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THE PRINCIPLE OF CONTRADICTION FOLLOWING THE REFORM BY POPE FRANCIS OF THE PROCESS TO DECLARE NULLITY OF MARRIAGE (LIBELLUS AND THE SUBJECT-MATTER OF THE PROCESS)*

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Abstract. The article covers the influence of Pope Francis' Apostolic Letter motu proprio *Mitis Iudex Dominus Iesus* on the scope of the principle of contradiction in matrimonial nullity trials. This article will present certain remarks concerning the effect of Pope Francis's process reform on the extent of the principle of contradiction in respect of such constituting factors of that principle as: the *libellus*; identification of the subject-matter of the process. In conclusion, it should be stated that Pope Francis' trial reform of 2015 extended the scope of the principle of adversarial in matrimonial nullity trial.

Keywords: canon law, principle of contradiction, nullity of marriage, *Mitis Iudex Dominus Iesus*

INTRODUCTION

Ecclesia semper reformanda, a popular truth in the Church, applies to its normative dimension as well, specifically in the aspect of procedural law. The need to change the existing matrimonial nullity proceeding canons was also realized by Pope Francis, considering the salvation of the souls of the people of God entrusted to His care. In His Apostolic Letter motu proprio *Mitis Iudex Dominus Iesus*, the Holy Father introduced a reform of the canons in the Code of Canon Law regarding matrimonial nullity trials.[1]

The procedural reform by Pope Francis of 8 December 2015 introduced certain modifications within Book VII, Part III, Title I, Chapter I *Cases to*

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[1] Franciscus PP., Litterae apostolicae motu proprio datae *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de causis ad matrimonii nullitatem declarandam reformantur (15.08.2015), AAS 107 (2015), p. 958–70 [hereinafter: MIDI].

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declare the nullity of marriage of the 1983 Code of Canon Law.[2] It clearly transpires from the foregoing that in his reforms of the special procedure to declare the nullity of marriage (can. 1671–1691), Pope Francis did not vary the canons on trials in general and on the ordinary contentious trial, which must be applied to cases for the declaration of the nullity of marriage unless the nature of the matter precludes it (can. 1691 § 3 MIDI).

Therefore, we should consider the impact the motu proprio *Mitis Iudex Dominus Iesus* Apostolic Letter had on the regulations regarding: the *libellus* as an impulse for the process; identification of the subject-matter of the process; the parties to the case and the competent forum; equal treatment of process parties, minimum availability of the parties, and the competent forum to pass a determination, having the attributes of neutrality and impartiality. This article will present certain remarks concerning the effect of Pope Francis's process reform on the extent of the principle of contradiction in respect of such constituting factors of that principle as: the *libellus*; identification of the subject-matter of the process. However, the parties to the case and the competent forum, matters of equality of the process parties, minimum availability of the parties, and the competent forum for determination, having the attributes of neutrality and impartiality, will be discussed in the subsequent articles.

1. MODIFICATIONS OF CANONS REGARDING THE *LIBELLUS*

It might seem, *prima facie*, that the realization of the principle of contradiction, consisting of stating two contradictory claims, is far from the spirit of the Gospels as well. Nevertheless, considering that the principle of contradiction leads in reality to determination of objective truth about a marriage, there can be no doubt as to the fact that it also contributes to a fair judgment being passed, and maintains its ancillary character as *salus animarum* [Greszata-Telusiewicz 2020, 173]. The meaning of the principle of contradiction, which is a *sine qua non* prerequisite for the emergence of a canonic *iudicium*, has also been confirmed by Pope Francis in the published motu proprio MIDI, reforming only those procedures which no longer fulfilled their functions targeted at the salvation of souls, for reason of the spirit of contemporary times [Idem 2019, 95–96].

In cases of declaring nullity of a marriage, the principle of contradiction is based on the assumption that the Church is the first authority legally raising an essential claim of validity of a marriage, whereas the spouses have the right and obligation to file a *libellus*, thus defining the petition in the process [Idem 2008, 261]. A *libellus* is the basis for the petitioner to pursue their rights by

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

stating the petition, whereas the respondent has the opportunity to acquaint themselves with the claim and the judge can resolve on the subject-matter of the dispute. It is emphasized in the doctrine of canon law that it is necessary for the benefit of the process parties and the arbitrator in the dispute, i.e. the judge [Sztychmiler 2003, 43–46].

For the above reasons, *libellus* is the foundation of an ecclesiastical process, whereas the Legislator defined the requirements which the petitioner should include in their petition. On one hand, these facts help the petitioner present their case to the judge, whereas they are also useful for the judge to decide whether to accept or reject the case. For the respondent, the *libellus* is the source of information necessary for proper commencement of defence. By giving the faithful the right to defend their rights before church tribunals, the Legislator further stipulates that any barriers to admission to ecclesiastic courts should be relatively limited. Even though the reasons for which a judge may reject a petition must be strictly construed, it is quite frequent for tribunals to reject *libelli* only on the grounds of difficulty of the cases, stating in the explanatory memoranda that these cases have no legal grounds [Doyle 2013, 437]. Considering the proper phrasing of a petition, there are mentions in the subject-matter literature of the importance of that writ of procedure, particularly if the parties are interested in requesting a briefer process. Whereas the circumstances of things and persons have to demonstrate the nullity of marriage and be supported with valid evidence, a failure to produce an appropriate *libellus* with the required contents will prevent admission to a process before the diocesan bishop, which further supports the importance of the academic background of the persons assisting in writing the petition [Jenkins 2016, 260].

At this point, it should be reiterated that the right to file a petition to an ecclesiastic judge is not only vested in a Catholic but in any person, pursuant to the regulation of can. 1476 CIC/83 *ab initio*. Whereas can. 1476 CIC/83 is fundamentally important for the establishment of a contradictory process relation, the rule set up therein refers to baptized as well as non-baptized individuals [De Diego-Lora 2011, 1112]. In this sense, a *libellus* is not just a *sine qua non* prerequisite for the commencement of an ecclesiastic trial, but also a manifestation of the realization of human rights, specifically giving a party the opportunity to take their case to court [Sztychmiler 2003, 43–46]. In this context, the remarks by P. Malecha, Substitute Promoter of Justice at the Apostolic Signature, should be approved in that oral decisions taken at so-called tribunal consultancies whether to accept or reject a *libellus* is a malpractice and a violation of the norm of can. 1476 CIC/83 [Malecha 2020, 23]. The above procedure not only infringes the principle of participation of both parties in a process to declare nullity of a marriage – *iudicium* (bilateral process), transpiring from can. 1476 CIC/83, but also the principle of contradiction. It has to be noted that without the establishment of the bilateral process

principle, it is not possible to proceed on the basis of contradictory claims, i.e. contradiction being the *sine qua non* prerequisite for the realization of the principle of contradiction in a matrimonial nullity process.

Pursuant to an analysis of the regulations applicable to an ordinary matrimonial process and a documentary procedure, it should be noted that these lack any autonomous regulations on the criteria to be fulfilled by a *libellus*. Only can. 1676 § 1 MIDI and can. 1688 MIDI indicate that a *libellus* is an indispensable impulse for opening an ordinary or documentary matrimonial nullity procedure. Consequently, can. 1691 § 3 MIDI will apply to ordinary proceedings as well as a documentary process. Accordingly, can. 1502 CIC/83 and can. 1504 CIC/83 concerning presentation of a *libellus* and the applicable requirements apply to both types of procedures. Hence, it should be concluded that the range of requirements set for a *libellus*, whether in an ordinary matrimonial nullity procedure or in a documentary process, has not changed further to the process reform by Pope Francis. Nevertheless, in this context we cannot disregard R. Sztychmiller's rightful remark to the effect that in a documentary process, the requirements defined by the legislator in can. 1684 MIDI should be followed with respect to a *libellus* as well. In the author's opinion, a *libellus* should not only include the requirements specified in can. 1504 CIC/83, but also a brief, comprehensive and transparent presentation of the facts on which the petitioner based their claim, and indication of proofs that can be gathered immediately by the judge, with appended documents constituting the basis of the petition [Sztychmiler 2020, 71]. We cannot disregard the fact that the *ratio legis* for a documentary process and for a briefer matrimonial process before the bishop is not only to simplify the procedures leading to the determination of a case to declare nullity of a marriage but also to streamline such procedures, while simultaneous compliance with the requirements of the judicial procedures which ensure to the maximum extent the determination of the objective truth about a marriage.

A separate reference needs to be made to a briefer matrimonial process before the bishop, in terms of the formal requirements defined for a *libellus*. The criteria for a *libellus* were defined on a hybrid basis in the *coram Episcopo* process. In accordance with can. 1684 MIDI, the norms of can. 1504 CIC/83 will apply to the construction of a *libellus*, identical to the requirements applicable to the construction of a *libellus* in an ordinary process and a documentary process. However, can. 1684 MIDI contains certain additional and partially autonomous norms concerning the formal requirements for a *libellus*, in the form of a short, comprehensive and transparent presentation of the facts on which the petition is based, with a reference to proofs that can be immediately collected by the judge and exhibit the documents, in an attachment, upon which the petition is based. It should be noted here that the requirements specified for a *libellus* in a process before the bishop, concerning a brief, complete

and clear presentation of facts, mirror the norm concerning an oral contentious process referred to in can. 1658 § 1, 1º CIC/83. This analogy is similar for the obligation to gather proofs that can be collected immediately by the judge in the context of can. 1658 § 1, 2º CIC/83. On the other hand, the obligation to attach documents on which the petition is based is a restatement of the norm in can. 1658 § 2 CIC/83, which also relates to an oral contentious process. The above clearly implies a similarity of the regulations on matters relating to *libellus*, whether in a briefer process before the bishop pursuant to can. 1684 MIDI or in an oral contentious process according to can. 1658 CIC/83.

Another view expressed in the doctrine of canon law is that in an oral process, the principle of contradiction is valued higher than other types of process [Dzięga 2007, 318]. The regulations on the requirements for a *libellus* in a briefer process before the bishop, similar to those applicable to a *libellus* in an oral contentious process, may imply that the extent of the contradiction principle will be broader in *processus brevior* than in an ordinary matrimonial nullity process, or in a documentary process. It needs to be emphasized very strongly that in processes for declaration of nullity of a marriage, in accordance with can. 1691 § 1 CIC/83, Pope Francis maintained the prohibition to resolve cases through an oral contentious process. This prohibition was based on the intention to ensure a fair resolution in matters of such importance as the validity of the matrimonial bond, with due respect of the principle of its indissolubility, which was clearly emphasized in the assumptions of Pope Francis's reform [Pieron 2015, 231].

As we analyze the reform by Pope Francis in respect of the criteria for a *libellus*, we cannot omit a reference to the provision of can. 1675 MIDI, requiring the judge to be assured that the marriage has irreparably failed, such that conjugal living cannot be restored, before the judge accepts a case. As reasonably noted in the doctrine of canon law, the implemented variation indicates that Pope Francis does not promote nullity of marriage for reason of the sanctity of the matrimonial bond. The reform by Francis rules out any proceedings in cases when the *libellus* only implies that a basis for a petition may only be revealed in the future [Krajczyński 2015, 67]. Moreover, the changes introduced through Pope Francis's reform relating to the assurance of failure of the matrimonial bond, as conditions for a process to declare nullity of marriage, show us that *iudicium* can only occur when convalidation of the marriage and restoration of conjugal living is no longer possible [Rozkrut 2015, 89–90].

2. IDENTIFICATION OF THE SUBJECT-MATTER OF THE PROCESS

Filing a *libellus* in an ecclesiastic tribunal starts a series of legal actions aimed at determining the subject-matter of the process to declare nullity of marriage, of which the decree of citation is of extraordinary importance for the realization of the principle of contradiction. Acceptance of a *libellus* constitutes three essential legal relations between the judge and the petitioner, the respondent, and the subject-matter of the petition. With regard to the petitioner, the relationships which already existed at the *libellus* submission phase are being transformed, as the petitioner becomes a party to the process and takes over the obligations transpiring from the course of the process. The respondent, on the other hand, sets up the initial process relation with the judge, arising from the respondent being established as a party to a case to declare nullity of marriage. The final relation into which the judge is entering is that with the subject-matter of dispute, for which the judge is responsible until the issuance of a final judgment [Greszata 2007, 145].

Citation is the formal act enabling initialization of contradiction of claims between the petitioner and the respondent [Dotti 2005, 83]. The respondent's statement of their view on the *libellus* is an act of particular importance for further proceeding. Judicial practice demonstrates the different views on facts and their interpretations which are typically presented by the respondent, when compared to those presented by the petitioner. Moreover, the defendant's response often indicates new evidence or emphasizes other events that undermine the petitioner's claims. This is how the dispute emerges, continuing throughout the proceedings thereafter, and the case will be in the jurisdiction of the judge that accepted the *libellus* [Dzięga 1992, 158–59].

Presentation of a legally meaningful challenge to the validity of a marriage is tantamount to formal occurrence of a contradiction [Greszata 2003, 244]. The matter of identifying the subject-matter of the process is certainly related to the scope of applicability of the principle of general availability and the principle of secrecy of proceeding in a process to declare nullity of a marriage. The mutual establishment of the two process principles determines the manner in which the parties are informed of the pending process and their effect on the accessibility of the process files for the parties, which is highly relevant to the principle of the right to defence and the principle of contradiction. The extent of available information regarding the essence of a pending matrimonial nullity process and the consequences thereof definitely have an effect on the process steps undertaken by the parties. Only this kind of knowledge will lead to presentation of contradictory proofs.

However, it should be borne in mind that the legal defence opportunity does not only encompass the right to technical defence but also the right to undertake legal measures. The above is the right to present a case to the

competent ecclesiastic judge in order to defend one's claims. This emphasizes the principle of contradiction which, in association with the principle of equality of the parties, enables adequate process measures to be undertaken during the dynamic phase of the process [Nanni 2009, 33]. Hence the close relationship between the right to defence and the contradiction principle, which has also been noted in subject-matter literature, pointing out that the right to defence is *ius ad contradictorium* as well as *ius ad auditionem iudiciale* [Acebal Luján 1993, 31]. Here, it would be reasonable to reaffirm the 1989 address of St. John Paul II to the Tribunal of the Roman Rota, concerning the importance of the right to defence, in which the Pope strongly emphasized that it is essential to "remind all engaged in the administration of justice that according to the sound jurisprudence of the Roman Rota, in cases of matrimonial nullity the party who may have renounced the exercise of the right to defence should be notified of the formula of the question to be judged, of every possible new demand of the opposing party, as well as of the definitive judgment" [Rozkrut 2003, 133]. What is notable in this context is the inappropriate proceeding of certain ecclesiastic tribunals, in which the respondent is completely excluded from trial. In such cases, the judge fails to communicate the basis for a petition for declaration of matrimonial nullity, even though such a communication is an integral part of the process, whereas the spouses and the defendant of the bond should be properly informed of the basis of the petition from the outset of the process, particularly as the formula of doubt is established. It turns out that the most common and most severe violation of a respondent's right to defence is that the respondent is not aware of the proofs presented against the validity of their marriage [Daniel 2014, 239–41].

As we relate to the reform by Pope Francis, we cannot disregard can. 1676 § 1 MIDI, obliging the judicial vicar, after receiving the *libellus*, if he considers that it has some basis, to admit it and to order that a copy be communicated to the defender of the bond and to the respondent, unless the *libellus* was signed by both parties. Consequently, the respondent would be acquainted with the *libellus* immediately upon its admission to trial, i.e. at the very beginning of the process. As rightfully noted in the doctrine, the respondent's right to be informed of the wording of the petition was particularly emphasized and appreciated in Pope Francis's reform. Thus, it seems reasonable not to follow the disposition of can. 1508 § 2 CIC/83 in such cases, as it is commonly criticized and objected against by the parties [Nowicka 2016, 40]. We should also concur with the claim that after the process reform by Pope Francis, a judicial vicar has the obligation to obtain assurance that the *libellus* not only reached the defendant of the bond but also the respondent, and to give them a period of fifteen days to express their views on the petition presented by the petitioner in the *libellus* [Rozkrut 2015, 93]. Another relevant obligation imposed on the judge, transpiring from the *Dignitas connubii* Process Instruction, to contact

the respondent, as presented in Article 126 § 1 [Stawniak 2007, 194]. An important regulation here is can. 1676 § 2 MIDI, additionally authorizing the official to summon the opposite party again to present their views on the case. The respondent's right to participate in the process and to undertake process steps aimed at determining the objective truth about the matrimonial bond, cannot be restricted in an arbitrary manner, even if the determination of the present place of domicile of the respective party is hindered. This is an even stronger argument against restriction of a party's rights as a consequence of neglecting the appropriate process steps [Wenz 2016, 261].

Therefore, T. Rozkrut is right to note that the official is obliged to undertake any and all possible process steps to obtain assurance that the respondent is informed of the process. Otherwise, without the respondent being given an opportunity to exercise their rights incorporated in the overall right to defence, the principle of contradiction in a process for declaration of nullity of a marriage is not fully realized [Rozkrut 2015, 97]. Hence, there can be no doubt that the matrimonial nullity process reformed by Pope Francis, at the preliminary stage when the parties to the process first intend to exercise their right to "proximity between the judge and the faithful," imposes a significant responsibility on a judicial vicar and auxiliary judicial vicars. They are the enforcers of the right to accept or reject a petition, to identify the subject-matter of the process, and to select the appropriate procedure for the case [Krajczyński 2015, 68–69].

As we review the *processus brevior* in the context of identifying the subject-matter of dispute, we should note that in view of the obvious nullity of marriage as the determining criterion for briefed proceeding, as well as the requirement for both spouses to give their consent to the proposed petition, or at least for the respondent not to object to the proposed petition, the subject-matter of the process is well known to both spouses, unlike in the case of an ordinary matrimonial nullity process, or a documentary process. The requirement specified in can. 1683, 1º MIDI is also relevant to the extent of the principle of contradiction in a briefed procedure before the bishop. In the latter case, contradictory claims regarding the subject-matter of the process are not raised by the spouses, who are in consent as to the reason of nullity of their matrimonial bond, whereas the contradiction principle is pursued as between the spouses and the defendant of the bond [Andrzejewski 2020, 16–17]. If a petition was proposed by one party and a judicial vicar sees an opportunity to proceed through a briefed procedure, the judicial vicar should request information from the respondent that did not sign the petition, together with the notification of the *libellus*, whether such a respondent will support the petition stated in the *libellus* and participate in the process (Article 15 *Ratio procedendi*, MIDI). There is no doubt in subject-matter literature as to the fact that a judicial vicar is entitled to address the respondent and to encourage the respondent to consider accessing the *libellus* presented by the petitioner

or completing the *libellus* with new elements and signings, so as to sanction a processus brevior [Rozkrut 2018, 182].

The process reform by Pope Francis in respect of identification of the subject-matter of the process in a documentary procedure makes a reference to the regulations of can. 1676 MIDI, without introducing any autonomous amendments in this respect, in accordance with can. 1688 MIDI. In this procedure, it is still required to attach a *libellus* to the other party's petition. The function of this obligation is to realize the principle of contradiction and the right to defence, as well as to facilitate the process of determination of the truth by the judge and obtaining moral assurance necessary for resolving on the case [Rozkrut 2014, 89–90]. Hence, there is no dispute as to the requirement for a copy of the *libellus* to be served upon the defendant of the bond as well as the respondent, unless the *libellus* was signed by both parties. We should concur here with R. Sztychmiler in that the reference to can. 1676 MIDI done by the Legislator in the documentary process is excessively broad in terms of application of the arrangements stipulated in can. 1676 § 3–4 MIDI to a documentary process [Sztychmiler 2020, 71]. On the other hand, it does not seem appropriate to disregard can. 1676 § 2 MIDI in a documentary process. First, the above references process norm is not contradictory to the nature of the documentary process, as may be the case with non-viable norms of can. 1676 § 3–4 MIDI, while it conforms *de lege lata* to the norm of can. 1688 MIDI. Second, there seems to be no *ratio* justifying a respondent in a documentary process being deprived of the guarantees transpiring from the right to be informed of the subject-matter of the process, and therefore to exercise their process entitlements transpiring from the principle of the right to defence and the right of contradiction. It further transpires from the requirement imposed on all the *iudicium* participants to seek objective truth about the marriage, like it is the case with an ordinary matrimonial nullity trial and in a briefed procedure. Moreover, the nature of the briefed procedure before the bishop and of the documentary process both follow the same direction, aiming at streamlining and facilitating the procedure.

CONCLUSIONS

It should be concluded that the process reform introduced by Pope Francis in 2015 extended the range of applicability of the principle of contradiction in a process for declaration of nullity of a marriage with respect to the prerequisites for contradictory proceedings in a canon law process concerning: the *libellus*; the subject-matter of the process. As regards the modification of the requirements for the *libellus*, it should be claimed that in addition to the requirements presented in the provision of can. 1504 CIC/83, like in the case of the briefed procedure before the bishop, the *libellus* has to meet the following

requirements: brief, complete and clear presentation of the facts on which the petitioner bases their claim, and indication of proofs that can be collected immediately by the judge, with appended documents in an exhibit that constitute the basis for the petition. This kind of a normative arrangement not only seems reasonable, on the grounds of the simplified character of the briefed procedure before the bishop and the documentary process, but is also aimed at streamlining and facilitating matrimonial nullity trials. At the same time, the diocesan bishop was established on a mandatory basis in the briefed procedure and on an optional basis in the documentary process as the guarantor of respect of the principle of inseparability of marriage. With regard to a briefed procedure before the bishop, the requirement for joint presentation of a *libellus* by the spouses seems to be excessively stringent, particularly considering the fact that this procedure is intended to apply only to cases of particular obviousness from the viewpoint of the criteria constituting the basis for declaration of nullity of a marriage, whereas the decision on the election of the applicable process option is reserved to the competence of the judicial vicar.

