceted in nature. It clashes between the norms of international, EU and internal law. The genesis of the European Union lacked the legal basis for the creation of internal and external security structures, while normative efforts were directed towards the economic development of the organization. At the same time, within the framework of the UN, normative solutions were introduced for the prevention of breaches of peace, spheres of security within the supranational framework. Both the European Union and members of the United Nations must introduce normative solutions to combat threats, including terrorist threats, as actions to protect the European system of values and the system of the United Nations.

Keywords: international security law, international organizations, EU security system, counter-terrorism

PRELIMINARY REMARKS

The genesis of internal and international security in the European Union is of a multi-faceted nature. This is so, because from the international-law point of view, the European Union has been an entity having a character of international organization.[1] Granting the Union the status of an internation-

[1] There were disputes between scholars specialised in international law, EU law and administrative law which focused mostly on the question of the essence of the European Union as an independent entity in international and internal relations. The European Union was granted the legal subjectivity in some international organizations, e.g. the World Trade Organisation, which was expressed by granting voting rights along the parallel voting rights of the Member States of the Union. Theoretical disputes in the legal literature both at home and abroad ended with the entry into force of the Treaty of Lisbon, which was drawn up on 13 December 2007 and substantially amended the Treaty on European Union (known as the Maastricht Treaty) made on 7 February 1992. The Treaty of Lisbon, being a revision treaty and thus amendment of the earlier treaty provisions, unequivocally states in Article 47 that "the Union shall have legal personal-

al organization was a fundamental decision which introduced considerable transparency in the consecutive stages of European integration and contributed to the strengthening of its cohesion. As a consequence, its operational efficiency increased and the decision-making process was unified. Concurrently, the transformation of the Union based on the regulations resulting from the Treaty of Lisbon led to significant changes (to be discussed below) in the field of internal and international security of the Union [Barcz 2009, 4–9]. The idea of a single international organization bringing together all the member states as it is today did not exist in the initial phase of forming the European communities.[2] The security paradigm existed at that time in a different form than currently [Huysmans 1998, 227–45]. This is so since the present Union stems from post-war tendencies resulting from the division of spheres of influence not only in Europe but also across the world.

1. THE PURPOSE AND SCOPE OF RESEARCH

The primary aim of this research is to evaluate and analyze the internal and external factors shaping the legal solutions in the field of security of the European Union. The group of internal factors shaping the development of security regulations of the Communities, and later the Union, includes the negative phenomena accompanying the development of the Communities. The group of external factors entailing the necessity of harmonization of community law with international law includes those related to the membership of the EU countries in the UN, and more recently to the status of the European Union as an international organization. The analysis also takes into account the historical aspect. In this situation, it seems appropriate to first formulate the following theses: 1) the European Communities, until the entry into force of the Maastricht Treaty, did not have a legal framework allowing the development of a common security policy; 2) the legal regulations contained in the Lisbon Treaty established a single common security space for member states; 3) until the European Union acquired the status of an international organization, the functioning of the Communities in the international environment was of a heterogeneous nature; 4) the overriding character of international law regulations is justified by the need to ensure the security of the Union from the perspective of protection against terrorist threats.

ity" (Article 47 added and numbered as set out in Article 1(55) and Article 5(1) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ EU.C.2007.306.1) as of 1 December 2009].

[2] The European Union currently is made of 27 states, following the withdrawal of the United Kingdom from the organization, see https://europa.eu/european-union/about-eu/countries_en/ [accessed: 11.01.2021].

2. THE ORIGINS OF THE CONCEPT OF INTERNAL SECURITY OF THE EUROPEAN COMMUNITIES

After the end of World War II, the divisions clearly emerged in Europe into the American and the Soviet spheres of influence.[3] The American sphere of influence has traditionally been concentrated within the so-called Western Europe, as it was liberated earlier, in the final phase of World War II, by the American army, and this zone also includes Great Britain. The societies of these countries sought to establish the United States of Europe. This idea was proclaimed by Winston Churchill, who was a strong advocate of cooperation with the United States and a staunch opponent of the domination of the Soviet Union in the sphere of international relations, both in Europe and globally. The concept of common Europe was presented by Churchill at the Zurich conference in September 1946 [Churchill 1996].[4] The pursuit towards reconstruction of European countries from the wartime destruction has, in essence, coincided with very serious concerns and threats from the Soviet Union, which during World War II decisively and unequivocally expanded its zone of influence in Europe. Economic factors have combined with elements related to the security of Western European countries in both the internal and external spheres. The political elites in the United States were aware of the nature of the situation and were ready to help countries across Europe. This was expressed in the formulation in 1947 of the European Recovery Program known as the so-called Marshall Plan.[5] Marshall himself stated in a speech delivered in June at

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[3] Countries that are now part of the European Union and previously were states or autonomous republics in the orbit of influence of the USSR (Union of Soviet Socialist Republics) or formed part thereof include: Czech Republic and Slovakia (formerly Czechoslovakia), the GDR (German Democratic Republic) incorporated into the FRG (Germany), Poland, Bulgaria, Romania, Lithuania, Latvia, Estonia.

[4] See more at https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/united-states-of-europe/ [accessed: 21.12.2020].

[5] George C. Marshall (1880–1959) achieved the rank of General of the Army of the United States as early as in 1939 and served as a military advisor to US President Franklin D. Roosevelt. He was one of the supporters of the Truman Doctrine, which was the US foreign policy programme. It was formulated by Harry Truman and presented to the US Congress on 12 March 1947. Generally, the doctrine stated that the United States should engage in assistance to countries, societies and ethnic groups that resist external pressure and attempts by armed minorities or external factions to seize power or establish new authority. This doctrine, forming part of a security policy in the broad sense, was undoubtedly directed against the pursuit of hegemony by the USSR both within and outside Europe. In a speech delivered at a joint session of Congress (House of Representatives and Senate), President Truman made it clear that "the peoples of a number of countries of the world have recently had totalitarian regimes forced upon them against their will. The Government of the United States has made frequent protests against coercion and intimidation, in violation of the Yalta agreement, in Poland, Rumania, and Bulgaria)," see Yale Law School, Lillian Goldman Law Library, The Avalon Project, Docu-

Harvard University that "the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace."[6] The plan involved 16 European countries and Turkey. The offer was also addressed to the countries of the so-called Eastern Bloc, including Poland, which, under pressure from the USSR, was forced, like other countries of the bloc, to refuse to accept the programme. The project was implemented between 1948 and 1951. It coincided with the so-called Schumann Plan,[7] which gave rise to the establishment, under the Treaty signed on 18 April 1951, of the European Coal and Steel Community (ECSC), which was an economic organization which achieved a spectacular success in the field of coal and steel in a very short period of time.[8] As a consequence, after the Conference of Foreign Ministers held in Messina in June 1955, Belgian Foreign Minister Paul Henri Spaak presented in 1956 a report on the economic integration of the Community countries, which formed the basis for further negotiations with a view to even closer cooperation between the states. They resulted in the signing of two so-called Treaties of Rome, establishing the European Atomic Energy Community (EAEC, Euratom) and the European Economic Community (EEC). Like the ECSC, the States-Parties to the Convention were France, Germany, Italy, Belgium, the Netherlands and Luxembourg. These three intergovernmental organizations have provided the economic basis for western European countries to operate within their framework. They were collectively referred to as the European Communities. It is worth noting that the Communities were an economic response to the USSR's aspiration to establish, together with its satellite countries, a privileged position as part of the so-called hegemony of socialist states. With the spectacular success of the European Communities, other elements of cooperation between states also had to emerge, the most important being the development of the internal security of the Member States of the Communities[9] in the light of the growing tension in international relations between the US and the USSR.

ments in Law, History and Diplomacy-Truman Doctrine. See more: https://avalon.law.yale.edu/20th_century/trudoc.asp [accessed: 21.12.2020].

[6] Yale Law School, Lillian Goldman Law Library, The Avalon Project, Documents in Law, History and Diplomacy-George Marshall's Harvard Speech. See more: https://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm [accessed: 21.12.2020].

[7] Robert Schumman, a former French Foreign Minister, is known as the father of the European Union.

[8] The Treaty establishing the organisation entered into force on 23 July 1952 and was concluded for 50 years. The founding countries were Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

[9] After the Second World War, as early as in 1945, it was known that the spheres of influence in Europe were divided between the USA and the USSR. This situation was particularly vivid in the German state, whose territory was divided into two spheres of influences, i.e. the American

Given that only six countries are in the initial phase of development of the Communities, the roots of the internal security of the European Communities should be sought in the efforts to establish the European Defence Communit, the work of which was initiated by France, initially unwilling to cooperate with Germany but eventually allowing such a solution in the light of a possible conflict with the USSR. This concept was preceded by the signing on 17 March 1948 by France, the Netherlands, Belgium, the United Kingdom and Luxembourg of the so-called Treaty of Brussels, which regulated also the issues of self-defence.[10] The concept, referred to as the Pleven plan,[11] assumed, apart from the integration of the Federal Republic of Germany into European defence structures, the defence of Western Europe from a possible attack by the USSR, establishing a European army under the authority of the European Defence Minister and military independence on the US. The plan was supported by the Popular Republican Movement (led by R. Schuman), which strove to establish a federal Homeland Europe. The Communist Party and the Republicans gathered around Ch. de Gaulle fought the project, seeing it as a restriction on French sovereignty. The establishment of the European Defence Community and the European Political Community in 1954 failed as a result of a veto by the French National Assembly. The project of common security policy was frozen for quite a long time, mainly as a result of the negative attitude of France, Belgium and the Netherlands to federalist ideas. The harmonisation of the economic sphere did not go in line with a similar

zone and the Soviet zone. The direct cause of the escalation of tension between the USA and the USSR was the introduction by the USA in its zone of a new currency: the German mark. The USSR, concerned about losing economic control over its part of Germany, introduced on the night of 23/24 June 1948 in its zone a physical blockade (military posts and barriers) of the western sectors of Berlin. At the same time, they cut off electricity supplies. Access to the American, British and French sectors of Berlin was closed. In response, the US and UK began to arrange an "air bridge" (Berlin airlift). The blockade lasted 11 months and, in political terms, accelerated the division of the German state into two separate geopolitical entities, with later capitals in Bonn and Berlin.

[10] The Polish literature on the subject also points out that the Brussels Treaty of 17 March 1948, as amended by the protocols of 23 October 1954, was under the so-called Paris agreements the legal basis for the functioning of the Western European Union (WEU). The Western European Union, originally formed by Belgium, France, the Netherlands, Luxembourg and the United Kingdom, expanded after 1954 to include Germany and Italy. Spain and Portugal accessed to WEU in 1990, and Greece in 1995. The main goal of the WEU was security cooperation. It was intended to perform most of the functions of the EDC, excluding the integration function. WEU was an organization that had no operational functions and in this sense played no role whatsoever. In fact, it was only a forum for exchanging views on the military capabilities of the Member States. It was dissolved on 31 March 2010 by decision of the Member States due to the entry into force of the Lisbon Treaty in December 2009. Logistics activities of the organization were terminated until 30 June 2011 [Ruszkowski, Górnicz, and Żurek 2003].

[11] The plan is related to French Prime Minister Rene Pleven, who presented it at the National Assembly of the French Republic on 24 October 1950.

process in the area of security. It should be stressed that until the entry into force of the Maastricht Treaty, the Communities did not have legal mechanisms to uniformly address the security policy. This is seen in the different pace of economic and security integration. Two plans by French diplomat Christian Fouchet are an example. The first plan of 2 November 1961 was to devise a common security and foreign policy. The second, on the other hand, was intended to establish a cooperation between governments. The two programmes were opposed mainly by Belgium and the Netherlands, which feared an increase in France's position in the Communities and weakening of the North Atlantic Alliance (NATO). By the end of the 1960s, it is difficult to distinguish a unified course of action in the area of security. As a consequence, the common idea of the internal security of the Communities could only be pursued in the form of loose consultations between government representatives and exchange of views. An example supporting this statement was the creation of the TREVI programme in 1975 at an informal meeting of interior ministers of the Member States of the European Communities. The aim was to set up groups for the cooperation on internal security between Member States. The name TREVI was an acronym standing for French words meaning "terrorism, radicalism, extremism, international violence." The following programmes were separated from the TREVI programme: TREVI I (counterterrorism), TREVI II (police techniques, equipment and training of officers). TREVI groups have launched an internal security cooperation in the strict sense [Bryksa and Adamczuk 2008, 9–10]. From a practical point of view, it is quite difficult to talk about a uniform, centralised structure of internal security in the Communities, even in the context of the common defence policy, until the entry into force of the Maastricht Treaty.[12] It is worth noting that even the global crises, such as the Soviet intervention in Afghanistan, have not been able to lead to taking a unified position on the foreign policy by the Member States of the Communities. In 1981, a meeting of the Foreign Ministers of the Member States was held in London, with the Foreign Ministers of Germany[13] and Italy[14] playing a central role. They proposed the signing of a European Act, the main aims of which referred to political, cultural cooperation, fundamental rights, harmonisation of legislation not included in the Treaties of the Communities, combating terrorism, crime and violence and the common security policy [Perez–Bustamente and Colsa 2004, 106–108]. It was one of the

[12] The Maastricht Treaty, formally the Treaty on European Union, is an international agreement establishing the European Union, which entered into force as late as on 1 November 1993, even though it was signed much earlier on 7 February 1992 in Maastricht, the Netherlands. The long period for the entry into force of this international agreement resulted from the need to hold referendums in 12 Member States.

[13] Hans Deitrich Genscher.

[14] Emilio Colombo.

elements of the adoption of the so-called London Report, which was accepted and subsequently adopted on 13 October 1981.[15]

3. THE TREATY ON EUROPEAN UNION AND THE AMSTERDAM TREATY AS A BASIS FOR THE DEVELOPMENT OF COMMUNITY LEGAL NORMS IN THE SPHERE OF INTERNAL SECURITY

Huge progress has been made in the area of the common foreign and security policy since the entry into force of the Treaty on European Union (colloquially referred to as the Maastricht Treaty). The Agreement introduced provisions on this subject under Title V "Provisions on a common foreign and security policy."[16] In accordance with Article 11 (consolidated version) the Union implements a security policy for protecting common values, in accordance with the principles of the United Nations Charter, strengthening the security of the Union in all its forms, maintaining peace and strengthening international security. These objectives are to be pursued in accordance with Article 12 under which the Union decides on the principles of the common foreign and security policy, common strategies, the adoption of joint actions, and on the strengthening of systematic cooperation between Member States in pursuing their policies. The Treaty has fully reactivated the Common Foreign and Security Policy in a uniform form and harmonized scope. The Treaty also required that the Union's institutions act coherently in the sphere of foreign and security policy as part of the so-called second pillar. It should be stressed that the Treaty provisions referred to the relationship between the European Union and the North Atlantic Alliance, which was a compromise between the supporters and opponents of the concept of Atlantic cooperation. In the light of Article 17: "The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty

[15] This report was a response to the inefficiency and inability to agree common positions on defence, security and foreign policy issues between the Member States of the European Communities. Based on its provisions, the so-called joint Troika Secretariat was established. It was also decided that the security issues of the Communities would be integrated into European political cooperation. The report also set out a crisis procedure that included the possibility of the Political Committee or a ministerial meeting to be convened within 48 hours. However, the first attempt to use this mechanism in the face of the introduction of martial law in Poland turned out to be a failure. See also Zięba 2007, 33–35.

[16] Title V "Treaty Provisions on European Cooperation in the Sphere of Common Foreign and Security Policy" [Przyborowska–Klimczak, and Skrzydło–Tefelska 2004; Staszewski, Przyborowska–Klimczak, and Wrzosek 2000].

Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework."

In 1997, the Treaty of Amsterdam was signed.[17] It strengthened the role of the Union institutions in the area of internal security by clarifying the terms and defining forms of combating crime, including corruption, terrorism, crime against children, human trafficking, drug smuggling. A very important provision of the Treaty of Amsterdam was the integration of the Schengen *acquis* into the EU legal system. The idea of the Schengen Agreements was to phase out border control between the contracting parties and to allow the free movement of nationals of these states.[18] Quite an important regulation of the Treaty of Amsterdam referred to the possibility of conducting so-called Petersberg missions. Petersberg missions consist in the possibility of carrying out humanitarian, rescue, peace-keeping, crisis management tasks both by specialised formations of the Member States and by military units of NATO members [Wojciuk 2012, 190–95].

Since 2003, the Union has had its own security strategy as part of the so-called European Security Strategy. It was adopted on 12 December 2003 on the initiative of the Council of Foreign Ministers and representatives of Greece. It was stated that while large-scale aggression against any member state is unlikely, Europe is nevertheless facing new threats: more diverse, less visible and less predictable. The strategy mentions as the main threats the proliferation of weapons of mass destruction, regional conflicts, the collapse of statehood and organised crime [Kuźniar 2004, 23–25]. The Union's strategic security goal, in a situation where threats are increasingly of non-military nature, is to have at hand multilateral tools tailored to different scenarios, including terrorist attacks and WMD threats.

In turn, in 2005 the European Council adopted the EU Counter Terrorism Strategy,[19] which obligated the Union to take steps to combat terrorism. Also

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[17] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain acts related thereto. It entered into force on 1 May 1999.

[18] The name "Schengen Agreement" refers to a number of agreements, the first of which was signed on 14 June 1985 in Schengen, which was subsequently supplemented by the Schengen Convention in 1990. The agreement was entered into by Belgium, the Netherlands, Luxembourg, France and the Federal Republic of Germany for gradually abolishing border controls between Member States. The Agreement was concluded outside the Community legal order. Membership of the Schengen Agreement is not tantamount to membership of the European Union. At present [as of 01.12.2020], a total of 22 EU Member States are full members of the Agreement, while Bulgaria, Cyprus, Croatia and Romania are entitled to accede to the Agreement. Iceland, Liechtenstein, Norway and Switzerland, the European Free Trade Association (EFTA) Member States, have signed the agreement while remaining outside the EU.

[19] EU Counter Terrorism Strategy, https://data.consilium.europa.eu/doc/document/ST%20 14469%202005%20REV%204/EN/pdf [accessed: 22.12.2020]. The EU security institutions designed to deal with terrorism matters include: The High Representative of the Union for Foreign Affairs and Security Policy, The Foreign Affairs Council, Committee of Permanent

in 2005, the European Council adopted the European Union Strategy for Combating Radicalisation and Recruitment to Terrorism.[20] Another very important document is the EU Internal Security Strategy – "Towards a European Security"[21] of 2010 also adopted by the European Council. It sets out in detail the issues governing the Union's internal security cooperation with third countries. Cooperation with third countries concerns the following sensitive areas:[22] combating terrorism in any form,[23] serious and organised transnational crime,[24] computer crime, cross-border crime including human trafficking into the EU territory, organised violence (riots, attacks on state bodies and private entities), destructive actions (causing floods, fires, destruction of power lines, water supply, IT and telecommunication networks, causing traffic disasters, etc.).

4. LEGALISM OF THE LISBON TREATY IN THE CONTEXT OF THE INTERNAL SECURITY OF THE EUROPEAN UNION

One of the most recent documents, which currently has a far-reaching impact on the formation of internal security of the European Union is undoubtedly the Treaty of Lisbon.[25] This Treaty makes many important changes, including reforms in the field of external and internal Union policy as the most prominent. In this respect, the most important changes are those concerning the European area of freedom, security and justice. This Treaty introduces

Representatives (COREPER), The Political and Security Committee (PSC), The Working Party on Terrorism – International Aspects The Common Position 931 Working Party (CP 931 WP) on the application of specific measures to combat terrorism, The Committee for Review of Listings under Regulation 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

[20] See more Oliveira and Ziegler 2018.

[21] The EU Internal Security Strategy – towards a European security, Council of EU, 2010.

[22] Council of European Union, Rev 2, 5842/2/10.

[23] Under a joint programme the Eurojust has carried out in 2007 an operation to detain 26 people in Romania, France, Italy and the UK as part of an international counter-terrorism operation. The terrorist organization planned attacks in Italy, Afghanistan and Iraq. See also: Eurojust Annual Report 2007, p. 34–35.

[24] As part of the programme the Operation PIPAS was carried out in 2008 against an organised bank fraud group, during which 112 people were detained and 48 properties searched at one time in 11 countries. See also: Europol Annual Report 2008, p. 24.

[25] The Treaty of Lisbon is a continuation of previous attempts to make reforms in the European Union under the Treaty establishing a Constitution for Europe. The Constitution was signed in Rome on 29 October 2009. The process of its ratification failed. In July 2007, a conference was convened in Lisbon during which negotiations were launched to draft a treaty reforming the Union. The treaty was signed on 13 December 2007, and entered into force on 1 December 2009, after ratification by all member states.

the need to intensify efforts to build a common European area. The common area should meet the expectations of EU citizens and regulate issues related to immigration control, fight against organised crime and terrorism. To implement these assumptions, the cross-border and pan-European cooperation is necessary. The area of freedom, security and justice can be classified into four categories: the first relates to border control, asylum and immigration, the second to judicial cooperation in civil law, the third to judicial cooperation in criminal matters, and the fourth to cooperation between police services. Border control, migration and asylum policy has been strengthened by granting special powers to European institutions in the form of common management of the EU's external borders (Frontex), establishment of a common asylum system, introduction of legal immigration procedures. Judicial cooperation in civil and criminal matters has been based on the introduction of dispute resolution solutions, real access to justice, joint training of personnel, strengthening of the Eurojust agency, the concept of establishing a European Public Prosecutor's Office. The police cooperation is based on a genuine strengthening of the European Police Office (Europol).

5. NORMATIVISM OF INTERNATIONAL LAW TOWARDS THE CONCEPT OF INTERNAL AND EXTERNAL SECURITY OF THE EUROPEAN UNION

The EU normative security system does not operate isolated from international law. It should also be strongly emphasized that the Union acts within the global security system as an international organization with all the rights and consequences of this fact. Undoubtedly, it is important to recognise the specific nature of the notion of internal security in international relations. This is one of the most difficult concepts in the areas of political science, international relations, international law and European Union law. This is so because it is much easier to speak of international security and national security, than about internal security in international relations. However, given the complexity and specificity of the problem and the changes resulting from the collapse of the Soviet Union and the Eastern bloc after 1989, devaluation of the notion of "peace" in its traditional form, and finally escalation of hybrid threats after the 11/09 attacks, it seems right to provide a synthesis of many definitions in this regard.[26]

Internal security in international relations should primarily be understood as the striving, in cooperation between States or international organizations, in the international forum, in bilateral or multilateral agreements or in cooperation within international organizations, towards the elimination of threats to

[26] In a broader perspective see Bobrow, Haliżak, and Zięba 1997.

their nationals or members of organizations, the integrity, independence and sovereignty of States or international organizations resulting from internal or external action by organised groups of either a state or a non-state character or natural persons. The mainspring of a state is to ensure the security of its citizens within a given territory, and the meaning of an international organization in many cases is to ensure the security of its members or the smooth implementation of its statutory objectives. A notable example of such an international organization, whose bodies currently aim at the security of citizens of all Member States, is the European Union [Popescu 2013, 28–31]. Therefore, the essence of internal security in international relations refers to groups of states, international organizations of a governmental nature, the international community, citizens of states participating in the security system, the stability of international processes and the stable functioning of elements of the state. In this sense, the concept is quite narrow, as it does not cover human rights issues. The system of actions related to international security recognizes as a paradigm and axiom the priority of protecting the health and life of citizens as a whole and not the individual, which is the priority in the human rights system [Haliżak and Popiuk–Rysińska 1995, 14–15]. In this regard, the dominance of the State or executive bodies of international organizations is therefore undisputed [Kitler 2002, 44–45].

The origins of security in international relations, in contrast to the definition of the concept itself, have not posed many problems for researchers neither in Poland nor abroad [Rosas 2015, 1074–1080]. As one of the most prominent specialists in international law L. Antonowicz writes: "international law has always known the distinction between peace and war, and the law of war has always formed its integral part. Such state of affairs is still valid [...]. A gradual replacement of the concept of war by the concept of armed conflict may be noticed" [Antonowicz 2002, 225–27]. In the Middle Ages and in modern times, there were strong tendencies to limit wars in general, and if allowed, they could only be waged as a so-called just war, the concept of which was developed by the school of natural law. One of the main assumptions of this school was the conviction that states can only initiate wars if there is a just cause. It was generally accepted that state sovereignty in international relations is expressed by the possession of a triad of rights: the right to make treaties, the right to send and receive diplomats and the right to war (*ius tractatuum, ius legationis, ius ad bellum*) [Kowalski 2013, 30–35]. Over time, waging wars without any legal consequences has led, mainly in Europe, to negative consequences both in relations between states, economic, cultural and other relations. This was particularly evident in the 19th century, with Napoleon's aspirations to win hegemony in Europe, countered by successive coalitions. One of the most important documents was the resolutions of

the Vienna Congress of 1815,[27] which established rules aimed at maintaining peace and balance between the great powers. Peace in this sense corresponded to the security of the peoples of Europe. The world literature on the subject emphasizes that the decisions of the Congress of Vienna have ensured the internal security of European society for a period of one hundred years [Bobbit 2002, 487–90]. Formally, the Congress established a directorate of five powers but did not prevent uprisings, revolutions and internal conflicts in Europe. Security was granted only to the great powers and institutions associated with them, not to individuals. Therefore, European security in international relations did not work in tandem with internal security. This was so because it did not provide the population with those elements that we can talk about today. The stability on the international stage between the great powers and the lack of real signs of preserving elements of internal security in Europe confirmed the lack of correlation between external relations and the situation within states just before World War I. Legal security in international relations was to be safeguarded by peace agreements. This objective is undoubtedly served by the legal mechanisms adopted within the framework of international organizations, including military accords. The delegation of powers to structures bringing together sovereign states is nothing new. The first were military alliances, specialized agreements aimed at defending the states that were part of the agreement or, accordingly, military activities.[28] However, it quickly became apparent that specialised coalitions such as military agreements were not useful in times of peace, when the main objective is to develop the economy, and exceptions relate to ensuring peace and security.

The League of Nations supposed to be a model of such an organization.[29] The Covenant of the League of Nations was signed at the end of the Paris

[27] The Vienna Congress was held from September 1814 to June 1815. It was convened with the aim to decide about political and territorial changes and brought together representatives of 16 European countries. See more Dobrzycki 2009.

[28] An example of such an alliance was the Triple Entente. This alliance between the Great Britain, the French Republic and the Russian Empire was a response to the Triple Alliance. Initially, the alliance was based on a desire to preserve peace in Europe and seek common solutions in the event of third-country aggression. At the outbreak of World War I, 25 countries were part of this agreement, the core of the coalition being the founding states [Mansergh 1949, 35–37].

[29] League of Nations. The initiative to establish this first universal international organization with a global reach is attributed to President of the United States Woodrow Wilson, although in fact this proposal was put forward by a group of American congressmen. It was included in the speech of the President of the United States to Congress on 8 January 1918, referred to in the literature on the subject as the Fourteen Points, stating that "a general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." These assumptions, which found the fertile soil in Europe, given the consequences of the world war, were developed during the Paris Peace Conference in January 1919. An interesting fact is that the United States, the originator of the project in the person of President Wilson, withdrew from participation in this

Peace Conference on 28 June 1919 and was the first collective security system in human history. It was the first international document to contain the term "security." The essence of the League of Nations was collective security. It consisted in a strict prohibition of aggressive war and a mechanism prohibiting the use of force. Despite many shortcomings used to be attributed to this organization, it should be regarded as a forerunner of supranational organizations having legal instruments but without mechanisms that could prevent negative phenomena in terms of international security breaches. The League of Nations was the first supranational organization to take "any action to protect peace," establish dispute resolution procedures and create mechanisms for imposing economic and military sanctions on states where necessary. The lack of effective mechanisms within the League of Nations resulted in the organization being criticised for decades.

The end of the Second World War[30] resulted, on the one hand, in the establishment of a new organization whose overriding objective is to ensure security, i.e. the United Nations,[31] and on the other hand, divided the world into two main areas of influence. Security interests of states in the "war of totalitarianisms" have once again led to a violation of the principle of equivalence of security in the sphere of international relations and internal security.

6. THE ROLE OF ARTICLE 51 OF THE UNITED NATIONS CHARTER IN THE EVOLUTION OF THE INTERNATIONAL SECURITY OF EUROPEAN STATES

The post-war legal and economic order has led to the application of Article 51of the UN Charter under which each member of the organization has the right to individual or collective self-defence before the Security Council takes the necessary measures to maintain international peace and security

organization and never became a member of the League of Nations, however American ideas were reflected in this organization.

[30] World literature underlines that during World War II, in relation to the German occupation, a sense of safety was extracted from people and replaced with a permanent state of the individual in danger. The German state applied genocide having no precedent in the history of mankind, especially to the Jewish people (Holocaust) [Howard 2007, 144–46].

[31] The United Nations Charter, which established the United Nations Organization was signed at the United Nations Conference in San Francisco on 26 June 1945 and its provisions entered into force on 24 October 1945. This document is currently one of the most important international documents (if not the most important one) which unites UN Member States in their efforts to ensure security. Regardless of the types of security and scientific disciplines that describe security issues, there is a common denominator, namely the Charter. Under Article 1(1), one of the main objectives of the organization is to maintain international peace and security with the use of effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.

[Przyborowska–Klimczak 1998, 19]. Although the provisions of the article do not explicitly mention the possibility of forming defence alliances against security threats, an expanding interpretation was adopted, according to which it provides the basis for establishing alliances and political and military blocks in case of a possible attack. Article 51 is invoked by the Inter-American Treaty of Reciprocal Assistance of 1948,[32] the North Atlantic Treaty of 1949,[33] the Southeast Asia Collective Defence Treaty of 1954,[34] the Baghdad Pact of 1955,[35] the Warsaw Pact of 1955.[36] During the Cold War the issue of internal security in international relations was mainly focused on members of two alliances, i.e. NATO and the Warsaw Pact [Nowak 2011, 350–53]. According to Article 5[37] of the North Atlantic Treaty in the event of an attack, "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." Also, in accordance with the

[32] Also known as TIAR or the Rio Pact. Signed by representatives of 21 American countries, it entered into force on 3 December 1948. The main provisions of the Treaty concern the defence of Member States against attack. It specifies the types of threats that include armed attack, threat to peace or security, conflict on the continent or elsewhere.

[33] The Alliance's provisions entered into force on 24 August 1949 under the international agreement signed on 4 April 1949. Initially, the organization was to provide military defence against the Soviet Union (USSR). It formed part of maintaining a strategic balance between the eastern and western worlds. The Alliance currently consists of 28 countries.

[34] Under the treaty, the Southeast Asia Treaty Organization was established as a military-political organization. The purpose of establishing organizations of this nature was the need to contain the influence of China and the USSR in South and East Asia, manifesting in communist ideology. The aim of the organization was to ensure security in the region and peaceful resolution of disputes.

[35] I was one of the few international agreements of a bilateral nature. It was signed on 24 February 1955 between Turkey and Iraq. The primary aim of the agreement was to prevent the spread of communist ideology in the Middle East. Very quickly, other countries acceded, including the UK, Pakistan, Iran.

[36] The Warsaw Pact, signed on 14 May 1955 in Warsaw, with the dominant position of the Soviet Union, was one of the most important political and military agreements in post-war history, alongside the North Atlantic Alliance. The Joint Military Command was based in Moscow. The Warsaw Pact existed until July 1991. The alliance consisted of the following countries: Soviet Union (USSR, Union of Soviet Socialist Republics), People's Republic of Albania, People's Republic of Bulgaria, Czechoslovakia Socialist Republic, German Democratic Republic (GDR), Polish People's Republic, Romanian People's Republic, Hungarian People's Republic. It was intended as a response to the establishment of the North Atlantic Alliance in 1949.

[37] Journal of Laws of 2000, No. 87, item 970.

provisions of Article 4[38] of the Warsaw Pact, "In the event of an armed attack in Europe on one or more of the States Parties to the Treaty by any State or group of States, each State Party to the Treaty shall, in the exercise of the right of individual or collective self-defence, in accordance with Article 51 of the United Nations Charter, afford the State or States so attacked immediate assistance, individually and in agreement with the other States Parties to the Treaty, by all the means it considers necessary, including the use of armed force. The States Parties to the Treaty shall consult together immediately concerning the joint measures necessary to restore and maintain international peace and security. Measures taken under this article shall be reported to the Security Council in accordance with the provisions of the United Nations Charter. These measures shall be discontinued as soon as the Security Council takes the necessary action to restore and maintain international peace and security." As it can be concluded, the two opposing political and military blocs have formed alliances based on a common legal provision and UN membership. Moreover, both the former Soviet Union and the US were permanent members of the UN Security Council. The literature on the subject used to point to the danger associated with the fact that states sought to ensure their security by establishing political and military systems and organizations. It is significant that during the Cold War a security deficit arose, which was filled by the development of procedures entailing an arms race, which in turn were to ensure the security of citizens of member states of the agreements. The pursuit of security entailed (mainly in the case of the Eastern Bloc, which also included Poland) a very strong emphasis on issues related to internal security and a significant increase in the role of the state and its organs vis-à-vis its own citizens. In particular, an increase in the role played by the intelligence, counterintelligence, police, military intelligence and counterintelligence and border services can be observed during the Cold War period. This was related to potential threats from the opposing political and military bloc, as well as the striving to limit the influence of other ideologies. At the same time, state authorities sought to control all activities that were incompatible with the policy of a particular country.[39] It is worth noting that despite the intensity of arms race during the Cold War, ideological confrontation, the utmost threat of World War III (the Cuban crisis in October 1962), it was possible to avoid a confrontation of a military nature

[38] Journal of Laws of 1955, No. 30, item 182.

[39] This was largely the case for the eastern bloc's societies. It was typical that uprisings against the authorities, or revolutions, were suppressed by military force or with the use of Warsaw Pact troops (Hungary 1956, Czechoslovakia 1968). However, it cannot be stated that the phenomenon of the strengthening of the role of state services did not occur in the USA. In the 1950s, a very common phenomenon was McCarthyism, which can be characterised as targeted political action using various means, often harsh (brutal interrogation methods), to fight the communist threat. The target of these actions carried out by US security services were American citizens.

between the US and the USSR. This was due to the instruments allowing the maintenance of internal security in international relations. The drive to slow down the pace of arms race, the disarmament and détente in the 1970s and 1980s was the result of institutionalised activities aimed precisely at keeping international peace and security. The UN played a major role in this process, with the conclusion of the most important disarmament agreements (except for SALT). Also, the launch of a security dialogue in international relations within the framework of the Conference on Security and Cooperation in Europe,[40] with an enormous intellectual potential of researchers and analysts, contributed to raising awareness, overcoming divisions and the process that led to the final end of the Cold War in the early 1990s.[41] The moment of the end of the Cold War coincided with the dissolution of the USSR, and with it, the risk of the outbreak of global conflict vanished. Geopolitical changes in Europe, covering also the USSR, have made the phenomenon of competition between the "east" and the "west" no longer relevant. Indeed, new phenomena have emerged (terrorism) or escalated (cross-border organised crime, cyberterrorism, trafficking in weapons of mass destruction) which replaced the threats associated with cold war politics. Both in world literature and in Polish literature, the system of threats is referred to as asymmetric or hybrid threats. According to M. Madej, asymmetric threats relate to a threat posed in conflict by a party which has much less potential than the adversary and thus uses methods, means and techniques that are different from the standard ones, routinely used and considered acceptable. In this sense, asymmetric threats include four main categories: international terrorism, organised crime, especially cross-border crime, the use of weapons of mass destruction by non-state actors, the hostile use of information technology [Madej 2012, 80–85].

7. UN CONVENTIONS AS A SOURCE OF COUNTER-TERRORISM LAW IN THE EUROPEAN UNION

Currently, the most serious threats to the internal security of democratic states, not only in EU, are the activities and functioning of terrorist organizations, which cover with their operations all countries of the world. The largest forum for cooperation in the field of countering terrorist threats is the UN, which has adopted more than a dozen anti-terrorism conventions since 1963. It is worth mentioning that international terrorism has been the subject of the

[40] The Conference on Security and Cooperation in Europe (CSCE) functioned until 1995 as a platform for dialogue between the two opposing blocs during the Cold War. Since 1995, the CSCE has taken an institutionalised form of a political organization as the Organization for Security and Cooperation in Europe. It has currently 57 member states, including those from Europe, Asia and North America (USA and Canada).

[41] See more Krukowski, Potrzeszcz, and Sitarz 2016; Czaputowicz 2003.

work of the international community since 1934, when the League of Nations drafted a convention on the prevention of terrorism. However, this convention has never entered into force. All these international agreements define the type of terrorist activity, impose on states the requirement to penalise criminal acts, the states are obliged to establish jurisdiction over the perpetrators of these acts. The most important ones are the following: 1) Convention on Offences and Certain Other Acts Committed on Board Aircraft signed in Tokyo on 14 September1963 (signed by Poland on 14 September 1963, entered into force in relation to Poland on 17 June 1971), 2) Convention for the Suppression of Unlawful Seizure of Aircraft signed in The Hague on 16 December 1970 (signed by Poland on 16 December 1970, entered into force for Poland on 20 April 1972), 3) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done in Montreal on 23 September 1971 (signed by Poland on 23 September 1971, entered into force for Poland on 27 February 1975) [Konaszczuk and Tokarski 2014, 30–35]; 4) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973 (Poland signed it on 7 June 1974, it entered into force with respect to Poland on 13 January 1983); 5) International Convention against the Taking of Hostages adopted in New York on 18 December 1979 (signed by Poland on 18 December 1979, entered into force in relation to Poland on 26 June 2000); 6) International Convention for the Suppression of the Financing of Terrorism was signed in New York on 9 December 1999; 6) International Convention for the Suppression of Terrorist Bombings was adopted in New York on 15 December 1997 (signed by Poland on 15 December 1997, entered into force in relation to Poland on 04 March 2004); 7) Convention on the Marking of Plastic Explosives for the Purpose of Detection was signed in Montreal on 1 March 1991 (entered into force for Poland on 25 November 2006); 8) Convention on the Physical Protection of Nuclear Material was opened for signature on 3 March 1980 (Poland signed it on 6 August 1980, the Convention entered into force for Poland on 8 February 1987); 9) International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005; 10) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988 (signed by Poland on 10 March 1988, entered into force for Poland on 1 March 1992); 11) Protocol for Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 (signed by Poland on 10 March 1988, entered into force for Poland on 1 March 1992) [Drzazga 2009, 15–23]. Among the most important terrorist organizations in the light of reports by the CIA[42] and the US Department of State[43] operating worldwide are: Abu Sayyaf (Father of

[42] Central Intelligence Agency, report at: http://www.cia.gov/ [accessed: 21.12.2020].
[43] See http://www.state.gov/j/ct/rls/other/des/123085.htm [accessed: 21.12.2020].

Swordsmith) [Izak 2015, 15], Al-Adl wa al-Ihsane (Justice and Spirituality) [ibid., 20], Da Afghanistan Islami Amarat (Islamic Emirate of Afghanistan) [ibid., 22], Aktivna Islamska Omladina (Active Muslim Youth) [ibid., 37], Allah in Partisi (Turkish Hezbollah) [ibid., 43], Amal (Lebanese Resistance Regiments) [ibid., 46], Ansar al Islam (Supporters of Islam) [ibid., 54], Ansar as Sunna (Supporters of Tradition) [ibid., 60], Boko Haram (Western civilization is forbidden) [ibid., 69], Darum Arqam (Arqam House/Land) [ibid., 76], Dawlat al Iraq al Islamiyya (Islamic State of Iraq) [ibid., 81], Jaish e Mohammad (Muhammad Army) [ibid.], Jaish al Mahdi (Mahdi Army) [ibid.], Hamas (Islamic Resistance Movement) [ibid., 102], Hezbollah (Party of God) [ibid., 240], Al Qaeda (Base) [ibid., 307], Sipah e Mohammad Pakistan (Pakistani Army of Muhammad) [ibid., 443], Tenzim al Qaeda fi Jazirat al Arab (Al Qaeda's Organization on the Arab Peninsula) [ibid., 473]. These are just examples of the most influential radical organizations. These organizations are very well prepared to carry out hybrid activities in any part of the globe, and according to Krzysztof Izak they belong to Islamist movements.[44]

FINAL CONCLUSIONS

From the point of view of the subject matter under consideration, the following conclusions can be formulated: a) the legal basis for the establishment of the European Communities did not contain normative legal regulations covering the sphere of security; b) negative social phenomena, in practice, forced the need for legal regulation of internal and international security; c) the consolidation of the area of security by the Maastricht Treaty and the Amsterdam Treaty contributed to the influence on the harmonization of this sphere with the norms of international law; d) the Union's failures on the international plane in the field of security was due to the Union having no formal status as a subject of international law. Taking into account the above conclusions, it should be emphasized that until now the direction of normative solutions in the international sphere has been determined by the UN system – thus creating security guarantees for the future. Thus, due to the lack of identification with the *raison d'etre* by citizens in the EU and the still existing inability to choose effective measures to combat the threat of terrorism, it is subject to the control of international law norms.

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[44] See more Izak 2015.

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THE SOCIAL FACTOR IN THE COURT OF CASSATION – INTERNAL AND EXTERNAL MOTIVATIONS

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Abstract. The article presents the results of empirical research devoted to the motivation for serving as a lay judge of the Supreme Court of the Republic of Poland. The social factor was introduced into the Polish legal system under the Act of December 8th, 2017 on the Supreme Court. Public discourse has pointed to the legislature's intent to provide broader, social legitimacy to the Supreme Court. The participation of the social factor is envisaged in the following proceedings: disciplinary and extraordinary appeal. The empirical study consisted in the Supreme Court lay judges filling a survey, which included a series of questions – mainly closed ones – concerning their motivation for holding the office, their management style, the way they work in a group, the role of rewards and reinforcements, but also their opinions on their functioning in the Supreme Court, their sense of satisfaction with their work, and their possible proposals for changes in the existing regulations. The article consists of a theoretical part, devoted to the legal regulations concerning the institution of lay judges of the Supreme Court, a discussion of the methodology of the study, its results and final conclusions. The authors only present and discuss the obtained results, without evaluating the legitimacy of introducing the social factor into the judicial process at the level of the Court of Cassation from the perspective of the theory and philosophy of law or the science of management and quality. The aim of the study was to examine the social attitudes of people who decided to run for the position of a lay judge of the Supreme Court and were sworn in after successfully passing the induction

procedure. The analysis is interdisciplinary. The study was prepared with the participation of researchers representing a number of disciplines in the field of social sciences: economics, law, management and quality sciences and psychology.

Keywords: lay judges, Supreme Court, motivation, law, society

INTRODUCTION

In the majority of the democratic states governed by the rule of law project participation of the so called social factor in dispensing is being projected. The general science of legal theory understands dispensing justice as the process of applying the law resulting in particular decisions decisive in terms of individual laws, rights and obligations. The extent of the category of cases to which the social factor applies is usually very diverse. However, as rule, participation of citizens in executing and dispensing justice is associated with proceedings in which the so called decisions on the substance of the case are being made. This is understood as the court determining facts within the framework of the proceedings to take evidence in order to qualify the findings into an appropriate legal norm with the goal of drawing the aforementioned particular and individual consequences from a given entity. Participation of the social factor consists in expanding the catalogue of verdicts and values taken into consideration within the framework of hearing the evidence. With increasing frequency social participation in executing authority, including judicatory authority, is being treated as a component of a law-observing state which should act efficiently as well as justly and therefore the law should be applied by the judicial system in the same efficient and just manner. Fulfilling both these premises jointly as a goal and value in on itself is a prerequisite for considering the state to be governed by the rule of law [Czarnek 2018, 83].

For this reason participation of citizens in appeal proceedings (within the framework of a second instance court) is usually severely restricted or not projected within the framework of civil and criminal procedures. In case of the latter it is being recognized that the social factor may be substantial in terms of sensitizing the adjudicating panel in regards to applying a penalty to an appropriate extent. In general terms, higher requirements regarding professional legal knowledge at the stage of the second instance proceedings programmatically exclude participation of the social factor at this particular stage of case proceedings. It is being accepted that participation of non-professional entities in the process of executing law is dysfunctional if a given procedure accepts only the legal control over adjudication at the stage of an appeal or extraordinary (cassation) instance. In other terms, additional social legitimization of the adjudication is possible only within the framework of the examination proceedings (when facts are being determined) and not during the appeal proceedings, particularly the proceedings during which only the legal control

over the already proclaimed verdict concerning application of law is being realized.

In Poland, along with adoption of the new Act on the Supreme Court[1] a social factor in the form of Supreme Court Lay Judges has been introduced into the court's practice regarding rulings [Grajewski 2018, 609–20; Szmulik 2018, 42–51; Otręba 2018, 45–52; Dudek 2018, 5–15]. The effective regulations project limited participation of lay judges in proceedings regarding dispensing justice but do not allow lay judges to participate in the resolution-making activities of the Court of Cassation. The Act on the Supreme Court projects participation of the Supreme Court lay judges only in the proceedings regarding control over or performance of the examination proceedings. As of the day of publishing of this paper such elements occur only within the framework of the operations of the so called "new chambers" of the Supreme Court, i.e. the Disciplinary Chamber and the Extraordinary Review and Public Affairs Chamber.[2] Therefore such form of inclusion of the social factor fulfils the doctrinal requirements of the social factor participation in the aforementioned

[1] Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2018, item 5 [hereinafter: SC Act or AoSC]. Adoption of the new act proceeded in the atmosphere of strong political and social resistance. Initially, in the summer of 2017, the draft of the new Act on the Supreme Court was presented by the parliamentary majority The new act largely departed from the constitutional tradition of the Polish Court of Cassation, primarily by transferring the majority of the Supreme Court judges appointed under the simultaneously adopted act on National Council of Judiciary into inactive status. On the grounds of this act the term of the First President of the Supreme Court explicitly defined in the Constitution has also been interrupted. According to the parliamentary majority such reform was effected on the grounds of, among other factors, Article 180(5) of the Constitution of the Republic of Poland which stipulates that a judge can be transferred into inactive status with full emolument in the instance of alteration of court system (with no explicit definition of this expression in the Polish doctrine of law). The political opposition and, partially, the community of judges indicated that this provision has been interpreted in isolation from the remaining normative contents of the Constitution, in particular with omission of Article 180(1), e.g. the general normative expression concerning the regulation indicating that judges are irremovable from office. Ultimately the President of RP vetoed the act (and simultaneously legalized election of the new National Council of Judiciary) and, subsequently, submitted own draft of the act on the Supreme Court which was adopted without major controversies and is still binding as of today. The act largely copies the previously introduced solutions. However, completely new solutions have been introduced including establishing two new Supreme Court Chambers staffed with the judges appointed under the new National Council of Judiciary. The judges whom were to be retired on the grounds of the previous draft continue to adjudicate as this aspect of the reform has been dropped. The previous First President of the SC (prof. Gersdorf) stepped down from the office in the May of 2020 in accordance with the conclusion of the 6-year term stipulated in the Constitution.

[2] As of the day of writing of this paper several rulings concerning the SC Disciplinary Chamber have been made by the Court of Justice of the European Union, the European Court of Human Rights and Polish Constitutional Tribunal, among which we should emphasize the Court of Justice of the European Union resolution of the 14th of July 2021, ref. no. C–204/21, CJEU ruling of the 15th of July 2021, ref. no. C–719/19, Constitutional Tribunal ruling of the 14th of

examination proceedings or in such proceedings where examination of facts is subject to review as a result of the call for extraordinary review.

However, introduction of lay judges into the Court of Cassation has been treated by the significant part of the Polish legal community as a controversial move. It has been indicated that there is no place for participation of the social factor in the supreme judiciary body of Poland, particularly in the judicial supervision body. Lay judges were selected by the upper house of the Polish parliament at the date of their appointment (for a term of 4 years which was later extended to the 31st of December 2022 but only for the SC lay judges of the first term). This selection proceeded in the atmosphere of media pressure on the candidates (several persons resigned). The draft of the Act on the Supreme Court did not present specific arguments for move such significant and innovative for the continental legal culture as introduction of the social factor into the Court of Cassation. Rare voices of representatives of the legal community postulated that the Constitution of the Republic of Poland projects participation of the social factor in the operations of the judicial system and does not present any restrictions in this regard [Szczucki 2021, 339–41].[3]

Currently the SC lay judges adjudicate since the day of taking the oath, i.e. the 30th of May 2019. Apart from several rare examples this institution – distinct from the common court lay judges – has not been a subject of analytical works, not in the Polish legal science nor in the associated disciplines [Basa 2020, 85–100]. As of today no empirical studies on this subject have been conducted in terms of legal sciences or management and quality sciences. The goal of this work is discussing results of the empirical studies performed among the SC lay judges concerning motivation behind taking this position. The work has been divided into three substantive parts: presentation of the normative regulations concerning the SC lay judges, discussing methodology of the studies and analysis of the results.

2. NORMATIVE REGULATIONS BINDING THE SC LAY JUDGES

The office of a Supreme Court lay judge is primarily regulated by the stipulations of chapter 6 (Articles 59–71) and chapter 11 (Articles 126–127) of the Act on the Supreme Court as well as the ordinance of the President of RP of the 29th of March 2018 concerning selection, composition, organizational structure, mode of operations and detailed tasks of the Supreme Court Board

July 2021, ref. no. P 7/20, the European Court of Human Rights ruling of the 22nd of July 2021 in Reczkowicz v. Poland case 43447/19.

[3] Article 182 of the Constitution of the Republic of Poland: Participation of citizens in the administration of justice is defined by the act; Act of 30 March 2021 concerning changes in the act on the Supreme Court, Journal of Laws item 611, Article 1(1).

of Lay Judges issued on the grounds of the Article 70(3) of the Act on the Supreme Court. This executive act defines operations of the Board of Lay Judges of the Supreme Court and constitutes an equivalent of the ordinance of the Minister of Justice of the 31st of January 2006 concerning selection, composition, organizational structure, mode of operations and detailed tasks of the Board of Lay Judges applying to the lay judges adjudicating in common courts of law. However, it must be taken into consideration that in case of the issues not regulated under the Act on the Supreme Court the provisions of Part IV, chapter 7 of the act of the 27th of July 2001 apply to lay judges of the Supreme Court – the law on common court system regarding lay judges.[4]

In accordance with the Act on the Supreme Court the Supreme Court Lay Judges participate in examination of extraordinary appeals and, partially, in the disciplinary proceedings. Therefore, as indicated previously, lay judges adjudicate only within the framework of operations of the so called "new" chambers of the Supreme Court: the Disciplinary Chamber and the Extraordinary Review and Public Affair Chamber. As a rule, in case of the proceedings in which SC lay judges participate, the adjudication is being delivered by a panel consisting of two Supreme Court Judges and as single Supreme Court lay judge (Article 59(2) of the Act on the Supreme Court).

In compliance with requirements of the Act on the SC only persons meeting the following requirements can serve as Supreme Court Lay Judge (Article 59(3) of the Act on the Supreme Court): 1) possess solely Polish citizenship and fully exercises his or her civil and civic rights; 2) are of impeccable character; 3) are at least 40 years of age; 4) at the day of being selected are under the age of 60; 5) owing to physical soundness are capable of serving as a Supreme Court lay judge; 6) have at least secondary or vocational secondary education.

Therefore the legislator forgoes not only the legal education requirement but the tertiary education requirement in general. As far as forgoing the former is understandable the latter raises doubts. Lack of legal education is typical of the social factor. However, it must be emphasized that it is only a lack of legal education requirement and ultimately persons possessing legal education entered the group of the first-term Supreme Court lay judges. In courts the social factor is not a professional component of the composition of judiciary in this understanding that the role of the social factor is not to assess interpretation, application or determination of a legal consequences apart from the discretionary powers requiring life experience to the extent compliant with the discretionary powers imparted on the bodies exercising these powers by the legislator (e.g. adjudicating extent of penalty within the framework of the system of applied sanctions). Within the framework of discretionary powers we may

[4] Journal of Laws of 2020, item 2072; Journal of Laws of 2021, item 154; Journal of Laws of 2018, item 653; Journal of Laws of 2006, No. 23, item 174.

distinguish open and confidential powers [Ura 2016, 511–28; Leszczyński 2004, 46–47, Kotowski 2014, 69–70]. The role of the social factor is not to provide additional information regarding interpretation and application of law – the role of reasoning within the framework of application of legal norms to individual cases is reserved for a professional entity – a judge who possesses specialist education and authorization to hold this office. In turn, the social factor represented by a lay judge is to serve in court as a supplementary source of sensitivity and tact regarding social and customary norms in regards to theses premises of application of law which emerge in the process of applying legal regulations to individual cases. This occurs only at the stage of establishing facts and, as already indicated, within the framework of the judicial discretionary powers imparted by the legislator. The issue whether the social factor is authorized to engage in the considerations regarding a variant of judicial discretionary powers in the form of interpretative discretionary powers is contested. However, because defining the meaning of such expressions occurs jointly through application of life experience and social standards the affirmative answers appears to be acceptable.

However, as already indicated, forgoing the prerequisite of the Supreme Court lay judges possessing tertiary education is controversial. Admittedly, a lay judge in order to meet his obligations required by the role discussed above does not need a particular tertiary education but on the level of the Supreme Court introduction of such requirement would be beneficial to establishing legitimacy of the Supreme Court institution.

On the grounds of the decision made by the legislator a Supreme Court lay judge is to act as a classical, non-professional social factor which as a full member of the adjudicating panel introduces an advisory voice into the cases in which the need arises for assessment and a certain degree of review over interpretation of facts in the examined case. This assessment is further bolstered by Article 60 of the Act on the Supreme Court in which premises preventing taking the office of a Supreme Court lay judge are listed. Among these premises performing legal professional work or being employed in institutions of public administration is indicated. Therefore persons performing the following occupations or employed at the following positions cannot serve as a Supreme Court lay judge: a person employed at the Supreme Court or other courts or prosecutor's office, an employee of bodies issuing verdicts which may be relegated to be reviewed in the course of court proceedings, a person who is a lay judge in a common court of law or a military court, is a police officer or is employed at services persecuting offences or felonies or in institutions rendering services to central state authorities, works in a profession over which the Supreme Court has jurisdiction in disciplinary cases, is a solicitor, a legal counsellor, a notary public or a judicial assistant for these legal occupations, is a clergyman, a soldier (only when remaining in active service), an

officer of the prison service, a deputy, a senator, a Member of the European Parliament, a municipality, county or province counsel or a person who was employed at or cooperated with the state security bodies or is a member of a political party.

The number of SC lay judges has not been determined by the legislator. The Supreme Court Board composition is being determined on the grounds of the demand for judicial functions (Article 61(1) of the Act on the Supreme Court) – as of the day of writing of this paper thirty two SC lay judges of the first term were sworn-in. Supreme Court lay judges are being selected by the Senate in the open voting for a term of 4 calendar years following the year in which the lay judges were selected. The office of the Supreme Court lay judge elected during the ongoing term expires along with expiration of term of the whole of Supreme Court lay judges (with the exception of the first-term lay judges whose term, owing to late swearing-in and limited performance of obligations due to the COVID-19 pandemic, has been extended by one year). It is worth to take note that in order to ensure continuity of the Supreme Court composition the legislator indicated in Article 61(5) of the Act on the SC that the selection of the Supreme Court lay judges is to take place at the latest in the October of the calendar year in which the term of the current Supreme Court lay judges expires.

The submissions for candidates for the position of a Supreme Court lay judge (submitted to the President of the Senate) can be submitted by associations, other professional and social organizations registered on the grounds of separate provisions, with the exception of political parties, and by at least 100 citizens enjoying full suffrage rights, by the 30th of June of the calendar year during which the term of the current Supreme Court lay judges expires (Article 62(2) of the Act on the Supreme Court).

The Supreme Court lay judges selected by the Senate are sworn into office by the First President of the Supreme Court and take the following oath: "As a lay judge of the Supreme Court I solemnly swear to serve the Republic of Poland faithfully, uphold the rule of law, dutifully fulfill obligations of a lay judge, adjudicate in compliance with legal provisions and principles of equity, impartially and in concord with my conscience, to protect information confidential under the law and in my conduct to follow principles of dignity and integrity." The person taking the oath may conclude it with the phrase: "So help me God" and refusal to take the oath is equal to renouncing the position of the Supreme Court lay judge. Following the swearing-in Supreme Court lay judges are entered into the list of the Supreme Court lay judges and only after that they may be designated to adjudicate. Each time the term of a Supreme Court lay judge begins with a compulsory training regarding extraordinary appeal and disciplinary proceedings (Article 63(6) of the Act on Supreme Court). The act does not stipulate whether the training is to be conducted by the First

President of the SC before or after accepting the oath. However, the systemic interpretation of Article 63(5–6) of the Act on the SC suggests that the training is being organized after swearing-in and therefore, following entering SC lay judges into the list. Refusal to take the oath is equated with renouncing the position of a Supreme Court lay judge (Article 63(4) of the Act on the SC) which is a further argument for organizing such training after accepting the oath.

In terms of adjudication lay judges are independent, sovereign and hold, as a rule, rights equal to the rights of career judges of the Supreme Court (Article 67(1) o the Act on the SC). The Supreme Court lay judge cannot preside over the proceedings and deliberations nor can he effect the actions of a judge outside of the hearing (Article 67(2) of the Act on the SC), a provision which, *de facto*, boils down to the prohibition on taking any administrative actions apart from the very action of adjudicating within the framework of the judiciary panel.

Lay judges of the Supreme Court do not receive permanent emolument. Similarly to the common court lay judges the lay judges of the Supreme Court are entitled to subsistence allowance and reimbursement of travel and accommodation costs on the grounds of the regulations established for common court judges (Article 69 of the act on SC). In turn, for performance of tasks in court each Supreme Court lay judge receives pecuniary compensation the amount of which for 1 day of serving as a Supreme Court lay judge is equal to 5% of the average national salary as defined in the previous calendar year (Article 68(2–3) of the Act on the SC). Among the tasks entitling a lay judge of the Supreme court to receive subsistence allowance the legislator lists: participation in proceedings or sitting, participation in deliberations concerning the sentence, preparing justification, participation in compulsory courses organized by the First President of the Supreme Court or participation in session of the board of the lay judges of the Supreme court provided that a lay judge was selected to participate in such session. This provision has roused doubts among the legal community since its implementation[5] and the whole system for compensating SC lay judges incites certain practical complications. The primary issue is the wording of Article 68(2) of the Act on the SC which lists, among other obligations, preparing a justification – a task which cannot be performed by a SC lay judge (the rule is that a justification is being prepared by a professional factor as confirmed by e.g. para. 106(1) of the Supreme

[5] In accordance with para. 106(1) of the Ordinance of the President of RP of 29 March 2018 Supreme Court Regulation (Journal of Laws item 660): justifications are being prepared by a Judge-Rapporteur. Therefore a lay judge cannot receive a pecuniary compensation for preparing a justification indicated in Article 68(2) of the Act on the SC because a lay judge does not participate in preparing a justification and instead signs the justification or prepares a separate opinion. As it has already been indicated Article 67(2) of the Act on the SC stipulates that a SC lay judge does not perform any tasks outside of a trial.

Court regulations which indicates that the justification for the adjudication is being prepared by a Judge-Rapporteur). The system of compensating SC lay judges is modeled after its equivalent effective in common courts whereas the majority of the SC lay judges are persons residing outside Warsaw, the residence of the Supreme Court. In these circumstances the subsistence allowances and compensations as defined in the amount projected by the legislator do not provide adequate emolument and compensation to SC lay judges for the amount of time and work resulting from the necessity of commuting to the Supreme Court in order to perform adjudication tasks on site. It should be further noted that as a rule a SC lay judge may be assigned to participate in proceedings in the extent not exceeding 20 days per year but this amount can be increased by the First President of the Supreme Court only due to significant reasons, particularly due to necessity of concluding the trial in which this particular SC lay judge participates (Article 68(1) act on SC). The subject literature also indicates that "All other tasks performed by a lay judge do not constitute a premise for paying compensation. The grounds for paying compensation consist in the lay judge not retaining the right for compensation for the period of absence from work. The lay judge retains only the right to other benefits resulting from employment [...]. On the grounds of a judicial decision it has been indicated that owing to his obligations a lay judge is not subject to national retirement insurance. There are also no grounds for qualifying the period of service as a lay judge as a contribution period (verdict of the Administrative court in Szczecin of 27th of June 2013, III AUa 100/13, Lex no. 134229)" [Szczucki 2021, 370–72].

An issue which may constitute a subject of a separate discussion is the Board of the Lay Judges of the Supreme Court – a body which is an equivalent of similar bodies in common courts of law. The Act on the Supreme Court only stipulates that the obligations of the Board include, in particular, improving quality of work of the Supreme court lay judges and representing lay judges as well as stimulating educational activities of the Supreme Court lay judges among the society (Article 70(2) act on SC). The detailed regulations, structure and mode of operations of the Board are defined by the president in an executive act. In accordance with para. 6(3) of the ordinance on the Board the meetings of the Board are to take place not less frequently than once per quarter or more frequently if need be. This means that the law giver considered the continuity of Board's operations the meetings of which should be summoned evenly throughout the year, at least once per quarter. The purposefulness of making the premises of the Supreme Court available and reimbursing the costs to members of the Board are left to be assessed by the First President of the SC who makes the SC premises available to the Board for the purpose of organizing a session of the Board (para. 11(1) of the ordinance on the Board) and therefore has the opportunity to verify the validity of summoning the Board more frequently than once per quarter.

In accordance with para. 10 of the ordinance on the Board the tasks of the Board include representing Supreme Court lay judges, engaging in actions aimed at improving quality of work of the SC lay judges and stimulating educational activity of the Supreme Court lay judges among the society, presenting to the First President of the Supreme Court and Presidents of the Supreme Court leading the works of the Disciplinary Chamber and the Extraordinary Review and Public Affairs Chamber propositions regarding training necessities for the lay judges, cooperation with the First President of the Supreme Court in regards to the tasks aimed at dismissing a Supreme Court lay judge, expressing opinions on the issues submitted by the First President of the Supreme Court or Presidents of the Supreme Court leading the Disciplinary Chamber or the Extraordinary Review and Public Affairs Chamber as well as passing to these entities information regarding activities of the Supreme Court lay judges upon request.

In conclusion it must be indicated that a Supreme Court lay judge possess a strong guarantee of sovereignty and can be dismissed only under the circumstances projected in the act. Article 65 of the Act on the Supreme Court stipulates that a Supreme Court lay judge cannot be assigned to serve only in the case of revelling circumstances which prevent his selection, commencement of proceedings aimed at dismissing a Supreme Court lay judge – until the Senate makes the decision regarding dismissal, in the event of instituting criminal proceedings against a Supreme Court lay judge for an intentional offence prosecuted by public indictment or for fiscal offences – until the case has been legally settled. Article 166(2) of the Law on the common courts system, applied under Article 71 of the Act on the Supreme Court, stipulates that a Supreme Court lay judge may be dismissed by the Senate upon the notion of the First President of the Supreme Court in the event of not meeting his obligations, displaying conduct detrimental to dignity and legitimacy of the court or inability to perform obligations of a lay judge.

In summary, the Supreme Court lay judges enjoy a status different to the lay judges adjudicating in common courts of law as a result of a different mode of appointment, placement of a Supreme Court lay judge in the body of judicial power which ensures compliance with law and uniformity of judicial decisions of common and military courts (Article 1(1)(a) of the act on SC) and participation in the process of legal application of law on the level of the Court of Cassation in the proceedings of exceptional importance for legal protection, i.e. within the framework of extraordinary appeal and disciplinary claims.

2. RESEARCH METHODOLOGY

The goal of this paper is to discuss the results of the empirical studies conducted among the lay judges of the Supreme Court concerning their motivation

to take and serve in the position of a lay judge. This work is based on the interpretative paradigm based on the premise of instability and relativity of social reality in which the role of a researcher is to understand and interpret social phenomena from the point of view of an organization [Burrell and Morgan 1979, 28; Kociatkiewicz and Kostera 2013, 12; Kostera 2003, 15–16].

The research problem has been formulated into a question: What factors influence motivation of the Supreme Court lay judges to serve in this position? The following specific questions correspond with the research problem: What are the sources of motivation for the SC lay judges? How the SC lay judges perceive own activities in the context of satisfaction drawn from their work? What management style the SC lay judges prefer? Do lay judges recognize the necessity of introducing changes into functioning of the SC lay judge office on the grounds of own experiences?

Owing to selection of the inductive methodology based on empirical inferring research questions were posed instead of hypotheses [Jemielniak 2012, 11; Kostera 2005, 12].

Authors studied opinion of the SC lay judges through a survey questionnaire which served to explore issues regarding motivation. The utilized research tool is not standardized but in authors' view it is adequate to the established scope of analysis and enables providing an answer to the presented research problem. The survey included both open and closed questions. The goal of the study was to explore the indicated scope of research; the study was not quantitative in character. The study consisted of the analysis of the manner in which a given reality is being perceived by the subjects of the study and thus corresponded with properties of a qualitative study. The survey questionnaire was used to procure data and its main goal was to assess experience of members of the organization, in this case lay judges of the Supreme Court, an act which enabled holistic study of the researched phenomenon. The goal of the study utilizing the survey questionnaire was to expand the knowledge regarding motivations of the SC lay judges to serve in this position. Thirty two lay judges adjudicate in the Supreme Court, of which 11 individuals participated in the study. Participation in the study was voluntary and anonymous. The majority of the questions concerned the motivating factors and preferences regarding exercising this function. The survey consisted of 45 closed questions and 4 open questions. In case of the closed questions the answers were given on a scale which was used by the respondents to asses own conduct in accordance with the assessment scale (1 – completely untrue; 2 – rather untrue; 3 – untrue to a slight degree; 4 – true to a slight degree; 5 – rather true; 6 – completely true). The open questions presented respondents with an opportunity of unrestricted expression.

3. ANALYSIS OF THE RESULTS

On the grounds of the survey questionnaire authors drew the conclusions concerning motivation and approach of lay judges towards the performed service. The results are presented in order beginning with the statements the respondents indicated as the most true. The arithmetic means calculated on the grounds of the values assigned by the respondents are provided in parentheses.

The respondents claim that they are characterized by consequence in pursuing goals (5.82), find rational arguments appealing (5.82) and are eager to acquire new knowledge (5.82). Furthermore, the respondents do not fear expressing an opinion different than the group (5.73) or admitting that they were mistaken (5.73). For a majority of the respondents their work should be interesting (5.64). They are motivated by willingness to serve the society and perceive their service as significant (5.64). The majority of respondents assigned the value of 5 and 6 to their answers with a single instance of the value of 1.

The respondents declare that they do not fear taking responsibility for their actions (5.64). In making decisions the respondents consider arguments to be significant (5.64). In their service the respondents expect autonomy and freedom of decision making (5.55) and simultaneously they, in general, value the opportunity for cooperation and coming into contact with interesting people (5.55). Eight persons has given these statements the value of 6 with one person giving them the value of 1.

It is significant for the respondents that the amount of work would be commensurable to the results (5.55). The respondents are task-oriented (5.45) and value the opportunity for individual work (5.36). In their opinion the work should not be monotonous (5.36) and should provide the opportunity for development (5.27). Lack of opportunities for development would constitute a source of frustration for the respondents (5.09). The respondents define themselves as tolerant persons (5.27).

The atmosphere at the workplace is important for the respondents (5.27). The respondents believe that the rewards should be subject to grading and be commensurate to achievements (5.18). The respondents believe that they cope well with stress (5.18). They perceive themselves as empathic persons (5.09). They consider themselves to be well-organized and plan their daily tasks in detail (5.09). The respondents usually make decisions autonomously (5.09) although they consider themselves good team workers (5.0). The respondents are not bothered by rivalry in the workplace (5.0).

Furthermore, the respondents claim that they cope well with criticism (4.91) and the opportunity to work in a team usually motivates them to act (4.91). They consider feedback regarding their work as rather important (4.91). Time pressure does not constitute an issue for the respondents (4.82).

The respondents claim that they rather prefer the conciliatory style of management and cooperation (4.73) and that they are content with the management style which assumes partnership of team members in making decisions (4.64). When making decisions autonomously they prefer to act in a conciliatory manner (4.36). The respondents recognized the statement that they enjoy working in an authoritatively managed team as rather untrue (3.18); similarly, they consider the statement that they feel well when their superior makes decisions independently to be untrue (2.64).

The respondents perceive audits and reviews as a rather natural aspect of their work (4.64). In turn, they deemed the statement that the possibility of their work being subjected to audit is stress-inducing to be false (2.82). The amount of compensation for the performed work is rather significant for the respondents (4.45). Some the respondents are motivated by rewards (4.18). In this area disparities in the answers given were major, three persons assigned the value of 6 to the statement, three assigned the value of 5, one the value of 4, two the value of 3, and the values of 1 and 2 were assigned by one person each. Pecuniary rewards are significant only to a part of the respondents (4.18) as evidenced by three persons assigning the value of 6 to the statement and one person the value of 1.

Some of the respondents pay particular attention to prestige and status (4.36) – 4 persons assigned the value of 6 to prestige and status whereas two persons assigned the value of 1. The respondents consider conflicts at workplace to be rather demotivating – four persons giving the statement the value of 6, two persons the value of 1. The issue of praises and citations was divisive (3.91).

In the open questions the respondents were asked what prompted them to become a candidate for the position of the Supreme Court lay judge. The respondents answered this question eagerly and explained the motivation behind becoming lay judges. Some of the respondents were motivated by desire for personal development, testing oneself in a new position and the willingness to learn and acquire experience. Some of the respondents previously served as lay judges in common courts of law.

The desire for further development for the benefit of the legal system [Respondent 1]; Further development. In my previous term I have served as a lay judge in a regional court [Respondent 11]; Learning [Respondent 2]; The willingness to experience new things, to become a part of the history because this is the first term of the Supreme Court lay judges and willingness to continue serving in the capacity of a lay judge [...] [Respondent 3].

The respondents indicated the opportunity to influence functioning of the justice system and the decisions made therein as well as the opportunity to share their knowledge and experience as an important motivating factor.

The opportunity to learn how the justice system operates on the grounds of the available files. The opportunity to express own opinion and view regarding subject of the case. Agency in the decision making – the feeling that the opinion I formulate is considered and may be meaningful [Respondent 4]; The opportunity to change how the justice system operates [Respondent 6]; The main motive behind me becoming a candidate was the desire to "share" my life experience in a discipline completely different from the field I have been acting in for more than 30 years. I wish for the knowledge I possess, for my personal predispositions for understanding peoples' conduct, motivations and acts as well as my significant empathy to become helpful there where the law is, at times, unable to altruistically assess certain human acts [Respondent 8]; The willingness to help people and long-term social work [Respondent 9].

Among the answers given to this question voices arose regarding poor condition of the Polish justice system although no specifics or detailed statements were provided. Abysmal state of the Polish judiciary system [Respondent 7].

A notion of willingness to participate in a historical project regarding introduction of the position of a lay judge into the Supreme Court was mentioned in two statements. One of the respondents did not provide answers but indicated that he had his reasons and motives [Respondent 5]. Another respondent expressed the opinion that introduction of the social factor into the Polish Court of Cassation is the act of "historical justice." Capitalizing on the formal opportunity for participation of the social factor in administering justice by the supreme body of Polish judiciary authority. Despite the criticism regarding our presence in the Supreme Court expressed by certain elements of the legal community it is a historical act of historical justice towards the Polish people [Respondent 10].

Within the framework of the open questions the respondents also had an opportunity to address the issue of what they value the most in their position as a lay judge of the Supreme Court. The respondents indicated the opportunity to acquire knowledge, test it in practice and the opportunity for further development as particularly important.

Expanding the already possessed knowledge. Opportunity for refinement. Further development. Testing my existing knowledge [Respondent 1]; Acquiring experience [Respondent 2].

The opportunity to participate in interesting cases and the possibility to come into contact with distinguished experts in the field of legal disciplines are also meaningful for the respondents. Participation in interesting, sometimes unusual cases and the opportunity to come into contact with excellent legal experts [Respondent 3].

Some of the respondents consider the ability to influence the decisions made, autonomy, independence, inclusion of the social factor in the

proceedings as well as the opportunity to alter judicial decisions and influence the justice systems to be important.

The ability to influence the decisions made in the context of rectifying mistakes (unjust verdicts) made previously and express opinions – own views – in case of disciplinary hearings. Learning the complex legal matters largely dependent on interpretation and importance and meaning of words [Respondent 4]; Autonomy and independence [Respondent 5]; I value the opportunity to express opinion on a given case independently the most [Respondent 6]; The opportunity to effect changes in the justice system [Respondent 7].

I value the opportunity to influence verdicts of the Court because my opinion is taken into consideration and therefore (as I imagine) it is possible to reach a verdict in which the punishment does not need to be excessively strict. I also greatly value the opportunity to meet numerous exceptional individuals. Personally I value the necessity of becoming familiarized with various cases in legal terms, an act which expands my horizons [Respondent 8]; The prestige and the ability to make independent decisions are important [Respondent 11].

The respondents have emphasized that they experience the sense of actually influencing verdicts, prestige and importance of the function they serve in as well as the sense of acting for the benefit of the society.

The opportunity to convince career judges to our views during deliberations. As a lay judge adjudicating in one of the district courts I am aware that in that type of court the possibility of convincing judges was illusionary, a façade, and our arguments were extremely rarely taken into consideration due to the attitude and resistance of career judges.In case of the SC the difference is distinctly visible. Our arguments bear importance and judges act properly and tactfully, they do not act superior to lay judges. I appreciate this fact and perceive it as a good omen in favor of slow but highly anticipated restoration of trust of citizens in the Polish justice system [Respondent 10]; The opportunity to fulfill social obligations [Respondent 9].

The respondents also referred to the issues which did not meet their expectations regarding serving in the role of a lay judge. The answers given were varied; each of the respondents drew attention to slightly different aspects. Among the provided answers such issues emerged as a very brief period for a discussion during deliberations [Respondent 4], bureaucracy in the Supreme Court [Respondent 5], resistance of the judiciary community in the face of changes [Respondent 7], stalling and dragging out cases which should have been dealt with quickly [Respondent 9], to infrequent participation in proceedings and hearings [Respondent 11]. Two individuals have drawn attention to the procedural issues – the manner in which cases are described, which influence impunity of the guilty parties, as well as the difficulties with rendering assistance to the actually aggrieved.

The cases submitted to the Supreme Court are frequently described and worded in a manner which ensures that not a slightest harm would come the blatantly guilty parties. I consider it to be faking of work [Respondent 6]; It is hard for me to accept that due to certain procedural errors it is impossible to provide assistance in cases where it should be justly done [Respondent 8].

Respondent 1 and Respondent 10 gave the most detailed answers to the question and indicated, among other issues, limited participation of the SC lay judges in adjudication during disciplinary proceedings, exclusion of lay judges from adjudicating on the election protests (in the Extraordinary Review and Public Affairs Chamber) as well as the limited number of training courses organized by the Supreme Court for its lay judges. It is also worth to emphasize that according to the survey the respondents frequently perceive themselves as "persons keeping an eye on career judges."

1. Inability to adjudicate in the Disciplinary Chamber in disciplinary cases regarding persons practising legal professions such as: notary publics, lawyers or legal counselors – lay judges were excluded from such cases. 2. Inability to adjudicate in the Disciplinary Chamber on the requests for waiving parliamentary immunity – only a single-person panel in Division I adjudicates. 3. Inability to adjudicate in the Disciplinary Chamber on the requests for pressing criminal charges - only a single-person panel in Division I adjudicates. 4. Inability to adjudicate in the Extraordinary Review and Public Affairs Chamber on the election protests – a lay judge is not included in the three-person composition – the legislator did not, unfortunately, project participation of the social factor [Respondent 1].

The amendment to the Act on the Supreme Court of the 20th of December 2019 introduced changes in regards to jurisdiction of the Disciplinary Chamber. Changes related to this amendment resulted in exclusion of the social factor from the proceedings regarding waiving parliamentary immunity. It also concerns the clearance for temporary detention of the aforementioned persons. The issues of limited number of training courses for lay judges and lack of cohesive concept of professional development of lay judges as persons supervising and "double-checking" work of career judges must also be recalled [Respondent 10].

One of the respondents indicated that he has no negative remarks [Respondent 3] and one respondent did not give answer [Respondent 2]. One of the respondents deemed a number of questions to be inappropriate (the issue of compensation) but continued to participate in the study and suggest that in future similar studies should by performed in the form of interviews (case studies).

The respondents also assessed the satisfaction they draw from serving as lay judges of the Supreme Court. Eight individuals indicated the level of satisfaction to be high whereas three persons deemed it to be average. Seven

of the respondents intend to stand for the second term as the Supreme Court lay judge, two persons have not decided yet and two persons do not intend to stand for the second term. Two persons who will not stand for the second term indicated that the sole reason is no longer meeting the requirement regarding age of a lay judge candidate. The respondents had the opportunity to communicate any comments to authors by way of open answers. The respondents made suggestions which would be – in their opinion – beneficial to their work such as introduction of compensation for reading files [Respondent 9], *de lege ferenda* changes in the regulations concerning composition of the judiciary, particularly in disciplinary proceedings, limiting bureaucracy in the Supreme Court or the postulates concerning the process of selecting Supreme Court lay judges.

I wonder if it wouldn't be good for the judiciary composition of the Disciplinary Chamber to be "mixed" and consist of persons with judiciary, barrister and prosecutor experience – it would enable approaching each individual case in a more broad and comprehensive manner. Each of the groups indicated above may perceive a given case, unclear for other groups, in a different manner.

Lack of solutions to the issues concerning the time devoted to familiarizing oneself with the files (compensation, the need to work on site – in the Supreme Court reading room). I am aware that it is the issue of confidentiality of information but the access to e.g. case files could be arranged on-line with printing and copying functions blocked in order to avoid the requirement of staying on the premises of the Supreme Court. For me personally working with physical copies of documents is easier than with digital copies but in the instance of cases described in a substantial amount of files this results in the need to travel to the Supreme Court at own expense and in own time, within the framework of a leave of absence, in order to familiarize myself with the case [Respondent 4].

The parliamentary commissions (the Senate) should extensively interview candidates for the position of a Supreme Court lay judge in regards to candidates' motivation. For the benefit of the Supreme Court and the entirety of the justice system it would be appropriate and legitimate for a Supreme Court lay judge to be a person who served at least two terms in the capacity of the common court lay judge. Currently only 25% of the 32 persons previously served as a lay judge in a regional or district court and this fact has adverse influence on our relations throughout the entire term. I am a supporter of the notion that lay judges should be assigned to not only the Disciplinary and Extraordinary Review and Public Affairs chambers but also to the Criminal chamber in order to "socialize" the highest level of the judiciary system even more through participation of the social factor in dispensing justice and in order to minimize the risk of errors of the judicial system (the case of Tomasz Komenda etc.).

The fact that the three-persons judicial panels in the Extraordinary Review and Public Affairs Chamber do not include a lay judge when adjudicating on the election protests related to the parliamentary and presidential elections etc. (with the exception of local government elections as these are resolved by the common courts of law) should be emphasized. At least one lay judge should enter the composition of the adjudicating panel and only such composition of the mixed panel would provide the sense of objective and impartial examination of the claims and election protests of the citizens. I write these words as a lay judge with 10 years of experience and a person serving in various election commissions over the span of 20 years [Respondent 10].

One of the respondents drew attention to the issue of good cooperation between career judges and the Lay Judges Office [Respondent 11].

4. REVIEW OF THE RESULTS

Owing to character of the study review of the results concerns those lay judges of the SC who participated in the study. It should be emphasized that the results are not representative and have the character of a case study. The further part of our considerations requires that these facts be addressed.

The studies indicate that the first-term lay judges of the Supreme Court perceive themselves as persons consistently pursuing their goals, orientated at acquiring new knowledge and personal development. Prestige and remuneration are an important issue for the respondents but the work they engage in should also be interesting and present the opportunity for coming into contact with interesting people. The opportunity to serve society is also a major source of motivation. The answers given by the respondents suggest a high degree of internal motivation. It is worth noting that strong internal motivation co-appears among the respondents with the external motivation based on rewards. In the contemporary approach to the issue of motivation researchers assume coexistence of both types of motivation; in order to serve as a motivating factor rewards should be dependent on results of work [Dermer 1975]. Similarly, the respondents emphasized that the degree of a reward should correspond with results of work and achievements.