As regards the prerequisite of identifying the subject-matter of the dispute, it should be noted that the Legislator continuously emphasizes communication of such subject-matter to other participants of the process, specifically through the obligation to serve the *libellus* upon the party that did not sign it and upon the defender of the bond. Moreover, in his reform act, Pope Francis gave even more prominence to this requirement, enabling the judicial vicar in an ordinary matrimonial nullity process, in a briefed process or in a documentary process to summon the party again whenever he does not have adequate assurance that the respondent was given an opportunity to become acquainted with the subject-matter of the case. In the context of the importance attributed by Pope Francis to the communication of the subject-matter of the process to the respondent, the postulated modification of the instructions in can. 1508 § 2 CIC/83, in which the authority of the judge to not serve the *libellus* upon the respondent for valid reasons, should be considered proper and justified. This is even more appropriate considering that this authority is practically never exercised in judicial processes for declaration of nullity of a marriage.

REFERENCES

Acebal Luján, Juan. 1993. "Principios inspiradores del derecho procesal canónico." In *Cuestiones básicas de derecho procesal canónico. XII Jornadas de la Asociación Española de Canonistas, Madrid, 22–24 abril, 1992*, edited by Julio Manzanares, 13–42. Salamanca: Universidad Pontificia de Salamanca.

Andrzejewski, Maciej. 2020. "Emergence of Contradiction in the Process to Declare the Nullity of Marriage." *Biuletyn Stowarzyszenia Kanonistów Polskich* 33:7–21.

Daniel, William. 2014. "Ongoing Difficulties in the Judicial Praxis of American Tribunals in Causes of the Nullity of Marriage." *The Jurist* 74, no. 2:215–63.

De Diego-Lora, Carmelo. 2011. "Strony w sprawie." In *Codex Iuris Canonici. Kodeks Prawa Kanonicznego. Komentarz. Powszechne i partykularne ustawodawstwo Kościoła katolickiego. Podstawowe akty polskiego prawa wyznaniowego. Edycja polska na podstawie wydania hiszpańskiego*, edited by Piotr Majer, 1111–20. Kraków: Wolters Kluwer.

Dotti, Federica. 2005. *Diritti della difesa e contraddittorio: garanzia di un giusto processo? Spunti per una riflessione comparata del processo canonico e statale*. Roma: Gregorian University Press.

Doyle, Sean. 2013. "The Libellus: Rejection and Recourse." *The Jurist* 73, no. 2:371–438.

Dzięga, Andrzej. 1992. *Kościelny proces ustny.* Lublin: Redakcja Wydawnictw KUL.

Dzięga, Andrzej. 2007. "Ustny proces sporny." In *Komentarz do Kodeksu Prawa Kanonicznego*. Vol. V: *Księga VII. Procesy*, edited by Józef Krukowski, 315–24. Poznań: Pallottinum.

Greszata, Marta. 2003. "Problem kontradyktoryjności w kanonicznym postępowaniu o nieważność małżeństwa." W *Kościelne Prawo Procesowe. Materiały i Studia*, vol. III, edited by Andrzej Dzięga, and Mirosław Wróbel, 239–58. Lublin: Wydawnictwo Diecezjalne Sandomierz.

Greszata, Marta. 2007. *Kanoniczne procesy małżeńskie. Pomoc dla studentów.* Lublin: Wydawnictwo Diecezjalne i Drukarnia w Sandomierzu.

Greszata, Marta. 2008. *Iudicium cum principia. Kodeksowa weryfikacja wybranych zasad procesowych w kanonicznych sprawach o nieważność małżeństwa*. Lublin: Wydawnictwo Diecezjalne i Drukarnia w Sandomierzu.

Greszata-Telusiewicz, Marta. 2019. *Salus animarum jako istota reformy procesowej Papieża Franciszka*. Lublin: Wydawnictwo KUL.

Greszata-Telusiewicz, Marta. 2020. "The Principle of Salus Animarum as the Essence of the Contradictory Character of the Canonical Trial." *Roczniki Nauk Prawnych* 30, no. 1:173–89.

Jenkins, Ronny. 2016. "Applying Article 14 of Mitis Iudex Dominus Iesus to the Processus Brevior in Light of the Church's Constant and Common Jurisprudence on Nullity of Consent." *The Jurist* 76, no. 1:231–65.

Krajczyński, Jan. 2015. "Proces zwyczajny." In *Proces małżeński według motu proprio Mitis Iudex Dominus Iesus*, edited by Jan Krajczyński, 53–74. Płock: Płocki Instytut Wydawniczy.

Malecha, Paweł. 2020. "Uwagi Sygnatury Apostolskiej na temat funkcjonowania polskiego wymiaru sprawiedliwości w kontekście corocznych sprawozdań." In *Małżeństwo i jego nieważność a współczesne sądownictwo Kościoła. Materiały z ogólnopolskiego spotkania pracowników sądownictwa kościelnego w Gródku nad Dunajcem w dniach 10–11 czerwca 2019 roku*, edited by Tomasz Rozkrut, 17–38. Tarnów: Wydawnictwo Diecezji Tarnowskiej Biblos.

Nanni, Alessia. 2009. *Il diritto di difesa nel processo matrimoniale canonico*. Roma: Pontificia Università Lateranense.

Nowicka, Urszula. 2016. *Proces o nieważność małżeństwa po Mitis Iudex Dominus Iesus w pytaniach i odpowiedziach*. Warszawa: Drukarnia Garmond.

Pieron, Bartłomiej 2015. "Art. 7/Normy generalne." In *Praktyczny komentarz do Listu apostolskiego motu proprio Mitis Iudex Dominus Iesus papieża Franciszka*, edited by Piotr Skonieczny, 227–33. Tarnów: Wydawnictwo Diecezji Tarnowskiej Biblos.

Rozkrut, Tomasz. 2003. *Jan Paweł II do Roty Rzymskiej*. Tarnów: Wydawnictwo Diecezji Tarnowskiej Biblos.

Rozkrut, Tomasz. 2014. "Dowodzenie w małżeńskim procesie dokumentalnym." In *Dowodzenie w procesach kościelnych*, edited by Justyna Krzywkowska, and Ryszard Sztychmiler, 87–105. Olsztyn: Zakład Poligraficzny Uniwersytetu Warmińsko-Mazurskiego.

Rozkrut, Tomasz. 2015. “Art. 3/ Tytuł III Wprowadzenie i instrukcja sprawy.” In *Praktyczny komentarz do Listu apostolskiego motu proprio Mitis Iudex Dominus Iesus papieża Franciszka*, edited by Piotr Skonieczny, 89–121. Tarnów: Wydawnictwo Diecezji Tarnowskiej Biblos.

Rozkrut, Tomasz. 2018. “Wybrane oraz praktyczne uwagi odnoszące się do zreformowanego przez papieża Franciszka procesu dotyczącego orzeczenia nieważności małżeństwa (w szczególności w przedmiocie procesu biskupiego).” In *Reforma procesowa papieża Franciszka – pierwsze doświadczenia. Materiały z ogólnopolskiego spotkania pracowników sądownictwa kościelnego w Gródku nad Dunajcem w dniach 12–13 czerwca 2017 roku*, edited by Tomasz Rozkrut, 179–92. Tarnów: Wydawnictwo Diecezji Tarnowskiej Biblos.

Stawniak, Henryk. 2007. “Wprowadzenie sprawy.” In *Komentarz do Instrukcji procesowej „Dignitas connubii”*, edited by Tomasz Rozkrut, 179–214. Sandomierz: Wydawnictwo Diecezjalne i Drukarnia w Sandomierzu.

Sztychmiler, Ryszard. 2003. *Ochrona praw człowieka w normach kanonicznego procesu spornego*. Olsztyn: Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego.

Sztychmiler, Ryszard. 2020. “Wybór właściwej formy procesu małżeńskiego.” In *Materiały z ogólnopolskiego spotkania pracowników sądownictwa kościelnego w Gródku nad Dunajcem w dniach 10–11 czerwca 2019 roku*, edited by Tomasz Rozkrut, 63–82. Tarnów: Wydawnictwo Diecezji Tarnowskiej Biblos.

Wenz, Wiesław. 2016. *Proces o nieważność małżeństwa według Motu Proprio Mitis Iudex Dominus Iesus Papieża Franciszka w tradycji kanonicznej*. Wrocław: Papieski Wydział Teologiczny.

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SELECTED TAX PROBLEMS OF ADMINISTRATIVE ENFORCEMENT OF TAXES AND LOCAL FEES

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Abstract. Article 13 of the Tax Ordinance lists the tax authorities. In the case of local government units, the tax authority is the head of the local authority, the mayor, the head of the district authority and the head of the voivodship, as the authority of first instance, and the local government board of appeals, as the authority to appeal against the decision of the head of the local authority, the mayor. The provision of Article 13 of the Tax Ordinance is imprecise with respect to the jurisdiction of instances because it regulates the jurisdiction of the appellate authorities only with respect to decisions, leaving aside the issue of provisions. In practice, however, there is no doubt that the body appealing against decisions is also the body appealing against provisions.

Keywords: tax authorities, administrative enforcement, taxes and local fees

INTRODUCTION

The Act on enforcement proceedings in administration has been amended as of 30 July 2020 and as of 20 February 2021. The introduced changes covered not only tax dues enforced for the benefit of communes or the State Treasury, but also all public-legal dues for the benefit of local government units at all levels, enforced in administrative enforcement. In communes the compulsory enforcement of arrears of real estate tax, agricultural tax, forestry tax, tax on means of transport, municipal waste management fee, as well as other public receivables such as fees for road lane occupation, fees for placing infrastructure in the road lane has been changed, fees for the increase in the value of real estate (planning rent), adiacencka fee, mining fee, fees for the use

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of pre-school education in public pre-school education establishments run by local government units and fees for the use of meals in these establishments, subsidy returns or enforcement of fines imposed by administrative mandate.

1. ADMINISTRATIVE ENFORCEMENT

The tax authorities are listed in Article 13 of the Tax Ordinance (Tax Code).[1] In the case of local government units (LGU's), the tax authorities are: the head of commune (mayor), head of district (district president) and marshal of the voivodship (head of voivodship) – as the body of first instance, and the local government appeals board – as the body appealing against the head of commune (mayor's) decision. The provision in Article 13 of the Civil Code is imprecise with respect to the jurisdiction of instances, because it regulates the jurisdiction of the appellate authorities only with respect to decisions, leaving aside the issue of provisions. In practice, however, there is no doubt that the body appealing against the decision is also the body appealing against the provisions. Proceedings aimed at compulsory execution of obligations arising from the norms of administrative law, including collection of unpaid taxes, are regulated by the act of June 17, 1966 on enforcement proceedings in administration.[2] It specifies, among other things, the procedure to be followed by creditors in cases where the obligated persons evade performance of their duties, as well as the procedure to be followed by enforcement authorities and the coercive measures to be taken by them in order to bring about or secure performance of the obligations. Enforcement proceedings are conducted by the enforcement authority, which institutes them at the request of the creditor, on the basis of the enforcement title issued by the creditor. The Law on Enforcement Proceedings specifies the enforcement authorities. With the exceptions listed in the Act, the head of the tax office is the enforcement authority authorised to apply all enforcement measures in administrative enforcement of monetary claims, as well as to secure such claims (Article 19(1) A.P.E.A.). One of these exceptions is Article 19(2) A.P.E.A., in which the legislator decided that the

[1] Act of 29 August 1997, the Tax Ordinance; Journal of Laws of 2021, item 1540.

[2] On 30 July 2020, the Act on Amending the Act on Enforcement Proceedings in Administration and Certain Other Acts (Journal of Laws item 1427 as amended) entered into force, which amended the Act of 17 June 1966 on Enforcement Proceedings in Administration (Journal of Laws of 2020, item 1427 [hereinafter: A.P.E.A.]). The changes introduced by the amendment covered the issues of pre-enforcement proceedings and enforcement proceedings carried out by heads of villages, mayors (city presidents), starosts and province governors with respect to tax and public law revenues to which administrative enforcement applies. Another amendment entered into force on 20 February 2021. With respect to pre-enforcement proceedings, the fundamental change affected reminders – see the Regulation of the Minister of Finance, Funds and Regional Policy of 4 December 2020 on data contained in a reminder, Journal of Laws item 2194.

competent authority of a municipality with the status of a city, mentioned in separate regulations, and of a municipality that is part of the administrative district of Warsaw, is the enforcement authority authorised to use all enforcement measures, except for execution against real property, in administrative enforcement of pecuniary receivables which that authority is competent to establish or establish and collect. These receivables are primarily taxes and fees regulated in the Act of 12 January 1991 on local taxes and fees.[3]

Pursuant to Article 1c L.T.F., the head of the local government (mayor, town president) is the competent tax authority in matters relating to the levies regulated therein. The local government appeals board is the body which appeals against the decision of the mayor. This therefore applies to real estate tax, agricultural tax, forestry tax, vehicle tax, dog ownership tax, market tax, local tax and spa tax. Pursuant to specific provisions, municipalities are also competent to determine or impose, inter alia, an additional fee for parking in a paid parking zone, an ad valorem fee or a penalty for cutting down trees without a permit.

2. INITIATION OF ENFORCEMENT PROCEEDINGS

The Ordinance of the Minister of Finance, Funds and Regional Policy of 18 November 2020 on the procedure for money creditors specifies, among other things, the procedure for money creditors when taking action to apply enforcement measures.[4] If the creditor is not at the same time the enforcement authority, he should immediately refer the enforcement title to the locally competent head of the tax office. If, on the other hand, the creditor has the status of an enforcement authority, he should immediately apply an enforcement measure himself.[5]

If the creditor is also the enforcement authority authorised to apply enforcement measures to a limited extent, but the enforcement proceedings conducted by the creditor have been wholly or partially ineffective, the creditor must refer the enforcement title to the locally competent head of tax office with a view to conducting the enforcement proceedings. Such authorities,

[3] Journal of Laws of 2019, item 1170 [hereinafter: L.T.F.].

[4] Ordinance of the Minister of Finance, Funds and Regional Policy of 18 November 2020 on proceedings of money creditors, Journal of Laws item 2083; Ordinance of the Minister of Finance of 24 July 2020 on transfer of enforcement title and other documents to the enforcement authority, Journal of Laws item 1310.

[5] Ordinance of the Minister of Finance, Funds and Regional Policy of 18 February 2021 on cooperation between the creditor, the enforcement authority and the debtor of the seized debt in enforcement proceedings of monetary receivables, Journal of Laws item 320.

unable to apply the measure of execution from real estate, are presidents of towns carrying out the execution on their own.[6]

3. PROCEDURES FOR COLLECTION AND RECOVERY OF LOCAL TAXES AND CHARGES

Each procedure applied by the local government applies to the collection and recovery of debts to which the provisions of the Act on enforcement proceedings in administration apply. The procedures are to define the principles of proceedings aimed at the recovery of receivables, together with interest and other fees arising after the decision to initiate the recovery procedure. Implementation of procedures is to ensure proper and timely collection of taxes and fees of public law nature and to limit the risk of time-barring of public law receivables in connection with not taking steps to enforce them.

In each procedure, managers of units are obliged to control, on an ongoing basis, entering data that enable identification of the payer, type and amount of receivables and payment dates. The recording of amounts due for payment together with the data of persons obliged and payment deadlines should be performed on an ongoing basis, but not later than within 3 to 5 days from the date the decision becomes final or another event occurs that results in the obligation to pay public-law debts to the local government units.

In the case of declarations submitted by taxpayers, recording takes place with the date of receipt in the local government except for declarations in relation to which it is necessary to undertake verification activities referred to in the Tax Ordinance. In case the due amount has not been paid on time, an employee of the tax accounting unit automatically prepares and delivers a reminder to the obliged person, in accordance with the rules specified in the regulations on the procedure of creditors of money receivables in administrative enforcement. It is permissible for employees to undertake information activities referred to in the provisions of the Regulation of the Minister of Finance on the procedure of creditors of monetary receivables , aimed at voluntary performance of the obligation by the obliged person, if there is a justified assumption that the obliged person will voluntarily perform the obligation without the need to initiate administrative enforcement proceedings. The actions may be taken, in particular, through an Internet information portal, short text message (sms), e-mail, telephone or fax and may include information about the deadline for payment of the monetary receivable or its expiration, the amount of the monetary receivable, type and amount of interest for failure to pay the monetary receivable on time as well as threatened administrative

[6] Ordinance of the Minister of Finance, Funds and Regional Policy of 18 November 2020; Ordinance of the Minister of Finance of 24 July 2020.

enforcement and possible enforcement costs. The selection of these methods is made according to the information available and the technical possibilities of the municipality [Wołowiec 2016a, 10–12].

In practice, the actions taken should be documented by means of an official note or a printout of an e-mail. In case of information actions taken, an employee sends a reminder to the debtor no earlier than after 7 days and no later than 21 days from the date of taking those actions. The amendment of Article 15 A.P.A. obliges the creditor to include a reminder that if the debtor fails to fulfil the obligation in full within 7 days from the date of service of the reminder, the debtor is obliged to notify the creditor of a change in the address of his place of residence or registered office. However, if the duty to notify is not fulfilled, delivery of the creditor's letter (reminder notice) to the current address is effective. Upon expiration of the payment deadline specified in the reminder, an employee of the tax accounting unit draws up an enforcement title no later than three months after expiration of the payment deadline specified in the reminder.

The enforcement title shall be drawn up in accordance with the requirements provided for in the regulations on administrative enforcement of monetary receivables and shall be sent to the appropriate head of the tax office. If, after the delivery of a reminder notice, the debtor files a request for relief from his obligations, it is permissible not to send the enforcement title to the head of the tax office until the debtor's request has been considered [Wołowiec 2016b, 6–11].

The amendment to the Act on Enforcement Proceedings in Administration, July 30, 2020, introduced in Article 26(1c) A.P.E.A., the obligation to transfer enforcement titles to the head of the tax office by electronic means – using the ICT system or means of electronic communication. If for technical reasons the electronic way is not possible, then – the creditor transfers the enforcement titles to the head of the tax office by Polish post within the meaning of the Postal Law,[7] by its employees and other authorized persons or bodies. In practice, this means that the head of the local authority, mayor (city president) is obliged to transmit the enforcement titles to the head of the tax office via the ICT system. And if those systems are not working, the creditor has the right to transfer the enforcement titles in paper form. The transitional provisions introducing amendments to the Act on Enforcement Proceedings in Administration as of 30 July 2020, in particular Article 28 of the Act amending the Act on Enforcement Proceedings in Administration and certain other acts, provide that until the teleinformatics[8] system is operational, by 30 June 2021, the creditor had the right to transmit the enforcement titles and other

[7] Act of 23 November 2012, the Postal Law, Journal of Laws of 2020, item 1041 as amended.
[8] Aplication e-TW or e-PUAP.

information to the enforcement authority in paper form or through the creditor's and enforcement authority's electronic mailbox.[9]

In accordance with the ordinance of the Minister of Finance on designation of an authority to run the ICT system designed to transmit enforcement requests and enforcement titles or the required information to the head of the tax office, the Director of the Tax Administration Chamber in Szczecin has been designated to run the ICT system. This authority managing the ICT system, upon the creditor's application, grants the creditor access to this system to the extent necessary to initiate or conduct the enforcement proceedings. A model of this application has already been published on the portal of creditors and enforcement authorities.[10]

Each employee responsible for debt collection is obliged to analyze the receivables due, as well as to take all actions aimed at preventing the statute of limitations. In particular, an analysis should be made as to whether it is reasonable and rational to establish a security on the debtor's assets by way of establishing a compulsory mortgage on real property belonging to the debtor or a fiscal pledge on movable property. In addition, in cases where the enforcement proceedings have been discontinued due to lack of debtor's assets, once a year we should take action to disclose the components of debtor's property that may be subject to enforcement [Wołowiec 2015, 13–15].

4. EXECUTIVE TITLE AFTER LEGAL CHANGES IN 2021

In order to initiate administrative enforcement of monetary claims, an executive title properly issued by the creditor is required. In addition to the enforcement title needed to carry out administrative enforcement of local taxes and fees, there is a further enforcement title. The creditor issues a further enforcement title only in three cases: in the event of a concurrence of enforcement proceedings, in the event that the enforcement authority competent to re-open administrative enforcement proceedings does not hold the previous enforcement title and in the event that the monetary receivable is secured with a compulsory mortgage, including a forced maritime mortgage.

[9] Announcement of the Minister of Finance, Funds and Regional Policy of 15 March 2021 on the deadline for launching the ICT system intended for transmitting enforcement titles to the head of the tax office, Official Gazette of the IFFiPR item 25; Announcement of the Minister of Finance, Funds and Regional Policy of 27 April 2021 amending the announcement on the deadline for launching the ICT system intended for transmitting enforcement titles to the head of the tax office, Official Gazette of the IFFiPR item 63.

[10] Ordinance of the Minister of Finance of 10 June 2020 on the designation of an authority to operate a teleinformation system designed to transmit enforcement requests and enforcement titles or required information to the head of the tax office, Journal of Laws item 1072.