Consistently with the expectancy theory it is important for the respondents that the amount of work be commensurable to the results. It means that the respondents analyze and compare the amount of work done to the achieved effects. This fact corresponds with Victor Vroom]s theory according to which human motivation is dependent on the strength of desires and the probability of satisfying these desires [Vroom 1995].

The respondents declare that they are not afraid to take responsibility for own actions, in the decision making process they consider arguments to be significant. They usually make decisions independently, although they work

well in teams. Such manner of making decisions can be referred to the normative model of decision making created by Victor Vroom and Philip Yetton. The decision making procedure in which the decision is being made independently after collecting information from members of the team fits in with the authocratic approach (A2) although among the statements given by the respondents the remarks and references emerged concerning the consultative approach (K2) which assumes making a decision after discussion and learning opinions of the team members [Vroom and Yetton 1973; Koźmiński and Jemielniak 2011, 34].

Consistently with the typology proposed by Kurt Lewin, Roland Lipitt and Ralph White the respondents undoubtedly feel well in a team governed by democracy in which a leader encourages coworkers to make decisions and to jointly establish goals and means of achieving them. The respondents indicated that they are comfortable with the mode of management which assumes co-participation of team members in decision making and that they themselves attempt to make conciliatory decisions. In turn, the respondents dislike the authocratic style based on centralization of authority and the superiors making decisions without consulting the team [Lewin, Lipitt, and White 1939].

The respondents are largely oriented at tasks and interpersonal relationships as well as the atmosphere in the workplace. Simultaneously, they highly value the opportunity to work independently and in teams. According to the managerial grid model developed by Robert Blake and Jane Mouton [Blake and Mouton 1985] such approach to management largely oriented at tasks and team (people) indicates preference for the style of management based on leadership.

The respondents perceive themselves as tolerant, empathic, and coping well with stress and not having any issue with subjecting themselves to audit/supervision. The open questions suggest that these qualities have in the opinion of the respondents a positive influence on their approach to the performed work.

Generally the Supreme Court lay judges assessed satisfaction drawn from the performed work highly; the majority of the respondents which is eligible to stand for the second term would wish to continue to serve in the capacity of a Supreme Court lay judge. However, on the grounds of their experience they indicate several issues, among these:

1) the changes in remuneration system for Supreme Court lay judges which was copied by the legislator from the legal provisions concerning the common courts' system – in this regard postulates of the SC lay judges appear to be valid. The authors indicate that the Article 68(2) of the Act on the Supreme Court stipulates that a SC lay judge receives a pecuniary compensation for the time devoted to the work performed in court and provides list of the tasks for which a SC lay judge is eligible to receive a pecuniary compensation. Because these

funds are public in character these provisions have to be interpreted strictly, primarily through use of the arguments of the language character. However, Supreme Court lay judges perform certain tasks outside of the court (e.g. familiarize themselves with case files through the use of court electronic mail when such files are available in digital form). For performing these tasks the SC lay judges do not receive any compensation, neither do they receive compensation for the amount of work devoted to preparing to participate in a case – a task which is also performed within the premises of the Supreme Court. If the actual need for participation of the social factor in a certain category of cases is being indicated (and not only a symbolic role of the social factor in the adjudicating panel) the fact must be taken into consideration that as a non-professional entities the lay judges will have to devote a significantly higher amount of work than career judges to familiarize themselves with the materials related to the case. Therefore the SC lay judges correctly drew attention to the issues of this kind during the study.

2) The postulate regarding modification of the criteria entitling a person to hold the office of the Supreme Court lay judge. What is interesting is the fact that this remark came from the judiciary community itself. According to the respondent who formulated this remark the additional requirement of the SC lay judge previously serving as a lay judge in common courts of law would result in a greater degree of professionalism of the social factor in the court of cassation and would nullify possible tensions between lay judges themselves as well as between career and lay judges of the Supreme Court. It is probably a question of lay judges acquiring better understanding of the reasoning of members of legal professions, manner of adjudication etc. The experience of serving in common courts of law as a prerequisite for serving in a capacity of a lay judge of the Supreme Court is an interesting notion which would not lead to the loss of the character of the SC lay judge as a social factor but would simultaneously lead to a certain professionalization of this community. Possibly introduction of the legal education prerequisite for the candidates for the position of the SC lay judge who did not previously serve in the capacity of a common court lay judge and forgoing this requirement for the candidates who possess such experience would be a compromise.

3) Another possible areas for introducing changes are the institution of the extraordinary appeal which was not mentioned directly by the SC lay judges in the survey but indirect remarks regarding this issue were communicated to the authors as well as general increase of participation of the social factor within the framework of the Supreme Court adjudication (the respondents indicate not only participation in disciplinary proceedings but also in dispensing justice within the framework of the Criminal Chamber of the Supreme Court in which SC lay judges do not adjudicate). The surveys include statements claiming that “the judicative community resists changes” and that the procedural errors

do not allow aiding a specific party to the proceedings. The latter remark is decisively related to the *de lege lata* regulations concerning the extraordinary appeal (Article 89–95 of the Act on the Supreme Court). Lay judges of the Supreme Court perceive this institution as a completely extraordinary measure for formal and material verification of the legally valid adjudication, essentially not bound by any restrictions. Meanwhile, within the framework of the already established adjudication process of the Extraordinary Review and Public Affairs Chamber, the need is being indicated for the lodged appeal to fulfil both the premises stipulated in Article 89(1) of the act on the SC (the need of ensuring compliance with regulations of a democratic state governed by the rule of law) as well as, secondarily, one of the specific premises listed in Article 89(1)(1–3) of the Act on the SC provided that the contested decision cannot be overruled or altered under other extraordinary appeal avenues (Article 89(1) act on SC).

The postulates of the community of lay judges listed hereinabove appear rational and, furthermore, indicate high motivation for serving in the capacity of a lay judge. Even if certain ideas are debatable from the legal standpoint the initiative displayed by submitting them (also by the Board of the Lay Judges of the Supreme Court) affords to presume that the first-term lay judges of the Supreme Court are an active community, deeply interested in the Supreme Court and justice system – a fact which constitutes a value in on itself.

CONCLUSIONS

As indicated at the beginning of this paper the introduction of the social factor into the Polish Supreme Court was realization of the postulates relating to increasing civil legitimization of the justice system submitted by way of public discourse by the current parliamentary majority. As it has been noted in the subject literature "the projector did not provide the motives behind introduction of position of the Supreme Court lay judge in the justification" but "a statement can be found in the legislative works' materials claiming that [...] introduction of lay judges as a social factor into the process of examination of certain cases in the Supreme Court was the result of a valid and justified need for enriching adjudicating panels with social sensibility as well as life knowledge and experience not related to performance of legal professions" [Szczucki 2021, 339]. Such major novelty in the justice system – even more so novel due to being introduced on the level of the Court of Cassation which also supervises work of common courts of law (Article 1(1) of the Act on the Supreme Court), was not until now a subject of a broader and more thorough discussion in the Polish legal doctrine. Currently it is to early to assess whether the goals declared by the legislator in the public discourse were reached, even partly, i.e. whether the office of the lay judge of the Supreme

Court contributed to the social perception of the Supreme Court and whether the justice system is perceived as more legitimate. Such studies are difficult to perform owing to the necessity of comparing the state of affairs "before" and "after" implementation of the said changes. It also appears that the idea of the institution of the Supreme Court lay judges is not widely spread in Polish society. At times works aimed at popularizing this concept are published but mainly in the legal papers.

The goal of this paper was to perform empirical studies among the lay judges of the Supreme Court concerning the issue of motivation for serving as a lay judge and to analyze results of the studies.

The analysis enabled verification of the research problem and provided answers to the specific research questions. It has been ascertained that the lay judges of the Supreme Court display a high degree of internal and external motivation.

The sources of the internal motivation are the work itself, the opportunity to expand knowledge, the desire to test oneself as well as apply and develop own skills. Motivation of the lay judges of the Supreme Court is also significantly influenced by beliefs and values (serving the society, counteracting injustice) as well as fulfilling desires (e.g. for prestige and recognition) through performance of work. This kind of motivation is usually stronger and has a more lasting effect than the external motivation [Dolot 2015, 23]. The source of external motivation of the lay judges of the SC is the opportunity for receiving praise and rewards related to dutiful performance of work. These should be – needless to say – understood as the whole of the forms of gratification stimulation for the performed service (the rewards can be material or immaterial in character: prestige, social standing, experience etc.). The respondents primarily emphasized the role of motivation based on positive reinforcement (positive motivation).

The surveyed lay judges of the Supreme Court prefer the democratic style of management based on including coworkers in the decision making process as well as the joint process of establishing goals and means of reaching them. They value teamwork but are comfortable with and not afraid of making decisions independently; similarly, the respondents are not vary of having a different view and opinion than the group and are not afraid of admitting to own mistakes. The respondents highly value the need of taking actions oriented at tasks and team; this fact displays preference for leadership-based style of management.

The decisive majority of the surveyed lay judges of the Supreme Court perceive their work as engaging, fulfilling and presenting opportunities for development as evidenced by the high degree of satisfaction related to serving as a lay judge and willingness to stand for another term of service.

However, on the grounds of own opinions the Supreme Court lay judges have several reservations concerning their participation in the process of adjudication, certain administrative solutions effective and practiced in the Supreme Court on the grounds of both the binding regulations as well as the developed practice of applying stipulations of these regulations; furthermore, lay judges of the SC have submitted postulates regarding changes in both the manner in which the lay judges of the SC are appointed as well as performance of this function. The authors do not attempt to formulate a broader assessment of the researched problems and, primarily, any possible statutory amendments as this is not the goal of this paper. From among the more prominent reservations the following should be listed: lack of acceptance for the lay judges of the SC and the restrictions concerning adjudicating in disciplinary proceedings, lack of a more comprehensive concept for professional development of lay judges within the structure of the Supreme Court and the compensation system not adapted to the specificity of the work of the lay judges who are appointed from across the entire country.

The issues regarding the lay judges of the Supreme Court present extensive opportunities for formulating research subjects. The complete assessment of the institution of the Supreme Court lay judge and broader issues related to the social science disciplines:[6] law, sociology, management and quality sciences, may present a valid reason for continuation of studies in the future. The first term of service of the lay judges of the Supreme Court concluding in the coming year is an example of one good opportunity for such initiatives. Further possible fields for analysis, both in terms of legal sciences as well as social sciences, should also be indicated. These are: the issues relating to interpretation and application of the regulations concerning lay judges of the Supreme Court which were included in the normative acts invoked in this paper, rationality of introduction of the social factor into the Court of Cassation from the point of view of theory and philosophy of law, also in consideration of the concept of deliberateness of law, its responsiveness or models of social participation in jurisprudential decision making processes (regarding official authority). The institution of the Board of the Lay Judges of the Supreme Court (Article 70 of the Act on the SC) is a very interesting, although more narrow, subject of research, both in the legal-normative aspect and sociological aspect or a subject of the analysis in the context of sciences regarding management and quality. The research problems indicated hereinabove display the wealth of research questions and topicality of the entire trend of the analyzes devoted to various institutions ensuring social participation in the process of application of law – customary these issues are studied in the context of law-making but it must

[6] In accordance with the ordinance of the Minister of Science and Higher Education of 25 September 2018 regarding fields and disciplines of science as well as artistic disciplines, Journal of Laws item 1818.

be taken into consideration that in the democratic states such analyzes should also apply to application of law as is most frequently and to the best effect exemplified by the inclusion of the social factor into the composition of judging panels. Possibly inclusion of lay judges into the Polish Court of Cassation should be perceived as an example of an action innovative and significant in the context of legitimizing judicature.

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NEW POSSIBILITIES OF OPERATION FOR ENTITIES OTHER THAN COMMERCIAL PARTNERSHIPS/ COMPANIES PROVIDED FOR IN THE SO-CALLED ANTI-CRISIS SHIELD

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Abstract. The article synthetically summarizes in a comparative form the main new possibilities for the operation of organisational entities other than commercial partnerships/companies in their internal relations (in the area of internal decision-making, including in particular the adoption of resolutions), mainly in the area of introducing or extending the possibilities for using means of distance communication, including electronic means of communication, which were provided for by the legislature directly in the regulations consisting of the so-called anti-crisis shield setting out specific support instruments due to the spread of the SARS-CoV-2 virus causing the COVID-19 pandemic, i.e. in the Act of 31 March 2020 (Journal of Laws item 568), as well as in the Act of 16 April 2020 (Journal of Laws item 695), as regards cooperatives operating under general rules, cooperative banks and entities managing the protection systems of those banks, investment funds and associations, as well as those arising from existing legal provisions or references introduced in these provisions, which in turn concerns mutual insurance or mutual reinsurance companies and foundations. Moreover, the article points to certain selected, general and specific doubts as to the manner and scope of regulation of these new possibilities of operation, as well as proposals to modify them, in the form of specific proposals *de lege ferenda* (for the law as it should stand), consisting of a general proposal for a broader, comprehensive and more symmetrical regulation of this matter in relation to organisational entities (including entities other than commercial partnerships/companies) according to the optimal theoretical model of its regulation.

Keywords: organisational entity, COVID-19, anti-crisis shield, means of direct distance communication, means of electronic communication

1. INTRODUCTION

1.1. Purpose and scope of the study

The article is to present in a synthetic form the new possibilities for the operation of entities other than commercial partnerships/companies[1] in internal relations (in the field of internal management, including, in particular, the adopting of resolutions) which were provided for by the legislature directly in one of the first regulations constituting the so-called anti-crisis shield,[2] i.e. in Article 3(1) to (3) and Article 27(5) to (7) of the Act of 31 March 2020 amending the Act on special arrangements for the prevention, countering and eradication of COVID-19, other contagious diseases and related emergencies, and certain other laws,[3] and Articles 15, 16, 18 and 29 items (2), (30) and (34) of the Act of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2[4] (which relates to cooperatives operating under general rules, cooperative banks and entities managing the protection systems of those banks, investment funds and associations), or result from legal provisions or references contained in the above-mentioned regulations (which in turn concerns mutual insurance companies or mutual reinsurance companies and foundations), an indication of specific selected, both general and specific doubts about the manner and scope of their regulation, as well as the formulation of proposals for their modification in the form of postulates for the law as it should stand (*de lege ferenda*), with particular regard to legal solutions for cooperatives operating under general rules, mutual insurance companies or

[1] The basis for the regulation of commercial partnerships/companies in Polish law, including partnerships (general partnership, professional partnership, limited partnership, limited joint-stock partnership) and companies (simple joint stock company, limited liability company and joint-stock company) is the Act of 15 September 2000, the Code of Commercial Partnerships and Companies, Journal of Laws of 2020, item 1526 as amended [hereinafter: CCPC].

[2] The term "anti-crisis shield" has been used for specific solutions and a comprehensive catalogue of actions aimed at countering the negative economic and social impact of the COVID-19 pandemic caused by SARS-CoV-2, as well as for the package of laws proposed by the Polish Government, adopted by the Polish Parliament and signed by the President of the Republic of Poland in March 2020, enabling the implementation of these actions, which were to be (and are still) continuously evaluated and supplemented; see: Explanatory note to the draft Act of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2, Sejm papers no: 330 [hereinafter: Explanatory note no. 2–330], p. 1. In this study, I use the term "anti-crisis shield" to designate the above-mentioned package of laws to the extent generally applicable to organisational entities, including in particular organisational entities other than commercial companies.

[3] Journal of Laws of 2020, item 568 as amended [hereinafter: Act of 31 March 2020 amending the Act on COVID-19].

[4] Journal of Laws of 2020, item 695 as amended [hereinafter: Act of 16 April 2020 on special support instruments in relation to SARS-CoV-2].

mutual reinsurance companies and foundations. Therefore, the author neither intends to provide a detailed commentary on each of the regulations introducing new possibilities of operation, nor to analyse and evaluate the legislative technique used in them in detail.

1.2. New possibilities of operation and their "model" spectrum of legal regulations

New possibilities of action of organisational entities (other than commercial partnerships and companies) in internal relations are, for a particular organisational unit and the manner of its operation, the following possibilities introduced or extended by the legislature: 1) participation in meetings of the entity governing bodies, as well as adoption of resolutions by means of direct communication at a distance, including means of electronic communication (especially software for holding meetings, audio and video on-line transmission, i.e. e.g. *ZOOM, Webex, Microsoft Teams, Google Meet*, or even a chat service, e.g. *Signal, Whatsapp or WeChat* [Omlor 2019, 6–12; Spindler 2019, 114–23; Ostrowski 2020, 34; Osajda 2020, 20–21]), 2) casting a vote in writing via another member of the body, as well as 3) adoption of resolutions by written ballot. Due to the contemporary dynamic development and growing practical application of various types of modern communication technologies, including in particular electronic communication means [Kosmin and Roberts 2020, VII–IX; Kosseff 2020, 155], this article will address primarily the new possibilities of operation related to the use of means of direct remote communication, especially electronic communication means.

The use of these means in commercial partnerships/companies was possible, but within a rather narrow subjective and objective scope (only in relation to supervisory boards and meetings in limited liability companies and joint-stock companies, and also with regard to audit committees in the case of limited liability companies) was possible before the adoption of the aforementioned legal solutions constituting the so-called anti-crisis shield as the opt-in model (it was possible provided that the articles of association provided for such a possibility), while under the provisions adopted as part of the so-called anti-crisis shield it was considerably extended and modified by adopting the opt-out model (it is possible by operation of law unless articles of association provide otherwise [Szumański 2020, 4; Ostrowski 2020, 33]), valid for a indeterminate period (and not episodically, within a specified period of time, e.g. only during the state epidemiological threat or the state of epidemic[5]). In view of the above, and also due to the fact that the spectrum of legal solutions in this

[5] Provided for in the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans, Journal of Laws of 2020, item 1845 as amended [hereinafter: APCI].

area in limited liability companies and joint-stock companies has been considerably expanded, despite their certain shortcomings, including in particular the lack of completeness or symmetry, and also taking into account the most complex, in the group of organisational entities, organisational and functional forms of commercial partnerships/companies (especially companies acting through their governing bodies) resulting from the provisions of law, overall regulations relating in this scope to the bodies of limited liability companies and joint-stock companies may be regarded, in their essential part, as models for the matter of the use of means of distance communication in other commercial partnerships/companies and in organisational entities other than commercial partnerships/companies. Therefore, in this study, they constitute a natural, fundamental point of reference for the presentation of this issue in relation to organisational entities other than commercial partnerships/companies, while in the case of mutual insurance companies or mutual reinsurance companies, due to the reference in the provisions on these companies to the provisions on the joint stock company, to the extent the joint stock company is concerned – they are the normative basis for regulation.

1.3. Research method

The study has used mainly the formal and dogmatic method, including all methods of interpretation, especially linguistic interpretation and systemic interpretation.

2. THE NEW POSSIBILITIES OF OPERATION PROVIDED DIRECTLY IN THE REGULATIONS MAKING UP THE SO-CALLED ANTI-CRISIS SHIELD

2.1. General remarks

New possibilities for the operation of organisational entities other than commercial partnerships/companies provided for in the rules comprising the so-called anti-crisis shield relate predominantly to the following entities:

1) in the group of organisational entities which, as a general rule, pursue business activity – to cooperatives (operating under a general rules, including to the operation of their management boards, supervisory boards, general meeting, meetings of representatives and meetings of member groups), cooperative banks and entities managing the protection systems of those banks (including to the operation of their management boards, supervisory boards, general meeting, meetings of representatives and meetings of member groups), and investment funds (including to the operation of their meetings of participants, investors' boards and investors' meetings), and

2) in the group of organisational entities which do not, as a general rule, engage in business activities – to associations (acting under general rules, including – for all governing bodies of the association: the general meeting of members, the internal auditing body and the management board).

2.2. The new possibilities of operation of cooperatives (operating under general rules)

For management boards and supervisory boards of cooperatives (operating under general rules), the new possibilities of operation include the possibility of:

a) submitting by members of these bodies to the president of the management board (in the case of the management board) or to the chairman of the supervisory board (in the case of the supervisory board), respectively, of a request to convene a meeting with the proposed agenda or adopting a specific resolution in writing or with the means of direct distance communication (Article $4(4^1)$ of the Act of 16 September 1982, the Law on Cooperatives)[6]),

b) convening of a meeting by members of these bodies, with its date and place specified, or ordering a vote in writing or with the means of direct distance communication – in the event where the chairman of the supervisory board or the president of the management board fails to convene the meeting or does not order voting in writing or by means of direct remote communication for a day within one week from the date of receipt of the above-mentioned request (Article $4(4^2)$ of the Law on Cooperatives),

c) adopting a resolution by these bodies in writing or with the use of means of direct distance communication (however, in accordance with Article $4(4^3)$ sentence 1 of the Law on Cooperatives, the resolution may be adopted if all members of the body have been properly notified of the meeting of the body or the voting in writing or with the means of direct distance communication),

d) adopting a resolution by these authorities, which will be the result of partially the votes cast at the meeting, and partially the votes cast in writing or by means of direct distance communication (Article $4(4^3)$ sentence 2 of the Law on Cooperatives – thus in a hybrid manner – in this case, in accordance with Article $4(4^4)$ of the Law on Cooperatives, when calculating the quorum, both members of bodies, who participated by voting in writing or those by using means of direct remote communication are taken into account).

Pursuant to Article 35(5) of the Law on Cooperatives, the detailed procedure for convening the meetings as well as the manner and conditions for adopting resolutions by the cooperative bodies (excluding the general meeting or meetings of representatives), including, *inter alia*, by the management

[6] Journal of Laws of 2020, item 275 as amended [hereinafter: Law on Cooperatives].

board and the supervisory board, should be specified in the statutes of the cooperative or the regulations of these bodies provided for therein.

The legislature ordered the application *mutatis mutandis* of the abovementioned rules relating to the management board and the supervisory board, as provided for in Article 35(4^{1}–5) of the Law on Cooperatives to meetings of member groups (Article 59(1) sentence 3 of the Law on Cooperatives) electing representatives to the meetings of representatives, as well as to general meetings of the cooperative which, by law, exercise the powers of supervisory boards (Article 46a, sentence 3 of the Law on Cooperatives), which – in the context of a separate and at the same time analogous regulation of this matter in the provisions relating directly to the general meeting (or the meeting of representatives), i.e. primarily in Article 36(9–12) and Article 40(3) of the Law on Cooperatives – can be treated as an expression of a certain incoherence, inconsistency and lack of a comprehensive approach to the solutions introduced.

On the other hand, in the case of the general meeting (Article 36(9–13) and Article 40(3) of the Law on Cooperatives), as well as the meeting of representatives (Article 37(5) of the of the Law on Cooperatives), the new possibilities include, notwithstanding the relevant provisions of its statutes (Article 36(12) of the Law on Cooperatives), and therefore it may be assumed that even if that statutes provide for otherwise, the possibility of the management board or the supervisory board of the cooperative to decide to adopt a specific resolution by its general meeting (or meeting of representatives): (a) in writing, (b) by means of direct distance communication (Article 36(9) of the Law on Cooperatives), c) which will be the result of votes partially cast in writing or by means of direct distance communication (Article 36(10) sentence 2 of the Law on Cooperatives), including, as may be believed, also votes cast partly in the traditional way (related to the personal presence of the members of the body at the meeting), and therefore in a mixed manner (which can be described as hybrid one).

In the provision of Article 36(11) of the Law on Cooperatives the legislature has aptly adopted a legal solution (also introduced with regard to the cooperative's management board, supervisory board and meetings of the member groups – in Article 35(4^{4}) of the Law on Cooperatives, including Article 59(1) of the Law on Cooperatives) according to which the calculation of the quorum (at the general meeting or the meeting of representatives) shall take into account the members participating by casting a vote in writing or by means of direct distance communication.

At the same time, it introduced a right principle (also adopted – as mentioned above – with regard to the management board, the supervisory board and the meetings of member groups in Article 35(4^{3}) of the Law on Cooperatives, including in conjunction with Article 59(1) of the Law on Cooperatives) that

a resolution of the general meeting (or of the meeting of representatives) may be adopted if all the members of the body have been notified of the vote in writing or by means of direct distance communication (Article 36(10) sentence 1 of the Law on Cooperatives).

Similarly, in accordance with Article 40(3) of the Law on Cooperatives, the aforementioned notifications or requests for the convening of a general meeting (or a meeting of representatives), including the adoption of resolutions in these specific procedures, may be effected by means of direct distance communication.

However, unlike in the case of governing bodies of a limited liability company, which is to be regarded as an expression of a certain inconsistency and the absence of a holistic, comprehensive and optimal approach to the legal arrangements introduced in various organisational entities, the legislature has not introduced, for the governing bodies of cooperatives, detailed legal and organisational arrangements in this area, which with regard to the regulation on those companies allow assuming that they show much greater comprehensiveness, completeness or optimality.

In particular, the legislature did not introduce as a normative principle, in relation to the bodies of cooperatives, the obligation to define, in the form of regulations, the detailed rules for participation in meetings of bodies using electronic communication means (which in the case of meetings of a limited liability company and joint-stock company, as well as the management board and supervisory board of a joint-stock company are governed by the provisions of Article 234^{1}(3) CCPC, Article 406^{5}(3) CCPC, Article 371(3^{1}) of CCPC and Article 388(1^{1}) CCPC), or the principle that a resolution is valid when all members of the body have been notified of the content of the draft resolution and at least half of the members took part in adopting the resolution, unless the articles of association provide for stricter requirements in this respect (which in the case of supervisory boards of a limited liability company and joint-stock company, as well as audit committees in limited liability companies, the provisions of Article 222(4) CCPC, including in conjunction with Article 222(7) CCPC and the provision of Article 388(3) CCPC).

Moreover, unfortunately, the above-mentioned legal solutions relating to the general meeting (or meeting of representatives) of a cooperative provided for in Article 36(9–12) of the Law on Cooperatives apply only during a state of epidemiological threat or state of epidemic referred to in APCI and not – as in the case of new possibilities of operation provided for its other bodies, or in the case of these possibilities introduced in relation to bodies in companies, mutual insurance (or mutual reinsurance) companies or investment funds – regardless of the introduction of any of these states, and therefore for an indefinite period of time.

2.3. The new possibilities of operation of cooperative banks and entities managing the protection systems of these banks

The provision of Article 2b of the Act of 7 December 2000 on the functioning of cooperative banks, their association and the associating banks,[7] following the model of regulation provided for governing bodies of cooperatives operating on general principles, provide for with regard to the bodies of cooperative banks and entities managing the protection systems of these banks (Article 22d item 1 point 2 and items 2–4 AFCB), i.e. the general meeting, management board, supervisory board and meetings of member groups, the possibility of: a) convening meetings with the use of means of direct distance communication, b) participating in meetings using means of direct distance communication, c) adopting resolutions in writing or using means of direct distance communication.

In this case, the legislature did not adopt any opt-out model involving a statutory reference to the introductory or repealing provisions of the entity's statutes (i.e. neither that applicable for supervisory boards and meetings of the limited liability company and joint-stock company before the introduction of the new opt-in model, nor the current opt-out model, generally adopted for the bodies of the limited liability company and joint-stock company). On the other hand, it has introduced, a presumably mandatory rule that the provisions of the statutes or regulations providing for different from the principles on the use of means of direct distance communication indicated by law (in Article 2b AFCB) and presented above do not apply and are therefore legally ineffective.

Regrettably, however, these rules are of an episodic nature, as in the case of cooperatives (operating on general principles), associations and foundations. They are applied during the period of epidemiological threat, state of epidemic, state of emergency or state of natural disaster and up to 90 days following their cancellation (Article 2b(6) AFCB).

2.4. The new possibilities of operation of investment funds

On the other hand, the provisions of the Act of 27 May 2004 on investment funds and the management of alternative investment funds[8] (Article 87(3a) – (3d), Article 87c(3) items 4–5, Article 113(3), Article 114(2a) – (2c), Article 140(2a), Article 142(1a) – (1d) AIF), modelled on the regulations provided for meetings in a limited liability company, provide for the possibility of attending investment fund meetings of participants, investors' boards and investors' meetings (open-end investment funds, specialised open-ended investment

[7] Journal of Laws of 2021, item 102 as amended [hereinafter: AFCB]. Apart from the regulation of AFCB and the Law on Cooperatives, the operations of cooperative banks are also based on the Act of 29 August 1997, the Banking Law, Journal of Laws of 2020, item 1896 as amended.

[8] Journal of Laws of 2020, item 95 as amended [hereinafter: AIF].

funds, closed-end investment funds) using electronic means of communication (and not, as in the case of bodies of a cooperative or company bodies other than meetings, more broadly: the means of direct distance communication), unless the statutes of the fund in question provide otherwise (and therefore on the basis of the opt-out model also adopted in the limited liability company [Szumański 2020, 4; Ostrowski 2020, 33]).

These regulations, in reference to the rules on meetings of capital companies (including a simple join-stock company), provide for that participation in meetings of these investment fund bodies by electronic means may be subject only to the requirements and restrictions necessary to identify their participants (members) and to ensure the security of electronic communications. It is regrettable, however, that these regulations do not, at the same time, make it compulsory, as the provisions on meetings of limited liability companies and management boards and supervisory boards of a joint-stock companies, to adopt, in the form of an internal regulation, rules for the participation of participants (members) in meetings of those bodies of investment funds with the use of means of electronic communication.

It is right, however, that, like the solutions provided for in commercial companies and mutual insurance companies (or mutual reinsurance companies), they do not apply only episodically, but for an indefinite period of time.

2.5. Doubts and comments regarding the legal regulation of new possibilities for the operation of cooperatives, cooperative banks and entities managing the protection systems of these banks, as well as investment funds

The legal solutions providing for new possibilities of action relating to the bodies of cooperatives (operating under general principles), cooperative banks and entities managing the protection systems of these banks, as well as the aforementioned investment funds may raise certain elementary doubts. These doubts are strengthened by the fact that the legislature failed to provide a convincing justification in this respect in the explanatory notes to the bills which introduced them, in particular – with regard to cooperatives – mentioning only in the Explanatory Note to the Act of 31 March 2020 amending the Act of 2 March 2020 that these changes are introduced following the model of the solutions provided for commercial partnerships/companies, specifically for the simple joint-stock company.[9]

[9] See: Explanatory note to the draft Act of 31 March 2020 amending the Act on COVID-19, Sejm paper no. 299 [hereinafter: Explanatory note no. 1], p. 82, which generally stated: "The proposed amendments are intended to enable operation of the bodies of cooperatives, including housing cooperatives, and housing communities, whose members may be quarantined. They provide for the possibility, like commercial partnerships/companies, of voting in writing or by means of distance communication. The model was borrowed from the solutions introduced in

The basic doubt raised by the analysis of the introduced solutions boils down, as indicated above, to the question as to why the new possibilities of operation of the general meeting (or meeting of representatives) of cooperatives (acting under general principles), as well as the general meeting, management board, supervisory board and meetings of member groups of cooperative banks and entities managing systems of protection of these banks are applied only episodically, i.e. generally in the period of a state of epidemiological threat or a state of epidemic (Article 36(13) of the Law on Cooperatives and Article 2b(6) AFCB), and not – as in the case of other bodies of cooperatives, bodies of limited liability companies and a joint-stock companies (and bodies of simple joint-stock companies other than the general meeting), or the meeting of participants, investors' board and the meeting of investors of the aforementioned investment funds – regardless of the declaration of these states, i.e. to the temporally unlimited extent. In the current state of development of modern technologies, diversified means of communication, direct communication at a distance, including electronic means of communication [Kosmin and Roberts 2020, VII–IX], regardless of the existence and scope of restrictions on communication resulting from the COVID-19 pandemic caused by SARS-CoV-2, there is no justification for the temporary limitation of the application of the legal solutions, both existing and proposed, related to the operation of cooperatives and cooperative banks and entities managing systems of protection of these banks, only to the sate of epidemiological threat and state of epidemic, thus it is reasonable to consider, as a proposal for the law as it should stand, abandoning the regulation providing for such a limitation.

It is intriguing why the new possibilities for cooperatives to act through a general meeting (or a meeting of representatives) do not apply, as is the case with most bodies of companies, by the operation of law itself, unless its statutes provide otherwise (the opt-out model), but are based on an order (decision) of the management board or the supervisory board, which, in the case of collegial bodies, has the form of a resolution. This entails a doubt concerning the hierarchy of internal corporate acts of cooperatives as to why that order, in the area under analysis, has the higher status than that of the statutes of a cooperative, since those improvements may be introduced by an "order" (decision) of the management board or supervisory board, irrespective of the provisions of the statutes of the cooperative (Article 36(12) of the Law on Cooperatives),

the Code of Commercial Companies and Partnerships in connection with the establishment of a new type of legal entity – a simple joint-stock company." See more Kozieł 2020, XIX–XXXVII, 3ff. See also Explanatory note no. 2–330, p. 27 relating to the changes to the new possibilities for investment funds introduced in AIF which stated similarly, very generally: "The proposed amendment [...] aims to allow investment fund participants to participate remotely in the fund's bodies. [...] The proposed amendments are to enable investment fund bodies to act in a situation of epidemiological threat or state of epidemic and to improve their functioning in the normal course of the investment fund business activity."

and therefore not only where those statutes do not provide for such an possibility, but also where it states otherwise.

In this context, questionable may also be the provisions of Article 2b AFCB regarding the general meeting, the management board, the supervisory board and the meetings of the member groups of cooperative banks and the entities managing the systems for the protection of those banks, which exclude the effectiveness of those provisions of the statutes of those banks and the entities managing their protection systems which are different in the area of rules for the use of means of direct communication at a distance from those specified in those provisions and set out above.

These doubts raise the fundamental question about the reasons for not introducing for cooperatives (operating under general principles), cooperative banks and entities managing the systems for the protection of those banks, as well as investment funds, a broader, much more complete, comprehensive or, finally, optimal spectrum of regulation of this matter and, at the same time, proposing, *de lege ferenda*, the introduction of such an optimal regulatory scope for the governing bodies of cooperatives, cooperative banks and the entities managing the systems for the protection of those banks, as well as investment funds, similar to that adopted for companies (which, as regards the regulations provided for in the so-called anti-crisis shield, refers directly to the bodies of the limited liability company).

The identification and analysis of new possibilities of operation for cooperatives (operating under general rules) acting through their governing bodies, and the formulation in this regard of proposals for the law as it should stand are very important also because the rules on the bodies of those cooperatives, including the rules on new ways in which they operate, are in principle not regulated by the provisions on almost all specific types of cooperatives (i.e. labour cooperatives regulated by Article 181 et seq. of the Law on Cooperatives, credit unions,[10] social cooperatives[11] or housing cooperatives[12]) are applicable *mutatis mutandis* to them.[13] Unfortunately, due to the resulting lack of regulation of the matter at issue in the legislation on housing communities,[14] and

[10] Acting under the Act of 5 November 2009 on credit unions, Journal of Laws of 2020, item 1643 as amended.

[11] Acting under the Act of 27 April 2006 on social cooperatives, Journal of Laws of 2020, item 2085 as amended.

[12] Acting under the Act of 15 December 2000 on housing cooperatives, Journal of Laws of 2020, item 1465 as amended.

[13] In connection with the regulation of Article 2b AFCB, as regards the new possibilities of operation of the organisational entities analysed herein, this does not apply, as mentioned above, to cooperative banks and entities managing the protection systems of those banks.

[14] Amended by Article 7 of the Act of 31 March 2020 amending the SARS-CoV-2 regulation of Article 21(4) to (5) of the Act of 24 June 1994 on the ownership of the premises, Journal of Laws of 2020, item 1910 as amended [hereinafter: AOP], providing, within the basic scope,

due to the failure to include therein, to the extent not regulated, references to the relevant rules, in particular the rules on cooperatives or housing cooperatives, the spectrum of new possibilities of action for cooperatives, analysed and considered in this article from the perspective *de lege lata* and in the context of *de lege ferenda*, cannot be adequately applied to the ability of housing communities to operate, which is not justified and should be corrected by the legislature.

2.6. The new possibilities of operation of associations (operating under general rules)

New possibilities of operation for the governing bodies of associations operating under general rules (general meeting of members, internal auditing body and management board) include the possibility of voting, as it may be assumed due to the wording of Article 10(1a) of the Act of 7 April 1989, the Law on Associations[15] – as a rule, outside of meetings of the association bodies; not – as in the case of bodies of cooperatives, or the management boards, supervisory boards, audit committees and boards of directors in individual companies – generally with the use of all means of direct distance communication, but only with the use of a specific group of them, as it may be considered, currently the fastest growing, the most accessible and, at the same time, the most frequently used, i.e. means of electronic communication, provided that the members of a given body of the association have agreed to it in a documentary form (Articles 77^2–77^3 of the Act of 23 April 1964, the Civil Code[16]).

The above-mentioned general rules for the use of electronic means of communication outside the meetings of the association's governing bodies apply unless a different regulation in this regard has been introduced in the association's statutes. This is so, because other regulations – the provisions of Article 10(1d) sentences 1 and 2 of the Law on Associations generally give priority to the provisions of its statute concerning the issue of the legal basis for the use of electronic means of communication by the association's bodies. Pursuant to Article 10(1d) sentence 1 of the Law on Associations, the use of electronic

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for the possibility of use by the management boards of housing communities the new possibilities of action, discussed in this paper (i.e. voting by written ballot or using the means of direct distance communication) were subsequently, regretfully, repealed by Article 5 of the Act of 10 December 2020 on the amendment of certain acts supporting the development of housing activities, Journal of Laws of 2021, item 11.

[15] Journal of Laws of 2020, item 2261 as amended [hereinafter: Law on Associations].

[16] Journal of Laws of 2020, item 1740 as amended [hereinafter: CC]. According to Article 77^2 CC, for the documentary form of a legal act, a declaration of will in the form of a document is sufficient (i.e. in the light of Article 77^3 CC, a data medium enabling the declaration of will to be read) in such a way as to make it possible to identify the person making the declaration.

means of communication in voting at and outside the meetings of the association's governing bodies may be subject to different regulations in its statute (e.g. providing for the possibility of voting using these means also at meetings of its governing bodies). On the other hand, in the light of Article 10(1d) sentence 2 of the Law on Associations, the association's statutes may limit or directly exclude the use of electronic means of communication in voting at and outside the meetings of the association's governing bodies.

The possibility of participating in a meeting of the association's governing bodies with the use of electronic means of communication must be specified in the notification of this meeting, containing a detailed description of the manner of participation and exercise of voting rights (Article 10(1b) of the Law on Associations). The use of electronic means of communication when voting at meetings of the association's authorities must ensure at least: the real-time transmission from the session, the two-way real-time communication, during which a member of the association's body may speak during the session, or exercise of the voting rights in person or through a legal representative before or during the meeting (Article 10(1c) of the Law on Associations).

It is a pity, however, that pursuant to Article (10(1e) of the Law on Associations the above solutions apply only in the case of introduction of a state of epidemiological threat or state of epidemic referred to in APCI, and not as in the case of other body than the general meeting (or meeting of representatives) of the cooperative, the bodies of limited liability companies and joint-stock companies (and, other than the general meeting, bodies of simple joint-stock companies), or the meeting of the participants, the investors' board and the investors' meeting of the aforementioned investment funds, regardless of the declaration of one of these emergency states, which seems to reflect a certain inconsistency and a lack of a complete, comprehensive and optimal approach to the legal arrangements in the different organisational entities in this area.

2.7. Doubts and comments regarding the legal regulation of new possibilities for the operation of associations

The legal solutions referred to above regarding associations give rise to similar doubts and questions like in the case of the relevant regulations of the law on cooperatives, the regulations relating to cooperative banks and the entities managing the protection systems of those banks, and the investment funds mentioned above, all the more so since, unlike in particular for the regulations of the law on cooperatives (for which the explanatory note to the bill very refers only to the general model and at the same time the direction of the

regulation) – no, even slightest, justification was presented for them in the explanatory notes for the bills introducing the so-called crisis shield.[17]

The fundamental doubt pointed to above, resulting from an analysis of the solutions in place, can be, as in the case of similar regulations relating to cooperatives (operating under general rules), cooperative banks and entities managing the protection systems of those banks, reduced to the question of why they are applicable only during the period of epidemiological or the state of epidemic (Article 10(1e) of the Law on Associations), i.e. episodically – which is not justified in the current state of development of modern technologies, diversified means of communication, direct distance communication, including electronic means of communication [Kosmin and Roberts 2020, VII–IX] – and not because of the introduction of these states for an indefinite period of time.

It is also intriguing why these improvements (including, as a general rule, the possibility of voting by electronic means outside the meetings of its bodies, unless otherwise provided by the statutes of the association) do not apply as in the case of bodies of cooperatives, other than the general meeting (or the meeting of representatives), bodies of companies (excluding the general meeting in a simple joint-stock company), or the meetings of participants, the investors' board and the meeting of investors of the aforementioned investment funds, by operation of law, unless otherwise provided by the statutes of the association (when e.g. it does not exclude their application in accordance with Article 10(1d) of the Law on Associations), but is based on a decision of the individual governing bodies of the association (expressed in a documentary form (Article 10(1a) of the Law on Associations).

As in the case of cooperatives (operating on a general basis), cooperative banks and entities managing the protection systems of those banks, as well as investment funds, these doubts raise a fundamental question about the justification for the failure to introduce for associations a broader, much more complete, comprehensive, full and, finally optimal spectrum of regulation of the matter, as the one adopted for capital companies (which, as regards the regulation of the so-called anti-crisis shield, relates directly to the bodies of the limited liability company) and, at the same time, to propose *de lege ferenda* the introduction of such an optimal scope of regulation for the bodies of those associations.

The identification and analysis of the new possibilities for associations to operate through their bodies, as well as the formulation of proposals *de lege ferenda* in this regard, is very important also because the provisions concerning the bodies of associations operating under general rules, including the

[17] See: Explanatory note to the draft Act of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2, Sejm papers no. 324 and 330 [hereinafter: Explanatory note no. 2].

analysed regulations concerning new ways of their operation, in principle, to the extent not regulated by the legislation on certain other organisational entities constituting social organizations operating under separate acts or international agreements to which the Republic of Poland is a party (i.e. in the provisions on chambers of crafts and guild associations,[18] chambers of commerce,[19] employers' associations, federations and confederations,[20] sports associations[21]) or religious organisations whose legal situation is governed by the laws on the relationship of the State to churches and other religious associations, operating within those churches and associations (e.g. in the provisions on organisations operating within the Catholic Church) are applicable to them *mutatis mutandis* (Article 7(2) in conjunction with Article 7(1) items 1) and 3) of the Law on Associations).

Looking from this perspective, all the more surprising and questionable is the failure to include in the provisions introducing new possibilities for associations of the option to apply them also to ordinary associations governed by Articles 40 to 43 of the Law on Associations, which are organisational entities without legal personality on which the Act confers legal capacity and therefore structurally simpler "sisters" of associations equipped with legal personality. It seems that, it should be considered, as a proposal *de lege ferenda*, introducing new possibilities for action also in ordinary associations.[22]

3. THE NEW POSSIBILITIES OF OPERATION ARISING FROM LEGAL REFERENCES TO REGULATIONS INTRODUCED BY THE SO-CALLED ANTI-CRISIS SHIELD

3.1. General remarks

In view of the fact that the principle of application of the law *mutatis mutandis* was used even before the adoption of the so-called anti-crisis shield or has been directly adopted in those provisions by the legislature, the catalogue of organisational entities other than commercial companies/partnerships

[18] Acting under the Act of 22 March 1989 on crafts, Journal of Laws of 2020, item 2159.
[19] Acting under the Act of 30 May 1989 on chambers of commerce, Journal of Laws of 2019, item 579.
[20] Acting under the Act of 23 May 1991 on employers' organizations, Journal of Laws of 2019, item 1809.
[21] Acting under the Act of 25 June 2010 on sport, Journal of Laws of 2020, item 1133.
[22] That proposal is also justified, in general, in respect of commercial partnerships which have similar subjective status and which are ignored in this area by the legislature (general partnership, professional partnership, limited partnership, limited joint-stock partnership), including their shareholders, which generally goes beyond the essential scope of the considerations of this paper, covering organisational entities other than commercial companies and partnerships.

to which the new possibilities of operation analysed herein apply is broader than those mentioned in point 2 above. It includes in particular:

1) in the group of organisational entities which, as a general rule, pursue an economic activity, – mutual insurance companies or mutual reassurance companies (including, due to applying *mutatis mutandis*, under Article 161 of the Act of 11 September 2015 on insurance and reinsurance business,[23] of the provisions of the Code of Commercial Partnerships and Companies about joint-stock company – Article 371(3^1–3^3) CCPC, Article 388(1–3) CCPC and Article 406^5 CCPC, unless otherwise provided in the articles of association of the company. – the management boards, supervisory boards and general meetings of members of these companies),

2) in the group of organisational entities which, as a general rule, are not engaged in an economic activity, foundations operating under general rules (including, due to the application *mutatis mutandis,* under Article 5(1a) and (1b) of the Act of 6 April 1984 on foundations,[24] of Article 10(1a) to (1e) of the Law on associations, all foundation bodies: the management board and other bodies established on the basis of the foundation statutes, for example: foundation council, foundation board, supervisory board, etc.).

3.2. The new possibilities of operation of mutual insurance (or mutual reinsurance) companies

Unless the articles of association of a mutual insurance (or mutual reinsurance) company provide otherwise (and therefore, similarly to the bodies of a limited liability company and a joint stock company, as well as in the case of the meeting of participants, investors' board and the meeting of investors of the aforementioned investment funds – on an opt-out basis [Szumański 2020, 4; Ostrowski 2020, 33]), to the extent not regulated in Chapter 5 AIRB on the operation of these companies under Article 161 AIRB, the provisions of the Code of Commercial Partnerships and Companies on the joint stock company shall apply *mutatis mutandis*, including in particular the provisions on its bodies and new possibilities of their operation analysed herein, set out in the provisions referred to as the anti-crisis shield. Due to the fact that the legislature did not introduce a separate regulation in the AIRB provisions on the issue of new possibilities of operation for mutual insurance and reinsurance companies by their governing bodies, in particular with the use of means of direct communication over distance, the scope of these possibilities is determined, pursuant to Article 161 AIRB, by the relevant provisions of the Code of Commercial Partnerships and Companies on joint stock companies, unless the articles of association of the company concerned provide otherwise.

[23] Journal of Laws of 2020, item 895 [hereinafter: AIRB].

[24] Journal of Laws of 2020, item 2167 [hereinafter: AF].

The new possibilities of operation for mutual insurance and reinsurance companies include, in the case of their management boards and supervisory boards, unless the statutes of the society provide otherwise (the opt-out model) the possibility of:

a) participation in a meeting of the body with the use of means of direct distance communication (Article 371(3^1) CCPC and Article 388(1^1) CCPC in conjunction with Article 161 AIRB, except that – more optimally than in the case of these bodies of cooperatives (acting under general rules), cooperative banks and entities managing systems of protection of these banks, as well as governing bodies of associations or foundations – the legislature imposed on supervisory boards of mutual insurance and reinsurance companies in connection with the application *mutatis mutandis* to their management boards and supervisory boards of the provision of Art. 406^5(3) CCPC in conjunction with Article 161 AIRB an obligation to determine, in the form of internal regulations, the detailed rules of participation in meetings of these bodies by electronic means of communication, with the exception of requirements and limitations, which are not necessary for identification of members and ensuring security of electronic communication),

b) adoption of resolutions in writing or with the use of means of direct distance communication (Article 371(3^2) CCPC and Article 388(3) CCPC in conjunction with Article 161 AIRB, but regrettably only in the case of supervisory boards and not also in the case of management boards, which should be assessed as an expression of a certain inconsistency and lack of comprehensive and optimal approach to the solutions being introduced, the legislature introduced a regulation according to which a resolution is valid if all members of the body have been notified about the content of the draft resolution and at least half of its members participated in passing it, and the articles of association may provide for stricter requirements concerning passing resolutions by this procedure),

c) participation of members of such bodies in adopting resolutions by casting their votes in writing via another member of the body (Article 371(3^3) CCPC and Article 388(2) CCP in conjunction with Article 161 AIRB, regrettably however, only in the case of supervisory boards and not also in the case of management boards, which should be perceived, similarly as above, as an expression of a certain inconsistency and lack of a comprehensive, complex and optimal approach to the introduced solutions, the legislature assumed that casting votes in writing may not concern matters placed in the agenda at the meeting of the body).[25]

[25] At the same time, the legislature rightly repealed Article 388(4) CCPC, in conjunction with Article 161 AIRB, which excluded specific powers to adopt resolutions and cast votes in respect of the election of the president and deputy president of the Supervisory Board, the appointment of a member of the Management Board and the dismissal and suspension of those persons. On

On the other hand, for general meetings of members of mutual insurance and reinsurance companies, the new possibilities of operation consist in the adoption, unless the articles of association of the company provide otherwise (and therefore, as in the case of management boards and supervisory boards under the so-called opt-out model) that there is an option of attending the general meeting not with the use of all the means of direct distance communication (as in the case of boards and supervisory boards) but only a specific, narrower, as it may be believed, the fastest growing, most accessible and at the same time the most widely used group of these means, i.e. electronic means of communication (Article 406^5(1) CCPC in conjunction with Article 161 AIRB).[26] This participation, in accordance with Article 406^5(2) CCPC in conjunction with Article 161 AIRB, includes, for example: a) two-way real-time communication between all persons participating in the meeting, in which they may speak in the course of discussion while staying elsewhere, and b) exercise of voting rights in person or by proxy before or during the meeting.[27]

Participation in the general meeting of members using electronic means is decided by the convening party, i.e. first of all the management board (see Article 135–136 AIRB).

In accordance with the provisions of Article 406^5(3) CCPC in conjunction with Article 161 AIRB, the supervisory board is obliged to lay down, in the form of internal regulations, detailed rules for participation in the general meeting using electronic means of communication. However, these regulations must not contain requirements or restrictions which are not necessary to identify the members and ensure the security of electronic communication.

Only with regard to the general meeting of members, and not with regard to the other bodies of mutual insurance and reinsurance companies (management boards and supervisory boards), which should be regarded, on the one hand, as an expression of a certain inconsistency and lack of a complete, comprehensive and optimal approach to the improvements made, but nonetheless

the other hand, the legislator aptly added to Article 388 CCPC the para. 3^1, in which it granted to the supervisory board of a joint-stock company, and at the same time (in conjunction with Article 161 AIRB) to the supervisory boards of mutual insurance/reinsurance companies the right to adopt resolutions in writing or by means of direct distance communication, including on matters for which the articles of association provides for voting by secret ballot, unless any member of the supervisory board objects to this. It is regrettable, however, that even the regulations analogous to those provided for in Article 388(3^1) CCPC, which can be seen as an example of a specific inconsistency and lack of a complete, comprehensive and optimal approach to the solutions put in place, have not been introduced by the legislature in relation to the management board and general meeting of a public limited liability company, and in conjunction with the regulation of Article 161 AIRB, also to those bodies of mutual insurance and reinsurance companies.

[26] Similarly Ostrowski 2020, 36; Osajda 2020, 21.

[27] See more Żaba 2020, 14.

still considered an appropriate solution, the legislature, in Article 506[5](5) and (6) CCPC imposed on the company, in the case of the exercise by its member of the voting rights at the use of electronic means of communication, the obligation to: a) promptly send the member an electronic notice of receipt of the vote (Article 506[5](5) CCPC in conjunction with Article 161 AIRB), as well as, b) to send the member or member's representative, at the request of the member submitted no later than three months after the date of the general meeting, a confirmation that his or her vote has been properly registered and counted (unless such confirmation has been given to the member or his/her representative in advance (Article 506[5](6) CCPC in conjunction with Article 161 AIRB).

Both in the case of management boards and supervisory boards, and in the case of general meetings of members of mutual insurance and reinsurance companies, completely different than in the provisions relating to the supervisory board applicable before the introduction of the analysed solutions (Article 388 CCPC) and the general meeting of a joint-stock company (Article 406[5] CCPC), which pursuant to Article 161 AIRB have been applied *mutatis mutandis* to mutual insurance and reinsurance companies, the above-mentioned new possibilities of operation are binding by operation of law, as a rule, unless the company's articles of association provides otherwise (which is an expression of the so-called opt-out model [Szumański 2020, 4; Ostrowski 2020, 33]). In the case of the supervisory board and the general meeting of members, one could therefore state that "the roles of rules and exceptions have been reversed" [Schmidt 2002, 1455ff]. Based on the currently applicable regulations, the principle is the possibility of taking advantage of these new options, contrary to the previous regulations, which in the case of supervisory boards and general meetings of members of mutual insurance and reinsurance companies required a clear basis in their articles of association to use them.

Contrary to the new possibilities of operation provided for the majority of organisational entities other than commercial companies and partnerships, which have been presented above (cooperatives operating under general rules, cooperative banks and entities managing the protection systems of these banks and associations), as well as foundations, mutual insurance or mutual reinsurance companies, similarly to the above-mentioned investment funds, can take advantage of these possibilities regardless of the duration of the state of epidemiological threat or state of epidemic, i.e. for an indefinite period, which should be assessed very positively.

3.3. Doubts and comments regarding the legal regulation of new possibilities for the operation of mutual insurance (or mutual reinsurance) companies

The new legal solutions adopted in the area of operation of joint-stock companies, which, in principle, pursuant to Article 161 AIRB are applicable

to mutual insurance and reinsurance companies, as well as the regulations relating to other organisational entities, other than commercial companies/ partnerships, which are the subject of this article, may raise certain, as one may think significant, doubts, the more so as the legislature did not present any clarification in the Explanatory Notes to the bills introducing the so-called anti-crisis shield.[28]

In particular, it seems that in this case there is no justification for differentiating the regulations regarding management boards and supervisory boards by not including in the regulations on management boards the provisions concerning the notification of the content of the draft resolution and the regulation of the issue of the quorum required to adopt resolutions in writing or using means of direct distance communication provided for in the provisions on supervisory boards, i.e. in Article 388(3) sentences 2 and 3 CCPC in conjunction with Article 161 AIRB, referred to the case of establishing a collective management board.

It is also interesting what prevented a regulation similar to the one rightly introduced in relation to the general meeting of shareholders in a limited liability company, which defines in Article 238(3) CCPC the specific requirements concerning the notification of the general meeting by means of electronic communication,[29] in relation to the general meeting, management board and supervisory board of a joint-stock company and, consequently, pursuant to Article 161 AIRB, also to mutual insurance and reinsurance companies.

Moreover, it does not seem to be justified to limit the possibility of using only electronic means of communication for the meetings of the societies (Article 406^5(1) CCPC in conjunction with Article 161 AIRB) and not more broadly, as in the case of their management boards and supervisory boards, i.e. to all means of direct distance communication.

As in the case of cooperatives operating under general rules, cooperative banks and entities managing the systems for the protection of those banks, the investment funds, associations and foundations mentioned above, these doubts raise questions about the reasons for not introducing a broader, slightly more complete, comprehensive and optimal scope for regulating this matter in the case of regulations concerning new possibilities of operation for the joint-stock company, which form the basis for those possibilities in mutual insurance and reinsurance companies, which could dispel these doubts and, at the same time, encourage putting forward a proposal *de lege ferenda* to

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[28] See Explanatory note no. 1 and Explanatory note no. 2.

[29] In Article 238(3) CCPC, the legislature, with regard to the limited liability company, adopted the principle that, where participation in the shareholders' meeting takes place with the use of electronic means of communication, the notification (of that meeting) should additionally include information on the manner of participation in the meeting, taking the floor, exercising one's voting rights and lodging an objection to the resolution(s) adopted.

introduce such an optimal scope of regulation for that kind of company and, consequently for mutual insurance and reinsurance companies.

3.4. The new possibilities of operation of foundations (acting under general rules)

Pursuant to Article 5(1a) AF, the provisions of Article 10(1a) – (1)d of the Law on Associations shall apply *mutatis mutandis* to the use of electronic means of communication for voting in the bodies of foundations (acting under general provisions of the Act on Foundations) providing for the possibility of voting not with the use, in general, of all means of direct distance communication (as in the case of governing bodies of cooperatives or management boards, supervisory boards, audit committees, or boards of directors in companies) but only using a specific group of them, namely the fastest growing, most accessible and at the same time most widely used today, i.e. with the use of electronic means of communication.

Unfortunately, pursuant to the provisions of Article 5(1b) AF, these solutions, similarly as in the case of the general meeting (or meeting of representatives) of cooperatives (operating under general rules), general meetings, management boards, supervisory boards and meetings of member groups of cooperative banks and entities managing the security systems of such banks and governing bodies of associations, are applied only in the event of introducing a state of epidemiological threat or a state of epidemic as referred to in the APCI, which, as has been argued above, is not justified nowadays, and not – as in the case of bodies of cooperatives other than the general meeting (or the meeting of representatives), governing bodies of limited liability companies and joint-stock companies, and also governing bodies of mutual insurance and reinsurance companies, or meetings of participants, investors' boards and meetings of investors of the aforementioned investment funds – irrespective of the introduction of one of these emergency states.

3.5. Doubts and comments regarding the legal regulation of new possibilities for the operation of foundations

The basic principles relating to the application of the new possibilities of operation in foundations, especially with the use of electronic communication means, the related doubts, the postulates *de lege ferenda* of modifications of the relevant regulations, and arguments for them, are therefore analogous to those adopted above in item 2.7 of this paper, concerning associations. The argument more adequate in relation to associations: about the application of these possibilities *mutatis mutandis* to certain other organisational entities (e.g. social organizations), as well as the postulate to extend them to ordinary associations, should be excluded from them.

The pointing out and analysis of new possibilities of operation for foundations (operating under general rules) by their bodies, as well as the formulation of *de lege ferenda* proposals in this respect are of great significance also due to the fact that the provisions relating to the foundation's governing bodies, including the regulations analysed herein concerning new possibilities of their operation, are in principle directly applicable, to the extent not regulated in the respective provisions on foundations operating under specific regulations (which applies in particular to the foundations: Centrum Badania Opinii Społecznej,[30] Fundacji Platforma Przemysłu Przyszłości,[31] foundation – Zakład Narodowy im. Ossolińskich,[32] or the foundation – Zakłady Kurnickie[33]). *De lege ferenda*, it seems justified to consider the possibility of their introduction in all the foundations operating on the basis of specific regulations.

CONCLUSIONS

In general, the introduction by the legislature of new possibilities for organisational entities other than commercial partnerships and companies, which, in particular, provide for the possibility of taking decisions using means of distance communication, including electronic means of communication (especially including minority cases where it is of a temporally indefinite nature: for meetings of participants, investors' boards and investors' meetings of the above-mentioned investment funds, as well as governing bodies of mutual insurance or reinsurance companies) should be assessed very positively, all the more in view of the current epidemic constituting an important obstacle to effective communication, including by decisions taken by the bodies of those entities in a traditional way based on the personal presence of their members in one place. They can be seen as a very important step, perhaps even a "milestone," and yet it is clear that they start another very important step in the area of regulating this matter.

However, as a whole, not only in the section on the new possibilities of operation relating to cooperatives operating under general rules, cooperative banks and entities managing the protection systems of those banks, investment funds, associations and foundations, but also, as mentioned above, to the

[30] Operating under the Act of 20 February 1997 on the foundation, the Centre for Public Opinion Research, Journal of Laws No. 30, item 163 as amended.

[31] Operating under the Act of 19 January 2019 on the Foundation of Industry of the Future, Journal of Laws item 229.

[32] Operating under the Act of 05 January 1995 on the foundation, the Ossoliński National Institute, Journal of Laws of 2017, item 1881.

[33] Operating under the Act of 18 September 2001 on the "Zakłady Kórnickie" foundation, Journal of Laws of 2020, item 1705.

extent referring to these possibilities for the joint-stock company, which are applicable *mutatis mutandis* to mutual insurance or reinsurance companies), the above-analysed legal arrangements adopted by the legislature appear to be incoherent, lacking a specific legislative consequence and symmetry (in terms of balance, uniformity) in the regulation of the same or similar issues (for individual governing bodies), as well as a holistic (comprehensive) and optimal character.

It would appear that optimal would be the changes that broadly cover, for each governing body of entities (including other than commercial partnerships/companies), almost all the essential legal provisions on individual, different bodies of those entities (including governing bodies of commercial partnerships/companies), elements of new possibilities of action integrated into one whole, taking into account the demands arising from the doubts and questions presented herein. This optimum nature and the resulting scope of legislative changes could be considered as the basis for an optimal model to regulate the matter in organisational entities (including other ones than commercial partnerships/companies).

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CONSENSUAL MODEL OF PROCEDURE ON GRANTING A CONSENT TO VOLUNTARY SUBMISSION TO LIABILITY IN CASES OF FISCAL CRIMES AND INFRACTIONS – AN OUTLINE OF THE PROBLEM

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Abstract. The paper addresses the issues of the model of proceeding for granting a consent to voluntary submission to liability. An attempt was made to show the features of the consensual model of proceedings and an analysis was made of the basic condition of "payment of a public-law receivable" starting the negotiation procedure on other conditions specified in Article 146(2) of the Code of Criminal Procedure. The last part of the article contains some remarks relating to the judicial proceedings with emphasis on the "benefit" for the accused in the form of a judgment in which the court allows for voluntary submission to liability – it is not entered in the National Criminal Register and it does not constitute a condition for fiscal recidivism.

Keywords: model of proceeding on the consent to the voluntary submission to liability, penal-procedural "agreement," negotiation, payment of a public-law receivable, judgment

INTRODUCTION

First, it should be noted that proceedings in cases involving fiscal crimes or infractions, despite constituting a branch of criminal law in the broad sense,[1] are also linked to financial law.[2] The main element which gives fiscal criminal

[1] A.R. Światłowski, when supporting the position expressed in Bafia 1980, 105, states that "the fiscal criminal procedure forms an integral part of the same system of procedure as the general criminal procedure and differs from the latter primarily in forms of proceeding," he rightly takes the view that "such a position should be taken today when the courts have been fully entrusted with adjudication powers in those cases. In the light of Article 1 of the Fiscal Criminal Code, there is no doubt about the nature of liability for fiscal crimes (although «liability» without adjectives refers to fiscal infractions), if we consider that fiscal criminal procedure concerns proceedings the main subject of which is criminal liability, the nature of proceedings conducted on the basis of the Fiscal Criminal Code should not give rise to doubt" [Światłowski 2008, 160].
[2] According to L. Wilk, "Fiscal criminal law plays a subsidiary role for financial law, in particular tax law, customs law, foreign exchange law and regulation on gambling, which means that

law its attribute of "connection" with financial law is its specific object of protection. This object of protection is the financial interest and financial order [Prusak 2002, 4], which determines its distinctiveness in relation to common criminal law [Wilk and Zagrodnik 2019, 4]. Fiscal criminal law protects the financial interest of the State Treasury, local government units and the EU [ibid.] and secures it by specifying which acts that violate the financial regulations of the state are to be countered with penalties and punitive measures [Sawicki and Skowronek 2017, 24]. A comprehensive understanding of the State Treasury covers its legal, economic and organisational senses [Prusak 2002, 4]. Due to the specific nature of the object of protection of the fiscal criminal law, the provisions of this branch of law define the principles of liability and punishment for fiscal crimes and infractions as infringements of the norms of financial law resulting in the direct or indirect depletion of State Treasury's assets or risk thereof, and also define the rules of procedure before adjudicating bodies and the manner of implementing their decisions [ibid.].

At this point, it should also be stressed that the essence of fiscal penal law is not so much repression, but first and foremost the striving to enforce payment of public-law receivables and to compensate for financial loss to the State Treasury, local government units or another entitled entity. Fiscal criminal law performs the enforcement function, also referred to as the enforcement/compensation function. According to its directives, fiscal criminal law is to ensure compliance with financial orders and prohibitions, and if necessary, the recovery of depleted public receivables (customs duties, taxes), which is to be achieved by means of penal measures specified in the Fiscal Criminal Code[3] [Sawicki and Skowronek 2017, 24–25].

The adoption by the legislature of the overarching objective – enforcement – gives this right a specialised character. It is largely linked to the implementation of the fiscal policy aimed at recovery of depleted public-law receivables as soon as possible [Znamierowski 2018, 109]. The normative expression of fiscalism expressed in procedural regulations is the purpose of fiscal criminal law defined in Article 114(1) FCC. The procedure for the cases of fiscal crimes

fiscal criminal law protects and safeguards, by means of criminal sanctions, compliance with financial law norms to the extent in which financial law alone does not have sufficient sanctions to compel compliance with its own rules. […] The link between fiscal law and financial law is reflected in the specific legislative technique used in the special part of the substantive fiscal law. This is a technique called the blanket structure of provisions. [...] Blanket fiscal provisions make reference outside the Fiscal Criminal Code to the provisions of financial law which supplement the statutory descriptions of criminal offences. Without this complement, the descriptions of the acts are incomplete. A clear reference to non-penal legal acts is made, for example, in the explanations of the so-called glossary of terms (Article 53 of the Fiscal Criminal Code), in which it refers to certain acts of tax, customs, foreign exchange or gambling law as regards the understanding of certain concepts used in the special part of the Fiscal Criminal Code (see e.g. Article 53(30–35a) of the Fiscal Criminal Code)" [Wilk 2019, 6–7].

[3] Hereinafter: FCC.

and fiscal infractions are shaped in such a way as to achieve the objectives of such proceedings in terms of compensating for the financial loss to the State Treasury, a local government unit or other entitled entity caused by such an offence. It is noted by scholars in the field that this objective, in relation to Article 2(1) of the Code of Criminal Procedure[4] in conjunction within Article 113(1) FCC should be regarded as complementary and, as regards the specificities of fiscal criminal law and the strong inclination of the legal rules in this area towards maximising the objective of compensation of the damage to public finances, should be regarded as very important [Skowronek 2017, 24–25].

The achieving of the fiscal objective of fiscal criminal law is enabled by a number of fiscal criminal regulations,[5] which reward compensation for the financial damage suffered by the creditor (State Treasury) as early as possible, and therefore the settlement of a public-law obligation, which entails greater relief and easing of fiscal criminal liability, which can be expected by the perpetrator of a fiscal crime or infraction. The condition for taking advantage of the benefits provided for by the provisions of the Fiscal Criminal Code is always the payment in full of the public-law receivable due (whether as a tax, duty, settlement of subsidies or subventions) depleted by an offence.

The next part of the study will outline the most important issues related to one of the most well-known instruments of a procedural nature, most commonly used in practice, provided for in fiscal criminal law for the purpose of achieving the essential objective of this regulation, i.e. the recovery of depleted dues for the Treasury and other entities indicated in the FCC.

The permission for voluntary submission to liability, discussed further herein, is considered to be one of those fiscal criminal law institutions carrying out an enforcement function that are most commonly used in practice and preferred by the legislature [Cichy 2015, 88].[6]

It is rightly assumed in the literature that voluntary submission to liability "as a means of implementing the principle of procedural economy, including due to the complete elimination of enforcement proceedings, is an expression of a rational trend in contemporary criminal policy based on practical considerations. Its essence is a clear degression of punishment in strictly defined

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[4] Hereinafter: CCP.

[5] Such institutions include: voluntary submission to liability – Article 17(1)(1) FCC; penalty notice proceedings – Article 137(2)(1) FCC; conviction without hearing – Article 156(3) FCC; abbreviated hearing – Article 161(1) FCC; voluntary disclosure – Article 16 and 16a FCC; refraining from imposing a penalty or punitive measure – Article 19(2) FCC; refraining from decision on forfeiture of assets – Article 31(3)(2) FCC; extraordinary leniency – Article 36(2) and 77(4) FCC; refraining from extraordinary aggravation of penalty– Article 37(2) FCC; replacing the penalty of imprisonment with the penalty of restriction of liberty – Article 26(1) and (2) FCC; conditional discontinuation of proceedings, conditional suspension of penalty execution and release on parole – Article 41 FCC.

[6] See also statistical data of the Ministry of Justice on convicts for fiscal offences, provided therein.

cases, consistent with the pragmatic approach to shifting the point of gravity of the criminal policy from punishment to resolving the social conflict by, *inter alia*, a compensation in whole or in part for the financial detriment suffered by the State Treasury or a local government unit (caused by an offence) in accordance with the principle that the formally imposed «penalty» is not the main instrument of combating fiscal crimes and infractions" [Stepanów 2001, 66].

This institution embodies the primacy of the enforcement function in the fiscal criminal law over the repressive one, and is undeniably the most vivid example of legal instruments serving this purpose.

1. CONSENSUAL MODEL OF PROCEDURE ON GRANTING A CONSENT TO VOLUNTARY SUBMISSION TO LIABILITY IN CASES OF FISCAL CRIMES AND INFRACTIONS – GENERAL REMARKS

The procedural institution of the consent to voluntary submission to liability constitutes a kind of model in fiscal criminal proceedings (i.e. in cases involving fiscal crimes and infractions). It has been constructed by lawmakers in such a way that certain characteristic elements may be distinguished that reflect its consensual nature, representing a kind of reflection of the legislature's assumptions regarding the normative shape of institutions based on negotiations or procedural agreements. Assuming that the legislature has assigned to the criminal fiscal law (in the broad sense) not only repressive goals, but especially the dominant enforcement goal, the institution in question should be analysed in the context of model solutions, characteristic of procedural consensualism, the essence of which is reaching an agreement (consensus). When presenting a model of proceedings that is part of a given legal system or a specific legal institution within a given branch of law, it is first of all necessary to explain what the "model"[7] refers to and how the term used in the title will be understood herein.

As H. Paluszkiewicz points out, science uses modelling understood as a cognitive procedure for idealisation and concretisation, leading to a set of statements describing the relationship between features characterising certain legal phenomena or features that are considered particularly important.[8] In the analysis of normative solutions, it is important to distinguish descriptive models, models that reconstruct a specific reality, and normative models, which

[7] Model may be defined as "someone or something that is an extremely good example of its type, esp. when a copy can be based on it." See Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/model [accessed: 05.02.2021].

[8] See Paluszkiewicz 2008, 151ff and the literature listed therein, especially studies by Malinowski and Nowak 1972, 88; Zieliński 1979, 8ff; Lang 1962, 59ff.

define what this reality should look like [Malinowski and Nowak 1972, 88]. This manner of understanding is also accepted in contemporary literature on the subject.[9]

Further discussion presents the model of the institution of consent to voluntary submission to liability as defined in Articles 17(2) and 142 FCC, understood as a normative model reflecting the provisions of the currently applicable fiscal criminal law. At the same time, it is an optimisation model presenting the properties by which this consensual institution is characterised, enabling it to achieve, by its application in tax proceedings, the essential objective of that proceeding, i.e. the recovery of the depleted dues for the State Treasury.

The normative form of the institution of consent to voluntary submission to liability is part of a much broader area of solutions corresponding to the consensual model, characterising proceedings for fiscal crimes and infractions, and regulated currently by the provisions of the Fiscal Criminal Code.

In penal-law literature, the term "model" is most often explained using the "trial model." Thus, Z. Gaberle defines the "trial model" as "a set of procedural institutions forming one whole focused on the achievement of specific objectives. In this sense, there are two extremely opposing models distinguished: the criminal control model, aimed at the crime control (combating), which focuses on efficiency, and the due process model that emphasizes a fair trial model, which focuses on a fair hearing of the case. In Poland, this term is most commonly used for the various stages of the procedure" [Gaberle 2004, 99–100].

On the other hand, S. Waltoś assumes that a "model" is "a set of basic characteristics of an arrangement which characterise its structure and thus make it possible to distinguish that arrangement from others" [Waltoś 1968, 9; Gerecka–Żołyńska 2009, 19].

Referring these comments to the present deliberations, it may be stated that while very proceedings in cases involving fiscal crimes and infractions is shaped in such a way as to create a separate model of proceedings in these categories of offences (although the subsidiarity of provisions of the general criminal procedural law – Article 113 FCC – should be noted), also this branch of law contains certain normative constructs, which constitute separate procedural institutions with their own characteristics. Due to these characteristics, the term "model" may also be applied to them and in this sense, the manner in

[9] B. Janusz–Pohl, when referring his remarks to the notion of "model," points to two its basic variants, namely a "constructed, proposed model" and a "model representing a certain actual arrangement." According to the author, "in the first case, the model is created *ab ovo*, from the outset and in the abstract, while in the second case the answer to the question of what the model represents (e.g. the model of criminal trial) is determined by the shape of the legal framework; in this sense, the basis for its determination is specifically applicable law; in that sense, it is determined by the applicable law" [Janusz–Pohl 2013, 85–86].

which the institution of consent to voluntary submission to liability is normatively shaped may be regarded on the grounds of fiscal criminal law as a kind of model institution, characteristic of consensual proceedings.

The model of a procedural institution is a kind of benchmark, which distinguishes its construction, in whole or in part, from other legally determined institutions located in a closed legal system, while maintaining consistent elements subordinated to the main objectives of the procedure (trial).

In my opinion, the institution of consent to voluntary submission to liability is this kind of normative construct having specific features, and also serves to achieve the objective of the proceeding conducted in cases of fiscal crimes and infractions, and moreover is clearly distinguished in the model of fiscal criminal proceedings. This objective, as I have mentioned earlier, is largely linked to the implementation of fiscal policy aimed at reclaiming depleted public dues as soon as possible [Znamierowski 2018, 109]. This pragmatic aspect, intrinsically linked with the fiscal function of the fiscal criminal law [ibid.], seems to support the functioning of consensual institutions in the fiscal criminal law, including the institution of consent to voluntary submission to liability.

For the purpose of these considerations, it also seems reasonable to answer the question what the 'consensual' model refers to and why this institution is considered a model with already developed features, which are in line with the assumptions of consensualism. As indicated by P. Wiliński, consensualism in the criminal procedure is a trend towards solutions introducing an agreement between the participants of the proceedings as a basic factor for reaching and speeding up the final decision.[10]

In fiscal criminal proceedings, the normative structure of consensual institutions or instruments is based on the element of "agreement." S. Steinborn, citing the definitions of "agreement" formulated by S. Waltoś[11] and A.R. Światłowski,[12] rightly notices that "the element that seems to be insufficiently exposed in these definitions, and which perfectly highlights the linguistic meaning of the word «agreement», is the fact that the parties agree on the issue being negotiated." According to this author, firstly, in the definition of a penal-procedural agreement, emphasis should be placed on the consent of two opposing parties as to the resolution of a procedural issue or an issue

[10] See Wiliński 2014, 606 and the literature referred to therein.

[11] The definition proposed by S. Waltoś as cited in: Steinborn 2005, 49–50. An agreement is an accord concluded by the accused with the public prosecutor, the aggrieved party or even the procedural authority in which, in exchange for the conduct of the accused, a decision is made more favourable to him than he would have expected without such conduct [Waltoś 1992, 38].

[12] A.R. Światłowski's definition is as cited in: Steinborn 2005, 49–50. "Penal-procedural agreements are accords whereby two participants in the criminal proceedings, acting within the limits of their powers make reciprocal concessions as to the course of the proceedings or the decision on the merits" [Światłowski 1998, 53].

related to the content of a decision on the merits, and secondly, the result of the agreement must be included in the process [Steinborn 2005, 49–50].

The procedure for the consent to voluntary submission to liability is based on an "agreement," but it is distinguished from other procedural instruments included in the FCC by its quite peculiar normative structure. The measure of distinction is, among other things, the fact that the provisions governing these proceedings constitute a closed whole, placed directly before the regulations concerning the subsequent stages of fiscal criminal proceedings [Wilk and Zagrodnik 2018a, 636]. Thus, we have here a peculiar "proceeding" within the fiscal criminal procedure. It is normatively distinguished, but still maintains the consistency of goals with the entire fiscal criminal procedure, remaining only one of several consensual procedural institutions provided for in its structure. Thus, one can also speak of its normative model.

The peculiarity of the structure of this procedure also boils down to a penal-procedural "agreement," but worked out through negotiations. It should be pointed out that the negotiations do not occur in any of the consensual proceedings regulated both at the level of fiscal criminal procedure and common criminal procedure.

As I mentioned, a common element characterising consensual institutions in proceedings concerning fiscal crimes or infractions, including proceedings on granting a consent to voluntary submission to liability, is a penal-procedural "agreement" concluded between the procedural body and the perpetrator of a fiscal crime or infraction. This means that the decision in the matter of granting a consent to voluntary submission to liability takes place in cooperation with the perpetrator [Prusak 2002, 311], by way of a specific "agreement" concluded between the state authority and the perpetrator, or more precisely – the state administration and the perpetrator of a fiscal crime or infraction [Sawicki and Skowronek 2017, 345]. This does not mean, however, that the agreement will release the procedural authority (financial authority or court) from the obligation to establish the course of the offence committed, and the perpetrator – from the obligation to pay the due public levy.

A penal-procedural agreement is the agreeing of a position or decision by two or more participants in criminal proceedings [Światłowski 1997, 50]. Procedural bodies may participate in an agreement where the law expressly so permits (Articles 142–149 FCC) or where the agreement concerns an institution, such as conditional discontinuation of proceedings. An agreement is not an "contract," as contract is a concept derived from civil law which emphasises equality of the parties. It would be difficult to see the principle of equality between the financial authority and the perpetrator in proceedings concerning the consent to voluntary submission to liability, or equality between the parties (i.e. the public prosecutor and the accused) in judicial proceedings.

Despite the lack of equivalence between the parties, it can be considered that, in proceedings concerning the consent to voluntary submission to liability, there is a "resolution of the dispute" and, consequently, a "settlement of the dispute." A. Korybski understands dispute resolution as any conduct of the parties involved in the conflict, aimed at peaceful (with the exclusion of violence) and not sovereign (i.e. without the possibility of arbitrarily imposing on the parties the decision terminating the dispute) elimination of the dispute, either permanently or temporarily [Korybski 1993, 20]. On the other hand, "dispute resolution," according to that author, is an arbitrary process based on the obligation to impose a decision terminating the dispute against one or both parties [ibid.]. Since the financial authority authorised to apply that institution and the offender who paid the financial obligation due have reached a common position and concluded a formal penal-procedural agreement, the consent to such an agreement is a consensus. In this case, we are talking about the resolution of a dispute at the preparatory stage. As P. Hofmański points out, adjudication occurs when the quality of being bound by a decision of another authority concerns another stage of judicial application of the law, namely the one in which the court, having regard to the facts, carries out the subsumption on the basis of an interpreted rule of law and bindingly determines the legal consequences of the facts established [Hofmański 1988, 103]. On that basis, the application for voluntary submission to liability may be upheld by the court, which results in issuing the decision concluding the procedure.

The distinguishing feature of the penal-procedural "agreement" in relation to other "agreements" occurring among consensual regulations is that it contains a previously unregulated element of negotiations in the criminal procedure.[13] It may therefore be concluded that the legislature, by introducing a specific instrument in the form of negotiations, clearly implements the assumptions of consensualism regarding negotiations between the offender and the administrative authority (financial authority). It is the offender who applies to the financial authority for the preparatory proceedings for the consent to voluntarily submission to liability. However, for the application to be accepted and for the negotiations to be commenced, the offender is required to comply with the conditions set out in Article 142 FCC.

An additional argument in favour of considering this institution as corresponding to the model of consensual proceedings is also the fact that it is the archetype, and its normative roots, shaped on the basis of elements of an agreement, date back to the Fiscal Penal Law of 1926.[14] Under this Act, the decision of the fiscal authority to accept a request for voluntary submission to

[13] A.R. Światłowski notes that "the shape of this institution is similar to plea bargaining known in various form in criminal procedures of countries of the Anglosphere" [Światłowski 2008, 202].

[14] Journal of Laws of 1926, No. 105, item 609.

punishment could take place as a result of an agreement concluded with the accused on condition that he relinquished a formal criminal ruling [Tużnik 2013, 54].