The next enforcement title is the newest of all types of enforcement titles. It was introduced to enforcement proceedings in administration by the legislator in the amendment of the Act on Enforcement Proceedings in Administration of 30 July 2020. The most common reason for issuing a subsequent enforcement title is the necessity to make a security on the property included in the joint property of the obligor and his spouse. The next reason for issuing another writ of execution is the execution from the real estate included in the common property of the obligee and his spouse. The last one is the execution from the object of the compulsory mortgage in case of transferring this object to an entity other than the obliged one [Kmieciak 2021].

The creditor's basic obligation is to immediately notify the enforcement authority of the events enumerated in Article 32a A.P.E.A. The creditor should immediately notify the head of the tax office of any change in the amount of the pecuniary receivable covered by the enforcement order resulting from its expiry in whole or in part, in particular when the expiry results from: enforcement of the pecuniary receivable by another enforcement authority, prescription of the pecuniary receivable and payment of the pecuniary receivable to the creditor. The manner of providing the enforcement authority with this information is regulated in the regulation on cooperation between the creditor, the enforcement authority and the debtor of a seized claim in monetary enforcement proceedings.[11]

It is the duty of the head of the local government, the mayor of a town or city to promptly notify the head of the tax office of any event that might give rise to suspension or discontinuance of enforcement proceedings. Enforcement proceedings shall be suspended in whole or in part: in the event of a stay of execution, postponement of the deadline for performance of an obligation or spreading the payment of a pecuniary receivable into instalments; in the event of the death of the obligor if the obligation is not strictly related to the obligor, and enforcement is carried out with property or a property right that has not expired due to the death of the obligor; in the event of the obligor losing the capacity to perform legal acts and the lack of his/her statutory representative; at the request of the creditor and in other cases provided for in the laws.

In accordance with Article 59(1) A.P.E.A., the prerequisites for discontinuance of the enforcement proceedings are: inadmissibility of administrative enforcement, including due to the obligee, failure to meet the requirements set forth in Article 27 of the Act, the death of the obligee, when the obligation is strictly related to the obligee, or when it is not strictly related to the obligee, but enforcement is conducted exclusively from a property right, which has expired due to the death of the obligee, when enforcement proceedings suspended at the request of the creditor have not been resumed before the

[11] Ordinance of the Minister of Finance, Funds and Regional Policy of 18 February 2021.

lapse of 12 months from the date of filing the request, as well as in a situation where the request for discontinuance of enforcement proceedings is submitted by the creditor; when separate laws so provide. The head of the tax office shall immediately notify the head of the tax office of any event that causes the reason for the suspension of the enforcement proceedings to cease; the period for which interest is not charged for failure to pay the amount due on time as a result of an event occurring after the date of issuing the enforcement title; information obtained about the assets or source of income of the obligor.

5. AMENDMENT OF THE ACT ON ENFORCEMENT PROCEEDINGS IN ADMINISTRATION OF 20 FEBRUARY 2021

When directing the writ of execution for administrative enforcement, the creditor shall provide the enforcement authority with the writ of execution together with the information regarding the assets of the debtor or the source of his/her income – if the creditor has such information. As a rule, it is possible to submit the enforcement title for enforcement without indicating the assets of the debtor. However, as practice shows, the execution in which the creditor indicates the debtor's assets is carried out immediately and, most importantly, effectively. Therefore, it is in the creditor's interest to exercise this right as often as possible. One of the solutions is to summon the obliged person to submit a statement about his/her assets and sources of income as well as about the truth and completeness of the statement.

The statement shall be submitted under pain of criminal liability for making a false statement, on a specified date, in writing or orally into minutes. The summons includes an instruction of the obliged person on the penal liability for making a false statement and information enabling the submission of a true and complete statement about the person's property and sources of income. The Minister of Finance, in the regulation on the declaration of the obligor on his/her assets and sources of income, as well as the truthfulness and completeness of the declaration and the request to submit such a declaration, indicated the elements of the request to submit such a declaration and the obligatory elements of the declaration itself. The regulation does not include a template of the summons or declaration, however, based on the applicable provisions of law, each of the creditors may prepare such a template on their own.[12]

With regard to determining the debtor's assets (Article 36 of the Act on enforcement proceedings), to the extent necessary to initiate or conduct the enforcement proceedings, the enforcement authority or the creditor may request

[12] Ordinance of the Minister of Finance of 15 July 2020 on the statement of the obliged person on his/her assets and sources of income, as well as on the truthfulness and completeness of this statement and the call for its submission, Journal of Laws item 1279.

information and explanations from the participants to the proceedings and request information from public administration bodies and organizational units subordinate to them as well as other entities. Information and explanations shall be provided free of charge by the participants to the proceedings.

6. RULES ON ISSUANCE OF REMINDERS

Non-compliance by a taxpayer with an obligation to pay tax resulting from a tax return or decision results in the necessity for the creditor to undertake, *ex officio*, debt collection activities. The first step is to send the taxpayer a written reminder. Administrative enforcement may be initiated if the creditor sends the taxpayer a written reminder after the expiration of the deadline for fulfillment of the obligation. The reminder should contain the elements specified in the Regulation of the Minister of Finance on the procedure of cash creditors. As the signature is not an obligatory element of the reminder, only the name and official position of the person authorized to act on behalf of the creditor are indicated [Wołowiec 2016c, 44–47].

The reminder is issued in one copy, the original is sent to the taxpayer, and the copy is saved in the computer system without the obligation to print another copy to be placed in the case file. There are no separate records of reminders – reminders are processed and collected in the computer system within the financial and accounting system. The deadline for payment of overdue amounts specified in the reminder is set for 7 days from the date of delivery of the reminder to the taxpayer.

The creditor sends the reminder to the taxpayer after the expiration of the deadline for payment of the amount due, when the total amount of the amount due, including interest, exceeds ten times the reminder costs. If the amount of the debt is lower, the reminder shall be issued no later than by 30 June of the following fiscal year. The reminders generated in the computer system should be verified before sending in order to ensure that they were issued correctly.

As of 20 February 2021, the content of the reminder is regulated by the regulation on data included in the reminder. Paragraph 2 of the regulation contains a closed catalog of enumerated elements of a reminder.

As of 20 February 2021, the amendment of the Act on enforcement proceedings in administration introduced the possibility of limitation of reminder costs. Article 15(3c)(first sentence) of the A.P.A. provides that the obligation to pay reminder costs is time-barred after 3 years, counting from the end of the calendar year in which the enforced obligation expired. As a rule, therefore, reminder costs as a liability are not imputed in the accounting equipment. There is no legal basis to allocate reminder costs that are due but not paid. Only for the reporting purposes, when reminder costs are presented in the Rb-27S report, the column of receivables shows the reminder costs paid.

Therefore, since the overdue reminder costs are not assigned anywhere, as a result of the statute of limitations on the obligation to pay them, there is no need to write them off. The statute of limitations on the obligation to pay reminder costs is 3 years, counting from the end of the calendar year in which the enforced obligation expired.

7. ACCOUNTING RECORDS OF TAXES AND INTEREST ON TAX ARREARS

An employee of the tax accounting unit is obliged to systematically verify the arrears covered by the reminder for a given period in order to check whether enforcement titles were issued for all arrears. What is important, before issuing the writ of execution, he/she should check whether the amount indicated in the writ of execution has not been credited to his/her bank account or via the Polish Post, or paid directly to the cash desk. Administrative enforcement may be initiated without prior delivery of a reminder in the cases referred to in the Regulation of the Minister of Finance on the definition of pecuniary receivables the enforcement of which may be initiated without prior delivery of a reminder.

In the case of postponement of the deadline for payment of a tax liability or payment in installments, the person keeping the analytical accounting records enters the decision into the computer system, the taxpayer's account and notifies the enforcement authority of the decision. If the decision expires due to the fact that the taxpayer did not pay the deferred tax or tax arrears with default interest within the period specified in the decision or did not pay any of the installments into which the tax or tax arrears were spread together with default interest, the decision restores the deadlines in accordance with the provisions of the Tax Ordinance Act and initiates recovery of these tax arrears.

In order to resume the enforcement proceedings, the enforcement authority shall be notified of the expiry of the decision on postponement or payment in instalments of the tax arrears and the enforcement authority shall be informed about the amount of the claimed cash receivable. The competent enforcement authority shall be immediately notified of any change in the status of the arrears covered by the writ of execution or expiry of the arrears as well as of any change affecting the enforcement proceedings. Notifications of the expiry of an obligation in whole or in part are signed by a person authorized to act on behalf of the creditor. In the course of verifying the recoverability of arrears by enforcement bodies, an employee of the tax accounting unit submits written inquiries on the status of enforcement titles.

If after the lapse of 1 year counting from the end of the year in which the writ of execution was issued to the external enforcement authority, no amounts have been paid to the tax account, or no information has been received about

the activities of the authority in the given proceedings – an inquiry is sent to the enforcement authority about the status of the enforcement proceedings. Subsequent inquiries are sent once a year. In the case of enforcement titles addressed to the own enforcement body, the status of the ongoing enforcement proceedings is agreed orally or in writing as required. In the case of the payment of arrears from enforcement titles to a bank account other than the bank account set aside for enforcement payments, an employee prints the payment document and forwards it to the appropriate unit carrying out administrative enforcement processes. It should be borne in mind that at present, in addition to the enforcement title, further enforcement title, modified enforcement title and lost enforcement title regulated so far by the Act on Enforcement Proceedings in Administration, a new one has appeared – another enforcement title.

Pursuant to Article 53(1) of the Code of Civil Procedure, interest on tax arrears is charged. Interest on tax arrears is recorded as: Wn 751 "Financial costs" and Ma 225 "Settlements with budgets," while payment to the tax office of interest on tax arrears respectively: Wn 225 "Settlements with budgets" and Ma 130 "Unit current account." Records of local taxes and fees are an integral part of the accounting records of the office and are kept using synthetic accounts of the office as a budgetary unit. Records of tax settlements are kept on: balance sheet accounts: synthetic accounts of the general ledger and analytical and detailed accounts of auxiliary ledgers; and off-balance sheet accounts used for settlements with third parties and with collectors within the scope of tax and fee payments collected by them and attributable to taxpayers' accounts: synthetic, analytical and detailed accounts. Records of taxes are kept in the following balance sheet synthetic accounts of the office's chart of accounts: 011 Fixed Assets, 020 Intangible Assets, 01 Cashier's Office, 30 Current Account of the Office, 140 Short-term Securities and Other Cash, 221 Budget Revenue Receivables, 226 Long-term Budget Receivables, 310 Materials, and 750 Finance Revenues and Expenses. Analytical accounts for synthetic accounts are maintained by type of taxes. Detailed accounts are kept for analytical accounts and are used for settlements with taxpayers, with collectors, with budget entities, with banks and with other entities.

Separate accounts are kept for each taxpayer and collector, as well as for each budget unit, bank and other entity.

Off-balance accounts include: 1) synthetic accounts: account 990 Settlements with third parties on account of their responsibility for tax liabilities of the taxpayer and account 991 Settlements with collectors on account of taxes collected by them that are attributable to taxpayers' accounts; 2) analytical accounts maintained by type of taxes; 3) detailed accounts of individual third parties and collectors.

On the balance sheet and off-balance sheet analytical and detailed accounts accounting records are kept taking into account the budget classification.

CONCLUSIONS

The Act of 11 September 2019 on Amendments to the Act on Administrative Enforcement Proceedings and Certain Other Acts and the Act of 4 July 2019 on Amendments to the Act on Administrative Enforcement Proceedings and Certain Other Acts made changes of a substantive and orderly nature early on. Their main objective was to simplify the administrative procedures applicable to administrative enforcement, which was to lead to an improvement in the situation of creditors and enforcement authorities. The legislator's main intention was to eliminate the problems resulting from overcomplicated, non-transparent procedures, unclear provisions or lack of unambiguous regulations. The legislator also undertook actions aimed at improving the legal situation of creditors in relation to debtors and administrative enforcement bodies, simplification and acceleration of procedures. One of the pillars of the amendment is the development and implementation of electronic solutions for quick generation and transmission of administrative enforcement titles from creditors of public law liabilities to the head of the tax office. To this end, the legislator has taken steps to develop interactive enforcement title forms and a special dedicated ICT system for communication between creditors and the enforcement authority. The changes introduced should significantly accelerate the completion of administrative enforcement proceedings in the traditional way (i.e. using paper enforcement titles).

The second solution involves the widening of the catalogue of participants to the proceedings on the issuance of a decision on the environmental conditions indicated in Article 74(3a), APIE, by adding the director of the national park in case of possible adverse impacts of the planned project on the park's natural assets. As a party to the administrative procedure, the director of the national park would be authorised to take all legal measures available to demonstrate the harmfulness of the planned project to the natural assets of the national park. The most important right is the possibility of challenging the findings of the environmental impact report. In particular, the director will be able to instruct specialists who have expertise to develop a counter-report. This document will be assessed by the decision issuing authority based on the same grounds as the investor's report on the environmental impact of the project. The cost of developing this document remains a separate issue. As stated above, in the case of such projects as a hard coal mine, the report (and thus a counter-report) would be a very comprehensive and complex document requiring the participation of specialists in many fields. It will therefore be

necessary to provide the national park with appropriate funding for developing counter-reports.

It seems that scholars in the field suggested the need for the searching of appropriate organisational and legal forms, calling on the legislature to create such conditions of "coexistence" of different values in order to ensure the effectiveness of nature protection of national parks [Łuczyńska–Bruzda 1985, 79–84]. So far, however, these postulates have not been fully embodied in the applicable legal regulations.

REFERENCES

Kmieciak, Halina. 2021. "Egzekucja administracyjna podatków i należności publicznoprawnych po zmianach." https://frdl.org.pl/opinie-frdl/egzekucja-administracyjna-podatkow-i--naleznosci-publicznoprawnych-po-zmianach [accessed: 14.01.2022].

Wołowiec, Tomasz. 2015. "Trwałość postępowania egzekucyjnego." *Prawo Finansów Publicznych* 12:13–15.

Wołowiec, Tomasz. 2016a. "Egzekucja należności gminy z tytułu opłaty adiacenckiej i renty planistycznej." *Prawo Finansów Publicznych* 8:10–12.

Wołowiec, Tomasz. 2016b. "Daniny publiczne jako kategoria należności publicznoprawnych." *Prawo Finansów Publicznych* 7:6–11.

Wołowiec, Tomasz. 2016c. "Środki ochrony prawnej dłużnika." *Prawo Finansów Publicznych* 3:44–47.

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THE DEGREE OF AN ACT'S HARMFULNESS TO PUBLIC FINANCES UNDER THE ACT OF 17 DECEMBER OF 2004 ON LIABILITY FOR BREACHING THE PUBLIC FINANCE DISCIPLINE

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Abstract. An act's harmfulness to public finances is graded. The legislator does not specify this harmfulness in greater detail and only relies on an example of a list of premises which should be taken into account when determining its degree. At the same time, the legislator decided that only a marginal degree of harmfulness of an act is a basis to refuse to initiate or to discontinue proceedings in a given case. Stating that the degree of harmfulness of an act is not significant, is significant or gross obliges authorities adjudicating in cases for breaches of public finance discipline to draw specific consequences against the infringer. The author focuses here on a discussion of vagueness of the "degree of an act's harmfulness to public finances" and refers to the premises of assessment of this degree as well as problems that arise in this context at the stage of application of law in the decision-issuing practice. It was deemed necessary to mostly rely on the practical meaning of the concepts discussed, which affected the study's methodology. The author intends to point out potential problems when interpreting under-defined terms in the Act on liability for breaching the public finance discipline, to determine the meaning of "an act's harmfulness to public finances" in the pursuit of values encoded in regulations of this act and to demonstrate practical application of the measure in question. The study's methodology involves mainly an analysis of universal legislation and judicial decisions of the Chief Adjudicating Committee in matters of breaches of public finance discipline and of first instance committees. It was also necessary to analyse the relevant law in force and commentary on it, limited to the views of domestic legal scholars.

Keywords: breach of public finance discipline, harmfulness of an act

INTRODUCTION

Be it a historical or a comparative law angle, one cannot imagine a correctly functioning legal and social system that would eliminate the existence of expressions and terms that are under-defined in law.[1]

[1] Judgment of the Constitutional Tribunal of 9 October 2015, ref. no. OSK 70/06, OTK–A 2007, No. 9, item 103.

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One of the values protected in the Act of 17 December 2004 on liability for breaching the public finance discipline includes[2] governance and security of public finances. In a general approach, the public finance discipline should be understood as an obligation to observe legally-prescribed rules related to disposing of public finances and funds coming from public resources given to entities listed in Article 9 of the Act of 27 August 2009 on public finances.[3] The legislator rightly condemns unlawful acts naming them in Articles 5–18c of the Discipline Breach Act as violations of the public finance discipline. It is because they are acts that are harmful to public finances. If guilt cannot be unequivocally declared, then a person is released from liability even if the premises for an act stipulated in the Discipline Breach Act are met formally.[4]

The Discipline Breach Act conditions the right to hold a person liable for breaching the public finance discipline on a certain degree of harmfulness of an unlawful act which is prescribed specific legal effects. Pursuant to a general rule expressed in Article 28(1) of the Discipline Breach Act, there is no liability if the degree of this act's harmfulness to public finances is negligent. Therefore, the starting point here if the fact that a negligent degree of an act's harmfulness to public finances does not exclude the fault of the infringer but is only a negative premise for further procedure in the matter.

When juxtaposed with a vague meaning of the "degree of an act's harmfulness," it is a valid, interesting and pragmatic research area. All the more so since the legislator lays down a few qualifiers of this degree, such as: "negligent," "non-negligent," "significant" and "gross."

1. PREMISES TAKEN INTO ACCOUNT WHEN ASSESSING THE DEGREE OF AN ACT'S HARMFULNESS TO PUBLIC FINANCES

A decision of an authority that adjudicates in matters for violations of the public finance discipline must not be discretionary [Cieślak 2019]. When assessing the degree of harmfulness of an act penalized under the Discipline Breach Act various premises (factors, aspects) are taken into consideration. These aspects, associated with circumstances of a specific matter, may be general, based on the criterion of a financial effect or lack thereof. To clarify the above, they may also be assigned to a specific type of a breach of the

[2] Act of 17 December 2004 on liability for breaching the public finance discipline, Journal of Laws of 2021, item 289 as amended [hereinafter: Discipline Breach Act].

[3] Act of 27 August 2009 on public finances, Journal of Laws of 2021, item 305 as amended.

[4] Decision of the Chief Adjudicating Committee in matters of breaches of the public finance discipline [hereinafter: Committee] of 20 January 2014, BDF1/4900/93/98/13/RWPD–95446, https://www.gov.pl/web/finanse/artykul-17-ust-1b-pkt-1 [accessed: 14.04.2022] and Decision of the Committee of 21 May 2018, BDF1.4800.7.2018, Legalis no. 1890118.

public finance discipline (Article 17 and 17a of the Discipline Breach Act) [Kościńska-Paszkowska 2012; Lipiec-Warzecha 2012].

General premises cover the gravity of the violated obligations, the manner and circumstances of violating them and also effects of such a breach. When assessing the degree of harmfulness that triggers financial effects, the magnitude of such effects is taken into account. These premises include for example how much of the public funds has been depleted, the amounts of public funds that have not been paid or returned to the appropriate account of the state budget, a local government unit or another unit of a public finance sector as well as the amount of public funds administered without authorisation or exceeding this authorisation or misusing this authorisation, and also commitments made without authorisation or exceeding this authorisation and the amount of interest, fines or fees paid or the interest paid out.

On the other hand, when assessing the degree of harmfulness to public finances of a breach that does not carry financial effects, the following are taken into account in particular: the importance of the responsibilities violated and the manner or circumstances of this violation, in this case: violation of the public finance discipline set forth in Article 17 and 17a – the manner of violating the principle of fair competition or the principle of equal treatment of subcontractors.

The decisions of committees adjudicating in matters regulated under the Discipline Breach Act present quite a clear position that the "Regulation of Article 28(1) of the Act of 17 December 2004 on liability for breaching the public finance discipline (Journal of Laws of 2013 item 168 as amended) stipulates harmfulness to public finances not only in the financial dimension but also in a potentially financial dimension and, importantly, the reprehensible sanctioning of wrong practices and violations of legally specified principles that are binding for units of the public finance sector."[5]

Therefore, any further analysis should be rooted in an assumption that the legislator acts rationally and has intentionally regulated the degree of an act's harmfulness to public finances in a vague and exemplary manner.

2. VAGUENESS OF THE "DEGREE OF AN ACT'S HARMFULNESS TO PUBLIC FINANCES"

The legislator does not specify normatively what must be understood by the public finance discipline and its violation [Kościńska-Paszkowska 2012].

[5] Decision of the Committee of 18 July 2013, BDF1.4900.38.43.13.RWPD–37774, Legalis no. 1655544, similar: Decision of the Committee of 17 September 2012, BDF1.4900.72.72.12.2074, Legalis no. 1657051, Decision of the Committee of 19 November 2007, DF/GKO–4900–46/50/07/1918, Legalis no. 185760.

From the point of view of the Discipline Breach Act these are elementary concepts. For many terms reference was made to the meaning given to certain legal issues in the Public Finance Law (Article 2 of the Discipline Breach Act). This is the case, i.a. for "public finances" which must be understood as processes associated with the gathering of public funds and disposing of them.[6]

The Discipline Breach Act also lacks a definition of an act's harmfulness to public finances and an express distinction based on clear criteria of individual degrees of this harmfulness [Borowska 2015, 23–24]. Such a legal measure must be seen as intentional action of a rational legislator who shifts the obligation to establish facts here onto the authorities that adjudicate in a given case (regulations of the Discipline Breach Act express what its creator (legislator) wanted to say in this way).