Moreover, it should be noted that the granting of the consent to voluntary submission to liability is not provided for with regard to common crimes regulated by the Criminal Code and common infractions regulated by the Code of Infractions, and the proceedings on this subject have no institutional counterpart in the Code of Criminal Procedure.[15]

2. OBJECTIVE SCOPE OF NEGOTIATIONS BETWEEN THE OFFENDER AND THE FINANCIAL AUTHORITY

In the proceedings conducted by a pre-trial financial authority, before a bill of indictment has been filed, the perpetrator of a fiscal crime or infraction may submit a request for the consent to voluntarily submit to liability (Article 142(1) FCC). This means that "before the first questioning, the pre-trial financial authority is obliged to instruct the offender also about the right to submit such a request" (Article 142(2) FCC).

J. Zagrodnik is right in stating that "a fundamental manifestation of the consensual nature of the special procedure under analysis is the possibility for the pre-trial financial authority to make the submission of the request for the consent to voluntary submission to liability conditional on the offender's fulfilment of additional preconditions (negotiation conditions) outlined by this authority, going beyond the scope of duties, which constitute the preconditions on whose fulfilment the effectiveness of the offender's request depends" [Wilk and Zagrodnik 2018b, 284–85].

[15] J. Brylak points to a kind if "permeation of voluntary submission to punishment into related acts. First, it was provided for in Article 196 et seq. of the Fiscal Penal Act of 1971 and then it was included in Article 141 of the proposed Fiscal Penal Code. From there it was transposed into the Code of Criminal Procedure" [Brylak 2017, 77]. However, the position of A.R. Światłowski should be supported here and it should be assumed that voluntary submission to liability in the FCC should not, of course, be confused with two legal institutions, which after the introduction into the general criminal procedure began to be commonly referred to as voluntary submission to liability, i.e.: conviction without trial (Article 335 and Article 343 of the Criminal Code) and conviction without evidence-taking proceedings (Article 387 of the Criminal Code), especially since both of these institutions, respectively modified, have been applied since 1999 also in the fiscal criminal procedure (Articles 151 and 161) and in infractions proceedings (Articles 58 and 73of the Code of Infractions Procedure) [Światłowski 2008, 196 (note 116)]. Institutions under Article 335 CCP and Art. 387 CCP are characterized by a different normative structure. A common feature of the institutions governed by the Fiscal Criminal Code and the Code of Criminal Procedure is their structural component in the form of a penal-procedural agreement.

2.1. "Payment of a public-law receivable" as a mandatory condition for the negotiating phase to be commenced

Article 146(1) FCC[16] makes the commencement of the negotiating phase conditional on the offender's payment of the public-law receivable if the fiscal crime or infraction has depleted that receivable.

It should be noted that Article142(4) FCC *in fine* also formulates in this regard an order to attach to the request the evidence of performance of the activities listed in Article 143(1–3),[17] i.e.: 1) the proof of payment of the public-law receivable if, as a result of the fiscal crime or infraction, the amount of the levy has been depleted, unless, until the request is submitted, that amount has been paid in full – Article 143(1)(1); 2) as a fine, an amount corresponding to at least one-third of the minimum wage and an amount corresponding to at least one-tenth of the minimum wage for a fiscal infraction – Article 143(1)(2); 3) at the least a flat-rate equivalent of the costs of the proceedings – Article 143(1)(3).

Of the above-mentioned conditions, evidence in the form of "payment of the public-law receivable" is of fundamental importance in the face of the requirement of a prior payment [Zgoliński 2011, 91], and on the part of the authority it makes the obligation to make the "request" conditional on the payment of the public-law receivable.

The analysis of the requirements set out in Article 143 FCC indicates that the obligation to pay a public-law receivable is not subject to negotiation: if it has not been paid in advance, the offender must pay it when submitting the request [Światłowski 2008, 203]. It is rightly assumed in the literature that this obligation is a manifestation of the legislature's taking into account of different axiological assumptions of the Fiscal Criminal Code and of the strive towards compensation for the financial damage caused by a fiscal crime or infraction [Zagrodnik 2019b, 922].

The requirement to pay a public-law receivable will be met both when the payment is made by the offender and when it was made by a third party "on behalf" of the offender [Skwarczyński 2006].[18]

As regards the condition in question, however, the question of the determination of the amount of the public-law receivable, i.e. the question of the obligation of the taxable person to pay the amount of the arrears itself or the arrears plus interest, has been raised. The position of the scholars in the field

[16] Article 146(1) reads as follows: "The pre-trial financial authority makes the filing of a request for the consent to voluntarily submission to liability conditional on the fulfilment of the obligation to pay the public-law receivable in full, if that receivable has been depleted as a result of a fiscal crime or infraction, and it has not yet been paid."

[17] Act of 16 November 2016 on the National Fiscal Administration, Journal of Laws item 1947.

[18] The same view proposed Razowski 2017a, 329.

on this point is not clear[19] and the context of the views expressed in this regard is based, *inter alia*, on a different interpretations of the phrase "due payment."

The provision of Article 143(1)(1) provides for that the offender, when submitting the request for the consent to voluntarily submit to liability, is obliged to pay a due public-law receivable if, as a result of a fiscal crime or infraction, this receivable has been depleted.

The Polish Fiscal Penal Code defines a "public-law receivable depleted by an offence" in Article 53(27). According to this provision, a "public-law receivable which has been depleted by an offence is a numerically expressed monetary amount the obliged person has evaded paying or declaring to pay in full or in part and this depletion actually occurred."

The scope of the notion of public-law receivable covers situations where the offender, by committing an offence, causes tax arrears by failing to pay, or declaring the payment of, a public-law levy [Łabuda 2017, 584]. On the other hand, according to commentators, "the notion of «due» receivable means a state of objective character, in which the entitled entity has a legal possibility to effectively demand from the offender the public-law claim to be paid (according to the Supreme Court, a state in which 'a tax authority may effectively claim through any legal means available."[20] This leads to the conclusion that it is necessary to identify a "due" public-law receivable additionally with its final determination in the course of appropriate administrative proceedings (tax, customs proceedings, etc.). Thus, the notion of "due" public-law receivable cannot extend to the meaning of a receivable distributed in instalments or for which deferred payment has been decided. What is more, this interpretation of the term makes it quite clear that in order to use the penal measure under analysis, it is not necessary to pay interest for delayed payment of public-law receivables.[21] This position should be supported in full.

According to the definition of tax arrears as set out in Article 51(1) of the Tax Ordinance,[22] a tax arrears is a tax not paid on time (the definitions of tax and tax liability, in turn, are contained in Articles 6 and 5 of this Act). At the same time, as follows from Article 53(30) FCC, the terms used in Chapter 6 of the Code, in particular: "checking activities," "declaration," "tax information," "collector," "tax inspection," "tax obligation," "tax," "taxpayer," "tax remitter," "tax refund," "tax scheme," "standardized tax scheme," "NSP [tax scheme number]," have the meaning given to them in the Act of 29 August 1997 the Tax Ordinance, except that the terms: 1) "tax" shall also mean an advance tax payment, a tax instalment, as well as fees, other non-tax claims

[19] P. Lewczuk pursues the view that there are no groundsfor the offenderto paythe dues together with interest [Lewczuk 2014, 122]. A different position see Kaczorkiewicz 2017, 135–38.

[20] Judgment of 9 January 2012, ref. no. V KK 327/11, BPK 2012, no. 1 item 1.2.17.

[21] See Razowski 2017a, 322 and the literature referred to therein.

[22] Journal of Laws of 2019, item 900 as amended.

of the State budget of a similar public levy nature and solidarity contribution referred to in Article 30h of the Personal Income Tax Act of 26 July 1991;[23] 2) "taxpayer" shall also mean a person obliged to pay fees, non-tax claims of the State budget of a similar public levy nature and solidarity contribution referred to in Article 30h of the Personal Income Tax Act of 26 July 1991.

Article 53(30a) FCC states that the term "taxpayer" used in Chapter 6 of the Fiscal Penal Code also means an entity obliged to pay the receivables referred to in para. 26a (i.e. receivables constituting the revenue of the general budget of the European Communities or the budget managed by the European Communities or on their behalf, within the meaning of the provisions of European Union law binding the Republic of Poland, which are the subject of a fiscal crime or infraction).

The Specific Part of the Fiscal Criminal Code covers not only fiscal crimes and infractions against tax obligations (Chapter 6), but also includes fiscal crimes and infractions against customs obligations and the rules of foreign trade in goods and services (Chapter 7).

Thus, in view of the above-mentioned statutory definitions and the regulations of the Specific Part of the Code, in my opinion, the public law receivable referred to in Article 53(27) of the Fiscal and Penal Code, and consequently also in Article 143(1)(1) of the Polish Fiscal Criminal Code should not be limited only to overdue tax receivables.

Interest is charged on the tax arrears, but the rule is that the interest is calculated by the taxpayer himself (Article 53(1) and (3) of the Tax Ordinance). The question of calculating and paying the correct amount is therefore a separate issue. Also, for example, the issue of interest on customs duties is regulated separately. in the provisions of customs law (the Polish Customs Law[24] and the Union Customs Code[25]). Obviously, customs duties are not an independent levy. They are ancillary to the principal amount due and may arise only when the arrears has arisen.

Nevertheless, taking into account the definition of a public-law receivable depleted by the offence specified in Article 53(27) FCC, it should be assumed, in my opinion, that the payment of this receivable, entailing the *sine qua non* condition of submitting a request for a consent to voluntary submission to liability, should be made up to the principal amount depleted as a result of a fiscal crime or infraction. As of today, there are no normative grounds for this public-law claim depleted as a result of an offence to cover also interest. As it follows directly from the legal definition of this term, it is "a numerically

[23] Journal of Laws of 2020, item 1426.
[24] Journal of Laws of 2020, item 1384.
[25] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L No. 269, p. 139.

expressed monetary amount the obliged person has evaded paying or declaring to pay in full or in part and this depletion actually occurred."

However, bearing in mind the purpose of the fiscal criminal procedure itself, which is to compensate for the financial loss of the State Treasury, a local government unit or other authorised entity, caused by an offence, it appears reasonable to put forward a proposal for the law as it should stand about the need to clarify this regulation and cover the principal amount of the claim together with interest. Only in this case will we deal with the compensation of the actual loss (financial detriment) suffered by the State Treasury, a local government unit or other authorised entity as a result of a committed fiscal crime or infraction, and thus with full implementation of the objective of the fiscal criminal procedure.

In view of the foregoing, it must be assumed that the "payment of the public-law receivable if, as a result of the fiscal crime or infraction, the amount of the levy has been depleted" must be made up to the amount outstanding on the part of the taxable person.

Finally, it should be noted that if having submitted the requests, it appears that the depleted public-law receivable has not been paid, the financial authority, as is apparent from Article 146(1) FCC, must make the request for the consent conditional on the full payment of that receivable [Świecki 2001, 97]. In such a situation, there is no room for negotiation, since the condition for payment of the public-law receivable in its entirety is mandatory [ibid.]. Therefore, it was only in Article 146(2) FCC that the legislature left the fulfilment of the additional conditions by the offender to be recognised by the financial authority in charge of the investigation [ibid.].

2.2. Optional conditions subject to negotiation under Article 146(2) FCC

To open the negotiations, the financial authority running the pre-trial procedure may make the acceptance of the request for a consent to the voluntary submission to liability conditional on the fulfilment by the offender of the additional conditions set out in Article 146(2) CCP.[26]

[26] Article 146 reads as follows: § 1. The pre-trial financial authority shall make the filing of a request for the consent to voluntarily submission to liability conditional on the fulfilment of the obligation to pay the public-law receivable in full, if that receivable has been depleted as a result of a fiscal crime or infraction, and it has not yet been paid. § 2. The financial authority in charge of the proceeding may make the submission of the request referred to in § 1 conditional on: 1. the payment of an additional fine, not exceeding, together with the amount already paid, half of the sum corresponding to the upper limit of the statutory range of penalty for the offence in question; 2. consenting to the forfeiture of items not covered by the offender's request, referred to in Article 142 § 1 and, if they cannot be lodged, from the payment of the monetary equivalent of those items, unless the forfeiture relates to the items referred to in Article 29 item

The notion of the negotiation conditions should be understood as the boundary conditions for the voluntary submission to liability by the offender [Razowski 2017b, 1273].

Negotiations between the offender and the financial authority should be carried out within the framework delineated, on the one hand, by the boundary conditions which must be met when the offender requests a consent for the voluntary submission to liability, and, on the other hand, by the further specified maximum requirements which may be imposed on the offender [Zagrodnik 2019a, 285].

The negotiations between the offender and the financial authority may concern the determination of the conditions which are limited by the provisions of the Fiscal Criminal Code, and once they are met, the authority applies to the court for the consent to the voluntary submission to liability [Tatarczak 2001, 44].

Accordingly, in order to open negotiations, the financial authority in charge of the proceedings has the right to make the request dependent on:

1) The payment of an additional fine, but not exceeding, together with the amount already paid, half of the sum corresponding to the upper limit of the statutory range of penalty for the offence in question (Article 146(2) CCP). This means that the amount of the fine can be negotiated both in terms of the number and level of day-fine units. The negotiation covers also conditions relating to the method of payment of the surcharge and the duration of performance and they shall be determined after hearing the offender or his legal representative. It must be stressed that the method of determining the amount of the fine is not defined differently for fiscal crimes and fiscal infractions. According to the provision of Article 143(1)(1) FCC, the amount paid as a fine should correspond to at least one-third of the minimum wage and for a fiscal infraction at least one-tenth of the minimum wage. The date of request submission and the minimum wage applicable at this point should be decisive here [Marciniak 2006, 104]. It should be noted that in practice the mere amount of the fine set by the minimum wage ceiling can be relatively problematic to pay by a potential offender. Accordingly, the negotiation conditions imposed by the authority as to the amount of the fine may be rejected, which in consequence will mean a refusal to accept the request. Instead of the request, an indictment will be brought before the court. The judicial proceedings will continue with the effect of the suspension of the limitation period for the tax liability.

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4. 3) payment of other costs of the proceedings. § 3. The financial authority in charge of the proceedings determines the time, type and manner of performance of the obligations referred to in § 1 or § 2 after hearing the offender and the statutory representative referred to in Article 142 § 3 of the National tax Administration Act of 16 November 2016, Journal of Laws of 2016, item 1947.

2) The consent to the forfeiture of items not covered by the offender's request, referred to in Article 142(1) and, if they cannot be lodged, from the payment of the monetary equivalent of those items, unless the forfeiture relates to the items referred to in Article 29(4) (Article 146(3) CCP). Where forfeiture of items is mandatory, the offender must consent to the forfeiture of the items and, where forfeiture cannot be made, he must pay the monetary equivalent of the items to be forfeited. Failure to comply with this condition makes it impossible to apply for voluntary submission to liability. Where the forfeiture of items is optional, the authority may make the acceptance of the request conditional on the offender's consent to the forfeiture of items not covered by the request and, if these cannot be lodged, on the payment of the monetary equivalent of those items.

3) Payment of other costs of the proceedings (Article 146(4) CCP). According to the Regulation of the Minister of Justice of 8 December 2005 on the amount of the flat-rate costs of proceedings on the request for the consent to voluntary submission to liability in cases of fiscal crimes and fiscal infractions, it amounts to 1/12th of the minimum monthly remuneration for fiscal crimes and 1/10th of that remuneration for fiscal infractions.

The objective of the pre-trial (negotiation) proceeding is, where evidence so allows, to prepare the judicial proceedings [Skowronek 2005, 157].

The phase of negotiation between the offender and the financial authority, concluded with a positive result, is culminated by the authority's request for a consent to the voluntary submission to liability.[27] On the other hand, where the negotiation conditions are not accepted or not met by the offender, or where the exceptions to voluntary submission to penalty provided for in Article 17 FCC are disclosed, the authority shall refuse by a decision to make such a request.

3. JUDICIAL PROCEEDING – ISSUANCE OF THE JUDGMENT

In the literature, the proceedings concerning the examination by the court of the request for the consent to the voluntary submission to liability are referred to as the decision-making phase [Tużnik 2012, 95]. The issue of granting the consent to the voluntary submission to liability is decided by the court in a ruling issued at a hearing on the basis of the principles indicated in Article 17 FCC, i.e. if the guilt and circumstances of the commission of a fiscal crime or fiscal infraction raise no doubts, and those indicated in Article 143(1) FCC.

In the scope of conditions negotiated by the financial authority with the offender, the request is binding for the court. Pursuant to Article 18(1) FCC,

[27] It is assumed that the request for the consent to the voluntary submission to liability is a principal action other than an indictment or a substitute for an indictment [Owsicka 2017, 99].

the court, when allowing the offender to voluntarily submit to liability, shall pronounce, as a fine, the amount paid by the offender, as well as the forfeiture of items only to the extent to which the court has consented to it, and if it is not possible to lodge them, the payment of the monetary equivalent [Gajewska–Kraczkowska and Suchocki 2012, 37]. A judgment by which the court allows the offender to voluntarily submit to liability under Article 18(2) FCC is not entered in the National Criminal Register and at the same time, pursuant to Article 18(3) FCC, it does not constitute a condition for fiscal recidivism [ibid.]. It seems that this type of solution is part of the consensual trend and helps to achieve the objectives arising from the Fiscal Criminal Code.

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PROTECTION OF NATURE IN HISTORIC GARDEN COMPLEXES AS DEFINED BY POLISH LAW

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Abstract. An important element of the cultural heritage of Poland are the monuments of garden art which should be protected due to their cultural, historic, artistic, natural and scientific values. Their uniqueness is a result not only of architectural and spatial structure but also the natural one in the form of vegetation arrangements. It is thus worth it to analyse binding acts of law and see to what extent they undertake the issue of nature preservation in historic garden sites. The analysis of past and current legal regulations as well as the survey of literature showed a lot of vagueness and ambiguity. First of all, it revealed the lack of precision present in legal documentation and shortages in the preservation of historic parks and gardens, especially of their surroundings and vegetative structure.

Keywords: historic parks and gardens, legal acts, vegetation structure, preservation

INTRODUCTION

Historic parks and gardens are a manifestation of centuries-old achievements as regards garden art and the tradition of land development. As it is noted by A. Zachariasz, they represent "the uniqueness of culture recorded in time and place." They have the exceptional historic, cultural, artistic, natural and scientific value which often is unique on a global scale [Zachariasz 2008,

150–61; Idem 2011, 4]. It is this extraordinary potential of historic garden sites that led to recognising them as monuments of cultural heritage which require particular protection [Furmanik 2016, 259–60]. It needs to be explained, however, that the notions of cultural heritage and monument may not be treated interchangeably as they are defined with different criteria. Including a building in the cultural heritage is decided about by a subjective opinion of a social group rather than its objective value. Another terminological difficulty with regard to the protection of monuments, historic gardens including, is caused by the fact that in the act of 15 February 1962 on the protection of cultural heritage and museums[1] the notion of monument was replaced with the term cultural heritage of much a wider conceptual range [Mącik 2017, 329–30]. In the currently binding act on the protection and preservation of monuments dated 23 July 2003 the term monument was reintroduced again. Whereas the very notion of cultural heritage was clarified in the act on the restitution of cultural heritage dated 25 May 2017.[2] It is also included in the Article 6 and 73 of the Constitution of the Republic of Poland dated 2 April 1997.[3]

Undoubtedly, the preserved historic gardens are covered by all the conceptual ranges mentioned above. Their exceptional value as monuments important for the development of cultural heritage is proved first of all by unique composition and planned spatial structure [Chrabelski and Ciołek 1949, 18]. As underlined by A. Mitkowska, the present situation of preservation of such monuments in Poland is mainly influenced by binding legal regulations as well as protective activities of conservation services. The problem however is the appropriate evaluation of historic values of garden art resources, which influences conservation activities both in the past and today. Moreover, the preservation of historic gardens depends on observing fundamental conservation assumptions recorded in guideline documents [Mitkowska 2015, 5–8]. This fundamental document which manifests the concern for preserving historic garden structures in their best condition is the Charter on the Preservation of

[1] Journal of Laws No.10, item 48. National Heritage and Culture Protection Act, Chapter 1, Article 2: Cultural heritage, in the understanding of this act, is any item movable or immovable, historic or modern, that has a meaning to heritage and cultural development due to its historic, scientific or artistic value.

[2] Journal of Laws item 1086. Chapter 1, Article 2: cultural heritage – a monument in the understanding of Article 3(1) of 23 July 2003, the Old Monuments Law, a movable item not being a part of a monument, and their components and parts the preservation of which lies in public interest due to their artistic, historic or scientific value, or due to their maining to cultural heritage and development.

[3] Journal of Laws No. 48, item 483 as amended. Chapter 1, Article 6: The Republic of Poland shall provide conditions for the people's equal access to the products of culture which are the source of the Nation's identity, continuity and development. Chapter 2, Article 73: The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone.

Historic Gardens commonly referred to as the Florence Charter. This document, which was passed on 21 May 1981 by the International board ICOMOS-IFLA and the International Board for Historic Gardens is a supplement of the Venice Charter, i.e. International Charter for the Conservation and Restoration of Monuments and Sites. The Florence Charter covers comprehensively the problems of the preservation of historic gardens defining precisely what a historic garden is, what elements it comprises and provides for four activities aimed at its preservation: maintenance, restoration and reconstruction [Zachariasz 2008, 150–61].

The reputation of historic gardens as a manifestation of cultural heritage is confirmed by the very fact that the UNESCO List of World Heritage includes 77 independent garden complexes designated as outstanding works of garden art [Furmanik 2016, 260].

Poland joined UNESCO just one year after this organisation was created in 1945 but our country had earlier started activities aimed at the preservation of cultural heritage. The authorities of a young state that was coming back to life recognised the necessity of taking care of its heritage, especially after the devastation caused by World War II. Thus, the preservation of the substance of national heritage became an indispensable step in order to retain national identity and its cultural achievements [Mącik 2017, 327–28]. In relation to this, as early as on 31 October 1918 the Decree of the Regency Council was signed, the first legal act which defined the scope of "protection to be undertaken with regard to the monuments of art and culture." The document points out that "All and any monuments of art and culture which stay within the borders of the Polish State, recorded in the register of national heritage are subject to protection by law. [...] they can be subject to particular means of protection of Polish state authorities as well as international treaties [...]."[4] The act also delegated the protection of monuments to conservators of historic objects. What is significant, that act at the same time specified that to the group of immovable monuments also belong "[...] decorative gardens, old cemetery and roadside alleys; aged and impressive trees that surround castles, churches, shrines, figures, cemeteries, etc."[5] In addition to this, the later Directive of the President of the Republic of Poland dated 6 March 1928 concerning the preservation of monuments pointed to the necessity of the preservation of decorative gardens, cemetery and roadside alleys, aged and impressive trees.[6] As stressed by J. Sługocki a special novelty in the directive was the change of authority responsible for the preservation of monuments. It was no longer

[4] Decree of the Regency Council of 31 October 1918 on the protection of monuments of culture and art, Journal of Laws No. 16, item 36.
[5] Ibid.
[6] Ordinance of the President of the Republic of Poland of 6 March 1928 on the protection of monuments, Journal of Laws No. 29, item 265.

a conservator's duty but "conservation authorities" that were supposed to declare the historic value of a building on the basis of a ruling. What is important in the matter of gardens, the ruling regarding immovable monuments was also supposed to define the boundaries of a building as well as the range of its surroundings which in the definition of the directive was also subject to protection [Sługocki 2020b, 253].

In the post-war period in Poland historic sites, including garden complexes were subject to legal protection under the act of law dated 15 February 1962 about the protection of cultural heritage and museums. D. Sikora notes that although that document mentioned "parks and decorative gardens, cemeteries" as well as "rare specimens of live or dead natural formation, if they are not included in the regulations about nature preservation" they are basically not protected in any way [Sikora 2016, 115]. I. Wildner–Nurek explains that it was the result of social unawareness and class prejudice. Parks and gardens, and especially the residential ones were perceived in a negative way as the remnants of pre-war social structure and were associated with the gentry seats. The monuments of Polish garden art as undervalued elements of national heritage were being devastated similarly to palaces and manor houses [Wildner–Nurek 2007, 95]. As late as in 1974, general conservator of the time Prof. A. Majewski appealed to province conservators in a circular letter to include in their protection garden sites and cemeteries. Whereas in 1975 Polish Ministry of Culture and Art commenced activities aimed at creating a national register of such monuments [Sikora 2016, 115]. What is important, the inventory method that was worked out then for historic garden sites took into consideration not only their historic, composition or spatial values but also the natural ones. A component of the description of an existing park, garden or orchard was a general inventory of vegetation together with information about natural features of historic value. It is also worth mentioning that the responsibility for historic substance of such sites was borne by both province conservators of monuments and province conservators of nature, although they were driven by different criteria of preservation. Naturalists valued park tree stand as an important element of the natural environment, whereas monument conservators as a proof of preserved spatial structure composition [Wildner–Nurek 2007, 97–98].

The aim of the present dissertation is presenting issues related to the preservation of historic parks and gardens, particularly to protecting their historic natural substance, carrying out an analysis of currently binding legal regulations that pertain to the preservation of historic parks and gardens as well as a survey of literature on the subject. It has allowed to point to the most significant problems associated with the protection and preservation of natural and landscape elements present in the historic resources of garden art in Poland.

1. CURRENT LEGAL STANDING

Currently garden art complexes of historic value are subject to legal protection as provided for in the act on monument protection and preservation dated 23 July 2003. Besides this, their protection is also provided for in the act on spatial planning land development of 27 March 2003 as well as in the act on conservation of nature dated 16 April 2004.

Following Article 3(1) of act on monument protection and preservation dated 23 July 2003[7] a monument is an immovable or movable object, their part or unit(s) that are a product of human activity or are related to human activity and which are the proof of a bygone era or event whose preservation lies in the interest of national welfare due to its historic, artistic or scientific value. The content of Article 3(15) MPP defines the surroundings as the area around or next to a monument which is described and included in the decision about entering the monument in a register of monuments in order to protect the scenic values of the monument as well as to protect it against the influence of any external factors. The act expressly includes in the group of immovable monuments parks, gardens and other forms of designed green areas (Article 6(1)(1)(g)), and declares that they are subject to protection regardless of their current condition (Article 6(1)(1) MPP).

Monuments become subject to protection as a result of being recorded in the register of monuments, the List of National Heritage Treasures, declared as a historic site, park of culture, as a result of declaring protection in a local land development plan or in a decision about a location of an investment of public use, decision on spatial development conditions, decision about building a road, railway or public airport (Article 7 MPP).

The issues of monument protection as interpreted by current home and international law have been the subject of researchers' interest that represent various scientific disciplines. An analysis of legal acts pertaining to historic sites preservation and the evaluation of these documents from the point of view of a lawyer has been presented, *inter alia*, by J. Brudnicki. He has been critical about the differentiation present in the act of law between the protection of monuments and preservation of them. He noticed that the concept of preservation of monuments is differently understood by public authorities and differently by the site's holder. Besides, these notions are broad and ambiguous, hence difficult in interpretation. The author has also pointed to the problem of uneven involvement of the state in the process of preservation of national heritage which results in relocating the responsibility to the sites' owners and limiting the state's role to supervisory activities only. In his deliberation the author does not refer to any specific examples or garden art

[7] Journal of Laws of 2021, item 710 as amended [hereinafter: MPP].

monuments [Brudnicki 2014, 49–53]. Other doubts as to the interpretation of the act of law about the protection of monuments and preservation of them are mentioned by S. Kowalska. The author draws our attention, inter alia, to the ambiguities, within the binding act of law, in requirements which have to be met by a building or site to be qualified as a monument. Although it is true that in Article 3(1) MPP the legislator clearly specifies that a monument is an immovable or movable object which is characterised by historic, artistic or scientific value but does not provide precise criteria for such evaluation or does not attribute a decisive feature to any of these values. Besides this, the legislator introduces the possibility of using other, not mentioned values as a basis to recognise an object as a monument, which makes this regulation even more ambiguous. Unclear is also the section in which it is declared that qualifying an object as a monument is carried out on the basis of "national welfare" as the legislator does not specify the criteria or principles to be applied in order to recognise the interest of national welfare [Kowalska 2007, 100]. The evaluation of binding legal regulations with regard to preservation of monuments as referred to previous acts of law has also been carried out by J. Sługocki. He also notices the problem of terminology as regards the notions "protection" and "preservation" which are present in the binding act of law. What is important from the perspective of preservation of historic garden compositions, the author points to the flawed method of legal protection of the surroundings of an immovable object that has been written in the act of law. The author stresses that although the act of law about monument protection and preservation introduces the concept of a monument's surroundings and orders to take it into consideration when entering a monument in a register, in practice the requirement is rarely enforced which leads to marginalising the surroundings of a monument [Sługocki 2020b, 254]. It is also confirmed by D. Sikora who proves that not considering the surroundings of historic garden and park complexes in registers is one of the causes of their degradation in Poland [Sikora 2014, 268–69].

Spatial protection of historic garden complexes was taken into account in the binding act of law about the protection and preservation of monuments. In accordance with Article 20 MPP plans and changes to the spatial development plan of a province as well as to a local spatial development plan are subject to approval of the province conservator of monuments as regards land development and land use. It is a significant regulation as it allows to preserve the values of historic green areas. In the study of determinants and tendencies in spatial development as well as in local spatial development plans the protection covers both the immovable historic objects together with their surroundings that have been recorded in the register and the immovable historic objects that are recorded in the parish register of monuments (Article 19(1)(1–2) MPP). Until parish registers were created, in the study of determinants and tendencies

in spatial development of a parish council and in its spatial development plan the elements that are taken into consideration are immovable objects that have been recorded the register, plans of preservation of cultural parks as well as other immovable monuments pointed at by province conservator of monuments (Article 145 MPP). Also, in documents related to investors' activities (such as a decision about a location of an investment of public use, decision about spatial development conditions, decision about building a road, railway or a public airport) the protection of immovable monuments and their surroundings is taken into account (Article 19(1a) MPP). Yet, one should notice that if a monument gets damaged, it may be crossed off the register (Article 13(1) MPP). J. Sługocki points out that crossing a monument off the register takes place when, as a result of damage, the object lost its historic, artistic or scientific value or when it is dictated by new scientific research which challenges previous decision about the entry [Sługocki 2020b, 252–53]. However, a question arises what can be treated as damage of a historic garden or park? On the other hand, can the presence of a tree stand be the only proof of park origin of an object without preserved spatial or road structure?

Another legal aspect, which considers the preservation of cultural heritage and monuments in the context of spatial development plans, is the act on spatial development dated 27 March 2003[8] (Article 1(2)(4) SD). As it has been written above, the condition of cultural heritage and monuments is one of the elements that the study of determinants and tendencies in spatial development of a parish should take into account (Article 10(1)(4) SD). This document defines, *inter alia*, areas and principles of cultural heritage and monuments preservation as well as of achievements of contemporary culture (Article 10(2)(4) SD), and all decisions that regard these issues require an opinion of a competent province conservator (Article 11(5c) SD). Regulations contained in the study, although they are not any local law (Article 9(5) SD), have to be consistent with the decisions of a local spatial development plan which defines the principles of protection of cultural heritage and monuments including cultural landscapes and achievements of contemporary culture (Article 15(1)(4) SD). What is interesting, the above-cited act of law does not mention the obligation of establishing conservator's protection zones for immovable monuments in the study of determinants and tendencies in spatial development of a parish or the local spatial development plan although the act of law about monument protection and preservation provides for such possibility in Article 19(3) SD. In none of the above-mentioned acts of law, nor in the currently binding regulations there is no definition as to the types of conservator's protection zones or details about how they should be stablished.[9] Despite the lack

[8] Journal of Laws of 2021, item 741 as amended [hereinafter: SD].

[9] Decree of the Minister of Infrastructure of 28 April 2004 on the study of land use conditions and directions, Journal of Laws No. 118, item 1233; decree of the Minister of Infrastructure of

of precise legal regulations with this respect, the National Heritage Board of Poland postulates the justifiability or even necessity of establishing conservator's protection zones as a suitable form of immovable monuments protection, historic park complexes included. Establishing the conservator's protection zones should take place in the study of determinants and tendencies in spatial development of parishes as based on the study of cultural landscape of a parish. In conservator's motions to local development plans the zones should be provided with details, i.e. should include principles of protection such as orders and prohibitions obligatory in a particular zone [Welc–Jędrzejewska, Kulesza–Szerniewicz, Makowska, et al. 2009, 16–17]. K. Ogrodnik adds that it is thanks to the possibility of establishing conservator's protection zones the local spatial development plans become independent legal forms of monument protection, especially for objects that have not been recorded in the register of monuments and are not a part of a cultural park [Ogrodnik 2013, 20].

Cited above J. Sługocki points to yet another legal problem regarding the protection and preservation of monuments, that is the imprecise legal situation of local programmes of monument preservation. In accordance with the binding act of law about the protection and preservation of monuments as well as the decision of the Province Administrative Court in Gdańsk dated 17 July 2019 the authorities of provinces, counties and parishes are supposed to prepare programmes of monument preservation. In accordance with the Supreme Chamber of Audit report of 2014 although it was made an obligatory requirement only half of the parishes launched them. Besides this, although this document is mentioned in the act of law as a legal obligation of local self-government institutions by administrative courts' verdicts it is not an act of local law because "it may not constitute an independent basis for court adjudication with reference to bodies from outside the public administration of monuments." It is a strategic document which helps to define the scope of activities in the sphere of monument protection. It also has influence on the spatial development of parishes and counties as the regulations included in the programme should be taken into consideration in the study of determinants and tendencies in spatial development as well as in local spatial development plans. The author also notices problems of local programmes of monument preservation with regard to the term preservation and legislator's imprecision about it. Following the act of law the preservation is provided by an owner of a historic object, not by local self-government bodies which are supposed to provide preservation, i.e. intervention that has source in their authority. Another problem of local programmes of monument preservation is exceeding their entitlements beyond the statutory term historic site often using the concept of "protection of cultural heritage." This way the programmes include

26 August 2003 on the required scope of the project of local project of the study of land use conditions and directions, Journal of Laws No. 164, item 1587.

in their scope not only immovable, movable and archaeological objects but also not mentioned in the act of law elements of non-material heritage, and as a result exceed the statutory aims of the programmes [Sługocki 2020a, 49–51].

2. PROTECTION OF HISTORIC GARDEN COMPLEXES IN PRACTICE

Following Article 25(1) MPP allocating a historic object recorded in the register to functional purposes requires the conservator's documentation, plan of preservation works and a programme of allocation of an immovable object together with its surroundings. What is more important, under Article 36(1)(1) MPP running preservation or restoration works at an object recorded in the register, including removing a tree or bush from the site or its part that is a park, garden or other form of designed greenery, requires the permission of a province conservator of monuments. However, under Article 36(1)(11) MPP such permission is also required when undertaking other activities which might lead to a substantial injury or changing the looks of a historic object recorded in the register, with the exclusion of activities consisting in removing trees or bushes from the site or its part that is a park, garden or other form of designed greenery not recorded in the register. Does it mean that trees that appeared during spatial transformations of a historic garden or park but are not included in the map extract of an area protected as a monument may be removed? Should shaping historic garden complexes be carried out through restoring the original form of a garden or should we face the challenges contained in art. 16 of the Florence Charter which suggests that preservation activities one ought to take into consideration the evolution of a garden.[10]

Readers' attention should also be drawn to the fact that following the regulations of the act of law dated 23 July 2003 about the protection and preservation of monuments works related to greenery in sites of historic character may be carried out by persons with suitable qualifications. As we read in Article 37b(1) MPP the preservation and restoration works that are run at monuments which are parks recorded in the register are to be supervised by a person who completed university studies of second cycle or uniform master's degree university studies whose curriculum includes appropriate classes providing necessary knowledge and who, after commencing the second cycle or after crediting sixth term of uniform studies took part in preservation works for a period of at least 9 months or was employed at such works in a museum. Whereas, technical jobs related to managing green areas may be carried out independently by a person with technical high school education and professional

[10] Historic Gardens IFLA-ICOMOS. The Florence Charter. The website of the National Institute of Cultural Heritage, https://www.nid.pl/upload/iblock/9b1/9b13bc019894c7975620590ae56f9641.pdf [accessed: 05.11.2021].

qualifications title or high school vocational education and professional title in professions related to caring for greenery or for a period of at least 9 months or was employed at such works in a museum (Article 37b(3) MPP). It seems that describing the necessary education so broadly does not guarantee providing conscientious preservation of historic vegetation.

3. PRESERVATION OF HISTORIC PARKS AND GARDENS – SPATIAL CONTEXT

Following para. 3(1) of Minister of Culture and National Heritage Directive dated 26 May 2011 about running the register of monuments, national, provincial and parish registers of monuments as well as the register of objects of historic value that have been stolen or illegally carried away abroad the register of monuments is run in the form of registers that include:[11] 1) register No.; 2) register entry; 3) object of protection; 4) scope of protection; 5) location of object of protection; 6) No. of land register – for immovable and archaeological objects; 7) No. of cadastre – for immovable and archaeological objects; 8) monument's owner; 9) monument's holder; 10) crossing of a register; 11) comments.

Every monument that has been recorded in the register should also have a detailed information card that in accordance with para 9(1) of the directive should include the following: 1) name; 2) time of creation; 3) place-name; 4) address; 5) administrative allocation; 6) geographic coordinates; 7) former place-names; 8) owner and their address; 9) user and their address; 10) forms of protection; 11) graphic material; 12) its history; 13) description; 14) cubic capacity; 15) usable area; 16) original purpose; 17) current use; 18) physical condition; 19) existing hazards and conservator's demands; 20) archival documentation; 21) comments; 22) information about inspections and changes; 23) bibliography; 24) information card details; 25) iconographic sources and where they are kept; 26) annexes.

Similarly, a monument that has not been recorded in the register has a detailed information card that in accordance with para. 10(1) includes the following: 1) name; 2) time of creation; 3) place-name; 4) address; 5) administrative allocation; 6) geographic coordinates; 7) current use; 8) physical condition; 9) graphic material; 10) existing hazards and conservator's demands; 11) information about inspections and changes; 12) information card details.

[11] Full and uniform text in accordance with Journal of Laws of 2021, item 56 Minister of Culture, National Heritage and Sport announcement dated 20 November 2020 about announcing uniform text of Minister of Culture and National Heritage Directive about running the register of monuments, national, provincial and parish registers of monuments as well as the register of objects of historic value that have been stolen or illegally carried away abroad.

The directive in detail defines the obligatory pieces of information that are required as documentation of an immovable monument. However, in both cases there is no straightforward indication that a description of vegetation that makes up the park, historic garden or other form of designed green area should be included. J. Sługocki also points to the excessive size of the register of monuments which is regulated by Minister of Culture and National Heritage Directive dated 26 May 2011 about running the register of monuments, national, provincial and parish registers of monuments as well as the register of objects of historic value that have been stolen or illegally carried away abroad. In his opinion the register that is currently in use is massive in character because it includes objects of regional importance, which leads to even greater centralisation of the protection of monuments in Poland [Sługocki 2020b, 253]. Also, architect and conservator M. Gawlicki as well as the cited already J. Brudnicki point to numerous imperfections of the register of monuments as the basic form of the protection of historic objects. In their opinion the appropriate protection of a historic object depends not so much on the very entry in the register but on its factual content. The mistakes most often found in the register include: wrongly defined scope of protection and imprecisely indicated object. Apart from this, a significant oversight is the absence of justification for a decision as well as too vague and laconic information about the object's value [Gawlicki 2008, 63–64; Brudnicki 2011, 41]. As noted by D. Sikora, landscape architect and employee of the National Heritage Board of Poland the same problems refer to historic parks and gardens which have been recorded in the register of monuments, especially before 1990. Among other oversights most often found by the author there are: absence of graphic material with the territorial scope of a historic object and lack of precise description of protected elements that confirm the value of a historic garden or park complex. The author also draws our attention to the need to verify the decisions about entering an object in the register, which especially refers to the objects that were recorded in the seventies and eighties of the 20th century [Sikora 2010, 16]. The acceptable legal means which allows to explain the "ambiguous" and "vague" entries is verification of the decisions issued on the basis of Article 113(2) of the Code of Administrative Procedure dated 14 June 1960[12] [Brudnicki 2011, 43].

The legal problems that refer to monuments of garden art, especially those of manor houses and palaces are noticed by J. Sługocki. He declares that the legal regulations that are currently in use with reference to such monuments are insufficient and do not provide them with suitable protection. The biggest hazards include provincial conservators' authority, received by acts of law, to issue permits to carry out partitioning of an immovable object that has been

[12] Journal od Laws of 2021, item 735 as amended.

recorded in the register on the basis of surveyor's divisions rather than those referring to ownership. This means that a historic park divided into a number of plots with a surveyor's decision is not treated as a whole. As a result, those particular plots that comprise a single object may come into the hands of various entities leading to the destruction of integrity of historic substance [Sługocki 2014, 229–35]. This serious legal hazard is also perceived by representatives of scholarly circles that deal with the preservation of historic garden complexes who call for working out legal fundamentals aiming at stopping harmful proprietary divisions [Siewniak and Sikora 2010, 37]. As rightly noticed by J. Sługocki, the binding act of law about the protection and preservation of monuments provides for the requirement of receiving a permission from a provincial conservator of monuments to carry out a division of an immovable historic object that has been recorded in the register (Article 36(1)(8) MPP) but it is late by at least 20 years. The results of incorrect proprietary divisions can be seen today in most manor house parks [Sługocki 2014, 228].

Landscape architects B. Fortuna–Antoszkiewicz and J. Łukaszkiewicz noticed another legal problem with regard to gardens and historic parks, namely applying different forms of protection to a single historic object, which is the result of separate legal acts. The two examples are garden complexes in Natolin and in Ursynów where apart from the preservation of their historic substance also their unique natural value is protected, and this is under the act of law about the protection of nature of 16 April 2004. Overlapping of so different forms of protection results in arising numerous conflicts both of authority and of caring for tree stands [Fortuna–Antoszkiewicz and Łukaszkiewicz 2015, 36]. The problem of legal collisions in the protection of natural, historic and cultural values due to the existing differences of national welfare in historic parks has also been noticed by lawyers. K. Gruszecki notes that the currently binding legal regulations hinder carrying out common activities of conservator services and institutions created to protect nature. The author suggests straight out that for the sake of a historic object and its natural value the provincial conservators and regional institutions for the protection of nature should undertake co-operation based on mutual agreements following principles that result from Article 106 Code of Administrative Procedure.[13] The other underlined problem is the conflict of public welfare since in order to preserve its value a historic garden complex requires taking such radical actions like felling trees, which stands in contradiction to the protection of nature [Gruszecki 2010, 51]. According to K. Chrabelski and G. Ciołek the elements of vegetation in a historic garden build up its harmonious structure but do not decide about its exceptional value as an architectonic and spatial complex.

[13] If a regulation of the law makes a decision conditional on a stand of another organ (opinion or permission or issuing a statement in a different form) then such a decision is to be made after a stand has been adopted.

Although trees and bushes contribute very much to perceiving the tier structure of a garden complex, they should not hamper its reconstruction. On the other hand, some tree specimens in historic parks should be protected due to their natural values rather than the spatial ones because with their size they support a proper build of a garden before young trees grow up [Chrabelski and Ciołek 1949, 15–19]. It is also worth noting that due to the global climate warming trees of considerable sizes play an unusually important role for the environment and for the climate. As a result, correctly defining and preserving the original composition of a historic garden is one of the most important stages in the process of its restoration. It is also worth explaining and remembering that in the meaning of Article 4 of the Florence Charter a historic garden composition is also comprised of 'groups of vegetation of various types', thus they constitute a significant element of a monument of garden art which ought to be subject to protection [Stachańczyk 2010, 45].

The above-mentioned survey of literature on the subject of the protection of monuments, gardens and historic parks has many threads and finds a response from various circles. It reveals that both lawyers, conservators, art historians and people who deal with the preservation and restoration of historic garden complexes place greatest emphasis on the protection of garden complexes from the point of view of space and composition. They tend to pay less attention to the preservation of natural substance which is the main material that constitutes a garden or park. The problems that have been named above, such as: lack of suitable protection of the natural substance, lack of precise description how the surroundings of an immovable monument should be defined as well as the conflict of authority when there exist more than one form of legal protection may have great importance for carrying out the preservation activities in historic garden complexes. The problem gets complicated even more by the change of the act of law about the protection of nature which makes it easier to fell trees in a property when it is not related to business activity. Such an area may constitute a direct surroundings of a monument but if it is not included in the register of monuments, it is not the provincial conservator who is entitled to issue a permission for cuttings (Article 83a(1) MPP).

CONCLUSIONS

The analysis of past and present legal acts about the protection of monuments in Poland unambiguously shows how important such sites are for the development and cultural continuity of the nation. Since the first days of regaining independence in 1918 the authorities of the Republic of Poland were strongly motivated to preserve the cultural and historic heritage in its best condition, to protect it against devastation and to keep it for the future generations by introducing appropriate legal regulations. The objects that were covered by

protection were also monuments of garden art. Yet, it is worth noticing that with time and with the legal changes the scope of protection in this sphere was generalised. Both in the Decree of Regency Council of 1918 and in the President's Directive of 1928 the protection not only covered decorative gardens but also ancient trees and alleys. In the binding act of law of 2003 instead of trees and alleys we find "forms of designed greenery." Another problem is the fact that the protection of historic vegetation which contributes to the structure of historic parks comes from two separate legal acts and is subject to decisions of two different supervisory bodies. Although it ensures a seemingly higher chance of protection of historic substance, at the same time it leads to conflicts of authority and different purposes of protection that result from different public interests. The analysis of existing legal regulations and survey of literature points to imprecise and ambiguous interpretation of current legal acts. It refers, inter alia, to a clear distinction between two legal concepts, protection and preservation. Debatable is also the protection of monuments on the level of local self-government as the county and parish programmes of monument protection, although obligatory by law, are not treated as truly protective local acts of law but as auxiliary ones only. There is also not enough precision as regards the protection of surroundings of historic immovable objects, especially as regards the principles of setting up zones of conservator's protection. Another issue is the lack of precise instructions and legal regulations as to legal regulations pertaining to documenting the historic park tree stands. In the Minister of Culture and National Heritage Directive dated 26 May 2011 about running the register of monuments, national, provincial and parish registers of monuments as well as the register of objects of historic value that have been stolen or illegally carried away abroad there are no regulations regarding trees or vegetation around historic objects in general. Under binding legal regulations, persons that prepare documents pertaining to the preservation of monuments focus first of all on the description of spatial structure of parks and adopt a vague approach to their natural substance. There are also doubts as to imposed by law authority requirements to be met by persons supposed to undertake preservation of a historic park object. In spite of all the oversights and legal ambiguities, works over developing the legal system of monument protection in Poland are worth continuing. It is particularly important for the future that legislators take into consideration greater substantive participation of conservators' and scientific circles in the process of monument preservation, the garden art in particular. In the context of on-going changes in the environment greater attention should be paid to the natural values of historic objects although it is not considered in the act of law about the protection and preservation of monuments.

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THE PRINCIPLE OF MULTI-LEVEL GOVERNANCE AS AN INSTRUMENT OF DEMOCRATIZATION OF DECISION-MAKING IN THE EUROPEAN UNION

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Abstract. The principle of multi-level governance significantly affects the quality of decision-making in the European Union. By distributing authority across governance levels, and increasing participation of governmental actors and non-state actors (entrepreneurs, citizens, non-governmental organizations) in EU decision-making, MLG contributes to the democratic legitimacy of decisions made by the EU. Importantly, the principle of multi-level governance has evolved gradually. On the one hand, it was promoted by the EU legislation, and on the other, embraced and supported by lobby groups representing various interests at the EU level.

Keywords: multi-level governance, European Union, democratization, legitimacy

INTRODUCTION

The reform of the EU institutional framework and its entire legal system implemented by the Treaty of Lisbon has changed the hitherto legal status if the EU as an international organization with regard to its internal structure and international public law. The Treaty was a huge step towards legislative harmonization, as it unified the law making system and systematized the sources of EU law. In consequence, the list of sources of EU law is more transparent, structured and unified, and placed within the entire legal framework of the EU.

Principles of the EU law are one of the sources of the EU law. They are made on the basis of primary law or derived from the interpretation of law made by the Court of Justice of the European Union. Among them, the policy-making principles are of special significance. One of them – i.e. the principle of multi-level governance – is the focus of the analysis presented in this paper.

The aim of this paper is to shed light on the source of the principle, its evolution and significance in the decision-making process of the EU. The paper looks into reference literature, the acts of secondary law of the EU and views relevant to the construction of the said policy-making principle. The author will attempt to prove that the principle of multi-level governance is not only

a policy-making principle, but also an efficient legal tool that facilitates democratization of the EU decision processes.

1. CRISIS OF DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION AS A CATALYST FOR CHANGING ITS DECISION-MAKING SYSTEM

The European Union is an unfinished project, one that is continuously evolving and adapting to the changing reality of the world and the expectations of its member states. When on 18 April 1951 the Treaty establishing the European Coal and Steel Community [ECSC] was signed in Paris, an international organization came into being whose most prominent goal was economic development [Barcz 2010, 22–40]. The integration process intensified over successive decades, embracing new member states and new areas of cooperation [Galster 2010, 43–119].

In its history, Europe has many turbulent chapters related to the process of integration [Borburska 2018, 27–32]. It is particularly true in case of such a complex project, and it is only natural that political and social crises have taken place. They were also noted by governments of the member states and Europe's citizens. As it comes to arguments raised by opponents of EU integration, a recurring one related to the lack of democratic legitimacy of European institutions to govern [Kubin 2014, 53–82].

The 80's and 90's saw a serious crisis regarding the democratic mandate of the European Community. In response, member states and institutions of the European Economic Community came up with reforms, embodied in the Treaty of Maastricht [Galster 2010, 48–51]. This act of primary EU law introduced a number of significant changes, i.a., it established the office of European Ombudsman [Sadowski 2014, 603–29], the institution of EU citizenship [Gniadzik 2018, 1–61] and the Committee of the Regions [Kuligowski 2019, 75–87].

Another major crisis hit the European Union after the most recent enlargement of the EU in 2013. The crisis was the effect of reaching a turning point in the EU's integration process. Within just 10 years, following accession of several Central and Eastern European countries, the number of member states doubled. Such robust expansion sparked a discussion on the identity of the European Union. What should the EU be? What are its goals? What should be the EU's final legal entity: an international organization, a federation or some other, as yet undetermined, entity? [Grzeszczak 2014, 7–8].

The democratic authority of the EU law making process was and still is, justly so, questionable, as it continues to lack transparency, to engage few participants and citizens, as a very small percentage of citizens are involved in the EU consultations. And yet, it is the building of common identity and

co-deciding about the future that lays the foundation of solidarity and belonging to any community, including the EU community.

The decision-making process in the EU was constructed based on the principle of multi-level governance.[1] This very principle was expected to address the above reservations. It is supposed to engage as many actors at different levels as possible, so as to ensure that the decision-making process is transparent and genuinely co-created.

Decision-making mechanisms in this international organization cannot be compared to decision-making processes within individual member states. The EU institutional system follows the principle of institutional balance [Dubowski 2010] which implies that there is no hierarchy between institutions within the legislative process. This solution ensures that decisions are taken with consideration of expert and political environments that engage institutions of the EU, governments and parliaments of member states, local and regional governments, and the civil society [Witkowska 2015, 125–26].

2. THE PRINCIPLE OF LAW AS A SOURCE OF EU LAW

The principle of law is a concept operating in the theory of law that is very difficult to define. There are two main ways of understanding the principle of law among legal scholars, that is prescriptive and descriptive [Korycka 2007, 3]. The task to create a catalogue of principles of law is as challenging [Bogucki and Czepita 2008, 69–70].

Within the EU legal framework we can definitely distinguish the written principles of law (principle of subsidiarity, of proportionality) and unwritten (principle of priority of the EU law) [Galster 2010, 218–19]. The view that principles of law are a special kind of legal norms that determine a general concept bearing a certain degree of significance is also shared by the author of this paper. The significance of the principles is stems from their axiology and the scope they cover. Similarly, in the EU legal system special place is given to policy-making principles. They regulate the foundation of the EU legal system, the functioning of its institutional system and the division of competence between the EU and member states. Galster underlines that three functions can be ascribed to the EU principles of law: an interpretative function, a demonstrative function as a paradigm of legitimacy and as a filler of treaty gaps.

The author believes that MLG is a policy-making principle aimed at regulating the EU decision processes in a way that ensures involvement of many entities at different level of governance, without forsaking responsibility for individual decisions.

[1] Hereinafter: MLG.

3. THE PRINCIPLE OF MULTI-LEVEL GOVERNANCE AND DEMOCRATIZATION OF DECISION-MAKING PROCESSES IN THE EUROPEAN UNION

MLG originated in the late '80s, during the era of reform of the Treaty of Rome that reshaped the EU by implementing a new cohesion policy in 1988. To reduce social and economic disparities throughout the EU, Structural Funds were integrated into the overarching cohesion policy, and among them – the European Regional Development Fund. In the context of this instrument Gary Marks observed that multi-level governance is a system of forging networks of relations between institutions, public authorities and private entities. The aim of these networks is to implement the goals of the Development Fund [Marks 1992, 19]. In subsequent academic works, the author defined and scrutinized the relations between actors involved in the implementation of the EU policies.

In one of his works, Gary Marks defined MLG as a "system of continuous negotiation among nested governments at several territorial tiers, i.e. supranational, national, regional and local" [Idem 1993, 392]. Another contributor to the debates on MLG and Marks' theory was Liesbet Hooghe. According to Marks and Hooghe, a very important feature of MLG is the separation of decision-making authority in both vertical and horizontal relations in case of public-private structures managing national political systems [Potorski 2019, 24–25]. In the continuously changing European Union and progressing integration, under their public policies, member states willingly transfer more authority not only to the EU institutions, but also to local governments and other participants in the decision-making process. Since the state has transferred the power hitherto reserved to the state, at present it has to co-decide with other actors [Danel 2009, 109–10].

Initially, attempts to formulate a definition of MLG raised serious doubts. This hesitancy was justifiable as the definition contained nebulous concepts. Roderick Arthur Rhodes, one of the critics, argued that Marks' theory lacked definition of the concept of "network." In his view, the lack of description of the network's creation process and its internal structure was also a weak point of the theory [Rhodes 1997, 140].

Until the Treaty of Lisbon[2] was put to effect, the principle of MLG did not have any grounds in EU treaties. Reform of the European Union, perpetrated on the basis of this primary act, included MLG in decision-making. This principle is particularly significant with respect to territorial cohesion and the local dimension of the principle of subsidiarity. It should be emphasized that MLG

[2] Consolidated versions of the Treaty on European Union and the Treaty in the functioning of the European Union of 13 December 2007, OJ C 202, 07.06.2016.

has derived from the principles of subsidiarity and proportionality embedded in the treaties [Urban–Kozłowska 2016, 199–200]. The principle of MLG is supported by the system of early warning mechanism of national parliaments. It also plays an important role in the monitoring and control of execution of public policy tasks by the EU institutions [Ruszkowski 2019, 106–108].

At the level of the European Union, it is the Committee of Regions that is the strongest lobbyist in favour of increasing the role of MLG in policy making. It is no chance that this body advocates strongly MLG as it is primarily local governments that are the addressees of acts passed by the EU institutions, and it is local governments (in Poland in particular) that are responsible for the implementation of cohesion policy through adequate allocation of the EU funds. Therefore, it is in the best interest of local governments to strengthen MLG system in order to formalize their position in the EU decision-making process. In the author's view, the latter correspondence is emphasized by the reports on the impact of MLG on the EU legislation.[3]

Another concept important for the research thesis is democratization of decision-making in the European Union. On the one hand, it should be understood as the normative and formal process of governance, and on the other hand, as genuine acceptance of governance by citizens. Both aspects will be analyzed in this paper, as both pertain to the research subject. Democratization of the EU decision-making is implemented in a threefold way through: axiological legitimization of democracy which is reflected in the system of values regulated by treaties, democratic structure of the EU's institutions and organs, and the structure that promotes engagement of citizens and civil governance [Mizera 2014, 107–109].

4. MULTI-LEVEL GOVERNANCE IN THE EU DECISION-MAKING

The first act honouring MLG was adoption of the Berlin Declaration on 25 March 2007 by heads of governments and states, which happened in effect of the Declaration of Rome formulated earlier by the Committee of the Regions.[4]

White Paper on Multi-Level Governance adopted by the Committee of the Regions was another significant document which reflected the EU's determination to support participatory democracy.[5] White Paper not only provided a definition of multi-level governance,[6] but also suggested specific solutions

[3] Annual Reports on the Impact of CoR Opinions, https://cor.europa.eu/pl/our-work/Pages/Opinions.aspx [accessed: 01.09.2021].

[4] Declaration for Europe of the Committee of the Regions, D1/CdR 55/2007 fin.

[5] The Committee of the Regions' White Paper on Multi-Level Governance (2009/C 211/01).

[6] Multi-level governance was defined by the Committee of the Regions as "coordinated action by the European Union, the Member States and local and regional authorities, based on partnership and aimed at drawing up and implementing EU policies. It leads to responsibility being

intended to reinforce the principle of MLG in EU policy-making. At the same time, the document emphasized the importance of the principle for strengthening democratic legitimacy of the process of European integration. Moreover, the Committee of the Regions provided some convincing examples of relevance and efficiency of MLG, including, i.a., the European neighborhood policy, cohesion policy and territorial cooperation.[7]

The Committee of the Regions continued to work on strengthening multi-governance across all tiers of government. In 2012 it issued an opinion[8] containing a thorough analysis of the practical application of MLG in EU policy-making. The Committee of the Regions urged the European Parliament and the European Commission to increase their commitment to applying the mechanisms of MLG at different levels of the EU policy-making process. It also called for creating a "Multilevel Governance Scoreboard at the European level" which would help to monitor and measure the incorporation of this principle. The first edition of the scoreboard will cover four key strategies and policies in the European Union's political programme, i.e. Europa 2020, the 2011–2020 Energy Strategy, the Stockholm Programme and the Spring Agenda.[9] Moreover, the Committee of the Regions also commits to the drawing up and implementation of the "European Union's Charter for Multilevel Governance."[10]

The stand point of the Committee of the Regions on the promotion and implementation of MLG mechanisms and principles was reflected in the operation of the EU institutions and adopted legislative acts. First, it should be emphasized that the European Commission acknowledged the importance of the said principle for the EU policy-making. It underlined that implementation of MLG reduces coordination and capacity gaps in policy making in terms of information, resources, funding, administrative and political fragmentation.[11]

European Parliament also expressed its position with regard to multi-level governance. The Resolution passed in 2016 draws attention to the challenges

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shared between the different tiers of government concerned and is underpinned by all sources of democratic legitimacy and the representative nature of the different players involved."

[7] White Paper on Multi-Level Governance (2009/C 211/01).

[8] Opinion of the Committee of the Regions on "building a European culture of multilevel governance: follow-up to the Committee of the Regions' White Paper," OJ C 113, 18.04.2012.

[9] The Committee of the Regions developed concrete practices for multilevel governance in six categories under two headings: I Procedures: Information & consultation; Stakeholder involvement and Responsiveness; II. Content of EU policies: Territorial/integrated/place based policy; Smart regulation mechanisms and Innovative instruments for implementation and partnership.

[10] The Charter was adopted by the Committee of the Regions in 2014 on the basis of the Resolution of the Committee of the Regions on the Charter for Multilevel Governance in Europe, OJ C 174, 07.06.2014.

[11] Commission Staff Working Document. The partnership principle in the implementation of the Common Strategic Framework Funds – elements for a European Code of Conduct on Partnership. Brussels 24 April 2012, SWD(2012) 106 fin.

of implementation of MLG into the legal order and practices of member states having different constitutional systems.[12] The Resolution passed in 2017, on the other hand, under lines that the MLG principle may be an important tool supporting the implementation of e-democracy.[13]

In result of efforts undertaken by the Committee of the Regions and by other EU institutions, multi-level governance is gradually gaining in importance. A good example here is the opinion of the European Economic and Social Committee[14] which emphasized the significance of the said principle for the operations of public administration at different levels.

In 2021, the European Parliament and the Council of Europe passed three regulations crucial to the financial framework of the European Union for the years 2021–2027. Each of them stresses out that it is crucial for the policies and goals to be implemented in line with the multi-level governance principle.[15] Such validation of MLG is a proof that governance where there is a dispersion of authority upwards, downwards and sideways is gaining in importance, and that the democratic mandate of the EU is being strengthened. Through involvement grounded in the binding EU legislation, all actors responsible for the implementation of public policies are obligated to foster open government partnerships and collaborate in line with the key principles of transparency, accountability, participation, efficiency and cohesion.

MLG helps the EU to evolve from the "top-down" model of governance to one that is more inclusive, involving not only regions and cities, but ultimately citizens. In plain words, MLG promotes citizen participation in the policy cycle. Citizens as "social actors" have two key instruments to their disposal to influence the EU policy-making. First instrument are various forms of lobbing, e.g. interest groups, social networks, cooperation and consultation networks [Garniszewski 2013, 25–100], or participation in social consultations

[12] European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), OJ C 468, 15.12.2016, p.176.

[13] European Parliament resolution of 16 March 2017 on e-democracy in the European Union: potential and challenges (2016/2008(INI)), OJ C 263, 25.7.2018, p. 156.

[14] Opinion of the European Economic and Social Committee on Public services principles for stability of democratic order, EESC 2020/02236, OJ C 56, 16.2.2021, p. 29.

[15] Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund, OJ L 231, 30.06.2021, p. 60; Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.06.2021, p. 159; Regulation (EU) 2021/1059 of the European Parliament and of the Council of 24 June 2021 on specific provisions for the European territorial cooperation goal (Interreg) supported by the European Regional Development Fund and external financing instruments, OJ L 231, 30.06.2021, p. 94.

organized by the EU institutions and bodies [Kurczewska 2015, 34–38]. However, it is a much easier to involve institutionalized entities than citizens in the EU policy-making process. Societal participation in EU governance is a big challenge, and in the author's humble opinion, it has had marginal significance for the institution of European Union. In the last four years though, increased attempts to engage citizens in policymaking can be observed with such initiatives as e.g. EU Citizens' Dialogues organized by the European Commission or the Conference on the Future of Europe 2021, which is a multilingual digital platform offering citizens across Europe a real opportunity to debate EU's future. These are just a few of many "exercises in democracy" that take place in addition to social consultations or the European legislative initiative.

It should be noted that the efficiency of MLG principle applied by the institutional system of the EU is conditioned on genuine acknowledgment of views and contributions presented by all state and non-state actors in the complex, interconnected MLG network. An underlying assumption of MLG is not only listening to the opinions and demands of civil society and various stakeholders, but rather hearing and understanding them, and including them in EU policy-making.

CONCLUSIONS

Since the 1960's the European Union has been widely criticized for its lack of democratic legitimacy in policy-making. The effects of implemented reforms (i.a. general elections to the European Parliament, establishment of European citizenship, European Citizens' Initiative) were ineffectual, as they only suspended debates about the EU decision-making as suffering from a "democratic deficit."

Multi-level governance was sanctioned by the EU institutions as a policy-making principle that fully addresses the objections of the EU policy-making to be undemocratic. MLG principle plays a key role in the policy-making by engaging multiple actors at multiple different levels. MLG offers a participatory answer in providing tools for participation in the EU law-making to regions, cities and citizens, thereby fostering democratization and increasing democratic legitimacy of the entire European Union.

It should be underlined that the Committee of the Regions, the most active advocate of the MLG principle, has since 2012 undertaken numerous endeavors that have resulted in strengthening the importance of multi-level governance in EU decision-making. Selected normative acts presented in the paper speak to the fruitfulness of those endeavors.

However, despite the increased recognition of this policy-making principle in EU decision-making, to play a greater role, multi-level governance

requires more commitment on the part of the EU institutional system. That shift towards multi-governance can be achieved through: sanctioning the participation of citizens and non-governmental organizations in decision-making, increasing participation of national parliaments in key policies regarding migration and asylum procedures, defining accountability for decisions taken by individual participants, and finally, providing a clear definition of MLG, its complex governance networks of actors, their responsibility and policies that come under the MLG framework.

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FINANCIAL SUPPORT OF ACCUSED CLERICS OF SEXUAL ABUSES OF MINORS. AN OUTLINE

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Abstract. The right to a decent remuneration is one of the fundamental rights of every human being. This right may not be denied to clerics, including those accused of sexual abuses of minors. *Ratio legis* of such a state, apart from a number of theological and legal motives, should be noticed in the priest's ministry itself, and even in his readiness to perform this service. Therefore, at every stage of disciplinary or penal proceedings, the accused cleric must be provided with dignified and just support.

Keywords: accused cleric, sexual misconduct, remuneration, sustenance, financing of the Church, can. 281

INTRODUCTION

The Church – as a community of Christ's faithful – cares for the salvation of every human being and for the common good of the community in which it undertakes its mission. Among the important tasks that have been set before the Church, one should recognize the protection of the common good of the faithful, including the protection of children and young people of sexual abuses. An objective and comprehensive response to cases of possible sexual abuses of minors perpetrated by clerics is therefore necessary for the Church to be able to – in an authentic and credible manner – pursue its proper purposes, above all, the order of divine worship, care for the decent support of the clergy and other ministers, and the exercise of works of the sacred apostolate and of charity, especially toward the needy (can. 1254 § 2; cf. can. 222 § 1).[1]

In order to adequately protect minors from sexual misconduct, only recently the legislator has clarified the procedure to be followed in these cases: Circular Letter to Assist Episcopal Conferences in Developing Guidelines

[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1–317 [hereinafter: CIC/83].

for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics,[2] Apostolic Letter Issued Motu Proprio by the Supreme Pontiff Francis *As a Loving Mother*[3] and Apostolic Letter Issued Motu Proprio by the Supreme Pontiff Francis *Vos estis lux mundi*.[4] Moreover, the Congregation for the Doctrine of the Faith has issued a *Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*, the purpose of which is to provide "instructions" to the correct handling of cases involving accused clerics of child abuse.[5]

In a situation of suspicion of sexual abuse of a minor against a cleric, the most important task of the Church is to clarify each case and provide protection and assistance to the victim, and the accused, the right to fair defence. Regarding the last point, it should be emphasized that the accused cleric is presumed innocent until the contrary is proven. Nonetheless the bishop is always able to limit the exercise of the cleric's ministry until the accusations are clarified (*Linee guida*, I, d, 3; cf. can. 1722). Such action, otherwise understandable and right, may initiate difficulties in the financial support of the cleric. This article is a contribution to the broad and – due to the nature of the accusations – very delicate matter of supporting accused clerics of sexual abuses of minors.

1. THE RIGHT TO A DECENT STANDARD OF LIVING

The inherent and inalienable dignity of every human being is the source of his freedoms and rights.[6] Among the fundamental rights that every human

[2] Congregazione per la Dottrina della Fede, *Lettera circolare per aiutare le Conferenze Episcopali nel preparare Linee guida per il trattamento dei casi di abuso sessuale nei confronti di minori da parte di chierici* (03.05.2011), AAS 103 (2011), p. 406–12 [hereinafter: *Linee guida*].

[3] Francesco, *Lettera apostolica in forma di «motu proprio» del sommo pontefice Francesco "Come una madreamorevole"* (04.06.2016), AAS 108 (2016), p. 715–17.

[4] Francesco, *Lettera apostolica in forma di «motu proprio» del sommo pontefice Francesco "Vos estis lux mundi"* (07.05.2019), "Communicationes" 51 (2019), p. 23–33.

[5] Congregazione per la Dottrina della Fede, *Vademecum su alcuni punti di procedura nel trattamento dei casi di abuso sessuale di minori commessi da chierici* (16.07.2020), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html [accessed: 16.12.2020] [hereinafter: *Vademecum*].

[6] "Permit me to enumerate some of the most important human rights that are universally recognized: the right to life, liberty and security of person; the right to food, clothing, housing, sufficient health care, rest and leisure; the right to freedom of expression, education and culture; the right to freedom of thought, conscience and religion, and the right to manifest one's religion either individually or in community, in public or in private; the right to choose a state of life, to found a family and to enjoy all conditions necessary for family life; the right to property and work, to adequate working conditions and a just wage; the right of assembly and association; the right to freedom of movement, to internal and external migration; the right to nationality and residence; the right to political participation and the right to participate in the free choice of

being is entitled to by virtue of his humanity is the right to a decent standard of living, regardless of gender, race, religion, social or national origin. Pope John XXIII, in his Encyclical on Establishing Universal Peace in Truth, Justice, Charity, and Liberty *Pacem in terris* clearly noted: "Man has the right […] to the means necessary for the proper development of life, particularly food, clothing, shelter, medical care, rest, and, finally, the necessary social services. In consequence, he has the right to be looked after in the event of ill health; disability stemming from his work; widowhood; old age; enforced unemployment; or whenever through no fault of his own he is deprived of the means of livelihood" (no. 11).[7] This thought was continued by Pope Paul VI, who emphasized that every man has the right to work and a just wage that could provide him with "a worthy life on the material, social, cultural and spiritual level."[8] A fair wage should therefore provide the worker with the necessary livelihoods, which should be interpreted not as a minimum of these resources, but as a safeguard for a "truly human" standard of living, corresponding to the dignity of the human person. Thus, such an approach excludes the possibility of treating remuneration for work in terms of payment for the "goods" provided by the employee [Wratny 2015, 301].

Undoubtedly, the analysed right also applies to clergy. The legislator confirmed this in the 1983 Code of Canon Law and in post-conciliar normative acts: *Ecclesiae Sanctae*,[9] *Ecclesiae imago*,[10] *Apostolorum successores*[11] and in

the political system of the people to which one belongs. All these human rights taken together are in keeping with the substance of the dignity of the human being, understood in his entirety, not as reduced to one dimension only. These rights concern the satisfaction of man's essential needs, the exercise of his freedoms, and his relationship with others; but always and everywhere they concern man, they concern man's full human dimension." Ioannes Paulus PP. II, *Palatium deinde adiit Nationum Unitarum; in quod ingressus, allocutionem habuit ad earundem Nationum Legatos* [Apostolic Journey to the United States of America Address of His Holiness John Paul II to the 34th General Assembly of the United Nations] (02.10.1979), AAS 71 (1979), p. 1144–160, no. 13.

[7] Cf. Paulus PP. VI, *A Beatissimo Patre habita Genavae, in Aedibus Nationum, ad Delegatos e variis Civitatibus, qui Coetui interfuerunt quinquagesimo anno volvente a condito Instituto quem v. «Organisation Internationale du Travail» appellant* (10.06.1969), AAS 61 (1969), p. 491–502, no. 8; Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025–115 [hereinafter: GS], no. 26.

[8] Paulus PP. VI, Epistula apostolica ad E.mum P.D. Mauricium S.R.E. Cardinalem Roy, Consilii de Laicis atque Pontificiae Commissionis Studiosorum a «Iustitia et pace» praesidem: octogesimo expleto anno ab editis Litteris Encyclicis e verbis appellatis «Rerum Novarum» *Octogésima adveniens* (14.05.1971), AAS 63 (1971), p. 401–41, no. 14; cf. GS 67.

[9] Idem, Litterae apostolicae motu proprio datae *Ecclesiae Sanctae*. Normae de quaedam exsequenda SS. Concilii Vaticani II decreta statuuntur (06.08.1966), AAS 58 (1966), p. 757–87.

[10] Sacra Congregatio pro Episcopis, Directorium de pastorali ministerio Episcoporum *Ecclesiae imago* (22.03.1973), Typis Polyglottis Vaticanis, Romae 1973.

[11] Congregazione per i Vescovi, Direttorio per il minister pastorale dei vescovi *Apostolorum successors* (22.02.2004), Libreria Editrice Vaticana, Città del Vaticano 2004.

the *Directory on the Ministry and Life of Priests*.[12] The 1983 Code of Canon Law contains numerous dispositions relating to the problem of the financial support of clergy [Lewandowski 2017, 132–38; Idem 2019a, 38–44]. A serious obligation to provide clerics with decent support and social security, in accordance with the provisions of law, rests on the Christ's faithful (can. 222 § 1; 1261 § 1) and the diocesan bishop (can. 384; 538 § 3) due to the incardination of a cleric or his temporary fulfilment service to a particular Church.

2. THE CLERIC'S ENTITLEMENT TO REMUNERATION

Apart from a number of theological and legal motives, concerning the right of clergy to decent support [Idem 2019a, 50–94; Idem 2019b, 155–67], it is necessary to refer to can. 281 § 1, in which the legislator indicates: "Since clerics dedicate themselves to ecclesiastical ministry, they deserve remuneration which is consistent with their condition, taking into account the nature of their function and the conditions of places and times, and by which they can provide for the necessities of their life as well as for the equitable payment of those whose services they need." In this analysis, it is therefore important to determine whether the remuneration of a cleric referred to in the cited canon results only from the motive of work performed during active priestly service (holding an ecclesiastical office) or, much more broadly, from the very motive of being a cleric, regardless of whether the cleric is actively involved in the priestly service (the ecclesiastical office is held) or, as in the case of accusations of sexual offenses of minors, the performance of the priestly ministry by the accused cleric while waiting for a full clarification of the accusations made is preventively limited.

In response to the above doubt, one should focus on the formula of the legislator *cum ministerio ecclesiastico se dedicant, remunerationem merentur* (can. 281 § 1), which used the syntax: *cum causativum + coniunctivus*. The relationship between service in the Church and wages is included here as cause and effect. Can. 141 § 1 of the 1977 Schema relating to the Book II *De Populo Dei*[13] was reintroduced unchanged as can. 255 of the 1980 Schema of the Code of Canon Law.[14] In view of the canon thus formulated, a reservation

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[12] Congregazione per il Clero, *Direttorio per il ministero e la vita dei presbiteri* (11.02.2013), Libreria Editrice Vaticana, Città del Vaticano 2013.

[13] "Clerici, cum ministerio ecclesiastico se dedicent, remunerationem merentur suae conditioni congruam, ratione habita tum ipsius muneris naturae tum locorum temporumque conditionum, quaque possint necessitatibus vitae suae necnon aequae retribution eorum quorum servitio egent providere." Pontificia Commissio Codici Iuris Canonici Recognoscendo, Schema Canonum Libri II *De Populo Dei* (15.11.1977), Typis Polyglottis Vaticanis, [Civitas Vaticana] 1977, p. 66.

[14] Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema Codicis Iuris Canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Cu-*

was made by Card. Joseph L. Bernardin, who called for a closer adaptation of the Code disposition to the teaching of the Fathers of the Second Vatican Council (cf. PO 20). The Archbishop of Cincinnati argued that the fundamental rationale for the remuneration of clergy is service to God and the Church, and this truth is weakened by the concept of *ministerium ecclesiasticum*. The negative response of the Pontifical Commission for the Revision of the Code of Canon Law confirms the deeper meaning of the analysed concept [Walencik 2007, 197].[15] Can. 255 of the 1980 Schema of the Code of Canon Law became the basis for can. 284 of the 1982 Schema of the Code of Canon Law,[16] in which several amendments were made, including changed from *coniunctivus* to *indicativus*. For this reason, *cum* in the paragraph under analysis should be interpreted in a temporal rather than a causal sense. Even in a temporal sense, however, it can be understood in many ways: as indicating an exclusively temporal relation, as explanatory, as iterative, or even as conditional. In such an array of possibilities, *cum* should be understood as *cum coincidens*, i.e. that the relationship between the ministry of the cleric and his support remains in a temporal and material relationship. What is more, service and remuneration are connected with each other in such a way that both planes correspond and complement each other [Lynch 2000, 368; Donlon 2005, 97; Walencik 2007, 199].

Moreover, it is necessary to ask what does the cleric do when devoting himself to the ecclesiastical ministry? The answer depends on understanding *dedico*, *-are*, *-avi*, *-atum*. Is the action expressed by *dedico*, *dedicare* actionable or ontological? The basic meaning of the verb under analysis in Latin is ontological, not actionable. It is about being a cleric, that is, who he is, not what he does. A cleric deserves support when he devotes himself to the ecclesiastical ministry, i.e. from the moment of the sacrament of Holy Orders,

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riae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum (Patribus Commissionis reservatum) (29.06.1980), Libreria Editrice Vaticana, Città del Vaticano 1980, p. 57–58.

[15] "Ad can. 255: 1. Ita incipiat § 1, iuxta Decr. «Presbyterorum Ordinis», n. 20: «Servitio Dei dediti in implendo sibi commisso, clerici aequam remunerationem…», quia fundamentalis ratio remunerationis in servitio Dei et Ecclesiae consistit (Exc. Bernardin). R. Additio non videtur necessaria, quia sufficient verba canonis «ministerio ecclesiastico» et quia non omnes legis rationes in eadem exprimi debent." Eadem, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissions ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis (Patribus Commissionis stricte reservata)* (16.07.1981), Typis Polyglottis Vaticanis, [Civitas Vaticana] 1981, p. 67.

[16] Eadem, *Codex Iuris Canonici. Schema novissimum post consultationem S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum, iuxta placita Patrum Commissionis deinde emendatum atque Summo Pontifici praesentatum* (25.03.1982), Typis Polyglottis Vaticanis, [Civitas Vaticana] 1982, p. 49. This canon entered the CIC/83 unchanged as can. 281 § 1.

because of who he has become, what he is, not because of what he has been doing since then [Lagges 2009, 162; Woestman 2006, 191–92]. On this basis, due to the constant ontological readiness to undertake the priestly service, also during the removal from duties arising from the office, there is no reason for accused clerics of sexual crimes of minors to be denied the right to a dignified and just support.

3. DETERMINING THE LEVEL OF SUPPORT

When analysing the financial support of accused clerics of sexual crimes of minors, which is a very sensitive issue due to the nature of the accusations, one should first of all distinguish between the clergy's support and the salary given to the laity. The subsistence to be provided to a cleric is not calculated according to the criteria of an exchange justice based on reciprocity and proportionality in relation to the work performed. The motive, then, is not the amount of services rendered, which should be recognized and proportionally compensated, but the cleric himself who offers his ministry for reasons other than those which guide the lay worker.[17] This means that a particular Church is not obliged to pay a cleric's salary, but must guarantee him support, which should be independent of the task assigned to the cleric [Lewandowski 2019a, 45–46]. The level of remuneration due to clergy in a specific scope was set by the Fathers of the Second Vatican Council: "The remuneration received by each one, in accord with his office and the conditions of time and place, should be fundamentally the same for all in the same circumstances and befitting his station. Moreover, those who have dedicated themselves to the service of the priesthood, by reason of the remuneration they receive, should not only be able to honourably provide for themselves but also themselves be provided with some means of helping the needy. For the ministry to the poor has always been held in great honour in the Church from its beginnings. Furthermore, this remuneration should be such that it will permit priests each year to take a suitable and sufficient vacation, something which indeed the bishops should see that their priests are able to have" (PO 20). In summary, it can be stated that decent support should include, what from a moral point of view, is necessary for a cleric to properly pursue a priestly vocation: board, housing, clothes, health care, social security, annual holidays (can. 283 § 2), helping parents

[17] Pontificium Consilium de Legum Textibus, *Decretum de recursu super congruentia inter legem particularem et normam codicialem* (29.04.2000), "Communicationes" 32 (2000), p. 162–67, no. 4.2. Cf. Pontificia Commissio Codici Iuris Canonici Recognescendo, *Schema Codicis Iuris Canonici* (16.07.1981), "Communicationes" 14 (1982), p. 172. See: Miñambres 2001, 536–44; Fiorita 2003.

or the closest family members,[18] remuneration of those who provide help or further intellectual development (can. 279 § 1) [Idem 2017, 141–42].

However, with regard to accused clerics of sexual crimes of minors, the specific situation in which they found themselves must be taken into account. In this matter, the legislator states: "[...] during the course of the disciplinary or penal process the accused cleric should always be afforded a just and fit sustenance" [*Linee guida*, III, h]. Interesting considerations are made by James I. Donlon, who, for the purposes of practical presentation of the question, distinguished five situations: 1) Cleric accused, restricted but allegation not proven; 2) Cleric accused, allegation deemed credible; 3) Cleric accused and admits guilt; 4) Cleric accused, tried and convicted, dismissed from clerical state; 5) Cleric accused, tried, acquitted, restricted nonetheless [Donlon 2005, 105–12]. Each of the indicated options puts the cleric in a different moral and penal situation, and therefore may affect the level of the due remuneration: from the full extent of justice to the one offered as an act of love and mercy (cf. can. 1350 § 2). However, due to the nature of clerical accusations, the need to act in a transparent manner in the Church community, and the social perception of such situations, it is necessary to appeal for a very deliberate action in the analysed matter. In this regard, the legislator's disposition, in which he calls on clerics to foster simplicity of life and are to refrain from all things that have a semblance of vanity (can. 282 § 1), should be considered a good sign. In the event of an accused cleric of a sexual offense, it would be frivolous and unfounded to display the right to an annual vacation or to emphasize the need for further intellectual development. On the other hand, the need to provide psychological and legal assistance to the accused cleric should certainly be included in the area of decent and just maintenance.

CONCLUSION

The analysis of the issues raised allows to draw conclusions *de lege lata* and *de lege ferenda*:

1. Already at the time of the preliminary canonical investigation in the case of a clerical accusation of a sexual offense of a minor the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or

[18] "Spetta ad essi una remunerazione proporzionata ai compiti svolti e tale da assicurare un decoroso sostentamento e consentire l'adempimento dei doveri del proprio stato, comprese anche quelle responsabilità che in certi casi possono avere di venire in aiuto ai propri genitori o ad altri familiari a loro carico." Ioannes Paulus PP. II, Epistula *La Sede Apostolica* (20.11.1982), AAS 75 (1983), pars I, p. 122.

territory, or even can prohibit public participation in the Most Holy Eucharist (can. 1722).

2. An accused cleric of a sexual offense of a minor should be provided with a dignified and just living. Due to the delicacy of the problem and social perception, it seems to be better to each and every time normalize the analysed clerical entitlement in a singular decree.

3. The support should secure the basic needs of the cleric which are the same for all – board, housing, clothes, health care, social security; and special needs due to the situation of the accused – access to psychological and legal assistance.

4. Depending on the Church's financing system, remuneration may constitute a proper salary or pension of a state or diocesan nature, or it may be based on voluntary offerings of the faithful.

5. In the analysed matter, the possibility of subsidizing the institution for the support or social security of clergy should be considered.

6. An accused cleric of sexual abuses of minors should be released from tax obligations towards the particular Church (e.g. for the diocesan curia, the seminary, etc.).

7. The spiritual and material help provided to the accused cleric by priests, in particular priests from the year of studies or vicariate forane cannot be overestimated.

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BASIC PRINCIPLES OF SUBSTANTIVE CRIMINAL LAW AND IDENTIFICATION OF THEIR IDEOLOGICAL BASIS IN ROMAN LAW AND CANON LAW*

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Abstract. In the presented paper, the author deals with the issue of the basic principles of substantive criminal law with an emphasis on their material and ideological basis in Roman law and in canon law. The author places special emphasis on the importance of Roman and canon law in connection with the possible positive enshrinement of the basic principles of substantive criminal law in the Criminal Code.

Keywords: principles of substantive criminal law, *nullum crimen sine lege*, *nullum poena sine lege*, subsidiarity of criminal repression, Roman law, canon law

INTRODUCTION

The basic principles represent an important aspect of society not only in general, but also in particular, for example precisely for a certain area of social life, as well as for a normative system, as the law undoubtedly is. In the field of law, the basic principles (or basic fundamentals[1]) express the primary ideas on which the legal branch is built. It is also true that in the field of law we are able to name principles of more general importance, the impact of which applies interdisciplinarily. On the other hand, it is also possible to identify such principles that are inherent to a particular legal branch, which have been modified and adapted by that legal branch.

From the point of view of the presented article, however, the interest of the author is not directed in relation to the content analysis of individual basic

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[1] Naming can be said to depend on the doctrinal perception of which branch of law, or on the author's view. Ultimately, for the purposes of this paper, the subject is not to resolve the discourse regarding that name, but to search for content, with particular emphasis on the reference to Roman law and canon law for the creation of fundamental principles of substantive criminal law.

principles of substantive criminal law, after all, sufficient space is devoted to the issue of substantive criminal law across the criminal law doctrine. On the contrary, the author's interest extends into the historical sphere with an effect on the current state of knowledge connected with the basic principles of substantive criminal law.

The author's interest is therefore conceived in two basic lines. First of all, it is an analysis of the very meaning (reference) of Roman law and canon law for determining the basic principles of substantive criminal law, on the other hand, it is the application of the above knowledge to the perception of these principles at present. This procedure is not accidental, it is associated with inexhaustible possibilities of inspiration in the legal systems in question, or with describing that even today, Roman law and canon law can be a tool for solving problems of applied practice (at least from an ideological point of view).

The focus on the sphere of basic principles of substantive criminal law is not accidental. On the one hand, they represent a set that determines the area of substantive criminal law, but on the other hand, their explicit positive legal expression is absent. Present times are associated with the opinion that virtually every problem can be solved by amending the legislation *de lege lata*. In this context, however, it should be borne in mind that, before proceeding with a change in legislation, it is necessary to ask the question: whether such an adjustment is beneficial, or whether it will realistically correspond with the problems of everyday practice. The question in connection with the basic principles of substantive criminal law should therefore not be how the principles in question can be positively expressed, but whether a positive expression of these principles is necessary at all, or whether it is possible to use different approaches in relation to individual principles of substantive criminal law or whether they need to be perceived as a mutually conditioned entity of elements.

We believe that the legal systems of Roman law and canon law can represent an interesting line of sight, even in relation to the presented research questions.

1. LEGAL SYSTEMS OF ROMAN AND CANON LAW AND THEIR APPROACH TO THE BASIC PRINCIPLES OF SUBSTANTIVE CRIMINAL LAW

The first part of the present paper will be devoted to the analysis of which approach to the basic principles (with a focus on the criminal law sector) can be perceived in connection with the legal systems of Roman law and canon law. Subsequently, the interpretation will focus on the relationship between these legal systems and the area of criminal law (or more broadly on the area of public law).

If we call these legal systems classical legal systems, as they shaped the legal orders of states based on the continental legal system in a certain way, it can be stated that they conditioned their development, both in terms of theory and application. The basic question then is how modern law has been influenced and to what extent. With regard to the differentiation of Roman law and canon law, it can be stated that while Roman law was perceived as the basis of private law (also with regard to the condition of the development of the legal systems of states), canon law was perceived as an element that similarly conditioned public law, especially the area of criminal law [Vladár 2020, 186]. This was due to the influence of the legal system (*de facto* legal system of the Catholic Church), especially in the High Middle Ages, which, however, is a general reason. The particular reason in relation to the development of criminal law, was primarily in the interest of eliminating pagan concepts. Canon law, even in view of the above, is the oldest valid legal system. Due to its nature and basis, it has influenced the development of law (as well as society as such) perhaps most significantly.

The teaching of law itself has historically been based on the concept of Roman law and canon law, while the shortcomings of Roman law in public law (we point out in particular the interest in regulating public relations by private institutes) were eliminated by evolving theory and practice of canon law (such as Catholic Church law). To date, it is possible to meet with the opinion that in connection with modern law, this influence is decisive. In the literature we encounter mainly the term "model of imitation" [Willock 1962, 89]. In terms of substance, therefore, it is not only the comparative framework that is important, but above all the interest in moving closer to the legal system in question.

However, why did canon law get into a position where it is perceived as a basic determinant of the development of modern criminal law (and *de facto*, in a sense, also of the fundamental principles of substantive criminal law)? The form of contemporary criminal law is mentioned as the reason, which required the formation and establishment of new starting points for criminal law, ultimately on the basis of the law of the Catholic Church. The founding of criminal law was therefore the Christian faith, theology, practicality, and justice [Vladár 2020, 196], thus the basic attributes that cross this legal system. Roman law could not be the basis for emerging criminal law because public law was not nearly as perfect as private law. It is true that in the field of criminal law, the norms of private law were applied relatively commonly [Berman 1983, 205]. The reason was not a denial of the peculiarities of criminal law (or public law in general), but an awareness of the imperfections of the legislation at the time, especially in terms of application practice.

A certain parallel with the use of canon law in the field of criminal law is visible in comparison with today's doctrinal understanding also in the sphere

of the purpose of criminal law as a branch of law. While, in accordance with the law of the Catholic Church, the primary deterrence of members of the community should be ensured from conduct which is perceived as a tort [Rees 1993, 140–46], the teaching of criminal law would be similar to the concept of the so-called general prevention, where the prosecution of the perpetrator and his conviction should have an impact not only on the perpetrator himself (in terms of individual prevention), but above all should be a deterrent to society as a whole. It is indisputable that the primary subject of the transformation into the form of criminal offenses were the most serious sins (for example in the area of life and health), which led to their determination from the internal forum to the external forum. In connection with the concept of criminal law on the basis of canon law, it is necessary to mention the so-called ecclesiastical ideals, where "[...] in the first place there was agreement between Christian doctrine, static and dynamically evolving theological principles, and finally with Roman legal standards, which ensured the norms not only theoretical justice but also real enforceability [...]" [Vladár 2020, 197]. With regard to all the above, it is therefore indisputable that canon law is a system which, over time, was perhaps the most important for the creation of the so-called secular criminal law, the impact being visible to this day (also in connection with the so-called modern law), especially in the context of the *de facto* shift towards the individualisation of criminal liability. On the basis of such a thesis, it is therefore possible to assume that the doctrine of canon law should (and could have) meaning also in connection with the basic principles of substantive criminal law (not only in terms of the relevant content connotations, but primarily with regard to their theoretical positive legal definition).

If we look at Roman law and its importance for the formation of criminal law in the basic principles, in the first place, it is necessary to distinguish between the concepts of Roman criminal law and the so-called modern (i.e. today's) criminal law. It is true that Roman criminal law is a much broader set, since, as mentioned above, in many institutes there is an identifiable overlap with general private law [Kincl, Urfus, and Skřejpek 1995, 317]. It is also necessary to realize that the development of Roman law was relatively noticeably shaped and modified by the development of history (or political development), which means that the individual institutes need to be interpreted in context, precisely with regard to the passage of time (an example could be the royal period associated with the almost exclusive jurisdiction of the fathers of the family, usually without limitation as to the amount of the sentence). Roman law therefore conditioned primarily the development and advancement of private law, meaning that knowledge of Roman criminal law is much more modest, but not negligible.

The view of the perfection of Roman law is therefore perhaps acceptable only in relation to the sphere of private law. This, or rather, some proof of the

illusion of perfection of Roman public law, can also be argued through two basic principles of substantive criminal law, which practically represents the core of the present contribution. We are thinking in particular of the lines of the principle of legality, *nullum crimen sine lege* and *nulla poena sine lege*. These represent the solid core of the catalogues of the basic principles of modern legal systems when it comes to the basic principles of substantive criminal law. It expresses the fact that without being enshrined in a generally binding legal regulation, a certain act cannot be classified as a criminal offense, or that only such a punishment as defined in the legal regulation can be imposed for a criminal offense. In the conditions of the Slovak Republic, the above principles have a constitutional basis. Modern criminal law is perceptible precisely through these basic principles, the definition of which is usually granted by Roman lawyers, or Roman law. However, the origin of these principles is undoubtedly later.

In terms of content, these principles are (in the current sense) a manifestation of type binding [Kincl, Urfus, and Skřejpek 1995, 317–18], together with the prohibition of retroactivity, they constitute the meaning of the current criminal law codes. This is precisely the set of basic principles that follow from criminal law (if we are talking about substantive criminal law).

However, from the point of view of the starting points of Roman law, it is relatively easy to show that none of these principles was accepted in a certain part of historical development, and therefore that they did not represent the starting point on which the original Roman law was created. In connection with the principle of *nullum crimen sine lege* (simply "there is no crime without law"), it can be stated that the non-acceptance of this principle was visible primarily in connection with the so-called criminal juries, which acted retroactively.[2] After the act that should be a criminal offense was identified, a commission of inquiry was established, and only on the basis of the official's proposal was the law adopted, by which the conduct was identified as a criminal offense (thus, only after the commission of the said act, which is inadmissible in the conditions of Slovak criminal law). The aforementioned criminal jury assessed such conduct, and may also have imposed a sentence. The same applies to the principle of *nulla poena sine lege* (simply "there is no punishment without law"), the non-acceptance of this principle is visible primarily in the period of the Roman Empire, when the imposition of punishments (not only in terms of the type of punishment, but also in terms of its amount) was practically subject to arbitrariness. In the context of the description, it is visible

[2] There is also a visible difference in the application of this principle in the comparison of public and private law. While in the area of private law it was relatively clearly accepted, in the area of public law, criminal liability was extended to cases not explicitly mentioned in the law – it is practically possible to talk about the use of an analogy to the detriment of the perpetrator, which is inadmissible in the field of substantive criminal law in the conditions of the Slovak Republic.

above all that the principle of non-retroactivity was not firmly anchored, the reason could be precisely that the basis for the creation of criminal law was often identified in private law [ibid., 318–19]. Even in connection with the period of the Roman Republic, it can be stated that the explicit and precise definition of crimes and punishments was actually absent. However, a certain change is noticeable in the last two centuries of the republic's existence, as several laws have been adopted which formulated some facts of criminal offenses and the associated penalties; as a rule, one criminal offense was defined through one law (the wording of these laws was modified over time, in order to extend the criminal sanction to other types of conducts, or to alternatives to the conducts already described). The extension of the wording of pre-existing crimes (and practically approximation to the principle of legality) is associated primarily with the period of the Roman Empire. During this period, one can observe an approach to some of the primary principles of sentencing – especially with regard to the parallels of the principle of individualization of punishment (however, at the expense of the principle of *nulla poena sine lege*, since the determination of the type and amount of the sentence was subject to the judge's discretion, the criterion was precisely the circumstances of the case),[3] as the imposition of the sentence was based on all the circumstances of the case, while the judge also took into account all mitigating and aggravating circumstances.

The introduction of the principle of legality (as described through the individual lines in the text above) and other principles can be talked about in the legal system of Roman law practically from the middle of the 2nd century BC – associated with this, however, is their not too strict acceptance, or application (especially as regards the *principle of nullum crimen sine lege* and *nulla poena sine lege*).[4] However, this does not exclude (and in particular does not deny) the ideological significance of gradually specified substantive criminal law principles for modern criminal law (and thus also for Slovak criminal law). It is worth mentioning at this point that the mentioned principles became an immanent part of the Austro-Hungarian legal system only in the period of absolutism, under the influence of the enlightenment [Szabová and Deset 2020, 126].

[3] However, it should be emphasized that such an approach was generally associated with the offender's disadvantage, the sentence imposed should have been a fair reflection of the assessment of the individual subjective and objective circumstances of the act, the offender, and other relevant circumstances.

[4] For example, "[...] the normative power of imperial constitutions in late antiquity cannot be underestimated [...]", primarily through the view of the principle of legality. Cf. Gregor 2020, 86.

2. BASIC PRINCIPLES IN THE FIELD OF SUBSTANTIVE CRIMINAL LAW AND THEIR SIGNIFICANCE

As we stated in the introduction to the present paper, the basic principles of a particular sector (as well as the criminal law sector) represent certain starting ideas [Kurilovská 2013, 8–9], which expresses their essence, while these are not proclaimed, but should be deducible from individual institutes of individual branches of law. In addition to what is described (cognitive function), the importance of basic principles for norm-setting and application practice is also decisive.[5]

At the given place, the purpose is not to describe the individual principles that the teaching of criminal law perceives as basic principles, but a reflection on their significance, especially on the possibilities of their positive legal incorporation into the wording of Act no. 300/2005 Coll. The Criminal Code as amended.[6] In the first place, the basic principles in question are not a rigid category, on the contrary, as an important normative criterion, they must be a timeless aspect, and changes in criminal law should be arguable through basic principles. A relatively suitable comparative aspect may be the reference to the acceptance of real criminal liability of legal persons, as on the one hand the calculation of hitherto consistently accepted basic principles has been extended (on new principles for attributing a criminal offense to a legal person and transferring criminal liability to the legal successor of a legal person), as well as the principle of individual criminal liability was modified. We talk about the modification because the application framework of the given principle was not broken, but on the contrary, extended. However, we believe that such an interference with the fundamental principles of substantive criminal law has been rather exceptional, due to the fact that there are currently few challenges to which the teaching of criminal law would have to respond in a similar way (thus, that the generally accepted starting points associated with criminal liability are argumentatively sustainable).

With regard to the considerations on the positive enshrinement of the basic principles in the Criminal Code, a relatively basic question arises, whether the application framework of these principles is limited precisely by the fact that, by means of an explicit statement, they are not part of a generally binding legal regulation (as there is no doubt about their implicit meaning). We believe that this is not perceived as a problem, the only criterion is perhaps a different view of the category of legal principles (in terms of the criteria of legal argumentation), as long as they are part of the legal text. At this point, it

[5] On the functions of the basic principles of criminal law, see Mencerová, Tobiášová, Turayová, et al. 2015, 21–22, possibly Jelínek 2019, 31–32.
[6] Hereinafter: Criminal Code or CC.

is necessary to realize the importance and role of the sources of law, which is inherent not only in modern law, but undoubtedly also in Roman law [Gregor 2020, 86].

So where to look for positives, or the importance of positively enshrining the basic principles of substantive criminal law? From the point of view of the scientific discussion, the basic answer is the clarity of the legal regulation, i.e. rather the technical side. Although we are able to identify the first proposals for such legislation (inspired by the legislation of other states),[7] there is still no scientific debate on the usefulness and the very need for positive grounding. It is probably not right for criminal policy to work in the style of some kind of ex-post control when the shortcomings of the legal regulation are revealed only by practice and not by the preparation of the legislative intention itself (or the legislative text).

An argument for the adoption of such legislation (i.e. a catalogue of basic principles) in the text of the Criminal Code could be an interdisciplinary view of the legislator's approach. The basic argument is, first of all, that Act no. 301/2005 Coll. The Criminal Procedure Code, as amended,[8] in contrast to the Criminal Code, contains a concentrated calculation of the basic principles of criminal proceedings, in the sense of Section 2. It should be added here, however, that this is undoubtedly an exemplifying calculation of principles of the greatest importance, as this is extensible through constitutional or supranational connotations. The basic principles in terms of the legislative text are inherent in the code of labour law, as well as in the codes of civil procedural law. In each of these cases, however, it is true that the relevant principles radiate through legislation (through individual institutes) and their use would be possible even if they were not part of the positive legislation (as they are perceived as an important rule of interpretation).

On the other hand, a certain compromise in connection with the need to positively enshrine the basic principles of substantive criminal law could be the approach in the Czech Republic, with regard to the wording of the recodified Act no. 40/2009 Sb. The Criminal Code as amended.[9] Despite the common historical and legal development, the Czech Republic has approached a different concept in the given issue, namely the kind of relative positive enshrinement of the basic principles (through the definition of some of the principles, but not concentrated in the introductory provisions of the legislation).[10]

[7] See e.g. Strémy, Balogh, and Turay 2020, 80ff.

[8] Hereinafter: Criminal Procedure Code.

[9] Hereinafter: Criminal Code of Czech Republic.

[10] We point out in particular to Section 1 and 12 of the Criminal Code of Czech Republic, within which the legislator enshrined three principles of substantive criminal law, which can be included among the basic principles. While Section 1 regulates the prohibition of retroactivity, section 12 regulates in para. 1 the principle of legality and in para. 2 the principle of subsidiarity of criminal repression (the legislator directly referred to these provisions as "principles").

In addition to implicitly identifiable principles, we are then able to identify some of the principles explicitly. In terms of normative wording, these represent a constant starting point for the science of criminal law, simplified to an acceptable normative form.

CONCLUSION

Conclusions can be drawn in several directions. First of all, it can be unequivocally stated, based on more general assumptions, that Roman law and canon law are the legal systems that have most influenced the creation of modern law. It is true that while Roman law had the greatest influence on the development of private law, canon law perhaps had the greatest influence on the creation of public law and thus criminal law.

It should be noted here that if we focused in the subject of the article on the level of influence of Roman law and canon law on the basic principles of substantive criminal law (or on the reference of these legal systems to their determination), the delineation of the conclusions will rather be a deduction. Roman law allowed us to identify that the principle of legality was part of a given legal system, although its application was limited, often suppressed (especially with an emphasis on non-compliance with the prohibition of retroactivity in criminal law). From a doctrinal point of view, however, it is of the utmost importance to know that the principle in question (in particular through *nullum crimen sine lege* and *nulla poena sine lege*) was not established until later, Roman law has therefore not been established on it from the outset, although it is identifiable in certain forms.

Within the stated, canon law acquires substance, which represents, as described above, the very basis for the development of the starting points of criminal law as we know it in a modern form (both through theoretical legal bases and through positive legal regulation). Although the available approaches to canon law to the basic principles of criminal law are not identifiable within the available starting points, it is necessary to proceed from the substance of the matter, and the fact that, as long as canon law is the ideological basis of criminal law, the given ideas precisely represent the basic ideas on which this branch of law is based, that is, its basic principles (or fundamentals, regardless of naming). Therefore, we believe that if it is not possible to speak of an explicit reference to Roman law and, above all, canon law for the basic principles of substantive criminal law, at least one can speak of an implicit but most important reference. In particular, canon law and Roman law have determined, in the course of development, criminal law and its form primarily through criminal institutes, of which the basic principles of substantive criminal law are recognizable and therefore extractable using generalization.

A certain partial conclusion, based on the second part of the present paper, is that, although Roman law and canon law form an indisputable basis for the existence of fundamental principles of substantive criminal law, they form the content basis, when we are able to recognize individual principles, identify individual functions and so on. On the other hand, a positive (legal) definition of such principles is a special process for which the reference to canon law and Roman law cannot be explicitly used. As we have said in the text itself, we believe that the question of the positive enshrinement of the fundamental principles of substantive criminal law should not only lie in how to do it, but whether it is necessary at all. It is necessary to realize that although the basic principles are recognizable in terms of content (also through individual institutes of criminal law, which is the basic reference of canon law), their positive anchoring could negatively affect them, especially at the application level. It is true that legislation should be sufficiently abstract to be used in indefinite cases of the same kind; if such a positive definition is too narrow, it may cause a problem for application practice. If, on the other hand, it is too broad, it will not reflect the real content of any principle. As an example, we can take the principle of subsidiarity of criminal repression, which is so materially extensive (and application-influenced by decision-making practice) that it is practically impossible to capture its content normatively and materially. It is possible to define the principles as certain rules of application, but provided that their doctrinal nature is not suppressed. Only in this way will the legacy of canon law and Roman law still be given.

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COMPETITION LAW AND ARTIFICIAL INTELLIGENCE – CHALLENGES AND OPPORTUNITIES

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Abstract. The dynamic development and expansion of artificial intelligence (AI), one of the most important technologies currently being developed in the world, which may herald the fourth technological revolution, brings not only numerous benefits, but also threats in many spheres of socio-economic life, including law. This breakthrough technology also creates a number of challenges and opportunities for the science and practice of competition law (or antitrust law). The aim of this study is to show the pro- and anticompetitive effects of AI implementation, as well as to identify and outline the key challenges and opportunities that these effects have on competition law. This paper is intended to serve as an introduction to the subject matter. It does not claim to examine it exhaustively, but rather to inspire its further, more extensive and in-depth analysis.

Keywords: algorithms, artificial intelligence, competition, competition law

“I think some of these algorithms,
they all have to go to law school before they are let out”
[Vestager 2017]

INTRODUCTION

The dynamic development and expansion of artificial intelligence (AI), one of the most important technologies currently being developed in the world, that may herald the fourth technological revolution, does not only bring numerous benefits, but also threats in many spheres of socio-economic life, including law [Skalfist, Mikelsten, and Teigens 2020; Schwab 2018]. This breakthrough technology also creates a number of challenges and opportunities for the science and practice of competition law (or antitrust law). It is certainly no longer *terra incognita* of this field of law, especially when it comes to research on antitrust threats associated with AI development. Nevertheless, the body of Polish scholarly literature and commentary addressing this subject still seems less than modest [Mleczko 2018, 63ff; Derdak 2018, 73ff]. Therefore, the author deemed it substantiated to show the pro- and anticompetitive effects

of AI implementation, and to identify and outline the key challenges and opportunities that these effects have on competition law. Due to the framework of the study, it is an introduction to the issues in question. This paper does not claim to examine it exhaustively, but rather to inspire further, more extensive and in-depth analysis.

1. WHAT IS AI FROM THE PERSPECTIVE OF LAW?

The very definition of AI proves quite a challenge in itself. Admittedly, it is a subject of numerous definitions formulated on the ground of various fields of science, yet it has not been given a single, universal and commonly accepted meaning (which is otherwise accepted at times) [Stone et al. 2016]. There is no normative definition of AI in the national and international legal order. Also, legal writings devoted to AI often (if not as a rule) do not define this concept at all, assuming its certain intuitive understanding or reaching for non-legal explanations of AI (usually of a technical or sociological character) [Zalewski 2020, 1ff]. There is no doubt that the AI concept is extremely capacious, heterogeneous and ambiguous and at the same time strongly dependent on the specific context in which it is examined and applied. What is more, because this concept refers to solutions based on dynamically developing technologies, its definition is at risk of being rapidly obsolete. Metaphorically speaking, defining AI can resemble chasing the horizon: when we have familiarised ourselves with a technological process that we do not understand, named AI, it stops being called AI and becomes just another clever computer program [Turner 2019, 8]. In this context, some commentators doubt or even rule out the possibility of creating a correct legal definition of AI [Schuett 2019; Rajpurohit and Seal, 87ff]. However, efforts to formulate it are already being taken due to political and regulatory considerations. As has already been raised, they have not yet enjoyed full success. This is also why for the purpose of this study it will be sufficient to adopt a simplified understanding of AI that appears in documents of the European Commission and of the Polish government.[1] In a nutshell, AI means a collection of technologies that combine data, algorithms and computing power or a specific combination of complex algorithms in a system capable of perceiving the environment and affecting it.[2]

[1] See *White Paper on Artificial intelligence - A European approach to excellence and trust, Brussels* (19.02.2020), COM(2020) 65 final, p. 2; *Polityka Rozwoju Sztucznej Inteligencji w Polsce na lata 2019–2027*, Warsaw 2019, p. 81.

[2] It is also worth noting that in 2018 a group of independent high-level experts appointed by the European Commission recommended the following (extensive and complex) (technical) definition of AI: "Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured

2. PROCOMPETITIVE EFFECTS OF IMPLEMENTING AI

It might seem that from the perspective of competition law benefits for market competition that the development of AI may bring do not deserve much attention. It may somewhat be evidenced by the fact that theory and practice of this law addresses, understandably, negative consequences of AI implementation rather than positive ones. However, these benefits cannot be completely ignored, especially in the context of the so-called economization of the competition law that dominates in today's antitrust policy (also in the UE and Poland), which is often manifested by the concept of the so-called more economic approach in the process of creation and application of this law [Piszcz 2009; Nizioł 2019, 127ff; Witt 2016; Drexl, Kerber, and Podszun 2011]. In line with this concept, when evaluating market behaviours one should mainly focus on their effects but not leaving out the so-called social and economic efficiency gains.

It turns out that AI implementation implies (directly or indirectly) an array of such benefits, both on the supply side and the demand side of the market[3] [Gürkaynak 2019, 29ff]. The probably most significant (and the most obvious) value of AI is the fact that it allows profound reduction of costs borne by suppliers and buyers (including consumers).

On the supply side, reduction of production and transaction costs that is possible by improving the allocation of resources translates into lower prices for consumers. Thanks to deep learning technologies, companies can optimise their commercial strategies instantaneously. By using advanced algorithms, they can analyse large quantities of data faster and more efficiently, which allows more suitable responses to buyers' needs. Artificial intelligence lowers entry barriers to markets, making them more transparent, which may increase the number of active participants and thus intensify competition. In turn, price algorithms allow responding to changes in supply conditions and demand fluctuations almost instantaneously, which leads to optimisation of prices, which are probably the most important parameter of market competition. Other algorithms offer an array of qualitative benefits, helping in numerous ways to improve market offers (e.g. search engines or price comparison websites may

or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions." *A Definition of AI: Main Capabilities and Disciplines,* High-Level Expert Group on Artificial Intelligence, https://digital-strategy.ec.europa.eu/en/library/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines [accessed: 08.04.2021].

[3] *Algorithms and Collusion: Competition Policy in the Digital Age*, www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm [accessed: 08.05.2021], p. 14ff.

provide personalized purchase recommendations). Procompetitive implications of implementing AI entail benefits in terms of static and dynamic efficiency alike. Artificial intelligence, making knowledge more available, facilitating market trend predictions and also allowing estimation of risk of research and development projects, clearly accelerates the placing of new products on the market and thus inspires innovations, including breakthroughs [Cockburn, Henderson, and Stern 2018]. Undertakings from the high-tech sector are the most inclined to compete intensively in creating their own IT systems and in offering new and increasingly advanced technologies to their recipients.

Procompetitive benefits on the demand side generated by AI include in particular optimisation of consumer decisions by ensuring more effective (easier, quicker, cheaper and fuller) access to commercial information and by protecting consumers from manipulative marketing techniques and price discrimination. By allowing consumers to compare a greater number of offers, AI algorithms (e.g. in the form of price comparison websites) increase transparency of the market environment, reduce information asymmetry and improve the flow of commercial information, which in consequence may encourage people to change suppliers and thus intensify competitive pressure on the side of the latter. Autonomous operations of algorithms of a new generation may also level consumers' opportunities. Those who are not able to use the potential of tools for on-line shopping may use the so-called digital personal assistants or digital butlers, who can identify users' purchase needs on their own, choose optimal offers and execute transactions [Budzinski, Noskova, and Zhang 2019]. Another procompetitive application of AI involves creation of consumer shopping platforms which enhance purchasing power and solve some problems related to collective actions on the demand side [Rha and Widdows 2002, 107ff].

The benefits of AI implementation presented above point to its significant procompetitive potential. By contributing to greater attractiveness of goods and services offered on the market (in terms of availability, prices, quality or innovativeness), AI increases consumer welfare, which is commonly considered one of the main objectives of the competition law (if not its ultimate goal).[4]

3. ANTICOMPETITIVE EFFECTS OF IMPLEMENTING AI

As has already been mentioned, the AI phenomenon has an ambivalent effect on market competition – both positive and negative. This technology may be used to the detriment of competition practically in all market conduct,

[4] On consumer welfare as the goal of competition law, see Hovenkamp 2020; Idem 2019; Reyna 2019; Daskalova 2015; Orbach 2011; Miąsik 2008; Cseres 2007.

qualified under competition law as practices limiting competition or as concentrations (mergers and acquisitions). There is no doubt that the majority of concerns here relate to the use of AI as a tool to effect multilateral (collective) competition-restricting practices that take the form of anticompetitive agreements and to AI's contribution to non-agreed market coordination, most often referred to as tacit collusion[5]. To illustrate this, we can point to five different scenarios of such threats, with a reservation that this categorisation is not definitive and that it is simplified (these scenarios are not disjoint and their delimitation in practice may often be difficult and ambiguous)[6] [Ezrachi and Stucke 2017, 1775ff; Marx, Ritz, and Weller 2019, 3ff].

In the *Messenger* scenario, AI may serve as an ordinary (though technically sophisticated) tool to assist in incorporating (implementing, monitoring, policing or concealing) a "classic" anticompetitive agreement, which had been executed (before) in a "traditional" way as a result of human interaction (e.g. cartel or vertical agreement) [Ezrachi and Stucke 2017, 1784ff].

Hub and Spoke, the second scenario, is one in which several competitors enter into vertical agreements with an AI software developer who acts as the hub which helps orchestrate anticompetitive horizontal agreements between counter parties (spokes) [ibid.]. This agreement is not an effect of direct contact between competitors but a consequence of actions of the algorithm supplied and its developer.

In the third scenario, *Predictable Agent*, no agreement is made at all between business operators, but each of them independently applies their own AI algorithm so that it leads to non-agreed coordination of their market behaviours (tacit collusion) [Ezrachi and Stucke 2017, 1789ff; Mehra 2016, 1323ff]. The source of the problem lies in AI algorithms' ability to respond in real time to the changing market situation (e.g. prices of competitive products) and to monitor the market in a much broader scope than possible with conventional tools of market analysis. In effect, the market environment may become so transparent that competitors find it much easier to reach a price balance at a supracompetitive level (higher than the market level). We would then be

[5] According to a frequently quoted definition of tacit collusion formulated by the US Supreme Court in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993), p. 227, this term describes the process allowing firms operating in a concentrated market to share monopoly power. By recognizing their shared economic interests and their interdependence with respect to price and output decisions, such undertakings may set their prices at a profit-maximizing, supracompetitive level. Under tacit collusion (contrary to its name which is an oxymoron), its participants do not contact one another in any way to coordinate their market behaviour, thereby it cannot be classified as an agreement in the meaning of competition law (this is why alternative names for this phenomenon are more adequate, though less popular, such as coordinated effects or conscious parallelism). More in Wieczorek 2011, 25ff; Rees 1993, 27ff.

[6] *Algorithms and Competition*, https://www.autoritedelaconcurrence.fr/sites/default/files/algorithms-and-competition.pdf [accessed: 08.05.2021], p. 26ff.

dealing with something that has been suggestively described in the literature as "tacit collusion on steroids" [Ezrachi and Stucke 2016, 56n.].

The next scenario, *Invisible Hand*, assumes that the AI software developer is able to independently manipulate in an anticompetitive fashion the market on which the users of its product operate (without them knowing about it) [Marx, Ritz, and Weller 2019, 4ff]. By using the information of its customers and by controlling their pricing, such developer can (like an invisible hand) in his own particular interest (hoping for benefits of increased sales) raise the prices of all competitors using its algorithm, while they may not be (fully) aware that they apply artificially high rates.

The last scenario, *Digital Eye*, also points to a threat in the form of tacit collusion where it is no longer a creation of a specific human project, but where it is rather created autonomously (without human interference) by highly advanced self-learning AI [Ezrachi and Stucke 2017, 1795ff].

Apart from the last scenario, which has the most speculative nature and which seems to still remain in the sphere of legal science fiction [Schwalbe 2018, 568ff; Schrepel 2017], the antitrust practice already provides (though still relatively few) examples of realisation of the threats pointed to above (naturally, these are usually cases falling under the first two scenarios).[7]

In the context of unilateral anticompetitive conduct (under competition law categorised as abuse of dominant position or monopolisation), AI may be used to effect both exploitative and exclusive practices. In particular, as is commonly believed, smart algorithms create abundant opportunities to apply discriminatory practices [Faella and Romano 2019, 20]. They allow undertakings to obtain and precisely process information about counter parties' and consumers' preferences and willingness to pay a specific price to carry out extremely sophisticated forms of price discrimination (in real time). AI-based price discrimination may be coming closer to perfect discrimination in the form of offering (hyper-) personalized prices [Faella and Romano 2019, 20; Botta and Wiedemann 2020, 381ff; Woodcock 2019, 311ff]. Moreover, by helping firms to estimate competitors' costs structure and to assess the probability that the practice will be successful and profitable, AI might facilitate exclusionary practices such as margin squeeze, predatory pricing or blocking (restricting) access to data necessary for algorithms' effective operation [Faella and Romano 2019, 20].

Compared to the threats outlined above that the AI poses in the area of practices (especially collective ones) that restrain competition, this technology rises much less doubt in the context of concentrations. However, even here strategic use of AI technologies for anticompetitive purposes is possible.

[7] A review of these cases is presented in the following studies: Mleczko 2018, 63ff; Derdak 2018, 73ff; Gürkaynak 2019, 29ff; Ezrachi and Stucke 2017, 1775ff; Marx, Ritz, and Weller 2019. See also*: Algorithms and Collusion: Competition Policy in the Digital Age*, p. 14ff.

In particular, extremely effective and rapid market adjustment by AI tools may increase the risk that concentrations lead to the so-called coordinated effects, even in less concentrated markets [Faella and Romano 2019, 20; McSweeny and O'Dea 2017, 75ff].

4. CHALLENGES FOR COMPETITION LAW IN THE FACE OF AI

Radical changes in the functioning of many markets, caused by AI development and proliferation, and especially the related threats pose a number of challenges for competition law. These challenges differ significantly depending on whether AI amplifies only conduct which is already covered under the current legal framework or whether it creates, to some extent, new risks related to behaviours not covered by the current antitrust rules.[8] In the first case, the problem does not seem exceptionally complicated, because the question of using AI ought to be assessed together with the main infringement that it helps enforce. While detecting the existence of an infringement and proving it might still be complex because of the presence of AI (especially in the case of deep learning algorithms), antitrust authorities can nevertheless rely on existing rules, e.g. referring to explicit collusions, which offer a framework to assess how AI is used on its own or as practices ancillary to the main infringement. As such, the challenges for authorities are left to understanding how the technology works and how AI can facilitate or support the main antitrust infringement.

The problem becomes even more complex in the second case when a given conduct that employs AI is not covered by standard antitrust rules. Such two legal loopholes (at least potential) seem to engage competition law experts in particular.

The first is related to the AI's expanding (especially by self-learning algorithms) the grey area between practices qualified as unlawful explicit collusions and practices that constitute tacit collusion, which despite being socially undesirable (since they produce anticompetitive effects, such as higher prices, similar to e.g. cartels), are not in fact prohibited under competition law.[9] Therefore, AI can amplify the so-called oligopoly problem by expanding its reach to cover non-oligopolistic markets (normally resistant to tacit collusion)[10] [Ittoo and Petit 2017].[11] To put it short, this problem boils down to the fact that

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[8] *Algorithms and Collusion: Competition Policy in the Digital Age*, p. 133ff.

[9] Ibid., p. 25.

[10] Ibid.

[11] The "oligopoly problem" (term attributed to R. Posner), otherwise immensely disputable and bothering lawyers for decades (still unresolved), reflects the concern that specific characteristics of oligopolistic markets (including far-reaching interdependence of oligopolists) may result in tacit collusion [Posner 1969, 1562ff; Petit 2013, 259ff].

AI enables competition restriction by means of lawful coordination instead of unlawful collusion. It does not seem that a remedy for this problem may come in the form of traditional antitrust instruments which are sometimes employed in attempts to address classic oligopoly problem, e.g. *ex ante* control of concentrations (since AI facilitates tacit collusion also in less concentrated markets) or *ex post* enforcement of the prohibition of abuse of collective market dominance (which is exceptionally difficult to prove). A remedy for this problem may be sought in considered, and sometimes even postulated, revision of the approach to the term collusion under competition law (i.e. expanding the scope of its normative definition or its interpretation). Even though this term is commonly understood in a broad angle (to ensure efficiency of prohibition of explicit collusion), it is still not to the degree that allows it to accommodate individual market behaviour (*ergo* tacit collusion). For example, in the Polish and EU competition law, execution of a typical agreement requires the "meeting of minds" or the "concurrence of wills" of two or more parties.[12] In turn, collusion in the form of "concerted practices" is admittedly highly capacious and may accommodate certain applications of AI, yet it still does not allow capturing all situations leading to anticompetitive effects when using it.[13]

The second loophole, which is a particular challenge for competition law in the face of development and expansion of AI, entails the so-called anthropocentric nature of this law, which uses traditionally subjective concepts (e.g. the concept of guilt) to attribute liability for its violation [Blockx 2017; Mleczko 2018, 70]. While in the case of (currently dominant) less advanced AI tools, operating on the basis of human-made instructions, there is usually no doubt about liability of the latter (undertakings) for violations of antitrust rules by means of AI (treated as a mere tool), the answer to the question of who is to be responsible and on what basis for AI's autonomous decisions and actions that violate antitrust rules may be much more difficult given the development of highly advanced and independent AI systems whose ties with

[12] See judgment of the Court of First Instance of 26 October 2000, Bayer AG v Commission of the European Communities, ECLI:EU:T:2000:242 ("the concept of an agreement […] centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention") [Górska 2012, 289ff].

[13] See e.g. judgment of the Polish Supreme Court of 9 August 2006, ref. no. III SK 6/06, OSNP 2008/1–2/25 ("They are not a manifestation of explicit collusion, especially one that has the form of concerted behaviour under Article 5(1)(1) of the Consumer and Competition Protection Law, the so-called parallel behaviours of undertakings who intentionally adjust to the market situation emerged. Conscious adjustment to changing market requirements, inter alia in terms of competitors' price offers, as a regular market response, is not prohibited. The difference between parallel lawful behaviour and unlawful collusion that restricts competition lies in the fact that in the first case we are only dealing with a rationally justified imitation of behaviours of other competitors, and in the second – with an agreement executed between competitors (in any way and form)."

human operators decrease (or even disappear). As it seems, the answer to this question (at least partially) will require the adjustment of existing concepts of antitrust liability of undertakings to AI attributes or the development of new, *sui generis* principles of this liability. In the context of civil law liability for damage caused by violation of the competition law, it is worth noting that there have already been legislative initiatives in the EU which aimed to streamline principles of civil law liability for AI actions in various legal systems of Member States, which postulated i.a. introduction of strict liability for an operator of a high-risk AI system together with the obligation to insure such liability.[14]

It is also worth mentioning new challenges for international cooperation in antitrust matters, implicated by anticompetitive AI threats with a global scope. As it is pointed out, guidelines adopted under the auspices of OECD concerning effective action against cartels do not correspond to these challenges.[15] Therefore, it is postulated that these recommendations should be modified by supplementing them with a uniform definition of agreement (as the basis of the concept of a cartel), with provisions that strengthen international cooperation not only in terms of penalising cartel participants, but also their detection, and with provisions that specify entities and practices that outline the personal and material scope of liability for "algorithmic" cartels [Noethlich 2019, 923ff].

5. AI IN THE SERVICE OF ANTITRUST ENFORCEMENT

Relations between competition law and AI have a synergistic character, which is an emanation of not only procompetitive market effects of AI implementation (previously described), but also new possibilities that this technology offers to antitrust authorities in their mission to protect and support the development of competition. In particular, they may use AI as a sophisticated tool to detect violations of competition law and to control compliance with it. Implementation of the so-called ECN+ Directive provides a convenient opportunity for significant strengthening of enforcement powers of antitrust authorities of EU Member States, thanks to the application of AI-based analytic tools.[16]

[14] See European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

[15] Recommendation of the Council concerning Effective Action Against Hard Core Cartels, 25 March 1998, C(98)35/Final.

[16] See e.g. Recital 30 of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L 11,

As envisaged, application of AI algorithms e.g. in the fight against bid rigging or more generally – against cartel practices (generally perceived as being the most serious infringements of the competition rules[17]) will open unprecedented possibilities of engaging technologies in the service of competition law enforcement[18] [Huber and Imhof 2019, 277ff; von Bonin and Malhi 2020, 468ff; Patakyová 2019]. Already now, antitrust authorities in many jurisdictions inform about the application of such tools to detect bid rigging, not without success. For example, many bid rigging situations in South Korea (who is one of the pioneers in digital screening in public tenders) as well as in Brazil and Russia were detected thanks to this type of advanced control of bid documentation.[19] The Polish Office of Competition and Consumer Protection is also carrying out works on the implementation of AI-based system for i.a. more effective detection of bid rigging.[20]

AI tools may also be used to monitor and assess market trends and developments, with a view to identifying possible anomalies, which might be linked to anticompetitive practices. Finally, the use of AI could also simplify and speed up the review process in merger cases or the conduct of antitrust proceedings, and could enable enforcers to monitor the correct implementation of remedies and commitments by firms more effectively and at lower costs [Faella and Romano 2019, 21].

The use of AI in cases of private enforcement of competition law, especially to obtain and assess evidence, deserves a separate mention. For example, AI tools may be helpful in the finding of a causal nexus between a given market conduct and the damage allegedly suffered, and also could help to quantify damages more precisely [ibid.].

14.1.2019, p. 3–33 ("The investigative powers of national administrative competition authorities should be adequate to meet the enforcement challenges of the digital environment").

[17] See e.g. judgment of the US Supreme Court in Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004), in which judge Antonin Scalia described cartels with a telling phrase "the supreme evil of the antitrust").

[18] *Algorithms and Collusion: Competition Policy in the Digital Age*, p. 14.

[19] Ibid.; *Ex officio cartel investigations and the use of screens to detect cartels*, https://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf [accessed: 08.05.2021]; *Latin American and Caribbean Competition Forum – Session I: Digital Evidence Gathering in Cartel Investigations – Contribution from UNCTAD*, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2020)4&docLanguage=En [accessed: 08.05.2021].

[20] See *Chróstny: UOKiK chce inwestować w AI, by wykrywać m.in. zmowy przetargowe*, https://www.wnp.pl/finanse/chrostny-uokik-chce-inwestowac-w-ai-by-wykrywac-m-in-zmowy-przetargowe,416400.html [accessed: 25.04.2021]. Incidentally, as early as in 2014, the President of the Office announced the development of their own screening programme directed at detection of bid rigging in public tenders, see *Polityka konkurencji na lata 2014–2018*, UOKiK, Warsaw 2014, p. 31.

CONCLUSIONS

As Melvin Kranzberg's first law says: "Technology is neither good nor bad; nor is it neutral" [Kranzberg 1986, 547]. In the light of the findings made in this paper, there is no doubt that this maxim also applies to AI. On the one hand, this breakthrough technology opens extremely promising perspectives for undertakings and consumers, on the other it gives rise to threats the consequences of which should involve increased responsibility on the side of AI developers and operators.

As it has been demonstrated, benefits and threats implicated by AI do not bypass one of the main pillars of social market economy – market competition, which translates into opportunities and threats for competition law that safeguards it. How to tackle these opportunities and challenges is still an open question. Due to a relatively early stage of research on AI impact on market competition, positions presented in this matter are, naturally, preliminary. However, one can undoubtedly see quite a bit of uncertainty and scepticism in them, or even concerns whether competition law in its current form is able to deal with AI-triggered threats and challenges.

Thus, postulates to undertake specific regulatory remedial actions (calling for a revision of competition law) meet with appeals for caution and with a warning not to follow the siren's call that asks for more regulatory interventionism each time there is a new technological evolution, which may turn out premature and in consequence counterproductive (sparking e.g. the chilling effect on competition, innovation and investment) [Colombo 2018, 22; Gal and Schrepel 2020, 3].

Artificial intelligence's ambivalent impact on competition puts decision-makers responsible for its protection before a truly Shakespearean dilemma: to regulate or not to regulate? So far, the wait-and-see strategy is the preferred option, though recently e.g. the European Commission seems to be more inclined to a position that opts for changes in competition law dictated by AI development [Colangelo 2021, 25].

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CONCORDANCE OF GENERAL CLAUSES IN TAX LAW

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Abstract. Pursuant to their constitutional model, general clauses protect, in the most general terms, the interest: general, universal or the interest or good of an individual. Unfortunately, this clear and evident categorisation of general clauses is absent in the tax law regulations. The aim of this article is to present an exhaustive catalogue of such indeterminate expressions, encoded in the specific provisions of the general and particular tax law. The study also aims to demonstrate the problems related to the interpretation of such expressions in the process of applying the law. It should be stressed that the diversity of tax law general clauses results in problems with their unambiguous interpretation. A correct interpretation of the scope of meaning of the given general clause requires advanced knowledge on the part of the interpreter, since in tax law, the same-sounding clauses, which operate in different legal acts, refer to distinct extra-legal domains. For these reasons the interpretation of such indeterminate expressions should never be limited only to a superficial, semantic (dictionary-level) explanation of the meaning of particular words.

Keywords: general clause, major taxpayer's interest, public interest, tax

1. PRELIMINARY REMARKS

Current tax regulations create numerous interpretation problems to all entities interpreting them. The reasons for that are not only complex constructions and legal institutions, but first of all less understandable wording of tax legislation In tax literature and case-law the rule of linguistic interpretation priority tends to be dominant. It seems that the gradual degradation of tax legislation jargon is determined by three tendencies: law inflation, dominance of law in social and economic life as well as commercialisation of law.

The dogma of tax law did not provide for separate interpretation directives. This means that we should apply linguistic and non-linguistic interpretation directives: systemic, functional and purposive. In tax literature and case-law the rule of linguistic interpretation priority tends to be dominant. However, the opinions for its restriction in favour of non-linguistic interpretation become more visible, especially in relation to the purposive interpretation with an emphasis put on economic interpretation. These changes stem from the increased

practical importance of the Court of Justice resolutions which consider the results of linguistic interpretation of very limited use due to the linguistic diversity of tax law among EU member states. This trend of diminishing the role of linguistic interpretation is especially visible in relation to general clause interpretation which requires the application of non-legal criteria.[1] As the interpretation of indeterminate phrases tends to be creative (constructive) and dynamic, it is crucial to specify the entities authorised to tax law application and operational interpretation. The specificity of tax law makes natural persons such as taxpayers and their representatives included in the list of entities [Mastalski 2008, 41].

Undoubtedly, the most difficult is the interpretation of general clauses referring tax authorities and courts to different types of axiological, political and economic values, functioning outside the law. The interpretation of non-legal criteria increases temptations to consult individual, thus subjective, opinions of moral, social, political and economic character. As stated in the literature, general clauses are accompanied by relative perception of values.[2] This feature is of particular importance when the interpreting tax authorities are engaged in protection of public finance and collection of taxes. Due to the above, it should be emphasised that in the case of general clauses, which are the natural means of transfer of non-legal values to tax law regulations, both the constitutional principle of two-instance proceeding and the judicial review of administrative decisions are of particular importance. Thus, the final authorities setting boundaries to the linguistic meaning of general phrases should be the courts.

General clauses, irrespective of the type of legislation in which they are laid down, whether in public or private law, are considered to be legal categories whose main purpose is to protect a specific good, interest or value identified in the legislation [Stelmachowski 1969, 290–91]. From a legal-theoretical point of view, these terms belong to the area of indeterminate evaluative expressions. The most important distinguishing feature of general clauses from other such forms is that in the course of their interpretation, the entity interpreting them should take into account the assessments and norms belonging to an axiological, economic, social and sometimes even the political system of a given legal regime.[3]

[1] See para. 155 of the Regulation of the Prime Minister of Poland of 20 June 2002 on "Principles of Legislative Methodology," Journal of Laws of 2016, item 283 as amended [hereinafter: Principles].

[2] See Grzybowski 1965, 38; Wójcik 1981, 91; Safjan 1990, 55; Leszczyński 1995, 296–98; Hanusz 2016, 5–6; Borszowski 2017, 71–72.

[3] The literature of the subject shows novel views on the nature of general clauses as legal categories referring to intra-system regulations, see Wilejczyk 2019, 3–15.

A condition on the effectiveness of a general clause is that it must be properly drafted in terms of language. If the clause is poorly worded, for instance, when it contains too many indeterminate terms, it is impossible to interpret it correctly. This means that the clause does not fulfil the function entrusted to it, i.e., it does not protect the good or interest for which it was created. Thus, a clause of that kind threatens the security and legal certainty of the regime to which it belongs.

As pointed out already, the general clauses follow the constitution to protect in general measures the public interest, or the interest or good of an individual. Unfortunately, the provisions of Poland's tax law lack such clear and evident classification of clauses. First of all, it should be stressed that for many reasons this legal category has been extremely rare in tax law since the inter-war Poland [Münnich 2019, 165–84]. The legislator's interest in these technical-legislative legal instruments has begun to grow over the last decade and the tendency seems to be irreversible now.

The main objective of the article is to classify indeterminate evaluation phrases used in tax law regulations, to ascertain the reasons for their use in the tax standards as well as to analyse the legal effects these types of legal categories may produce during tax law application. By way of introduction, it should be explained that the essential distinctive feature of indeterminate evaluation phrases, such as indeterminate comparative phrases as well as general clauses, is their specific linguistic construction. Comparative phrases or general clauses usually consist of at least (or more) words both of which are vague. This feature of evaluation phrases is often used by legislators while constructing economic and business factual circumstances included in hypothesis of tax norms.

2. GENERAL CLAUSES PROTECTING THE PUBLIC INTEREST AND IMPORTANT TAXPAYERS' INTERESTS

General clauses protecting the public interest and the important interests of the taxpayer are traditional and typical of public law, a branch of which is tax law. The general clauses regulated in tax law to protect the public interest include the following: a) protecting the interests of the State Treasury;[4] b) protecting an important state interest;[5] c) protecting the public interest/a major

[4] See Article 1(2) of the Act of 16 November 2016 on the National Revenue Administration, Journal of Laws of 2020, item 505 as amended [hereinafter: the National Revenue Administration Act or the NRA].

[5] See Article 119(1)(1) of the Act of 6 December 2008 on Excise Duty, Journal of Laws of 2020, item 722 as amended [hereinafter: the Excise Act]. Pursuant to these regulations, Minister of Finance may, through a regulation, exempt certain excise goods from the obligation to mark them with excise tax marks.

public interest (under the Tax Code)[6] and the major public interest (under the Excise Act – Article 52(1)(2)); the public interest (under the Gambling Law – Article 33(4)).

These clauses have a similar linguistic formulation, and their main focus in on protecting the interest or major interest of the Treasury, the State or simply the public. Yet, any effort at the interpretation of these clauses is thwarted – despite the obvious semantic similarities between them – since when approached individually, these general clauses have divergent scopes of meaning under specific tax regulations, as their semantic deconstruction requires reference to extra-legal norms and values.

A major state interest or the public interest as coded in the Gambling Law tax is always interpreted, due to the nature of these taxes, in terms of the economic or fiscal interest of the state. These tax regulations do not contain any provisions obliging the interpreting entities to allow for the equivalent interests of the taxpayer.

This a line of interpretation of public interest clauses is absolutely unacceptable when interpreting the provisions of the Tax Code. As a rule, the public interest clause in this law appears in the same articles in which an important taxpayer's interest or an important party's interest is regulated. Firstly, interpreters – tax authorities or courts – are obliged to treat both interests protected by the general clauses on a par. Secondly, in the course of interpretation, the entities must objectively balance both interests, relying on the extra-legal values to which the clauses refer.

Consequently, a general clause formulated linguistically in the same or similar way may be interpreted distinctly at the stage of application. The proper scope of meaning of the clause, in line with the rationale of the legislator, is to be determined by the interpreter. Thus, a clause will serve as an instrument of safeguarding security and certainty in tax law, provided that it is correctly interpreted in relation to the relevant factual and legal situation.

In tax law, the traditional general clauses discussed above are increasingly being juxtaposed with clauses of administrative roots pertinent to the protection of state interest and public order. This results in the occurrence of legal acts containing double or triple general clauses, which, for the sake of their semantic complexity, e.g. use of conjunctions, demand interpretations dependent on a given factual situation. These include clauses protecting: 1) a major state interest relating to public security, state defence, state fuel security or environmental protection;[7] 2) public security, a major economic or financial

[6] See Article 20, 22(1), 48(1), 67a, 160, 169(3)(1), 179(1), 208(2), 234, 240(2), 253(1), 253a(1), 270, 299b(2) of the Act of 29 August 1997, the Tax Code, Journal of Laws of 2020, item 1325 as amended [hereinafter: the Tax Code].

[7] These clauses are prerequisites for the Minister of Finance to grant exemptions from excise duty, see Article 39(1)(1) of the Excise Act.

interest of the Republic of Poland or the European Union (Article 47(1)(1) of the NRA); 3) state security, public order or the economic interests of the state.[8]

One of the unique general clauses of this type is a clause regulated in only one legal act: public order of the Republic of Poland.[9]

As mentioned above, general clauses such as those referring to state security and public order are rooted in administrative law and, until recently, were not recognized within tax law. It should be emphasized that the legislator is increasingly using them in two contexts. The first one concerns the state systemic norms regulating the organisation and scope of activities of the bodies under the National Revenue Administration (KAS). This case uses protective clauses in order to build and emphasise the importance of these bodies in the context of state functioning. A similar function is performed by the clauses protecting national security and order contained in the Gambling Law or Excise Act. In addition to the public or economic interest of the state, these are additional premises that allow the tax authorities to exercise their power towards taxpayers, for instance, to grant excise duty exemptions or to refuse the granting of a licence to conduct business activity in the field of organised gambling and betting.[10]

Conclusion: these types of general clauses are very rarely used, and their main purpose is to ensure the safety and certainty of tax legislation.

Clauses protecting the interests of the individual have a completely different role as instruments of safeguarding security and certainty in tax law. It should be emphasised at the outset that there are far fewer such clauses in tax law, and the vast majority of them have been standardised in general tax law provisions.

Clauses safeguarding a major interest of the individual, as laid down in the Tax Code, include: 1) major taxpayer's interest – the supreme clause (Article 22(1); 22(2)(1); 48(1); 67a; 77a; 253(1) of the Tax Code), 2) major party's interest (Article 20; 169(3)(1); 253a(1) of the Tax Code), 3) major interest of the entity concerned (Article 160(1) of the Tax Code), 4) major interest of the obliged entity (Article 270(1) of the Tax Code).

A general clause protecting individuals' interests is also laid down in the Gambling Law, and concerns a major interest of the gambler (Article 23d of the Gambling Law) or participants in gambling (Article 21(3) of the Gambling

[8] See Article 11(1)(1) and (2) and Article 28(3)(3)(3) of the Gambling Law of 19 November 2009, Journal of Laws of 2019, item 847 as amended [hereinafter: the Gambling Law].

[9] See Article 13(5) of the Act of 9 March 2017 on exchange of tax information with other countries, Journal of Laws of 2020, item 343 as amended.

[10] The Constitutional Tribunal stated that the provisions of the Gambling Act are consistent with the Constitution and do not restrict economic freedom, Judgment of the Constitutional Tribunal of 11 March 2015, ref. no. P/14, Journal of Laws item 369.

Law)[11] or betting (Article 22(4) of the Gambling Law), or the financial interest of participants in gambling (Article 63(1) and 67 of the Gambling Law).

Conclusions: the function of clauses protecting the interests of a particular entity is clear and legible. Undeniably, the meaning of an individual clause depends on the specific factual situation. In tax law, such a clause may concern protecting personal, family or social values. Nonetheless, the fundamental aim of the aforementioned clauses under the Gambling Law is to protect the player and to reduce the risk of their becoming addicted to gambling, which is treated as a type of disorder with a detrimental impact on a particular addict, his or her financial situation and sometimes on his or her family [Wilk 2010, 7–8].

In addition to these two types of general "traditional" clauses, there are new clauses in tax legislation which have an impact on national tax law. They are European tax law clauses. First and foremost, these are general anti-abuse clauses, which have been implemented into national law on the basis of the relevant EU directives: 1) large anti-evasion clause – Tax Code (Articles 119a–119f of the GATA Directive); 2) small anti-evasion clause (CIT Act).[12]

Thus, the two Polish statutory acts represent the EU legal tax provisions in a literal manner.

Conclusions: The premise behind the anti-abuse clauses is to protect the state budget and, at the same time, the reliable taxpayers from fraudulent taxpayers and contractors who use counterfeit accountancy constructions to evade tax [Brzeziński 2013, 168; Mastalski 2016, 158]. An analysis of the Polish solutions, either in their original or amended version, does not confirm such a direction in interpreting the provisions of the Tax Code.

The Polish language versions of the anti-abuse clauses, and especially in the case of the so-called large anti-evasion clause are extremely extensive and constantly amended provisions of the tax law. To make matters worse, because of their unclear and abundant use of economic and legally indeterminate phrases, the content of the provisions is essentially a dead letter. At the same

[11] Pursuant to this provision, the Minister of Finance shall determine, through a regulation, the procedure for lodging claims by participants. This clause also appears in Article 23(4) of the Law. The Minister of Finance may issue a regulation to specify detailed requirements for the operation of a gaming device enabling the accumulation of winnings referred to in section 1c, taking into account, in particular, a need to protect the interests of game participants, and to ensure the settlement of tax duties towards the state budget.

[12] See Article 22c of the Corporate Income Tax Act of 15 February 1992, Journal of Laws of 2020, item 1406 as amended [hereinafter: the CIT Act]. This article is effective as of 1 January 2016. This provision was introduced in order to implement Articles 4 and 5 of Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJEU L 345). The aim of the regulation is to prevent the risk of double non-taxation of profits from dividends in the legal-economic sense.

time, it must be observed that some clauses have been successfully defined, such as tax benefit.

Controlled foreign corporations/companies (CFC) regulations are generally controversial, as they affect the freedom of enterprise and the free movement of capital between states [Karwat 2016, 12–20]. This is particularly the case when CFC regulations are designed in such a way that they can be regarded as restrictions on these freedoms within the framework of the European Union, which includes both territories that practically do not collect income tax (e.g. Gibraltar) and those that apply extremely attractive principles of income taxation (e.g. Cyprus, Malta and Luxembourg). Worth noting in this context is the judgment of the European Court of Justice of 12 September 2006 in Cadbury Schweppes case (C–196/04). This judgment implied that many European countries may have exceeded the limits of tax measures that can be taken against the taxpayer, while retaining the principle of free movement of capital and freedom of economic activity.[13]

Therefore, the anti-evasion clauses fail to fulfil the function of an instrument of safeguarding security and certainty in tax law, despite the timespan of their being in force.

In addition to anti-abuse clauses, a specific type of general clause introduced into national legal system, and operating primarily in the VAT framework, is the clause of the good faith of the taxpayer. Its specificity lies in the fact that it is not explicitly expressed either in the VAT Directive or in the provisions of Poland's VAT Act, as is the case in the Civil Code.[14] As a matter of fact, the clause has been introduced into the legal reality by the CJEU case-law.

In contrast, transposed by the CJEU into the VAT framework, the civil law clause of *bona fides* reaches beyond the traditional understanding of good faith, as EU case law indicates. In the VAT framework, a taxpayer meets the requirement of good faith not only on his or her being not actively involved in the fraud, but also on condition that he or she does not even know and cannot know about this involvement. In order to determine whether or not the taxpayer was guided by good or bad faith, the CJEU has ordered so-called abuse tests.

Taxpayers are therefore required not only to be honest but, if necessary, to take precautions to ensure that transactions are legal. Indeed, if a transaction is fraudulent, the exercise of the right for tax reduction is conditional on the taxpayer's ensuring due diligence in checking all information relating to the transaction in order to ensure that he or she is not involved in the fraud. The

[13] See https://kancelaria-skarbiec.pl/publikacje/spolki-kontrolowane.html [accessed: 29.10.2021].

[14] See Article 7 of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2020, item 1740 as amended [hereinafter: the Civil Code].

requirement of good faith is not a requirement as to the result, but the extent of the action taken by the taxable person in the course of the transaction.[15]

The taxpayer's good faith clause appeared for a while among the general principles to be included in the draft Tax Code[16] and is also included in the current edition of the Tax Code, in a new Chapter 6a: Additional tax liability, in Section III of the Tax Code (Article 58a(3) and (4) of the Tax Code).

The reasonableness clause is also an equity clause and represents, in the light of dogmatic and theoretical research in civil law, an alternative to *bona fides*. However, it derives from a completely different tradition of making and applying law: the Anglo-Saxon model of case law and the Dutch (post-Protestant) legal culture, rejecting the Roman clause as archaic.

The general clause of reasonableness makes it possible to determine whether or not the taxpayer has acted reasonably on the basis of the reasonable person test. In simple terms, the test is to assess whether or not a person in a particular situation has acted as a reasonable person should. The basic standard of assessment, when interpreting statements of intent and other behaviour, is the model of a reasonable and at the same time honest person whose trust or expectations should be protected.

In view of the interpretations of the equitable clauses that coincide with those of the general anti-abuse clauses, it can be said, in principle, that their purpose is not predominantly to safeguard particular types of interest: public or individual, but that, because of their multi-faceted interpretation, clauses of this type can be instruments that guarantee security and certainty of tax law.

In tax law, unfortunately, there is another method of introducing general clauses into the legal reality, namely the judicial application of tax law by administrative courts. The court, functioning as an interpreter of the law, cannot create any new normative constructions not contained in legal regulations, let alone general clauses, as these are technical and legislative tools reserved exclusively for the legislator (para. 155 of the Principles). The court, a tax authority or a taxpayer can only infer conclusions within the scope of meaning of a specific general clause contained in tax legislation, taking into account the relevant extra-legal domain behind a given assessment.

An example of such an inappropriate enforcement of a general clause into legal circulation by rulings of administrative courts is the clause of "tax deductible costs." The provisions that standardise this notion contain a typical substantive legal definition.

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[15] Opinion of the Advocate General delivered on 11 September 2014 in the joined cases of *Staatssecretaris van Financiën v. Schoenimport "Italmoda" Mariano Preveti vof*, C 131/13 and *Turbo.com BV*, C 164/13.

[16] Article 19 of the draft Tax Code Act of 4 July 2018 includes the following principle: "The good faith of the obliged person shall be presumed, unless there is a good reason to believe otherwise."

CONCLUSIONS

The numerous general clauses functioning in tax law do not allow for an unambiguous assessment. The vast majority of the general clauses laid down in tax law fulfil their function and protect a specific good of the state or an individual. Such clauses can be said to serve as instruments used in safeguarding security and certainty of tax law.

There are, however, also such evaluative expressions in tax legislation which, due to their indeterminate wording, or the manner in which they are introduced into legal circulation, do not fulfil their function.

Normative analysis of tax provisions contain general clauses indicate that these expressions because of the open scope of meaning, are a special category of law, therefore their introduction to the content of the tax legislation should be done in a reasonable manner compatible with the legislative technique. For each type of general clause, the legislator should take into account adequate standards and requirements formulated in the case-law as well as in the literature, concerning the theology and the philosophy of law. Only the evaluation phrases and the general clauses which are implemented accurately are able to perform their essential function on the grounds of tax law, namely to make tax law flexible and simultaneously ensure the proper protection of the taxpayer's individual interest as well as of the public interest.

Therefore, general clauses should have such a normative and linguistic construction, so that it would be obvious for each interpreting entity that an individual provision regulate this particular legal category. Such clarity of a legal text can be obtained either by implementing a specific name of the clause, e.g. the public interest, or by using the term general clause. The latter solution may be helpful, if one general clause is regulated by a few provisions. The lack of clear indication of the assets protected by the general clause entails interpretation doubts concerning the legislator's intentions, and thus, the interpretation may not provide for an explicit meaning of the clause.

The legislator should understand and remember that it is not the number of general clauses, but their substantive and formal quality that is decisive in whether or not they become instrumental in safeguarding the security and certainty of tax law.

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A WORKPLACE AS THE CENTRAL INSTITUTION OF LABOUR LAW. BUT ALSO AN ADMINISTRATION ENTITY?

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Abstract. A workplace, for the sole fact of being a public administration entity, would be realising a public interest. This allegation of legality of activity, and so of realising the rule of law, would also affect different application and practice of labour law. To be brief, labour law would receive a real chance of becoming "socially just." And this would be achieved through the authority of the state, whose structural element would be a workplace.

Keywords: workplace, labour law and workplace, public interest in labour law

Dedicated to Prof. Maciej Święcki
A Renown Polish Scholar
On the 50th anniversary of death

INTRODUCTION

One of the key theses expressed in a monograph by A. Sobczyk, titled "Zakład pracy jako zakład administracyjny," apart from the one where the Author claims that a workplace is an administration entity, applies to a statement according to which a workplace constitutes the fundamental institution of the labour law. The author concludes in his monograph: "It turns out [...] that it is not the employment contract, but rather the workplace, that is the central institution of the entire labour law system. People do not work at an employer [...]. They work in workplaces." He then follows: "The matter of the labour law is [...] solely the social policy [...]" [Sobczyk 2021, 277]. I believe that these conclusions made by A. Sobczyk reflect the nature of the modern, humanistic labour law, and to say more, of the Polish labour law, if the law is required to conform to the Constitution and international standards accepted by Poland. I cannot think of a more accurately expressed characteristics of labour law, whose aim is the well-being of humans. At the same time, I am aware that this means, sadly, even though I am noting this with a bit of satisfaction, that

the neo-liberal vision of labour law, forced by the Polish labour law doctrine especially in early 1990's and maintained throughout subsequent decades, when the focus was put on employment relationship understood as a reciprocal relationship, failed to prevail [Baran 2005, 165; Florek 2003, 16].

1. THE NOTION OF WORKPLACE IN LABOUR LAW

Still, as I have already written, this is only one of numerous theses expressed by A. Sobczyk. However, as I have already mentioned, it may be the most important one for me, because it establishes the absolutely correct vision for analysing the subsequent, detailed institutions (issues) with regard to the labour law, which is what I wish to focus on in this paper predominantly. The thesis expressed in the mentioned monograph, where the Author classifies a workplace as an administration entity, is another key one. This thesis constitutes a further consequence (on the grounds of a more advanced, legal qualification of a workplace) of acknowledging an absolutely fundamental importance of a workplace as a labour law institution. Although I believe that this issue calls for another paper and obtaining a "black & white" outcome may be difficult, unless certain pre-conditions are set, I remain deeply convinced that an analysis of a workplace in an analogy to an administration entity has a staggering potential in terms of understanding the normative nature of the entirety of the Polish labour law and presents itself to be highly useful in the process of, so to speak, de-privatisation of thinking of the law. To put things in order.

A. Sobczyk finds, very accurately, that the notion of a workplace is an absolutely central labour law institution, but follows, with equally high accuracy, that the workplace constitutes an institution "without which the discipline [labour law - A.M.] is impossible to understand" [Sobczyk 2021, 30]. He then proceeds to present, in details, the unimaginably complex legal structure of the institution of a workplace, citing a series of labour law stipulations and analysing them in minute details. One of his statements: "[…] a workplace has property and goodwill (Article 100(4)(4) of labour law). A workplace also has premises (Article 22^2 of labour law). We are also aware that a workplace has a structure and bodies, since it is subject to management (Article 18^2 of labour law). A workplace also has its laws (e.g., its own collective agreement)." Which is followed by: "A social labour inspector conducts inspections. The employer manages the workplace's social benefits fund." A. Sobczyk then goes on to conclude: "These are but a few elements with which we can, with some effort and with relative accuracy, define what a workplace is" [ibid., 30–31]. Particular attention should be paid to the following Author's observation: "As a community, a workplace is characterized by goodwill (the workplace's goodwill), meaning a total of conditions that optimise the growth of both the community's members and the community itself. From the solidarity perspective,

the common good is justified in that private enterprises bear the costs of services and social transfers of employees. As a community, a workplace is an organisation of people where the rights and freedoms of its members are interfered with in order to achieve an optimal state, which justifies maintaining its autonomy in the name of the principle of subsidiarity" [ibid., 31].

An exhaustive, normative analysis of institutions of a workplace has led the Author to observe that a workplace is predominantly an immensely well organised structure, perfectly reflected in its "workplace order." The Author presents the relation of the "workplace order" to the notion of "order in the labour process," indicating a reduced scope of meaning of the latter, but most importantly discovers a massive content potential encapsulated in the notion of "workplace order." Taking advantage of the Constitutional Tribunal's jurisprudential acquis, A. Sobczyk creates the definition of order in a workplace and writes: "[...] the notion of order encompasses everything that creates conditions for the growth of individuals and societies. Therefore, the material sphere is also a value protected in the name of order. So, if the purpose of ensuring order in a workplace is to achieve optimal economic results, which is certainly the case, then we still have social order in our minds" [ibid., 63]. He then follows: "Yet that is not all. Acknowledging a man's work as a form of self-fulfilment breeds the effect that just organising work so that it creates a possibility of development is an element of social order" [ibid.]. The employer's obligation to ensure order in a workplace, and thus order in a labour process, is rightly by A. Sobczyk to be the employer's meta-task [ibid., 64].

2. THE CONSEQUENCES OF THE NOTION OF WORKPLACE IN LABOUR LAW

Consequently, the author proceeds, in a natural way, to considering the problems of labour law sources. Understanding the importance of order not only in a labour process, but also more broadly, in a workplace, addressing labour law sources was unavoidable. However, the most important thing in A. Sobczyk's considerations, speaking of law sources, constitutes, by virtue of being diligent and thorough, the real emphasis, apparently a first in labour law, of their completely fundamental importance on the ground of the legal setting of social work relationships. From the perspective of ensuring order in a workplace, the Author discovers, in a sense (because I have not seen such deeply driven considerations lately), a certain importance of work regulations. Following an in-depth analysis, A. Sobczyk shows, making a very fair point, that work regulations are a source of labour law, rather than an act of its application. Even more, he accurately argues that they are a source of internal law from the perspective of systematics of sources of law [ibid., 170]. The conclusion that there is an obligation, and not just "a right" to introduce

regulations in a workplace deserves special approval, since it brings very positive consequences in the aspect of building order in a workplace. The author appropriately states: "[...] a thesis may be postulated with relative confidence that the employer should introduce order-related regulations when, given the concentration of individuals performing work in one place, the rules of conduct should be **standardized** [emphasis by A.M.]." The explanation continues: "Within this context, the following statement may be made. Firstly, there is probably no reason to introduce work regulations at an employer with 49 tele-employees. Secondly, workplace regulations should be introduced in a workplace where 20 employees work and where 30, or more, so-called contractors, or self-employed individuals are employed, as long as they perform work in the same place and time. Especially that with regard to OHS, these individuals are subordinate to the «employer» and obligated to collaborate with them" [ibid., 180]. Finally, the author adds, again on point, on a case made by their monograph only seemingly complex, clarifying doctrinal debates around the issue of the rationale behind sobriety tests in a workplace, for which the Supreme Court has managed to amend its jurisprudential approach: "In the context of the performed analysis, there should be no doubts that work regulations specify the terms of being present in a workplace. These terms may, apparently obviously, apply to sobriety, being drug-free or undergoing an inspection" [ibid., 181].

Therefore, viewing a workplace in labour law aspect as its completely fundamental institution, specifically a reference point for determining the rights and obligations of work relationships, and at the same time emphasizing the importance of labour law sources in establishing workplace order, A. Sobczyk manages to find, in an obviously easy manner, answers to what he himself describes as "trivial" questions on, among else, the admissibility of sobriety tests for employees and non-employees as administered by the employer [ibid., 13]. I would say that these questions are "trivial," but in a situation where, just like the Author did, one has covered the entire analytical process of the labour law system, because only then is the, so to speak, "internal" structure of the labour law visible, along with the labour law in the context of the entire legal system. The fact that so many, sometimes completely divergent views on these "trivial" questions have been expressed in discussions over the Polish labour law doctrine, and where the jurisprudence managed to radically shift its direction of thinking, to make matters worse, is the ultimate proof that the overhaul of the entire labour law system, without losing the necessity of considering its place in the context of other areas of law from the sight, has not happened, apart from the works of the mentioned Author. Otherwise, the answers to these "trivial" questions would be known and, consequently, it would be possible to move on to the more advanced labour law problems, thus functioning "more" in a humanistic world of labour and human rights culture,

which, in the context of the Polish level of labour law doctrine that still lingers at the level where labour law is treated as a commodity [Mitrus 2017, 356–57), whereas employment relationship, understood as a mutual obligation relationship is granted a key role in labour law theory [Stelina 2017, 93], all while completely ignoring the workplace.[1] After all, many professors and labour law experts protested to the idea of reviving the idea of a workplace as a community of people, rejecting the proposal to introduce the workplace institution to the labour law project that was in development from 2016 to 2018 [Musiała 2019, 139–53]. This is why it brings me a lot of joy that A. Sobczyk noticed the fundamental nature of the workplace institution in his monograph, consequently making the workplace institution a starting point for the remaining labour law analyses. The pleasure is even greater, because I am finally achieving coherence of the Polish labour law doctrine with the world's most renown authors addressing the problems of the contemporary world.

I am now thinking about a book by Y. Mounk I recently read, "The People vs. Democracy" [Mounk 2019], which made me realise not only the importance of the topic of labour community, but actually the necessity to discuss it, if we want to stop the spread of populism, which we are now facing in Poland. According to the Author, the employment, understood as Monk attaching to a group, achieving a certain social status, allows us to remove cultural differences, find a plane of co-existence with various people, regardless of their race or religion. Seen in this way and performed in a certain community, our work also constitutes an entire set of social bonds that make life full of sense and order. The Author says: "When our acquired identity slips away, we generally revert to the «assigned» identity, consequently making our ethnic origin, religion and nationality crucial for our worldview." He then goes on to say that in the world of social media all of this, meaning the differences, is magnified even further. [ibid., 283]. The need to submit to certain, imposed and commonly developed rules, in other words the need for heteronomy, was also addressed by A. Supiot, who also warned about the danger stemming from splitting communities and labour communities, followed by these specific, potential consequences in the face of different origins, ethnicities, etc. [Supiot 2019, 344].

It therefore seems that there are no doubts to what A. Sobczyk wrote, and what I have already mentioned, that: "People work in workplaces," which also applies to the massive positive potential this thesis can bring, provided these

[1] As indicated in the discussed monograph, A. Sobczyk notes in the *Labour Law System*, issued just three years ago, the notion of "a workplace" not only received its own editorial unit, but also, apparently, this notion has not been defined anywhere, despite many authors referencing it. As further accurately noted by A. Sobczyk, the same applies to the volume on collective labour law, which, after all and among else, applies to unions and collective disputes [Sobczyk 2021, 30].

communities are built correctly, under democratic rules. In other words, the issue is the role played by a workplace across numerous planes of human existence, starting with the fact that men find fulfilment through work, in relations with others, in that a workplace is a place of fulfilment of work related human rights, and finally in the context of work performed within a community with others pedagogical element is achieved, because people learn how to function together and respect other humans in a properly organized workplace, where the order has been created on the basis of the workplace law, rather than as a product of bilateral agreements. An effective tool of combating populist tendencies, and thus the progressing fall of civilisation, can only be achieved in a workplace organised in this manner, namely subject to transparency principles, which can only be achieved with democratically developed workplace law. Thanks to the Author, A. Sobczyk, we can enjoy these reflections in the Polish labour law literature – by finding an encouraging convergence with the results of analyses conducted by renown researchers from outside our scientific circle.

The thought presented by A. Sobczyk, about an employee's social status as the effect of their work in the workplace, also made me especially happy. So far, I was able to find this though only in Western European literature [Supiot 2002, 143; Dockes 2017, 448]. At any rate, it was pointless to look for it among the Authors writing about Polish labour law, most of whom representing a neo-liberal point of view and consequently writing about the labour law's protective function [Skąpski 2006], the employer's risk [Pisarczyk 2007] or business partners as the parties of work relationship [Stelina 2017, 93; Czerniak–Swędzioł 2017, 628–29), despite the fact that over 70 years passed since the adoption of the Declaration of Philadelphia.[2] On the other hand, *notabene*, the process that is intensifying as we speak, namely of "removing" the Polish legal culture from the Western civilisation and pushing us towards the state of social and economic collapse, may have already started

[2] The Declaration of Philadelphia underscores the understanding of labour as a social value, not an exchangeable commodity; labour understood in this manner was to allow men to "find satisfaction from the fullest use of their skills, to fulfil themselves" and provide "the biggest input to common welfare." The declaration is commonly known as the Constitution of the International Labour Organisation. On May 10, 1944, during the twenty sixth session in Philadelphia, the General Conference of the International Labour Organisation adopted the Declaration concerning the aims and purposes of the International Labour Organisation and principles that should inspire the policy of the Member States. The conference confirmed the basic principles on which the Organisation is founded, in particular: 1) labour is not a commodity; 2) freedom of expression and of association are essential to sustained progress; 3) poverty anywhere constitutes a danger to prosperity everywhere, 4) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

right there and then. Going back to this thought with regard to the public status achieved by men working in a workplace, I wish to say that this turns out to be an unusually useful construct for the purpose of describing the situation of an employee in labour law, because it allows us to notice the importance of effects of fulfilling work related human rights. A man who finds employment, "enters," so to speak, the entire social security system, thus gaining living guarantees, not only for themselves, but for their entire family [Sobczyk 2021, 115]. The Author, A. Sobczyk, takes his considerations even further, using the public status achieved by an employee through work to draw further conclusion and writes about the employee's work as a service for the common good. He then notices: "Placing an employee as an individual performing pubic tasks as a part of a public law organisational unit explains numerous service elements present in employment, typical for relation with the state" [ibid., 118]. I am guessing the Author's intents, presumably aiming at bringing back the real sense to the employee's obligations with regard to diligent and thorough performance of their work and the care for their workplace – hence referencing the notion of service. However, it seems to me that calling on employee ethos may be insufficient [Musiała 2020]. I am writing this having in mind that the Author is familiar with the idea of noticing the public and legal nature of private law standards - and idea very accurately noticed by the Author anyway [Sobczyk 2021, 146].