An under-defined expression should be understood as a situation where the "dictionary content of a given expression is not complete, it is not a set of constitutive features or it is a set of such features but one of them is non-diagnostic" [Zieliński 2002, 163]. The need to apply under-defined terms in the text of a legislative act does not raise doubts. However, we must each time assess the nature of such regulations because it will often determine the rules of interpretation of these terms. It must be emphasised in this context that the Discipline Breach Act regulates a special kind of liability that enables the achievement of preventive goals and also serves as a retaliatory effect on the perpetrator (repression).

Interpretation of an under-defined expression under general regulations of the Discipline Breach Act must, therefore, be strict and correspond to rigorous principles applied in a repressive law. An expanding and a narrowing interpretation of under-defined terms in the Discipline Breach Act are equally inadmissible. By using these terms, the legislator increases flexibility of a legislative act, that is adjusts its provisions to the "environment" in which it functions and at the same time agrees to reach outside the legal system in the law application process [Śliwa 2010, 261]. The legislator rightly resigns from a legal definition of "an act's harmfulness to public finances." It must be borne in mind that the Discipline Breach Act specifies a bountiful catalogue of acts that constitute violations in questions, while the rule specified in Article 28 of the Discipline Breach Act will be – potentially – applicable in each of the violations specified in Articles 5–18c of the Discipline Breach Act. This is why, as has been noted in legal commentary, "it is not possible to specify a clear research model and objective criteria or boundaries in this situation"

[6] Article 3 of the Public Finances Act shows that these include in particular: gathering of public revenues and incomes; spending of public resources; financing state budget's loan needs; making commitments that engage public funds; managing public resources; managing government debt; settling of accounts with the European Union's budget. Not all of these processes were covered in the Discipline Breach Act.

[Tomczak 2021] and apart form that, it may prove pointless from the axiological point of view. The legislator should, first and foremost, make sure that law-applying authorities have effective tools to maintain governance and security in public finances.

In the context of under-defined terms used in the Discipline Breach Act, we must refer to the need (resulting from the principle of the democratic rule of law) to create correct, precise and clear regulations. Correctness of a provision means its correct construction from the linguistic and logical point of view and is a basic condition that allows the provision to be assessed in the aspect of the other two criteria – clarity and precision.[7] Provisions of the law should be clear and understandable to all addressees. These addressees may expect the rational legislator to create legal norms that do not raise doubts as to the content of obligations imposed and rights granted.[8] Precision, on the other hand, should be expressed in the specific nature of obligations imposed and rights granted so that their content is clear and allows them to be enforceable.[9] Therefore, in a democratic rule of law the legislator should provide a law that will optimally benefit the implementation of normatively and socially desirable goals. Values encoded in provisions of the law must, thus, be reflected in positive law and result from it because, as socially acceptable values, they will also serve a correct interpretation of positive law. An absence of under-defined terms in the Discipline Breach Act could mean that the type-classification of the legal assessment is done already at the stage of abstractly created law, therefore the role of authorities adjudicating in matters of breaches of the public finance discipline would be limited to the "subsumptive automation."[10] In this context, the lack of a legal definition of "an act's harmfulness to public finances" seems to be axiologically justified.

Taking the above into consideration, it is worth noting that there are attempts made in judicial decisions to specify "an act's harmfulness to public finances" where these attempts are based on specific circumstances of the case. A belief expressed in the decision of the Committee of 14 November 2013 is worth noting here. It demonstrates that harmfulness of an act is a broader concept, because next to the concept of damage in the substantive understanding, we take into account the gravity of the responsivities infringed, how and in what circumstances they were violated, general and specific frequency of their violation, effects of this violation, and a preventive effect of a possible

[7] Judgement of the Constitutional Tribunal of 3 December 2009, ref. no. Kp 8/09, OTK–A 2009, No. 11, item 164.
[8] Ibid.
[9] Judgement of the Constitutional Tribunal of 21 March 2001, ref. no. K 24/00, OTK ZU 2001, No. 3, item 51.
[10] Judgement of the Constitutional Tribunal of 9 October 2015, ref. no. OSK 70/06, OTK–A 2007, No. 9, item 103.

punishment, both in a general and specific aspect.[11] We cannot equate the terms "harmfulness" and "damage" because the fact that the breach of discipline did not result in any damage to public finances or in a loss in material interests does not have to mean that the harmfulness to public finances was negligent [Lipiec-Warzecha 2012].[12] However, this does not change the fact that in the current realities of casuistic regulation of individual breaches of the public finance discipline, adoption of a legal definition of "an act's harmfulness to public finances" may turn out not only impossible, but even unnecessary and may deepen dysfunctions in the liability system regulated in the Discipline Breach Act.

3. DEGREE OF AN ACT'S HARMFULNESS AS SEEN IN EXAMPLES OF PREMISES – REVIEW OF JUDICIAL DECISIONS

One of the most frequent criteria of assessment of the degree of an act's harmfulness to public finances is the time criterion. Adjudicating committees do not present a uniform stance in this area. For example, in its decision of 28 February 2019,[13] the Committee claimed that failure to account for a subsidy in the time period prescribed (Article 9(2) of the Discipline Breach Act) violates the principle of open public finances, thus distorting public finance governance. This is why it was decided that the degree of this harmfulness is not negligent, though also not significant. Given the above, between the negligent degree of an act's harmfulness to public finances (which means that Article 78(1)(7) of the Discipline Breach Act must be applied) and the warning adjudicated when determining that the degree of an act's harmfulness to public finances is not significant (Article 35 of the Discipline Breach Act), the Committee found "room" for resigning from imposing a punishment (Article 36(1) of the Discipline Breach Act). It linked the "degree of this breach" with its condition which "is not negligent though also not significant."

However, at the same time, the Committee concluded that despite failing to meet the obligation to obtain the minister's written permission for prolonging the deadline for settling accounts for the subsidy, this settlement was carried out, albeit with delay. The Committee believed that given the circumstances of the case, a delay of 22 days cannot be considered excessively long. In another decision, a delay of "a few days" in "individual months" was attributed a negligent degree of harmfulness to public finances.[14] It was also emphasized

[11] Decision of the Committee of 14 November 2013, BDF1.4900.86.91.13.RWPD–88736, Legalis no. 1657044.
[12] Decision of the Committee of 4 July 2011, BDF1/4900/46/52/11/1593, Legalis no. 1445560.
[13] Decision of the Committee of 28 February 2019, BDF1.4800.2.2019, Legalis no. 2285915.
[14] Decision of the Committee of 22 September 2005, DF/GKO/Odw.–32/43/2005/327, Legalis no. 268191.

that a delay in the payment of social insurance contributions did not exceed 4 days in individual months and a 22-day delay applied to the nominal amount of PLN 54.26 (Article 16(1) of the Discipline Breach Act). The time factor was decisive in declaring a negligent degree of an act's harmfulness to public finances also in the decision of the Committee of 25 January 2016.[15] It was emphasized at that that the entity charged took the initiative to repair the trespasses of the financial plan immediately (within 2 days), whereby they were only passing, short-lived.

The adjudicating committees, guided by Article 28(2–3) of the Discipline Breach Act, often notice no provisions to discontinue proceedings in such cases under Article 78(1)(7) in connection with Article 28(1) of the Discipline Breach Act. For example, a nearly two-year delay in conducting internal audit in a unit of a public finance sector was considered a persistent violation (Article 18a of the Discipline Breach Act).[16] On the other hand, in a different case[17] (act under Article 6(1) of the Discipline Breach Act), a delay between 4 and 16 days applied to 18 violations (in the amounts ranging between PLN 30 and PLN 4,516.56 (PLN 12,704 in total)). In the opinion of the Committee, these behaviours were not incidental and were a long-term occurrence (January–October, total of 133 days of delay). Therefore, it was not possible to discontinue proceedings in this case while the adjudicating committee decided that due to the act's negligent harmfulness to public finances, it is reasonable to impose the penalty of a warning.

Another criterion that serves the assessment of the degree of harmfulness of an act expressly articulated in Article 28(2) and (3) of the Discipline Breach Act is the financial effect that differs depending on the circumstances of a specific case. In this context, we must bear in mind the rule prescribed by Article 26(1) of the Discipline Breach Act, according to which a breach of the public finance discipline will not apply to an act or an omission specified in Article 5–16 of the Discipline Breach Act whose subject involves funds that do not exceed the minimum amount on one occasion and its total during a financial year for more than one action or omission. Such a situation took place in the decision of the Committee of 22 September 2005 quoted above.

However, financial effects of individual unlawful acts that demonstrate the legitimacy of discontinuing proceedings are different sum-wise. For example, in the Committee's decision of 3 September 2015[18] it was PLN 24,494.19 (Article 11(1) of the Discipline Breach Act) and in the decision of 25 January

[15] Decision of the Committee of 25 January 2016, BDF1.4800.151.2015, Legalis no. 1640622.
[16] Decision of the Committee of 10 June 2013, BDF1/4900/37/42/13/RWPD–37545, Legalis no. 1350056.
[17] Decision of the Committee of 11 December 2014, BDF1/4900/98/99/14, https://www.gov.pl/attachment/a76de653-a501-4bc2-af85-5cf5588a7e8d [accessed: 14.04.2022].
[18] Decision of the Committee of 3 September 2015, BDF1.4800.88.2015, Legalis no. 1651395.

2016 the authorities recorded the amount of PLN 10,174.20 that exceeded the financial plan[19] (Article 15(1) of the Discipline Breach Act). In another case (violation of Article 6(1) of the Discipline Breach Act) it was decided that PLN 1,901.05 was a relatively low amount that was transferred to the State Treasury with a delay and the final decision in the case was affected by the fact that the party charged paid the due interest as part of his "own payment" (PLN 4.72) [Gontarczyk-Skowrońska 2013, 45–46].[20] In this case too it was emphasized that an act's harmfulness to public finances was negligent. In case BDF1/4900/88/99/10/2396[21] it was decided that the act's harmfulness to public finances was negligent because the amount relating to the commitment made exceeding authorisation was low – approximately 0.44% of the total expenditure plan of a given unit (Article 1 of the Discipline Breach Act). The analysis of judicial decisions of committees adjudicating in cases for breaches of the public finance discipline shows at the same time that the degree of an act's harmfulness to public finances cannot be defined only in the framework of specific amounts of depletions but reference must also be made to amounts that a given entity has at its disposal.[22]

The current body of decisions of adjudicating committees shows that the number of violations too is important when establishing the degree of an act's harmfulness to public finances. Case BDF1/4900/82/83/09/2805[23] points to the fact that since the person charged performed his obligation to transfer the revenues to the budget timely on a few dozen cases but one, imposing any penalty on them for the violation is pointless (Article 6(2) of the Discipline Breach Act). On the other hand, acts that are frequently repeated (acts specified in Article 16(1) of the Discipline Breach Act) despite applying to not great amounts, point to a situation in which the degree of harmfulness for public finances is not negligent.[24] The number of violations has not always been considered a significant circumstance from the point of view of the measure stipulated in Article 28(1) of the Discipline Breach Act. Sometimes we saw a clear ruling out of the linking of an effect and the degree of an act's harmfulness to public finances with the number of violations committed. It was seen in the case closed with the Committee's decision of 5 September 2002.[25]

[19] Decision of the Committee of 25 January 2016, BDF1.4800.151.2015, Legalis no. 1640622.
[20] Decision of the Committee of 4 March 2010, BDF1/4900/3/3/10/75, 286994.
[21] Decision of the Committee of 8 November 2010, BDF1/4900/88/99/10/2396, Lex no. 794046.
[22] Decision of the Committee of 28 July 2014, BDF1.4900.68.68.RN–16.14, Legalis no. 1651680.
[23] Decision of the Committee of 10 December 2009, BDF1/4900/82/83/09/2805, Legalis no. 292310.
[24] Decision of the Committee of 6 April 2009, BDF1/4900/21/20/09/727, Legalis no. 268206.
[25] Decision of the Committee of 5 September 2002, DF/GKO/Odw.–50/67/2002, Lex no. 80073.

Other examples of circumstances in which the degree of an act's harmfulness to public finances is declared negligent include: a) efforts made by the persons charged, whereby the correct financial standing of the entity is restored quickly (Article 11 and 15 of the Discipline Breach Act);[26] b) school's interest, preventing depletion of public funds, negligent weight of the violated obligations, holiday period that made it difficult to amend the financial plan, efforts to prevent failure to exercise the will of donors (Article 15 of the Discipline Breach Act);[27] c) making an additional expense by mistake and repairing the error immediately (incidental, one-off violation, no adverse effects for the entity's financial management (Article 15 of the Discipline Breach Act);[28] d) preventing purchasing of unnecessary equipment and making a non-earmarked expense (Article 17(3) of the Discipline Breach Act).[29]

On the other hand, the following were considered behaviours that are harmful to public finances to a significant degree: non-observance of the principle of fair competition (Article 17(6) of the Discipline Breach Act),[30] failure to observe the principle of equal treatment of contractors (Article 17(1) of the Discipline Breach Act),[31] distorting public finance governance (Article 18(1) of the Discipline Breach Act),[32] exceeding planned expenditure by 21% (Article 11(1) of the Discipline Breach Act),[33] or constructing one's own rules on financial settlements with the state budget and making deductions in a way that goes beyond statutory regulations (Article 6(1) of the Discipline Breach Act).[34]

The highest degree of an act's harmfulness to public finances is the act's grossness. According to a belief expressed in judicial decisions, we may say that acts or omissions are gross if these violations are easy to detect, apparent, indisputable and far-reaching. In such a case, an analysis of the behaviour (action or omission) of the entity charged in the context of an order or prohibition resulting from the hypothesis of the violated legal norm, points to their obvious non-compliance.[35]

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[26] Decision of the Committee of 28 November 2005, DF/GKO/Odw.–60/79–81/2005/517, Legalis no. 268061.

[27] Decision of the Committee of 14 October 2013, BDF1.4900.41.46.13.RWPD–41864, Legalis no. 1655542.

[28] Decision of the Committee of 25 January 2016, BDF1.4800.151.2015, Legalis no. 1640622.

29 Decision of the Committee of 2 December 2013, BDF1.4900.64.69.13.RWPD, Legalis no. 1657062.

[30] Decision of the Committee of 7 July 2014, BDF1.4900.16.18.14, Legalis no. 1651402.

[31] Decision of the Committee of 18 March 2019, BDF1.4800.8.2019, Legalis no. 2285917.

[32] Decision of the Committee of 24 September 2012, BDF1.4900.67.67.12.1889, Legalis no. 1657057.

[33] Decision of the Committee of 5 October 2006, DF/GKO–4900–61/76/06/1755, Lex no. 1724661.

[34] Decision of the Committee of 19 October 2015, BDF1.4800.104.2015, Legalis no. 2094435.

[35] Decision of the Committee of 27 September 2018, BDF1.4800.27.2018, Legalis no. 1893359.

This review of judicial decisions issued in cases of violations of the public finance discipline demonstrates that assigning a rigid definitional framework to "degrees of an act's harmfulness to public finances" and to the "harmfulness" itself could have a limiting effect on the adjudicating committees and ultimately make the liability system under analysis less effective.

CONCLUSIONS

A system that lacks under-defined terms would have to be not only highly causal, for which the legislator would be responsible, but it would also rule out any margin of freedom in decision-making when assessing specific cases of application of the law. Such an inflexible system would have to lead to unfair decisions. Type-categorisation of a legal assessment would always be done already at the stage of an abstractly created law. Such a legal vision would not only be insubstantial, but in a broader approach, it would be alien to provisions of the Constitution of the Republic of Poland of 2 April 1997.[36] This is why, given the frequent doubts resulting from the decision-making practice of the adjudicating committees, the general under-defined nature of an act's harmfulness to public finances and its "degrees" may be an expression of the legislator's pragmatism. Of course, we cannot rule out a situation where at the stage of application of the law the interpretative discretion is violated, but we cannot forget that Article 169 of the Discipline Breach Act allows submission of a complaint to an administrative court, which will serve to verify the correctness of actions taken by adjudicating panels in individual adjudicating committees (or possibly heads of adjudicating committees).

An analysis of a few dozen decisions shows that adjudicating committees take into account premises specified in Article 28 of the Discipline Breach Act and each time refer them to the circumstances of a given case. The postulate of adequacy of legal measures to existing needs of decision-making practice is implemented intentionally and legitimately. This helps achieve axiological assumptions of the Discipline Breach Act by satisfying not only the preventive objectives assigned to this act, but also a social sense of justice. One needs to remember that caring for the public interest, for the financial stability of the public finances sector and for the governance and security of this area of state's operation is essential in promoting appropriate civic attitudes and in strengthening citizens' trust to the law given.

There are divergent interpretations of under-defined terms in judicial decisions. It is unavoidable as it is inscribed in the risk of the principle of independence of members of adjudicating panels resulting from Article 45 of the

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

Discipline Breach Act. It needs to be borne in mind that members of adjudicating committees issue decisions within the boundaries specified by the statute and on the basis of a conviction following from the assessment of evidence. Therefore, such assessment should be objective [Kołakowski 2022, 29–30]. Importantly, these members independently settle the arising legal issues and are not bound by decisions of other authorities save for final court judgments.

This is due to their independence in deciding in cases of violations of the public finance discipline and is only subject to provisions of the law. It is also worth emphasizing that the principle of interpreting irremovable doubts to the benefit of the charged persons as much as possible applies to proceedings for breaches of the public finance discipline. However, where different interpretations of a provision are possible and where these interpretations are equal in their grammatical wording and are not contrary to other regulations of a given legal act (and also the entire branch of law), then application of one of them cannot be seen an unlawful behaviour).[37]

REFERENCES

Borowska, Katarzyna. 2015. "Znikomy stopień szkodliwości naruszenia dyscypliny finansów publicznych w praktyce orzeczniczej organów właściwych w sprawach o naruszenie dyscypliny finansów publicznych." *Finanse Komunalne* 10:23–31.

Cieślak, Rafał. 2019. "Komentarz do art. 28 u.o.n.d.f.p." In *Ustawa o finansach publicznych. Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych. Komentarz*, edited by Wojciech Misiąg. Warszawa: C.H. Beck. Legalis el.

Gontarczyk-Skowrońska, Marta. 2013. "Szkodliwość w naruszeniu dyscypliny finansów publicznych a szkoda w majątku Skarbu Państwa lub jednostki sektora finansów publicznych." *Kwartalnik Prawa Publicznego* 4:33–47.

Kołakowski, Ireneusz. 2022. "Stopniowanie szkodliwości naruszenia dyscypliny finansów publicznych." *Finanse Komunalne* 1:21–30.

Kościńska-Paszkowska, Anna. 2012. "Komentarz do art. 28 u.o.n.d.f.p." In *Odpowiedzialność za naruszenie dyscypliny finansów publicznych. Komentarz*, edited by Tomasz Bolek, Katarzyna Borowska, and Anna Kościńska-Paszkowska. Warszawa: LexisNexis. Lex el.

Lipiec-Warzecha, Ludmiła. 2012. *Odpowiedzialność za naruszenie dyscypliny finansów publicznych. Komentarz.* Warszawa: Wolters Kluwer. Lex el.

Śliwka, Małgorzata. 2010. "Znaczenie zwrotów niedookreślonych na tle orzecznictwa polskiego Trybunału Konstytucyjnego." *Studia Iuridica Lublinesia* 1:261–72.

Tomczak, Maciej. 2021. "Komentarz do art. 28 u.o.n.d.f.p." In *Odpowiedzialność za naruszenie dyscypliny finansów publicznych. Komentarz*, edited by Anna Kościńska-Paszkowska. Warszawa: Wolters Kluwer. Lex el.

Zieliński, Maciej. 2002. *Wykładnia prawa. Zasady. Reguły. Wskazówki.* Warszawa: Wolters Kluwer.

[37] Decision of the Committee of 23 June 2016, BDF1.4800.10.2016, Legalis no. 1514678.

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SECURITY MANAGEMENT IN POLAND DURING A CRISIS SITUATION – FORMAL AND PRACTICAL ASPECTS. INDICATIONS FOR UKRAINE*

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Abstract. This paper aims to analyse the processes related to security management in Poland in the case of a crisis. It is crucial to indicate the legal and organisational basis, including specific practical actions, particularly in the context of making general indications for Ukraine. Poland and Ukraine are neighbouring states with large areas and populations. However, their organisational systems, as well as internal and external conditions, are different. The paper focuses on the issue of crisis management at the level of public administration processes and tasks. The relevance of this issue is also based on the cross-border nature of opportunities and challenges in this respect.

Keywords: security management, crisis management, Poland, Ukraine

INTRODUCTION

The geopolitical changes initiated in 1989, especially in Central and Eastern Europe, have had a profound impact on security processes. This includes changes at the level of states, international organisations and other actors. In addition, significant challenges are related to space, both regional and global. The scope of these challenges is constantly growing. Essentially, security challenges are the result of social, political and economic changes, including the development of new technologies. The pace of the processes involved

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is incredibly fast. All this makes it difficult to conduct a systematic, long-term and effective policy in the field of security management.

This paper aims to outline several key conditions related to security management during various crises as exemplified by Poland. The legal basis and examples of practical state actions in the area covered by the analysis will be presented. The paper attempts to answer several research questions: 1) what is the legal and organisational basis of the security management system in Poland? 2) what is the specific nature of actions during a crisis situation in Poland? 3) what indications can be made for Ukraine in this respect?