Looking for an accurate legal characteristics of a workplace, the Author proposes treating a workplace as an administration entity. As I have already noted, facing this calls for a separate paper, in general a symmetrical one, i.e., a monograph, but most importantly it must be determined whether we are moving in the plane of *de lege lata* or *de lege ferenda*. The said proposal by A. Sobczyk – just as the Author wrote himself, and similarly, which he pointed out, the public nature of the workplace and its "centrality" in labour law theory – "rebuilds the way of thinking about labour law" [ibid., 277] and thus calls for very in-depth discussion. I do believe that his public workplace thesis and the fact a workplace is a central labour law institution do not necessarily require any "rebuilding of the way of thinking about labour law," but only indicating that the current, doctrinal deliberations with regard to labour law were simply erroneous in that they failed to take into account the axiological assumptions of the Constitution in force. In short, the fundamental nature of a workplace in the context of labour law is very deeply rooted in the Preamble to the Constitution, where the role of communities in the structure of the social and state organisation is discussed, along with the principle of subsidiarity, but also where a claim is made that the Polish state respects human rights *in genere*, also meaning the social rights, which are realised in a workplace. After all, it is there that the realisation of subjective, public rights, connected with human labour, is done. Consequently, all considerations within the labour law,

not considering the importance of the subject of the law, namely the workplace, must be, in my belief, understood as performed with no respect for the social-economic order introduced by the Constitution in 1997.[3]

SUMMARY

For me personally, orientating the thinking about a workplace as an administration entity, for now leaving the final result of the "zero-one" qualification, is extraordinarily valuable, because it somehow allowed me to completely free myself from a fully erroneous way of thinking of work relationship as a reciprocal obligation. Following the "test" which A. Sobczyk conducted in the context of examining the workplace as an administrative workplace, every fragment would convince me how very "public" a workplace is, and most importantly how fundamental the workplace law is for a workplace. Consequently, the issue of employment contracts, built with respect, although a limited one, for the principle of freedom of contracts, is marginalised. Still, I no longer have any doubts that an employee simply accedes to a workplace, which is the only possibility, as they enter a certain, existing arrangement. I can see the biggest "convergence" in the process of analysis of a workplace with an administration entity, apart from the fundamentality of workplace law in both cases, in administrative supervision over a workplace, similarly to the case of an administration entity. After all, the control and supervision over observing the law by the employer in a workplace are conducted by the National Labour Inspectorate. Simply speaking, looking at a workplace as an analogy to an administration entity – even if we ultimately question the "zero-one" qualification of a workplace as an administration entity *de lege lata* - constitutes immeasurably valuable considerations that allow to grasp the nature of work relationships and the characteristics of the employer's legal situation, which mostly boils down to its legal competences conjoined with an employee's

[3] See a review by K. Ślebzak with respect to the post-doctoral disseration of M. Bosak–Sojka, "Krytyka w stosunkach pracy," on the basis of which one may get an impression that the community nature principle of a workplace is unknown to Professor Ślebzak. The reviewer wrote: "If we were to determine the subject of research after reading the reviewed monograph, a question arises whether it was supposed to be about: [...] the community nature of a workplace (whatever this notion refers to) [...]." This continues: "The last subchapter constitutes a sort of *novum*, as it features the aspect of the impact of criticism in work relationships, being a representation of the freedom of speech on the community nature of a workplace. [...] In my opinion this subchapter does not fit the title of chapter III or its purpose. I also have an issue with relating the chapter to the topic of the entire book and the purpose that boils down to determining the limits of permissible criticism within work relationship. I understand that this was about the fact that the good of the workplace's community, whatever the origin of the good, may constitute independent grounds for limiting the law to criticism formulated by the parties to the work relationship." Review received from the post-doctoral student.

obligations, so briefly speaking to authority, just like the case is with authority in an administrative entity. Even more, this optics of an administrative entity for a labour law entity allows to see the importance of the National Labour Inspectorate and, consequently, make a reflection that in neoliberal thinking of labour law, this particular institution could not have its rightful place. After all, its importance was being reduced through the labour law doctrine for the sake of economic freedom that shunned all sorts of limitations [Musiała 2016, 622–23]. *Notabene*, this is perfectly seen thanks to the incredibly far-reaching considerations that A. Sobczyk has been conducting with regard to the nature of the institution of the presence of a labour inspector.

Which is why I remain so grateful to the Author for the conducted analyses with regard to a workplace from the perspective of the institution of an administration entity. Because this is how, in a way, I became completely confident that effective labour law, i.e. labour law that is realised from the perspective of subjective rights, namely employee rights, which are *de facto* human rights, cannot be achieved without acknowledging the fundamentality of a properly functioning workplace, in other words a workplace that serves the man, where the man's subjective rights are realised, with the workplace based on democratic rules, ultimately meaning that workplace law is the point of origin for the workplace "life." Due to their scale, workplaces that operate in this manner may guarantee, and *de facto* constitute a major guarantee of a well-functioning society that participates in the state's decision-making processes and that understands the issue of responsibility. A mature society, in other words. And in the further perspective this means a society that does not yield to populism [Krastew 2013]. Which is why, may I add, I am very surprised by the voices of opposition of the labour law doctrine in Poland with regard to acknowledging the nature of a workplace that is based on deep democracy, which is only guaranteed by workplace law, making the workplace space public, along with effective supervision by the state – and, on the other hand, the criticism aimed at the today's government. It is as if the doctrine completely failed to understand the connection between raising standards with regard to the man's social rights and the people's political choices. After all, it is this neo-liberal labour law that significantly contributed to the populist rule in Poland. Reading the existing labour law handbooks, even cursorily, allows to see that the labour law's core is work relationship, being a bilateral obligation, created with the observance of the principle of freedom of contracts, outside the context of a workplace in which the work relationship is realised, and in general without automatically connecting this relationship to the state's supervision system, and actually while combating it.

The readers of this paper will not find it surprising that I consider labour law as a part of civil law, just as family or inheritance law are parts of civil law [Musiała 2020]. I categorically refuse to recognise law that is based on

obligation relationship in the understanding of Section 3 of the Civil Code. Reading A. Sobczyk's monograph has allowed me to even more clearly see the public nature of labour law as a part of private law. The difference between seeing labour law by A. Sobczyk and me is both "significant and insignificant." It is "significant" in that I consider labour law, although public, as regulated with a private-legal method. The Author, however, understands it as administration law, because he sees the law's main subject, namely a workplace, as a public administration subject. On the other hand, my view of labour law, where an employment contract is treated as an organising contract, all while acknowledging the fundamental nature of the workplace labour law and the far-reaching control conducted by the state's bodies, *de facto* nullifies any differences between us. I believe that in a state of law, a state that protects the rights and interests of its citizens, follows the principles of subsidiarity and proportionality – moderating administrative authority should be among the most important objectives [Zimmermann 2013, 143].

However, I am aware that the vision of labour law as a private law, despite its public nature and the ability to bring out the public interest, did not prevail. In fact, the practice of application of labour law in Poland for the last 30 years has led to its collapse. Viewing it through the angle of mutual obligation "blocked" seeing the fundamental importance of public interest [Musiała 2021]. As it is, it had to be blocked, because the essence of mutual obligation is the subjective equivalence (*do ut des*) [Idem 2020, 140]. It is true that throughout the entire time of existence of labour law after 1980, the commonly binding legal regulations under labour law were in force, but the perspective of reciprocity of obligations in work relationship was "thwarting" the public interest, which may also come from the legal regulation binding the private law entities [Radwański and Zieliński 2012, 374; Pisuliński and Zawadzka, 2020; Grochowski 2020; Wilejczyk 2020]. However, the "voracious" nature of Polish capitalism in 1990's left no hopes to labour law as law where private entities realise public interest, without categorically incorporating the workplace (the employer) within the public administration system. Anyway, after the abolition of the subject of a "workplace" as a community of people and given the trend of competition among businesses, mainly through human labour, so typical for semi-peripheral states, there remained no possibilities of noticing the public interest in labour law anymore. As an example, the practice of observing leave regulations may be indicated, where a leave would be granted without "seeing" this institution as one not only realising the employee's right to rest, but also fulfilling their family-related obligations, which did affect when a leave was granted and due to another fact that this unique case had to be considered against the background of the group. The above is evidently seen in the emergence of practice of obligating employees to maintain confidentiality with regard to remuneration, but most importantly

in the failure to respect the equality of remuneration outside a workplace (however, equality of remuneration was also completely disregarded in the said workplace).

In short, the low level of culture of the Polish society, meaning the ruthlessness of especially the first generation of entrepreneurs, but not only this, because the new elites as well, in particular the legal elites, those related to my own circles, which also means the legal theory (doctrine) and practice (judges), formulating the foundations of a newly emerging democratic state had their hand in destroying the possibility of creating the labour law as a law constituting a part of the civil law in which a chance to implement public interest could be seen [Żakowski 2013, 56]. This was possible, as this is how French labour law is created, which is classified as private law that realises public order (although a part of this law constitutes a section of administrative law) [Canut 2004].[4] Polish law had this chance. Yet it failed to take it. In principle, this field of law, the labour law, was effectively pushed, with a great help from the Polish labour law doctrine, back to 19th century [Musiała 2020, 174].

This, however, had to happen. Labour law seen as private law with public order, where a workplace remains a subject of private law and is the addressee of obligations originating from the commonly binding law (not necessarily a subject of public administration, or an element of the state, so to speak) – given the Polish cultural context, where it is nearly impossible to enforce it sans restrictive law, only lead to the law of the mightier one. And it finally did. Today, in Poland, work relationships are by principle built only by the fear of losing a job.[5] The judicial system, with judges educated with regard to work relationship as reciprocal obligations, is all but a robust protection against social Darwinism.

Whatever the result of assessment of the modern state structures, I think that placing a workplace as a public administration entity may be the only chance of salvation. This would allow to use the authority of the state to reinstate civilisation in relationships with employees. As it is, we cannot hope that the subjects of contemporary work relationships, especially the employers, but sometimes also the "degenerated" employees themselves, who are not familiar with work ethos at all, will be able to use the freedom provided by the civil law, imposing upon themselves a "limit" in the form of a public interest in labour law.

Now, however, in A. Sobczyk's take, a workplace, for the sole fact of being a public administration entity, would be realising a public interest. This allegation of legality of activity, and so of realising the rule of law, would also

[4] Although labour law section is recognized in the French administrative law.

[5] This has been widely discussed in sociological literature. See also Gitkiewicz 2017; Szymianiak 2017; Fajfer 2017.

affect different application and practice of labour law. To be brief, labour law would receive a real chance of becoming "socially just." And this would be achieved through the authority of the state, whose structural element would be a workplace. This is the vision presented by A. Sobczyk in his monograph "Zakład pracy jako zakład administracyjny. Z problematyki kontroli, prawa wewnętrznego i innych zadań publicznych pracodawcy (zakładu pracy)" [Sobczyk 2021].

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PRIMATE WYSZYŃSKI'S MESSAGE TO STUDENTS

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Abstract. The subject of the article is the teaching of Cardinal Stefan Wyszyński, the Primate of Poland, addressed to young people, especially students of the Catholic University of Lublin. The analyses are based on the selected texts of speeches (and other documents) that Wyszyński addressed to the community of the Catholic University of Lublin, starting in 1946, when he was appointed bishop of Lublin, and ending in 1980, just before his death. As a result of the philological analysis of Wyszyński's most important statements, it should be concluded that his message to students is an original pedagogy: full of heart, goodness, kindness and faith in other people. Wyszyński's attitude is of a concerned and demanding father who really wishes for his "children" ("a tribe of new people") to get not only a reliable education, but also life wisdom, and strong moral backbone, so that they can serve their neighbours and the homeland. In his teaching, Wyszyński presents a holistic vision of a young person – a student. This vision includes both their education and upbringing – understood as an integral combination of natural values (abilities, talents, qualities of spirit and body) with supernatural values, i.e. self-improvement for the sake of The One who should always be the Way, the Truth and the Life for young people and for all humanity. Wyszyński believed that the diplomas obtained by young people would wisely serve their homeland for a long time. Due to moral relativism, the crisis in the education of children and young people and the abandonment of Christian values, his speeches take on special significance today. Therefore, based on a solid, humanistic foundation, on the lasting categories of truth, good, beauty, solidarity and usefulness, the Primate's educational message can be of use to the teacher who will effectively reach the hearts and minds of his students. He will equip them with complete knowledge and bring them closer to spiritual values and the Truth.

Keywords: Stefan Wyszyński, cardinal, Primate of Poland, Catholic University of Lublin, heritage, students, teaching, upbringing, basic humanistic and Christian values

INTRODUCTION

We all seem to realize that knowing our heritage gives us strength we need so much now as we grapple with the harsh reality. In this special year,[1] remem-

[1] The year 2021 was designated the Year of Cardinal Stefan Wyszyński by both the Sejm of the Republic of Poland (resolution of November 27, 2020) and the Senate (resolution of December 2, 2020). Quoting the resolution of the Sejm: "The Sejm of the Republic of Poland

bering his acts of kindness and showing our gratitude for them, we explore the heritage of Cardinal Stefan Wyszyński, the Primate of the Millennium, whose merits for the John Paul II Catholic University of Lublin, our *Alma Mater*, cannot be overestimated.

In the post-war reality, when the authorities of the People's Republic of Poland tried to close down the only Catholic university in Poland at that time, Stefan Wyszyński was strongly defending it. Being a graduate, he knew the university perfectly well. As a bishop of Lublin (in the years 1946–1948) he was also its Grand Chancellor. His speeches at university ceremonies were extremely important, as they provided an opportunity to encourage and strengthen the academic community. In them, he called for defending national culture, for acquiring and deepening knowledge, for getting involved in social life, and for working on oneself. He taught what a family should be, what Catholic education is, what human rights and Christian values are.

In this wealth of topics and addressees, a very important place was reserved for students whom Stefan Wyszyński addressed many times, on various occasions, especially during almost every inauguration of the academic year. Therefore, I would like to concentrate on the Cardinal's most important thoughts and reflections, which he directed to young people at that time. Most of these messages are still relevant today. I based my analyses on the selected texts of speeches (including appeals and even letters)[2] addressed to the community of KUL, starting in 1946, when Stefan Wyszyński was appointed bishop of Lublin, and ending in 1980, just before his death.

Let me start with the Primate's speech during the inauguration of the academic year 1968–1969, crowning the 50th anniversary of KUL: "Let this assurance [it is about the support of the Church for KUL – K.N.] be – for you, Distinguished Senate, and for you Catholic Academic Youth – the greatest comfort and encouragement for the hardships that await you. And when you reach the 100th anniversary of this University, remember about us – we will bless you from heaven" [Wyszyński 1969, 120]. Today, when the centenary is behind us, as we wait for the beatification of Cardinal Stefan Wyszyński, we express our gratitude for his many good deeds and we hope for the blessing, about which the Cardinal assured us in 1968 (among others). Therefore, in

establishes 2021 as the Year of Cardinal Stefan Wyszyński. We are convinced of his particular importance for respecting human dignity and freedom, and for his respect for the Fatherland and help in building free and independent Poland." See http://orka.sejm.gov.pl/proc9.nsf/uchwaly/624_u.htm [accessed: 29.03.2021]. To quote the Senate resolution: "The Senate of the Republic of Poland designates 2021 the Year of the Primate of the Millennium – Stefan Cardinal Wyszyński. We pay a special tribute to him and show our respect and great appreciation for his whole life, which was a great testimony of love for our Homeland and Compatriots. He served Poland and the Church with his life." See https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20200001169 [accessed: 29.03.2021].

[2] These are largely in the collection: Rynio, Gawrysiakowa, and Butkiewicz 2008.

accordance with Cicero's sentence:[3] *memoria bene redditae vitae sempiterna* – "the memory of a gloriously fulfilled life is eternal," we want to express our gratitude for Stefan Wyszyński and declare our lasting memory, passing it onto the next generations of young people whom the Cardinal loved so much.

1. KNOWLEDGE IS THE WAY TO THE TRUTH

His great devotion to students is evidenced by the greeting formulas he used many times in speeches and in various documents (there are as many as 14 of these formulas):

- Dear Children!, Children of God! Dear Children of God! Beloved children!
- Young people!, Dear Young people!, Dear Academic Youth!, Dear Catholic Youth!, Beloved Youth!
- My youngest friends!
- Beloved!, Beloved, Young Friends!, My Dearest Friends!

In these phrases, and especially in the attributes used: "kind, dear (in superlative form), beloved, of God, my," we find a true testimony of extraordinary devotion, and even more, fatherly love, concern for the fate of his children and fellow-brothers. The Primate addresses students as: (1) a father, (2) a friend, (3) an older colleague,[4] thus manifesting various types of relationships between him and young people who have multiple desires and goals in their lives. These goals are both spiritual and temporal, including the most important one in the context of studies, i.e. the search for truth. This is what the Cardinal said about this pursuit during the 50th anniversary of KUL, adding, however, that the *conditio sine qua non* of the pursuit of knowledge is love:

"A Catholic university must love. In this courtyard, through these corridors and halls, the truth must stroll hand in hand with love. It is to emanate from the eyes and mouth of all who assume the authority of a toga. It must be visible on the lips, smiling cheeks and in the trusting gaze of the youth, who, like a fresh flower, spread open to the blessed specks of truth, which are born of love. Then the young people of the new generation will be formed into fruit nutritious for the Church, the Nation and the family, for all God's children, for the efforts of the Nation and the State, for all areas of human life in our homeland. Only the fruit of the truth combined with love is nutritious" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 171–72].

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[3] It is located in one of the *Philippics* of Cicero against Antonius: *Phil.* XIV 32.

[4] For example, in a speech on the occasion of the inauguration of the 1956–1957 academic year, Lublin, November 11, 1956: "[...] I am a student and a graduate of this University. This is what gives me the right to specially address my current, much younger female colleagues and slightly younger male colleagues at the moment. […] That is why I will talk to you like an old friend, and I will speak from experience" [Wyszyński 1999, 33].

The Primate in his message always put profound knowledge in the first place. For him knowledge was the goal for the youth, something that ultimately leads to the Truth, the one written with a capital letter. He never concealed the fact that in order to achieve this goal, one needs persistent work, determination and courage to look into the future. He explicitly said: "So I appeal to you: learn to serve and look boldly into the future" [Wyszyński 1968, 92]. Equally important is the love-based conviction about the right choice of the path[5] that should always lead to the goal, to the very top, despite the changeability of characters and emotional instability typical of young people. This was perfectly understood by the Primate, who diagnosed the situation in the following way: "Sometimes we are worried about the changeability of dispositions and moods of our youth. These are momentary experiences that do not give satisfaction and therefore change quickly. The same is true of contemporary fashion which is the expression of some momentary achievement but changes quickly. When a change takes place, we find that it was not what it was about, and it was not an achievement. Beloved, may this always encourage you to *duc in altum*" ("to put out into deep water")[6] [Idem 1990, 504]. In the last sentence, the Primate seems to appeal to the hearts of young people. In them, he sees a deeply hidden intellectual and spiritual potential that allows them to achieve the highest goal – the Truth through the pursuit of knowledge.

The Primate delivers a similar incentive in another appeal during the inauguration of the 1967–1968 academic year: "And you, Dear Youth, as you go into the future, shape your character and gain knowledge so that it comes to you with difficulty. In this way you will be better prepared for life in difficulties."

We find this appeal continued a bit further: "Dear Academic Youth, we appeal to you briefly and to the point: Be in the truth and value the truth, even if you follow the difficult path of disappointments and defeats. Do not accept a ready-made and easy truth, but fight for it! Love the struggle for the truth because it extends your knowledge, frees you from the danger of «temporariness» and from taking the easy way out that is always dangerous for the national, spiritual and even political culture. Science, as we like to repeat, is a great lady,[7] taking over the whole hearts of people who want to devote them-

[5] Cardinal Wyszyński encouraged young people, who chose various fields of study, to look at their field of study, and then work, and perceive them as a vocation. Then it will be easier for them to endure various disappointments that life brings [Wyszyński 1990, 504].

[6] "Duc in altum" is a biblical phrase used by Jesus to address St. Peter while teaching on Lake Gennesaret (Lk 5:4). For more on the theological meaning of this phrase see Zbroja 2001, 1–10.

[7] In the speech at the 40th Anniversary of the Catholic University of Lublin, on September 21, 1958, the Primate used an identical parallel, adding a comparison with the work of a farmer: "[...] we must free ourselves from all dishonesty in scientific work. Scientific work is similar to that of a farmer: you reap what you sow. Whoever sows chaff will regret the harvest time. The same applies to science. Science is a great, wonderful lady. She engages mind, heart and will. But if we fully commit ourselves to her, even if we become her slaves, we will bring a rich har-

selves to it. Do not be afraid of this great lady! Learn to serve her in truth, but always associate truth with love – *Veritatem facientes in caritate*"[8] [Rynio, Gawrysiakowa, and Butkiewicz 2008, 153].

The Primate knew perfectly well that "Truth without love is cruel and terrible." Hence he emphasized so many times how important love is and how important God is – the source of this love. With love you can overcome your selfishness in the name of altruistic service to society and the Homeland.

2. DEVELOPMENT OF TALENTS AND HUMANITY

The acquired knowledge is to serve the nation and the homeland, thus being "nutritious fruit" for them. The aim of education is not just to get a diploma. As the Primate put it, "*Universitas Catholica* is supposed to shape not so much a professional but rather a man. This can be achieved only by seeking the Truth. Seeking diplomas produces dilettantes, while the desire for the Truth opens the way for progress and dissemination of science in order to deepen the human personality" [ibid., 36]. At the threshold of the academic year 1951–1952, Stefan Wyszyński applied this truth directly to Christ, who "is still in our boat," because he is in us. Young people only need to look inside themselves and ask the question: "Who is this? …."[9] It was part of a program for the starting academic year. Therefore, every young person can answer this question if they really want to. The more so because they are endowed with gifts by the Creator: "threads that are anchored somewhere in the depths of the human personality"[10] [Wyszyński 1999, 34], values and gifts, which one

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vest to our Homeland, Nation, and State. […] Although young people are eager to experience joyful moments, their life cannot be easy because it is always so at the beginning. A newborn baby comes into the world in pain, blood and screaming, full of tears in its still closed eyes. With great agony, the seed pierces a hard shell in the dark womb of the earth. With considerable effort and without being rushed, the bud develops into a flower. An oak grows for a hundred years and nothing can be done about it. Science can accelerate certain processes in the fields of technology, civilization, culture and industry, but it cannot significantly accelerate one thing. Even if science creates the most favourable conditions, it cannot accelerate the development of spiritual and scientific culture. You have to wait; you have to wait patiently. We can inherit a fortune, we can inherit the library from our very wise and very educated father, but we will not inherit his wisdom or his knowledge. He will take his wisdom in its entirety. This is a clue for every young person that they must seek wisdom on their own: calmly, patiently and with considerable difficulty" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 78].

[8] *Veritatem facientes in caritate* are the words of St. Paul in the Letter to the Ephesians (4:15). Pope Pius XII used these words to entitle his Apostolic Letter to Roman Catholics in 1952, thus protesting against their persecution and the liquidation of the Catholic Church in their country.

[9] From the sermon during the inauguration of the 1951–1952 academic year, in: Archiwum Uniwersyteckie KUL [KUL University Archives], Inauguration of the 1951/52 academic year.

[10] The Primate's requests to the young. To the youth of the Catholic University of Lublin, Lublin, KUL assembly hall, November 11, 1956.

has to skillfully discover like hidden talents and continue working on them. Therefore, according to the Primate, one should learn to appreciate oneself in order to harmoniously develop all one's talents without omitting any good qualities and minimizing weaknesses. That is why the ability to work systematically is so important on this path. As the Cardinal put it beautifully, addressing his younger colleagues directly: "You like to wander in the mountains, watch the lofty spruces torn by the winds, and you see how they fight for their existence, supported by their roots and looking for support in the ground" [ibid., 35]. This comparison directly suggests that young people should be characterized by: resilience, patience, diligence and regularity. Undoubtedly, these qualities increase the efficiency and effects of students' work[11] in the process of acquiring knowledge. This process is aided by concentration and silence, which the Primate commented half-jokingly, half-seriously, in his speech to students living at Poczekajka in 1964: "the specific feature of any scientific and spiritual work or study is that it takes place in some seclusion, in concentration, and in silence. Do not think that there is something very original about it, that you were placed outside the city, at Poczekajka («waiting area»), as if saying: wait, wait a little longer...!"[12] [Rynio, Gawrysiakowa, and Butkiewicz 2008, 121] – probably referring to the happy end of their studies. There is no doubt, therefore, that the Primate's wish was that the systematic and efficient work of the young, devoid of the mistakes of the previous generation, would allow them to surpass that generation, so that the future Polish intelligentsia would be even better.[13] Students' work in silence and concentration is not limited to just staying in one place. The Primate appreciated the comprehensive intellectual development of students, broadening the horizons and maintaining scientific contacts with foreign universities. Hence, he encouraged the more gifted to go abroad and gain knowledge there,[14] to have an

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[11] In his speeches, Cardinal Wyszyński often paid special attention to intensive work on oneself, to reflection on the results of one's own actions. In his speech to the academic youth from Wrocław, he encouraged them to pursue thorough studies: "You will not shirk your own mind, it will remain empty and idle. You can inherit the library and manuscripts from your wise father - professor, but you will never inherit his wisdom" [Wyszyński 2001, 218].

[12] From the speech to female students of KUL: *Na "Poczekajce"* życia *[In the "waiting area" of life]*, Lublin, "Poczekajka," April 16, 1964.

[13] Cf. the speech on the occasion of the inauguration of the academic year 1956–1957, Lublin, KUL assembly hall, November 11, 1956: "If there is anything that your older colleague requires of you at the moment it is going to be this: increase the efficiency of your systematic work. If systematic work is indispensable everywhere today, even in the production of shoes, then even more so in shaping the future Polish intelligentsia! This is the generation that will become our legacy. You can enumerate our weaknesses when you are looking at us – it does not matter! Just be careful not to repeat our mistakes. Therefore, work more systematically, work better!" [Wyszyński 1999, 35].

[14] Cf. the speech on the occasion of the 1957–1958 academic year, Lublin, November 10, 1957: "[…] we should do our best to let the gifted and better prepared young people travel abroad and

insight "into what is happening beyond the seventh river, beyond the seventh border"[15] [ibid., 124], and to learn foreign languages, especially Latin, highly praised by the Second Vatican Council and the Senate of KUL.[16]

However, lest such comprehensive work be wasted and be socially useful, young people must learn to notice and appreciate others, while harmoniously developing their body and soul. In short, they must serve their neighbors[17] and be a good example for them, thus realizing the idea of solidarity. Thanks to this attitude, it will be possible to bring people closer together, to eliminate the social boundaries (which the Cardinal called "liquidation of the social ghetto"), and ultimately – to deepen the spiritual community. However, all these acts will not be possible without a high level of knowledge gained, among others, from good books. During the speech on the occasion of the inauguration of the 1956–1957 academic year, Primate Wyszyński made the following request to students: "If you come across subpar literature, especially propaganda literature, remember that these are merely mental shortcuts, often below standards! Remember that you always have to go deeper. If anyone, then it's you who must rise above the «brochure». You must save yourself and defend yourself against the «brochure». You must always have more confidence in fundamental scientific works than in brochures, which are often written for this moment. […] Beloved Ones, defend yourselves against «brochure education». Once in parliament before the war, one of the deputies in a cassock was accused of citing brochure titles to other deputies: «Father, all you do is quote brochures». The deputy replied: «Because that's all you read». The fact that the intelligentsia sometimes forms their intellect on brochures leads

gain knowledge in foreign laboratories. We are all aware that this is an extremely expensive department of studies. We will have to wait a long time for it in our homeland, even under favourable conditions" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 62].

[15] From the speech on the occasion of the awarding of honorary doctorate to the Rector of the Catholic University of Leuven, Lublin, Assembly Hall, June 7, 1964.

[16] "Young people, especially academics, are strongly encouraged to study Western languages, especially Latin […]. Let the knowledge of Western languages arouse your curiosity for Western literature and encourage you, Dear Young People, to make efforts to travel to the West. Go with an obvious thought and desire to return to your homeland and bring inspiration for working in your own country" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 124].

[17] Cf. sermon during the inauguration of the academic year 1957–1958 entitled *Dwie strony jednego medalu [Two sides of the same coin]*, Lublin, November 10, 1957: "Children of God, you are standing in the face of a new educational effort, self-education, an effort to introduce your personalities into social life. You take on the obligation of educating yourself under the guidance of your professors, so that you will truly align your body and soul, your mind, your will and heart throughout your life. Your humanity should easily, as if in a completely natural and simple way, give your neighbours what is human, and give God what is divine. The entire educational process aims to create such a harmonious attitude in our spirituality and personality. While we take care of ourselves, we should never lose sight of this rich social life that unfolds around us, which we participate in" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 55].

to their undoing. Protect yourselves from this! Even when you happen to win in battles, remember that you have a duty to love your opponent and encourage yourselves to work even more on yourselves. You have a duty to combine your honest mental work with your honest spiritual work" [Wyszyński 1999, 37–38].[18]

Humanities are of particular importance in the education of young people. The Primate prophetically spoke about this fact in the context of the threat of technicalization: "We already notice some dangers in the world today. Sometimes man becomes a slave to the machine. […] Meanwhile, we can rank them correctly: machine for man, not man for machine." Therefore, in this situation, the Primate continued, "this rich and wonderful science, collectively referred to as humanities, can be of great importance"[19] [Rynio, Gawrysiakowa, and Butkiewicz 2008, 96]. Consequently, it should come as no surprise that the Primate calls for young people, those characterized by literary inspiration or those having scientific inclination, to use the pen to create good texts: "Dear Youth, do not imitate models of pseudo-literary works that unfortunately fill many literary magazines, unworthy of this name"[20] [ibid., 64].

3. THE MORAL EDUCATION OF STUDENTS

The Primate was very concerned with the moral education of his students. He often talked about the flaws and weaknesses that a young person may succumb to during studies and about struggling with oneself. Therefore, he bitterly called for respect for the common good: "in terms of morality, a disturbing symptom is some absolute carelessness about the spiritual and moral values of the nation. […] Even the economic goods gained by hard work and under difficult conditions are not properly used. Hence, the following become common practice: destruction and lack of respect for the results of cooperation. At

[18] The Primate spoke in a similar vein in 1957, during the inauguration of the 1957–1958 academic year, in a speech entitled *Rzetelna praca naukowa dla narodu – naszą ambicją [Honest scientific work for the nation is our ambition]*: "Even when young people reach for books in reading rooms and research laboratories, they usually look for books that will give a specific benefit in the shortest time; books which provide the shortcut to passing the exam. There is a noticeable decrease in the demand for in-depth and independent reading, the one that proves a deeper interest in the subject of study. Young people do not like to read a lot and they do not like to read carefully. They read as if prompted by some directly utilitarian argument. It would be necessary to require a deeper mental life of academic youth at all costs. […] We should improve our intellectual work so that it becomes as comprehensive as possible" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 62].

[19] From the speech at the end of the inauguration of the academic year 1960–1961, Lublin, November 13, 1960.

[20] From the speech on the occasion of the inauguration of the academic year 1957–1958.

universities, we often observe a sad phenomenon: after our young people have passed through the halls, auditoriums and libraries, these places look awful. Well, forgive me for pointing this out, but the goods that surround you are common property, which was built with great effort. The dormitories are said to present a terrible picture: everything that can be destroyed is destroyed. The careless destruction of all student facilities is disturbing" [ibid., 65].

The disregard for economic values and material goods is not the Primate's only concern. Another weakness filled him with even more fear: "A terrifying image of intoxication, which is impossible not to talk about." The Primate continues euphemistically: "I wish that the youth of our University took on the task of organizing, at least in their environment, this disorder that gives us the most unfavourable opinion within society, perhaps undeservedly. […] Dear students! We must have the ambition to improve our style, our social customs and our national image"[21] [ibid., 66].

The Primate paid great attention to the moral formation of the future Polish intelligentsia, especially students of KUL, whom he encouraged to go to the academic Church, to benefit from the ministry of its priests, to participate in various pastoral activities, and to become lay apostles.[22] Female youth played an important role in the teaching of the Primate. Therefore, he appealed that male youth should always show respect to their female friends and that they, in turn, should give many reasons to deserve this respect. In this context, it is worth quoting the Primate's significant words, which contain a difficult but expected postulate: "I wish that you (female students) [...] display sensitivity to beauty and the aesthetic sense. I wish that you do not exceed the norms of appropriateness [...] that you promote the return to healthy principles of aesthetics and appropriateness"[23] [Rynio, Gawrysiakowa, and Butkiewicz 2008, 206]. So the Primate wishes that young people build a generation that is better than the one he belonged to.

The Primate hoped that this new generation would introduce great social changes, reform morality, and eradicate addictions, which is explicitly expressed in his appeal: "Beloved, you need to get to work. After all, there were healthy, filarets and philomaths movements among academic youth in Poland.

[21] From the speech on the occasion of the inauguration of the academic year 1957–1958.

[22] It was expressed, inter alia, in "Słowo Biskupów Polskich do młodzieży KUL" [The Word of the Polish Bishops to the youth of KUL], signed by Cardinal Stefan Wyszyński, sent from Jasna Góra on September 8, 1976. The Primate wrote, inter alia: "[Dear Youth of KUL – K.N.] you represent the Polish youth who are to join the ranks of the Catholic intelligentsia in the near future. […] Combine your daily work on your moral development with intellectual formation. […] What we care about most is your faith and your religious life. Let the academic church become the center of cultivating the greatest human values for all of you" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 229].

[23] From the speech at the inauguration of the 1973–1974 academic year, Lublin, October 21, 1973.

These movements would have to be updated. It should be postulated that young people cannot blindly follow the indecent manifestations of public customs, especially reflected in street life. Dear Youth, the street cannot impose its style of conduct on you. It is you who must change the face of the earth. It is you who must improve the bad style of our younger, unhappy compatriots who do not have the proper knowledge"[24] [ibid., 66].

Because only the young, the educated, the "light and salt" of this world will be able to bring a new quality to social life.

"Dear Youth," continued the Primate, "you are very sensitive to social style and customs. When working on yourself, however, do not close yourself off so that you can notice this society to which you will be as light and salt. Having recognized all the troubles of social life, bring your most precious mental, moral and political values that originate from your soul. Bring a new style! You will work it out in various academic works that are perhaps hard and arduous, but very necessary" [ibid.].

In 1973, the Primate encouraged the youth even more forcefully to work on themselves when he compared their efforts to fire, which keeps you warm and gives light when well-kept: "Beloved! Poland needs such fires that would keep going without burning anyone, but instead would keep us warm and provide light. Today our Homeland needs some new «philomaths» and «filarets», we need «burning» youth! […] Remember that the Nation needs youth with burning minds and hearts! Don't be fooled by appearances of modernity, or by some bland form of expressionless protest. If you do not like the current reality, you can protest against it with honest work through which you prepare yourselves to create "a tribe of new people."[25] Everything else is an illusion. Whether you comb your hair in one way or another, whether you wear one dress or another, whether you attend lectures, or whether you think that you already know everything – these are secondary matters. It is important that you burn with this fire and spread it – with luck – over numerous ranks of academic youth. You can do so through honest work and knowledge, and even through sacrifice and self-denial. So that you are able to connect the present with the future […]"[26] [Rynio, Gawrysiakowa, and Butkiewicz 2008, 186].

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[24] From the speech on the occasion of the inauguration of the academic year 1957–1958.

[25] As Bartosz Mitkiewicz notes, Wyszyński often mentioned the need for and expectation of a new man. The Cardinal put it beautifully when addressing students at the church of St. Anna in Warsaw: "If others serve you, you also have a duty to serve, help, and save! You are to save yourselves and others – for Christ and for our Homeland! When you do this with all your youthful, zealous soul, it will be possible to say these words: A tribe of new people is coming, a tribe that has not yet been seen! – People who have faith and love. Oh! How we all wait for such people. For... people! For... the human being" [Mitkiewicz 2011, 195].

[26] From the speech on the occasion of the 20th anniversary of the Institute of Historical Geography of KUL, Lublin, April 11, 1973.

However, enthusiasm alone is not enough. A young person should still have "their own maximum program" and a specific goal, which they must "approach slowly, as if climbing a mountain peak that can already be seen from a distance, but is reached by a long and arduous climb"[27] [ibid., 247].

4. AUTHORITIES AS GUIDES ON KNOWLEDGE AND INTELLECTUAL IMPROVEMENT

In order to acquire knowledge and to form a sharp intellect, one needs a lively mind, big heart and effort, persistent work and finally a good guide who will recognize not only the intellectual needs of a young person, but will be a moral signpost for them. The Cardinal was fully aware of this while speaking at the end of the inauguration of the academic year 1966–1967: "Students seek both the truth and formal powers, but most of all they are looking for… a human being. Young people are insightful. They carefully examine their professors and educators, while delving into and beyond the formal aspects of knowledge. Young people want to fully recognize the teacher's character"[28] [ibid., 140]. That is why he appealed to the lecturers: "Beloved Professors! Share your experience – *in caritate*. And you, dear young people, seek the truth also *in caritate*" [ibid., 142]. Respect and admiration for good lecturers does not mean that they cannot be surpassed. The Primate calls for healthy competition between students and their teachers: "The professor has a duty to help you and he must tell you: I have done a lot. I have devoted my life to the great lady – science, but you can do more! Surpass your master"[29] [ibid., 139], because his achievements by no means exhaust the truth. What's more, the Primate believed in the potential of his students to such an extent that he even wished that their professors would give them better grades. Better than is apparent from their responses: as if on credit, on account of what they would become in the future.[30]

Apart from academic teachers, Cardinal Wyszyński also indicated other authorities as guides, the best among them being the Patron of Youth, St. Stanislaus: a model of the harmonious interaction of mind, will and heart. For, as he said: "He was a man who mastered body and spirit, he knew how to seek

[27] From the homily during the inauguration of the academic year 1976–1977, Lublin, October 21, 1976.

[28] From the speech at the end of the inauguration of the 1966–1967 academic year: *Veritatem facientes in caritate*.

[29] From the sermon delivered during the *Te Deum* of the Millenium, Lublin, June 6, 1966.

[30] See the speech at the inauguration of the 1973–1974 academic year, Lublin, October 21, 1973: "Therefore, Beloved, I wish you that the kind professors evaluate you not only in terms of what you «want» to disclose in your goodness, but also in terms of what your whole life will reveal in the future" [Rynio, Gawrysiakowa, and Butkiewicz 2008, 205].

and defend the truth, he was a marvelously brave and independent man. He knew how to stand up to the world that tempted him and encouraged him to take an easier path. He chose the difficult path. […] St. Stanislaus is a valid role model, and he is appreciated to this day"[31] [ibid., 89]. According to the Primate, it is St. Stanislaus who shows young people how natural values, i.e. reason, will and heart, as well as hidden talents, should be used and combined with supernatural values, i.e. faith in the existence of God. For "without reason there is no basis for the deepest faith" [ibid., 90]. It is not possible to integrate human nature with the revealed truth. After all, only the use of intellect will "unite human affairs with divine matters," as the Cardinal often concluded with his favorite Latin phrase: *humanis divina iunguntur*.[32]

This is how a complete person is formed. It is a person who engages their whole intellect, heart and body, in painstaking and harmonious work on themselves.[33] Only such a vision of the birth of a new man inspires hope and joy in the Primate: "Of all the work of Catholic education, the greatest joy is the fact that a new man is born in us through our efforts and torments, in struggling with ourselves. And you are struggling in your youth, in your academic efforts, in your studies. However, in this blessed struggle, in these short years of study, you are going through «many times», because you are collecting every experience to live a full life in the future"[34] [ibid., 93].

CONCLUSIONS

Summing up, it should be noted that Cardinal Stefan Wyszyński's message to young people and students is a thoroughly original pedagogy: full of heart, goodness, kindness and faith in other people.[35] Wyszyński's attitude is

[31] From the sermon during the inauguration of the academic year 1960–1961, Lublin November 13, 1960.

[32] This sentence comes from the *Paschal Message* (also known as *Easter message*, Latin *Exultet*), an ancient song attributed to St. Ambrose, in its present form known from the 7th century AD.

[33] The Primate expressed his concern for the comprehensive development of young people many times. He addressed the students with an extremely emotional message during the mass inaugurating the new academic year at St. Anne's Church in Warsaw on October 6, 1957, in a homily entitled "Learn to love...": "Work on yourselves! If you want to socialize your soul, have love for people, not only for yourself. Learn to love not only with a little bit of yourself, but with all your humanity, mind, will, heart, body and spirit. Learn to love not only one layer of the Nation, a member of this or that group or party. Love the whole Nation because when you love a part of the Nation, you will be a sectarian working towards the destruction of the nation" [Wyszyński 2007, 22].

[34] From the sermon during the inauguration of the academic year 1960-1961, Lublin November 13, 1960.

[35] Alina Rynio, thoroughly analysing the primate's pedagogical thought and its originality, rightly calls it "the pedagogy of faith in man and his possibilities" [Rynio 2001, 280]. For

of a concerned and demanding father who really cares about his "children," or "a tribe of new people." He wishes for them to get not only a reliable education, but also gain life wisdom and a strong moral backbone. They should be able to pass on their wisdom to others, as well as teach them honest life and lasting values. The Primate presents a full, coherent, holistic vision of a young person – a student. This vision includes both their education and upbringing as an integral combination of natural values (abilities, talents, qualities of body and spirit) with supernatural values, i.e. self-improvement for the sake of "The One who is always the Way, the Truth and the Life for young people and for all humanity – *Deus, scientiae Dominus!*"[36] [Wyszyński 1968, 92]. The Primate looked to the future with hope, as he believed that the diplomas obtained by young people would be of use to the Homeland for a long time. They would shine with a steady flame, like lamps with a large supply of oil.

The Primate's statements acquire a special meaning even today because the modern world is beginning to depart from Christian values at a growing rate and it is becoming downright hostile to humans, despite the positive changes that have been taking place. The tangible proof of these trends is the crisis of education of children and youth, as well as moral relativism caused by the rejection of basic humanistic values and the greatest authorities (such as St. John Paul II). As a result, the following phenomena arise: conformism, apathy, rebellion, relative truth, calling evil good, calling ugliness beauty, etc. The Primate based his teaching on a solid, humanistic foundation, on the lasting categories of truth, good, beauty, solidarity and usefulness. In this situation, the Primate's educational message can be of use to the teacher who will effectively reach the hearts and minds of his students. He will equip them with complete knowledge and bring them closer to spiritual values and the Truth (the one with a capital "T"). Therefore, it is vitally important to continue to reflect upon the rich heritage of Cardinal Wyszyński, especially in the context of education of young people who want to become students. John Paul II, the Grand Patron of our University, often asked for this reflection.

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more on this, see chapter IV of her monograph entitled "Próba oceny koncepcji wychowania młodzieży w nauczaniu Kardynała Stefana Wyszyńskiego" [An attempt to evaluate the concept of educating young people in the teaching of Cardinal Stefan Wyszyński], 280–92.

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CONSTITUTIONAL CONDITIONS OF FINANCIAL CORRECTIONAL MECHANISM FOR SELF-GOVERNMENT VOIVODESHIPS

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Abstract. Correctional and compensatory mechanism that complements own revenues as the main source of financing own tasks and allowing correction of unequal, on a country scale, distribution of potential of self-government's own revenues, is an element of the system of self-government income, including own revenues, general subsidy and grants from the state budget. The elements of this mechanism at the level of self-governing voivodeships are voivodeships' contributions that gain a high level of own incomes from taxes and regional part of subsidy that is financed by the contributions. Fulfillment of the duty of making contributions limits autonomy of disposing own revenues by the self-government of the voivodeship. It is noteworthy, then, that shifting of financial resources between units of self-government of the same level, which is allowed by correctional and compensatory mechanism, is justified by such values and principles that are base to legal system and expressed in Constitution as justice, subsidiarity and solidarity. They cannot therefore be put aside when assessing legal regulation of voivodeship's self-government income system.

Keywords: regional part of subsidy, contributions of self-governing voivodeships, autonomy of self-government, the principle of solidarity, the principle of subsidiarity

INTRODUCTION

The income system of self-government units in Poland in its basis was created at the turn of XXth and XXIst centuries.[1] As Article 167(2) of Constitution states, it includes three elements: own revenues, general subsidy and specific subsidies from the State. Own revenues are the main resource for their own investments, sometimes supported also by the general subsidy. The general subsidy is financed by the State and partly by the payments made by units of local government that gain significant incomes by own revenues. It is all

[1] By provisions of Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended, and Act of 13 November 2003, the Local Government Units Income, Journal of Laws of 2021, item 38 [hereinafter: u.d.j.s.t.].

called by the general name of financial correctional mechanism for self-government that completes own revenues as the main resource for own investments and supporting corrections necessary due to uneven self-government incomes throughout the country. System of incomes of local authority units is supported by specific subsidies from the State that serve the end of realizing state administration orders that local authorities are obliged to fulfill [Hanusz 2015].

This type of self-government incomes has been the object of criticism and some of its details are not considered optimal. There has been a call for e.g. increasing significance of own revenues by providing these units with more resources of gaining them and extending competence of their organs of how to organize own revenues. There is also proposition of modifying financial correctional mechanism for self-government by limitation or even cancelling payments [Weber 2019]. Severe criticism is connected with the mechanism of financing of regional part of subsidy which is the part of voivodeship self-government income realized by payments of voivodeships that gain high income per person.[2] The arguments against it referred to legislation,[3] but also to unwanted results [Żółciak 2018]. But these arguments seem to be unsatisfactory. Resignation from payments of better – off units that would be the support in financing regional part of subsidy cannot be justified in the light of constitutional rules that influence legal regulation of the system of self-government incomes. They are also not rooted in financial conditions of the system.

1. CONSTITUTIONAL BASIS FOR SELF-GOVERNMENT INCOME SYSTEM

Legal regulation of the system of self-government incomes in Poland is firmly based in Constitution; it is rooted in the position of self - government in the system of public government and division of public resources between state and self-government administration [Niezgoda 2012]. The position of self-government in the system of public government is governed mainly by autonomy principle. It follows from the character of self-government units as structures different from state administration. As such, they realize own goals on their own behalf and responsibility (Article 16(2) of the Constitution). Own goals are public tasks that serve the needs of particulars self-government

[2] Which resulted in eliminating indicated part of general subsidy and contributions from voivodeship self-government income, while temporary leaving them for a period, until 2021. See Article 1 and 2 of the Amendment to Act of Local Government Units Income Act, Journal of Laws of 2019, item 1951.

[3] There were objections on the grounds of non-compliance with Article 167(2) of the Constitution. See the applicants' argumentation presented reasoning of the judgment of Constitutional Tribunal of 4 March 2014, ref. no. K 13/11, OTK–A 2014, No. 3, item 28.

communities (Article 166(1) of the Constitution); they have their own constitutive and executive organs[4] and they can be supervised only in respect of legality of their actions (Article 171(1) of the Constitution). With no autonomy for realizing their own tasks, conditioned by autonomy of taking decisions how to spend financial resources gained by own incomes that are meant to realize public tasks, self-government is of no meaning anymore as it becomes the element of unified state administration.

This autonomy, referred to the system of self-government incomes in its formal aspect, can only be guaranteed by legal regulation (Article 167(3) of the Constitution). Substantively, autonomy is realized by providing self-government units their own resources of financing own tasks, which enables them to decide how to organize the sources (Article 168 of the Constitution) and collecting incomes and also to decide what to spend money on. It is worth adding that in accordance with autonomy principle, if one wishes to be consequent, on one hand incomes that are generated on the territory of particular self-government unit should be administered by it; on the other hand it should also be responsible for financing its own tasks. Polish model of division of tax resources between state administration and local self-governments does not fulfill such a great autonomy.[5]

But autonomy of self-government is not absolute. On the contrary, there are certain limits conditioned by the necessity of realization need of the whole country, i.e. protection of interests the country as a whole [Banasiński 1998, 51], especially in unitarian country.[6] While analyzing the construction of the system of incomes of self-government units from the perspective of political position of these units that is expressed in autonomy of the self-government, one cannot forget about significance of other constitutional values and political rules,[7] as Constitutional Court stated.

One of these principles that is a base to the whole legal order is the principle of justice. Narrowly interpreted, it is identified with equality, is appeared

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[4] The initial ones are elected. See Article 169 of the Constitution.

[5] The model of tax competition, in which every public-law relation has absolute freedom in organizing and imposing public levies, was rejected. The solution using model of differentiation of tax sources and self-government share in state taxes was adopted in provisions of u.d.j.s.t. [Borodo 2012, 26ff]. Such solution is dependent on Act's principle of imposing and organising public levies, resulting from Article 217 of the Constitution. This means, that imposing and shaping their structure is restricted exclusively for state authorities. Limited capabilities, concerning determining the rate of tax and local charges can be given to local government units on the basis of the act in accordance to Article 168 of state's Basic Law [Niezgoda 2010, 360ff].

[6] Principle of the unitarian country is unbreakable boundary for decentralisation actions. See judgement of Constitutional Tribunal of 18 February 2003, ref. no. K 24/02, OTK–A 2003, No. 2, item 11.

[7] Hereinafter: CT. See judgement Of Constitutional Tribunal of 18 February 2003, ref. no. K 24/02.

in Constitutional Court's practice as a constitutional rule long before present Constitution was adopted.[8] Its normative base in Constitution is Article 32(1), according to which everyone is legally equal and should be equally treated by public authorities. The principle of justice is addressing also the legislator.[9] The place of the article in the chapter entitled "Freedom, rights and duties of a man and a citizen" suggests its application to the relation between an individual and the public authority. But it can be argued that the principle of justice as the constitutional pattern can be applied to the division of public resources between public administration and self-government administration, and especially between particular units of self-government which seems to be asserted by the specific system of self-government income. Firstly, the rules of division of public income are decisive in the quality of fulfilling public tasks by the subjects of public government which equals with the access that citizens have to the services of public government. Self-government units fulfill a fair deal of public tasks, ranging from education to transportation and public roads.[10] Principle of justice does not allow for uneven access of citizens to the services that is caused by uneven level of affluence of self-government units. Secondly, principle of justice, as it is mentioned above, is universal and applies to social life as well as to the political life. It should be therefore referred not only to individual citizens, but also to the whole groups, e.g. self-government units.

It means that public income should be divided between public administration and self-government units, and also – which should be stressed because of its relevance to the problem discussed – between specific units of self-government in proportions that reflect their share of realization of public tasks. Financial expression of the responsibility that they take is the money that has to be spent on the tasks. From the perspective of the principle analyzed, system of self-government incomes should ensure division of public incomes proportionally to the outcomes that shall follow from realization of the tasks. Not mentioning complex issue of the way of estimation of outcomes connected to the realization of public tasks and remembering that public tasks of self-government units at the same level are alike, it is worth to notice that limiting the system of self-government incomes to own revenues only which would be in line with principle of autonomy, cannot assure fulfillment of principle of justice understood as the directive of equality.

[8] See e.g. judgement of 5 November 1986, ref. no. U 5/86, OTK 1986, No. 1, item 1, and of 9 March 1988, ref. no. U 7/87, OTK 1988 No. 1, item 1.

[9] Cf. judgement of the Constitutional Tribunal of 24 October 1989, ref. no. K 6/89, OTK 1989 No 1, item 7.

[10] Listed among voivodeship self-government's tasks in Article 14(1)(1 and 10) of Act of 5 June 1998, the Voivodeship Self-government's, Journal of Laws of 2020, item 1668 as amended.

In the case of ceding all public collections as own revenues of the units of self-government, that would be hard to divide incomes between public administration and self-government units proportionally as to the outcomes. Incomes from the taxation could turn out too high or too low to fulfill assigned tasks. This note, though, becomes less important when considering the system of own revenues of the voivodeship self-government that is based on participation in public taxes, i.e. income taxes that contribute to state budget.[11] In such situation, appropriate division of incomes between public administration and self-government units can be assured by changing the percentage of self-government units in participation of tax incomes. What is more, it must be remembered that the revenue potential is unevenly distributed across the country. Some areas are better economically developed than others. Because of that fact, incomes from public taxation is uneven although these different units have to fulfill the same tasks. It can therefore be assumed that they need to spend similar amount of money, at least *per capita*. Both of these reasons lead to the conclusion that self-government system based on own revenues only cannot assure that principle of justice will be realized as there must be proportionate division of public incomes between public administration and self-government units, in proportion to the responsibility of realization of public tasks. There is a necessity to implement financial correctional mechanism that enables completing self-government units from public resources if needed and can be used to transfer these resources between different units of self-government.

It is worth noting that there is a value that could justify abandoning equality understood as it is shown above. This value, whose normative form is principle of solidarity, that justifies differentiation of self-government units' access to public incomes, is struggling to equalize chances of less affluent regions of the country at a cost paid by better – off units. Its realization requires the existence of financial correctional mechanism in the system of self-government incomes that enables transfer from more to less affluent units within the country.

The principle of solidarity in Polish Constitution is explicitly expressed in the preamble and also in Article 20. In jurisprudence of Constitutional Court is said in according to the public solidarity that the principle analyzed assumes the necessity of looking for the balance of interests of different legal entities as social life is based on codependence and mutual responsibility of

[11] See Article 6 u.d.j.s.t., according to which voivodeship self-government income from tax is contributing in tax revenues from Personal Income Tax from natural persons resining on the territory of the voivodeship, of 1,60% and contributing in revenues from Corporate Income Tax, from legal persons having their establishment on the territory of the voivodeship, of 14,75%.

all participants.[12] What is more, Constitutional Court states that the principle of solidarity is an axiological base to the Republic as the common good for all the citizens and democratic state of law that embodies the principles of social justice – which is expressed in Articles 1 and 2 of Constitution. This legislation provides grounds to inducing the duty of legislator that is prioritizing common good ahead of particular good when needed. Solidarity is the base of redistributive function of the principle of social justice.[13] Solidarity means therefore necessity of State intervention that should encompass supporting those who need it and no all including affluent ones [Banaszak 2009, 10]. Solidarity means just balancing of interest of particular legal entities. Its essence is shared responsibility for the common good. It requires on one hand restraining from acting that could destroy common interests and on the other hand, fulfilling one's duties and making easier for the other ones to fulfill theirs [Wojtowicz 2009, 219].

The principle of solidarity described above should be taken into account as the factor that shapes the legislation of self-government incomes. As it was mentioned before, the levels of affluence of self-government units vary. It results in uneven access to potential sources of income. It should be remembered that sometimes it is caused by factors that do not depend on self-government communities and local authorities cannot do much about this problem.[14] The principle of solidarity requires therefore that the part of the income of better – off units should be transferred to those that have limited access to sources of own revenues. The analyze of the system of self-government incomes, also seen from the perspective of this principle, leads to the conclusion that it cannot limit to own revenues, only letting units use their resources on their own territory. On the contrary, it should be completed with financial correctional mechanism that allows transferring financial resources between specific units of self-government which will in turn contribute to support less affluent communities and ensure all the people have equal access to the services of public government. Analyzed principle justifies limitations of freedom of particular units to use their own resources if there are other units to be supported.[15] These limitations cannot though overwhelm these affluent units so that they cannot fulfill their own tasks.[16]

[12] See judgement of 21 March 2000, ref. no. K 14/99, OTK 2000, No. 2, item 61, and of 30 February 2001, ref. no. K 17/00, OTK 2001, No. 1, item 4.

[13] See judgement of the Constitutional Tribunal of 19 December 2012, ref. no. K 9/12, OTK–A 2012, No. 11, item 136.

[14] E.g. presence of the natural resources, management centres, communication routes and development certain branches of economy, dependent on them.

[15] See judgement of Constitutional Tribunal of 4 March 2014, ref. no. K 13/11.

[16] See judgement of Constitutional Tribunal of 16 March 1999, ref. no. K 35/98, OTK 1999, No. 3, item 37.

The principle of solidarity is connected with the principle of subsidiarity in the range in which it shapes the system of self-government incomes. The latter is based on the assumption that whereas some of the tasks can be fulfilled by the communities at the lower level, they cannot be transferred to higher levels, but the communities of higher levels should support the ones of lower levels in their work.[17] In Polish Constitution the principle of subsidiarity is expressed in the final lines of preamble, together with the principle of solidarity. However, there is no doubt that it has been base to the concept of division of public tasks between organs of public administration and the units of self-government of different levels which is expressed in Article 163 and 164 in Constitution. According to them, this is self-government that fulfills public tasks unless they are reserved by Constitution to other organs of public government. Municipality, being the basic unit of self-government,[18] fulfills all the tasks of self-government, not reserved to other levels of self-government units. The principle of subsidiarity can be also seen as axiological base of the system of self-government incomes from Article 167(2) of Constitution. In that paragraph, the legislator, indicating categories of self-government incomes, in the first place indicated own revenues. That means that this category of incomes should be the main resource of financing own tasks. That is, particular self-government units should collect resources to fulfill public tasks assigned to them. These resources come from public dues as well as administering their assets.[19] If this is impossible from certain objectives reasons, these units should obtain the support from the state in the form of general subsidy and specific subsidies. This understanding of the analyzed paragraph of Constitution is coherent with the international regulations of self-government units.[20]

The principle of subsidiarity and with the principle of solidarity as they are applied to self-governmental legislation, can be linked to the principle of proportionality [Stępkowski 2006, 130]. In Constitution, it is expressed in limited way and it is only referred to the issue of the protection of freedom and rights of a human and citizen. Nevertheless, it was already present in jurisprudence of Constitutional Court even before introduction of present Constitution, as the

[17] Cf. e.g. judgements of Constitutional Tribunal of 8 April 2009, ref. no. K 37/06, OTK–A 2009, No. 4, item 47, and of 12 March 2007, ref. no. K 54/05, OTK–A 2007, No. 3, item 25.
[18] The lowest level unit.
[19] For Self-government voivodeships see Article 6(1 and 2) in connection to Article 3(2) of u.d.j.s.t.
[20] It is in accordance with Article 9 of European Charter of Local Self-Government drawn up in Strasburg on 15 October 1985 (Journal of Laws of 1994, No. 124, item 607 as amended), which does not apply to self-government voivodeship, as local self-government, but was a model for regulations adapted in Poland in regard to local government units income system of all levels [Niezgoda 2012, 82ff]. It is also in accordance to European Charter of Local Self-Government Article 14(3–5), which is not in force.

principle that has broader political meaning and is able to regulate functioning of self-government units.[21] It is also referred to by Constitutional Court as the point of reference while judging the constitutionality of self- government laws on the grounds of present Constitution from 1997[22]. As the Court indicates, this principle must be protected from violation which is excessive interference into self-government units which means that this interference must satisfy three conditions. Firstly, it must lead to intended ends, i.e. it must be purposeful. Secondly, it must be necessary to protect the public interest to which it is connected. Thirdly, its effects must remain proportionate to the measures that are taken on the citizen.[23] The principle of proportionality this understood, in connection with principles of subsidiarity and solidarity, referred to shaping of the system of self-government units incomes, requires that supporting less affluent units by wealthier ones, i.e. having wider access to potential income resources, does not lead to the situation when the latter are devoid of essential portion of own revenues that are needed to fulfill own tasks.[24]

2. NORMATIVE REGULATION OF THE FINACIAL CORRECTIONAL SYSTEM OF SELF-GOVERNMENT VOIVODESHIPS

The present normative form of general subsidy and payments for self-government voivodeships is a result of changes by the law of incomes of self-government units introduced due to Constitution Court's decision of non-compliance between Article 163(1) and (3) with Article 167(1) of Constitution of laws Article 31 in connection to Article 25 law indicated that regulate rules of calculating payments and division of regional part of subsidy.[25]

General subsidy for these units consists of three parts: compensatory, regional and educational. The part of the greatest significance is compensatory[26] one and it is financed by the state. It includes two elements: basic amount and compensatory amount. Basic amount is obtained by the voivodeships of low revenue potential. This potential is measured with the rate of tax income per capita. It is calculated by dividing the sum of tax income of self-government voivodeship by the number of its inhabitants. Own tax income of the voivodeship consists of income tax from natural persons and income tax from legal entities and these are the only sources that can be used to calculate the rate

[21] Cf. judgement of Constitutional Tribunal of 26 May 1998, ref. no. K 17/98, OTK 1998, No. 4, item 48.

[22] See e.g. judgement of 12 April 2000, ref. no. K 8/98, OTK 2000, No. 3, item 87, and judgement of 15 April 2002, ref. no. K 23/01, OTK–A 2002, No. 2, item 19.

[23] See judgement of 4 May 1998, ref. no. K 38/97, OTK 1998, No. 3, item 31.

[24] Cf. judgement of Constitutional Tribunal of 4 March 2014, ref. no. K 13/11.

[25] Ibid.

[26] In 2021 it is estimated to be 1.738.735 zloty. See the budget bill substantiation for 2021.

of tax income for self-government voivodeships. To obtain basic amount, voivodeship's rate must be below the average rate calculated on the basis of the date collected from across the country (Article 24(2) and (6) u.d.j.s.t.) and the basic amount constitutes 72% of difference between voivodeship's rate and average rate. Construction of basic amount assumes therefore only partial completion of incomes of the voivodeships that do not gain average level of tax income. It is worth noting that the inflation of average rate is dictated by relatively high rate of Mazovian Voivodeship. Most of Polish voivodeship gains income that places them under the average level[27] and they use the completion from the state budget.

Basic amount is obtained by voivodeships of small number of inhabitants (Article 24(7) and (8) u.d.j.s.t.). Although basic amount can be obtained by voivodeships whose income rate does not exceed 125% of an average rate (Article 24(7) u.d.j.s.t.), it can be accepted that the amount is granted to units of low tax income as tax income rate *per capita*[28] is shaped in a specific way and the criterion of obtaining it is small number of inhabitants.[29]

Educational part of subsidy is of far less significance.[30] It is also financed by the state. Its amount is connected to many criteria described in the law of incomes of self-government units that determine the level of expenditures that self-government units bear in the educational sector. It is worth stressing that educational part of subsidy has general character which means that self-government unit can decide what tasks it will support. Neither the law of incomes of self-government units nor any other law oblige self-government unit to account for subsidy or return any portion of it. The name is therefore connected with the criteria of its calculation and not with its purpose. The principle of the division of this part of the subsidy as it is determined in budget law is claimed by the proper education minister with the regulation. He does it after consulting public finance minister and the representation of the units of self-government and he also has to take into account many other criteria (Article 28(6) u.d.j.s.t.). This regulation does not therefore satisfy requirement of fulfilling the rules of calculation of general subsidy by law that follows from the principle of self-government autonomy.

The part of subsidy that is of far less significance for self-government voivodeships[31] is regional part. However, it is the object of criticism because

[27] According to data from 2019 that was used to estimate rate for 2021 it was 12 voivodeships out of 16. See https://www.gov.pl/web/finanse/wskazniki-dochodow-podatkowych-gmin-powiatow-i-wojewodztw-na-2021-r [accessed: 19.01.2021].

[28] Only Mazovian Voivodeship exceeds indicated rate of tax revenues.

[29] Seen as an overall amount of tax income, as tax income rate *per capita*.

[30] Educational part of subsidy from state budget for 2020, for all local government units overall cost was 49.735.775 zloty, but only 628.488 zloty was given to self-government voivodeships, see https://www.gov.pl/web/finanse/zestawienia-zbiorcze3 [accessed: 01.12.2021].

[31] In 2021 it amounts 638.824 zloty. See the budget bill substantiation for 2021.

of the source of its financing. It is financed by payments made by affluent self-government voivodeships. Making those payments is obligatory for the voivodeships whose tax income rate is at least 125% of the average rate. The amount of charge is calculated progressively. At the same time, the payment cannot exceed 35% of tax income of a given voivodeship. Moreover, payments become 10% lower in case tax income[32] falls 10%. Regional part of subsidy is therefore provided for voivodeships with high unemployment rate and low income (Article 70b u.d.j.s.t.).[33]

Considering criteria of calculating payments that contribute to regional part of subsidy and the principles of its division it can be recognized that the payments and the analyzed subsidy part together create financial mechanism allowing for shifting resources between self-government voivodeships, i.e. in a horizontal manner. Under present conditions constituted by the system of tax income in self-government voivodeships that is limited to participating in tax income, this mechanism seems to be well justified. One must take into account that inherent part of the system is diversification of the amount of voivodeship's income. Tax income rate for Mazovian Voivodeship with its capital city of Warsaw is significantly higher than other voivodeships' rates. It is twice as high as the average rate. Apart from Mazovian Voivodeship, only three other voivodeships reach the rate higher than average. Mazovian Voivodeship is however the only one that reaches 125% of the average rate.[34] This shows how significant is the dissection of tax income *per capita* at the level of voivodeship is.

In such situation, the only voivodeship that is obliged to make payments to finance regional part of subsidy is Mazovian Voivodeship. From that fact does not follow that making payments is a thread to welfare of this voivodeship. Even with financing regional part, Mazovian Voivodeship gains positive tax income.[35] Similarly, it does not follow that voivodeships that obtain regional part of the subsidy are supported excessively[36] by that. This financial correctional mechanism that includes all parts of subsidy, the ones financed

[32] Compared to the period adopted as a point of reference. See Article 70a(2) and (4) u.d.j.s.t.

[33] This refers to these voivodeships, in which income from tax revenues plus compensatory subsidy are lower than 125% of average rate *per capita*.

[34] According to data published by Ministry of Finance for 2021, rate of the tax revenue income *per capita* in Mazovian voivodeship is 497,02 zloty; the average rate is 230,09 zloty, whereas the lowest rate 103,52 zloty. Respectively rate of income of tax revenues for 2019 was: in Mazovian voivodeship 390,79 zloty, the average rate – 178,32 zloty, and the lowest rate – 76,87 zloty; whereas in 2018 tax revenue income rate for Mazovian voivodeship was 324,90 zloty, the average rate was 159,41 and the lowest rate was 75,46 zloty.

[35] In 2018 according to the data published by Ministry of Finance, the surplus of income over the expenditure for Mazovian voivodeship was 326.069.738 zloty.

[36] Voivodeships that had the lowest tax income rates, despite obtaining regional part of the subsidy recorded in 2018 budget deficit.

with state budget as well as the ones financed by the contributions of self-government voivodeships, does not undermine significance of own revenues as the basic source of financing own tasks by self-government voivodeships.[37]

CONCLUSIONS

Construction of financial correctional mechanism at the level of self-government of voivodeship following from the law of incomes of self-government units that includes general subsidy and payments made by self-government voivodeships is compatible with directives that follow from constitutional legislation that regulates the system of self-government income. Therefore, demands to liquidate payments as partial financing of subsidy seem to be unreasonable.

Firstly, it is worth noticing that own revenues remain the main source of financing own tasks of self-government voivodeships. General subsidy merely supplements own revenues in their function of financing own tasks and is mainly financed from state resources. The principles of calculating are objectivized and not random, and they are determined by law. What is more, self-government units are autonomous in their decision how to use resources obtained in the form of subsidy. Using subsidy does not limit their autonomy in realization of own tasks. This regulation does not stand in opposition to the principle of autonomy of self-government.

Secondly, compensational part of subsidy only partially neutralizes the results of limited access of self-government voivodeships to the sources of own revenues. On general basis, self-government unit itself is obliged to seek possibilities to finance own tasks with its resources. This regulation complies with the principle of subsidiarity principle.

Thirdly, general subsidy is financed by the state, i.e. it contains of resources collected centrally in the state budget. It is financed by more affluent voivodeships only in a limited way and only in those that belong to the regional part. And so it can be said that partial and limited support less affluent voivodeships by those that are economically stronger is in line with demands following from the principle of solidarity and it does not violate the principle of subsidiarity.

This general judgment can be enhanced by the analysis of the tax income rate of self-government voivodeships that shows significant and, by the principle of proportionality, unacceptable, stratification of the access to the resources of own revenues in specific voivodeships. At the same time, they are obliged to pay for their own tasks that implies increase of the outcome. Considering

[37] According to Ministry of Finance's compilation of financial statement of local government units, own revenues made 52,7% of overall income in 2017, whereas in 2018 it raised to 53,2% of overall income.

regulations that limit amount of the payments which means that they cannot fully use their own tax income, present regulation of payments does not violate autonomy of self-government voivodeships in governing their own revenues. It applies to Mazovian Voivodeship as well. The necessity of sustaining correctional financial mechanism as an element of financing self-government does not follow from faulty regulation of income system, but rather from objective situation that is uneven income potential in specific self-government units. Until that happens, financial correctional mechanism may enable realization of constitutional principles and values mentioned above within the system of self-government voivodeships income.

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PROCEEDINGS IN RELATION TO ABSENT PERSONS UNDER THE FISCAL PENAL CODE (SELECTED ISSUES)

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Abstract. The paper is devoted to the discussion of the situation of the accused in the proceedings in relation to the absent, which is regulated by the Fiscal Penal Code. The author discusses the conditions which make it possible to examine the case of a person accused of fiscal offences and fiscal petty offences. The prerequisites for conducting such special proceedings are: permanent residence abroad of the perpetrator of a fiscal offence or fiscal petty offence or a situation when it is not possible to determine the place of residence or stay of the accused perpetrator (Article 173(1) of the Fiscal Penal Code). Negative conditions for these proceedings are the following situations: when the guilt of the perpetrator or circumstances of a prohibited act give rise to doubts, or when a person accused of a fiscal offence hid after the filing of a bill of indictment with the court, and also when in the course of proceedings before the court his place of residence or place of stay in the country is established (Article 173(2) of the Fiscal Penal Code). The author discusses the procedural consequences that result from the possibility of conducting proceedings against an absent defendant in cases of fiscal offences or fiscal petty offences.

Keywords: criminal fiscal proceedings, criminal proceedings, proceedings against absent persons, accused of a fiscal offence or fiscal petty offence

INTRODUCTION

The study discusses issues relating to the legal regulations that apply to the accused in the proceedings in relation to absent persons. It omits the rules relating to the entity bearing subsidiary responsibility.

1. THE CHARACTERIZATION OF PROCEEDINGS IN RELATION TO ABSENT PERSONS UNDER THE FISCAL PENAL CODE

Pursuant to Article 117(1)(4) of the Fiscal Penal Code,[1] proceedings in relation to the absent are one of the proceedings in which it is possible to

[1] Act of 10 September 1999, the Fiscal Penal Code, Journal of Laws of 2020, item 19 as amended [hereinafter: FPC].

adjudicate in cases of fiscal offences and fiscal petty offences. It is treated as a special procedure in relation to ordinary proceedings [Grzegorczyk 2001, 407, 534; Światłowski 2008, 263], provided for by the Fiscal Penal Code. Article 113(1)(2) FPC provides that in proceedings in cases of fiscal offences and fiscal petty offences the provisions of the Code of Criminal Procedure[2] shall apply accordingly, apart from those which are excluded under special regulations contained in the Fiscal Penal Code. It should be pointed out that there is no consensus of views in the literature as to the legal nature of proceedings in cases of fiscal offences. In principle, the following positions can be distinguished on this issue. The first assumes that fiscal penal proceedings are separate from criminal proceedings [Światłowski 2008, 146, 157], a special mode, a special criminal procedure.[3] In the opposite view, the fiscal penal proceedings are a type of criminal proceedings in the broad sense [Wilk and Zagrodnik 2015, 253]. In the opinion of these authors, the subject matter of these proceedings is the distinguishing feature [ibid.]. Taking into account the specific subject matter was the basis for the formulation of the view that fiscal penal proceedings are neither criminal proceedings within the meaning of Article 1 CCP nor special proceedings or a separate mode of criminal trial, and this is so because the subject matter of such proceedings is the issue of legal liability for prohibited acts which are not offences in the sense adopted in the provisions of the Criminal Code and specific criminal statutes [Kmiecik 2009, 48–49; Idem 2004, 456]. According to R. Kmiecik, fiscal penal proceedings, similarly to disciplinary or petty offences proceedings, belong to a separate system of law on the borderline between the law regulating the administration of justice in criminal matters and broadly defined administrative law [Kmiecik 2004, 456] and is one of the quasi-criminal proceedings regulated in separate legal acts [Idem 2009, 48].[4] In addressing this issue, the view should be supported that the possibility of applying the provisions of the Code of Criminal Procedure in specific proceedings does not in itself determine that a given proceeding should be equated with criminal proceedings within the meaning of Article 1 CCP. The subject of the criminal trial is the issue of legal liability, especially the criminal liability of the accused for the alleged offence. Since it is not possible to equate an offence with a fiscal offence,[5] it is therefore reasonable to take the view that proceedings in cases

[2] Act of 19 April 1969, the Code of Criminal Procedure, Journal of Laws of 2021, item 534 as amended [hereinafter: CCP].

[3] See also Światłowski 2008, 156; Grzegorczyk 2001, 392; Idem 2014, 886; Razowski 2017a, 1069; Wiliński 2020, 26, 28. P. Wiliński classifies fiscal penal proceedings as proceedings related to criminal proceedings [Wiliński 2020, 26].

[4] This view has been challenged in the literature, see: Błachnio–Parzych, Hudzik, and Pomykała 2006, 253; Światłowski 2008, 159.

[5] See the resolution of the Supreme Court - Criminal Chamber of 4 April 2005, ref. no. I KZP 7/05, Lex no. 146390. In the opinion of the Supreme Court, *de lege lata* the thesis that, under

of fiscal offences are neither a separate form of criminal proceedings nor specific criminal proceedings. The above statement does not mean that in the course of the proceedings provided for by the Fiscal Penal Code no decisions on criminal liability are made. The following arguments support this thesis. Firstly, Article 1(1) FPC provides that criminal liability is incurred for committing a fiscal offence [Łabuda 2017, 24]. It is worth noting at this point that the Fiscal Penal Code does not extend the concept of criminal liability onto committing a fiscal petty offence. Pursuant to Article 1(1) FPC, in this case the expression "liability for a fiscal petty offence" was used [ibid., 24–25]. Secondly, the interpretation of the concept of a criminal case within the meaning of Article 6(1) of the European Convention on Human Rights should be used. It is assumed that the regulations in force in a given country are relevant in resolving this issue [Nowicki 2009, 263]. At the same time, it is argued that they are not considered decisive. Whether we are dealing with a criminal case within the meaning of Article 6(1) of the European Convention on Human Rights is to be decided by the nature of the punishable act [ibid.; Nita–Światłowska 2019, 669]. It is pointed out that the punishment is primarily aimed at retribution and deterring similar acts of the perpetrator himself and others. Its application must be based on a general standard of a preventive and repressive nature.[6] A consequence of these assumptions is the thesis, according to which the proceedings in the case of a petty offence are also treated as a criminal case within the meaning of Article 6 of the European Convention on Human Rights [Hofmański and Wróbel 2010, 281–83; Dąbkiewicz 2014, 24–25]. Accepting these assumptions one should assume that proceedings in the case of a fiscal offence should be treated as a criminal case. The recognition of a case as a criminal one makes it necessary for proceedings in such cases to meet the requirements set out in Article 6 of the European Convention on Human Rights.

This understanding of the criminal case is also present in the case law of the Constitutional Tribunal. According to the rulings of the Constitutional Tribunal, constitutional guarantees related to repressive liability (Article 42(2)

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the Criminal Code, the concept of an offence does not include fiscal offences has been accepted by both the judges who supported the view expressed in the thesis of this resolution and the judges who submitted a separate opinion. See also: Wilk and Zagrodnik 2015, 10. On the relationship between fiscal and ordinary criminal law, see Błachnio–Parzych, Hudzik, and Pomykała 2006, 252 and the literature indicated there. As regards the autonomy of the Penal Code, see Konarska–Wrzosek 2010, 30–31.

[6] See the judgement Bendenoum v. France of 24 February 1994, ref. no. A 284, para. 47, in: Nowicki 1998, 134; Idem 2009, 263. See also Kruk and Nowikowski 2015, 200; Nita–Światłowska 2019, 669.

of the Constitution) apply not only to strictly criminal proceedings, but also to other proceedings referring to the issue of repressive liability.[7]

As an addition to the above thesis, it is worth quoting the view of the Supreme Court expressed in its judgment of 9 June 2005, according to which the principles of *nullum crimen sine lege*, *nulla poena sine lege* and the presumption of innocence provided for in Article 42 of the Constitution of the Republic of Poland concern not only criminal liability in the strict sense of the word, but also apply to other forms of criminal liability associated with the imposition of penalties on an individual.[8]

For these reasons, it can be argued that the constitutional principles of guarantee nature and the regulations contained in Article 6 of the European Convention on Human Rights cover various areas of repressive law, which include proceedings in cases of fiscal offences and petty fiscal offences.

2. THE CONDITIONS WHICH MAKE IT POSSIBLE TO EXAMINE THE CASE OF A PERSON ACCUSED OF FISCAL OFFENCES AND FISCAL PETTY OFFENCES AND NEGATIVE CONDITIONS FOR THESE PROCEEDINGS

Pursuant to Article 173(1) FPC, proceedings may be conducted against a perpetrator of a fiscal offence permanently residing abroad or if his place of residence or stay in the country cannot be determined, during his absence. The possibility of conducting proceedings in relation to an absent defendant is a permanent normative solution in Polish fiscal penal law [Razowski 2014, 60; Tużnik 2011, 61]. Such a regulation was provided for in the fiscal penal acts: of 2 August 1926 (Article 228),[9] of 18 March 1932 (Article 227),[10] of 13 April 1960 (Articles 230–234),[11] of 26 October 1971 (Articles 271–273)[12] and in the Decrees – Fiscal Criminal Law: of 3 November 1936 (Articles 337–342)[13] and of 11 April 1947 (Articles 288–293).[14]

The legal possibility of conducting proceedings in cases of fiscal offences against a defendant permanently residing abroad or when his place of residence

[7] Thus: judgement of the Constitutional Court of 19 February 2008, ref. no. P 48/06, OTK–A 2008, no. 1, item 4; judgment of the Constitutional Court of 3 November 2004, ref. no. K 18/03, OTK–A 2004, no. 10, item 103. On the concept of repressive behaviour, see Mamak 2016, 3–6.

[8] See judgement of the Supreme Court of 9 June 2005, ref. no. V KK 41/05, OSNKW 2005, no. 9, item 83. This vie is approved by Dąbkiewicz 2014, 25.

[9] Journal of Laws No. 105, item 608 as amended.

[10] Journal of Laws No. 34, item 355 as amended.

[11] Journal of Laws No. 21, item 123 as amended.

[12] Journal of Laws, No. 28, item 260 as amended.

[13] Journal of Laws, No. 84, item 581 as amended.

[14] Journal of Laws, No. 32 as amended.

or stay in the country cannot be determined is a different regulation from the legal solutions adopted in the currently binding Code of Criminal Procedure in the case of the occurrence of the above mentioned circumstances, which are connected with the suspension of proceedings [Tużnik 2011, 63–64]. Pursuant to Article 22(1) CCP a long-term obstacle preventing the conducting of proceedings, consisting, among others, in the inability to capture the accused, justifies the suspension of proceedings. It is assumed that the expression "the accused cannot be captured" refers both to the perpetrator's hiding and his long-term absence in the country in circumstances in which there are no prospects of his imminent return, and extradition proceedings either have not been initiated or are protracted [Gostyński 1998a, 121; Idem 1998b, 231]. Therefore, it is justified to state that Article 173(1) FPC constitutes a *lex specialis* in relation to Article 22 CCP [Światłowski 2008, 176]. The conditions justifying the suspension of proceedings are not the same as those justifying the conducting of proceedings in relation to the absent.[15]

It should be pointed out that there are legal regulations in force referring to the criminal process which allow proceedings to be conducted in spite of the absence of the accused. In the context of these considerations, it is worth mentioning that the 1969 Code of Criminal Procedure provided for proceedings in relation to the absent. Pursuant to Article 415 CCP of 1969,[16] against a person accused of committing an offence specified in Article 122 of the former Penal Code,[17] (treason of the homeland), Article 123 f.P.C. (conspiracy against the State), Article 124 f.P.C. (espionage) and Article 130 f.P.C. (diplomatic treason), Article 304(3) f.P.C. (desertion), Article 1(1) of the decree of 31 August 1944 on the punishment of fascist-Hitlerian criminals guilty of murder and abuse of civilians and prisoners of war and of traitors of the Polish Nation[18] [Prusak 2015, 77] could take place during that person's absence. Article 417 CCP of 1969 provided that in the case when the convicted person was apprehended or personally appeared before the court, a copy of the final judgment should have been delivered to him. At the request of the accused, submitted within 14 days from the date of delivering him the judgement, the court whose judgment became final was to set the date of the hearing, and the judgment issued at that instance expired when the accused appeared at the hearing. The defendant's request was considered to be an objection.[19] Although pursuant

[15] According to G. Skowronek one can talk of apparent convergence in this case [Skowronek 2020].

[16] Act of 19 April 1969, the Code of Criminal Procedure, Journal of Laws No. 13, item 96 as amended.

[17] Act of 19 April 1969, the Penal Code, Journal of Laws No. 13, item 94 as amended indicated [hereinafter: f.P.C. or former Penal Code].

[18] Journal of Laws of 1946, No. 69, item 377 as amended.

[19] See Cieślak 1984, 379; Grajewski 1993, 551; Wrona 1997, 112. According to S. Waltoś, this request was described either as "de facto objection" [Waltoś 1971, 206, 210, 211] or as an

to Article 3(1) of the Statute introducing the Code of Criminal Procedure of 6 June 1997,[20] the Code of Criminal Procedure of 19 April 1969 was repealed, and thus also the articles on proceedings with respect to absent persons (Articles 415–417), but under Article 12a of the Introductory Provisions[21] in a case which ended with a final conviction, issued in the proceedings with respect to the absent persons provided for by the Code of Criminal Procedure of 1969, a copy of that conviction is delivered to the convicted person if the convicted person is apprehended or if he or she appears before the court. At the request of the convicted person, submitted in writing within 14 days of delivering of the judgment, the court whose judgment has become final shall immediately convene a hearing and the judgment delivered at that instance shall cease to have effect as soon as the convicted person appears at the hearing. This provision therefore allows a person convicted before 1 September 1998, in proceedings against the absent, to have the final judgment cancelled. The discussed measure of appeal can be classified as an objection.

In addition, it should be pointed out that there were other regulations under criminal procedural law and fiscal criminal law that allowed proceedings to be conducted despite the defendant's failure to appear. In this context, it should be pointed out that until the entry into force of the amendment of 27 September 2013, i.e. 1 July 2015, both the criminal proceedings regulated by the Code of Criminal Procedure and the Fiscal Penal Code provided for simplified proceedings, which allowed for the possibility of issuing a judgment in absentia in the case of the defendant's failure to appear at the trial.[22] Pursuant to Article 479(1) CCP in connection with Article 113(1) FPC, if a defendant, who had received the summons, did not appear at the main hearing, then the court could conduct the proceedings without his participation, and if his defence counsel did not appear, the court could issue a judgment in absentia [Kala 2005, 46]. In addition, prior hearing of the defendant was a condition for allowing the judgment to be issued in absentia (Article 479(2) CCP). This regulation was applicable in penal fiscal proceedings as well (Article 479(2) CCP in connection with Article 113(1) FPC).

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objection [Idem 1973, 68–69].

[20] Journal of Laws No. 89, item 556.

[21] Article 12a was added by the Act of 10 January 2003 amending the act – the Code of Criminal Procedure, the statute – Provisions introducing the Code of Criminal Procedure, the act on the Crown Witness and the act on the Protection of Classified Information, Journal of Laws No. 17, item 155.

[22] In the fiscal penal law the simplified procedure was provided for in the fiscal penal laws of 1926, 1932, 1960, 1971, 1999. Fiscal penal law, regulated by the decrees of 1936 and 1947, although they did not provide for a simplified procedure, they referred to the regulations contained in the Code of Criminal Procedure, and provided for the possibility of a simplified procedure. See more Tużnik 2013, 54–55.

In addition, when comparing the regulations contained in the proceedings against the absent from the Fiscal Penal Code with the regulations provided for in the Code of Criminal Procedure, the following may be observed. As a result of the amendment of Article 374 CCP by the Act of 27 September 2013,[23] the rule that the presence of the accused at the trial is mandatory was broken. A different regulation was adopted, according to which the compulsory participation of the accused at the trial is an exception to the rule according to which the accused is entitled to participate in the trial [Ponikowski and Zagrodnik 2020, 1002]. Pursuant to Article 113(1) FPC, these regulations apply in criminal fiscal proceedings.

Pursuant to Article 173(1) FPC, proceedings may be conducted against a perpetrator of a fiscal offence or a fiscal petty offence permanently residing abroad or if his place of residence or stay in the country cannot be determined, during his absence. This provision shall not apply if: the guilt of the perpetrator or the circumstances of the offence raise some doubts and, in addition, the accused of the fiscal offence concealed himself when the indictment was brought before the court, and also when his place of residence or stay in the country was discovered in the course of proceedings before the court.

The following comments can be made in relation to this regulation.

Firstly, the use by the legislator of the term "perpetrator of a fiscal offence" is questionable. Pursuant to Article 42(3) of the Constitution and Article 113(1) FPC in conjunction with Article 5(1) CCP, the principle of the presumption of innocence applies in these proceedings, and therefore the term "defendant" should be the correct expression. In the context of these remarks, it is worth recalling that previously applicable laws used the term "accused" in articles referring to the proceedings in relation to the absent.[24]

It should be noted, however, that the current Fiscal Penal Code does not make a distinction between the accused and the blamed person within the meaning of the Code of Petty Offences Procedure. Pursuant to Article 120(1) and (2) FPC the accused is the passive party both in proceedings in cases of fiscal offences and the passive party in proceedings in cases of fiscal petty offences.

Secondly, one of the prerequisites for the possibility of conducting proceedings in relation to absent persons is the permanent presence of the accused abroad. It is assumed that this circumstance occurs when the accused is a foreigner or a Polish citizen permanently residing abroad [Prusak 1994, 387; Błaszczyk 2016, 305]. Moreover, the thesis that permanent residence is also taking place when a Polish citizen has left the country's borders and is staying abroad without specifying his stay or does not show any intention of

[23] Journal of Laws item 1247.

[24] See: Article 222(1) in connection with Article 271 and 272 of the Fiscal Penal Act of 1971; Article 230 of the Fiscal Penal Act of 1960.

returning should be accepted [ibid.]. It is assumed in the literature that the condition of "permanent residence" is also met when the accused, the blamed person, is temporarily staying abroad, but for a long time and without specifying the probable moment of return.[25] These circumstances should be established in criminal fiscal proceedings. If it is impossible to establish that the accused's stay is not permanent within the meaning of Article 173(1) FPC, and at the same time the absence is of a long-term character, then fiscal penal proceedings should be suspended pursuant to Article 22 CCP in connection with Article 113(1) FPC, while undertaking certain search activities. In this case, it will be the issuance of e.g. a European arrest warrant [Błaszczyk 2016, 305], a letter of intent (Article 281 CCP in connection with Article 113(1) FPC) [Tużnik 2013, 302].

Another positive condition for the proceedings in relation to absent persons is the inability to determine the defendant's place of residence or stay. Also in this case, determination of this circumstance should be preceded by appropriate search activities such as ordinary search (Article 278 CCP in connection with Article 113(1) FPC), an arrest warrant (Article 279 CCP in connection with Article 113(1) FPC) [Błaszczyk 2016, 305; Wilk and Zagrodnik 2015, 705].

It should be stated that if the accused cannot be apprehended and it is necessary to suspend the proceedings and there are no grounds for conducting the proceedings in relation to absent persons, while the evidence gathered indicates that in the case of a conviction the forfeiture would be ordered, the court may order the forfeiture of objects (see Article 43a FPC).

Thirdly, Article 173(2) provides for negative conditions for conducting proceedings in relation to the absent. One of them occurs when the guilt of the perpetrator or the circumstances of committing a prohibited act give rise to some doubts, which should be understood as uncertainty or the occurrence of justified doubts as to the existence of the constituent elements of a fiscal offence or fiscal petty offence.[26] It has been indicated that such a situation occurs when the evidence gathered in the preparatory proceedings does not allow for a full and unambiguous assessment of the committed fiscal offence or fiscal petty offence and of its perpetrator and thus prevents the truth from being reached in these proceedings [Razowski 2017b, 1403].

[25] See Razowski 2017b, 1402–403; Skwarczyński 2012, 49 (and the literature indicated there); Skwarczyński 2002, 114. Temporary stay abroad is when the accused has gone away for business, tourism or family purposes [Błaszczyk 2016, 305].

[26] See the comments of Razowski 2017b, 1403 on the correctness of the formulation of this premise. The Supreme Court stated in its judgment of 1 October 2005, ref. no. II KK 124/15, that proceedings against the absent can only take place if there is a substantive conviction that a fiscal offence or fiscal petty offence has actually occurred.

The second negative condition for the conducting of proceedings in relation to the absent occurs when the accused of a fiscal offence has concealed himself when a bill of indictment has been filed with the court as well as when his place of residence or stay in the country has been established in the course of proceedings before the court. In the literature, there has been a divergence of opinions concerning the subjective scope of the regulation indicated in Article 173(2)(2) FPC. According to the first position, the phrase "accused of a fiscal offence" contained in Article 173(2)(2) FPC only applies to the accused who has been charged with a fiscal offence [Skwarczyński 2012, 48; Tużnik 2011, 65; Wilk and Zagrodnik 2015, 706]. This negative condition for the prosecution of the absent person would not apply to a person accused of a fiscal petty offence [Skwarczyński 2012, 48; Tużnik 2011, 65]. The consequence of this distinction would therefore be to state that the concealment of a defendant charged with a fiscal petty offence after the indictment has been brought before a court would not constitute an obstacle to conducting proceedings against the absent in relation to that person. According to a different opinion, when interpreting Article 173(2)(2) FPC, a literal interpretation of the term "accused of a fiscal offence" should not be adopted, but the scope of that formulation should include both the accused of a fiscal offence and the perpetrator of a fiscal petty offence [Razowski 2017b, 1405]. In R. Razowski's opinion, adopting a literal interpretation would mean that discovering the offender's place of residence or stay after the filing of the indictment would not be an obstacle to the conduct of proceedings against the absent in relation to that person, which is considered to be contrary to the principles of that special procedure [ibid.].

In addressing this issue, it should be pointed out that the legislator has not differentiated between the "accused" and the "blamed" in the meaning given to these concepts by the Code of Criminal Procedure and the Code of Petty Offences Procedure. For these reasons, to use only the term "accused" without further specification may mean both the accused in fiscal offence proceedings and the accused in fiscal petty offences proceedings. It should be noted that in the original version of Article 173(2)(2) FPC, the lawmaker used the concept of the accused without further specification of the categories of cases to which the accused was a party. Therefore, taking into account the content of Article 120(1) and (2) FPC, the view was justified that the regulation contained in Article 173(2)(2) FPC concerned both the accused in cases of fiscal offences as well as the blamed person in cases of fiscal petty offences. Pursuant to Article 1(132) of the Statute of 28 July 2005 amending the act – Fiscal Penal Code and certain other acts,[27] Article 173(2)(2) FPC was amended in such a way that the wording was used: "accused of a fiscal offence." Therefore,

[27] Journal of Laws of 2005, No 178, item 1479.

when comparing the current wording of this provision with the regulation previously in force, it seems justified to conclude that the negative condition for conducting proceedings in relation to the absent persons, contained in Article 173(2)(2) FPC, applies only to a defendant in cases of a fiscal offence.

3. THE PROCEDURAL CONSEQUENCES THAT RESULT FROM THE POSSIBILITY OF CONDUCTING PROCEEDINGS AGAINST AN ABSENT DEFENDANT IN CASES OF FISCAL OFFENCES OR FISCAL PETTY OFFENCES

The issuance of a decision on the application of the proceedings to the absent, pursuant to Article 175 FPC, entails the necessity to appoint a defence counsel *ex officio* – in preparatory and court proceedings, both in the first and second instance (Article 176(1) FPC).[28]

It can be inferred from the essence of the proceedings in relation to the absent that the provisions which require the presence of the accused cannot be applied in these proceedings (Article 174 FPC). Proceedings in relation to the absent are conducted in accordance with the provisions on ordinary proceedings with deviations resulting from the specificity of such special proceedings. Pursuant to this regulation, in preparatory proceedings, the complex act of presenting charges (Article 313 CCP, in conjunction with Article 113(1) FPC) is limited only to preparing a decision on presenting charges. Evidence such as questioning the suspect (accused), confrontation, presentation with the participation of the accused is not carried out. The fact of the absence of the accused (suspect) does not release the authorities conducting preparatory proceedings from the obligation to inform the defence counsel of the final date of being apprised with the materials of the preparatory proceedings and to inform about the right to a prior examination of the files within a time limit appropriate to the gravity or complexity of the case (Article 321(1) CCP, Article 325h in connection with Article 113(1) FPC). Similar solutions related to the absence of the accused are found at the stage of court proceedings. In this context, it is worth paying special attention to the activities in which it is necessary to cooperate with the accused or the essence of which is his expression of consent to actions taken by other participants in the proceedings.

The first such situation occurs in the case of the institution of conviction at a sitting without a trial (Article 335 CCP in connection with Article 343 CCP). The lack of the presence of the accused prevents the conclusion of an appropriate agreement between the accused and the prosecutor. Similarly, the regulation indicated in Article 338a CCP cannot be applied in connection with Article 343a CCP due to the absence of the accused, who is entitled to submit

[28] See Grzegorczyk 2001, 539; Razowski 2005, 261–62; Idem 2017c,1407.

an appropriate motion. Also the absence of the accused makes it inadmissible to apply Article 387 CCP, which provides for voluntary submission to criminal liability.

In criminal proceedings, the consent of the accused is required when a public prosecutor withdraws the indictment after the commencement of court proceedings (Article 14(2) CCP), during the proceedings referring to an incidental process (Article 398 CCP), when a defence counsel withdraws the appeal brought in favour of the accused (Article 431 CCP). Pursuant to Article 113(1) FPC these regulations apply in criminal fiscal proceedings. Due to the absence of the accused in the proceedings, the condition of making a relevant declaration of will by that participant in the proceedings cannot be fulfilled in relation to the absent persons. Since the consent of the accused is necessary to revoke a relevant action, the lack of possibility to obtain such consent makes the revocation of the action impossible [Nowikowski 2001, 148].

However, this thesis requires additional commentary in connection with the content of Article 176(1) FPC. Pursuant to this provision, if a relevant procedural authority issues a decision to examine a case in the proceedings in relation to the absent, it becomes necessary to appoint a defence counsel *ex officio*. The question arises, therefore, whether in proceedings in relation to the absent, the defence counsel in lieu of the absent may not express a statement containing consent to the withdrawal of the above actions? This question should be answered in the negative. In situations where the regulations indicate the accused's consent as one of the conditions for the effectiveness of the action, it must be assumed that this consent should be demonstrated by a clear and unquestionable statement by the accused himself [ibid., 135]. Accepting the opposite view, according to which the defence counsel could replace the accused in expressing his consent, would mean that the condition set out in Article 431 CCP, applicable in these specific proceedings, that the defence counsel must show the defendant's consent to the revocation of the appeal would in fact be pointless. Such an interpretation would make the requirement for the defence counsel to obtain the consent of the accused to the withdrawal of the appeal unnecessary – which would be an example of interpretation per non est. According to this rule, it is not acceptable to establish the meaning of a rule in which certain of its phrases are considered irrelevant and therefore superfluous.[29]

When presenting the specificity of the proceedings in relation to the absent in cases of fiscal offences and fiscal petty offences, it is necessary to indicate the regulations concerning the means of appeal. They are characterised by a particular double-track approach. For the public prosecutor, for the entity brought to the auxiliary responsibility, for the accused, for the defence

[29] See Morawski 2002, 150–51 and the literature and case law indicated there.

counsel, pursuant to Article 113(1) FPC, a procedure for appealing against decisions is provided for, such as in ordinary proceedings in the Code of Criminal Procedure.[30] A different regulation applies to an accused, against whom a final judgment has been passed in the proceedings in relation to the absent.

Pursuant to Article 177 FPC, if the convicted person makes himself available to the court or if the convicted person is arrested, a copy of the final judgment is delivered to him. At the request of the convicted person, submitted in writing within 14 days from the date of delivering the judgment, the court whose judgment has become final and binding shall immediately appoint a hearing, and the judgment issued in this instance shall cease to be valid upon the presence of the convicted person at the hearing. This extraordinary measure of appeal is considered to be an objection.[31] It is accepted in the literature that the specific features of objections are: adversarial nature, cassationality, lack of devolutive effect.[32] Furthermore, according to some authors, objections are characterized by suspensiveness [Nowikowski 2019, 475].

The Fiscal Penal Code does not directly regulate the issue of withdrawal of the objection indicated in Article 177 FPC. The withdrawal of an action performed by a party becomes possible if a certain time elapses between the performance of the action and its effect [Idem 2001, 175]. This delay in the effects of the action makes it possible to declare the withdrawal of the appeal so that the effects of the action can be prevented.[33] We are dealing with such a situation in the regulation provided for in Article 177 FPC. The mere lodging of an objection by the accused indicated in this provision does not automatically result in setting aside the judgment under appeal. The cassation effect, connected with this objection, arises when the accused (sentenced) appears for the trial. A certain period of time therefore elapses between the lodging of an appeal and the cassation effect connected with the loss of legal force of the judgment under appeal, which makes it possible to make an effective statement of revocation of that objection.[34]

[30] See Skorupka 2010, 440.

[31] See Grzegorczyk 2001, 539; Razowski 2017d, 1415; Nowikowski 2001, 177; Skowronek 2020 (commentary to Article 177, thesis 2). The request referred to in Article 177 FPC is also referred to as a quasi-objection [Tużnik 2013, 309; Idem 2011, 68; Wilk and Zagrodnik 2015, 708]. This is also the view of the Supreme Court in the justification of the judgment of 1 October 2025, ref. no. II KK 124/15, Lex no. 1918813.

[32] See more on this issue: Nowikowski 2019, 474 and the literature indicated there.

[33] Nowikowski 2001, 175 and the literature indicated there.

[34] See Nowikowski 2001, 177; Razowski 2017d, 1416; Tużnik 2013, 310; Idem 2011, 69. That thesis was not approved by Gostyński 2000, 317–18. According to the Author, the lack of a regulation in Article 177 FPC, which would provide for the withdrawal of this motion, is to indicate that such a possibility is excluded. In the opinion of Z. Gostynski, since under Article 177 FPC, the appearance of the accused at the trial results in the loss of legal force of the judgment, then the possible statement of the accused at the trial about the withdrawal of the motion does not cause any legal effects.

The prohibition of *reformationis in peius* is not connected with the lodging of this objection, as it is not a remedy.[35] However, the view expressed in the literature and jurisprudence of the Supreme Court should be accepted, that in the case of a retrial of the case at an appeal hearing, appointed as a result of the lodging of the motion referred to in Article 177 FPC by the defendant and as a result of loss *ex lege*, at the moment of the appearance of the convicted person at that hearing, of the power of the judgment of the court of second instance issued in absentia – the court *ad quem* is bound by the prohibition of *reformationis in peius* only when it has previously ruled on the appeal lodged only in favour of the accused.[36]

In the context of these observations, it may be examined whether the granting of the right to the accused to lodge an appeal against a final judgment in the course of the proceedings against the absent is linked to the admissibility of the defence counsel's lodging of the same means of appeal. This issue has been considered in the literature and case-law in connection with the lodging of an objection in the context of order proceedings and has given rise to diverging views [Hofmański, Sadzik, and Zgryzek 2012, 98]. With regard to the issue under consideration, two different solutions can be adopted. According to the first view, it should be possible for a defence counsel to lodge an objection, as this right arises from the procedural role of the defence counsel in criminal proceedings.[37] According to the opposite view, the lack of the prohibition of *reformationis in peius* when lodging an objection provided for in Article 177 FPC speaks against granting the defence counsel the right to lodge this appeal.[38] Pursuant to Article 86(1) CCP the defence counsel may take procedural steps only for the benefit of the accused, and in the event of filing such an objection, it cannot be ruled out that the defendant's procedural situation will deteriorate. When addressing this issue, it should be noted that the possibility of revoking an objection indicated in Article 177 FPC makes it possible, even after lodging this appeal, to deprive it of its effectiveness, which may be in favour of granting a defence counsel the right to file this objection.

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[35] See Razowski 2017d, 1416; Skwarczyński 2012, 59; Wilk and Zagrodnik 2015, 709. With regard to objections, this is the dominant position in literature see Nowikowski 2019, 475–76 and the literature indicated there. It should be noted, however, that, according to some authors, the ban on *reformationis in peius* should be combined with the raising of objections see Nowikowski 2019, 476 and the literature indicated there.

[36] Thus: Baniak 2001, 228; Grzegorczyk 2001, 177; Razowski 2017d, 1416; Skowronek 2020 (commentary on Article 177, thesis 3); Tużnik 2011, 69; Wilk and Zagrodnik 2015, 709. Thus also: the Supreme Court in its judgment of 1 October 2015, ref. no. II KK 124/15, Lex no. 1918813.

[37] Thus: the resolution of the Supreme Court of 15 April 1986, ref. no. VI KZP 8/86 [Hofmański, Sadzik, and Zgryzek 2012, 98; Grzegorczyk 1987, 144–47].

[38] Thus in reference to order proceedings: Zgryzek 1987, 141–42.

One should approve the thesis that if a person accused of committing a fiscal offence or a fiscal petty offence has appeared before the sourt in person or has been arrested after the announcement of the judgment, but prior to its becoming final and binding, he does not have the right to lodge the objection indicated in Article 177 FPC [Razowski 2014, 63–66; Idem 2017d, 1412–415]. Therefore, if the above mentioned circumstance related to the appearance of the defendant occurs before the lapse of the time limit for submitting a motion to draw up grounds for the judgment (Article 422(1) CCP in connection with Article 113(1) FPC), the defendant may independently initiate the appeal against the judgment, submitting a motion to draw up grounds for the judgment and then lodging an appeal [Idem 2014, 64].

CONCLUSION

Three comments can be made in conclusion.

1) The conducting of proceedings in relation to an absent accused person makes certain procedural rules affecting the situation of the accused significantly restricted. This includes the principle of the accused person's right of defence in a material sense, the adversarial principle, the equality of parties.[39] Proceedings shaped that way are aimed at protecting the financial interest of the State Treasury, local government units or any other entitled entity in a situation where the accused does not intend to participate in proceedings pending against him/her in a case of a fiscal offence or a fiscal petty offence. The above mentioned deviations from the above-mentioned procedural principles may be minimised by introducing an obligatory defence, giving the accused the possibility to try his case with his participation in the event of submitting the motion provided for in Article 177 FPC. It should be added that the Constitutional Tribunal in its judgment of 9 July 2002, P 4/01 did not find the provisions in question incompatible with Article 42(2), Article 45(1) of the Constitution and Article 6(1) and (3)(a–d) of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14(1) and (3)(a)(b)(d)(e) of the International Covenant on Civil and Political Rights.[40]

2) The case law of the European Court of Human Rights allows, in the context of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, for the trial to be conducted in absentia, provided that the authorities have acted with due diligence to inform the accused of the trial.

[39] See in more detail on this issue: Kosonoga 2002, 93–101; Tużnik 2013, 312.

[40] OTK ZU–A 2002, no. 4, item 52. See also the grounds for the judgment of the Supreme Court of 1 October 2015, ref. no. II KK 124/15, Lex no. 1918813. See also the endorsing remarks by Światłowski 2008, 177–79.

This notification must reach the accused person within a reasonable time.[41] It is complemented by the statement that if it has not been established that the accused waived his right to be present at the trial and to defend himself in person or that he intended to evade the administration of justice, then he must have the possibility to have the case reviewed by the court that previously judged him.[42] Such a guarantee in the proceedings in relation to the absent is the possibility to lodge an objection indicated in Article 177 FPC.

3) Pursuant to Article 19(4) FPC, in proceedings with respect to the absent, a ruling on a penalty, penal measure or other measure may be limited to forfeiture of objects. At the same time, it should be reminded that if it is impossible to establish that the defendant's stay abroad is not permanent within the meaning of Article 173(1) FPC, and at the same time this absence is of a long-term character and the defendant cannot be aprehended, fiscal penal proceedings should be suspended pursuant to Article 22 CCP. This decision allows the court to decide on the forfeiture of objects pursuant to Article 43a FPC. In fact, it is a new way of adjudicating the forfeiture in spite of not conducting proceedings in relation to the absent person, and therefore without observing the guarantee solutions provided for in those proceedings.

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[41] Nowicki 2009, 288 and the case-law indicated there.

[42] Ibid.

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LEGAL SECURITY IN THE INTERPRETATION OF TAX LAW

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Abstract. This article defines the concept of legal security of the state in the sphere of public finance and the concept of legal security of the taxpayer. Subsequently, it presents a critical analysis of the legal interpretation directives that was carried out, taking into account the specificity of tax law and normatively defined institutions that guarantee the legal security of tax law recipients.

Keywords: taxpayer, interpretation of law, legal security of the state in the sphere of public finance, legal security of the taxpayer, interpretations of tax law

INTRODUCTION

The subject of this article is legal security in the interpretation of tax law. At the outset, it should be noted that the considerations presented in this study are at the normative level in the sense that they define the obligation to implement legal security and indicate which methods of interpretation and legally defined institutions can provide legal security to the recipients of tax law at the highest level.

A separate study is required to verify the practical functioning of the tax law guarantee instruments presented at the normative level. Considerations of such a kind are on the descriptive level and relate to specific problems emerging in practice when interpreting and applying tax law. Several of aforementioned problems are presented in the literature [Potrzeszcz 2019, 149–63].

Therefore, while remaining on the normative level, many specific issues should be indicated. Primarily, the necessity to interpret the law should be emphasized at the outset, due to the ambiguity of the language, along with the dynamics of the socio-political and economic environment in which the law operates. This applies in particular to tax law. Subsequently, it is necessary to explain the meaning of the concept of legal security that is applied in relation

to the creation and application of tax law. It is also worth considering why legal security is an important value in tax law.

Referring to the undertaken and discussed wider issues, determined by the topic "Legal security of the state and the taxpayer and a fair tax system," we should raise the question of the passive entity and active entity of legal security in the context of tax law and its interpretation. Namely, it should be indicated whose rights and interests are to be guaranteed, by what means, and who is the entity responsible for ensuring these rights and interests.

A further group of issues concerns the separation of directives specific to the interpretation of tax law, which directly serve to respect the legal security of tax law recipients. Moreover, the institutions of general and individual tax interpretations will be discussed due to their protective function of tax law recipients.

1. THE NECESSITY TO INTERPRET THE LAW, INCLUDING TAX LAW

It is widely recognized the statement of Montesquieu, who in his famous work *The Spirit of the Laws*, mentioned "things to be followed in making laws." He indicated, inter alia, that "the style of laws should be concise," "the style of laws should be simple," and above all, "it is of the utmost importance that the words of laws evoke the same concepts in everyone" [Montesquieu 2003, 524]. Fulfilling such demands is also extremely important nowadays. This applies in particular to repressive regulations in the sense that they create obligations or a heavy burden on the recipients. An illustration of such a regulation is tax law, the specificity of which consists in a particularly strongly outlined state authority over the taxpayer, as well as in the application of the principle of self-calculation of tax [Potrzeszcz 2019, 149–63].

The directive of colloquial language, contemporary accentuated, perfectly harmonizes with the postulate of Montesquieu. This directive should be a guideline in relation to both the principles of drafting laws and their interpretation. This is very important especially in cases where the recipients of legal norms are ordinary citizens, not lawyers specializing in tax law interpretation [Brzeziński 2008, 45].

In practice, however, it turns out that the legal provisions are not so unambiguous and clear that the person applying the law could only be the "mouth of the law," the mouth that expresses the wording of laws, without the necessity and possibility of interpreting the legal provisions in advance, as Montesquieu postulated in relation to judges. The demand and necessity to interpret the law occurs in all areas of law, including those which, due to their specificity, are closed (criminal law and tax law). The necessity to interpret the law is primarily related to the nature of the language in which legal provisions are expressed. That language is characterized by vagueness, ambiguity, semantic

openness (indeterminate). Moreover, the language is dependent on changing non-linguistic contexts, including social, economic, political relationships and moral convictions [Morawski 2010, 19].

Therefore, we accept the view of A. Kaufmann, an outstanding representative of legal hermeneutics, according to which legal provisions constitute only a potential law, while the relevant law arises as a result of an interpretation in the form of a hermeneutic circle. Kaufmann, therefore, rightly argues that "there no exists the law before its interpretation," and Montesquieu's claim that judges are "mouths of laws" is the biggest mistake in legal thinking [Kaufmann and Hassemer 1995, 122]. This view corresponds with the proclaimed by M. Zielinski legal maxim *Omnia sunt interpretanda* [Zieliński 2005, 120], contrasted with the legal maxim *Clara non sunt interpretanda*, and its sophisticated form *Interpretatio cessat in claris*. We always deal with the situation of interpretation whenever we try to apply the law. This view was confirmed in the judgment of the Polish Constitutional Tribunal, according to which "The Constitutional Tribunal states that the fact that a provision is ambiguous, and therefore its possible different linguistic interpretation, does not by mean that a proper interpretation is impossible. According to the currently predominant position of the doctrine, the interpretation of a provision – as a reconstruction of a legal norm from the text of a normative act – is always made, even in cases apparently raise no doubts as to interpretation."[1]

Tax laws are among the most complex in legal system. Frequent amendments to tax laws, the introduction of indefinite phrases, divergent interpretative lines of the tax authorities and differences in the interpretation of judicial interpretation of the judiciary cause that the taxpayer may get the impression of the failure to implement the principle of legal certainty of tax law [Bernat 2016, 102], as well as the principle of legal security.

2. THE CONCEPT AND IMPORTANCE OF LEGAL SECURITY OF THE STATE AND THE TAXPAYER

Each country requires financial resources in order to function, and manage to fulfil its obligations towards its citizens. The scope of such obligations of the state towards its citizens determines the value of the common good, defined as "the sum of the conditions of social life enabling and facilitating the integral development of all members of the political community and the communities created by them" [Piechowiak 2012, 433].

On the other hand, citizens are obliged to care for the common good, inter alia, by bearing public burdens and benefits, including taxes, specified in the

[1] The judgment of the Constitutional Tribunal of 13 January 2005, ref. no. P 15/02, OTK ZU No. 1/A/2005, item 4, p. 39; see Zieliński 2002, 56.

law (Article 84 of the Polish Constitution[2]). Thus, the obligation to pay taxes is justified by the necessity to bear burdens for the sake of the common good of the entire political community. As such, it does not raise any objections.

From the taxpayer's perspective, taxation also restricts their ownership. Property as a constitutional value is subject to equal legal protection for all, however, it is not an absolute value and may be limited by law, but only to the extent that the law does not infringe the essence of the right to property (Article 64 of the Polish Constitution).

Turning to the issue of determining the concepts of legal security of the state and legal security of the taxpayer, I apply a more general definition, according to which "Legal security is the state achieved by means of positive law, in which life goods and interests of the subject of that security are guaranteed as completely and effectively as possible" [Potrzeszcz 2013, 405]. Legal security is the value gradated in the sense that the level of its implementation may be relatively corresponding to the standards of the rule of law.

An important issue that requires to be defined is also the concept of the legal security subject. It is necessary to distinguish between the passive subject and the active subject. Referring to the passive subject of legal security, we understand the entity that is entitled to protection in the legal order or the entity that is the beneficiary of legal security. By contrast, as the active subject of legal security, we indicate the entity that acts to realize the idea of legal security a reality [Idem 2015, 76]. The passive subject of legal security in the context of tax law is both the state and the taxpayer.

Legal security of the state in the sphere of public finances means the state in which the fiscal interests of the state are guaranteed by means of tax law, allowing for obtaining funds for the budget, as well as maintaining budget balance. Whereas the legal security of a taxpayer means the state in which tax law defines in a precise and unequivocal manner what their rights and obligations are towards the tax authorities (legal certainty), as well as fair imposition of the tax obligation, respecting the principle of equality and proportionality. In this sense, the legal security of the taxpayer can only occur if the fair tax system (law) exists. In contrast, certainty of tax law may exist independently of the fairness of this law.

From the perspective of the concepts defined in such a manner, the issue of protecting the legal security of the state in the sphere of public finance and the legal security of the taxpayer should be analysed in the process of interpreting tax law. The legal security of the taxpayer requires not only certainty of tax law, and thus the possibility of unambiguous identification of the tax obligation, which is closely related to the issue of tax law interpretation. The legal security of the taxpayer additionally requires fairness of the tax system. The

[2] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: the Polish Constitution].

postulate of justice is an argument invoked for centuries by both the state and taxpayers, and is reflected in particular in the context of reforms. The implementation of the principle of justice determines the acceptance by society of tax burdens, in turn in the legal sphere it legitimizes the state's tax jurisdiction.

Tax justice is the guiding idea of the creation of a tax law system, however, simultaneously it is a very complex issue involving multiple points of view of the participants of the political community, who from the perspective of their economic situation in various manners perceive the role of the state. Commonly, entrepreneurial entities that receive high incomes, postulate the state ought to limit its role to a "night watchman," which implies the hope of lowering taxes. The situation is different from the perspective of entities benefiting from state aid in the social sphere. Undoubtedly, the views on the economic system adopted in a given country are closely related to the understanding of tax justice.

3. LEGAL SECURITY AS A PARTICULARLY IMPORTANT VALUE IN TAX LAW

It is emphasized in the literature and judicature that, in particular, tax law should be created in a precise and defined manner, and that the so-called autonomous model should be characteristic for its creation. In such a model the most important values are legality and legal security, including guarantees of fundamental human rights. The argumentative procedure of discussing the law and the idea of formal justice are prevailing [Wojciechowski 2019, 59].

One of the basic tax principles is the principle of tax certainty. The taxpayer, as the weaker party to the obligation relationship, must know their obligations and rights. They should also be aware of when their specific behaviour or omission will result in a tax obligation, which subsequently will turn into a tax liability. The taxpayer should also know at what time, in what place and in what amount to pay the tax due [Burzec 2012, 207].

Due to the specific nature of tax law, in which the authority of the state in relation to the taxpayer is particularly strongly outlined, the necessity to guarantee legal security for the taxpayer at the highest possible level becomes of significant importance. On the other hand, legal security should also be secured in relation to the guarantees of the fiscal interests of the state in order to maintain the budget balance.

A sort of symmetry of the right of the state and the taxpayer to secure interests was indicated both in the doctrine and in jurisprudence. For instance, in the context of considering the dilemma whether issuing an interpretation means its delivery, the Supreme Administrative Court stated that "if the taxpayer is to gain legal certainty by delivering the interpretation, the tax authority should have the same certainty concerning the end of the deadline for

issuing the decision. The protective function of the law is not unilateral. The term referred to, determines the security limits for both the interested party and the tax authority."[3]

The Constitutional Tribunal accepted the arguments of the Supreme Administrative Court, confirming that "if the taxpayer were to gain legal certainty by delivering the interpretation, then the tax authority should have the same certainty regarding the end of the deadline for issuing it. The protective function of the law is not unilateral. The term referred to, determines the security limits of both the interested party and the tax authority. Due to the consequences that are associated with the expiry of each term, both procedural and material, the entity to which the term refers, must know when it starts and when it ends. The absence of clarity of the provision in this regard would be tantamount to violation of the principle of specificity by the legislator."[4]

However, jurisprudence often emphasizes the necessity of assurance of legal security, primarily for the taxpayer, taking into account their weaker position in relation to the position of state authorities. The Constitutional Tribunal has repeatedly emphasized that legal certainty and the related principle of legal security have an important role in the law regulating public levies. According to the Constitutional Tribunal, legal certainty means not so much the stability of legal provisions, which in this area of law may be difficult to achieve in a given economic situation of the state, but the conditions for the possibility of predicting the actions of state organs and the related behaviour of citizens. Thus understood, predictable actions of the state legislature guarantee confidence in the legislator and the constituted law. Frequently, the inevitable increase in the burden by changing the law should be done in such a manner so that the legal entities, which it relates to, have adequate time to rationally dispose of their interests.[5]

4. TAX LAW AS A MEANS OF GUARANTEEING THE RIGHTS AND INTERESTS OF PASSIVE SUBJECTS OF LEGAL SECURITY

When considering the issue of legal means by which the rights and interests of passive subjects are secured, attention should be paid to the quality of tax law. Legal norms are reconstructed from the provisions of tax law through their interpretation. According to the derivative theory of legal interpretation, the purpose of interpretation is to reconstruct the full and unambiguous norm

[3] Resolution of the Supreme Administrative Court of 14 December 2009, ref. no. II FPS 7/09, ONSAiWSA 2010, No. 3, item 38.

[4] Judgment of the Constitutional Tribunal of 25 September 2014, ref. no. K 49/12, OTK ZU No. 8/A/2014, item 94.

[5] Cf. judgment of the Constitutional Tribunal of 27 February 2002, ref. no. K 47/01, OTK ZU No. 1/A/2002, item 6.

of conduct from legal provisions. Therefore, only as a result of interpretation do we obtain the norms of tax law. The task of these norms is to protect the fiscal interests of the state, on the one hand, and the rights and interests of the taxpayer, on the other hand.

When applying the principles of tax law interpretation, it should be taken into account that in accordance with Article 2 of the Polish Constitution, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. The principle of a democratic state ruled by law includes many specific principles. One of them is the principle of correct legislation, which, in turn, covers such issues as the obligation to respect rightly acquired rights, the prohibition to enact legal provisions with retroactive effect, the obligation to observe *vacatio legis*. The state ruled by law should protect citizens' confidence in the law. In particular, the provisions of tax law should be formulated in such a manner as to precisely and clearly define the content of the taxpayers' rights and obligations. Tax law provisions should not allow tax authorities to abuse their position towards taxpayers.[6]

The far-reaching freedom of the legislator in shaping the substantive content of tax law is balanced by the existence of an obligation, concerning the legislator, to respect the procedural aspects of the principle of a democratic state of law, and in particular to respect the principle of correct legislation. As the Constitutional Tribunal has repeatedly emphasized, in a democratic state ruled by law, making and applying the law cannot be a trap for the citizen. A citizen should have the possibility of arranging their affairs in the confidence that they do not expose themselves to adverse legal results of their decisions and actions, the consequences of which they could not have foreseen at the time of taking their decisions and actions. Therefore, tax legislation must always be carefully assessed in terms of compliance with these procedural requirements. Since its effects for the citizen take a specific financial aspect and are often associated with the reduction of their income, the legislator must shape new tax regulations taking into consideration the fact that the taxpayer, assuming the stability of the previous regulations, planned certain economic moves and their various interests may be in progress. Obviously, the protection of such interests cannot be attributed an absolute character, as the volatility of law is an element that citizens must take into account. However, in situations where the provisions of the law set a certain time horizon for planning and carrying out a specific financial or economic project, such "rules of the game" cannot be changed before the end of the period or deadline provided by the legislator. Since, in confidence in the applicable law, a specific project has already been started, and the law stipulated that it would be realized for a certain period of time, therefore, except special situations, the citizen should have

[6] Legal certainty, with regard to the interpretation of tax law, is also indicated as a value [Filipczyk 2013].

the confidence that they would be allowed to use this period safely. Starting a financial or economic enterprise is frequently associated with making the first investments, and a sudden change in the legal framework of such an enterprise may expose the citizen to serious losses.[7]

5. THE SPECIFICITY OF THE INTERPRETATION OF TAX LAW WITH RESPECT TO THE VALUE OF LEGAL SECURITY

5.1. The principle of linguistic interpretation primacy

The principle of the primacy of linguistic interpretation is universal and applies to all branches of law. However, it is of particular importance in relation to tax law. The recipient of tax law is every subject obligated to pay taxes, not only entities professionally involved in the creation and application of the law. Therefore, it is important that the recipient of the law can reconstruct the binding legal norms on the basis of the legal text. Consequently, in tax law, the principle of the primacy of language interpretation [Mastalski 2008, 156] before teleological or functional ones should be observed. Such preference rules primarily serve the legal security of taxpayers.

In justified cases, however, when the linguistic interpretation does not provide satisfactory results, the teleological and functional interpretation should also be applied. The doctrine rightly emphasizes that linguistic interpretation is not the only or essentially exclusive tool for determining the content and meaning of norms of tax law [Brolik 2014, 61].

5.2. The legal language directive

The legal language directive requires that the specific legal meaning assigned by the legislator be respected to certain expressions. Specifically, if the legislator formulated a legal definition, it should be taken into account in the process of interpreting the law. The problematic issue is whether legal definitions expressed in one branch of law can be included in another branch of law. This problem raises numerous controversies in terms of tax law. The question is whether terms that are not defined under tax law, but are defined in other branches of law, should be applied in their colloquial meanings or in the meaning assigned to them in the source regulations. The popular view is that the specific objectives of the tax regulations determine the conceptual autonomy of tax law and generally exclude the application of concepts in their civil interpretation or adopted in other branches of law [Morawski 2010, 111].

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[7] Judgment of the Constitutional Tribunal of 25 November 1997, ref. no. K 26/97, OTK ZU No. 5–6/1997, item 64.

5.3. Functional interpretation

Due to the fact that the application of a functional interpretation involves reaching beyond the text of a legal provision, we should be careful when interpreting tax law. Tax regulations introduce severe obligations, and therefore require precise and unambiguous regulations. Therefore, the application methods of teleological interpretation to tax regulations should be exceptional and is justified mainly when the meaning of the regulations is not clear [ibid., 157].

5.4. Static and dynamic interpretation

In the case law the preference of static interpretation in relation to tax law, where the highest value is certainty, predictability and a sense of security of the taxpayer, can be observed. Otherwise, dynamic interpretation is applied in such cases where the law should be adapted to changing social, economic or political contexts [ibid., 161].

In the view of the Supreme Administrative Court, the characteristics of the tax law allow for the assumption of a significant role of static elements in the interpretation of tax law. This leads us to conclusions that it is essential to prefer legal certainty and legal security in the interpretation of tax law, as well as strict adherence to the "letter of the law." This would be an interpretation with a strong "static" overtone, postulating the permanence of the meaning of the law and seeking the will of the legislator primarily in historical reality. Applying only such a type of interpretation is, as one can assume, an intriguing postulate regarding tax law, however, unfortunately not very realistic. Its fulfilment would require considerable precision of the provisions of tax law, as well as the elimination of subjective and evaluative elements, so that the concepts of tax law were at least as objectified as in the case of economic sciences. Determining the economic phenomena in the language appropriate for the law, however, requires a certain schematization and standardization, which means that the provisions of tax law are distant from the precision and clarity, and when applying them, certain subjective elements seem to be unavoidable. The bonds of tax law and civil law concerning the phenomena of economic life lead to the conclusion that tax law is likewise, to some extent, the law of everyday life. This requires, when interpreting it, to take into account not only the moment when a normative act is created, but also the moment at which the interpretation is made, and thus also the dynamic elements of the interpretation. According to the postulates of dynamic theories, the interpretation of law should link the meaning of the provision with the will of the current legislator, with the extensive consideration of the changing reality. For instance, applying a dynamic interpretation, when interpreting the concept of "renovation" with regard to the nature of the works performed by the complaining party,

we should take into account the changing economic reality and technical progress, which have a large impact on the manner and means of carrying out the works covered by this concept[8].

5.5. The scope of tax law interpretation

Due to the scope of interpretation, the following types of interpretation are distinguished: 1) literal interpretation (*interpretatio declarativa*), 2) intensive interpretation (*interpretatio extensiva*), 3) restrictive interpretation (*interprtatio restrictiva*) [Morawski 2010, 191].

The case law and doctrine developed directives specifying the principles of applying aforementioned types of interpretation. With regard to tax law, an order for a literal interpretation of the provisions of this law is formulated. This order is justified by the concern to protect the interests of taxpayers, because it is unacceptable, applying an intensive interpretation, to impose new obligations or increase the scope of tax obligations upon taxpayers.

The fiscal interests of the state are also protected by the obligation to interpret the provisions of tax law literally. Especially, with regard to the provisions establishing tax exemptions or reliefs, which are treated as exceptions to general taxation rules, the requirement of their literal and the prohibition of their intensive interpretation, is a manifestation of concern for the fiscal interests of the state, and thus the legal security of the state in the sphere of public finances.

5.6. Logical interpretation of tax law

With regard to the provisions of tax law, as a rule, inference *a contrario* is applied, and the application of inference from analogy is prohibited. Inference from the opposite is the exact opposite of inferring from analogy. Inferring from analogy entitles to the application of similar or the same legal consequences to situations that are substantially similar to each other. In contrast, inference from the opposite forbids that [ibid., 245].

Basically, it is assumed that all tax obligations should be expressly stated in the provisions of tax law. This corresponds to the principle of *nullum tributum sine lege*. Unless the legislator explicitly established a tax obligation in the regulations, such an obligation cannot be imposed on the taxpayer applying logical interpretation. Therefore, it is prohibited to use analogy in tax law if it might lead to extending the scope of taxation. However, the doctrine

[8] See the judgment of the Supreme Administrative Court of 1 March 2000, ref. no. I SA/Wr 2915/98, http://www.orzeczenia-nsa.pl/wyrok/i-sa-wr-2915-98/podatki_i_inne_swiadczenia_pieniezne_do_ktorych_maja_zastosowanie_przepisy_ordynacji_podatkowej/9db84a/6.html?q=&_symbol=611&_sad=NSA+oz.+we+Wroc%C5%82awiu&_okres=2000_03 [accessed: 24.05.2021].

recognizes that it is permissible to use analogies to the benefit of the taxpayer [ibid., 228], this view may be debatable due to the need to protect the financial interests and legal security of the state.

6. THE RULE *IN DUBIO PRO TRIBUTARIO*

The rule *in dubio pro tributario* orders to settle questions of interpretation in favour of the taxpayer. Simultaneously, this rule prohibits the resolution of interpretative doubts in favour of the tax authorities (*in dubio pro fisco*). This undoubtedly constitutes a significant protection of the taxpayer's interests, thus increasing the level of legal security guaranteed. The rule *in dubio pro tributario* has its well-established position within the framework of *ius interpretandi*, i.e. the canon of legal interpretation directives adopted in a given legal culture.

Currently, this rule is reflected in the provisions of tax law. Namely, Article 2a of the Act of 29 August 1997, the Tax Code[9] provides "Doubts that cannot be removed as to the content of tax law provisions in favour of the taxpayer." The introduction of this provision is widely commented in the doctrine. It is emphasized that the positivization of the *in dubio pro tributario* made in the Directive on 1 January 2016 is an event whose significance from the perspective of legal theory cannot be overestimated [Bielska–Brodziak and Suska 2020, 69]. The legal provision directly expressed a directive that used to be only an element of legal culture. Representatives of the doctrine rightly emphasize that the rule *in dubio pro tributario* can and should be an element of the legal system building the legal culture and "civilizing" tax law [Brzeziński 2015, 21]. Undoubtedly, it serves the legal security of taxpayers.

7. INTERPRETATIONS OF TAX LAW

An important protective function in relation to taxpayers is performed by the interpretations of tax law provided for in the Tax Code. They include general tax interpretations, tax explanations and individual tax interpretations. The existence of above-mentioned institutions in Polish tax law is justified by the adoption of the general rule that the recipient's compliance with the interpretation derived from a state authority may not harm the entity who followed it, regardless of whether the interpretation is binding or not. This principle is a necessary condition for the implementation of legal security for taxpayers who act in confidence in the state authorities [ibid., 48].

[9] Journal of Laws of 2020, item 1325 as amended [hereinafter: the Tax Code].

7.1. General tax interpretations and tax explanations

General tax interpretations and tax explanations are regulated in the Tax Code. According to Article 14a(1) of the Tax Code "The minister responsible for public finance aims to ensure the uniform application of tax law by tax authorities, in particular: 1) interpreting them, ex officio or upon request (general interpretations), 2) issuing ex officio general explanations of provisions of tax law concerning the application of these provisions (tax explanations)."

"The essence and purpose of the general interpretation should be perceived mainly from the perspective of the principle of legal certainty and legal security. Legal certainty, often treated as legal security considered from the point of view of the protection of individual rights, is nowadays considered to be one of the most important factors of the proper functioning of the law and means the possibility of predicting what decisions will be issued by entities applying the law - in this case the tax administration. In tax law, legal certainty has long been associated with such a precise and clear shaping of the law that the role of entities applying the law is mainly limited to executive activities. More realistic, however, is the position, when analysing legal certainty places emphasis on the process of interpretation and application of law, recognizing that the ultimate result of legal certainty is a product of its concretization carried out by entities applying the law. The taxpayer should therefore build their sense of legal certainty not only on the wording of tax laws, but also on how the administration and courts apply tax law. Consequently, it will be to a great extent objective legal certainty, and thus independent of the experience of a specific entity, based not only on the interpretation of the law made by the taxpayer and their legal adviser, but also on the knowledge of the practice of applying tax law by the tax authorities" [Mastalski 2007, 8; Brolik 2013, 26].

7.2. Individual tax interpretations

Individual tax interpretations are regulated in the Tax Code. According to Article 14b(1) of the Tax Code "The director of the National Tax Information, upon request of the interested entity, issues an interpretation of tax law (individual interpretation) in their individual case." The individual interpretation contains an interpretation of tax law in an individual factual state or a future event directly related to the applicant. The Supreme Administrative Court noted that "The introduction of the institution of individual tax interpretations as of 1 July 2007 was based on the assumption that they are to perform two types of functions, specifically the informative and guarantee functions. This assumption was implemented in the scope of the informative function in Article 14b(1–3) and Article 14c(1) and (2) of the Tax Code. In contrast, the guarantee function of individual interpretations was ensured by introducing the so-called provisions «not damaging» the entity that complied with the

issued legal interpretation (Article 14k(1) and (3), Article 14m and Article 14f of the Tax Code). Therefore, by its nature, issuing an individual interpretation should mean that the interested entity will know the views of the tax authority concerning certain provisions of tax law, having regard to the factual situation described in the application, as well as the fact that the «interested subject» will have a real opportunity of relying on the issued interpretation in case of potential disputes with tax authorities […] Thus an individual interpretation is an act in which the authority, by assessing the situation of the applicant described in the application for the interpretation, grants or refuses to grant certain rights by ensuring that compliance with the position of the authority cannot injure the taxpayer, regardless of the correctness of this interpretation."[10]

CONCLUSION

The considerations presented in this study lead to the conclusion that, both at the doctrinal, normative and judicial level, the value of legal security of tax law recipients is recognized and appreciated. Although, due to the frequent scarcely intuitive understanding of the concept of "legal security" of a given entity, there are no (or are very seldom) direct references to the manners of realization of such security in tax law by measures of applied methods of interpretation, however, the guarantee function of the measures indicated in this study can be specified by analysing their role and importance in the legal order.

It requires separate studies to examine the practical operation reconstructed in this article directives and institutions designed to essentially implement legal security of recipients of tax law. This issue is beyond the scope of the study.

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GENESIS AND MEANING OF THE TITLE OF "DOCTOR OF THE CHURCH" FOR THE DEVELOPMENT OF THE CATHOLIC FAITH

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Abstract. Title of the Doctor of the Church is, unquestionably, very significant, but the method used by the bishop of Rome to grant the title is almost unknown, nowadays. Most of all, this is true due to its specific and special procedure. Formal and legal issues regarding granting this very significant and meaningful ecclesiastical dignity of universal character has returned lately together with numerous suggestions to grant the title of the Doctor of the Church to Saint John Paul II. It is worth to mention that until present the title of the Doctor of the Church has been granted to 36 people, who, obviously, were previously canonized by the Church. Among these there are 32 men and 4 women. Popes who were heads of the Church after the Second Vatican Council, namely St. Paul VI, St. John Paul II, Benedict XVI, as well as current Pope Francis had a habit of granting this ecclesiastical title in a systematic but sporadic manner. They did it in a special apostolic letter. It must also be pointed out that there is not any Pole on the list of the Doctors. However, there are 2 bishops of Rome, 3 cardinals, 15 bishops, 11 presbyters, 1 deacon, 2 nuns, 1 tertiary, and 1 abbess. As the above list indicates, this honourable title of the universal Church can be granted even to the lay faithful. It can be said synthetically that Doctors of the Church are important and prominent teachers of the universal Church. It is also worth to add that in 1687 the Krakow Academy expressed a wish that John Cantius was pronounced a Doctor of the Church at the time of his canonization. However, the Roman Curia questioned the authorship of his writings. This, without any doubt, caused that the issue could not have been further proceeded. The St. John Paul II apostolic constitution *Pastor bonus*, about the Roman Curia of 28 June 1988 states in Article 73 that the Congregation for the Causes of Saints is competent to "examine what is necessary for the granting of the title of doctor to saints, after having received the recommendation of the Congregation for the Doctrine of the Faith concerning outstanding teaching."

Keywords: bishop of Rome, Doctor of the Church, teacher, saint, outstanding doctrine

INTRODUCTION

The title of Doctor of the Church is, admittedly, very meaningful, yet the method of granting this title by the Bishop of Rome is commonly little-known due to its specific and distinctive procedure. Also the problematic aspects regarding the conditions and methods of granting this exceptional title of the

Church were not subject to rich specialist studies. Nevertheless, there exist specific positions in this substance written in various languages. Some of them are synthetic encyclopaedic statements that include the most important information concerning this, undoubtedly, meaningful and exceptional dignity of the Church granted to individuals who outstandingly rendered their services for the development of the Church [Bar 2019, 569–74; Danielski 1985, 34–36; Rubio 2012, 448–51].

1. VALIDITY OF THE PROBLEMATIC ASPECTS

Formal and legal problematic aspects in regards to granting this very meaningful and distinctive dignity of the Church, that has a universal nature, has returned lately with a number of propositions for granting the title of Doctor of the Church to St. John Paul II. Without any doubts, among solemn and meaningful gestures advocating this initiative, such as, e.g. Resolution no. 25/2020 of the Senate of the Pontifical University of John Paul II in Kraków of 17 February 2020 and adopted by acclamation by the University senators, that concerned advocacy of the initiative to declare St. John Paul II a Doctor of the Church and co-patron of Europe, there also appeared such statements, the authors of which will, assuredly, be ashamed of in the future [Obirek and Nowak 2020, 16].

That is the world as we know it, where evil fights against good, similarly to the gospel parable of the weeds, in which we can read prophetically: "Let both grow together until the harvest. At that time I will tell the harvesters: First collect the weeds and tie them in bundles to be burned; then gather the wheat and bring it into my barn" [Paciorek 2009, 288].[1] Hence, the obligation of many entities of social life is to constantly indicate these social and evangelic values that shaped and are shaping the history of mankind.

It can be, *inter alia*, read in the cited resolution of the Church University in Krakow that: "Without any doubt, both the person and the entire lifetime achievement of St. John Paul II meets the requirements followed by the Church when granting the title of *Doctor Ecclesiae*. These are: holiness of

[1] "The parable indicates contrast between the present time, when wheat and weed grow next to each other and the harvest time, when good will be separated from evil. It does not mean that Matthew fails to distinguish good from evil already. A good disciple can be distinguished already by fulfilling the will of the Father (7,21) and gives fruits (7,16–20)." Despite eschatological nature in line 30, the central idea of pericope is expressed in the following statement: "Let both grow together until the harvest […]." This indicates awareness of delaying parousia. Then, it indicates that those who accepted the word of Jesus cannot be separated from those who did not accept it, at present. Thirdly, the Church should be characterized by patience, as the time of separation has not come, yet. Judgement belongs to the Lord and is not a competence of the Church."

life, outstanding teaching and attitude of the educator that had influence on the development of the Church's preaching and theological thought, as well as an input into the mission of evangelization that Jesus Christ entrusted to His Church. First and foremost, during his long pontiff in the Holy See and even earlier, being a professor and a bishop, Karol Wojtyła transferred to the universal Church a rich and multithreaded teaching, accurately assessing the «signs of the time» in the light of Revelation and Tradition, at the same time being inspired by the teaching of the Second Vatican Council in which he himself participated and was co-author of compilation of the published documents. Furthermore, he himself gave an example of life fully devoted to fulfilment of the mission of a preacher and shepherd that was commissioned to him, and a witness of God who showed a man his dignity in Jesus Christ."[2]

Successively, in view of accusations that cannot be justified by any means and that are directed towards St. John Paul II, the Senate of the Pontifical University of John Paul II in Kraków in Resolution no. 177/2020 on the defence of good name of St. John Paul II of 30 November 2020 stated: "Referring to its resolution of 17 February of this year, supporting the initiative to proclaim St. John Paul II Doctor of the Church and co-patron of Europe, the Senate of PUJPII wishes to remind that our Patron, as an active participant of historic drama of people and nations in the 20th century accurately identified both the symptoms of evil, that he opposed, and signs of goodness, in which he saw symptoms of hope."[3]

When we look on the rich, universal and everlasting Magisterium of St. John Paul II, that undoubtedly has also a prophetic character, from the perspective of this day, then in this place of reflection on the validity of importance of the title of Doctor of the Church, especially in today's very complicated reality of the Church and the entire world that is marked by the coronavirus pandemic, it is worth to cite a piece of his homily delivered in Kraków, at Błonie, during his last pilgrimage to the Homeland on 18 August 2002: "From the beginning of its existence, referring to the mystery of the Cross and resurrection, the Church preaches Divine Mercy that is a guarantee and source of salvation for man. However, it seems that today the Church is specifically called to preach this message to the world. It cannot neglect this mission, since the God Himself calls it to it by testimony of St. Faustina. And He chose our times for this. The reason might be that the twentieth century, despite unquestionable achievements in many fields, was specifically marked by the «mystery of iniquity». With this legacy of good, but also evil, we entered a new millennium. New, unprecedented perspectives of development and at the same

[2] See https://fs.siteor.com/upjp2/article_attachments/attachments/217293/original/Uchwa%C5%82a_25-2020.pdf?1582281038 [accessed: 18.07.2020].

[3] See https://fs.siteor.com/upjp2/article_attachments/attachments/242906/original/Uchwa%C5%82a_177-2020_-_JPII_%281%29.pdf?1606946042 [accessed: 04.03.2021].

time new, unprecedented risks come into view of mankind. Not infrequently human lives as if the God did not exist and even puts himself in His position. He usurps the Creator's right to tamper with the mystery of human life. We try to decide about its materialization, determine its shape by manipulating genes and, finally, define the boundary of death. By rejecting the God's laws and moral rules, one steps against family. The voice of God in human hearts is tried to be silenced in many ways and it is attempted that He is made «the great absentee» in the culture and social consciousness of the nations. «The mystery of iniquity» is constantly fitted in the world's reality. Experiencing this mystery a man is afraid of the future, emptiness, suffering, annihilation. Maybe it is for this reason that through the testimony of a humble nun Christ, so to say, enters our times to explicitly indicate this source of consolation and hope that lies in the eternal mercy of God. It is a must that His message of merciful love resounds with a new power. The world needs this love. The time has come for the message of Christ to reach all, especially those whose humanity and dignity seem to fall into *mysterium iniquitatis*. The time has come for the message of the Divine Mercy to pour hope into human hearts and become a tinder for new civilization – civilization of love."[4]

St. John Paul II said the above cited words on the day after consecration of the Divine Mercy Sanctuary in Łagiewniki, in Kraków, where he synthetically indicated: "It is for this reason that today, on this day, I want to make a solemn act of entrusting the world to the Divine Mercy. I do it with a warm desire that the message of the Divine Mercy, that was announced here through St. Faustina, reached all citizens of the Earth and filled their hearts with hope. Let this message spread from this place to our entire, beloved Homeland and the entire world. Let the binding promise of the Lord Jesus come true that «a spark that will prepare the world for His final coming» is to come forth from here (cf. *Diary*, 1732). This spark of Divine Mercy must be inflamed. The fire of Divine Mercy must be passed to the world. The world will find peace in the Divine Mercy, and a man will find happiness! This task I entrust with you my dear brothers and sisters, the Church in Kraków and in Poland, and all who worship the Divine Mercy and who will come here from Poland and the whole world. Be witnesses of the Divine Mercy!"[5]

In the context of the cited utterances and moving to the contemplation of general nature, it is worth to cite the Archbishop of Vienna, card. Christoph Schönborn, who in a preface to one of the latest and important publication regarding the title of Doctor of the Church indicates: "The title of Doctor of the Universal Church is granted to these saints who by their outstanding teaching

[4] See http://www.vatican.va/content/john-paul-ii/pl/homilies/2002/documents/hf_jp-ii_hom_20020818_beatification-krakow.html [accessed: 17.07.2020].

[5] See http://www.vatican.va/content/john-paul-ii/pl/homilies/2002/documents/hf_jp-ii_hom_20020817_shrine-divine-mercy.html [accessed: 18.07.2020].

contributed to the deepening of familiarity with the God's Revelation, at the same time enriching the theological legacy of the Church and increasing faith in love in the faithful. From the theological point of view they explain unknown aspects of the evangelic truth. Whereas, from the pastoral point of view they ignite a call for the holiness of life in the faithful" [Schönborn 2019, 6].

It is worth to indicate that until present the title of Doctor of the Church has been granted to 36 individuals, obviously prior to this canonized by the Church, among whom there are 32 men and 4 women, but only since the year 1970. These are: St. Teresa of Avila (1970), St. Catherine of Siena (1970), St. Therese of Lisieux (1997), and St. Hildegarda of Bingen (2012) [Wodrazka 2019, 20–23].[6]

The post-council popes, i.e. St. Paul VI, St. John Paul II, Benedict XVI, as well as Pope Francis had and have a custom of granting this exceptional title of the Church in a systematic, yet sporadic manner. They do it in a special apostolic letter.

And so, St. Paul VI granted the title of Doctor of the Church to St. Teresa of Avila[7] and St. Catherine of Siena in 1970,[8] St. John Paul II granted the title of Doctor of the Church to St. Therese of Lisieux in 1997,[9] Benedict XVI granted the title of Doctor of the Church to St. John of Avila[10] and St. Hildegarda of Bingen in 2012;[11] whereas, Pope Francis granted this title to St. Gregory of Narek[12] who died around 1005, on 12 April 2015, it means more than a thousand years after his death [Wodrazka 2019, 22–23].

It must also be indicated that there is not any Pole on the list of Doctors of the Church, whereas there are: 2 Bishops of Rome, 3 cardinals, 15 bishops, 11 presbyters, 1 deacon, 2 nuns, 1 tertiary, and 1 prioress [ibid.]. As the above list provides, this honourable title of the Universal Church can also be granted to lay faithful. It can be said synthetically that Doctors of the Church are influential and preeminent teachers of the Universal Church [Danielski 1985, 34].

[6] Table with the list of Doctors of the Church that provides, i.a. date of their deaths and the pope, date and source of proclamation of the title.

[7] Cf. Paul VI, Apostolic Letter *S. Teresia a Iesu, Virgo Abulensis, Doctor Ecclesiae universalis renuntiatur*, AAS 63 (1971), p. 185–92.

[8] Cf. Idem, Apostolic Letter *Sanctae Catharinae Senensi titulus Doctoris Ecclesiae universalis defertur*, AAS 63 (1971), p. 674–82.

[9] Cf. John Paul II, Apostolic Letter *Sancta Teresia a Iesu Infante et a Sacro Vultu Doctor Ecclesiae universalis renuntiatur*, AAS 90 (1998), p. 930–44.

[10] See http://www.vatican.va/content/benedict-xvi/it/apost_letters/documents/hf_ben-xvi_apl_20121007_giovanni-avila.html [accessed: 22.07.2020].

[11] See http://www.vatican.va/content/benedict-xvi/it/apost_letters/documents/hf_ben-xvi_apl_20121007_ildegarda-bingen.html [accessed: 22.07.2020].

[12] Cf. Francis, Apostolic Letter *Sanctus Gregorius Narecensis Doctor Ecclesiae Universalis renuntiatur*, AAS 107 (2015), p. 421–26.

It is also worth to add that in 1687 the Krakow University expressed a wish that Jan Kanty is also proclaimed Doctor of the Church at the moment of his canonization. However, the Sacred Congregation of Rites that at that time was appropriate for these types of issues questioned the authorship of his letter, which inevitably caused that the case could not have been proceeded any further [ibid., 35].

2. GENESIS AND GRANTING THE TITLE OF "DOCTOR OF THE CHURCH"

The history of granting first titles of Doctor of the Church is relatively distant. Generally, it can be said that the concept of the Doctor of the Church itself corresponds to the concept of the Father of the Church, with the exception that unlike in the case of the Fathers of the Church it is not preconditioned by ancient times – *antiquitas*. The ancient times teachers of the Church had to possess the following three elements: *doctrina orthodoxa*, *sanctitas vitae*, *approbatio Ecclesiae* [Wodrazka 2019, 13].

As W. Bar indicates, granting the title of Doctor of the Church was initiated in the Western Church by St. Venerable Bede (lifetime: 673–735, who was granted the title of Doctor of the Church by Leo XIII on 13 November 1899[13]) referring to four saints: Ambrose, Augustine, Jerome, and Gregory I the Great, applying in this regard an analogy to four evangelists [Bar 2019, 570; Wodrazka 2019, 19]. Officially, they were jointly proclaimed Doctors of the Church by Boniface VIII on 20 September 1295 [Wodrazka 2019, 20–21]. Therefore, some assume that the official establishment of the institution of Doctor of the Church should be assigned to Pope Boniface VIII, who further indicated that the four Fathers of the Western Church mentioned hereinabove gave glory to the Church by their exceptional example of life and through their teaching explain doubts arising out of the reading of the Holy Bible [Betti 1988, 279]. Their remembrances were celebrated in Kraków, in Poland on the basis of a decision made by bishop Nanker since 1320 [Danielski 1985, 35].

Whereas, since the 9th century, in the Eastern Church this title was assigned to the following three saints: Basil the Great, Gregory of Nazianzus and John Chrysostom, in this case applying the trinity scheme [Bar 2019, 570; Wodrazka 2019, 19]. Influence of their thought and respect for the thought was ubiquitous in the ecclesial commune. Therefore, Pope Pius V granted them and St. Athanasius the Great the title of Doctor of the Church by virtue of the office, however, it was not granted by way of some kind of special act, but by including these saints in breviary reformed after the Council of Trent,

[13] Cf. S. C. Ritum, URBIS ET ORBIS. *Extenditur ad universam Ecclesiam, addita Doctoris qualitate, officium et Missa s. Bedae Venerabilis*, AAS 32 (1899–1900), p. 338–39.

that was printed in 1568 following the decision of this pope and containing a proper form of liturgy [Bar 2019, 570].

Earlier, the same Pope Pius V granted the title of Doctor of the Church to St. Thomas Aquinas by the power of bull *Mirabilis Deus* dated 11 April 1567 [Bar 2019, 570–71].

Synthetically, it must be noted that Bishops of Rome began granting the title of Doctor of the Church in a formally structured manner to the saint father figures of the doctrine since the Council of Trent. Specifically, it must be underlined that establishing the Sacred Congregation of Rites in the *Triumphantis Hierusalem* bull of 14 March 1588 Pope Sixtus V ordered it to, e.g. study issues relating to granting the title of Doctor of the Church to a specified person [ibid., 571]. This decision, without any doubt, strongly influenced the formation of granting this title of the Church in an organized and institutional manner.

Exactly from the Council of Trent there have already been granted 32 titles of Doctor of the Church – a few in every century, except for the seventeenth century, when such title was not granted at all.

Doctors of the Church also found an important place in the church art. And so the iconography presents a group of four western Doctors of the Church as an analogy to four evangelists; whereas, in 1667 G.L. Bernini ordered by pope Alexander VII placed the four saint Doctors of the Church in the apse of the Vatican basilica. These were: Athanasius the Great, John Chrysostom, Ambrose, and Augustine who support the Peter's throne [Danielski 1985, 35].

In this short historic *iter* one must also recall the teaching of card. Prospero Lambertini, later Benedict XIV, who in his work "De servorum Dei beatificazione et beatorum canonizatione" gave three conditions necessary to grant an indicated candidate the title of Doctor of the Church. These are the following: a) outstanding teaching: "eminens doctrina;" b) exceptional holiness of life: "insignis vitae sanctitas;" c) clear approval by the Church, i.e. granting the title of Doctor of the Church by the Bishop of Rome or the Council – "Summi Pontificis aut Concilii Generalis legitime congregati declaratio" [Castellano Cervera 1995, 8].

As to the criteria indicating exceptional nature of teaching presented by the candidate for the title of Doctor of the Church, Benedict XIV believed that it should protect from mistakes, enlighten darkness, solve doubts, and advise a method to solve obstacles arising when reading incomprehensible fragments of the Holy Bible [Wodrazka 2019, 15].

Furthermore, as the reading of the instruction of the Congregation for the Causes of Saints of 1981 (*Istruzione della Congregazione delle Cause dei Santi sul conferimento del titolo di Dottore della Chiesa* approved by Pope

John Paul II on 4 May 1981[14]) indicates, the three requisites determined by Benedict XIV lost nothing from their validity [Wodrazka 2019, 15].[15] Moreover, successive popes referred to the above teaching in the past, e.g. St. John XXIII in his Apostolic Letter titled *Celsitudo ex humilitate* of 19 March 1959, in which he proclaimed St. Lawrence of Brindisi a Doctor of the Church pointed out that: "Benedictum PP. XIV in Ecclesiae universalis Doctore enumerari solent, requisitis, insigni nempe vitae sanctitate, eminenti caelesti doctrina et Summi Pontificis declaration."[16]

Therefore, it must be assumed that both teaching of the Bishops of Rome and position of the teaching in regards to conditions necessary for obtaining the title of Doctor of the Church indicated by Pope Benedict XVI are obvious and one must state that it has not been changed for centuries [Castellano Cervera 1995, 20]. Due to this it should not be changed. Naturally, there will appear interpretations of creative and innovative character as to the even better understanding or a broader understanding and explanation what the exceptional quality of the teaching presented by the candidate to the title of Doctor of the Church should be. Beyond doubts, this is an element that will be a subject of progressive development and appraisal of the authority of the Church, as the Second Vatican Council teaches in para. 8 of its Dogmatic Constitution on Divine Revelation: "For there is a growth in the understanding of the realities and the words which have been handed down. This happens through the contemplation and study made by believers, who treasure these things in their hearts (see Luke, 2:19, 51) through a penetrating understanding of the spiritual realities which they experience, and through the preaching of those who have received through Episcopal succession the sure gift of truth. For as the centuries succeed one another, the Church constantly moves forward toward the fullness of divine truth until the words of God reach their complete fulfilment in her."[17] Therefore, it is beyond any doubt that the teaching of a Doctor of the Church should remain in service of the Divine Revelation and Tradition of the Church. It should also have a glance into the future and contribute to the development of the deposit of faith [Castellano Cervera 1995, 14].

[14] Cf. *Istruzione della Congregazione delle Cause dei Santi sul conferimento del titolo di Dottore della Chiesa*, in: Congregatio De Causis Sanctorum, *Le cause dei Santi*, Libreria Editrice Vaticana, Città del Vaticano 2018, p. 629–37.

[15] "I requisiti, fissati da Benedetto XIV, conservano tuttora la loro validità. […] Tali requisiti sono: la *eminens doctrina*, la *insignis vitae sanctitatis*, la *Summi Pontificis aut Concilii generalis legitime congregati declaratio*. Ognuno di questi tre punti richiede opportune precisazioni," *Istruzione della Congregazione delle Cause dei Santi sul conferimento del titolo di Dottore della Chiesa*, p. 631.

[16] John XXIII, Apostolic Letter *S. Laurentius Brundusinus Doctor Ecclesiae Universalis declaratur*, AAS 51 (1959), p. 460.

[17] Cf. Paul VI, *Sanctae Catharinae Senensi titulus Doctoris Ecclesiae universalis defertur*, p. 675.

Furthermore, relating to the above presented conditions indicated by Pope Benedict XIV, although the analysed title could have been granted by the Council, the history shows and teaches that the title of Doctor of the Church was granted exclusively by the Bishop of Rome. This exceptional and sole competence of pope was discussed in 1874 by, i.a. St. John Henry Newman in a letter to his friend, rev. James Spencer Northcote [Schönborn 2019, 5]. Hence, undoubtedly this is a custom solidified by a centuries-old practice that, assuredly, will not change, the more that the councils are convened very rarely and for quite a different purpose [Rozkrut 2010, 37]. Their relatively small number throughout the history of the Church is an evidence of their unique nature and gives an impression that we deal with a rather extraordinary institution; as in reality councils were convened in the most important and difficult moments for the Church. And so, the first four councils – sometimes compared to four Gospels – consolidated and strengthened faith of the developing Church; successive middle ages councils were engaged in defining "societas christiana" in the West; the Council of Trent and the First Vatican Council were engaged in defending Roman Catholicism against theses of the Reformation and the destructive secular culture; whereas, the Second Vatican Council is characterized by the pastoral dimension and openness to wide social problems of the present world in which the Church lives [Alberigo 1991, XIII]. Therefore, it seems that the Church should remain with this centuries-old practice.

It is also worth to indicate that until the Second Vatican Council the title of Doctor of the Church was granted only to men. However, on 27 January 1966 St. Pope Paul VI entrusted prefect of the Sacred Congregation of Rites, card. A.M. Larraona, with a task to examine whether this title can be granted to a holy woman, as well, and in particular, whether this is not in contradiction with the teaching of the Apostle of Nations, the St. Paul's teaching, that "women should remain silent in the church" (1 Corinthians 14,34) and his concrete recommendation: "I do not permit a woman to teach" (1 Timothy 2,12).

Having heard four positive opinions of theologians in this issue, the Sacred Congregation of Rites gave the Pope a positive opinion that resulted in successive proclamation of a first saint women a Doctor of the Church by St. Paul VI in 1970 [Wodrazka 2019, 16–17]. The above decision of the post-council Bishop of Rome must also be obeyed in full concordance with the teaching of the Second Vatican Council, and in particular with the teaching of the Dogmatic Constitution on the Church, where in para. 12 we can read that the Holy Spirit leading the God's People "distributes special graces among the faithful of every rank. By these gifts He makes them fit and ready to undertake the various tasks and offices which contribute toward the renewal and building up of the Church." Therefore, St. Paul VI proclaiming St. Teresa of Avila

a Doctor of the Church referred at the very beginning of his Apostolic Letter to the cited fragment of the Council Constitution *Lumen gentium*, thus solving all previous doubts.[18]

3. HOLINESS OF LIFE AND OUTSTANDING TEACHING

The St. John Paul II Apostolic Constitution on Roman Curia *Pastor bonus*, dated 28 June 1988, states in Article 73 that the Congregation for the Causes of Saints has competence to "examine what is necessary for the granting of the title of Doctor to saints, after having received the recommendation of the Congregation for the Doctrine of the Faith concerning outstanding teaching."

When giving his comments on the cited article of the *Pastor bonus* constitution card. José Saraiva Martins practically indicated that before the title of Doctor of the Church is granted to a saint by the pope, it is necessary that apart from the holiness of life confirmed by canonization, his teaching did not only have a feature of orthodoxy, but was *eminens*, i.e. was distinguished by its high scientific qualification and deepness of content obtained by informed synthesis of wisdom, as well as through its positive influence, so that its author can be recognized as a qualified witness of the vivid tradition of the Church. Moreover, it must be verified whether pieces of writing of a candidate for the title of Doctor of the Church had and have a universal notability, and whether they have a feature of special influence on the God's people, so that they create a certain and firm message that is able to influence the consolidation and deepening of the deposit of faith, also enlightening new directions of science and life. Such teaching should also be characterized by validity and its influence on the present times [Saraiva Martins 2003, 104].

Also the Rules of the Congregation for the Causes of Saints of 2000 in its Article 2 repeats notation from *Pastor bonus* that the congregation considers the granting of the title of Doctor of the Church to already canonized individuals, after obtaining a positive vote in regards to the outstanding character of the teaching from the Congregation for the Doctrine of the Faith [Rubio 2012, 449].

Naturally, as one could figure out based on the statements of *Pastor bonus*, the granting of the title of Doctor of the Church to a selected saint carries with itself a special proceedings both in Congregation for the Causes of Saints and the Congregation for the Doctrine of the Faith [Saraiva Martins 2003, 105; Wodrazka 2019, 24–75]. Whereas, for it to be initiated an approval of the bishop of Rome is required [Wodrazka 2019, 38–39]. Its absence results in inability to initiate such a proceedings. The above practice shows that it is the Bishop of Rome that always decides about initiation of special proceedings *in casu* in the Vatican congregations and that a request for granting the title of

[18] Cf. Idem, *S. Teresia a Iesu, Virgo Abulensis, Doctor Ecclesiae universalis renuntiatur*, p. 185.

Doctor of the Church to a canonized person should be directed to him at all times.

It is also worth to mention that the above congregations of Rome perform only a preliminary task for a successive decision that will be personally made by the Bishop of Rome, who by no means is bound by previous opinions of the two Congregations; as a decision in regards to granting the title of Doctor of the Church to an already canonized person is a sole competence of the Pope [ibid., 25]. Therefore, it is worth to mention that many decades have passed since the proceedings aimed at granting the title of Doctor of the Church to St. Bernardine of Siena ended on the level of Congregations; there is only a solemn proclamation for the title of Doctor of the Church missing that must be done by the Bishop of Rome [ibid., 34]. It can be said that the mentioned saint still remains on the list of individuals who are candidates for the title of Doctor of the Church [Castellano Cervera 1995, 8].

Problematic aspects undertaken by Doctors of the Church in their pieces of writing differed. They included, e.g. a systematic theology in the case of St. Thomas Aquinas and St. Albert the Great; mystical experiences in the case of St. John of the Cross and St. Teresa of Avila; or historical studies in the case of St. Venerable Bede [Rubio 2012, 450]. Thus, it can generally be seen that it is very broad and is not formally limited only to a narrow subject of studies.

Paragraph 19 of the Decree on the ministry and life of priests of the Second Vatican Council, *Presbyterorum ordinis* states: "The knowledge of the sacred minister ought to be sacred because it is drawn from the sacred source and directed to a sacred goal. Especially is it drawn from reading and meditating on the Sacred Scriptures, and it is equally nourished by the study of the Holy Fathers and other Doctors and monuments or tradition."

Whereas, in its para. 16 the Council Decree on priestly training, *Optatam totius* directly points on the teaching of St. Thomas Aquinas that is to shape seminarians: "Next, in order that they may illumine the mysteries of salvation as completely as possible, the students should learn to penetrate them more deeply with the help of speculation, under the guidance of St. Thomas, and to perceive their interconnections."

Therefore, a Doctor of the Church is a saint who had significant influence on the development of the holy science and perfecting the ecclesiastical life [Wodrazka 2019, 27]. Particularly, one should underline his significant influence not only on the successive Catholic teaching, but also development of piousness in consecutive historical periods. Hence, first and foremost, one must perceive a dynamic and creative element in the teaching of every Doctor of the Church, and do not stop solely on these elements that consolidated the deposit of faith in a specific historical moment. Granting of the title of Doctor of the Church means acknowledgement by its highest authority of the significance of an apprised teaching from the perspective of centuries [Betti 1988, 291].

CONCLUSION

Primarily, when making a summary it is worth to point out that an outstanding teaching of a Doctor of the Church must be timeless and has to shape faith of the faithful in not only a specific region, but it has to have a universal dimension [Rubio 2012, 449]. Hence without any doubt, it significantly contributes to the development of the Catholic faith, as well as piety practiced by the faithful. This, undeniably, can also be seen both in Magisterium and the method of directing the Universal Church by St. John Paul II, especially through prophetic entrustment of the world to the Divine Mercy on 17 August 2002.[19]

Without any doubt, this fact must be perceived together with a mission that was received by St Faustina Kowalska to prepare the world for the final coming of the Saviour, that was made by St. John Paul II an integral part of his pontiff.[20] Certainly, in such a delineated context it is not surprising that also St. Sister Faustina Kowalska is perceived as a candidate for the title of Doctor of the Church.[21] The above actions remain in full concordance with the mission of the canonical law, the aim of which is to contribute and, in the end, serve the salvation of souls – "that should be the utmost law in the Church" – through its norms and concrete orders and procedures (can. 1752 of the 1983 Code of Canon Law).