The paper adopts a research method based on content analysis, comparative analysis and a case study. This will allow achieving the assumed research objective. Security management processes involve multiple areas and activities. Due to the specific nature of the methodology and the structure of the text, this paper is limited to a few basic issues. The analysis essentially focuses on the crisis management system.

1. CRISIS MANAGEMENT AS A RESEARCH PROBLEM

Crisis management is part of security management. It is one of the basic issues analysed in social science. Depending on the scientific discipline, slightly different aspects and entities covered by the crisis management system are emphasised. In most research studies, crisis management is defined as an organisation's process involving effective coping with negative, destructive events affecting its subjective and material resources. Some differences can be found in defining types of crises and coping strategies, including the role of leadership [Lerbinger 1997]. In security studies, the necessity to undertake effective actions on the level of public administration is emphasised above all. In the case of the analysis undertaken in this study, the focus is on the three main types of crises identified by Lerbinger: natural disaster, technological disaster and terrorist attack. A state's activity must focus on these threats in order to counteract or mitigate their effects.

The issue under consideration is evolving. Various studies illustrating the issue in the analytical and research context of the 21st century can be cited [Houben 2005; Giegerich 2008; Olsson 2009; Fagel and Hesterman 2016; Farazmand 2017; Lægreid and Rykkja 2019; Hilhorst, Boersma, and Raju 2020]. Without a doubt, their value lies in combining theory and practice, identifying specific problems, providing ways to solve them and perspectives on how to counteract crisis situations.

Scientific research in Poland conducted in the field of crisis management is very extensive and includes a multidimensional perspective. Researchers address issues concerning many areas that are part of the internal and external security system. These include problems related to the responsibilities of

local government [Kożuch and Sienkiewicz-Małyjurek 2016; Karpiuk 2019], critical infrastructure [Walkowiak and Szczurek 2021], countering terrorism [Jałoszyński 2017], cybersecurity [Chałubińska-Jentkiewicz, Radoniewicz, and Zieliński 2021] environmental challenges [Poskrobko and Poskrobko 2012; Adamczyk, Piwowar, and Dzikuć 2017], and the activities of the armed forces [Szulc 2019]. Yet, this list is not exhaustive, because many issues are cross-sectional and multi-faceted [Raczkowski, Kegö, and Żuber 2010; Dworzecki 2012; Marszałek, Sobolewski, and Majchrzak 2014; Cichocki and Grosse 2019; Kalinowski 2020; Gruszczak 2021; Gizicki and Pankevych 2021]. The experience of researchers concerning Ukraine is less extensive in this regard, although the issue of crisis management is present in the scientific discourse. In this respect, studies representing various scientific fields can be mentioned: economic, social, political, legal sciences, which analyse, among others, the content and priority directions of a state's anti-crisis policy [Simons, Kapitonenko, Lavrenyuk, et al. 2018; Franchuk and Sylkin 2021], the principles and models for implementing the crisis management system in local governments [Akimova, Khomiuk, Bezena, et al. 2020], the condition and system of critical infrastructure protection [Sukhodolia et al. 2017], the issues of the military conflict in Ukraine [Pankevych and Slovska 2020], state cybersecurity policy [Slipachuk, Toliupa, and Nakonechnyi 2019], and environmental security issues [Radchenko, Kovach, Radchenko, et al. 2017].

2. THE LEGAL AND ORGANISATIONAL BASIS OF SECURITY MANAGEMENT IN POLAND

The legal basis for Poland's crisis management system is contained in the Constitution of the Republic of Poland of 1997[1] (Constitution 1997). It is also complemented in this respect by the indications and solutions included in the National Security Strategy of the Republic of Poland of 2020[2] (National Security Strategy 2020).

The Constitution of the Republic of Poland mentions the principles of directing, supervising and organising security management in Poland several times. Article 5 indicates the state's subjective and objective assumptions and obligations. The state's key duties are related to safeguarding the independence and integrity of the territory and ensuring the freedoms, security and rights of persons and citizens. The Constitution indicates the competence principles concerning shaping security by legislative and executive institutions. Articles

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

[2] See www.bbn.gov.pl/ftp/dokumenty/National_Security_Strategy_of_the_Republic_of_Poland_2020.pdf [accessed: 13.04.2022].

116 and 117 define the powers of the Sejm concerning declaring a state of war, concluding peace and implementing obligations arising from joint defence under international agreements (e.g. Article 5 of the North Atlantic Treaty).

The President's powers in the area of security are contained in several articles. Article 126 unequivocally emphasises the responsibility of the head of state to oversee activities for the benefit of the state's sovereignty, security, and the inviolability and integrity of its territory. The President plays a particularly important role in the representation of the state in foreign affairs (Article 133). The President is also the supreme commander of the armed forces (Article 134). In this respect, the Constitution presents an extensive list of powers, which are further described in several acts. The decisions made by the President are supported by the National Security Council, appointed by him under Article 135. Article 136 indicates the powers regarding mobilising the state's defence forces in the event of a threat. The tasks of the Council of Ministers in the area of security are defined in Article 146. These include ensuring internal security and order, performing tasks as part of external security, general management of activities as part of international relations, and concluding international agreements including the area of defence.

Chapter XI (Articles 228–234) of the Constitution outlines the tasks concerning extraordinary measures (natural disaster, state of emergency and martial law). All major state institutions have responsibilities in this regard. The constitutional principles related to this area are complemented by four acts specifying the possibilities of security management in the event of undertaking extraordinary measures.

The Act of 18 April 2002 on Natural Disasters governs the way the state is organised in the situation of a natural disaster or technical failure. These are situations related to both the effects of nature and human errors.

By virtue of the Act of 21 June 2002 on the State of Emergency, activities are carried out primarily related to internal threats. Most often, they are defined by their ability to cause threats to public order and the legal and political system.

The Act of 29 August 2002 on Martial Law and the Competences of the Commander-in-Chief of the Army and the Rules of the Commander-in-Chief's Subordination to the Constitutional Authorities of the Republic of Poland refers to situations in which threats to the state are mainly external. These are situations defined by an armed attack, interference with territorial integrity or other action detrimental to Poland's independence and sovereignty. In the context of these threats, an obligation related to alliance commitments towards common defence, e.g. under the North Atlantic Treaty, can also be indicated, when a threat concerns an allied state.

Pursuant to the Act of 22 November 2002 on Compensation for Material Losses resulting from the Limitations of Liberties and Human Rights during

Extraordinary Measures, the Polish legislator has also provided for a situation in which entities involved in counteracting or mitigating the effects of extraordinary measures may claim reimbursement of actual losses related thereto.

The National Security Strategy of the Republic of Poland includes several references to crisis management. The document is an expression of concern for the security of the state and its citizens in a particularly complicated and uncertain world. The solutions adopted are to minimise risks, face challenges, and take advantage of contemporary and future opportunities. The vision of Poland's security is multidimensional, both in subjective (relations and cooperation) and objective terms (functioning of the system). In the security environment, uncertainty, unpredictability and disruption of the global order are emphasised. This is based on subjective (e.g. the neo-imperial policy of the Russian government, strategic rivalry of the big players: the USA, Russia, China) and objective reasons (e.g. hybridisation of wars and conflicts, technological development, socio-economic challenges). Poland's opportunities to strengthen its position are related, among others, to bilateral cooperation (especially with the USA), regional cooperation (e.g. NATO, EU and several initiatives in Central Europe) and global cooperation (e.g. UN). The document mentions a list of values and national interests. These are traditionally associated with the strength of the nation and the state, and the tasks undertaken. They can be summarised as the subjective continuity of Poland's existence and dynamic development. Crisis situations require multifaceted actions. In the first place, the strategy points to the role of information exchange and communication in crisis management. It is also of key importance in integrating Poland's security system, both at the state level and in the context of NATO. Strong support for the area of protecting our national heritage against all crises should be emphasised. This is extremely important in a time of civilisational challenges in Europe and increased migration problems.

3. THE SPECIFIC NATURE OF CRISIS MANAGEMENT IN POLAND BASED ON SELECTED EVENTS

The aforementioned legal basis is reflected in specific organisational activities. They are expressed by the system of managing and responding to emerging challenges.

Poland's security system, including crisis management, is quite clearly defined. The division made includes two areas: 1) the internal security system and 2) the external security system.

The internal security system aims to guarantee the civilian population a sufficient sense of security, as well as peaceful and effective development. The most important tasks at this level include ensuring society's conflict-free development, having the ability to respond effectively to a situation threatening

the normal and acceptable social order. Within the internal security system, two subsystems can be identified: 1) public security, which mainly aims to counteract crimes and threats related to the activities of Polish and foreign citizens; 2) general security, which primarily aims to counteract threats against the existence and positive development of man and society, including in particular natural and technological disasters.

The external security system aims to protect the independence and integrity of the territory of the Republic of Poland, including the state borders, and to protect the national heritage. The main tasks include ensuring the conflict-free development of the state in the international arena, and maintaining the ability to defend and effectively respond in a situation of a threat to the state's existence and survival. In the external security system, two subsystems can also be identified. These include: 1) security within the territory of the Republic of Poland, which is aimed mainly at counteracting direct threats to state security, related to acts of aggression by other states, such as armed attacks; 2) security outside the territory of the Republic of Poland, which is aimed primarily at supporting coalition activities (based for example on Article 5 of the North Atlantic Treaty), stabilisation and peace-keeping activities (e.g. participation in foreign missions).

Regardless of the type of system, the organisational structure is interministerial. Several ministries, especially the Ministry of the Interior and Administration, the Ministry of Defence, the Ministry of Justice, and the Ministry of Climate and Environment influence the activities undertaken to ensure internal security. The key decision-making role is played by the Prime Minister, together with the Council of Ministers. Supporting institutions participate in the implementation of the tasks: central institutions, e.g. the Government Centre for Security, the Police, the Polish Border Guard, the National Civil Defence, as well as local government institutions, subordinate to province governors, province marshals, district governors, mayors and commune heads.

In Poland, the course of action concerning crisis management is related to the so-called general principles arising from legislative solutions. Six main general principles may be identified. The managerial and organisational activities of the public administration must take into account the resulting subjective and objective areas.

The principle of exceptionality indicates that the threats which are to form the basis for introducing extraordinary measures and the measures aimed at preventing or limiting their effects must be of a special, extraordinary nature. This refers to a situation in which it becomes impossible to act as provided for under ordinary constitutional measures. In addition, it should be pointed out that a decision to introduce an extraordinary measure is somewhat optional. Even in the situation of a justified basis for its introduction, state institutions are not obliged to introduce an extraordinary measure. As a consequence, the

second principle applies, that of purpose limitation. In a situation of introducing an extraordinary measure, all actions should be conducted in such a way as to return to the normal situation as soon as possible. The third principle is legality. It means that decisions related to an extraordinary measure, including its introduction, must be in accordance with the act and introduced through regulation. The fourth principle, proportionality, means that state authorities and institutions operating in the area of crisis management must make their actions commensurate with the risks. The fifth principle involves protecting the foundations of the legal order. This case is particularly about the prohibition of amending key legal acts (Constitution, elections acts, emergency measures acts). The sixth principle is the protection of political representation. It concerns a situation in which it is not possible to shorten the term of office of the Parliament, organise elections or hold referendums during and 90 days after the end of an extraordinary measure. These are certainly reasons that seriously influence decisions on possibly introducing a specific extraordinary measure.

In the 21st century, several events took place in Poland that triggered a serious crisis situation. They required undertaking immediate actions in the area of crisis management. Yet, the right decisions were not always made. Their effects, including political, were quite unambiguous. The actions mitigating the effects did not generally lead to introducing any of the extraordinary measures. This was the case with the floods in 2010 and the plane crash with President Lech Kaczyński on board at Smoleńsk. A total of 96 people died in that event, including the incumbent President of the Republic of Poland, the former President of the Republic of Poland in exile, commanders of all branches of the Polish armed forces, representatives of important state institutions and members of Parliament. At that time, the state was acting decisively in a crisis situation. This was aggravated by the flood disaster in the spring/summer of 2010. The failure to introduce an extraordinary measure was the result of the restrictions, including electoral restrictions, that were necessary at that time. In 2021, as a result of the border crisis with Belarus, Poland introduced a state of emergency on part of its territory, covering 183 municipalities in two provinces of eastern Poland bordering Belarus. This obviously brings about certain consequences. However, it is justified by the actions associated with maximising the protection of its territory and the EU's external border. Limiting a crisis related to potential socio-cultural consequences is also of great significance.

4. SELECTED IMPLICATIONS FOR UKRAINE

After the events of the Revolution of Dignity in 2014, the so-called multivector policy was abandoned in Ukraine. Its effect was not only geopolitical hesitation in terms of the direction of the state's further development, but also the actual division of Ukrainian society according to ideological, ethnic, linguistic or religious criteria, as well as the division due to the integrative direction of the state's development. Ukraine's state authorities faced the challenge not only of fighting a military invasion by the Russian Federation, but also of resolving a number of other geopolitical issues. Euro-Atlantic integration has become one of the basic policy priorities in the international arena. In view of the very painful experience related to the annexation of the territory of the Autonomous Republic of Crimea and the Russian-Ukrainian hybrid war which has continued to this day, it is essential to adopt effective mechanisms for managing security, including a crisis situation. Poland's experience may be a good platform for Ukraine to search for and adopt specific solutions.

In the legal area, amending the Act "On the National Security of Ukraine" is essential. The Ukrainian legislator should take a systemic and logical approach to drafting appropriate legal norms in the area of security. One example is part 2 of Article 3 of the aforementioned Act. It provides the three most important principles for state security policy-making. These include: 1) supremacy of law, accountability, legality, transparency and adherence to the principles of democratic-civilian control over the functioning of the security and defence sector and the use of force; 2) compliance with international law, Ukraine's participation in international peacekeeping and security activities, interstate systems and mechanisms of international collective security; and 3) developing the security and defence sector as a basic tool for implementing state policy. Among the principles mentioned, including the principle of the necessity of sustainable development of the security and defence sector is advised. The legal acts to be passed are to be based on strategic analysis, planning and forecasting. This may result in the creation of an effective state crisis management mechanism. This is precisely the area where the experience of crisis management in Poland could be applied to Ukrainian conditions. It would make it possible to avoid mistakes in lawmaking as well as in the area of the law's application.

For the effective organisation of the activities of state and local government entities, it would seem fundamental to move away from the long-standing Ukrainian practice of identifying the concept of decentralisation with state disintegration by the central authorities. All authorities in the state (legislative, executive, judicial and local government) are to become a single efficient state mechanism. The solutions provided for in the National Security Strategy of the Republic of Poland will be beneficial for Ukraine, as the principles necessary

for applying it in Ukraine are applied in crisis management in Poland. These are the principles of a systemic and institutional approach. The consequences of their application will be systematic integrity, coherence and usefulness of crisis management. The key task for the Verkhovna Rada of Ukraine is not only to incorporate the aforementioned principles into the relevant legal acts, but also to set a longer planning period for crisis management. As a rule, in Poland, the medium-term national security strategy is planned for a period of no less than 10 years. However, in Ukraine, the national security strategy is planned for a period longer than 5 years. The aforementioned short-term planning in Ukraine is a consequence of the said multi-vector policy. However, once Ukraine implements the Euro-Atlantic direction of development, such short-term planning no longer makes sense. The fruitful application of Poland's experience in crisis management will stabilise Ukraine's development and strengthen its national security.

CONCLUSIONS

The selected issues presented in this paper concerning the subject matter make it possible to draw some general conclusions. They result directly from the research objective and are a consequence of the answers to the questions posed in the introduction.

First, the legal basis of the crisis management system in Poland seems to be stable and sufficient. The solutions adopted cover both the constitutional and statutory levels. Detailed regulations have not been fully verified due to the relatively rare cases when an extraordinary measure was introduced. However, they seem to be sufficient for actions taken from time to time, justified by a crisis situation, for example, as a result of environmental events.

Second, the crisis experience in Poland generally covers sudden events. These result from local or regional natural crisis situations. There have been, so far, no major terrorist incidents or events in the country. The same is true of events in the field of technical failure. Apart from the tragic effects of the Smoleńsk disaster in 2010, no events requiring radical anti-crisis action have been recorded, although, of course, the effects of this event are still being felt in Poland at different levels. Certainly, the coordination of crisis management activities, including at the local level, needs to be made more effective.

Third, Poland's experience in the field of crisis management may be an inspiration for Ukraine because of its spatial proximity and the choices of solutions made at different levels. This is also facilitated by cross-border cooperation and the exchange of experience at the local government level. Poland and Ukraine's partnership is also expressed in the fact that proven models are being implemented and mistakes are avoided. It is therefore crucial, among other things, to define priorities and maintain the chosen strategic direction in

which crisis management plays an important role. This is particularly important in the light of the challenges and hybrid threats that Ukraine has experienced since the beginning of its independence in 1991.

REFERENCES

Adamczyk, Janusz, Arkadiusz Piwowar, and Maciej Dzikuć. 2017. "Air protection programmes in Poland in the context of the low emission." *Environmental Science and Pollution Research* 24:16316–6327.

Akimova, Liudmyla, Natallia Khomiuk, Ivan Bezena, et al. 2020. "Planning of Socio-Economic Development of the Territories (Experience of European Union)." *International Journal of Management* 11, no. 4:567–75.

Chałubińska-Jentkiewicz, Katarzyna, Filip Radoniewicz, and Tadeusz Zieliński. 2021. *Cybersecurity in Poland. Legal aspects*. Cham: Springer.

Cichocki, Marek, and Tomasz G. Grosse. 2019. *The many faces of crisis: an analysis of crisis management from an economic and political perspective.* Berlin: Peter Lang.

Dworzecki, Jerzy. 2012. "Crisis Management in Poland." *The Science for Population Protection* 2:1–15.

Fagel, Michael, and Jennifer Hesterman. 2016. *Soft Targets and Crisis Management: What Emergency Planners and Security Professionals Need to Know*. Boca Raton, FL: Taylor and Francis.

Farazmand, Ali. 2017. *Crisis and Emergency Management: Theory and Practice*. Boca Raton, FL: Routledge.

Franchuk, Vasil, and Oleksandr Sylkin. 2021. "Implementation of Anti-Crisis Management in the Context of Ensuring Sustainable Development of the Enterprise." *Advances in Economics, Business and Management Research* vol. 170, 35–39.

Giegerich, Bastian. 2008. *European Military Crisis Management Connecting Ambition and Reality*. London: Routledge.

Gizicki, Wojciech, and Ivan Pankevych, eds. 2021. *Theoretical, Methodological and Practical Support for Crisis Management Processes in Borderland Areas*. Lublin: Stowarzyszenie Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego.

Gruszczak, Artur. 2021. "The use of force by the Frontex agency: International legal aspects." *Studia Prawnicze KUL* 4:73–89.

Hilhorst, Dorothea, Kees Boersma, and Emmanuel Raju. 2020. "Research on Politics of Disaster Risk Governance: Where Are We Headed?" *Politics and Governance* 4:214–19.

Houben, Marc. 2005. *International crisis management the approach of European states*. London–New York: Routledge.

Jałoszyński, Kuba. 2017. "Role of Units Subordinate to the Minister of the Interior and Administration in Preventing and Countering Terrorist Threats in Poland." *Security Dimensions* 23:68–86.

Kalinowski, Romuald. 2020. "Civil defense and crisis management in Poland in the systemic approach." *Scientific Journal of the Military University of Land Forces* 3:513–25.

Karpiuk, Mirosław. 2019. "Position of the Local Government of Commune Level in the Space of Security and Public Order." *Studia Iuridica Lublinensa* 2:27–39.

Kożuch, Barbara, and Katarzyna Sienkiewicz-Małyjurek. 2016. "Inter-Organisational Coordination for Sustainable Local Governance: Public Safety Management in Poland." *Sustainability* 8:1–27.

Lægreid, Per, and Lise Rykkja. 2019. *Societal Security and Crisis Management Governance Capacity and Legitimacy.* Cham: Springer International Publishing. Imprint: Palgrave Macmillan.

Lerbinger, Otto. 1997. *The crisis manager: Facing risk and responsibility.* Mahwah–NJ: Erlbaum.

Marszałek, Maciej, Grzegorz Sobolewski, and Dariusz Majchrzak. 2014. *National and international dimension of crisis management.* Toruń: Adam Marszałek.

Olsson, Stefan. 2009. *Crisis Management in the European Union Cooperation in the Face of Emergencies*. Berlin–Heidelberg: Springer Berlin Heidelberg. Imprint: Springer.

Pankevych, Ivan, and Iryna Slovska. 2020. "Military conflict: Ukraine's and the world challenges." *Balkan Social Science Review* 16:197–213.

Poskrobko, Bazyli, and Tomasz Poskrobko. 2012. *Environment Management in Poland.* Białystok: Białystok University Press.

Raczkowski, Konrad, Walter Kegö, and Marian Żuber, eds. 2010. *Different Faces of Security From Knowledge to Management.* Stockholm-Nacka.

Radchenko, Oleksandr, Valeriia Kovach, Oksana Radchenko, et al. 2021. "Principles of natural capital preservation in the context of strategy of state environmental safety." *E3S Web Conference*, 1–6.

Simons, Gregory, Mykola Kapitonenko, Viktor Lavrenyuk, et al., eds. 2018. *The politics and complexities of crisis management in Ukraine: a historical perspective*. London: Taylor and Francis.