More particularly, the doctrine of Doctor of the Church is not only free from mistakes, but it also enlightens darkness, solves doubts and makes fragments of the Holy Bible that appeared enigmatic understandable [Schönborn 2019, 6–7]. Synthetically, the title of Doctor of the Church is granted to an already canonized person by the Bishop of Rome to honour the teaching that was elaborated by the saint based on the theological plane [Wodrazka 2019, 12].

Naturally, the best method of showing this would be through analysis and influence of the teaching of individual Doctors of the Church on the development of the Christian thought. Admittedly, this is a very broad problematic aspect that can constitute a special subject of a number of precise scientific researches, the more that granting of the title of Doctor of the Church is alone a very complex procedure and generally speaking combines elements of theology and law of the Church.

It is also worth to underline that the presented title was granted spontaneously in the first millennium. It has been granted institutionally and successively

[19] See http://www.vatican.va/content/john-paul-ii/pl/homilies/2002/documents/hf_jp-ii_hom_20020817_shrine-divine-mercy.html [accessed: 18.07.2020].

[20] "You will prepare the world for my final coming." See Św. Siostra Faustyna Kowalska ZMBM, *Dzienniczek. Miłosierdzie Boże w duszy mojej*, Kraków 2001, no. 429, p. 254.

[21] See https://it.wikipedia.org/wiki/Dottore_della_Chiesa [accessed: 20.07.2020].

only precisely from 13th century. However, it has always been granted only and solely on the way of a personal decision of the Bishop of Rome.

A consequence of the great role and importance of the Doctors of the Church in its life is also the fact that they have an important place in the liturgy of the Church, which makes their holy lives even more current and fruitful, and in particular makes the conveyed teaching still current in the life and prayer of the Church.

"Doctors of the Church are not paintings in museums or ancient abandoned sarcophaguses, but they are real characters that even today inspire the universal Church to avoid paralysis of good and preserve the optimism of faith, love of life and hope. The vessel of the Church finds dependable guides in the saints of all Times. Those saints who have their anchors in Heaven support it, so that it wouldn't draw in the sea of history, but reached a safe harbour – heavenly Jerusalem" [Schönborn 2019, 6–7].

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DIGNITAS HUMANA AND *BONUM COMMUNE* AS THE CORNERSTONES OF HUMAN RIGHTS IN THE TEACHING OF JOHN PAUL II

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Abstract. It seems that the awareness of the idea of human dignity as the cornerstone of infrangible human rights has become today an axiom widely accepted in Western civilisation. Pope John Paul II played a major role in the popularisation of this idea. Undoubtedly, the teachings of John Paul II were a call not only for Catholics, but for all the people of good will – stressing that human dignity, which respects each and every life, may become the basis the most important values in society: democracy and peace. In the papal teaching set out in the encyclicals, the right to life is not only a determinant of human dignity, but also a factor which enables the development of the common good. For John Paul II, the category of human dignity became the cornerstone of human rights, and it seems to be an unconditional concept that can be accepted by all – both Christians and adherents to other faiths, as well as atheists – as the basis of society. The current pope, just like his predecessors, regards the concepts of *dignitas humana* and *bonum commune* as the cornerstones of the social teaching of the papacy. In the view of Pope Francis, human rights are derived from the inalienable human dignity.

Keywords: John Paul II, human dignity, common good, human rights

> "[…] the value of democracy stands or falls with the values which it embodies and promotes.
> Of course, values such as the dignity of every human person, respectfor inviolable and inalienable human rights, and the adoption of the «common good» as the end and criterion regulating political life are certainly fundamental and not to be ignored"
> (*Evangelium vitae*, no. 70)

1. CHRISTIANITY AS *FONS ET ORIGO* OF HUMAN DIGNITY AND HUMAN RIGHTS

In Western civilization, the contemporary debate on the axiological roots of law and the state draws upon a number of timeless concepts: the dignity of a human person, freedom, equality, the common good [Sadowski 2010]

justice. These fundamental categories also include the idea of human rights, which seems to be gaining an almost metaphysical importance, at least in Catholic Social Teaching. There are many concepts of human rights in the 21st century, and their most crucial features include their inherent nature [Spaemann 2001][1] inalienability and the fact that they arise from laws that were not made by man. For these reasons, the validity of human rights does not depend on their recognition by the state legal order. Nowadays, they are even considered the basis of international relations. The need to define the category of human dignity more precisely in the acts of international protection of human rights in order to increase their impact has been postulated for years [Zajadło 1989, 117]. Human dignity is sometimes recognized as the original source of all other rights [Safjan 2002, 226–27].

Statements of the representatives of the Catholic Church on this matter are also unequivocal: "Terms such as «personal dignity» or human rights, conveyed by the Magisterium to the entire human community in order to secure the inviolability of human life and freedom, are often included into Revelation itself in order to show their definitive force."[2]

To my understanding, probably all contemporary political ideologies in the Occidental world, as well as the political systems based on them, draw on the idea of human rights, which has become one of the dominant categories of contemporary public debate [Skorowski 2005, 9]. I have purposefully used the term "Occidental world" because I believe that the Western understanding of the concept of human rights is alien to, for example, the civilization of Islam.[3] Alongside Catholic Social Teaching, human rights are part of the socialist and liberal doctrines, which have little in common with the former. It seems undisputable that the question of human rights had not appeared in Catholic Social Teaching until the pontificate of Leo XIII [Mazurek 1991, 33].[4] As L. Garlicki aptly pointed out, in Western civilization, human dignity is rooted primarily in Christian philosophy, because human dignity is a consequence of recognizing man as *imago Dei* [Garlicki 2000, 90].[5]

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[1] However, there are concepts that grant human rights only to certain categories of homo sapiens [Spaemann 2001].

[2] Cf. e.g. Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025–115, no. 12 and 41; Idem, Declaratio de libertate religiosa *Dignitatis humanae* (07.12.1965), AAS 58 (1966) [hereinafter: DH], p. 929–46, no. 9; International Theological Commission, *Propositions on the Dignity and Rights of the Human Person* (1983), https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1983_dignita-diritti_en.html [accessed: 14.03.2021].

[3] See more Sadowski 2017, 427–39.

[4] The author believes – incorrectly in my opinion – that the issue of human rights was recognized by the Church before that [Mazurek 1991, 33].

[5] Cf. Waldron 2013, 8.

In my opinion, the notion of human rights, understood in the Catholic way, first appeared in the social teaching of Leo XIII (1878–1903) and has been present in papal teaching ever since.[6] By comparing the views of Leo XIII with the liberal doctrine of human rights, we can see that both in papal teaching and in the concepts of liberals, not only the subject, but often the object of these rights is identical.[7] What is undoubtedly different, however, is their origin, as for liberals the source of human rights will be a social convention and positive law. For Leo XIII, the foundation of human rights is the conviction that man, as *imago Dei*, has an inalienable dignity that is the foundation and source of his rights. The second source of human rights in papal teaching is natural law, which, according to Johannes Messner, means "a stock of rights accorded to man by virtue of his nature" [Spindelböck 2017, 1].

It seems beyond discussion that John Paul II, who sat on the chair of St. Peter in 1978–2005, made the issue of human rights one of the central categories of his teaching. In my opinion, the papal teaching on human rights was firmly set in the context of human dignity and the common good [Skorowski 1998, 117–29].

The very first encyclical of John Paul II, entitled *Redemptor hominis* and announced on 4 march 1979,[8] is considered a treatise on human dignity.[9] Linking the category of human dignity with personal freedom allowed the pontiff to emphasise the role of the Church in protecting these fundamental values (RH 12).

By referring to the Universal Declaration of Human Rights, John Paul II stressed [Mazurek 1991, 181–82] that its aim was to create the basis for the idea that all programs and political systems are founded on man's welfare, or of the person in the community, which ought to be a fundamental factor in the common good in all concepts or systems. For John Paul II, the source and determinant of *bonum commune* is man's welfare, thus human dignity becomes the criterion of the common good. Recalling the critical stance of his predecessors towards totalitarian regimes,[10] the Pontiff argued that the

[6] Cf. e.g. Carozza and Philpott 2012, 15–43; Sadowski 2019, 351–62.

[7] For example, the human right to own private property.

[8] Ioannis Paulis PP. II, Litterae encyclicae Pontificali eius Ministerio ineunte *Redemptor hominis* (04.03.1979), AAS 71 (1979), p. 257–324 [hereinafter: RH], no. 10.

[9] The concept of dignity appears in the encyclical 25 times. Significantly, in the first Polish collective commentary to this encyclical, none of the 18 texts contained therein referred to the term human dignity in its title, although in the comments we can find a reference to the category of *dignitas humana*, cf. *Redemptor hominis. Tekst i komentarz*, Polskie Towarzystwo Teologiczne, Kraków 1980, passim.

[10] John Paul II recalled the following statements of his predecessors: Pius XI – *Quadragesimo anno*, *Non abbiamo bisogno*, *Divini Redemptoris* and *Mit brennender Sorge*, and Pius XII – *Summi Pontificatus*. In these enunciations, he saw criticism of the totalitarian systems of fascist Italy, the Soviet Union and Nazi Germany.

main drawback of those systems was the violation of inviolable human rights, which would be eventually enshrined in international law (RH 17). The author of the encyclical even asked whether the Declaration of Human Rights and the acceptance of their "letter" mean everywhere also the actualization of their "spirit." Indeed, well founded fears arise that very often we are still far from this actualization and that at times the spirit of social and public life is painfully opposed to the declared "letter" of human rights. John Paul II argued that if the state no longer serves the common good, understood as the widest possible realization of human rights, totalitarianisms could develop [de Laubier 1988, 138] i.e. systems that annihilate human dignity and disregard the common good. Thus, in his very first encyclical, the Polish pope recognized *dignitas humana* and *bonum commune* as the basis of human rights. Moreover, he argued that these categories are inseparably connected with each other and depend on each other.

Referring to the category of *bonum commune*, John Paul II insisted that the Church had always called for striving after the common good and taught that the primary duty of authority in the state is to care for the common good of society, which constitutes the basis of its rights. Thus, the objective ethical order imposes an obligation on the authorities to respect natural and inviolable human rights. The state authority should care for *bonum commune*, because it is fully realized only when all citizens are certain that their rights will be recognized (RH 17). Lack of concern for the common good leads to the atomization of society, anarchy and, consequently, a situation of terror, as evidenced by the totalitarian systems of the twentieth century. The idea of the common good, supported by the principle of human rights, conditions the broadly understood social justice and becomes its measure in public life, which is obliged to protect and develop *bonum commune*.

By referring to *Dignitatis Humanae*, the Declaration of the Second Vatican Council (DH 7), John Paul II stressed that a prominent place among human rights is occupied by the right to religious freedom together with the right to a freedom of conscience. Importantly, the Pontiff's assessment was determined not only by the theological approach to the issue, but also by an approach from the point of view of natural law, therefore from a "purely human" position, i.e. based on the premises that result from common sense and a sense of human dignity. The Pontiff noticed that religious freedom, one of the fundamental human rights, both in the individual and social dimension, cannot be curtailed, because it would be an attack on human dignity itself, regardless of religion or belief. For John Paul II, the curtailment and violation of religious freedom are in contrast with man's dignity and his objective rights (RH 17). The Pontiff emphasized that religious freedom is more than just one human right among many others; it is the most fundamental right, "since the dignity of every person has its first source in his essential relationship with God the

Creator and Father, in whose image and likeness he was created."[11] The emphasis on the fact that the source of human rights lies in God, in whose image man was created, is characteristic and constantly present in the teaching of John Paul II.

2. *LABOREM EXERCENS* AND HUMAN RIGHTS

In the context of human rights based on *dignitas humana* [Curran 1988, 95] and *bonum commune*, many important statements are contained in the encyclical "on human work" (*Laborem exercens*) of 14 September 1981.[12] In the document, the pope considers the analyzed categories mainly from the point of view of human work, placing them in a personalist context [Rourke and Chazaretta Rourke 2005, 140; Bayer 1999, 18; Cortright 2001].

According to John Paul II, work not only enables man – the subject that performs it – to cater to his temporal needs, but also constitutes a foundation for the formation of family life, which is why it ought to be considered a natural right and human vocation (LE 10). The author of the encyclical taught that work is not only an obligation, but also a source of rights of the working person. "The human rights that flow from work" are part of the broader context of those fundamental rights of the person (LE 16).[13]

3. SOLIDARITY IN THE SERVICE OF HUMAN RIGHTS

The second social encyclical of John Paul II, entitled *Sollicitudo rei socialis* of 30 December 1987,[14] is largely devoted to broadly understood human rights [Beyer 2014, 71–75].

While arguing in favor of the human right to entrepreneurship [Novak 1993, 230; Dulles 2008, 149] the Pontiff refers to it in the context of *bonum commune*, demonstrating that this right is important not only for the individual

[11] Message of His Holiness Pope John Paul II for the XXIV World Day of Peace "If You Want Peace, Respect the Conscience of Every Person" (01.01.1991), http://www.vatican.va/content/john-paul-ii/en/messages/peace/documents/hf_jp-ii_mes_08121990_xxiv-world-day-for-peace.html [accessed: 14.03.2021].

[12] Ioannis Paulis PP. II, Litterae encyclicae de labore humano, LXXXX expleto anno ab editis Litteris Encyclicis «Rerum novarum» *Laborem exercens* (14.09.1981), AAS 73 (1981), p. 577–647 [hereinafter: LE].

[13] In the Pontiff's opinion, "When it is a question of establishing an ethically correct labour policy, all these influences must be kept in mind. A policy is correct when the objective rights of the worker are fully respected" (LE 17).

[14] Ioannis Paulis PP. II, Litterae encyclicae vicesimo expleto anno ab editis Litteris Encyclicis a verbis «Populorum progressio» incipientibus *Sollicitudo rei socialis* (30.12.1987), AAS 80 (1988), p. 513–86 [hereinafter: SRS], no. 31.

but also for the common good of all mankind; for these reasons, the state cannot limit the right of an individual to undertake economic initiative (SRS 15).[15] The Pontiff instructed that denying this right, "its limitation in the name of an alleged «equality» of everyone in society, diminishes, or in practice absolutely destroys the spirit of initiative, that is to say the creative subjectivity of the citizen, leading in consequence not to equality, but to a «leveling down»." (SRS 15)[16] This statement is evidently aligned with the conclusion of Leo XII in *Rerum novarum*, namely that the abolition of private property would not bring equal wealth to all, but on the contrary: equal poverty to all.

What we recognize in the Pontiff's concept are clear moral and anthropological references [Weigel 1994, 126] that characterize economic initiative as a right (*ius*) – of a human-citizen. For John Paul II, the human right of economic initiative indicates that he is the creative subject of the act of work, which entails two consequences.

First, it indicates that the right of economic initiative is a human right because it expresses the truth about man and his nature as the subject that performs work. Secondly, it emphasizes that economic activity is something more than just the production of things, because a person who undertakes an economic initiative strives for man's moral good through the act of work, and therefore contributes to the growth of *bonum commune* [Gregg 2002, 163].

Thus, in the teaching of John Paul II, the human right of economic initiative is deeply theologically justified, as it results from the creative subjectivity of the man-citizen as *imago Dei*. In the Pontiff's assessment, the right to private initiative serves both the human person, whose dignity it protects, and the common good, which is multiplied. We can therefore see that the categories of *dignitas humana* and *bonum commune* complement each other. According to John Paul II, the conviction that human dignity is the foundation of human rights is beginning to be fully respected in the contemporary world.

4. HUMAN RIGHTS AND THE POLITICAL AND ECONOMIC SYSTEM

Important observations on human dignity and the common good can be found in the encyclical *Centesimus annus* of 1 May 1991.[17] This document seems to summarize the social teaching of John Paul II, and perhaps his entire papal teaching. To venerate the achievements of Leo XIII and rediscover

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[15] This is also the case with J.I. Lavastida, who stated that the right to economic initiative is connected in the encyclical with the common good [Lavastida 2000, 180].

[16] M. Novak argues that this fragment of the encyclical is a blow to the heart of Marxism-Leninism [Novak 1993, 230].

[17] Ioannis Paulis PP. II, Litterae encyclicae saeculo ipso Encyclicis ab editis litteris «Rerum novarum» transacto *Centesimus annus* (01.05.1991), AAS 83 (1991), p. 819–67 [hereinafter: CA], no. 39.

his work [Weigel 2000, 774; Neuhaus 1993, 149].[18] John Paul II suggested rereading the rights that, according to his great predecessor, workers were entitled to. In this context, he mentioned: the right to private property, then the human right to establish professional associations, and the right to "fair pay" (CA 7, 8) The author of *Centesimus annus* not only spoke out for the array of workers' rights proposed by Leo XIII, but also greatly expanded it by referring to the category of human dignity and the common good. It seems that the Polish pope resorted to Christian personalism to creatively reinterpret the ideas of solidarity, private property, the common good, subsidiarity and human dignity in the context of human rights [Gentry II 2020, 237–51].

John Paul II recalled that Leo XIII had already indicated in *Rerum novarum* that apart from the rights acquired through man's own work, there are also rights that are not connected with work, but derived from man's fundamental dignity as a person (CA 11). Thus, the Polish pope emphasized that Leo XIII already treated human dignity as the foundation of human rights, natural and inalienable, to which he is entitled to as a human person [Coronado 2011]. It seems undisputable that in the teaching of John Paul II, the Christian concept of *imago Dei* is the foundation of human dignity, which is the rationale behind the political support for the idea of human rights.

By referring to Leo's teaching about ownership of property, John Paul II emphasized that the author of *Rerum Novarum* perceived the right to private property as natural. The Church has always defended this right, fundamental to the autonomy and development of the person [Roger and Drosten 1995, 333]. At the same time, John Paul II pointed out that the possession of goods is not an absolute right, but as a human right, it is by its nature limited[19] by reasons of the common good.

Regarding the political system of the state, the Pontiff opted for the principle of "the «rule of law», in which the law is sovereign, and not the arbitrary will of individuals," in which Montesquieu's principle of the separation and balance of powers is respected (CA 44). According to John Paul II, both the

[18] As noted by G. Weigel, *Centesimus annus* begins with a tribute to Leo XIII, whose creative application of Catholic moral principles created a lasting model for the Church [Weigel 2000, 774]. Weigel argues that *Centesimus annus* provided the Church with the Pontiff's mature reflections on the 1989 revolution [ibid., 773]. Neuhaus calculated that the footnotes to *Centesimus annus* contain 143 quotations from earlier papal statements. Of these, 45 refer to Leo XIII, whom the encyclical was meant to honor. Among the remaining 98 quotations, the statements of John Paul II are cited 61 times. The six popes elected between Leo XIII and John Paul II (including John Paul I, whose pontificate lasted only one month), spanning 75 years, were only quoted 37 times [Neuhaus 1993, 149].

[19] Referring to the teaching of Leo XIII, John Paul II stated that by proclaiming the right to private property, the author of *Rerum novarum* clearly indicated "the necessity and therefore the legitimacy of private ownership, as well as the limits which are imposed on it" (CA 30). The Second Vatican Council adopted a similar position.

principle of the rule of law and the rule of majority are subordinate to natural law [Mazurkiewicz 2001, 98]. It can be therefore assumed that the rule of law, understood in Christian terms, is the best guarantor of respect for human dignity and the common good, and consequently – for human rights.

The Pontiff believed that modern totalitarianism arises from the negation of the transcendent dignity of the human person, who is *imago Dei*, because by nature man is the subject of rights that cannot be violated by anyone – neither individual or group, nor nation or state. Even the majority in a given society must not violate these rights by turning against, marginalizing, exploiting or annihilating a minority. According to John Paul II, the transcendent dignity of the human person is the foundation of his inalienable rights.

John Paul II warned that even in countries with a democratic system of rule, human rights are not always fully respected.[20] This is because democratic systems have lost the ability to make decisions that are consistent with the common good. Instead of resolving social problems using the criteria of justice and morality, voters' strength or the financial power of the groups behind them are taken into account. Such actions lead to the disappearance of the civic spirit, as a significant part of society begins to care only about their own personal interests. In this way, the image of the common good is distorted – it is not a simple sum of particular benefits, but "it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately, it demands a correct understanding of the dignity and the rights of the person" (CA 47). John Paul II prophetically warned that democracy does not always work for the benefit of *bonum commune* and *dignitas humana*, so this model does not always favor the development and protection of human rights.

5. HUMAN DIGNITY AND THE RIGHT TO LIFE

An extremely important message pertaining to human rights can be found in the encyclical *Evangelium vitae*,[21] which focuses on the value and dignity of every human person [May 2003, 311–22]. Already at the beginning of this document, the Pontiff instructs that human coexistence and the existence of a political community must be founded on the recognition (or even sanctity) of every human being's natural right to life, from conception to natural death [Dulles 2003, 238].

[20] John Paul II means here primarily abortion.

[21] Ioannis Paulis PP. II, Litterae encyclicae de vitae humanae inviolabili bono *Evangelium vitae* (25.03.1995), AAS 87 (1995), p. 401–522 [hereinafter: EV].

According to the author of the encyclical, the expansion of the "culture of death"[22] in contemporary society leads to the fact that many people make dramatic decisions against life out of fear for the future; additionally, they do so in the belief that these crimes should be understood as an expression of personal freedom and human rights (EV 12, 18). The author of *Evangelium vitae* teaches that all threats to the dignity of human life result from a false concept of the human person (wrong concept of human dignity).

John Paul II believes that all these actions lead to a tragic turning point. The process that once enabled the discovery of the idea of "human rights" – "rights inherent in every person and prior to any Constitution and State legislation – is today marked by a surprising contradiction. Precisely in an age when the inviolable rights of the person are solemnly proclaimed and the value of life is publicly affirmed, the very right to life is being denied or trampled upon, especially at the more significant moments of existence: the moment of birth and the moment of death" (EV 18).[23]

At the same time, the Pontiff sees some optimistic signs: the proliferation of human rights declarations and the numerous initiatives that refer to them indicate an increase in moral sensitivity, ready to recognize the value and dignity of every human being as such, regardless of race, nationality, religion, political views and social class (EV 18). However, John Paul II is well aware that all these arrays of human rights are only abstract in nature, because philosophical and theological norms do not translate into positive law or judicial practice.

The Pontiff asks a question about the reasons for this paradoxical contradiction: on the one hand, there is more and more formal protection of human rights, and on the other, the fundamental human right – the right to life – is being questioned. It is hard to disagree with the author of the encyclical, because the constant expansion of the array of human rights (some researchers indicate that there are five generations of human rights) [Kociołek–Pęksa and Menkes 2018, 125–26] leads to the devaluation of this otherwise right idea.

It seems that for John Paul II, the real threat to man and his inviolable rights lies in attempts to undermine traditional ethics [Picker 2007, 11–34]. Some of these views grant rights only to those who have at least incipient autonomy and who emerge from a state of total dependence on others.[24] In the

[22] It seems that John Paul II interchangeably uses the terms "culture of death" and "civilization of death." More on the subject cf. Nagórny 1999, 135–58.

[23] These considerations of John Paul II perfectly correspond to the arguments and reasons quoted by E. Picker [Picker 2007], where the author reaches the same conclusions as the pope, demonstrating the destruction of two fundamental values – human dignity and human life.

[24] The loudest exponent of the views criticized here by John Paul II is the Australian philosopher and ethicist Peter Albert Singer. More on the subject, cf. Fenigsen 1999, 335–43. According to Fenigsen, Singer's ethics is not a new ethic, in fact it is very old, it dates back to the Neanderthal [ibid., 343]. More on Singer's views, cf. Sadowski 2020, 274–76.

Pontiff's opinion, these views cannot be reconciled with the assumption that man is a being who is "not to be used." The theory of human rights is based on the affirmation that, unlike animals and things, the human person cannot be subjected to domination by others. Equally wrong is a position ready to equate personal dignity with the capacity for verbal and explicit, or at least perceptible, communication (EV 19) [Clark 2000, 192–93].

In the analyzed enunciation, the Pontiff argues that the cause of the contradiction between the official human rights declarations and their tragic negation in practice is the misunderstanding of freedom, which exalts the isolated individual in an absolute way, while giving no place to solidarity, to openness to others and service of them. John Paul II teaches that man will achieve his full dignity only when he opens himself up to the needs of others by voluntarily giving up part of his own freedom.

On the other hand, the individualistic concept of freedom, which the author of the encyclical perceives as false, leads to a serious distortion of life in society. In this situation, the absolute autonomy and the constant promotion of one's self lead to the rejection of the other person, who is perceived as an enemy from whom one has to defend oneself. The consequence of freedom understood in this way is the creation of a society that becomes a community of individuals living side by side, but without any mutual bonds. In such a society, everyone strives after their own goals independently of others. However, since others have similar goals, all seek a compromise so that society can guarantee as much freedom to everyone as possible. Such actions lead to the disappearance of a sense of common values and an absolute truth recognized by all. As a consequence, social life is exposed to the risk of complete relativism, and everything becomes the subject of contract and negotiation, including the most important of human rights – the right to life (EV 20).

The Pontiff believed that modern legislation and politics of many states lead to the fact that the original and inalienable right to life is being questioned, or worse, it may be denied by a parliamentary decision or by the will of the majority of society. These disastrous actions stem from the absolute reign of relativism and lead to a situation in which "law" ceases to be law, because it is no longer based on a solid foundation of the inviolable dignity of the human person, but becomes subject to the will of the stronger. In this way, democracy annihilates its own principles and morphs into a totalitarian system (EV 20).[25] For John Paul II, law must protect human dignity, because inviolable human dignity is the foundation of a fair law that best protects human rights.

[25] E. Picker terms such actions "devitalization" of dignity, leading to the abandonment of the protection of life [Picker 2007, 51–135].

Although it might seem that all these actions are made with respect for the rule of law,[26] they are actually but a substitute for the rule of law, because the democratic ideal truly deserves the name only if it recognizes and protects the dignity of each person. According to John Paul II, the raison d'être of both law and the state as a legislator is to protect man as a good worthy of affirmation by his own virtue. Real democracy requires the citizens to reach a certain level of moral maturity, otherwise democratic procedures will allow for the enactment of both good and bad laws.

In proclaiming the fundamental truth about human dignity, the Pontiff teaches that innocent human life is inviolable [Dulles 2003, 242], therefore abortion, euthanasia and suicide must be strongly condemned. Their acceptance would be against human dignity.

The laws that make abortion and euthanasia permissible allow the commission of crimes, and therefore are not in any way binding on the conscience; on the contrary, they require man to oppose them through conscientious objection.[27] A Christian has a duty to oppose such a law, because from a moral point of view, one must never be an accomplice in doing evil. Refusing to participate in injustice is not only a moral obligation but also a fundamental human right; otherwise, man would be forced to commit acts which inherently offend his dignity and radically violate his freedom, whose authentic meaning and purpose is to pursue truth and goodness. For these reasons, Christians' refusal to engage in activities contrary to the moral law is a fundamental right which should be enshrined in state law. This should entail that health care professionals (doctors, medical personnel and health service managers) [Schooyans 1991, 43–46]. Ought to be allowed by law to refuse to participate in planning, preparing and carrying out acts against life. Anyone who resorts to conscientious objection must not only be protected from criminal sanctions, but also from any other legal, disciplinary, material or professional consequences (EV 73).

When considering issues connected with interpersonal solidarity, John Paul II makes a direct reference to the idea of *bonum commune*, stating that solidarity, understood as "a firm and persevering determination to commit oneself to the common good," must also be realized through various forms of participation in social and political life. Christians should influence the legislators and state institutions in such a way that they do not violate the right to life from conception until natural death, but protect and strengthen this right (EV 93) in order to foster the development of human dignity.

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[26] As John Paul II points out, "at least when the laws permitting abortion and euthanasia are the result of a ballot in accordance with what are generally seen as the rules of democracy" (EV 20).

[27] Regarding Christians' attitude to unjust law, cf. Ślęczka 2003, 94–109; Bertone 2003, 113–29; Vitelli, 2003, 165–73.

CONCLUSIONS

It seems that the awareness of the idea of human dignity as the cornerstone of infrangible human rights has today become an axiom in Western civilization, accepted by the vast majority of participants in the public debate. Pope John Paul II played a major role in the popularisation of this idea. Undoubtedly, the teachings of John Paul II were a call not only for Catholics, but for all the people of good will – stressing that human dignity, which respects each and every life, may become the basis the most important values in society: democracy and peace (EV 101). In the papal teaching set out in the encyclicals, the right to life is not only a determinant of human dignity, but also a factor that enables the development of the common good. For John Paul II, the category of human dignity became the cornerstone of human rights, and it seems to be an unconditional concept that can be accepted by all – both Christians and adherents to other faiths, as well as atheists – as the basis of society. The current pope, like his predecessors, regards the concepts of *dignitas humana* and *bonum commune* as the cornerstones of the social teaching of the papacy. In the view of Pope Francis, human rights are derived from the inalienable human dignity.

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THE COMPARATIVE LAW METHOD AND ITS CORRECT APPLICATION AS A PREREQUISITE FOR OBTAINING RELIABILITY OF RESEARCH RESULTS

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Abstract. Approximation of legal systems serves the achievement of similar economic, social or cultural goals. The comparative method is a tool to achieve such goals. This is why the subject matter of this paper is to present the characteristic features of the legal comparison method and all its stages. Results of research that uses this method aim to formulate *de lege ferenda* conclusions for the national legislator. The main hypothesis of this article is to demonstrate that the truth of the research result obtained by a comparatist largely depends on the correct application of the comparative method. Nevertheless, it is not the only factor that affects reliability of the research result. The article also points to the relationship of comparative law with neighbouring scientific disciplines and in particular with the theory of law, where this relationship concerns convergence of legislative goals. This is why a lawyer – comparatist, who is preparing a comparative law study, should draw on the research method developed in the theory of legal comparison and on the achievements of the theory of law. The discussion opens with a presentation of a short historical overview of the essence of the dispute on the perception of comparative law either as an independent scientific disciple or as only a specific research method (section 1). When it comes to the characteristics of the comparative law method, its general properties are presented first (section 2), followed by a description of its special features (section 3). It is in particular unique in the fact that it is implemented in stages during which specific activities must be performed. Adherence to this multi-stage procedure is significant in obtaining reliable research results.

Keywords: research method, comparative law, research result, legal equivalent, theory of law

INTRODUCTION

Recently there has been an increase in the number of studies that employ the comparative law method. There is no doubt that each comparative legal study is very specific, often based on abundant sources from territorially and culturally remote law systems. Therefore, evaluation of reliability of research results becomes more difficult, not only for the domestic legislator who would like to use the outcomes of this research, but also for any prospective reader. However, the criterion of how the comparative method should be used may

become useful. Nevertheless, there is no single universal path that would be suitable for any comparative legal study, though each method constitutes a set of typical activities. The comparative method also has characteristic elements (activities), that appear in consecutive research stages. Therefore, the aim of this article is to show the "full research path" of an investigator who applies the comparative law method. A comparative study should be carried out in a few stages. Omitting any of such stages may distort the research result. In a pursuit to obtain an objective and a reliable result, one needs to make sure that all steps making up the research procedure are implemented completely and correctly. In other words, a comparative lawyer should pass through all stages in his comparative research so that the quality of results may allow them to be used in the legislative process.

I will also refer polemically to a view expressed in the literature according to which a researcher may follow one of two paths [Radwański and Zegadło 2012, 258]. First, a comparative lawyer may choose an easier way, that is a description of the problem in a foreign law (it is most often presented in a separate segment of the text). A legal institution may be investigated in this way by describing – one by one – the legal constructions derived from various legal systems in separate chapters devoted to individual law systems. Secondly, a more difficult way may be opted for, which involves placing comparative elements in the content of the entire study. Then, notes that involve comparative law content may be likened to "building blocks" dispersed in subsequent chapters among other "building blocks." As I do not agree with this alternative approach to the comparative method, I believe that the two ways mentioned above are not two separate comparative methods, but are subsequent stages that form one method leading to the achievement of the final research result.

1. DSPUTES ON THE NOTION OF COMPARATIVE LAW

When characterising the comparative law method, one must, at least briefly, refer to the discussion among legal scholars and commentators on what *comparative law* is. Since comparative studies are mainly written in English, which has a broad semantic scope relevant to this notion, legal scholars and commentators point out terminological ambiguities [Szymczak 2014, 39]. Because there are different conceptual grids in other languages for describing the notion of comparative law, this may cause reasonable misunderstandings leading in consequence to polemics in substantive issues. In the Polish scholarship this problem is noticed by R. Tokarczyk, who sees *komparatystka prawnicza* [legal comparison] as a science and thus pays a great deal of attention to the genesis of the term *prawo porównawcze* [comparative law] [Tokarczyk 2008, 25]. He analyses many expressions that might be

applied, such as *prawoznawstwo porównawcze* [comparative jurisprudence] or *porównawcza nauka prawna* [comparative legal science], and in the final part of his discussion – pointing out some shortcomings – he offers the term *komparatystka prawnicza* [legal comparison], which is also used as the title of his monograph. Before that, Z. Ziembiński wrote about it in a similar way. He suggested the term *prawoznawstwo porównawcze* [comparative law study] [Ziembiński 1983, 25].

Throughout the world, this debate is in fact carried out in literature written in the English language. Even though authors who voice their opinions in the discussion represent various nationalities, they choose the English language as the *lingua franca*. However, English language literature lacks a suitable conceptual grid which would show the differences between the term denoting the *comparative law method* and the *study on comparing law systems.* Therefore, commentators who write in this very language believe that the term comparative law is used in two separate meanings in studies written in English. First of all, comparative law is used to specify legal comparison as a stock of knowledge (the term *academic discipline* is sometimes used), secondly, as a research method. Similarly, in the French language, the term *Le droit comparé* [comparative law] is defined as an intellectual discipline and a research method [Samuel 2014, 8]. In turn, there is no such problem in the German language, where terminology is more diverse and offers terms. Firstly, the term *Rechtsvergleichung* operates, which should be understood as a method [“comparing law”], and secondly, the term *vergleichende Rechtswissenschaft*, which—if analysed lexically in more detail—turns out to be “the science of comparing law.” Grossfeld uses this terms in describing the comparative law method. It is reflected in his monograph’s title: *Kernfragen der Rechtsvergleichnung* [Grossfeld 1996, 3]. Another example of a title of a monograph by K. Zweigert and H. Kötz is *Einführung in die Rechtsvergleichung* [1998]. This terminology appears in names of scholarly journals that deal with this subject matter (German comparative journal titled: *Zeitschriften für vergleichende Rechtswissenschaft*).

Moving on now to the essence of the debate over whether comparative law is a scientific discipline or a research method, I will begin by presenting advocates of the thesis that comparative law is a science. Proponents of treating comparative law as a science include Bussani and Mattei, who write about the exploratory calling of this discipline. Nevertheless, they do point out that it is likely to interact with neighbouring disciplines, thereby it is difficult to identify its boundaries precisely [Bussani and Mattei 2012, 4]. Reimann also opts for such an approach. The author accepts the dual role of comparative law, first as a method of studying law; and second, as a “stock of academic knowledge” [Reimann 2012, 14]. In his further reflections, he writes about the “core of science.” Reimann, in a footnote, makes a reference to the views

of Zweigert and Kötz, who wrote about pure science [ibid., 16]. And it is the existence of this stock of knowledge that is to be the formal basis for recognizing this discipline [Zweigert and Kötz 1998, 6]. Comparative law consolidates knowledge about general legislative trends or common law principles [Monateri 2012, 7]. Its basic function is to form the canon of knowledge on the basis of various legal sources from different legal cultures.

In Polish science the subject matter of comparative law was addressed by Ziembiński, who concluded that even though it is not a doctrinal discipline of law, it is a "stock of knowledge" which is composed of general statements on re-occurrence of individual measures in certain legal circles and also common rules for law systems of a certain social and economic formations or cultural circles [Ziembiński 1972, 50].

When it comes to the opposite approach, that is a view treating comparative law as a method, its advocates can be found in Polish and international literature alike. In the Polish literature this belief is held by Szer and Rozmaryn. Both authors treat comparative law solely as a method [Szer 1967, 22]. The former shares Rozmaryn's view [Rozmaryn 1966, 407]. In foreign literature it is concluded that comparative law does not exist as an independent discipline, because it does not have its own substance and may only be treated as a research method [Örücü 2004, 37]. To some extent one must agree with the statement that comparative law cannot be treated as a classic branch of law. Nonetheless, we cannot agree with this author's belief that comparative law has no substance on its own (which has been mentioned before). Even the proponent of this position himself is not entirely consistent in his statements. He admits in a further part of his discussion that comparative law consolidates knowledge on law and allows understanding of law in a context [ibid., 34]. Therefore, when searching for arguments for recognizing comparative law as a scientific discipline, one may point out that, even though it does not have its "own" set of legal norms (like civil law or criminal law does) on the one hand, it still has a certain stock of knowledge on the other. Therefore, it seems reasonable to specify that comparative law, though not yet a single separate branch of law like the branches identified before, does indeed have its own substance.

Naturally, a question arises whether this stock of knowledge is characteristic enough for it to be reasonable to recognize it as an independent discipline. Borucka–Arctowa asks a suitable question about the point of dividing a specific legal study into a comparative part and a part which addresses national ("domestic") law [Borucka–Arctowa 1971, 11]. On the one hand, the author questions this separation from the methodological point of view. Her justification sounds convincing to me, whereby any legal research on national measures involves a presentation of the full background which includes other norms and instruments in the surrounding world. On other hand, she accepts

institutional separation of research teams justifying it with organizational needs (preparation of suitably qualified staff, exchange of views or concentration of library resources). Hage writes in a similar fashion about the difficulties related to the separation of "comparative substance." He claims that we cannot draw a list of matters and problems that fall under comparative law and a list of other matters [Hage 2014, 38].

However, a conclusion has been drawn from this on-going debate – i.e. a debate on whether comparative law contains its own content or whether it is only a method – according to which the term *comparative law* accommodates a stock of scientific knowledge. It may be substantiated by the fact that if comparative law is perceived solely as a method (research process), it will create a problem with classifying and organizing a lot of information that is usually gathered as part of comparative research. Even though this information relates to specific legal measures accommodated under specific branches of doctrinal law, they are analysed in a particularly broad comparative law approach which allows an in-depth analysis of the reasons for this research problem. Given the above, it is worth distinguishing and identifying these comparative conclusions (research results) so that it is easier for the science of law to establish a certain canon of shared principles that occur in different law systems to which we can refer.

2. GENERAL COMMENTS ON THE COMPARATIVE LAW METHOD

At the outset I will remind the reader, in the broader context of reflections, that the method in the original Greek meaning denotes "a path to achieve a goal" and in Latin it was defined as a rational procedure composed of individual planned actions that occur in a given scientific discipline. Modern science offers the following definition: "[a] method described a rational way of doing things, a particular mode of proceeding according to a defined and regular plan in intellectual discipline" [Vogenauer 2008, 885]. In turn, when it comes to the comparative methodology, it is a scholarly method applied in various scientific fields, such as finance, political studies, sociology or even environmental studies [Reimann 2012, 14; Tokarczyk 2008, 26; Flejterski and Solarz, 2015, 11]. Its broad application can be found in historical studies and in particular in the history of the state and law [Bardach 1962, 10]. Giaro claims that a historian must be a comparatist and comparative studies need history [Giaro 2016, 63]. Thus, it may be concluded that the comparative method is differentiated due to the kinds of objects that may be compared. If this object involves legal norms (and not regulations (!), which will be discussed later), we can talk about a comparative law method.

I will begin the explanation of the general characteristics of the comparative law method by introducing a rather extreme position of Ziembiński, who

claims that comparative law "does not in fact contribute anything particular in terms of how doctrinal problems are formulated and solved." However, in further discussion he admits that the key difference in comparative research pertains to the processing of results [Ziembiński 1983, 25]. He then goes on to present its very general outline. He writes that a comparative study may be done in a vertical set-up and at the same time in a horizontal plane (also known as: a vertical approach and a horizontal approach). The former includes examination of subsequent evolutionary stages of a given law system (or its individual measures) in a longer run. The latter compares various law systems that are contemporary to the researcher. A combination of these two planes, that is investigating a few law systems in the longer period of development, constitutes investigation of evolutionary stages (either of the entire system or a specific legal institution). In comparison, in the "horizontal profile," which includes examination of contemporary law systems, the emphasis is placed on a logical and linguistic examination [ibid., 26]. A linguistic and logical analysis is obligatory in each legal research type. Moreover, the research may be conducted in the sociological, cultural, psychological and economic approach, where the last one is optional. They depend on the nature of the legal measure. E.g., when investigating adoption, cultural and social factors, not economic premises, are important. In turn, when analysing the construct of a commercial company, the economic aspect is important, not the psychological factor. Therefore, the last criteria may be perceived by the researcher differently, depending on the character of the investigated legal institution.

The statements quoted above show that the legal science sees a strong relationship between the comparative law method and methods developed on the ground of theory of law, though undoubtedly the comparative law method has its own characteristics determined by a special function. Foreign literature emphasises that the function of the legal comparison research does not only involve a description of a foreign law, but also an assessment of the investigated rules as potential candidates to a domestic law system and substantiation of legal solutions for specific types of cases [Hage 2014, 47]. The basic question asked by researchers in comparative literature reads as follows: Is there only one research method, or is it rather a set of research tools? The scientific canon identifies the following types of the comparative law method: a) functional comparison; b) structural comparison; c) systemic comparison; and d) critical comparison [Husa 2014, 60–63]. However, authors who address these issues believe that the functional method is the most crucial. The functional comparison places emphasis on locating the same (or almost the same) social and legal problem and on establishing how it is (or was) solved in different law systems. In general terms, the functional method deals with an answer to the question about which institution in law system A is a legal equivalent in system B [Örücü 2006, 443].

Husa claims that the functional method plays the main role, while the other methods are only auxiliary to it. Therefore, in turn, a structural comparison refers to the location of an investigated object (legal norm) in its primary environment, that is the law system in which it operates. This structural comparison takes into account the division into branches in the law system which the investigated object originates from. In contrast, a systemic comparison means that the investigated legal institutions are cut off from their national contexts and examined in a pure theoretical perspective created by the comparatist on the basis of a canon of comparative knowledge. When it comes to critical comparison, it actually refers to the three previous ones.

3. RESEARCH STAGES OF THE COMPARATIVE METHOD

The specific feature which distinguishes the comparative law method involves research activities which must be carried out in consecutive stages. The comparative law method consists of a few characteristic steps. The correct performance of particular activities belonging to each of these stages affects reliability of the research result. The stages of the research process which are identified in the theory of comparative study are: (1) setting research objectives; (2) choice and selection of equivalent objects of comparison; (3) their juxtaposition; (4) classification; and (5) drawing general conclusions and their justification (postulates *de lege ferenda*).

The first stage involves identification of a research goal. The theory of comparative studies only provides a general differentiation of research goals. The area of application of results coming from legal comparison studies may consist in the unification of the law at the international level (e.g. in the European Union) or a reform of a national law. The intended research aim may be achieved by filling the structural loophole (thetic loophole) or by transplanting the legal institution. However, from the individual perspective of a given comparative law study, a much more detailed research goal must be specified – depending on the level of knowledge in a given field of law [de Cruz 2007, 8]. The choice of a research goal is a very important moment of the research, which will impact the shape of the method applied by a comparatist. In other words, the choice of the goal largely determines detailed research steps (activities) that form the stages of the particular procedure to be applied in a specific comparative study. At the beginning, a comparative lawyer formulates preliminary research hypotheses which should be verified in the course of the research process (they may be proven or rejected). Where the hypotheses are supported by proof, which is collected in the research, then they become theses which will be presented as final conclusions.

In the second stage, equivalent objects to be compared are chosen and selected.

An object of comparison includes abstract legal norms or entire legal institutions (these are not specific legal provisions). Firmenich claims that the subject matter of research involves abstract objects, the content of which has been interpreted on the basis of the wording of a legal text. She writes "Vergleich sich auf Rechtssysteme ingesamt, also ihres Geistes und Stil" [*Compare them to legal systems as a whole, including their spirit and style*] [Firmenich 2011, 52]. One must explain here that, at first, a broader scope of potentially similar legal constructs is investigated in legal comparison studies, but next, during this stage, their functional similarity is investigated – the content of the legal institution is established. Selection occurs at the end of this stage, which also means elimination of certain objects from the pool of those initially chosen for the investigation. It is about identifying legal institutions that are similar in content to functional legal equivalents [Gordley 2012, 118]. A lawyer – comparatist cannot be solely guided by a similar-sounding name (lexical similarity), but he should determine the content of the institutions compared. For example, Swiss law features an institution called *das Retentionsrecht*, which is defined in general dictionaries as "the right to refuse to deliver a thing" [Kozieja–Dachterska 2006, 368]. On the basis of a lexical analysis it could be concluded that it is an equivalent of the Polish term: *retention right.* However, when we analyse its content (in the functional approach), it turns out that in the Swiss law the term *das Retentionsrecht* should be qualified from the functional side as an equivalent of the Polish construction of the statutory pledge right. This construct is regulated in the Swiss law in Article 268a ZGB.[1] The Polish law equivalent, i.e. the legal construct of the statutory *pledge right*, is regulated in Article 670 of the Civil Code. Both legal constructs have a similar function – they serve to secure liabilities that form, *inter alia*, in the tenancy relationship. Therefore, it is clear that the dictionary definition based on an "acoustic" similarity may fail since *retention right* in the Polish law occurs in the law of obligations, while in the Swiss law the content of *das Retentionsrecht,* equivalent to the Polish statutory *pledge right*, pertains to a limited real right. This means that the objects compared, that is legal norms, should include equivalent content or a similar concept, but it is not enough to compare terms that sound lexically similar.

The next stage is juxtaposition of (previously selected) institutional equivalents. In practice, these two stages, that is selection and juxtaposition, may overlap, but they must be distinguished in the formal sense. In comparative studies, the term "juxtaposition" must be understood not only as the technical ordering of a set of elements, but it is also necessary to compare preliminarily various scientific concepts (or ideas). As has been previously mentioned, the prerequisite for proceeding to the stage of research that consists of a strict

[1] ZGB – Swiss Civil Code of 1907 – Zivilgesetzbuch.

comparison, involves comparability of objects. These objects that may be compared must present a score of common features. The etymology of the word "comparison" shows that it is a Latin word which means: comparing something with something else (Latin *com* means *with*; Latin *parare* means *comparison*). The researcher should compare a national legal norm or institution with its equivalent in a foreign law system [Firmenich 2011, 44]. Therefore, one must note that there must be at least two legal institutions in a comparison. Moreover, legal theory talks of a third element called *tertium comparationis*. This means that next to the two objects that are being compared, known as *comparatum* and *comparandum* in the literature, there is a third element (an abstract element). Örücü explains that objects of comparison must have shared common features that serve as a common comparative denominator. In other sources this common denominator is called *tertium comparationis* [Örücü 2006, 442–43]. In Polish literature this subject was addressed by Jakubowski, who referred this term to the establishment of repeatability of economic circumstances or social events. He believed that establishing this repeatability must be done in an inductive procedure [Jakubowski 1963, 12]. It involves finding a minimum of uniformity which may be expressed in the similarity of functions, an organizational structure or origin of the institution.

This may be illustrated by the examples below. I start with a minimum standard for comparative studies, which consists of two equivalents (two institutions) coming from two different law systems. When German law is compared with Polish law, we have two elements to compare and a model with common features that will be the reference point (*tertium comaprationis*). However, when we have three legal equivalents, three comparison variants will be possible: Polish-German, Polish-Swiss and Swiss-German. Each set of two equivalent elements will be compared with a model reference point, which is the fourth element (constructed on the basis of common features of these three equivalents). In all those three variants comparison is made in reference to these common features, that is to the so-called *tertium comparationis*. Similarly, the above-mentioned comparison mode will apply when we increase the number of equivalent objects. For example, if we have four equivalents, then it is even possible to configure six variants of comparison: Polish-German, Polish-Swiss, Polish-Austrian, Swiss-German, Swiss-Austrian and German-Austrian. In each of these variants, two substantial equivalents will be compared with respect to model features covered by *tertium comparationis*.

The model presented above shows that the increasing of a set of comparative objects with only one more element multiplies the number of possible comparative options. And then a question may emerge about the point of expanding the comparison which then accommodates too many options. Do all of them have to be carried out in the research process for the research results

to be deemed reliable? The answer to this question is not easy. There is no general rule on the number of comparable variants applied.

However, this answer surfaces in the next stage, that is classification. A lawyer – comparatist proceeds to the ordering of law institutions. This may be done as identification of a "family" that gathers together similar law systems. Therefore, in this stage the set of equivalents is put in order, that is they are classified according to a criterion specified by the scholar [Kadner Graziano 2007, 259]. The legal solutions compared should not be geographically or conceptually remote from the basic law system or else the scientific result obtained may be an element that expands only the general canon of comparative knowledge and is useless for the national legislator. In this stage, a move is made from comparative law analysis to synthesis. In the English language literature this stage is even metaphorically described as "filtering" or "refining" (the latter is an even more complex process of purification in order to extract suitable elements and to eliminate unnecessary components). When transposing this metaphor to the research process, it is about extracting essential elements and separating them from other research information that does not contribute anything to the score of knowledge.

The last stage involves explanation of reasons (French: *raison d'etre*) that affect the existence of differences or similarities of solutions that belong to different legal systems. The comparative law function does not only consist in describing a foreign law, but also in an assessment of legal solutions as potentially recommended for introduction into the national law system [Hage 2014, 47]. This stage of research, which involves drawing general conclusions, is the most important moment of proceeding from a comparative analysis to a comparative synthesis [Örücü 2004, 34].

In the Polish literature, Szer writes more appropriately about this stage of explaining the reasons, claiming that comparative law should not be limited to the function of being an effective instrument of determining and explaining specific regularities in the field of legal phenomena [Szer 1967, 25]. This explanation is to be done in a context of broader cultural, social or economic phenomena. Similarly, Ziembiński believes that the very pointing to the fact that there are analogous legal norms in force in different systems does not bring anything and does not solve the problem until we demonstrate the similarity in operation or in the genesis of these norms [Ziembiński 1972, 51]. The discovery of this fact does not only require an examination of the reasons referring to the construction of legal institutions, but also the taking into account of social, economic and cultural determinants. In turn, F. Longchamps de Berier expresses a belief that all three arguments (doctrinal, historic and comparative) must be used "in concurrence" in the methodology of the science of private law as each of them requires careful attention [Longchamps de Berier 2016, 289].

Therefore, the last stage of comparative research involves the discovery and explanation of reasons of the legislative differences. An author of a law comparison study should sum up the research and place general conclusions in this summary. They are the basis for formulating legal theories on the development and course of legislative trends. Moreover, such a summary usually accommodates *de lege ferenda* conclusions for the national legislator.

CONCLUSIONS

Comparative law and its method have an immense impact on the internal legislative process and approximation of legal systems. This is why it is important that the scientific comparative result be reliable. In order to do so, a scholar must follow the full path, that is all stages of a comparative procedure that lead to the achievement of a research goal. There are many comparative studies, with varying degree of detail and thematic scope, but each of them should be implemented with full compliance to this procedure as this ensures correctness of the scientific outcome. The process of its verification is needed to distinguish the "superficial" comparative studies from in-depth comparative research. The last one is based on a multi-stage and labour-intensive research process that requires the scholar's immense involvement. He also often encounters language barriers and difficulties.

However, the goals and tasks that the lawyer – comparatist must achieve and perform, respectively, are important because he makes certain generalizations (recognized as general rules) on the basis of detailed information from various law systems. Given the above, all the more, he must be expected to demonstrate a higher degree of diligence in collecting and selecting data and a high level of argumentation due to the measurable effect of comparative investigations that hold scholarly conclusions and postulates (*de lege ferenda* conclusions). I hope that the issues addressed in this paper will contribute to a more in-depth study of foreign law systems in order to create the scientific core of shared legal values.

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THE NATURE AND ESSENCE OF THE LIMITATION OF THE GENERAL RIGHT TO INFORMATION DUE TO THE FORCED RESTRUCTURING PROVISIONS

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Abstract. The general right to information, which guarantees individuals the ability to reach for public information, is not absolute. It is subject to many limitations, which are provided for by both the legislator and the legislature. The need to protect certain kinds of goods and values leads to various ways of limiting access to public knowledge. One of them is to give priority to special regulations that introduce different principles and procedures of access to public knowledge. Such regulations are the provisions on forced restructuring to which the legislator refers in the text of the Act on Access to Public Information of 6 September 2001. It makes them one of the restrictions distinguished in the catalogue of Article 5. This study is devoted to determining the nature of this type of restriction and its essence.

Keywords: public information, access, restriction, forced restructuring, right to information

INTRODUCTION

The long-term validity of the Act of 6 September 2001 on Access to Public Information[1] made it possible to develop a catalogue of the properties of the universal right to information (Article 61 of the Constitution of the Republic of Poland of 2 April 1997[2]). Importantly, it is not just a matter of characterizing the legal right by isolating simple adjectival terms associated with it or applicable to it, but also (if not primarily) of referring to the utility of the right in question as an information tool with multifaceted significance. The universal right to information, remaining in close relation with the concept of a democratic state of law, constitutes a tool for the realization of widely understood disclosure and is a testimony to the democratization of social relations [Górzyńska 1999, 11; Bernaczyk 2008, 24; Mucha 2002, 57; Zaremba 2009, 15; Kędzierska 2015, 1; Opaliński 2016, 25]. Being a universal right of a political nature, it also fulfils the prerequisites of a public subjective right, which

[1] Journal of Laws of 2020, item 2176 [hereinafter: u.d.i.p.].
[2] Journal of Laws No. 78, item 483 as amended.

in its assumption provides a guarantee that the entitled person will achieve the desired response from the state and the bodies acting on its behalf [Bernaczyk 2008, 26–27; Banaszak 2004, 447; Garlicki 2007, 5; Bidziński, Chmaj, and Szustakiewicz 2018; Czarnow 2007; Kłączyński and Szuster 2003]. It is not, however, an absolute right of an absolute nature, and for this reason, it is subject to the limitation in situations envisaged by the law and for the protection of values and goods specified therein. This property is of particular importance from the point of view of the carried-out analysis. This is because it indicates the existence of a legally regulated level related to limiting access to public knowledge. It encompasses a range of rights, for whose protection the obligation to respect public and private secrets is activated. Moreover, the legislator, being aware of the importance and significance of certain regulations in a democratic state under the rule of law, gives them priority of respect, thus leading to the restriction of access to information. As is clear from the content of Article 5 u.d.i.p. the right to public information is limited to the extent and on the principles set out in the provisions of compulsory restructuring. The study is devoted to determining the essence and nature of this type of restriction. In doing so, it will be helpful to define the concept of restriction in its general meaning and to determine its basic function. It is also important to classify all legally defined grounds for limiting access to public knowledge and to place among these the limitation dictated by the content of the regulations on forced restructuring.

1. THE NATURE OF THE RESTRICTION UNDER ARTICLE 5(2A) U.D.I.P.

A colloquial understanding of limitation reduces its meaning to the inability to act in a certain sphere, or at least to the presence of a certain type of impediment to the proceedings. A restriction is identified by the existence of obstacles that prevent the achievement of the desired goal, which deprive the person concerned of the opportunity to obtain the desired state of affairs. According to the PWN dictionary, a restriction means a norm, regulation, or order that restrains someone's freedom of action.[3] Such understanding of the concept reflects the essence of restrictions on the availability of public information. It justifies the position in light of which, "all restrictions are exceptions [...]"[4] and their introduction should take place only when there are

[3] See https://sjp.pwn.pl/slowniki/ograniczenie.html [accessed: 20.04.2021].

[4] Judgement of the Constitutional Tribunal [hereinafter: CT] of 27 June 2008, ref. no. K 51/07, OTK ZU 5A/2008, item 87, see also judgement of CT of 26 April 1995, ref. no. K 11/94, OTK ZU 1995, item 12; judgement of CT of 28 May 1997, ref. no. K 26/96, OTK ZU 2/1997, item 19.

special reasons for it. It also confirms the legitimacy of the use of the concept of secrecy in the case of complete exclusion of admissibility of reaching or applying for specific information covered by a special protection regime, despite having the status of public knowledge M. Brzozowska and K. Pawlik indicate that the limitation is a situation in which it is necessary to take certain actions that inhibit the disclosure of information particularly protected by the legislator due to public interest or private interest [Brzozowska and Pawlik 2019]. The attribute of secrecy is confidentiality, which implies the state of non-disclosure to the public and at the same time taking appropriate steps to guarantee its protection [Taczkowska–Olszewska 2014, 196]. What is more, it allows treating the limitation as a tool influencing the content of the right subject to limitation. M. Wyrzykowski rightly points out: "[...] that limitations of the right to information, in fact, determine the content of this right, because the essence of rights and freedoms, in fact, depends on legally permissible limitation of them" [Wyrzykowski 1998, 48]. It is also at this level that the functionality of the legally guaranteed limitations on rights and freedoms becomes apparent. Particularly noteworthy is the fact that, despite the highly pejorative meaning of the term itself, doctrine attributes to all premises limiting freedom the role of an ordering factor in the process in which persons entitled to exercise their legally guaranteed rights (rights and freedoms). This is because striving to extend the scope of exercising freedoms and rights (characteristic of democratic societies) requires the simultaneous delimitation of their implementation because unlimited freedom in the exercise of rights and the exercise of freedom by everyone would result or could result in conflicts between authorized persons acting in the same time and in the same way [Walaszak–Pyzioł 1995, 14].

The analysis of all regulations relating to the general right (right of access) to public information makes it possible to work out several classifications leading to the following categories of limitations: 1) due to the location of the legal grounds for the restriction, we can distinguish constitutional restrictions resulting from Article 61(3) and Article 31(3) of the Polish Constitution and statutory restrictions based, inter alia, on Article 5 u.d.i.p.; 2) due to the properties possessed, or due to the values (goods) that are to be protected in connection with the restriction, as well as due to the way the restriction itself is shaped – we can distinguish statutory and contractual restrictions (the so-called public and private secrets); 3) due to having a clear or only apparent nature, we can distinguish statutory restrictions to which the legislator in u.d.i.p. refers directly and explicitly as well as quasi limitations, the distinction of which is closely related to the content of Article 1(2) sentence 1 u.d.i.p. According to its content: "The provisions of the Act do not infringe the provisions of other acts specifying different rules and mode of access to information that is public information." U.d.i.p. although it is a set of general regulations in the field

of access to public knowledge, however, as T. Górzyńska points out, it is not an organic law that comprehensively regulates all accessibility rules and all legally permitted exceptions to its implementation[5] [Tarnacka 2009, 270]. The clause determined by the content of Article 1(2) u.d.i.p. is a verbalization of the generally applicable *rule lex primaria derogat legi subsydiariae* [Trzaska and Żurek 2003; Tarnacka 2009, 270], but at the same time it creates a special type of restriction, which, as a rule, is not to lead to the exclusion of publicity, but to give priority to other regulations that provide for specific contents – other than u.d.i.p. the rules and modes of sharing. Therefore, it is a kind of limitation in the application of regulations in certain situations, and not limiting the mere availability to public knowledge.

The typology of limitations presented in point 3 is of particular importance from the point of view of this study, although qualifying the restriction resulting from the content of Article 5 (2a) u.d.i.p. to a group of clear or only quasi-limitations is not so simple and unambiguous. Referring to the content of the cited regulation and the legislator's procedure itself consisting in introducing the regulation of Article 5(2a) u.d.i.p. one may even be tempted to say that an intermediate category should be developed between the limitations to which the legislator refers directly and which are the actual premises for excluding access to public information and those which are not explicitly mentioned by the legislator, but are subject to the general clause specified in Article 1(2) u.d.i.p. Reference to the provisions of the Act of June 10th 2016 on the Bank Guarantee Fund, the deposit guarantee system and resolution[6] due to the limitation resulting from the content of Article 5(2a) of the Act on Compulsory Restructuring, shows the existence of specific rules for disclosing public information, although the wording adopted by the legislator, according to which the right to public information is limited to the extent and on the terms specified in the provisions on resolution, also allows for the adoption of the statement that there is a presence based on the Act on Compulsory Restructuring specific rules for limiting access to public content itself. This is confirmed by, inter alia, stipulated admissibility of sharing certain public content only after the compulsory restructuring process has been completed (Article 322(1) u.b.f.g.), publication of analyzes and forecasts referred to in Article 325(4) u.b.f.g. in the form that ensures information protection and the right to disclose the information referred to in Article 325(1)(3) u.b.f.g. only in cases specified in the Act.

Therefore, it should be pointed out that on the one hand the legislator (perhaps to emphasize the legitimacy of this type of restriction) names it directly and lists it in the catalogue of legally permissible limitations of access to

[5] This was the position taken by T. Górzyńska in an interview with the Rzeczpospolita journal on 27 July 2001.

[6] Journal of Laws of 2020, item 2176 [hereinafter: u.b.f.g.].

public information (Article 5 u.d.i.p.), although on the other hand refers to separate legislation, which in its content creates its own rules and modes of access,[7] but at the same time refers to the u.d.i.p. to a quite significant extent. In the light of Article 322(1) u.b.f.g. information on the resolution may be made available based on u.d.i.p. after the end of compulsory restructuring.[8] In addition, it is impossible to ignore the reference in the text of the u.b.f.g. to the obligation to observe banking secrecy, professional secrecy and the need to guarantee the protection of classified information (Article 181(7) u.b.f.g., Article 327(2) u.b.f.g.).[9] In fact, the regulations of u.b.f.g. related to the restriction referred to in Article 5(2a) u.d.i.p. also exhaust the premises of the legislation referred to by the legislator in Article 1(2) u.d.i.p. Thus, they are a manifestation of a quasi-restriction which leads to the exclusion of the application of the u.d.i.p. by invoking the primacy of special regulations. However, it has a unique dimension due to the statutory, although indirect separation in Article 5 u.d.i.p. It should not be forgotten that apart from the acts which, in essence, were enacted to exhaustively regulate the issues related to access to information, there are several provisions contained in various legal acts in the field of administrative law, criminal law and systemic law [Taczkowska–Olszewska 2014, 139], which also create different rules, forms and methods of sharing public information. All of them together and each such act separately create a plane of quasi-limitations. However, neither u.d.i.p. nor the Act of October 3th 2008 on the provision of information on the environment and its protection, public participation in environmental protection and on environmental impact assessments[10] do not refer to such acts directly and individually (as is the case indirectly in the case of the u.b.f.g.), although they were also given priority based on the already mentioned Article 1(2) u.d.i.p.

2. BANK GUARANTEE FUND (HEREINAFTER REFERRED TO AS BFG OR FUND) AS AN ENTITY OBLIGED TO PROVIDE INFORMATION

The regulation contained in Article 1(2) u.d.i.p. apart from having the status of a quasi-restriction of access to public knowledge, it fulfils one more important function, namely, it determines the substantive scope of the regulations on u.d.i.p. It does not do it explicitly and unambiguously, nevertheless,

[7] A. Fornalik points to these special forms and ways of making available [Fornalik 2021].
[8] Judgement of Voivodship Administrative Court in Warsaw of 11 December 2020, ref. no. II SA/Wa 1066/20, http://orzeczenia.nsa.gov.pl/cbo/search [accessed: 17.04.2021].
[9] These are basic secrets that the regulations require to be respected based on u.d.i.p. Article 5(1).
[10] Journal of Laws of 2021, item 247. J. Taczkowska–Olszewska refers to this act, also comprehensively regulating the issue of access to information – information about the environment.

the use by the legislator of the wording according to which: "the provisions of the act do not infringe the provisions of other acts specifying different rules and procedures for access to information that is public information," makes the subject of the regulation of the Act on Laws clear and indicates the functions of "access control." In this case, it is about designating the subjective side and the objective of the disclosure process, including legally permissible forms and methods of access to information that exhaust the features of public knowledge. Among these, the rule of the universality of the subject matter, which is derived by the doctrine and the judicature from the content of Articles 2 and 4 u.d.i.p., creates a broad framework of the party entitled and, more importantly, obliged to provide information, is dominant. According to Article 4, sentence 1 u.d.i.p., public authorities and other entities performing public tasks are obliged to make public information available. The openness of the catalogue of entities obliged to provide information, which causes problems but also entails many benefits in the process of making it available, makes it possible to include in this group also such entities which seemingly or actually do not meet the conditions of having a public status or character. Such an assertion is of particular significance in the process of qualifying the BFG as an obliged entity, especially if we take into account the content of Article 3(3) u.b.f.g. Following the cited regulation, the fund is not a state legal person or a unit of the public finance sector. It is also not a state special purpose fund referred to in Article 29 of the Act of August 27th 2009 on public finances,[11] and finding its place among financial administration entities such as the Polish Financial Supervision Authority or the National Bank of Poland, it does not exhaust the features of a public authority, taking into account Article 4(1)(1) u.d.i.p.[12] [Szczęśniak 2018; Sura 2012, 87–97; Zawadzka, Zimmerman, and Sura 2017]. This happens even though it has public authority over the entities covered by the deposit guarantee scheme, although it has the authority to decide, within the framework of its administrative discretion, whether a particular method of influencing the other party (the bank) should be applied, and despite its complete independence from the discretion granted to it as to whether the initiation of compulsory restructuring is necessary to guarantee the protection of the public interest [Zawadzka, Zimmerman, and Sura 2017; Burzyńska 2014, 76–97; Szczęśniak 2018]. The status of the BFG depicted in such a way, taking into account only the structural aspect, eliminates the admissibility of its qualification as an obliged informational entity following the regulations of the u.d.i.p. It should not be forgotten that both the system legislator in the content of Article 61(1) of the Constitution of the Republic of Poland, as well

[11] Journal of Laws of 2021, item 305.

[12] A different standpoint is presented by P. Szczęśniak, who directly calls the BFG a public administration body. However, he further indicates the necessity of recognising the BFG as an entity of public law performing tasks within the scope of public administration.

as the legislator, distinguish two groups of "institutions" qualified as obliged to provide information. The first group consists of entities (or, more precisely, specific categories of entities), which are directly defined as information obligations. In this case, it is about bodies of public authority, persons performing public functions, bodies of economic and professional self-government. Therefore, having a specific status that allows being included in one of the indicated categories is absolutely decisive for the existence of the information obligation. This manifests the aforementioned structural aspect treated as a premise for the existence of an information obligation. Inability to fulfil it requires recourse to conditions of a different kind – the functional aspect. The second group, a much larger group, but at the same time heterogeneous and ambiguous in meaning, is based on undertaking specific activities related to the implementation of public tasks or the disposal of public funds. According to Article 61(1) sentence 2, a citizen has the right to obtain information about the activities of other persons and organizational units to the extent that they perform tasks of public authority and manage municipal property or the property of the State Treasury. In this case, it is about entities doctrinally defined as administering because they perform public tasks and spend public funds, or fulfil at least one of the above conditions in their activities [Zimmermann 2008, 101]. As J. Zimmermann points out, this is a concept that covers entities that are not administrative authorities but have legally vested powers to act as authorities or are entities that actually exercise such competence [ibid.; Hauser, Wróbel, and Niewiadomski 2011].

Pursuant to Article 3(2)(3) of Directive 2014/59/EU of the European Parliament and of the Council of May 15th 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms,[13] national resolution authority in the individual Member States it must be a public administration body or body entrusted with the exercise of administrative powers. "Resolution authorities may be national central banks, competent ministries or other public administrations or authorities entrusted with powers in the field of public administration." BFG, not being a public administration body, fulfils the conditions of the entity with the information obligation due to the

[13] Directive of European Parliament and Council 2014/59/UE of May 15th 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Directive of Council 82/891/EWG and directive of European Parliament and Council 2001/24/WE, 2002/47/WE, 2004/25/WE, 2005/56/WE, 2007/36/WE, 2011/35/UE, 2012/30/UE and 2013/36/EU and the Regulation of the European Parliament and of the Council (EU) no. 1093/2010 and (UE) no. 648/2012, Official Journal of the European Union L 173 of June 12th 2014, p. 190–348, Directive of European Parliament and Council 2014/49/UE of April 16th 2014, on deposit guarantee schemes, Official Journal of the European Union L 173, of June 12th 2014, p. 149–78.

performance of tasks in the public interest.[14] According to Article 101(8) and, above all, section 10 u.b.f.g, the BFG's activities are undertaken in the public interest if they are necessary to ensure the achievement of at least one of the objectives of resolution, and achieving these objectives to the same extent is not possible under the supervision or bankruptcy proceedings. The statement that the compulsory restructuring plans prepared by the BFG are an important element of guaranteeing state security following the content of the Act of April 26th 2007 on crisis management is also not without significance here.[15] [Szczęśniak 2018]. As R. Sura points out: the protection of depositors, financial stability or the security of public finances are goods of great importance to protect them in the public interest [Zawadzka, Zimmermann, and Sura 2017].[16] Based on the law and prejudging its belonging to the group of administering entities, the activities of the BFG [Sura 2013, 175ff] in favour of satisfying the needs of individuals resulting from coexistence in society come down to the fulfilment of the restructuring function (Article 5(1)(3–4) u.b.f.g.), the guarantee function (Article 5(1)(1) u.b.f.g.), the analytical and control function (Article 5(1)(5–6) u.b.f.g.) and the stabilisation function (Article 5(1)(7) u.b.f.g.) [Zawadzka, Zimmermann, and Sura 2017; Fedorowicz 2017, 405ff]. Their implementation is closely related to the pursuit of a specific goal, to following the specific (because public) establishment of the fund. According to Article 4 u.b.f.g.: the main goal of the BFG's activity is to take measures to develop and maintain the stability of the domestic financial system, in particular by ensuring the functioning of the obligatory deposit guarantee system and as a result of forced restructuring. Its active participation in the prevention and elimination of threats related to the insolvency of banks, which comes down to the performance of activities referred to in Article 4 u.b.f.g. is closely related to the establishment by the BFG of relations of a sovereign type (based on the superiority and subordination of the other party), where binding decisions are made within the framework of separate, administrative jurisdiction proceedings and have a unidirectional and arbitrary impact on the property rights of the bank itself, its shareholders, members, creditors, as well as debtors (See. Article 11(5) u.b.f.g) [Zawadzka, Zimmermann, and Sura 2017; Szczęśniak 2018; Kiełkowski 1997, 86ff].

The functionality of the BFG presented above confirms the legitimacy of the statement that the decisions of the BFG, including those on forced restructuring in connection with the content of Article 1(1) u.d.i.p. constitute information on public matters subject to disclosure. Support for the above may

[14] At this point, it is worth referring to A. Jakubowski's views on the administrative facility [Jakubowski 2018, 527ff].

[15] Journal of Laws of 2020, item 1856 as amended.

[16] Individual interpretation of November 4th 2020, 0114-KDIP2-2.4017.2.2020.2. RK, SIP Legalis.

be found in the content of Article 6(1)(6) u.d.i.p., providing for accessibility to the content of administrative acts and other similar decisions being public data. In this scope, however, the universality of access understood as a guarantee of providing specific knowledge to each interested party (Article 2(1) u.d.i.p.) is conditioned not only by provisions of the u.d.i.p., but, according to Article 1(2) u.d.i.p., first and foremost by the content of the u.b.f.g.

3. LEGALLY PERMISSIBLE FORMS AND WAYS OF MAKING PUBLIC INFORMATION AVAILABLE IN THE LIGHT OF THE RULES ON FORCED RESTRUCTURING

Under Article 61(2) of the Constitution of the Republic of Poland, the right to obtain information shall include access to documents and entry to meetings of collective organs of public authority coming from universal elections, with the possibility of sound or image recording. This regulation presents a set of legal possibilities for the individual to exercise his constitutional right. Their scope is subject to development and specification on the grounds of the regulations of the u.d.i.p. W. Skrzydło rightly emphasizes that the discussed law can also be implemented using other forms because the basic law distinguishes only those that are most important without closing their extensive catalogue based on the regulations of the such as u.b.f.g. [Skrzydło 2002, 1ff]. Their role is by no means to interfere with the material substrate of this law and reduce it or lower it below the level set by the constitution [Karsznicki 2015, 112–22], on the contrary, it is about specifying the actual means and methods by which an individual can approach information he expects and achieve full informational satisfaction.

Taking into account the content of the regulations of the u.d.i.p., the regulations of Articles 3 and 7 deserve special emphasis. In their content, there is a distinction between legally guaranteed forms and ways of making public information available. Answering a question from the person concerned (orally, in writing, electronically); guaranteeing the possibility of consulting the content of an official document; and access to meetings of collegiate bodies, in the broad sense, constitute a catalogue of forms of access, i.e. legally regulated rights which an individual can use in order to satisfy his or her information needs [Tomaszewska 2019, 131]. These include publishing information in the BIP; displaying or posting information in places accessible to the public; or installing devices that allow the public to read the information; placing a specific type of public information in the central repository is the means of making available, i.e. a set of activities of the obligated person performed one after the other (or activities limited to a single act of action), thanks to which it

becomes possible to use legally permissible forms of fulfilling an information claim [ibid., 131–32].[17]

Considering Article 322 u.b.f.g., the actions and powers presented above may theoretically find their application as forms and ways of making public also in the scope of making available information concerning forced restructuring. According to the cited regulation, information on the forced restructuring may be made available based on the u.d.i.p. after the completion of the forced restructuring. Therefore, the u.b.f.g., being specific legislation, provides for the admissibility of referring to generally defined principles of the access process, including the forms and ways of access to public knowledge provided in the u.d.i.p. This implies the validity of the statements about the occurrence in the content of u.b.f.g. two types of the disclosure process, i.e. based on the regulations of the u.d.i.p., which is optional, and based on the so-called own regulations (obligatory disclosure based on u.b.f.g.). In this case, the optionality is based on the possibility of acting and only on the possible publication of the information referred to in Article 322(1) u.b.f.g. and not on a specifically defined obligation of the BFG from which there is no possibility to evade. Information relating to the forced restructuring may or may not be made available on the basis of the u.d.i.p., which is further conditioned by the completion of the forced restructuring. So presented in the light of Article 322(1) u.b.f.g. the nature of the disclosure process cannot be changed by the exception referred to by the legislator in Article 322(2) u.b.f.g. On the contrary, with its help, it expresses the existence of an obligatory publicity process separate from the content of the u.d.i.p.

As follows from Article 5(4) u.b.f.g. BFG within the scope of the fulfilment of its tasks, as well as within the scope of cooperation with other entities that operate for the benefit of the national financial system and that operate deposit guarantee schemes, may conduct information activities. Irrespective of the above, the whole of the regulations of the u.b.f.g. shows the information activity of the BFG of a slightly different nature. In this case, it concerns the implementation of the information activities of the forced restructuring authority, which, despite not being subject to the regulations of the u.d.i.p., fall within the broadly considered category of access to public knowledge. Regardless of their different nature and course, their implementation fulfils the essence of the universal right to the information referred to in Article 61(1) of the Polish Constitution. Their analysis makes it possible to work out a catalogue that determines the specific methods of making available information

[17] P. Sitniewski presents a different meaning of the form and the way of sharing [Sitniewski 2016, 213–14].

connected with forced restructuring – methods not infrequently accompanying those forms and methods which result from general regulations (u.d.i.p.).[18]

The analysis of the entirety of the provisions of the u.b.f.g., referring to the process of the obligatory disclosure of information (taking into account the definition of the notions of form and manner presented above) allows us to state that the regulations of the u.b.f.g. only emphasize the existence of specific methods (ways) of disclosure, and not forms, as it might initially seem. Therefore, it should be concluded that the legislator, in Article 1(1) u.d.i.p., referring to special rules and procedures of making available, resulting, inter alia, from the u.b.f.g., had in mind all activities of the authority aimed directly at transferring or creating the possibility for interested entities to become acquainted with a particular type of public information.[19] These specific modalities are inevitably linked to the BFG's information activities for the public at large, but also for each individual. They are visible when announcing the resolutions referred to in Article 47 u.b.f.g.; decisions referred to in Article 109(1)(2) u.b.f.g. (or only information on the causes and effects of the decision on resolution); information on the establishment by a decision of the administrator of an entity under restructuring (Article 153 u.b.f.g.); information on searching for bids for the takeover of the enterprise (Article 178(7) u.b.f.g.); information on the non-collection of contributions to the obligatory deposit guarantee scheme (Article 294(2) u.b.f.g. and Article 302(2) u.b.f.g.); information on the principles of the functioning of the mandatory deposit guarantee system, including the subjective and objective scope of protection, and information on the rules of disbursement of guaranteed funds, resolutions and information on the amount of the rates of guaranteed funds protection funds (para. 8(2) and para. 30(2) of the BFG statute[20]).

[18] The use of the term "accompaniment" in this case is not entirely appropriate, because it may erroneously suggest that the so-called special activities of making the forced restructuring organ available, regulated by the provisions of the u.b.f.g., take precedence or are of secondary importance in relation to the rights and activities defined in the provisions of Articles 3 and 7 u.d.i.p. It should not be forgotten, after all, that it is the BFG's information activities set out in the u.b.f.g. that are of an obligatory nature, and the provision of information about the forced restructuring in the spring mode may, but does not have to take place and, as a rule, takes place only after the completion of the forced restructuring.

[19] The creation of grounds for individuals to reach for public information should be seen in connection with the BFG's provision of the decisions referred to in Article 109(1) and (2) of the BFG and information on the establishment of the administrator (Article 153 of the BFG) to the KNF and the entity under restructuring, which subsequently publish them on their websites. The implementation of such obligations of the fund is closely related to the indirect impact of the forced restructuring authority on public awareness. This is due to the creation of additional possibilities of accessing public information made available also through the websites of entities which are not obliged to provide information.

[20] Appendix to the Regulation of the Minister of Development and Finance of 25 January 2017 on the granting of the statutes of the Bank Guarantee Fund, Journal of Laws of 2017, item 203.

Importantly, concerning the implementation of the BFG's information obligations, the legislator does not use a uniform nomenclature to define the means by which information is made available, although in all cases the aim is to provide information to all potentially interested parties in a universal and general manner, even if the information is first addressed to direct interested parties (the banks themselves). Making information available to the public (by publishing it in a nationwide daily newspaper), publishing or announcing information on the fund's website as specific (because regulated in the u.b.f.g.) ways of making information available have the same effect – they give everyone (Article 1(1) u.d.i.p.), who shows even the slightest interest in the information and reaches for the public data made available to the public on their own. This type of information is of particular importance concerning the decision on the initiation of compulsory restructuring or conversion of capital instruments in connection with the content of Article 103(5) of the BFG because it allows anyone whose legal interest has been infringed by a decision of the BFG to appeal against the decision.[21] Apart from delivering the decision to the entity under restructuring, the publication of its content on the fund's website gives real opportunities to take steps to protect the legal interest of those who invoke its violation. Moreover, irrespective of the above, it confirms the view in the literature that access to public knowledge possesses the importance of the institution of protection of the legal interest of an individual and that the forms and methods leading to the act of making available are treated as tools for the implementation of the universal right to information.