Slipachuk, Lada, Serhii Toliupa, and Volodymyr Nakonechnyi. 2019. "The Process of the Critical Infrastructure Cyber Security Management using the Integrated System of the National Cyber Security Sector Management in Ukraine." *3rd International Conference on Advanced Information and Communications Technologies*, 451–54.

Sukhodolia, Oleksandr. 2017. *Developing The Critical Infrastructure Protection System in Ukraine*. Kyiv: NISS.

Szulc, Tomasz. 2019. "Participation of units and troops of the Armed Forces of the Republic of Poland in crisis situations." *Scientific Journal of the Military University of Land Forces* 2:294–309.

Walkowiak, Marzena, and Tadeusz Szczurek. 2021. *Critical infrastructure in view of the challenges to national security.* Warszawa: Military University of Technology.

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APPOINTING AND DISMISSING A DISTRICT COMMANDANT OF THE STATE FIRE SERVICE IN POLAND

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Abstract. The article is the first, original and only scientific study of the issue of appointing and dismissing district commandants of the State Fire Service in Poland. Thus it fills a gap in the science of law, which can be a reference point for judicial decisions. The article deals with such issues as the administrative nature of the appointment and dismissal, the prerequisites for the appointment and dismissal of the commandant and their proof, the procedure for the appointment and dismissal and the participation in them of the organs of the State Fire Service and the organs of public administration, the importance of the *starost's* opinion in these procedures, the importance of the loss of confidence in the appointment and dismissal of the commandant. The issue of the application of the Code of Administrative Procedure raised in the article plays an important role in these procedures. The article is based on the current legal status, exhaustively analyzed and applied judicial decisions and views of the science of law. The paper also refers to the views occurring in the procedures for appointing and dismissing commandants in other uniformed services.

Keywords: State Fire Service, district commandant, public administration, fire protection, state security

INTRODUCTION

The subject of the article is the appointment and dismissal of a district commandant of the State Fire Service.[1] The rationale behind this choice of topic is the lack of scientific studies on the subject. Therefore, the article fills a gap in the science of law. The study is also of great practical importance, because in Poland there are 314 *powiats* (counties) and 66 cities with *powiat* rights,[2] as well as 335 district commandants of the SFS.[3] The rotation in

[1] Hereinafter: SFS.
[2] Administrative division of Poland according to the Central Statistical Office, see https://stat.gov.pl/statystyka-regionalna/jednostki-terytorialne/podzial-administracyjny-polski/ [accessed: 08.01.2022].
[3] See https://strazacki.pl/artyku%C5%82y/pa%C5%84stwowa-stra%C5%BC-po%C5%BCarna-

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the position of district commandant is usually greatest in the period of post-election changes. The management of the state, of the Ministry of Internal Affairs and Administration, and of the SFS decide to change the vast majority of county commandants after an election.

The aim of the study is to describe the prerequisites and principles of appointing and dismissing a district commandant of the SFS. The main problem of the study can be laid out in specific questions: What is the legal nature of the decision to appoint and dismiss a district commandant? How do public administration officials participate in the procedure of appointment and dismissal? Are the opinions of public administration officials in these procedures binding? What are the main reasons for dismissing someone from the post of district commandant and must they be proved? Does the Code of Administrative Procedure[4] apply in the procedure of appointing and dismissing a district commandant?

The article uses traditional scientific methods from the science of law, such as the historical method, the hermeneutic method, and the argumentative method.

1. HISTORICAL AND LEGAL BACKGROUND

According to the Act of 4 February 1950 on fire protection and its organisation,[5] which entered into force on 28 February 1950, district and local commandant fire officers were appointed and dismissed by the commandant fire officer after consultation with the praesidium of the relevant national council. This regulation was in force and unchanged until 24 April 1960, when it was repealed by the Fire Protection Act of 1960.

From 25 April 1960 to 17 June 1975 there were district fire brigades within the structures of the professional fire brigades. They functioned as fire protection authorities of the praesidiums of national councils, subject to the supervision of the Minister of Internal Affairs. The fire protection authorities operated in accordance with the orders and guidelines issued by the Minister of Internal Affairs and the relevant higher authorities and praesidiums of national councils.

The Decree of 27 December 1974 on the Fire Service[6] stipulated that commandants of district fire brigades (city or district) were appointed by the head of the district (city or district) from among the candidates presented by the commandant of the voivodeship fire brigade (the commandant of fire brigades

w-%E2%80%9Epigu%C5%82ce%E2%80%9D [accessed: 25.04.2022].

[4] Journal of Laws of 2021, item 735 as amended [hereinafter: CAP].

[5] Journal of Laws No. 6, item 51.

[6] Journal of Laws No. 50, item 321 – the decree entered into force on 1 January 1975.

from that city was excluded from the voivodeship). This regulation was repealed by the enactment of the Law on Fire Protection of 12 June 1975,[7] which came into force on 18 June 1975. This regulation remained unchanged until 31 December 1988, when it was made more precise by another amendment.[8] Starting 1 January 1989 a provision came into force, according to which a regional commandant of fire brigades was appointed by a local state administrative body of general competence of a provincial level from among the candidates presented by the commandant of the provincial fire brigades.

On 1 January 1992, when a new Act on the SFS of 24 August 1991 came into force,[9] there were no district (city) fire brigades, but rather regional fire brigades within the structure of the SFS. A district commandant was appointed and dismissed from among the fire service officers by the commandant of the SFS, on the request of the competent regional commandant. At that time there was no legal regulation allowing a *starosta* (head of the county district) to participate in the appointment of a district commandant of the SFS.

The institution of district commandant appeared on 1 January 1999 when the Act of 24 July 1998 on the change of certain Acts defining the powers of public administration bodies – in connection with the reform of the state system[10] came into force. The reform of the state system was introduced by the Act of 24 July 1998 by instituting a basic three-tier territorial division of the country.[11] The units of the three-level division of the country's territory were then established as communes, counties, and voivodships.

At that time a legal regulation appeared in the Act on the SFS, according to which a district commandant officer was appointed from among the officers of the SFS by the provincial commandant of the SFS in agreement with the *starosta*. The provision of Article 35(3)(1) of the Act on County Government did not apply. A district (municipal) commandant of the SFS could be dismissed by a regional commandant after consultation with the *starosta*. The provision of Article 12(3) applied accordingly. This regulation survived practically unchanged until 30 June 2005.

On 1 July 2005 a regulation was added to the existing law, which has remained unchanged, according to which in cases where the candidate for the position of district (city) commandant of the SFS is not approved or does not accept the position, another candidate shall be presented to the *starosta* within 30 days of the day the candidate was presented. In case of a disagreement with

[7] Journal of Laws No. 20, item 106 as amended.

[8] Act of 16 June 1988 on amending certain acts regulating the principles of functioning of territorial bodies of state authority and administration, Journal of Laws No. 19, item 132.

[9] Journal of Laws No. 88, item 400.

[10] Journal of Laws No. 106, item 668.

[11] Journal of Laws No. 96, item 603.

this candidacy, within 14 days of its presentation to the *starosta* the voivodship commandant of the SFS appoints the officer selected by the voivode.

The function of district commandant of the fire service has existed in the structures of the state (formerly professional) fire service since at least World War II. At some point, the name was changed to district commandant in connection with the changing territorial and institutional structure of the state. Since 1 January 1999, when the reform of the three-tier territorial division of the country was introduced and *powiats* were created, there has been the function of *powiat* commandant in the structure of the SFS.

From post-war times until today the legal model of appointing the district (regional) fire commandant, in which officials of state (professional) fire brigades and local officials of public administration participate, has been preserved. The only changes in this matter concerned the level of the officials of fire brigades and public administration which participated in the appointment of the district (regional) commandant and the nature of their participation, either in the form of an opinion or a directive to appoint a candidate.

2. APPOINTMENT AND DISMISSAL OF COMMANDANTS IN OTHER UNIFORMED SERVICES

District (city) police commandants are appointed and dismissed by the regional police commandant, after consultation with the *starosta*. The provision of Article 35(3)(1) of the Act of 5 June 1998 on county government does not apply (Article 6c (1) of the Police Act of 6 April 1990[12]). In the case of failure to receive an opinion from a *starosta*, the regional police commandant may appoint a respective district (city) police commandant after 14 days have lapsed from the date the request for an opinion was presented.

In the prison service, there is no post of district commandant and the district governor is not involved in the procedure for appointing district directors. In the border guard service, there is no post of county commandant and the procedure for appointing a branch commandant does not involve the district governor. In the Internal Security Agency, the Intelligence Agency, and the Central Anti-Corruption Bureau there are no positions of county commandants and the *starosta* does not play a role in appointment in these agencies.

It is justified to analyse the regulations of uniformed services other than those of the SFS, as it is rightly and uniformly indicated in judicial decisions that due to the similarity of regulations in the acts of uniformed services, judicial decisions issued, for example, in relation to the rights of police officers can be used to solve problems occurring in the SFS, for instance.[13]

[12] Journal of Laws of 2021, item 1882 as amended.

[13] Judgment of the Supreme Administrative Court of 13 February 2019, ref. no. I OSK 864/17,

3. APPOINTMENT OF THE DISTRICT COMMANDANT OF THE STATE FIRE BRIGADE

3.1. General principles

Under the current legal status a district (city) commandant[14] of the SFS is appointed from officers of the SFS by the voivodeship commandant of the SFS in agreement with the *starosta*. The provision of Article 35(3)(1)[15] of the Act of 5 June 1998 on county government[16] does not apply. In the event of a failure to take up a position or a failure to accept the submitted candidacy for the position of the district (municipal) commandant of the SFS, another candidate shall be presented within 30 days of the initial presentation to the *starosta*. If no agreement is reached with regard to this candidacy within 14 days of its presentation to the *starosta*, the voivodeship commandant shall appoint the officer indicated by the voivode for the position of the *powiat* (municipal) commandant (Article 13(1–2) of the SFS Act). A firefighter's service relationship arises – in the case of positions which the SFS Act provides for the appointment of – on the day of his/her appointment to the position (Article 31 of the SFS Act). The appointment of a firefighter to a particular official position in the SFS depends on his/her education, qualifications, and length of service or work (Article 36(1) of the SFS Act).[17] As far as the appointment of district commandants is concerned, there are generally no statements of law or court judgements.

The appointment of a district commandant of the SFS is a three-stage process. The successive stages depend on the consensus of the bodies appointing the district commandant. If a consensus is reached in any stage, there is no need to proceed to a further stage. A lack of consensus in any stage of the procedure results in moving to the next stage. The third and final stage must lead to the appointment of a candidate to the position of district commandant. Officials of both the SFS (the regional commandant of the SFS) and of

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Legalis no. 1889822; judgment of the Provincial Administrative Court in Warsaw of 15 February 2019, ref. no. II SA/Wa 784/18, Legalis no. 2237363; judgment of the Supreme Administrative Court of 26 January 2012, ref. no. I OSK 921/11, Legalis no. 117452.

[14] In cities with county rights, a municipal commandant is appointed. In the remainder of this article the phrase 'district commandant' will be used. Any conclusions and comments in relation to a district commandant will apply equally to municipal commandant of the SFS.

[15] The wording of Article 35(3)(1) of the Coll: (3) The starosta, exercising authority over county services, inspections, and guards, appoints and dismisses managers of these units, in agreement with the voivode, and also performs activities with respect to them in matters of labour law, unless specific provisions provide otherwise.

[16] Journal of Laws of 2020, item 920 as amended.

[17] This provision also applies to appointments to the position of district commandant of the SFS.

public administration (the *starosta* and/or voivode) take part in the appointment procedure.

A requirement for appointment to the position of district commandant of the SFS is that the appointed firefighter must be an SFS officer. The officer corps of the SFS comprises the ranks of junior captain, captain, senior captain, junior brigadier, brigadier, senior brigadier, super brigadier, and brigadier general. Firemen from the ranks of privates, aspirants, or non-commissioned officers cannot be appointed to the position of district commandant.

In each of the stages of appointing a district commandant there is cooperation between the SFS authority and the public administration authority. In the first two stages there is interaction between the regional commandant of the SFS and the *starosta*, whilst in the third stage the regional commandant and the voivode cooperate.

In the first two stages, the regional commandant of the SFS is the official who initiates the appointment procedure, selecting candidates among SFS officers. This selection is somewhat discretionary or arbitrary in nature. The regional commandant need not consult with anyone about the selection of a candidate, and there are no statutory requirements that a candidate for the position of district commandant must meet. Such a person must be able to perform the statutory tasks assigned to the position of a district commandant of the SFS, so the choice cannot be completely detached from matters of the education, knowledge, and experience of the potential candidates.[18]

It is necessary to agree with the uniform line of rulings of administrative courts, expressing the view that appointment to the position of district commandant of the SFS is done in order to perform specific tasks and usually in connection with carrying out the relevant managerial functions; the guarantee of the performance of these functions is the full suitability of a given person for a specific official position. This relationship is based on trust. Another condition for appointment, in addition to expertise and experience, is that the appointing authority has trust in the appointee for a given position.[19] The appointment has the nature of administrative discretion.[20] So far, the science of law has not expressed a position in this respect.

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[18] Pursuant to Article 36(1) of the SFS Act, the appointment of a firefighter to a particular official position in the SFS depends on his/her education, qualifications, and length of service or work.

[19] Ref. no. I OSK 921/11; judgment of the Provincial Administrative Court in Warsaw of 16 April 2009, ref. no. II SA/Wa 87/09, Legalis no. 213426; judgment of the Provincial Administrative Court in Warsaw of 8 March 2011, ref. no. II SA/Wa 1808/10, Legalis no. 355216; judgment of the Supreme Administrative Court of 28 February 2007, ref. no. I OSK 324/06, Legalis no. 236699.

[20] Judgment of the Provincial Administrative Court in Warsaw of 5 October 2006, ref. no. II SA/Wa 1146/06, Legalis no. 292865.

Pursuant to Article 58(2) of the SFS Act, a firefighter performing his/her duties in a position for which the provisions of this Act provide for appointment cannot perform the function in a trade union and is not subject to the protection referred to in Article 32 of the Law on Trade Unions of 23 May 1991.[21] In view of this regulation, it should be concluded that a firefighter performing the function of a district commandant officer cannot perform the function in a trade union and is not subject to the protection referred to in Article 32 of the Act on Trade Unions of 23 May 1991.

3.2. First stage of appointment

After an internal selection within the ranks of the SFS, the regional commandant is obliged to submit a candidate to the *starosta* for approval. The law expressly mentions the appointment of a district commandant on the basis of an agreement between the regional commandant and the *starosta*. The provision does not describe the intended agreement. It should be regarded as an 'informal' agreement, one that does not require prior written agreement concerning the opinion on the candidate. The requirement of agreement is met if the regional commandant of the SFS indicates the candidate of his/her choice in writing to the *starosta* and the *starosta* issues his/her opinion. It is permissible for the regional commandant to justify the choice, which probably yields a better chance that the *starosta* will approve the selected candidate. It is unacceptable for the regional commandant to present several candidates at the same time and for the *starosta* to select a candidate for approval. This is indicated in the regulation, which speaks explicitly about presenting a candidacy, not candidates.

After the *starosta* is presented with a candidate, he/she is obliged to issue an opinion on the presented candidate. Although Article 13(1–2) of the SFS Act do not literally state that a *starosta* expresses his/her opinion, Article 13(3) does expressly indicate the necessity of expressing an opinion. Therefore, it should be understood that the *starosta* should express an opinion in the procedure for appointing a district commandant of the SFS, as in the procedure for the dismissal of a district commandant. The opinion should be in writing and it should be returned to the regional commandant if the *starosta* expresses and prepares such an opinion.

In the first stage of appointment, the *starosta* has 30 days to react to a nomination. The *starosta* may react in one of three ways. Firstly, he/she may express approval of the selected candidate. Secondly, he/she may express outright disapproval of the candidate. Thirdly, he/she may not take any position.

[21] This provision makes the termination and dissolution of legal relations of trade union members subject to the approval of the company trade union organisation.

The *starosta's* acceptance of a presented candidate results in the need for the regional commandant to appoint the approved candidate to the position of district commandant of the SFS. The *starosta's* approval of the candidate precludes the regional commandant dismissing a previously selected candidate. In this respect, the opinion of the *starosta* is binding for the voivodship commandant. After the *starosta* issues an opinion approving the candidate, the last formal element of this stage takes place: the formal appointment of the candidate for the position of district commandant by the voivodeship commandant fire officer.

If there is a clear lack of acceptance of the presented candidate from the *starosta* or a failure to take a position on the presented candidate, the first candidacy is rejected and the second stage of the appointment procedure is triggered.

3.3. Second stage of appointment

The second stage of the procedure is a repetition of the steps taken in the first stage. It is necessary for the voivodship commandant to present a single candidate and for the *starosta* to take a stance. The only thing that changes is that the time in which the *starosta* should react to the presented candidate is reduced from 30 days to 14 days. Written approval of a candidate ultimately results in his/her appointment by the regional commandant to the position of district commandant.

If there is a clear lack of acceptance of the presented candidate from the *starosta* or a failure to take a stance on the presented candidate, the second candidacy is rejected and the third stage of the appointment procedure is triggered. If the *starosta* fails twice to approve a candidate, not only will the third stage of appointing a district commandant begin, but the *starosta* will also lose the right to issue opinions on subsequent candidates.

3.4. Third stage of appointment

The third stage of appointment is fundamentally different from the previous two stages. First of all, the role of *starosta* in the appointment of a district commandant of the SFS is taken over by the voivode. Secondly, the actions of the voivode do not take the form of an opinion, but rather of a directive; they indicate the SFS officer who should be appointed to the position of a district commandant by the voivodship commandant. Thirdly, the legislature did not specify a time limit within which an SFS officer should be appointed to the position of district commandant in the third stage. Fourthly, it has to be acknowledged that a voivodedoes not have sufficient knowledge of the ranks of the several hundred SFS officers in his/her province. The voivode can only be assisted in the proper selection of candidates by the appropriate local regional commandant of the SFS, who does have such an overview.

The role of the regional commandant of the SFS in the third stage of the appointment procedure is also limited. Article 13 does not give the regional commandant the right to choose a single candidate presented to the voivode for acceptance. In order for a voivode to direct the provincial commandant of the SFS to select an officer for the position of district commandant without possessing adequate knowledge of the SFS, he/she must receive from the provincial commandant of the SFS several relatively equivalent candidates with their competences indicated to justify their selection. A voivode then, being aware that each of the presented candidates is suitable for the position of the district commandant, can arbitrarily and bindingly select a candidate to be chosen for the position of district commandant. A voivode is not in a position, unlike a *starosta*, to take no position or to reject all candidates. A voivode has only one way to react to the candidates presented, which is to select a suitable person in his/her opinion. Therefore, the provincial commandant of the SFS should present a sufficient number of candidates to enable the voivode to choose a suitable one. The candidates should be presented by the regional commandant in writing, just like the selection made by the voivode. If a voivode receives an inadequate selection of candidates, he/she can ask the regional commandant to extend the list of candidates before the formal decision is made. The provincial commandant is bound by the provincial decision. The final element of this stage is the formal appointment of the selected candidate to the position of district commandant of the SFS by the provincial commandant of the SFS.

This model for the third stage, giving the dominant role to the voivode, prevents the procedure for appointing a district commandant from being drawn out as a result of discrepancies in the assessment of candidates between the regional commandant of the SFS and the *starosta*.

4. DISMISSAL OF A DISTRICT COMMANDANT OF THE STATE FIRE SERVICE

The district (municipal) commandant of the SFS may be dismissed by the regional commandant of the SFS after consultation with the *starosta*. The provision of Article 12(3) applies respectively (Article 13(3) of the SFS Act). This provision constitutes the formal and legal basis for the dismissal of a district commandant of the SFS.

A firefighter performing his/her duties in an official, appointed post can be dismissed from that post at any time, immediately or within a specified period of time, by the body entrusted with the appointment. The dismissal of a firefighter from his/her official post, referred to in Section 1, does not result in the termination of the official relationship (Article 31a(1–2) of the Polish Fire Service Act). Article 31a of the SFS Act constitutes the material and legal basis for the dismissal of a district commandant firefighter.

In the legal doctrine there is no statement on the appointment and dismissal of a district commandant of the SFS. Some aspects of the appointment and dismissal have been clarified by court rulings, mainly of administrative courts. This jurisprudence is essentially uniform. On the basis of these rulings practically uniform lines of jurisprudence have emerged, which should be assessed positively and approved.

4.1. Nature of the appeal decision

One has to agree with the court rulings that indicate the discretionary nature of the decision to dismiss a district commandant of the SFS. The dismissal of a district commandant is of an administrative discretionary nature and results from the legislature not establishing specific criteria to justify a dismissal. The service relationship of an appointed firefighter is organisational in nature and does not benefit from any special legal protections characteristic of appointments, the termination of which is possible only in cases specified by law.[22] A voivodeship commandant dismissing a district commandant has total freedom in his/her decision.[23]

"The court examines whether the decision is not arbitrary, i.e. whether the authority issuing the decision gathered all the evidence and chose a specific way of settling the case, after a comprehensive and thorough examination of all the factual circumstances. On the other hand, the lack of premises, which should be followed by the body, when dismissing a firefighter from his/her post, makes it impossible for the court to verify the decision. It is also difficult to control the decision in terms of its compliance with the provisions of procedural law, given that the decision may be taken at any time or immediately, while the lack of premises which would determine the possibility of dismissal from the post excludes the need to demonstrate the legitimacy of decisions taken on this basis."[24]

[22] Ref. no. I OSK 921/11; ref. no. II SA/Wa 87/09; ref. no. II SA/Wa 1808/10; ref. no. I OSK 324/06; ref. no. II SA/Wa 1146/06; judgment of the Provincial Administrative Court in Warsaw of 22 April 2008, ref. no. II SA/Wa 227/08, Legalis no. 164184; judgment of the Provincial Administrative Court in Warsaw of 21 March 2019, ref. no. II SA/Wa 1431/18, Legalis no. 2295600; judgment of the Provincial Administrative Court in Warsaw of 26 February 2008, ref. no. II SA/Wa 1737/07, Legalis no. 838342. Cf. judgement of the Supreme Administrative Court of 8 April 2008, ref. no. I OSK 648/07, Legalis no. 117452 and the judgement of the Supreme Administrative Court of 18 February 2010, ref. no. I OSK 1133/09, Legalis no. 223649.

[23] Ref. no. II SA/Wa 227/08.

[24] Ref. no. II SA/Wa 87/09; ref. no. II SA/Wa 1808/10; ref. no. II SA/Wa 227/08; ref. no. II SA/Wa 1431/18; ref. no. II SA/Wa 1737/07.

4.2. Reasons for dismissal

The most common reason for dismissing a district commandant of the SFS from their post is a loss of confidence by their superiors, which results from specific factual circumstances. It is rightly recognised in court jurisprudence that: "Once there is a loss of confidence, if specific circumstances are demonstrated that may raise doubts about the advisability of keeping a person in a managerial position, there are reasons justifying dismissal. The loss of trust results from the subjective assessment of the superior and not from objectively occurring reasons. The loss of confidence cannot be effectively challenged in a situation where the authority has demonstrated facts justifying the loss of confidence."[25]

When a loss of trust is invoked, it should be supported with indications of the reason behind it, particularly if the dismissed district commandant has an excellent service record, is quickly promoted and repeatedly awarded and honoured, and has good relations with the district authorities.[26]

The court decisions indicated the reasons for the loss of trust, which in turn became the reason for dismissing the district commandants. The indications of the courts should be regarded as accurate. A loss of trust may result from a conflict between a regional SFS commandant and a district SFS commandant.[27] The loss of trust may also result from an ad hoc inspection, in which irregularities were found in their organisation of service, management of an SFS unit, or behaviour towards other firefighters.[28] The reason for dismissal may be the final conclusions from a post-inspection report concerning potential irregularities, for example, related to the participation of district commandants in the course for vehicle appraisers or their possession of several mobile phone subscriber cards.[29] A lack of availability of the district commandant may also be a reason for dismissal. The court rightly pointed out that "after all, it is obvious that persons in managerial positions must be characterised by full availability and which the applicant, due to her sick leave, could not demonstrate. On the other hand, her reliance on the argument that her duties were performed by a deputy is all the more misplaced, since in principle every organisational structure has such a position, but not in order to permanently perform the duties of a superior."[30]

[25] Ref. no. I OSK 921/11; ref. no. II SA/Wa 87/09; ref. no. II SA/Wa 1808/10; ref. no. I OSK 324/06; ref. no. II SA/Wa 227/08; ref. no. II SA/Wa 1431/18.
[26] Ref. no. II SA/Wa 1737/07.
[27] Ref. no. I OSK 921/11; ref. no. II SA/Wa 1808/10.
[28] Ref. no. II SA/Wa 87/09.
[29] Ref. no. II SA/Wa 1431/18.
[30] Judgment of the Provincial Administrative Court in Warsaw of 11 May 2010, ref. no. II SA/Wa 1981/09, Legalis no. 619402.

"In the case there was no violation of the presumption of innocence. The provisions of the professional statute for firemen relating to the loss of trust by a superior do not link the possibility of appeal with the fact of a criminal conviction. Hence, certain too firm and final statements used by the authority in the appealed decision, e.g. «in connection with having committed an act» should only be treated as unauthorised and premature, but as a rule not affecting the correctness of the decision itself."[31]

"The refusal to carry out an inspection, the refusal to allow an inspection, the polemic against the content of an order given by a superior, including the lack of discipline of subordinates, could be reasonable grounds for the authority to consider that the appellant had lost the confidence of his superior resulting in his dismissal from the post of commandant of the State Fire Service. It is not necessary to prove all the facts constituting the grounds for the decision to dismiss. It is sufficient to confirm the occurrence of the majority of events that are the cause of the loss of trust of the superior."[32]

It is necessary to agree with the uniform line of judicial decisions that a dismissed district commandant of the SFS does not enjoy the protection to which trade union members are entitled under Article 32 of the Trade Union Act.[33]

In one court decision, a view was expressed to the effect that: "The justification for the dismissal of an officer from his/her official post may, in principle, be very laconic. The lack of prerequisites defining the possibility of removal from a post excludes the necessity to prove the legitimacy of decisions taken on this basis. The justification of the decision in this type of cases may in fact boil down to statements on the autonomous right of the authority in the selection of personnel, without the need to prove the lack of appropriate qualifications, merits, achievements or assessments."[34] This ruling can only be partially agreed with. Taking into account the rulings quoted earlier, it should be acknowledged that the grounds for dismissal should be indicated in the justification of the decision to dismiss a district commandant, although the regulations do not indicate what the grounds for dismissal of a district commandant of the SFS are. In addition, facts supporting such a reason must be indicated and these must be at least mostly proven by the evidence gathered. The administrative court will not investigate whether a reason for dismissal is reasonable and purposeful, because the regulations do not specify proper reasons for dismissal. However, it is necessary to state the reason for the appeal in the grounds of the appeal decision in order to make the decision as transparent as possible.

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[31] Ref. no. II SA/Wa 1431/18.

[32] Ref. no. I OSK 324/06.

[33] Ibid.; judgment of the Supreme Administrative Court of 14 October 2005, ref. no. I OSK 131/05, Legalis no. 1123599.

[34] Ref. no. II SA/Wa 227/08.

4.3. Power of the *starosta's* opinion

It was rightly pointed out in a uniform court jurisdiction that obtaining an opinion of a *starosta* concerning the dismissal of a district commandant of the SFS is not obligatory. For the dismissal it is sufficient for the regional commandant of the SFS to request an opinion from the *starosta*.[35] "It is not important for the authority taking the decision whether the *starosta's* opinion is positive or negative. Such an opinion may influence the decision made by the authority, but it cannot determine the will of the authority which has the right to decide."[36]

4.4. Applicability of Article 12(3) of the SFS Act

Pursuant to Article 13(3) of the SFS Act, a district (municipal) commandant of the SFS can be dismissed by the regional commandant of the SFS after consultation with the *starosta*. The provision of Article 12(3) applies accordingly. Pursuant to the provision of Article 12(3) of the SFS Act, in the absence of the opinion referred to in Section 2,[37] the minister in charge of internal affairs shall dismiss the regional commandant of the SFS 14 days after the request for dismissal was submitted.

According to the views of the legal sciences and the decisions of the Supreme Court and administrative courts referring to them, it should be indicated that the term 'accordingly' (apply the provisions of law) should be understood to mean that some provisions indicated for appropriate application should be applied without any changes in their disposition to the indicated scope of reference, other provisions should be applied with some changes in their disposition to the indicated scope of reference, and others still cannot be applied at all to the indicated scope of reference [Nowacki 1964, 367–76; Kała 2012, 39].[38]

It has been rightly pointed out in court rulings that pursuant to Article 13(2) of the SFS Act, a municipal commandant of the SFS may be dismissed by the regional commandant of the SFS after consultation with the *starosta*. The provision of Article 12(3) of the Act applies accordingly, which means that in the absence of such an opinion, the regional commandant of the SFS shall dismiss the municipal commandant of fire service 14 days after the day the request for dismissal is presented.[39]

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[35] Ref. no. II SA/Wa 1146/06; ref. no. II SA/Wa 1431/18; judgment of the Supreme Administrative Court of 4 December 2002, ref. no. II SA 744/02, Legalis no. 99988.

[36] Ref. no. II SA/Wa 1808/10; ref. no. II SA/Wa 227/08; ref. no. II SA/Wa 1431/18.

[37] This is in regards to the opinion of the governor.

[38] Resolution of the Supreme Court of 23 May 2006, I KZP 6/06, Legalis no. 74446.

[39] Judgment of the Provincial Administrative Court in Warsaw of 28 September 2004, ref. no. II SA 1460/03, Legalis no. 1134032.

4.5. Application of the Code of Administrative Procedure

A certain divergence has emerged in court rulings as to whether the Code of Administrative Procedure should be applied in the procedure for dismissing a district commandant of the SFS and to what extent. In one of the judgments it was indicated that: "Once again it should be emphasised that the Act on the State Fire Service contains a comprehensive regulation in this respect both as to the material basis and the procedure, it does not contain an appeal to apply the provisions of the Code of Administrative Procedure in matters not regulated in the quoted Act. It should be noted that this special procedure concerns only the dismissal of a firefighter from a position held on the basis of appointment."[40] We can partially agree with this statement, as far as the claim that the SFS Act contains the material and procedural basis for the dismissal of a district commandant of the SFS is concerned. However, in the procedure for dismissing a district commandant of the SFS, the Code of Administrative Procedure should be applied, even if the SFS Act does not explicitly provide for such dismissal.

One has to agree with the decision of the court, in which it was reasonably indicated that: "The Commandant of the State Fire Service, adjudicating in the case as an appeal body, and the Świętokrzyskie Regional Commandant of the State Fire Service, taking decisions on the dismissal of the applicant[41] from his former position, were bound by the rigours of administrative procedure. Thus, they should observe the principle of pursuing the material truth (Article 7 CAP), and thus take all steps necessary to clarify the facts accurately. They were obliged to duly and exhaustively inform the party about factual and legal circumstances that could have an impact on the establishment of its rights and obligations being the subject matter of the administrative proceedings (Article 9 CAP). Finally, they had to exhaustively collect, consider and evaluate all the evidence (Article 77(1) and Article 80 CAP) and justify their decision according to the requirements set out in Article 107(3) CAP."[42]

A decision to dismiss a district commandant may be made immediately enforceable.[43]

5. DISMISSAL OF A DISTRICT POLICE COMMANDANT

The views expressed in the court rulings concerning the dismissal of a district commandant of the SFS are legitimate and valid, as confirmed by the doctrine of law and the court rulings concerning the dismissal of a district

[40] Ref. no. II SA/Wa 1146/06.
[41] A county fire commandant.
[42] Ref. no. II SA/Wa 1737/07.
[43] Ref. no. II SA/Wa 1808/10.

commandant of the SFS. When interpreting the provisions on the dismissal of a district commandant of the SFS, it is reasonable to use the views expressed regarding the provisions on the dismissal of a district commandant of police. In the doctrine and court judgements it is uniformly and rightly indicated that the opinion of a *starosta* in a procedure for dismissing a district police commandant is not binding. The regional commandant is only obliged to request such an opinion from the *starosta*. However, if the former does not receive an opinion within 14 days of requesting it, he/she may dismiss the district police commandant on his/her own [Kotowski 2012, 189; Świerczewska-Gąsiorowska 2015, 72; Sęk and Obrębski 2009, 291–300; Siwek 2012, 174].[44]

One must agree with the uniform views of the courts with regard to the prerequisites and grounds for dismissal of a district police commandant. The provisions "do not give grounds for assuming that dismissal from the post of district police commandant should be justified in a special way. The legislator has not introduced any conditions on the fulfilment of which dismissal from this post is conditional. The lack of specific criteria means that the decision in this matter is left to the discretion of the competent public administration body, which at any time, when assessing the suitability to manage a subordinate organisational unit, due to the nature of the service performed, may dismiss a police officer from the position of the head of the unit. Thus, the assessment of suitability both upon appointment to the post of district police commandant and upon dismissal from this post is left to the regional police commandant, who performs his tasks with the help of the police headquarters subordinate to him. The condition for appointment, in addition to professionalism and experience, is the confidence that the person appointed to the position has in the appointing authority, and the loss of confidence necessary to perform the function is the basis for dismissal from the position."[45]

"The Court hearing the complaint shares the views expressed in the case law that the dismissal of a police officer from a position held on the basis of appointment is the prerogative of the authority and is characterised by discretion. It is not apparent from the wording of this provision that there are special grounds or reasons for dismissal, as it does not contain specific criteria justifying the dismissal of a district police commandant from his post by the regional police commandant. The term «at any time», without any supplementation with material and legal prerequisites for interfering with the official

[44] Judgment of the Provincial Administrative Court in Warsaw of 3 September 2009, ref. no. II SA/Wa 663/09, Legalis no. 228811.

[45] Judgment of the Provincial Administrative Court in Warsaw of 18 October 2019, ref. no. II SA/Wa 411/19, Legalis no. 2385209; judgment of the Provincial Administrative Court in Warsaw of 18 April 2016, ref. no. II SA/Wa 1684/15, Legalis no. 1471450; judgment of the Provincial Administrative Court in Warsaw of 6 June 2019, ref. no. II SA/Wa 1890/18, Legalis no. 2294394.

relationship, makes this regulation provide full discretion and even freedom in decision-making by an authorised body."[46]

"Judicial review of a decision to remove an officer from a functional position is limited, which is due to the lack of grounds that the authority should be guided by when removing an officer from an official position. The court examines the legality of the decision, but does not inquire into the purposefulness of the decision made and the decision contained therein. Such decisions are excluded from judicial review to the extent to which the administrative authority exercises its discretion within the limits granted to it by the provisions of substantive law. In such cases the administrative court, due to its constitutionally (Article 184 of the Constitution of the Republic of Poland) specified tasks of judicial control of administration, cannot constitute a «third instance» of administration and replace the administrative body in resolving an administrative case. The specificity of this type of adjudication also limits the procedure of taking evidence, regulated in the Code of Administrative Procedure. The lack of prerequisites defining the possibility of dismissal from a position excludes the need to demonstrate the legitimacy of decisions taken on this basis and to conduct evidence proceedings aimed at determining all grounds for dismissal (see judgments of the Supreme Administrative Court of 8 April 2008, ref. no. I OSK 648/07 and of 10 May 2011, ref. no. I OSK 1446/10 – judgments of administrative courts are available in an online judgment database at: orzeczenia.nsa.gov.pl)."[47]

"Transferring the above comments of a general nature to the case at hand, it must be borne in mind that the regional police commandant had lost confidence in the applicant and it was within his discretion to assess the advisability of keeping the applicant in a managerial position. The loss of trust results from a subjective assessment of certain facts by the superior, not the subordinate. It should be noted here that the authority of first instance referred to a specific incident of 14 March 2018, which also formed the basis for initiating disciplinary proceedings against the applicant. In addition, the correctness of the position of the body of first instance is strengthened by the results of the questionnaire conducted on 16–17 July 2018 by the Psychologists' Section of the Provincial Police Headquarters in [...] among persons (police officers and civilian employees) from the unit headed by the applicant. These results indicate that the persons participating in the study even fear the return of the complainant" [Kotowski 2012, 189–90; Świerczewska-Gąsiorowska 2015, 73].[48]

It is necessary to agree with the court's view that when issuing a decision on the dismissal of a district police commandant, the commandant commandant

[46] Ref. no. II SA/Wa 411/19; ref. no. II SA/Wa 1684/15; ref. no. II SA/Wa 1890/18.
[47] Ref. no. II SA/Wa 1981/09; ref. no. II SA/Wa 411/19; ref. no. II SA/Wa 1684/15; ref. no. II SA/Wa 1890/18.
[48] Ref. no. II SA/Wa 1981/09; ref. no. II SA/Wa 411/19; ref. no. II SA/Wa 1684/15.

and the provincial commandant are obliged to apply Articles 6, 7, 77(2), 80, and 107(3) of the Code of Civil Procedure, as well as with a more far-reaching view that: "Despite the fact that the provision of Article 6c of the Police Act of 06 April 1990 (Journal of Laws of 2002, No. 7, item 58 as amended) does not refer directly to the provisions of the Code of Administrative Procedure, the application of the provision of Article 106 CAP is fully justified. There is no doubt that the proceedings for the dismissal of a municipal police commandant are administrative proceedings and are conducted on the basis of the provisions of the Code of Administrative Procedure, so they also apply to the proceedings conducted in order to issue an opinion by a co-operating body. Moreover, Article 106 CAP will not apply only in situations where it is expressly provided for in the substantive law."[49]

The court rightly held that: "In a case, there must be actual and concrete occurrences arguing against leaving a particular officer in his former post, and the decision cannot be attributed the characteristic of arbitrariness. This is not the situation in this case. In a very extensive decision, in which the authority mainly analysed the grounds to be followed when dismissing a police officer from his/her former post and transferring him/her to his/her disposal, there was no justification of the actual and concrete grounds in relation to the person of the applicant. The personnel order issued by the authority of first instance merely stated that in connection with the situation occurring on [...] and [...] June 2018 at [...] in S. at the training of the managerial staff of the Lubuskie garrison and the accompanying media coverage of the incident, resulting in the loss of confidence in the complainant by his superiors, there was a need to dismiss the complainant from his previously held position and to transfer him to his disposal. It was also pointed out that the complainant, while on duty in a managerial position, should refrain from behaviour exposing the police to a loss of public confidence. In the case, it has not been shown in any way what situation occurred during the training in question, whether the media coverage referred to was caused by the applicant's behaviour or attitude and, most importantly, what behaviour the applicant R.K. should refrain from. The staff order in question does not indicate in any way why there was a loss of confidence in the applicant on the part of his superiors. Not a single real and concrete reason causing it was indicated."[50]

[49] Judgment of the Provincial Administrative Court in Gliwice of 12 June 2007, ref. no. IV SA/Gl 1349/06, Legalis no. 112720.
[50] Ref. no. II SA/Wa 1890/18.

CONCLUSIONS

The historical legal interpretation does not provide fundamental answers on the subject of appointments and dismissals of district commandants of the SFS. The lack of doctrinal and case-law statements on the subject in the past does not allow to continue or change the doctrinal or case-law lines or to relate them to the interpretation of the current legal state.

The function of district commandant is found only in the SFS and the police; it does not exist in other uniformed services. According to court rulings, it is possible to use the views of doctrine and jurisprudence expressed with respect to legal regulations on the police in order to interpret legal regulations related to the appointment of district commandants in the SFS.

A firefighter appointed to the post of district commandant of the SFS must be an officer. When appointing him/her, his/her education, experience, and length of service should be taken into account. The appointment is an administrative discretion, and the regulations do not contain specific requirements to be fulfilled by a candidate for this function. The regional commandant of the SFS should have confidence in the candidate appointed to the position of the district commandant.

In the three-stage procedure for appointing a district commandant, the regional commandant of the SFS and the *starosta* play a crucial role. If a *starosta* obstructs the candidates presented by a regional commandant, the voivode 'enters into' the appointment procedure, having the right to select a person for the position of district commandant from several candidates presented by the regional commandant.

The model of appointing a district commandant of the SFS defined by the law should be evaluated positively and should be kept in the current legal system. The legitimacy of this model results from the dominant role of the regional commandant in the appointment procedure and from the cooperation of public administration bodies (i.e. the *starosta* and the voivode) with the district commandant, after his/her formal appointment, in carrying out tasks in the field of fire protection in the territory of the district and the voivodeship. The validity of this model is confirmed by its long history in the system of law, with minor corrections resulting from political changes that have taken place in Poland over the past few decades.

The dismissal of a district commandant of the SFS is discretionary, and the regulations do not specify grounds for dismissal. In practice, the main reason for dismissal appears to be a subjective loss of trust on the part of the regional commandant commandant of the SFS, which may result, for instance, from a conflict with the regional commandant commandant or from irregularities in the management of the district commandant. The reason for the loss of trust should be indicated in the decision to dismiss the district commandant and

should be based on the evidence gathered in the appeal proceedings. In order to dismiss a district commandant, it is sufficient for the regional commandant of the SFS to request an opinion from the *starosta*. The regional commandant commandant does not have to wait for the *starosta's* opinion and may even dismiss the district commandant against the *starosta's* advice. In the procedure for the appointment and dismissal of a district commandant, the Code of Administrative Procedure should be applied.

In order to resolve legal doubts in the procedure for appointing and dismissing a district commandant of the SFS, one may apply the views of the legal doctrine and court rulings expressed in relation to the appointment and dismissal of a district commandant of the police, which are consistent with the views of court rulings regarding the appointment and dismissal of a district commandant of the SFS.

REFERENCES

Kała, Dariusz P. 2012. *Sto pytań do prawnika o ochotnicze straże pożarne. Poradnik praktyczny*. Vol. 1. Gdańsk: Oddział Wojewódzki Związku Ochotniczych Straży Pożarnych RP.

Kotowski, Wojciech. 2012. *Ustawa o Policji. Komentarz*. Warszawa: Wolters Kluwer.

Nowacki, Józef. 1964. "«Odpowiednie» stosowanie przepisów prawa." *Państwo i Prawo* 3:367–76.

Sęk, Andrzej, and Zbigniew Obrębski. 2009. "Prawne determinanty współpracy jednostek samorządu terytorialnego i Policji w zakresie ochrony bezpieczeństwa publicznego." *Studia Politologiczne* 14:291–300.

Siwek, Małgorzata. 2012. "Organy samorządu terytorialnego a działanie gminy." *Acta Universitatis Lodziensis. Folia Oeconomica* 270:171–79.