CONCLUSION

The constitutional right to information is subject to various restrictions and, contrary to appearances, such regulations which, in essence, establish or are intended to establish obstacles to the process of seeking public knowledge are numerous. It should be remembered, however, that a significant part of them are regulations which, despite being qualified as limiting access to information, in fact, provide for specific rules for the disclosure process, and do not exclude its existence. Regulations of the u.b.f.g., which confirm the existence of information obligations on the part of the BFG, also have such a character. The legislator refers to the provisions on forced restructuring, making them one of the basic restrictions located in the catalogue of Article 5 u.d.i.p. A closer look at their content, however, reveals that they are not a restriction in the strict sense and that this limitation comes down to the shaping of specific rules for the process of making access available and the distinction of specific

[21] Decision of Voivodship Administrative Court of 8 October 2020, ref. no. II GZ 293/20, http://orzeczenia.nsa.gov.pl/doc/58BDF3E2B0 [accessed: 21.04.2020].

ways of doing it. The use of the term "special ways" in this case is not entirely accurate either, because, despite the atypical naming, the characteristics of publishing certain information on the website, in a nationwide daily newspaper or, generally speaking, making information public, are similar and, above all, lead, or are supposed to lead, to the same results as publishing data in the BIP (bulletin of public information) or displaying or posting information in generally accessible places. It is about reaching the widest possible circle of entities interested in information with specific information, which has all the features of public knowledge. Taking into account the content of the regulations of the u.b.f.g. itself, it is also worth noting that the fund's informational activity in many cases has a conditioning character. Moreover, the publication of information is not infrequently treated as a means of determining the timing of application of certain actions by the BFG to an entity under restructuring (e.g. Article 143(1) and Article 144(1) u.b.f.g.).

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JUDGEMENT OF THE POLISH CONSTITUTIONAL TRIBUNAL OF 22 OCTOBER 2020 (K 1/20) ON EUGENIC ABORTION

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Abstract. The paper discusses the judgement of the Constitutional Tribunal of the Republic of Poland, given on 22 October 2020 (K 1/20) concerning *eugenic abortion*. The Constitutional Tribunal adjudicated that legal provisions permitting termination of pregnancy on the basis of "a high probability of the foetus's severe and irreversible impairment" or of "the foetus's life-threatening incurable illness" are inconsistent with the Constitution of the Republic of Poland. The result of the ruling is a ban on eugenic abortion and, consequently, a wider scope of protection of human life in the prenatal period.

Keywords: abortion, conceived child, right to life, Constitution of the Republic of Poland

INTRODUCTION

On 22 October 2020 the Polish Constitutional Tribunal gave the judgement in the case K 1/20 concerning *eugenic abortion*. The Constitutional Tribunal adjudicated that legal provisions permitting termination of pregnancy on the basis of "a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness" are inconsistent with the Constitution of the Republic of Poland. According to the Constitution of Poland, judgements of the Constitutional Tribunal are "of universally binding application and final" (Article 190(1)) and "take effect from the day of their publication" (Article 190(3)).[1] It means that – from 27 January 2021 (the day of the publication of the decision in the Journal of Laws of the Republic of

[1] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended; see also: https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland [accessed: 22.09.2021].

Poland)[2] – so-called *eugenic abortion* has been prohibited and punished under criminal law.

The ruling was adopted by a majority of votes. Two dissenting opinions (of Judge L. Kieres and Judge P. Pszczółkowski) to the judgment were submitted. Three subsequent dissenting opinions (by Judge Z. Jędrzejewski, Judge M. Muszyński and Judge J. Wyrembak) to the written justification for the judgment were published.

1. HISTRICAL BACKGROUND AND LEGAL BASES

Currently binding in Poland legal solutions regarding criminal protection of human life during prenatal development are based on a general ban of abortion, however, the prohibition is limited by a few exceptions (so-called *model of reasons*). A detailed scope of legal protection of the *conceived child*[3] should be reconstructed from regulations of the Penal Code[4] and of the Act on Family Planning, the Protection of Foetus and Grounds for Permitting the Termination of a Pregnancy.[5]

Article 152(1) of the Penal Code considers pregnancy termination with woman's consent, though with violation of the provisions of the Act of 7 January 1993, as criminal offence. Such an act is punishable with imprisonment ranging from 1 month to 3 years. A more severe penalty – that is imprisonment from 6 months to 8 years – applies in the case of pregnancy termination when the conceived child attained the ability to independent life outside the mother's womb (Article 152(3) of the Penal Code). Assistance to a pregnant woman in pregnancy termination with the violation of the provisions of the law or inducement to such an activity is penalized with imprisonment of up to 3 years (Article 152(2) of the Penal Code).

In Article 153(1) of the Penal Code, two cases of pregnancy termination against the will of the pregnant woman are punishable, i.e. the first, pregnancy termination with the use of violence against the pregnant woman or in other way without her consent, for example deceitfully, and the second, forcing a pregnant woman to terminate her pregnancy by violence, illegal threat or deceit. This criminal offence is punishable with imprisonment from 6 months to 8 years. The fact that the offense of the perpetrator was directed against

[2] Journal of Laws item 175. Justification to the judgement was published on 27 January 2021, see https://monitorpolski.gov.pl/M2021000011401.pdf [accessed: 22.09.2021].

[3] The phrase *conceived child* (in Polish: *dziecko poczęte*) is a law term that means "human being from the moment of conception" [Grześkowiak 1996, 240].

[4] Act of 6 June 1997, the Penal Code, Journal of Laws No. 88, item 553 [hereinafter: the Penal Code].

[5] Act of 7 January 1993 on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy, Journal of Laws No. 17, item 78 as amended.

the conceived child that attained the ability to independent life outside the mother's womb is a circumstance resulting in a more severe penalty, that is imprisonment from 1 to 10 years. (Article 153(2) of the Penal Code). The Penal Code also defines the types of the so-called offenses qualified by consequences, in which a more severe penalty was introduced, dependent on the effects, such as the death of the pregnant woman (Article 154 of the Penal Code).

While the case was examined by the Tribunal in 2020, Article 4a(1) of the Act of 7 January 1993 provided three conditions for pregnancy termination, namely when: 1) pregnancy constitutes a threat to the life or health of the pregnant woman (*medical reasons*), 2) on the basis of prenatal tests or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness (*eugenic reasons*), 3) there are justifiable suspicions that the pregnancy results from a prohibited act (*criminal reasons*).

The law also provided for a number of specific requirements regarding a woman's consent to perform abortion, time limits for performing abortion, place of the procedure (a hospital or a private clinic), doctor's qualifications.[6]

It is worth noting that in 1996 an attempt was made in the Polish Parliament to liberalize the protection of life of a conceived child, which was eventually blocked by the Constitutional Tribunal. In the Act of 30 August 1996 on the Amendment of the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy,[7] two new, very unclearly specified *social reasons* for pregnancy termination appeared, namely "difficult living conditions" or "difficult personal situation" of the woman. In the decision of 28 May 1997 (K 26/96)[8] the Constitutional Tribunal disqualified – in view of constitutional standards – these two *social reasons* for pregnancy termination. The 1997 ruling is considered one of the most important in the history of the Constitutional Tribunal [Żelichowski 1997, 104]. In subsequent years, the argumentation adopted in it was a point of reference for decisions concerning human life. The Tribunal outlined in detail the constitutional standards for the protection of human life, referring them to the prenatal period of human development.

The Constitutional Tribunal held that the very essence of a democratic state ruled by law implies the obligation to ensure the protection of human life from the moment of conception. "Such a state" – the Tribunal said – "can only exist as a community of people and only people can be recognized as the

[6] More see Wiak 2021, 1030.

[7] Act of 30 August 1996 on the amendment of the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy, Journal of Laws No. 139, item 646.

[8] Published in: "Orzecznictwo Trybunału Konstytucyjnego" of 1997, No. 2, item 19.

actual carriers of rights and obligations laid down by the State concerned. Life is the fundamental attribute of a human being. When life is taken away, a human being is at the same time annihilated as the holder of rights and obligations. If the essence of a democratic state ruled by law is a set of fundamental directives inferred from the sense of law proclaimed through democratic procedures, providing for the minimum level of fairness thereof, therefore, under a democratic state ruled by law, the first such directive must be respect for the value, as its absence excludes the recognition of a person before the law, i.e. human life from its outset. The supreme value for a democratic state ruled by law shall be a human being and his/her goods of the utmost value. Life is such a value and, in a state under a democratic state ruled by law, it must be covered by constitutional protection at every stage of development."[9]

The following three statements of the Tribunal should be considered particularly important, the first: "human life, also at the prenatal stage, is a constitutional value,"[10] the second: the recognition of the fact that "every human being is eligible for the protection of his/her life from the moment of conception,"[11] and the third, that "the value of legal interest covered by constitutional protection, such as human life, including life at the prenatal stage of development, cannot be subject to any differentiation."[12]

According to the Tribunal, regardless of the recognition of the fact that human life, also at the prenatal stage, is a constitutional value, in certain extraordinary situations the protection of that value may be limited or even waived in order to protect or enforce other constitutional values, rights or freedoms. The decision of the legislator who waives the protection of a constitutional value or even legalizes cases of violations of that value, must be justified on the basis of the aforesaid conflict of constitutional interests, rights or freedoms. Nevertheless, the legislator is not entitled to resolve such conflicts in a discretionary, arbitrary manner.[13]

From that point of view, the regulation contained in the Act of 30 August 1996, in the part covering the legalization of abortion when the living conditions of a pregnant woman were difficult or her personal situation was difficult, did not meet the above requirements. The comparison of the value of such interest that was in conflict in view of constitutional standards, disqualified the regulation of abortion for *social reasons*. Human life is the fundamental interest of a human being, as the Tribunal emphasised. The essence of constitutional values, by reference to which attempts can be made to justify the regulation laid down in the Act of 30 August 1996 regarding *social reasons*

[9] Ibid., p. 6–7.
[10] Ibid., p. 15.
[11] Ibid., p. 4.
[12] Ibid.
[13] Ibid., p. 15.

for abortion, does not entail their priority or at least equality in relation to the value of human life, also at the prenatal stage.[14]

In the following years, the constitutional standards for the protection of human life, outlined in the decision of 28 May 1997 by the Constitutional Tribunal, became a point of reference for resolving various issues related to the protection of life, including, among others, the problem of admissibility of the decision of shooting down a civilian aircraft posing a potential threat of a terrorist attack. Resting its decision of 30 September 2008[15] on the principle of the legal protection of life and human dignity, the Constitutional Tribunal appealed to axiology underlying a democratic state ruled by law. This axiology entails some important limitations to the state's activity that should be respected in all circumstances, including the threat of terrorism. However, it is unacceptable in the first place to judge the value of human life, neither in quantitative nor qualitative terms.[16]

The constitutional standards of life protection outlined in the decision of 28 May 1997 also became the starting point for the Tribunal's ruling on *eugenic abortion* in 2020.

2. JUDGEMENT AND ITS JUSTIFICATION

In 2020 the Constitutional Tribunal considered the application lodged by a group of 119 Deputies of Parliament (*Sejm*) demanding that Article 4a(1)(2) and Article 4a(2), first sentence, of the Act of 7 January 1993 on Family Planning, the Protection of Foetus and Grounds for Permitting the Termination of a Pregnancy be examined for compliance with the Constitution of the Republic of Poland.

Pursuant to Article 4a(1)(2) of the Act of 7 January 1993, pregnancy may be terminated exclusively by a competent medical practitioner when, "on the basis of prenatal tests or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness." Article 4a(2) of the Act of 7 January 1993 specifies that "the termination of a pregnancy is permissible until the foetus is able to live outside the body of the pregnant woman."

The Constitutional Tribunal examined the conformity of the above provisions to Article 38 in conjunction with Article 30 and Article 31(3) of the Constitution of the Republic of Poland. Pursuant to Article 38 of the Constitution, "the Republic of Poland shall ensure the legal protection of the

[14] Ibid., p. 15–16.
[15] Decision of the Constitutional Tribunal of 30 September 2008, ref. no. K 44/07, "Orzecznictwo Trybunału Konstytucyjnego" of 2008 (7A), item 126.
[16] More see Wiak 2012, 180–82.

life of every human being." Article 30 of the Constitution, lays down the strong normative declaration and obligation directed to all authorities of Poland, that "the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities." Article 31(3) of the Constitution, contains a plain directive that "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state ruled by the law for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

In the beginning, the Tribunal emphasized that the problem under examination required considering two issues of a constitutional nature. First of all, it concerns the legal status of the child in the prenatal phase of life and its subjectivity within law. Secondly, it requires determining the admissibility and limits of abortion, and thus action in the event of a conflict of values.[17]

The Tribunal upheld its earlier position expressed in the decision of 28 May 1997 that human life is a value at every stage of development, and as a value whose source are constitutional provisions, it should be protected by the legislator, not only in the form of provisions guaranteeing human survival as a purely biological entity, but also as a whole being, for the existence of which there are also necessary social, living and cultural conditions that make up the entire existence of an individual. In the opinion of the Tribunal, a child not yet born, as a human being – a person who is entitled to inherent and inalienable dignity, is a subject having the right to life, and – pursuant to Article 38 of the Constitution – the legal system must guarantee due protection for this central good, without which this subjectivity would be deleted.[18]

Thus, human life is subject to legal protection, including in the prenatal phase, and the legal subjectivity of a child is intrinsically linked with its dignity. However, the protection of life as a constitutional value may be subject to limitations in the event of a conflict with other constitutional liberties and rights. These restrictions – in accordance with the principle of proportionality resulting from Article 30(3) of the Constitution – may be introduced only when they are "necessary in a democratic state ruled by law."[19]

Referring to its previous jurisprudence, the Tribunal indicated that the condition of necessity in relation to solutions limiting the legal protection of life must be interpreted particularly restrictively, in the direction consistent with the criterion of "absolute necessity," developed in the jurisprudence of the European Court of Human Rights under Article 2 of the European Convention

[17] See https://monitorpolski.gov.pl/M2021000011401.pdf [accessed: 22.09.2021], p. 22.
[18] Ibid., p. 44.
[19] Ibid., p. 45.

on Human Rights. Any limitation on the legal protection of human life must be treated as an *ultima ratio* measure. Moreover, due to the fundamental nature of the right to life in the constitutional axiology, not each of the goods indicated in Article 31(3) of the Constitution, e.g. property, public morality, environmental protection or even the health of other people, may justify solutions that can harm human life. The condition for limiting the legal protection of life is the existence of a situation in which it is undoubtedly incompatible with the analogous rights of other people. This premise can be broadly defined as the requirement of symmetry of goods: sacrificed and saved.[20]

Taking into account the provisions to Article 38 in conjunction with Article 30 and Article 31(3) of the Constitution, the Tribunal stated that the only grounds for terminating a pregnancy cannot be circumstances related to the child's health, the more so as the statutory premise for terminating a pregnancy is not the state of diagnostic certainty but only a "high probability" of severe and irreversible impairment or an incurable life-threatening disease. The Tribunal found that it is not permissible to juxtapose human health with his/her life, as the problem of weighing goods cannot be considered when both the sacrificed and the saved good belong to the same subject. It shared the view expressed in the legal literature that in the case of the premises specified in Article 4a(1)(2) of the Act of 7 January 1993 "the mere fact of fetal impairment (an incurable disease) cannot independently determine the admissibility of the termination of a pregnancy in the constitutional perspective"[21] [Wróbel 2007, 32].

Due to the essence of the termination of a pregnancy, considering the conflict situation, the analogous good can only be sought on the side of the child's mother. Although the high probability of severe and irreversible impairment of the fetus or an incurable life-threatening disease may also be associated with a threat to the life or health of the mother, the *eugenic reasons* under examination do not refer to such a situation of a woman, but constitute a separate premise for the admissibility of termination of a pregnancy specified in Article 4a(1)(1) of the Act of 7 January 1993. In the opinion of the Tribunal, Article 4a(1)(2) of the Act of 7 January 1993 does not allow one to assume that the high probability of severe and irreversible impairment of the fetus or an incurable disease that threatens its life is to be the basis for the automatic presumption of a violation of the welfare of a pregnant woman, and the mere indication of a possible burden of such defects in the child is eugenic in nature. This provision does not refer to measurable criteria of violating the mother's welfare justifying the termination of a pregnancy, i.e. a situation in which she could not be legally required to sacrifice a given legal interest. Finally, taking into account the above arguments, the Tribunal stated that the

[20] Ibid., p. 47.

[21] Ibid., p. 48–49.

legalization of the abortion when, on the basis of prenatal tests or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness, has no constitutional justification.[22]

3. CONSEQUENCES

Judgement of the Polish Constitutional Tribunal given on 22 October 2020 had significant legal and social consequences.

The direct result of the judgment was the loss of binding force by the provision of Article 4a(1)(2) of the Act of 7 January 1993, and thus – limitation of the catalog of circumstances legalizing termination of pregnancy. From the date of the publication of the judgment, a "foetus" in "a high probability of severe and irreversible impairment or life-threatening incurable illness" should be treated as a "child" with a disability, requiring special protection and assistance from the state [Lis–Staranowicz 2021, 103]. Against the background of Polish criminal law, this statement may not be surprising. It does not introduce any "normative novelty," if only because the Act of 6 January 2000 on the Ombudsman for Children in Article 2(1) states that "a child is every person from the moment of conception until the age of majority."[23]

The fact that eugenic abortion is no longer legal, has the effect of extending the scope of criminalization under Article 152(1) of the Penal Code. As of 27 January 2021, termination of pregnancy for *eugenic reasons* became a crime. Such a result of the ruling could suggest a violation of an old idea and important principle of criminal law that only a parliament may proscribe a particular act as punishable (*nullum crimen sine lege*). Such an objection was raised against both the judgment of 28 May 1997 and the judgment of 22 October 2020 [Giezek and Kardas 2021, 59–60]. The Constitutional Tribunal referred to such an objection in the justification, stating that the Tribunal "does not introduce a new type of prohibited act, does not criminalize."[24] The subject of the scrutiny was not Article 152(1) of the Penal Code, which is a "blank rule" criminalizing pregnancy termination "with violation of provisions of the law." Such "provisions" are not included in the Penal Code but in Article 4a(1)(2) of the Act of 7 January 1993.

It should be noted that after the Tribunal eliminated *social reasons* for the termination of a pregnancy in 1997, the most common condition for legal termination of a pregnancy in the following years were *eugenic reasons*. According to annual *Report of the Council of Ministers on the Implementation*

[22] Ibid., p. 49.

[23] Act of 6 January 2000 on the Ombudsman for Children, Journal of Laws of 2017, item 922.

[24] See https://monitorpolski.gov.pl/M2021000011401.pdf [accessed: 22.09.2021], p. 53.

of the Act of 7 January 1993 on Family Planning, the Protection of Foetus and Grounds for Permitting the Termination of a Pregnancy in 2019,[25] the total number of registered abortions for *medical*, *eugenic* and *criminal reasons* amounted to 1110, of which: 1074 – for *eugenic reasons*, 33 – for *medical reasons*, 3 – for *criminal reasons*. These data do not differ from the number of abortions recorded in previous years.[26]

In the current legal state, two conditions for pregnancy termination are still in force, the first, when pregnancy constitutes a threat to the life or health of a pregnant woman (*medical reasons*), or the second, when there are justifiable suspicions that the pregnancy results from a prohibited act (*criminal reasons*). So far, both in the doctrine of Polish criminal law and in the jurisprudence of Polish courts, these conditions are restrictively interpreted, e.g. the *medical reasons* does not include a threat to the mental condition of a woman.

Another consequence of the ruling was that it caused strong social emotions and sparked a wave of social protests. On the same day that the sentence was passed, demonstrations against it began. The protest was characterized by an unprecedented level of aggression and vulgarity. Demonstrators attacked Catholic churches, and holy masses were interrupted. Leaders of the protest published in social media the personal addresses of the judges of the Constitutional Tribunal and pro-life activists.

In such circumstances, on 29 October 2020 President Andrzej Duda submitted to the Parliament a bill amending the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy.[27] According to the President's proposition, abortion is to be allowed in a situation where "prenatal tests or other medical considerations indicate a high probability that a child will be born with a disease or defect that will lead to its death inevitably and directly, regardless of the therapeutic measures used." As a consequence, legal termination of pregnancy would be allowed only in the case of finding lethal defects (excluding Down Syndrome).

Another proposal, put forward in the Parliament by the deputies of the Left, is the project to restore the *eugenic reasons* for abortion, not in the Act of 7 January 1993, but in the Article 152 of the Penal Code.[28] The provision requires that cases of the termination of a pregnancy (in its first 12 weeks of duration) with the consent of the woman, should be treated as unpunishable "if on the basis of prenatal tests or on other medical grounds, there is a high

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[25] See https://orka.sejm.gov.pl/Druki9ka.nsf/0/E3A8B0D34BEFF42BC12586FD003A09AE/%24File/1332.pdf [accessed: 22.09.2021].

[26] Ibid., p. 115.

[27] The bill presented by the President of the Republic of Poland amending the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy, Paper no. 727, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=727 [accessed: 22.09.2021].

[28] The bill amending the Penal Code, see: http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty /9-020-299-2020/$file/9-020-299-2020.pdf [accessed: 22.09.2021].

probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness."

The above two bills were submitted to the Parliament and, after a few months, are still at the initial stage of legislative work (*first reading*), which seems to indicate a lack of sufficient political will to proceed with them.

CONCLUSION

It should be pointed out that, on the one hand, the normative importance of the judgment is questioned on the procedural and substantive grounds.

Because the status of three judges who participated in the ruling is challenged (with reference to the judgement of the Constitutional Tribunal of 3 December 2015[29]) some lawyers consider the decision as "procedurally flawed" and "non-existent" [Gliszczyńska–Grabias and Sadurski 2021, 130; Piotrowski 2021, 76–77].[30] However, according to the Constitution of Poland, judgements of the Constitutional Tribunal are binding and final (Article 190(1)) and "take effect from the day of their publication" (Article 190(3)). Consequently, in Polish law there is no procedure to question the rulings of the Constitutional Tribunal and there are no authorities competent to evaluate the possible defectiveness of such rulings.

It is also stated that the ruling fails to acknowledge the need to protect the inherent and inalienable dignity of women and it violates the prohibition of cruel treatment and torture, the right to protection of private life and the right to health, protected under the Constitution and public international law[31] [Grabowska–Moroz and Łakomiec, 255–56; Piotrowski 2021, 73–76].

On the other hand, given the content of constitutional norms and the detailed standards of life protection set out in the previous jurisprudence of the Constitutional Tribunal, it could not be reasonably expected that the ruling on *eugenic abortion* would have been different. In the Polish criminal law literature, opinions have been expressed for years that the admissibility of termination of a pregnancy in such circumstances violates the constitutional principles of protecting human life and the very essence of a democratic state ruled by law, because sacrificing the life of a conceived child is not sufficiently justified by the need to protect women's essential rights [Wiak 2001, 267].

[29] Judgement of the Constitutional Tribunal of 3 December 2015, ref. no. K 34/15, Journal of Laws item 2129.

[30] *Statement by the Legal Experts Group of the Stefan Batory Foundation on the Constitutional Tribunal Ruling on Abortion*, https://www.batory.org.pl/en/oswiadczenie/statement-by-the-legal-experts-group-of-the-stefan-batory-foundation-on-the-constitutional-tribunal-ruling-on-abortion/ [accessed: 14.09.2021], p. 1.

[31] Ibid., p. 1–2.

Against the normative background, the judgment has a strong constitutional justification.

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THE EUROPEAN UNION'S SOVEREIGNTY OF ARTIFICIAL INTELLIGENCE (AI)

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Abstract. When assessing the regulatory activities of the European Union, it can of course be pointed out that the entire legislative process is running too slowly. However, I have the impression that the proposals for "controlling" AI may finally be successful. Without the implementation of a holistic solution, in which the framework of conduct / ethical rules will be imposed on the creators and the validation of AI systems by the state will be introduced, one cannot speak of any sovereignty. It seems that only such a duopoly can lead to the use of brilliant AI solutions, minimizing the risks associated with it. However, without strong state organs, this process will not be adequately secured. This article proves that sovereignty over AI seems to be a *sine qua non* condition for us to be safe in the understanding of dominating processes.

Keywords: artificial intelligence, validation of AI systems, responsibility for AI, security of AI implementation, the European Union's sovereignty

INTRODUCTION

The European Commission is working on the artificial intelligence (AI) regulations that will form the legal basis of its technological, ethical, legal and socio-economic framework. The European Parliament puts emphasis on the "human-centered" European values as well as the contribution of AI to the revival of the economy. The European approach to the Artificial Intelligence aims to promote Europe's innovation capacity in the field of artificial intelligence, while supporting the development and use of ethical and trustworthy artificial intelligence throughout the EU economy. Artificial intelligence should act on people and be a force for good in society.[1]

[1] See https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52020DC0065&from=EN [accessed: 30.04.2021].

1. TO TAME THE UNBRIDLED

For 70 years, Artificial Intelligence (AI) has been the subject of a wide ranging scientific research, in the recent years the interest in AI has intensified and its application spread across many new areas including the field of legal sciences.

Artificial intelligence is perceived as an important link at the start of the fourth technological revolution, that will introduce breakthrough changes in most areas of the economy. The undisputed weakness of the EU proposals/directives for a legal framework across the EU countries is treating AI as a monolithic entity, while the specific examples of AI applications are considered from the perspective of the existing legal regulations. It seems that at present the axis of the analysis is focused on the reference of statutory law norms to technical applications that already exist – is it a good solution to adjust the existing legal regulations to the changing reality? [Rojszczak 2019, 1–23]. Much less attention is paid to the attempt to search for the direction of changes for the entire legal system in such a way that legal norms serve to proactively shape the industry that is just emerging. The question is whether such proactive action would not guarantee that the technology, which is evolving and probably will have a huge impact on people's lives and the functioning of entire societies, will be created from the beginning taking into account the key regulations and ethical principles underlying modern civilization? Or maybe we should implement holistic regulations, general principles defining the legal environment for the functioning of artificial intelligence, taking into account the interoperability requirements of systems, tools and services? However, whatever system we adopt (horizontal or sectoral), it seems necessary to create procedures for verification, validation and control of artificial intelligence systems based on a wide range of security and transparency standards. The issues of accountability and accountability appear to be the most serious legal issues related to AI.

Undoubtedly, the European Union has recently been striving to take control of the rapidly developing artificial intelligence. After years of lack of commitment in this regard, he seems to be moving from the observer's position to the role of the creator of duties. The activity of the European Union in the recent period has been defined more by a number of recommendations, resolutions, opinions, positions[2] than by hard legal provisions. The presented solutions

[2] Resolution of 16 February 2017 with recommendations to the Commission on civil law on robotics, resolution of 1 June 2017 on the digitization of European industry, resolution of 12 September 2018 on autonomous weapons systems, resolution on 12 February 2019 on a comprehensive European industrial policy on artificial intelligence and robotics, Commission Communication of 25 April 2018 on Artificial Intelligence for Europe (COM (2018) 0237), Commission Communication of 7 December 2018. On a Coordinated AI Plan (COM (2018)

suggest imperative actions initiated by the institutions of the European Union. They are unequivocally based on the inequality of entities, expressed in the possibility of shaping the situation of another entity by the European Union, regardless of its will, but in accordance with the subject law – hence the title of the term of sovereignty.[3]

2. MAKING MACHINES INTELLIGENT

In 1968, Marvin Minsky said, AI is "the science of making machines that would require intelligence if made by humans." Thus, all intelligent behavior belongs to the realm of AI, including playing chess, solving calculus problems, making mathematical discoveries, understanding stories, learning new concepts, interpreting visual scenes, "diagnosing disease," and analogy reasoning. As indicated, artificial intelligence is realized for at least two reasons: understanding how human intelligence works and creating useful computer programs and computers that they can perform intelligently [Rissland 1990, 1957–981].

Fully autonomous artificial intelligence systems such as robots are constantly featured in various science fiction movies and books, and therefore reach the minds of the vast majority of people in the world [Naučius 2018, 113–32]. However, if creating these entities is one important task, another key goal is to determine the future legal status of fully autonomous AI entities.

Computer scientist of Stanford University, Nils Nillson, identifies the concept of artificial intelligence as "an activity devoted to making machines intelligent, and intelligence is the quality that allows an entity to function properly and be farsighted in its environment. Therefore, it is clear that AI is some kind of being made by humans and capable of performing certain tasks while being environmentally friendly" [ibid.].

0795), Commission Communication of 8 April 2019 on Building Trust in Human-Centered AI (COM (2019) 0168), Commission White Paper of 19 February 2020 on Artificial Intelligence – A European Approach to Excellence and Trust, Commission report of 19 February 2020 on the impact of Intelligence, Internet of Things and Robotics on Security and Accountability, European Parliament STOA Policy Briefing of June 2016 on Legal and Ethical Reflections on Robotics, Report of the High Level Expert Group on Artificial Intelligence of 8 April 2019 "Ethical Guidelines for Trustworthy Artificial Intelligence," Report of the High Level Expert Group on Artificial Intelligence of 8 April 2019 entitled "The Definition of Artificial Intelligence: Main Opportunities and Disciplines," Report of the High Level Expert Group on Artificial Intelligence of 26 June 2019 entitled "Policy and Investment Recommendations for Trustworthy AI," Report of the Expert Group on Liability and New Technologies – Formation of New Technologies of 21 November 2019 entitled "Responsibility for Artificial Intelligence and Other New Digital Technologies."

[3] More, for example, see Radziewicz 2005.

3. RISKS ASSOCIATED WITH AI

In the face of "making machines intelligent," the intervention of EU legislators seems necessary. In addition to consistency with existing law, it is imperative to ensure a transnational understanding of basic data economy ideas. Indeed, the digital revolution is forcing all of us, scientists and practitioners, to understand and reconsider how traditional concepts and legal principles can be adapted to new scenarios that will become science fiction [Fradera 2018, 707–12].

In the White Paper of the European Commission, Artificial Intelligence – A European approach to excellence and trust,[4] it is pointed out that as digital technology becomes an increasingly central part of every aspect of people's lives, people should be able to trust it. Credibility is therefore the basic condition for its acceptance. The document sees AI as an opportunity for Europe given […] "proven ability to create safe, reliable and sophisticated products and services, ranging from aeronautics to energy, automotive and medical equipment."

The document defines AI as a set of technologies that combine data, algorithms and computing power. Advances in computer science and increasing data availability are therefore the main drivers of the current rise in artificial intelligence. An artificial intelligence ecosystem could develop which brings the benefits of this technology to European society and the economy as a whole. It is noted that it is extremely important for European AI to be based on our values and fundamental rights, such as human dignity and the protection of privacy. And the impact of AI systems should be considered not only from an individual perspective, but also from the perspective of society as a whole. The use of artificial intelligence systems can play a significant role in achieving the SDGs and in supporting the democratic process and social rights.

As the European Commission points out, the main risks associated with the use of artificial intelligence relate to the application of principles aimed at the protection of fundamental rights (including the protection of personal data and privacy and non-discrimination), as well as security and liability issues. The use of artificial intelligence can affect the values on which the EU is founded and lead to a violation of fundamental rights, including the right to freedom of expression, freedom of assembly, human dignity, non-discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, as applicable in certain areas, protection of personal data and private life, or the right to an effective remedy and to a fair trial, and consumer

[4] See https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52020DC0065&from=EN [accessed: 30.04.2021].

protection. The document raises extremely important issues that these threats may result from flaws in the overall design of AI systems (including with regard to human surveillance) or the use of data without correcting possible bias.

The European Parliament is also speaking in a similar vein.[5] Importantly, Parliament points to the need for regulation at the level of a regulation, not a directive. It is necessary to introduce a uniform regulation throughout the European Union, due to the specific features of IS, such as: complexity, connectivity, opacity, vulnerability, the ability to change through updates, the ability to learn, autonomy, and finally the multiplicity of entities involved.

The specific characteristics of many AI technologies, including the lack of transparency, complexity, unpredictability and partially autonomous behavior, may make it difficult to verify compliance with applicable EU law and may hamper effective enforcement to protect fundamental rights. Enforcement authorities and individuals may not have the means to verify how the decision was made with AI, and therefore whether the relevant regulations were complied with. Natural and legal persons may find it difficult to effectively access justice where they may be adversely affected by such decisions.

The lack of clear safety rules on these risks can, in addition to the risks for the people concerned, create legal uncertainty for companies that sell their products using AI in the EU. Market surveillance and enforcement authorities may find themselves in a situation where they are unsure whether they can intervene because they may not be empowered to act and / or not have the appropriate technical capacity to inspect systems. Legal uncertainty can therefore lower the overall level of safety and undermine the competitiveness of European businesses. If security threats do materialize, the lack of clear requirements and features of the AI technology mentioned above makes it difficult to trace potentially problematic decisions made with the involvement of AI systems. This, in turn, can make it difficult for those who have suffered damage to obtain compensation under applicable EU and national liability rules.

Considering these threats indicated by the European Commission, it seems necessary to reduce the above-mentioned dangers, it is necessary to introduce solutions binding both the AI creators / engineers and state authorities in the process of systems admissibility / certification. It seems that only an attempt benefiting from the AI achievements.

[5] Resolution of 20 October 2020 with recommendations to the Commission on a framework for the ethical aspects of AI, robotics and related technologies (2020/2012 (INL)) Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014 (INL)) Resolution of 20 October 2020 on intellectual property rights in the field of AI technology development (2020/2015 (INI)).

4. GOOD PRACTICES

With regard to the legal / ethical framework for developers, there are already good practices in similar disciples – for example the Code of Ethics for Robotics Engineers.[6] It encourages all scientists and designers to act responsibly and to take full account of the need to respect the dignity, privacy and safety of people. Scientists conducting research in the field of robotics should adhere to the highest standards of ethics and professionalism and adhere to the following principles: benefit – robots should serve the best interest of humans, harmlessness – the principle of "no harm first," according to which robots should not harm people, autonomy – the ability to make informed, decisions about the principles of interaction with robots and justice – by fairly distributing the benefits of robotics, in particular the affordability of robots for home care and healthcare. By using the robotics experience of engineers, you can relate their principles to AI. And this is how the following catalog of rules is created: 1) any involvement in AI work should respect fundamental rights, and their design, production, dissemination and use should be in the interests of the individual and society as a whole, and with respect for the right to self-determination. Human dignity and autonomy, both physical and psychological, must always be strictly respected; 2) work on AI should follow the precautionary principle, anticipating their potential safety impact and taking appropriate precautions commensurate with the level of protection required, while promoting progress with benefits for society and the environment; 3) AI designers ensure transparency and respect for the legitimate right of access to information by all stakeholders. Integration enables all entities involved in or interested in research to participate in the decision-making process; 4) AI designers should be responsible for the social, environmental and human health impacts robotics may have now and in the future; 5) AI designers should consider and respect people's physical well-being, safety, health, and rights. Robotics engineers must promote human welfare while respecting human rights and quickly exposing factors that could threaten society or the environment; 6) reversibility, as an indispensable condition for controllability, should be a fundamental assumption in AI development; 7) the right to privacy must be strictly respected; 8) the operation of systems should always be based on a robust risk assessment process, which should be based on the principles of prudence and proportionality.

[6] See https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_PL.html [accessed: 30.04.2021].

5. TRAINERS' RESPONSIBILITY

The cliche seems to be that in order to achieve the regulatory goal, every legal provision should be properly applied. With regard to AI, it is particularly important to assess whether existing / planned legislation can be adequately enforced to address the risks posed by AI systems. The European Commission believes that the legal framework could be improved by the effective application and enforcement of existing EU and national legislation, limiting the scope of existing EU legislation, modifying the functionality of AI systems, uncertainty about the division of responsibilities between different economic entities in the supply chain, and finally changes in security concept.[7] It is worth paying attention to the last-mentioned aspect. The use of artificial intelligence in products and services may pose risks that are not currently specifically addressed by EU legislation. These threats can be related to cyber threats, personal security threats, or threats from loss of connectivity, etc. These threats can occur at the time of product launch, or they arise from software updates or self-learning while using the product.

It is worth recalling that in the context of determining responsibility for autonomous systems, the basic concept was expressed in the judgment of Greenman against Yuba Power Prod. Inc., in which the court stated that "a defect may appear in the mind of designers as well as at the hands of a worker" (case of 1963). It is clear that there is a risk of artificial intelligence being "taken over" and it is important to maintain control over the system. Opponents call the takeover argument a "paranoid anthropocentric argument," and oppose it by saying that because robotic technology can pose a threat to humans, the only solution is not to manufacture robots [Adriano 2015, 370].

As an example, Tesla requires buyers to sign a contract that obliges them to keep their hands on the steering wheel at all times, even when the autopilot is engaged [Kowert 2017, 181–204]. It seems that once the ultimately responsible parties have been identified, their responsibilities should generally be proportionate to the level of instructions given to the robot and its degree of autonomy. Thus, the more learning or autonomy a given robot has, and the longer the robot has been "trained," the more responsibility should rest with the trainer. Importantly, when looking for a person who is actually responsible for the harmful behavior of the robot, you should not confuse the skills resulting from the robot's "training" with skills that depend strictly on the robot's ability to learn independently. At least at this stage, the responsibility must lie with the person, not the job.

[7] Read more cited above The White Book.

6. TRUSTWORTHY AI

A key issue for the future detailed regulatory framework for AI is to define its scope of application. In the opinion of the European Commission, the requirements for high-risk AI applications may consist of the following key functions: data, data and documentation storage, information to be provided, robustness and accuracy, human supervision, detailed requirements for some specific AI applications, such as these used for remote biometric identification. To ensure legal certainty, these requirements will be clarified to provide a clear benchmark for all actors who need to comply with them.

Considering the complexity and opacity of many AI systems and the associated difficulties that may exist in order to effectively check compliance and enforce the applicable rules, it is urged to meet the record keeping requirements related to algorithm programming, the data used for training high-risk AI systems, and in some cases, to store the data itself. These requirements generally allow potentially problematic actions or decisions of AI systems to be traced and verified. This should not only facilitate supervision and enforcement. It may also increase the incentive for economic operators to consider the need to comply with these rules at an early stage.

There is no doubt that it seems necessary to introduce an appropriate regulatory framework. These could identify the exact set of data used to train and test AI systems, including a description of the main characteristics and how to select the data set. A necessary condition seems to be the presentation of documentation on programming and methodology of training processes and techniques used to build a given AI system. In the process of validating such a system, it must be proven that the safety has been guaranteed and that any bias that could lead to prohibited discrimination has been excluded. Records, documentation and, where applicable, data sets would need to be kept for a limited, reasonable period to ensure the effective enforcement of the relevant provisions. Data from these files should be available on request of the relevant administrative authorities. At the same time, it is necessary to ensure the protection of confidential information (e.g. business secrets).

For the creators of such systems, it seems necessary to provide clear information about the possibilities and limitations of the AI system. They need to know that they are required to clearly state the purpose for which the systems are intended and the conditions under which they can be expected to function as intended, and last but not least, the level of accuracy expected in achieving the stated objective. This information is especially important for system implementers, but may also be relevant to competent authorities and stakeholders.

Citizens should be clearly informed when they are interacting with an AI system and not with humans. It is important that the information provided is

objective, concise and easily understood. The way information is to be communicated should be context specific.

AI systems need to be technically robust and accurate to be trustworthy. This means that such systems have to be developed responsibly and with due diligence ex ante, taking due account of the risks they may generate. Their development and operation must ensure the reliable operation of AI systems as intended. It is therefore necessary to ensure that AI systems are robust and accurate, or at least correctly reflect their level of accuracy, at all stages of the life cycle. Furthermore, they ensure reproducible results and deal with errors or inconsistencies at all stages. It is also necessary to make AI systems resilient to both blatant attacks and more subtle attempts to manipulate data or algorithms.

Human surveillance helps to ensure that the AI system does not undermine human autonomy or cause other undesirable effects. The goal of a credible, ethical and human-centered AI can only be achieved by ensuring that people are properly engaged with regard to high-risk AI applications. Ultimately, it is the human who should make the decision / finally approve the operation of the AI application. In the opinion of the European Commission, human surveillance may be that the output from an AI system does not become effective unless it has been previously validated and approved by a human. Or it may be that the output from the AI system becomes effective immediately, but human intervention is ensured later. We must absolutely agree with this approach. Monitoring the AI system during operation and the possibility of real-time intervention and deactivation should be obligatorily entered as the guiding principle of the SI operation, and it is at the design stage that such operational restrictions should be imposed on the AI system.

Any such obligation should be directed to the creator who is best prepared to deal with the potential risk. For example, while AI developers may be best equipped to deal with risks arising from the development phase, their ability to control risk during the use phase may be more limited. In this case, the implementer should be subject to appropriate obligations. This is without prejudice to the question of whether, in order to ensure accountability to end-users or other parties suffering a loss and to ensure effective access to justice, that party should be liable for any damage caused. Under EU product liability law, liability for defective products is assigned to the manufacturer, without prejudice to national legislation that may also allow recovery from other parties.

The Commission also considers it extremely important that the requirements apply to all relevant economic operators delivering AI-enabled products or services in the EU, whether or not they are based in the EU. Otherwise, the aforementioned objectives of legislative intervention could not be fully achieved.

We should also agree with this postulate of the Commission. Conformity assessments would be mandatory for all affected economic operators, irrespective of their place of establishment. To reduce the burden on entrepreneurs, a support structure could be envisaged, including through digital innovation hubs. In addition, standards and dedicated online tools can facilitate compliance.

Any prior conformity assessment should be without prejudice to compliance monitoring and ex post enforcement by national competent authorities. Ex-post controls should be made possible by properly documenting the relevant AI request and, where appropriate, allowing such applications to be tested by third parties such as competent authorities. This can be especially important where there are threats to fundamental rights which depend on the context. Such compliance monitoring should be part of the continued market surveillance system.

As shown by bad experiences related to, for example, sanitary services, it seems necessary to increase the capacity of administrative bodies in the Member States of the European Union in the field of testing and certification of IS. In this context, it is necessary to support the competent national authorities to enable them to fulfill their mandate when AI is used. The entire process indicated above, without qualified and efficient state authorities, will not function, and the individual will not be adequately protected.

CONCLUSION

When assessing the regulatory activities of the European Union, it can of course be pointed out that the entire legislative process is running too slowly. However, I have the impression that the proposals for “controlling” AI may finally be successful. Without the implementation of a holistic solution, in which the framework of conduct / ethical rules will be imposed on the creators and the validation of AI systems by the state will be introduced, one cannot speak of any sovereignty. It seems that only such a duopoly can lead to the use of brilliant AI solutions, minimizing the risks associated with it. However, without strong state organs, this process will not be adequately secured. This title sovereignty over AI seems to be a *sine qua non* condition for us to be safe in the understanding of dominating processes.

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THE ACCEPTANCE BY THE NATIONAL ELECTORAL COMMISSION OF A NOTIFICATION ON THE FORMATION OF AN ELECTION COMMITTEE OF A CANDIDATE FOR THE PRESIDENT OF THE REPUBLIC OF POLAND – A GLOSS ON THE DECISION OF THE SUPREME COURT OF 23 MARCH 2020, REF. NO. I NSW 4/20

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Abstract. The view taken by the Supreme Court challenging the resolution of the National Electoral Commission imposing on it the obligation to accept the notification on the formation of the Election Committee of the Candidate for the President of the Republic of Poland Sławomir Grzywa does not deserve approval. The National Electoral Commission correctly applied the provisions of the Election Code by setting a deadline of three days for the submission of one thousand signatures of support due to the fact that initially the signatures were provided on sheets containing an annotation contrary to the requirement of the Act. The fact that there was coronavirus outbreak across the country during the period when the obligation to provide signatures existed could not be taken into account. The provisions of the Election Code do not specify how election activities should be carried out during the period of epidemic emergency, and the only possibility of suspending election procedures would then be the introduction of a state of emergency, which, however, was not declared.

Keywords: registration of the Election Committee of the candidate for the President of the Republic of Poland in the coronavirus pandemic, the impact of the coronavirus pandemic on the deadlines in the election procedure, National Electoral Commission

In its decision of 23 March 2020 (I NSW 4/20), the Supreme Court examined the appeal filed by the election agent of the Election Committee of the Candidate for the President of the Republic of Poland Sławomir Grzywa, against the resolution of the National Electoral Commission[1] of 16 March 2020 on the refusal to accept the notification on the formation of the said Committee.

[1] Hereinafter: PKW.

The facts of the case were as follows. On 4 March 2020, the election agent of the Election Committee of the Candidate for the President of the Republic of Poland, Sławomir Grzywa, while notifying PKW about the formation of the committee, submitted an appropriate number of one thousand signatures confirming support for the candidate. PKW found the signature list as defective. It questioned the correctness of the signatures, as they appeared on sheets which were annotated incorrectly. The annotation did not constitute a literal repetition of the formula set out in Article 303(1)(3) of the Election Code.[2] Therefore, PKW assumed that they could not be considered as proper proof of support for a candidate.

On 9 March 2020, PKW called the election agent of the Election Committee of the Candidate for the President of the Republic of Poland, Sławomir Grzywa, to provide within three days, i.e. by 12 March 2020, a correct list of citizens supporting the submission of the election committee. In practice, PKW's decision meant that the agent had to submit anew a thousand signatures of support for the candidate on properly prepared sheets, containing an annotation strictly corresponding to the formula set out in the Election Code. Only 89 signatures were submitted within the deadline set by PKW. Having this fact in mind, PKW refrained from verifying the correctness of the signatures submitted.

Since the defect was not removed by submitting a list containing at least one thousand signatures of Polish citizens holding the right to vote for the Sejm of the Republic of Poland, who supported Sławomir Grzywa as a candidate for the President of the Republic of Poland, within the three-day period set out in Article 97(2) of the EC, PKW refused to accept the notification on the formation of the Election Committee of the Candidate for the President of the Republic of Poland Sławomir Grzywa. The PKW's resolution was appealed against to the Supreme Court, which consequently gave the ruling which is the subject of this gloss.

First of all, the Supreme Court did not share the view taken by PKW as regards the "restrictive" interpretation of Article 303(1)(3) of the EC. It concluded that the fact that the sheets on which voters expressed their support did not constitute a literal repetition of the formula referred to in the indicated provision does not render the support invalid. As the Supreme Court stated, the persons who had put their signatures, after becoming acquainted with the contents of the annotation on the individual sheets of the list, were fully aware of whom (which person) they had been supporting and for what purpose (in which election). For this reason the Supreme Court concluded that there was no legal basis for requesting the election agent to remove the defect in the notification on the formation of the election committee.

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[2] Act of 5 January 2011, the Election Code, Journal of Laws of 2019, item 684 as amended [hereinafter: EC].

When considering the correctness of the view taken by the Supreme Court, the lack of precision of the provisions of the Election Code defining the essence of the "defect", the occurrence of which may result in PKW's not accepting the notification on the formation of an election committee of a candidate in the presidential election or refusing to register a candidate, should be pointed out. Therefore, the legal regulation set out in Article 97(2) and Article 304(4) of the EC should be examined. In this way, in the process of systemic interpretation, using the semantic equivalence directive, the doubts that arise in relation to the linguistic meaning of the term "defect" may be clarified. In the process of interpretation of the aforementioned provisions, the assessment of the manner in which they were drafted, namely the use of the plural form ("defects") and not the singular form ("defect") by the legislator, should be left aside. There should not be the slightest doubt that the finding of even one defect in the submission gives grounds to call the agent of the election committee to remove the defect (or to refuse to register the candidate for President).

Unlike Article 304(2) of the EC, which governs the procedure for the registration of a candidate for President,[3] Article 97(2) of the EC does not define in detail (in the form of a list) the scope of PKW's examination whether the notification on the formation of an election committee is correct. The legislators limited themselves to imposing on PKW, within three days from the date of delivery of the notification, an obligation to call the election agent to remove the defects – within three days from the date of making the information about the defects in the notification public. The decision on the refusal to accept the notification, together with the justification, shall be immediately made public and delivered to the election agent.

On the other hand, according to Article 304(4) of the EC, if the submission of a candidate for President has defects, PKW shall immediately call the election agent to remove the defects within three days from the date of making the information about the defects in the submission public, and if the defects are not removed within the deadline, the National Electoral Commission decides to refuse to register the candidate. In connection with Article 304(2) of the EC, a question arises as to what the legislator means by the term "defects" in the submission of a candidate for President. Namely, whether PKW determines the existence of a defect only as a result of the process for examining the correctness of the submission of a candidate for President, as referred to in Article 304(2) of the EC, or whether it may determine the existence of such a defect

[3] Pursuant to Article 304(2) of the EC, the National Electoral Commission, when verifying the correctness of the submission of a candidate, shall examine: 1) whether the candidate fulfils the conditions set out in Article 11(1)(3); 2) the compliance of the data referred to in Article 297(4) on the basis of officially available documents; 3) whether the nomination has been supported by signatures of at least 100,000 citizens in accordance with Article 303(1)(3).

through findings other than those stipulated in the said Article. It should be emphasised here that Article 304(2) of the EC does not contain the phrase "in particular". The specification of conditions for the correct registration of a candidate is therefore enumerative in this provision – it is a closed list.

Only the fact that a candidate does not have the right to be elected triggers an obligation on the part of PKW to refuse to register the candidate (Article 304(3) of the EC). Otherwise, we are dealing with defects, the finding of which gives rise to an obligation on the part of PKW to immediately call the election agent to remove them within three days from the date of making the information about the defects in the submission public. Thus, the defect referred to in Article 304(4) of the EC undoubtedly relates to the other two issues referred to in Article 304(2) of the EC.

However, the question arises as to whether, despite the list enumerating the issues to be reviewed by PKW under Article 304(2) of the EC, there may be other defects justifying the demand for their removal. It should be undoubtedly pointed out that the defect referred to in Article 304(4) of the EC can be the election committee's failure to submit the documents listed in Article 303(1)(1) of the EC. Thus, if the submission did not contain e.g. an indication of the candidate's affiliation to a political party, this would be a reason justifying a call for the removal of the defect. It is therefore difficult to understand why the legislators did not include in Article 304(4) a reference to Article 303(1). As both the determination of the circumstances referred to in Article 304(2) of the EC and the determination of failure to fulfil the obligations specified in Article 303(1) of the EC constitute a defect which gives rise to an obligation on the part of PKW to call for its removal pursuant to Article 304(4) of the EC.

The above statement is significant for the assessment of the view taken by the Supreme Court in the ruling being discussed in this gloss. Referring the conclusions from the analysis of Article 304 of the EC to the procedure of accepting the notification on the formation of the election committee, it should be pointed out that, under Article 97(2) of the EC, a defect occurs whenever the notification is found to be inconsistent with the requirements set out in the Election Code. In the case resolved by the Supreme Court in the ruling being discussed here, the decisive factor is Article 299 of the EC, pursuant to which after collecting, in accordance with the requirements set out in Article 303(1)(3) of the EC, at least one thousand signatures of citizens having the right to vote in parliamentary elections and supporting the candidate, the election agent notifies the National Electoral Commission that the election committee has been formed.

The reference to Article 303(1)(3) of the EC should be interpreted in such a way that any violation of the statutory requirements related to the notification of the formation of an election committee constitutes a defect as defined in Article 97(2) of the EC. The election committee is therefore required to

provide a list of one thousand citizens supporting the submission, containing a legible indication of the name(s) and surname, address of residence and identification number (PESEL) of the citizen who gives his/her support, with his/her handwritten signature on the list. Each page of the list must contain the name of the election committee submitting the candidate and an annotation: "I give my support to the candidate for the President of the Republic of Poland .... [name(s) and surname of the candidate] in the election called for .... (day, month, year)."

In the case of submitting the candidacy of Sławomir Grzywa, PKW stated that the annotation deviated from the statutory formula. The Supreme Court did not question the PKW's findings in this respect, but made a different legal assessment of the facts. It did not agree with the restrictive interpretation of the provisions of the election law presented in the PKW's resolution. In the opinion of the author of the gloss, the view taken by the Supreme Court gives rise to justified doubts. If in this case the requirements laid down in the provisions of the Election Code were violated, it is difficult to find the reasoning presented by the Supreme Court convincing. The provisions in question do not provide any basis for creating deviations from the obligations imposed on an election committee in the process of submitting a candidate for President. Therefore, it should be assessed that PKW correctly applied the provisions of the Election Code and rightly decided to refuse to register the candidate Sławomir Grzywa due to the fact that the election committee failed to submit a list of support by at least one thousand citizens as required by Article 303(1)(3) of the EC.[4]

Summing up this aspect of the analysis, it should be pointed out that the PKW's statutory obligation is to verify whether all the statutory requirements concerning submission of a notification on the formation of an election committee have been fulfilled.[5] They also include a correctly prepared list of support (i.e. in accordance with the Act) given by citizens who have the right to vote. The unquestioning acceptance of the view taken by the Supreme Court

[4] It is a well-established doctrine and case-law that the lack of the required number of signatures of electors supporting the formation of an election committee is a defect pursuant to Article 97(2) of the EC, if the submission was made at such a time that the removal of the identified defects in the number of signatures is not possible, due to the fact that the lack of the required number of signatures of electors cannot be supplemented after the deadline for the submission of the notification. The deadline for submitting a list of citizens supporting the formation of an election committee cannot be extended by calling the election agent to remedy the lack of the required number of signatures [Czaplicki and Zbieranek 2018, 262; Banaszak 2018, 198–99; Jaworski 2012, 264]. See also decision of the Supreme Court of 19 September 2002, ref. no. III SW 28/02, OSNP 2003, No. 4, item 89; decision of the Supreme Court of 31 August 2011, ref. no. III SW 10/11, OSNAPiUS 2011, No. 11–12, item 151.

[5] Decision of the Supreme Court of 19 September 2002, ref. no. III SW 28/02, OSNAPiUS 2003, No. 4, item 89.

pro futuro potentially puts PKW at risk of the accusation that it accepted a notification of the formation of an election committee which includes signatures of support in a manner infringing the statutory requirements.

The ruling of the Supreme Court also deserves attention due to the fact that it raised the problem of the possibility to conduct election activities affected by the coronavirus pandemic. Referring to this part of the Supreme Court's reasoning, it is only theoretically possible to consider whether or not the coronavirus pandemic could be regarded as a natural disaster as defined in Article 232 of the Constitution,[6] and whether its occurrence did not justify the possibility to introduce the state of natural disaster by the Council of Ministers. This measure would have had significant consequences for the election of the President of the Republic announced for 10 May 2020. According to Article 228(7) of the Constitution, the introduction of the state of natural disaster (or any other state of emergency) prohibits by law the holding of elections for the office of the President of the Republic of Poland and extends his term of office until 90 days after the end of that state.

As is well known, the Council of Ministers did not decide to introduce a state of natural disaster, so the coronavirus pandemic did not formally affect the sequence of implementation of election activities defined by the provisions of the Election Code. Nevertheless, the Supreme Court found it appropriate to call into question the possibility to conduct election activities within the statutory deadlines. It assumed that collecting a thousand signatures of support for a candidate in the presidential election within the three-day period set out in Article 97(2) of the EC is objectively possible under normal conditions of the functioning of the state apparatus. As the Supreme Court noted, we did not face such a situation on 9–12 March 2020 due to the threat to human life and health caused by the coronavirus. The Supreme Court took into account the necessity to comply with strict hygienic and sanitary requirements in interpersonal contacts at that time and the real concerns of people signing the lists and collecting signatures of support for Sławomir Grzywa's nomination about the possibility of getting infected with coronavirus. In view of the above, the Supreme Court concluded that the obligation imposed by PKW on the election agent to provide a thousand signatures of support was impracticable from the outset. Its fulfilment was hindered by objective factors justified by extraordinary circumstances, completely beyond the election agent's control.

Referring to this part of the Supreme Court's reasoning, it should be reminded that, in the opinion of the author of the gloss, PKW correctly applied the provisions of the Election Code specifying the procedure for accepting a notification of the formation of an election committee. Due to the fact that the submitted signatures of support for the candidate were provided on sheets

[6] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

containing an annotation inconsistent with Article 303(1)(3) of the EC, PKW, acting pursuant to Article 97(2) of the EC, called the election agent to remove the defect in the notification within three days from the date of making the information about the defects in the notification public.

The question arises whether PKW, while exercising these powers, was obliged to take into account the threats related to the coronavirus pandemic. With regard to this issue, it should be noted that the provisions of the Election Code do not contain any norms referring to extraordinary circumstances due to which it might be difficult to meet the election deadlines. The institution of a state of emergency (Chapter XI of the Constitution of the Republic of Poland) is provided for in the event of situations of particular threats in which ordinary constitutional measures would prove insufficient.

The deadlines for the implementation of election activities result from the election calendar, which was laid down in an appendix to the decision of the Speaker of the Sejm of the Republic of Poland of 5 February 2020 on the ordering of the election of the President of the Republic of Poland.[7] The National Electoral Commission does not have any power to suspend, extend or reschedule the deadlines set in the election calendar. This is not possible even in the event of extraordinary circumstances.

Therefore, the justification for creating deviations from the election calendar cannot be the introduction of a state of epidemic emergency in the territory of the Republic of Poland (from 14 March 2020)[8] followed by the state of epidemic (from 20 March 2020).[9] There are statutory grounds for both states.[10] Therefore, neither the state of epidemic emergency nor a state of epidemic may be regarded as a state of emergency in the constitutional sense. The Constitution of the Republic of Poland sets out a closed list of states of emergency in Article 228(1), and it may not be extended by way of an act.

No provisions provide PKW with grounds to waive its obligation to verify the correctness of collecting an appropriate number of signatures supporting the submission of a candidate for President. Neither does it have any powers that could lead to further suspension or modification of election procedures. In particular, it should be stressed that PKW does not have the right of legislative initiative, nor is it entitled to request the Council of Ministers or the President

[7] Journal of Laws, item 184.

[8] A state of epidemic emergency was introduced by the Regulation of the Minister of Health of 13 March 2020 on the declaration of a state of epidemic emergency in the territory of the Republic of Poland (Journal of Laws, item 433 as amended) and revoked by the Regulation of the Minister of Health of 20 March 2020 on the revocation of a state of epidemic emergency in the territory of the Republic of Poland (Journal of Laws, item 490).

[9] Regulation of the Minister of Health of 20 March 2020 on the declaration of a state of epidemic in the territory of the Republic of Poland (Journal of Laws, item 491 as amended).

[10] Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans (Journal of Laws of 2019, item 1239 as amended).

of the Republic of Poland to exercise powers related to the introduction of a state of emergency, which would result in the postponement of the elections.

Therefore, since no state of emergency was introduced due to the coronavirus pandemic, PKW had no legal grounds to create derogations from the rules defined by the provisions of the Election Code. As a state authority, it is bound by the principle of legality (Article 7 of the Constitution). It is therefore entitled to make decisions only on the basis and within the limits of the law. Since the legislators did not create special regulations specifying the procedure for the registration of candidates for the President of the Republic of Poland and collection of signatures of support for the candidacies, PKW was obligated to apply the provisions of the Election Code normally in force.

Given the above, even if the collection of signatures did indeed constitute a threat to human life and health, the view taken by the Supreme Court undermining the obligation of PKW to apply the provisions of the Election Code does not deserve approval. If the Supreme Court deems the application of Article 97(2) of the EC inappropriate, the question arises what regulations were to be applied by PKW in a situation of a defect referred to in the provision in question. Although the Supreme Court assumed (as pointed out above – erroneously) that such a defect did not exist despite the fact that the signatures were collected on sheets which did not contain an annotation required by the Act, it did not answer the question as to what provision PKW was supposed to apply in a situation where it would not be possible to carry out an election activity due to the coronavirus pandemic.

The critical position of the author of the gloss on the Supreme Court's ruling is also due to the fact that it created a real threat to the respect of the principle of equal opportunities for candidates in presidential elections. The coronavirus pandemic is a threat that all election committees have to face. It is therefore unjustified to exempt any of them from the obligation to collect signatures of support in the quantity and form laid down in the Election Code.

It should also be noted that the coronavirus pandemic was not an obstacle to the registration of other candidates in the presidential elections. The first case of infection was recorded in Poland on 4 March 2020, while the decision of the Speaker of the Sejm to order elections for the office of President of the Republic of Poland was announced on 5 February 2020, i.e. one month earlier. During this period, there were no obstacles to the process of collecting signatures. The fact that the signatures under the submission of Sławomir Grzywa were collected on the sheets with the annotation inconsistent with the content laid down in the Election Code was an error made by the election committee.

In conclusion, it should be stated that the view taken by the Supreme Court challenging the resolution of the National Electoral Commission and imposing on it the obligation to accept the notification on the formation of the Election Committee of the Candidate for the President of the Republic of

Poland Sławomir Grzywa does not deserve approval. The National Electoral Commission correctly applied Article 97(2) in conjunction with Article 299(1) and Article 303(1)(3) of the EC by setting a deadline of three days for the submission of one thousand signatures of support due to the fact that initially the signatures were provided on sheets containing an annotation contrary to the requirement of the Act. The fact that there was coronavirus outbreak across the country during the period when the obligation to provide signatures existed could not be taken into account. The provisions of the Election Code do not specify how election activities should be carried out during the period of epidemic emergency, and the only possibility of suspending election procedures would then be the introduction of a state of emergency.

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GLOSS TO THE JUDGMENT OF THE SUPREME COURT OF POLAND OF 16 APRIL 2019, REF. NO. VI KA 5/19

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Abstract. The subject of this gloss is military reduction in rank. It is an important element of the penalty system in Polish military criminal law. The author accepts the position of the Supreme Court of Poland concerning this penalty. The following study, based on the judgment given on 16 April 2019, as well as earlier judgments of the Supreme Court of Poland, contains the analysis of the prerequisites of its ordering as well as the role of reduction in rank. The study also sets out to showcase the practical and theoretical problems presented by using this penalty.

Keywords: penal measures, reduction in rank, military criminal law

"According to the provisions of Article 327(2) of the Criminal Code, reduction in rank can be ordered in case of sentencing for a crime committed with intent, if the type of act, the manner and the circumstances it was committed in make it appear that the offender has lost the attributes required to hold a military rank, and especially in the case of acting to achieve economic gain."

The judgment of the Supreme Court given on 16 April 2019[1] was passed in the following circumstances. One of the accused was convicted of five aggravated offenses pursuant to Article 228(1) of the Criminal Code, of which three were committed as serial offenses (Article 91(1) of the Criminal Code). For these crimes he was given a converged sentence of one year of imprisonment, which was conditionally suspended for the probation period of three years. The court also imposed a fine of 600 daily units, setting the value of one unit at 40 PLN. Additionally, pursuant to Article 45(1) of the Criminal Code, the court ordered the forfeiture of all ill-gotten gains coming directly from the crime, and pursuant to Article 43b of the Criminal Code used the penal measure of publicly announcing the judgment.

[1] Ref. no. VI KA 5/19, Lex no. 2677119.

The second of the accused committed twenty offenses, of which thirteen were classified under Article 230(1) of the Criminal Code, five were classified under Article 230(1) concurrent with Article 229(1) in conjunction with Article 12 of the Criminal Code, one under Article 270(1) of the Criminal Code and one under Article 286(1) of the Criminal Code in conjunction with Article 65(1) of the Criminal Code. It must be mentioned that most of the offenses were committed as serial offenses (Article 91(1) of the Criminal Code). Due to this the reduction in rank was imposed in conjunction with one year of imprisonment, conditionally suspended for a trial period of three years, a cumulative fine of 800 daily units of 30 PLN, and additionally, pursuant to Article 45(1) of the Criminal Code, forfeiture of all ill-gotten gains and penal measure of publicly announcing the judgment (Article 43b of the Criminal Code).

An appeal was filed by the prosecutor against the defendants. The prosecution based their appeal on the fact that there was an unfair lack of use of reduction in rank against both defendants despite the fact that their situations, the types of offenses that were attributed to them, their seriality, the manner and circumstances in which they were committed, including their role in the criminal behaviour, as well as the fact that they acted to achieve economic gain led to the conclusion that they lost the qualities required for the military rank they held. The Supreme Court shared the views of the appellant on the matter of not applying the penal measures set in Article 324(1)(3) of the Criminal Code to both defendants and changed the sentence in such a way that, pursuant to Article 327(2) of the Criminal Code, ordered the penal measure of reduction in rank.

The Supreme Court's judgment includes interesting thoughts on reduction in rank. Its deeper analysis can become a good opportunity to reflect on this military penal measure. The commented judgment can be an important voice in the discussion concerning the substance of demotion, its functions, its role in criminal policy, as well as the point of keeping its presence in the system of military penal measures, especially considering the changes happening in the military that lead to revaluating existing principles, determining the denotation of traditional concepts that make up the soldier ethos. The need for such discussion becomes all the more obvious when one takes into account that reduction in rank is considered the most severe of military penal measures [Kutzman 2020; Marek 2007, 592] and its role has in effect been reduced solely to repression [Janiszowski–Downarowicz 2016, 491]. The timeliness of the topics undertaken in the judgment is confirmed by the tendencies visible in the doctrine, to broaden the personal scope of reduction in rank to include those that had, at the time of committing a prohibited act, held a military rank, even though they were not in active military service [Winik and Nowak 2019, 44–61]. The judgment is worth analysing also due to the fact that the Supreme

Court rarely has the chance to speak out on the subject of military penal measures, which stems from their rareness in the practice of the criminal justice system.

The subject of reduction in rank cannot be analysed separately from the concept of a soldier's and officer's ethos. According to M. Ossowska, ethos is a lifestyle of a community, a social hierarchy of values adopted by that community, formulated in a distinct way and possible to decipher from people's behaviour [Ossowska 2014, 7]. This definition underlines both the hermetic character as well as the uniqueness of a particular group's ethos, which makes it specific to particular communities or social structures. One can surmise, as C. von Calusewitz did, that the distinctness of the military ethos is defined by the organization, customs and laws [Clausewitz 1958, 157].

In popular opinion this distinctness has always been fully justified and stemmed from the singular position occupied by the military in society as well as the trust that is bestowed upon it. It had its sources in soldiers' ethos that consisted of, e.g., courage, honour, discipline, readiness to sacrifice oneself for laudable ideals, righteousness of character, faithfulness, truthfulness, solidarity with one's service companions. These values, norms and attitudes were linked to numerous privileges, honorary rights and powers.

The amount of these privileges was connected to the rank in the army. The higher the position in the hierarchy, the bigger the level of expectations and trust bestowed upon the soldier. Breaching that trust by committing an act inconsistent with the ethos could not elude the criminal reaction, though it could not be limited to using penal measures analogical to those that were used on persons who were not soldiers. Even in the most ancient times it was noted that the specific nature of the military service requires different reactions from criminal law.

In the military, the punishment needed to be a mirror of the peculiar position occupied by soldiers, connected to the extraordinary trust bestowed upon them. It applied particularly to the soldiers of higher rank, officers and noncommissioned officers, for whom the level of expectations and requirements was higher than in the case of privates. At a normative level, it meant the need to deprive soldiers of the thing that determined their exceptional position, both in the society and amongst their fellow soldiers, which meant dignity, ethos, prestige, veneration, respect and honour [Czyżak 2010, 158]. This caused the universal tendency to use punishments targeting that veneration and honour. One of them was reduction in rank – a sanction strictly connected to the hierarchy of military ranks and their role and meaning in the army, as well as outside of it [Majewski 2006, 1017].

The particular character of military service stems not only from assigning some "special" or "separate" system of values to the army, but also from goals and tasks that should be achieved and fulfilled by the armed forces

[Marcinkowski 2014, 86]. The most important role of the army is to guard the sovereignty of the state and the safety of its citizens. To achieve that goal the army needs to be well trained. This process depends on leadership that is efficient, effective and based on high ethical standard, which requires the commanding staff to be aware of the officer's ethos, its traditions and commitments that come with it.

Military service has always been treated as an honourable service to the motherland. Over the centuries, its character changed, and along with it, the requirements for soldiers changed too. The one stable and invariable value that stayed the same was soldier's honour, as well as soldier's and officer's ethos that was connected to it. It has its source in the ethos of a knight. It was significantly impacted by the Polish tradition of fighting for independence [Adamkiewicz 1997a; Idem 1997b; Łochyński 1997, 157; Karwin, Pomianowski, and Rutkowski 1965, 32]. These historical conditions caused the standards set before the officers to be very high and demanding.

Currently the officers' ethos of the Polish Armed Forces is shaped by a few basic groups of values [Kasperski 1997, 221]. The first of them is the group of professional values, understood as obligations and requirements resulting from the particular nature of the officer's profession. They are an emanation of the postulated professional traits and their achievement serves to ensure the right way of performing tasks. They include competence, responsibility, discipline and control, care for the subordinates, courage, amicability, efficiency, loyalty to the superiors. Second group consists of strictly moral traits, which enable (when they are observed) conflict-free cohabitation of individuals and groups of people. These values are often called personal traits or moral virtues. As is often noted, these values determine the correct influence on subordinates, organization of social relations and performance of educational duties. Values enumerated in this group include honour, honesty, fairness, tact, cordiality, nobility, tolerance, respect for the dignity of other people (soldiers). The next group consists of the so called virtues of character, such as firmness, truthfulness, dependability, reliability, modesty. The officer's ethos also consists of the perfecting (creating) values, among which one can include intelligence and knowledge as well as those that help achieve them, such as diligence and perseverance, and civic values, chiefly patriotism [ibid.; Marcinkowski 2012, 70].

This ethos positions an officer not only in the structures of the Armed Forces. It also plays an important social role, stemming from the tasks set before the army in a democratic state, as well as the role of a professional soldier in their environment. Nursing and cultivating universal ethical values: dignity, honour, faithfulness, responsibility, courage, bravery, nobility and those that stem from the particular nature of the military service, is invaluable in times of overwhelming relativism. It is those values that create the still needed archetype of a contemporary officer.

Faithfulness to these values and their observance are the best protection of the quality and efficiency of the army [Kubiak 2008, 179]. It is particularly important when confronted with the ongoing processes that lead to the change in the model of the army [Świniarski 2012, 160–61] that results in devaluation of the traditional concepts that shape the officer's ethos.[2] Ordering the reduction in rank is dependent on establishing that the perpetrator lost all qualities required to hold a military rank. Those qualities are the traits that should characterize a soldier who received a particular military rank. Being appointed to a military rank (or to the next military rank) of a non-commissioned officer, ensign or officer is conditional upon, e.g., whether the soldier has the

[2] These changes come down to moving on from the model of the army as an institution and treating it as a civil organization with all the following consequences. One of them is denotation of honour and other values shaping the officer's ethos. As J. Świnarski notes, "faithfulness, immutability and tenacity that were absolutized before, are now exchanged for integrity to oneself and others, care not for the abstract and hypostatic family of the families – the Motherland, but specific and own family as well as their and own safety. It is a pragmatic mentality. The virtue of honour seems to be replaced by such an ethical distinctness as human dignity, or the denotation of honour starts to include human dignity, which Aristotle defined as the moderation between the overabundance of servility and the scarcity of conceit – the golden mean between egoism and altruism, care for oneself and sacrifice for others. In this ideal a soldier doesn't serve any special purpose in a country, they have the same rights as any other citizen – simply a citizen. Faithfulness or submission are not required of him, as is not mindless discipline. Instead, what is required is partnership, a soldier's dignity, «citizenship in a uniform» of a free and equal man, friendly towards others and himself. A «citizen in a uniform» is characterized more by their inalienable human dignity, care for himself and others than by strictly understood honour, loyalty, obedience and tenacity. Because honour understood in such a way cannot be reconciled with such preferences of contemporary democratic societies as freedom and individualism. Strictly understood honour doesn't favour dignity, freedom and responsibility. At the dusk of strictly understood honour and preference for human dignity, the rule of law and freedom of people in uniforms is somewhat proved by the belief that if in the society of liberal, free market economy there is no time for honour, because if all people care for are themselves and their own gain, material goods and economic values as well as mass consumption, traditions of officer's codes of honour do not have to be cultivated, or alternatively they can be equitably extended to cover those who are not officers, meaning all professional soldiers. What seems to become more meaningful is business ethics, grounded in economic ethics, which contradicts the heroic ethics – ethics of honour that doesn't calculate outlays and profits, costs and effects. Human dignity is the most important value in democratic systems that strive to achieve the idea of freedom. Because of this in the conditions of military service the goal is to maximally respect human dignity and simultaneously optimize military efficiency – professionalism. The goal is not a soldier who is faithful to their sovereign (state), with the distinction of honour (understood as unconditional devotion) as a priority, but a soldier who respects the law, their own and others' dignity as well as the order of free democracy. It is the ideal of a «citizen in a uniform» […]. The tendencies of the army as an organization and changes in the conditions of military service serve the purpose of perfecting the military professionalism. This purpose shapes the pragmatic, rational and liberal tradition of military activity – activity of people who are equal in their dignity and civic rights, who take up an occupation in one organisations that is natural and indispensable to the liberal-democratic society, as the professional armed forces fundamentally are."

necessary moral and professional qualifications that determine the exemplary attitudes of soldiers as well as their prestige and social recognition. Officers, ensigns and non-commissioned officers that have particular powers as commanders and educators are especially obligated to act in a way that shows their commitment to moral and professional requirements.

It can be said that attributes required to hold a military rank are the normative characteristics that make up the concept of an officer's ethos. The loss of attributes required to hold a military rank has to be the result of evaluation of the type of offense as well as the manner and circumstances in which it was committed. This evaluation should be complex and take into account all components (the type of offense, the manner and circumstances in which it was committed). It cannot be based solely on some aspects determining the loss of attributes required to hold a military rank. It must be stressed that in the commented judgment, the Supreme Court made a comprehensive analysis of circumstances that determine the loss of attributes required to hold a military rank. These considerations are, in a way, a synthesis of previous achievements of the jurisprudence of the highest court, while at the same time being their updated expansion.

The Supreme Court notices that the loss of attributes required for holding a military rank is evidenced by the fact that the crimes committed by the accused were not accidental or incidental in their lives. On the contrary, the crimes for which they were sentenced were committed over the course of several years and in that time, neither of them felt the need to reflect and change their behaviour. Subsequently, the Supreme Court takes note of the fact that the accused did not commit the acts attributed to them under the influence of fleeting emotions, but acted deliberately, with motives that do not deserve any justification.

The doctrine has also pointed out that reduction in rank should be ordered when the perpetrator committed the crime with motives deserving particular reprobation [Hoc 2016, 1711]. As early as in the Supreme Court's resolution given on 27 August 1977[3] it was stressed that establishing that the perpetrator acted with low motives (i.e. motives that in general opinion are considered disgusting or contemptible) should as a rule be considered a reason to award reduction in rank. Such a sentence, in cases of crimes (both military and common) committed with low motives, can be issued only when the type of crime, the gravity of social harmfulness, especially to the military discipline (e.g. by committing a crime with a subordinate or an officer of lower rank, or to the detriment of a comrade-in-arms), the manner in which the perpetrator acted as well as their personality traits indicate that they should be completely disqualified from the role of a commander and educator, connected to holding the

[3] Resolution of the Supreme Court of 27 August1977, ref. no. U 1/77, OSKNW 1977, No. 10-11, item 110.

rank of an officer, ensign or non-commissioned officer, and they should also never hold such rank in the future.

In the commented judgment the Supreme Court emphasized that the fact that a professional soldier commits a serial crime to achieve economic gain, should lead to reduction in rank. In the previous jurisprudence of the Supreme Court it was precisely articulated that the fact that a crime was committed as a serial crime should be treated as an aggravating circumstance when deciding on a punishment, and the impact of this circumstance should depend on the number of serial actions.[4]

It should be noted that the Supreme Court, referring to its previous judgments, emphasized again that the fact that a professional soldier acts to achieve economic gain and additionally commits a crime in collusion with soldiers of lower rank should usually lead to ordering reduction in rank of that perpetrator. When it comes to officers, their criminal actions can have a negative influence on shaping the attitudes of other soldiers, particularly subordinates and soldiers of lower rank.

This leads to the decline the officer's authority, and at the same time undermines the correct functioning of the army. The position of a contemporary officer is based mainly on authority. Authority (Lat. *auctoritas* – example) is someone's generally recognized seriousness, impact, meaning. Authority is a set of characteristics, particularly how respected a person is, e.g. in a group, work environment, which causes others to follow their orders, prohibitions, opinions – without coercion or fear.

Authority creates the ability to manage people. Compliance with the orders of a person who is an authority stems from the positive evaluation of their characteristics, and not from fear of punishment [Borkowski, Dyrda, Kanarski, et al. 2000, 16]. It does not just come down to formal authority, but also the informal one, based mainly on trustworthiness. It cannot be achieved with norms, or anyone's bestowal. It is achieved with one's own example and attitude. Conflict between behaviour and ethos causes an officer's loss of authority, and at the same time prevents them from positively impacting their subordinates and shaping their attitudes correctly.

Compatibility between an officer's ethos and their behaviour, corroborated by their personal example, is an expression of responsibility for shaping the right attitudes of subordinates. An officer without authority becomes dysfunctional. It leads to lowering the level of discipline, which in turn can result in reduction of an officer's leadership skills, and in consequence – their ability to fulfil tasks set before the army. The superior officer is supposed to, by using their authority, make their subordinates execute specific tasks and

[4] Judgment of the Supreme Court of 16 March1979, ref. no. Rw 60/79, OSNKW 1979, No. 5, item 57.

activities that are their sovereign decisions or prerogatives given to them by higher command.

Without a competent commander, wielding their authority and equipped with appropriate traits and abilities, the efficiency of leadership might be disrupted and goals might not be reached. In all situations, they should be the personification of consequence and integrity, which form the foundation of leadership. It is also important from the point of view of subordinates. Subordinate soldiers want to believe that their commanding officer is absolutely and implicitly fair, both at work and in their private life.

Thus, it is with approval that one should consider the Supreme Court's comments, which unequivocally show that actions of the accused R.B. were highly demoralising; the accused not only did not react appropriately to the actions of the lower ranked soldier, but with his attitude allowed him to carry out his criminal activities, from which he himself benefitted. As the Supreme Court clearly noted, the accused committed subsequent crimes, regardless of the fact that their behaviour created in persons willing to take up military service - who had nothing to do with the honour of an officer or a non-commissioned officer – the image of a soldier as a person who, in order to achieve economic gain, is willing to break the rules of service and commit a crime, and thus harmed the prestige of the Polish Army. One has to appreciate the fact that the Supreme Court noticed the relationship between the authority of the institution (the army) and the authority of the individuals, on which it is based, and the fact that a blemish on one element of a hierarchical structure is not indifferent to the image and perception of the whole.

In regards to the commented judgment, it mattered significantly that the accused committed crimes connected to their military service and used opportunities provided to them by that service. In practice it is connected to, e.g., managing funds or materials owned by the army. It should also be noted that committing a crime against the interest of the military service is not a prerequisite of using the penal measure of reduction in rank. It can be justified by committing any other intentional crime. As the Supreme Court accurately stated, the fact that the crime committed by a soldier does not infringe on the interests of the military or the service, but concerns the private or personal spheres of life, is not an obstacle to ordering reduction in rank if the conditions set out in Article 327(2) of the Criminal Code are met.[5]

In the commented judgment the Supreme Court could once again confirm that ordering a penal measure of reduction in rank is justified when the crime is committed by a soldier to achieve economic gain. It is not synonymous with automatic assumption that a soldier lost their right to hold a military rank, and especially not with obligatory ordering of reduction in rank. Committing

[5] Judgment of the Supreme Court of 20 August 1970, ref. no. Rw 42/70, OSNKW 1970, No. 11, item 136.

a crime with this purpose should cause the court to carefully examine the purposefulness of ordering reduction in rank, while the decision to not use this penal measure should be justified by the particular circumstances of the case [Marcinkowski 2011, 127].

In the case held before the Supreme Court there were so many circumstances proving the loss of attributes required for holding a military rank that, in essence, each of them, if analysed separately, could be a sufficient reason for ordering the reduction in rank. The character of these circumstances is unequivocally negative and shows that the accused lost the moral and ethical values necessary in persons who want to belong to the corps of officers or non-commissioned officers of the Polish Armed Forces and should not hold their military ranks even after ending their military service.

The Martial District Court was even more critical in its appraisal of the accused's attitude, noticing that "the accused proved to be persons who brought shame and dishonor on the uniforms of the Polish Armed Forces they wore" and that persons such as them "should not continue to perform military service, because the number and type of criminal violations they committed, related either to the performance of official duties or in the milieu of their military service was so discrediting that they should not be allowed to continue that service." Despite such an unequivocal assessment, the District Court decided not to order reduction in rank, reserving its use for even more drastic cases. It is particularly satisfying that such a necessity was noticed by the Supreme Court, according to which the *ratio legis* of this penal measure is to protect the authority connected to the possession of a military rank, which after all has a hierarchical structure. In this context, it will not be an exaggeration to say that the Supreme Court, by changing the appealed judgment and ordering the reduction in rank of both defendants, also saved the authority of the military justice system.

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