Świerczewska-Gąsiorowska, Anna. 2015. "Komentarz do art. 6c." In Łukasz Czebotar, Zuzanna Gądzik, Aneta Łyżwa, et al., *Ustawa o Policji. Komentarz*, 71–73. Warszawa: Wolters Kluwer.

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ENVIRONMENTAL PROTECTION AND ITALIAN CONSTITUTIONAL REFORM. SOME PROFILES OF INTEREST AND CRITICAL REMARKS

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Abstract. This paper aims to analyse the scope of constitutional reform no. 1/2022, approved last 8th February by the Italian Parliament, with which the Articles 9 and 41 of the Constitution have been modified. Thanks to this amendment, the environment (the ecosystem and biodiversity) has been included as a legal asset subject that needs an expressed protection. Specifically, it is possible to highlight the critical profiles concerning the balance that the legislator has already intended to offer at a regulatory level between respect for the environment and private economic activities. In this field, the Ilva case-law represents a milestone for the Constitutional Court and the Italian legislator.

Keywords: environment, environment protection, constitutional reform, ecocentric perspective

INTRODUCTION

Recently, the Italian legal system has undergone a peculiar reform, through which the level of environmental protection already enshrined in the Constitution has been strengthened. Italy is therefore one of those countries that, in order to react to the effects and disasters of climate change, has – perhaps symbolically – oriented all economic, social and economic activities towards the awareness and need to protect the environment. Since this is a civil law system, culturally close to the Polish and Central European systems, it is worth reflecting on the content of the reform and above all on the effects it may have on the real economy. This is in order to offer a comparative perspective.

In the course of this paper, therefore, we will focus on the analysis of the protection of the environment in the Italian constitutional context, on the process of the reform, its content, and its critical profiles to verify its impact, strength and weaknesses.

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1. THE ENVIRONMENTAL PROTECTION. A NEED THAT CAN NO LONGER BE POSTPONED

To understand how the text of the reform and its ratio were arrived at, it may be useful to consider, firstly, which principles protect the environment in the context of the Italian legal system. In this way, it will also be possible to guess what is meant by "environment" according to the Italian constitutional legislator.

In fact, the notion of "environment," outside the legal context, already has different meanings.[1] This fact shows how it is not so easy for the legislator of a country to guide regulatory choices with respect to a protected good whose perimeter is not so clear. And, on this path, the first thing to do is to understand whether the environment is understood as a complex of elements not dependent on the simultaneous need to safeguard the economic, social and political components of human life on the planet or whether the environment should be considered an object of definition and protection only from the perspective of the human being. In short, it is a question of deciding between an "anthropocentric" and an "ecocentric" view of the environment [Kortenkamp and Moore 2019, 261–72].

As mentioned above, in the first case, the environment is instrumental to the well-being of humans. In the second case, on the other hand, the well-being of the environment must be protected regardless of human behavior and necessities. Recently, from a political and international point of view, there has been a slight change of way.

In the last decades the climate emergency was surely perceived as a scientific reality but not as well as a political and consequently as a juridical reality. Indeed, from a political point of view, there was no single vision and, therefore, not a single approach to the "environment" issue.

The very existence of man-made climate change was the subject of great doubt even in countries that were particularly advanced and central to the entire world environmental ed economic balance. It would be enough just to think here about the United States of America. During President Trump's previous administration, not only the country was pulled out of the 2015 Paris Agreement on limiting CO_2 emissions and preventing the Earth's temperature from rising, but also sustained populist approach implied that human race was unable to trigger and facilitate the devastation of the climate balance through the exploitation of natural resources; pollution from industrial activity was being questioned [Tollefson 2017].

[1] One of the most common is "the natural world in which people, animals and plants live," in Oxford Dictionary.

At the same time, in terms of international policy and relations, other countries in the East, such as China, are still investing in the exploitation of coal and fossil energy resources to make their economies more efficient. That because the economic growth comes before environmental protection in a global context.[2]

However, as anticipated, a change of course seems to have taken place with the recent G20 and Cop 26 [Nascimiento et al. 2022, 158–74].

The summit of the Heads of State and Government of the countries belonging to the G20, held in Rome from 30 to 31 October 2021, had the environment as one of its main goals: numerous sessions were dedicated to this issue, leading to the signing of the commitment to contain climate warming within 1.5 degrees through immediate actions such as the reduction of global gas emissions, and the commitment to formulate long-term strategies that establish pathways consistent with achieving a balance between "anthropogenic emissions" and the reduction of CO_2 by or around mid-century, taking into account different approaches, including the circular carbon economy, socio-economic, economic, technological and market developments and the promotion of the most efficient solutions.

The summit smoothly passed the baton to Cop 26, the UN climate change conference, chaired by the UK and hosted in Glasgow from 31 October to 12 November 2021, where more than 190 world leaders are gathered for twelve days of negotiations.

This was an event that many believe is the world's last chance to bring the devastating consequences of climate change under control, the debate involving society at large: scholars, citizens, activists. The summit has therefore made it possible to transform the certainty of climate change into a political issue, one which no country can shirk any longer or regard in a different sense, for instance, believing that human behavior is not capable of compromising the environment.

In this context, several countries, including Italy, have developed the interest – or the need – to take clear regulatory action to crystallize the principle that human activity must be limited, must be consistent with the reasons for protecting the environment. This new approach can be interpreted as the political will to move from "anthropocentric" to "ecocentric" environmental protection. In fact, as will be seen below, the intervention of the Italian legislator has effectively modified articles of the Constitution that are not directly linked to the right to human health.

[2] *The 2020 China report of the Lancet Countdown on health and climate change*, https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30256-5/fulltext [accessed: 25.03.2022].

2. THE ENVIRONMENT IN THE ITALIAN CONSTITUTION. A LOOK AT THE SYSTEM BEFORE THE CONSTITUTIONAL REFORM

Until the reform of February 2022, Italy's Constitution did not in fact expressly provide for the "environment" as an object of protection [Bartolucci 2021, 212–30].

In fact, within the text of the Charter, it was possible to glimpse a positioning within Article 9 of the Constitution, with reference to the object and the fact that protection should be provided for. Within Article 117 of the Constitution, on the other hand, the environment is still identified with reference to the legislative power – in the division of competences between the central State and the territorial regions – which must provide a reference discipline. In particular, the Italian Constitution assigns to the central State the prerogative of legislating to protect the environment as such [Cerrato 2020, 216–24].

These two articles have a different weight and function within the constitutional system. Article 9 of the Constitution is in fact included in the first part of the constitutional text, which is dedicated to the fundamental values and principles that inspire the Republic. Article 117 of the Constitution, on the other hand, falls within the regulatory provisions of the so-called second part of the Constitution, which regulates the powers of the State, its checks, balances and the various functions they perform. And yet, before the 2022 reform, the object "environment" was explicitly referred to only in Article 117 of the Constitution. In fact, Article 9 of the Constitution did not expressly refer to the "environment," since in paragraph 2 there was only a generic reference to the "protection of the landscape."

In its entirety, Article 9 of the Constitution stated: "The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the nation."

It is clear, therefore, that the "environment" was not the subject of an express provision. Only over the years, the doctrine, supported at times by the constitutional jurisprudence (Constitutional Court No. 85/2013) [Ceddia, Graziano, Mezzi, et al. 2020, 9–22], has managed to extrapolate from the concept of "landscape," the environmental asset as an independent one to be protected. And this process has certainly been facilitated by the fact that Italy, a founding country of the EU, ratified the Maastricht Treaty of 1992 and the following treaties that followed until Lisbon in 2009. However, let us take a look at the various stages that followed.

The sensitivity that has matured for environmental issues over the last few decades, as mentioned above, has led the doctrine to look for a formal foothold in the text of the Italian Constitution on which to base the legal relevance of the environment as such. And in fact, at first, the evolutionary interpretation of the expression "protect the landscape," in combination with Article 32 of

the Constitution,[3] which qualifies health as a fundamental good of the individual and the community, has allowed to expand the meaning to include the protection of the environment [Mengoni 1996, 121].

In this sense, if Article 9 of the Constitution has represented the normative foundation useful to guarantee the protection of the environment against violations on the landscape and on the territory that could create damage to mankind, Article 32 of the Constitution has turned out to be the juridical key to make the violation of the environment protectable before a judge and the damage caused to it the fundamental element to be able also to ask for a compensation for the damage caused.

In this context, a sentence of the Italian Constitutional Court was significant (No. 5172/1979) which, interpreting Article 32(2) of the Constitution, stated that the protection of human health "extends to the associated life of man in the places of the various aggregations in which it is articulated." For this reason, even the environment, as the place where man lives, must be protected in order to guarantee the human being.

During the following years, the Constitutional Court then made an "extensive" interpretation to protect the environment within the Constitution. In sentence No. 167/1987, it is stated that Article 9 of the Constitution not only contemplates the landscape as a cultural and patrimonial value of the Nation but also the "environment" as a new good to value and protect. It thus obliges the legislator to protect it in all its forms. Landscape and environment are thus taken together as constitutional values of equal level and importance for the Italian legal system.

Even more important is sentence No. 641/1987 of the Constitutional Court, which states that: "the environment is protected as a determinative element of the quality of life. Its protection does not pursue abstract naturalistic or aesthetic purposes but expresses the need for a natural habitat in which man lives and acts and which is necessary for the entire community" [Corriero 2020, 106–20; Bin 1992, 136].

Yet, as can be seen from the words used, the Constitutional Court used the term "value," which legally can be understood in a non-univocal way. For this reason, the doctrine tried to affirm that more than value it would be necessary to speak of legal interest, which requires effective protection that can be exercised before a judge [Bin 1992, 136]. It was only in the 2000s, thanks to the European Union, that Italy adopted a regulatory system capable of giving substance to the environment as a legal asset and as an object of protection.

[3] Article 32: "The Republic protects health as a fundamental right of the individual and the interest of the community and guarantees free health care to the indigent. No one may be obliged to undergo a given health treatment except by provision of law."

It can be just seen that Article 3 of the TEU states that the European Union and thus the Member States must act to promote economic sustainability and the environment.[4]

Without going deep into the European regulatory framework that has been adopted on this subject and with which Italy has had to comply, it is sufficient to recall that it is thanks to Legislative Decree No. 152/2006 "Environmental Code" that Italy has been able to regulate the institution of "environmental damage." The legislative act thus gave an identity to the concept of environmental damage and consequently provided terms of reference within which to place the meaning of the environment within the Italian legal system [Salanitro 2008, 373–86; Cerbo 2008, 533–40].

The "Environment Code" also introduced into the Italian system a set of measures aimed at providing rules for companies and citizens on compliance with a whole series of prerogatives and models to be observed in order to avoid environmental damage of various kinds. The "polluter pays" principle was also highlighted, which requires the party causing the damage to restore the situation ex ante as well as compensating the injured parties and the community [Salanitro 2020, 33–37; Leonardi 2019, 1548–566; Lo Sapio 2018, 40–44; Moramarco 2017, 175–94; Corriero 2016, 509].

Concerning our particular interest in this context, it is clear, how the Italian legal system was, until the constitutional reform of February 2022 fundamentally equipped it with a system of rules for the protection of the environment based on ordinary law, on parliamentary or regional laws (Article 117 of the Constitution) which, as is known in the system of sources, has a subordinate position to the Constitutional one. In addition, the concept of the environment has nevertheless remained implicit in the constitutional fabric and enhanced by the activity of the Constitutional Court's jurisprudence.

Moreover, as can be deduced from the references made to some of the Court's rulings, the good of the environment has always been linked to the well-being of mankind; a perspective therefore more anthropocentric than ecocentric, in which, although the environment assumes a fundamental value in the constitutional order, it must be contemplated and regulated with regard to human activity and its development.

[4] Article 3 TEU: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological progress."

3. THE REFORM OF ARTICLE 9 AND 41 OF THE ITALIAN CONSTITUTION

It is only in recent years, also in the light of the more mature political reasons to do with the subject, that Italy has arrived at the formulation of a constitutional reform law aimed at protecting the environment in a more stringent and reinforced manner.

Constitutional Law No. 1 of 11 February 2022 on "Amendments to Articles 9 and 41 of the Constitution on environmental protection" has been published in the Italian Official Gazette on 22 February 2022, after having been definitively approved in the second reading by the Chamber of Deputies in the session of 8 February 2022 with a majority of two thirds of its members.

The constitutional reform, as mentioned above, inserts in the Italian Constitutional Charter an express reference to the protection of the environment and animals, by amending Articles 9 and 41 of the Italian Constitution [Sciascia 2021, 465–76]. More specifically, with the integration of the second paragraph of Article 9,[5] the reform amends one of the twelve articles of the Italian Constitution relating to the fundamental principles, introducing not only environmental protection but also the protection of biodiversity and ecosystems in the interest of future generations, also stating that the law of the State must regulate the ways and forms of animal protection. This is therefore a fundamental change of course. The environment is to be protected regardless of the reasons and needs of mankind. The environment is the future of the planet and must be preserved as it is.

It also amends Article 41 of the Italian Constitution,[6] which affirms that economic undertakings may not be carried out in such a way as to damage health and the environment, and that the law shall determine the programmes and appropriate controls so that public and private economic activity may be directed and coordinated for environmental purposes.

Here, too, the difference from the past is evident. It is no longer the environment, as a fundamental constitutional value, that must be assessed and protected in relation to economic performance. This time, the economy must always be oriented towards respect for the environment, the ecosystem and biodiversity.

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[5] Article 9: "The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation. It protects the environment, biodiversity and ecosystems, also in the interest of future generations. State law regulates the ways and forms of animal protection."

[6] Article 41: "Private economic initiative is free. It may not be carried out in conflict with social utility or in such a way as to damage health, the environment, security, freedom or human dignity. The law determines the programmes and appropriate controls so that public and private economic activity can be directed and coordinated for social and environmental purposes."

Lastly, it contains a safeguarding clause to the legislative powers granted to the Regions with special statutes and to the Autonomous Provinces of Trento and Bolzano by their respective statutes.[7] Therefore, it is clear that the Italian legislator wanted to include a plurality of new legal assets to be protected at a constitutional level, not only the environment. We thus move from an abstract consideration of the good to be protected to a concrete one, made up of tangible elements that have their own dimension. "Biodiversity" and the concept of "ecosystem" are included in the text as if to reiterate a conceptual distinction, which is also fundamental for the purposes of protection [Predieri 1981, 503ff].

The environment is no longer just the "landscape," but takes on a visible and physically perceptible dimension getting beyond something static, becoming dynamic. This explains also the direct protection of animals [Merusi 1975, 445ff]. This differentiation of protection objects could lead to "a potential and unresolvable conflict between different and, in theory, non-coincident objects (landscape, environment, ecosystems and biodiversity), whose protection requirements are not always unequivocally convergent, imposing, much more often than one might think, complex operations of reciprocal weighting and balancing, all «internal» to the macro-objective constituted by environmental protection" [Cecchetti 2021, 299ff].

The reason why the Italian legislator decided to separate the terms "biodiversity and ecosystems" from the term "environment" is both the desire to comply with especially supranational and international practice, which has long used these terms, and the desire to guide the behaviour of the community and institutions. The amendment to Article 41 is also along the same lines.

4. THE AMENDMENT OF ARTICLE 41 OF THE ITALIAN CONSTITUTION. A NEW START BY ILVA CASE

Article 2 of the Italian constitutional reform modifies Article 41 of Constitution concerning the exercise of private economic initiative. As anticipated, the revision added to the original provision a further limitation according to which the private economic activity may not be carried out in such a way as to cause damage to health and the environment.

Reading the reports and the draft concerning constitutional laws, it emerges that the Italian constitutional legislator wanted to give a practical and effective dimension to environmental protection: the economy cannot damage the ecosystem and threaten biodiversity and the animal world. In this way, the Italian legislator is also trying to take on board, but at the same time overcome, a number of rulings given by the Constitutional Court on the relationship between

[7] See https://bit.ly/3M4llUo [accessed: 25.03.2022].

the economy and the environment. In the past, in the absence of strong politics, the Constitutional Court has had to find very delicate solutions.

An example can be given talking about the Ilva case (Cosst. N. 85/ 2013) [Corso 2019, 405–409]. In this verdict, the judges focus on the balance between constitutional rights and goods, in particular, on private economic initiative in relation to work and health and reiterate that the legislature cannot be considered precluded in abstract terms from intervening to ensure employment levels and safeguard production continuity in strategic sectors for the economy. Then the Court was called upon to judge the constitutionality of the so-called Ilva Decree of 2015, which allows Ilva to continue its activities despite the preventive seizure order issued by the judicial authorities for offences relating to workers' safety.

The case involving the Ilva plant in the city of Taranto had seen the adoption of rules under which – even in the presence of preventive seizures ordered by the authority – the continuation of economic activity was not denied, as long as there was a reasonable and balanced dimension of the constitutional values at stake.

According to the Court, such a balancing act must be carried out "without allowing the unlimited expansion of one of the rights," which would become a "tyrant" in relation to the other constitutionally recognised and protected legal situations which, taken as a whole, constitute an expression of the dignity of the person. In this regard, the Court affirmed that the balancing must respond to criteria of proportionality and reasonableness, in such a way as to allow neither the absolute prevalence of one of the values involved, nor the total sacrifice of any of them, so that a unitary, systemic and not fragmented protection of all the constitutional interests involved is always guaranteed[8] [Corso 2019, 405–409]. "It seems clear – the Court concludes in its ruling – that, unlike in 2012, the legislator ended up by excessively privileging the interest in the continuation of production activity, completely neglecting the requirements of inviolable constitutional rights linked to the protection of health and life itself (Articles 2 and 32 of the Italian Constitution), to which the right to work in a safe and non-dangerous environment must be considered inseparably connected (Articles 4 and 35 of the Italian Constitution). The sacrifice of such fundamental values protected by the Constitution leads to the conclusion that the contested legislation does not comply with the limits imposed by the Constitution on the activity of an undertaking which must always be carried out in such a way as not to harm safety, freedom and human dignity. Promptly removing factors that pose a danger to the health, safety and life of workers is in fact a minimum and indispensable condition for production activity to

[8] Cost. sent., 85 /2013; 63/2016; 264/2012.

be carried out in harmony with constitutional principles, which are always primarily concerned with the basic needs of the individual."[9]

More in detail, the Constitutional Court, with pronouncement no. 58 of 2018, in declaring constitutionally illegitimate certain provisions aimed at allowing the continuation for twelve months of the production activity of industrial plants of national strategic interest subject to preventive seizure ordered by the judicial authority in relation to alleged offences related to the safety of workers, – in this case the blast furnace "Afo2" ILVA Taranto – the Court found a violation of the constitutional provisions of Articles 2, 4, 32(1), 35(1), as well as Article 41(2) of the Constitution. So, the Constitutional Court found a loophole in Article 41 of Constitution. It seemed to be necessary to crystallize how the balance among rights should be arrived at.

The censured legislation was considered to be "far from balancing in a reasonable and proportionate manner all the relevant constitutional interests;" rather, it was found to be such as to "excessively favour the interest in the continuation of production activity, completely disregarding the requirements of inviolable constitutional rights linked to the protection of health and life itself (Articles 2 and 32 of the Constitution)." These inviolable constitutional rights linked to the protection of health and life itself must, according to the Court's findings, be considered inextricably linked to the right to work in a safe and non-dangerous environment (Articles 4 and 35 of the Italian Constitution), so that the legislative provisions under criticism constituted a violation of the limits to business activity, which – the Court emphasises – "pursuant to Article 41 of the Italian Constitution, must always be carried out in such a way as not to damage safety, freedom and human dignity."

In this sense, it is thanks to case-law such as that mentioned above that the need to intervene directly in the Constitution to regulate the balance between the interests to be protected that may come into conflict has been perceived as definitive.[10] Instead, according to the Court, it was necessary to ensure a continuous and reciprocal balance between fundamental principles and rights, without claiming absoluteness for any of them.[11] In short, through the reform, the Italian legislator is once again managing at a political and therefore regulatory level the model around which the balancing of the various constitutional interests at stake must take place.

While before the reform, it was the Constitutional Court that was able to bring out, now the right to work, now the economy, now the environment, with this new legislation, the Italian constitutional legislator imposes, once

[9] Dossier n. 405\3 of 7th February 2022 by *Servizio Studi delle Camere*, https://www.senato.it/leg/18/BGT/Schede/Dossier/Elenchi/1_3.htm [accessed: 26.03.2022].
[10] Ibid.
[11] Ibid.

and for all, already at the level of principles, the proviso that the environment can no longer be called into question to favour other rights.

The qualification of the value of the environment as "primary" therefore means that it cannot be sacrificed to other interests, even if they are constitutionally protected, not that they are placed at the top of an absolute hierarchical order.

While it is true that it might be superfluous to explain that economic activities should be functionalised for environmental purposes, given the numerous constitutional provisions concerning the subject, it is also certain that thanks to the reform of Articles 9 and 41, it is possible to talk about the constitutional foundation of a green economic activities programme [Checchetti 2022, 146] and that it constitutes "a real revolution destined to modify the economic Constitution of the country" [De Leonardis 2021, 779ff].

CONCLUSIONS

In the light of the above, however, some initial conclusions must be drawn. At the moment, it should be noted, the subject is still hotly debated in Italy. The subject is really new. The doctrine but also the national and regional legislator are trying to give a concrete and balanced value and effect to this reform.

Basically, it cannot be denied that environmental protection has indeed become expressly mentioned and central to the Italian system. It was a necessity, an ethical duty that should probably also be applied in other European countries.

However, the way in which the text, especially Article 41, has been formulated leaves open a number of perplexities of application which will have to be reflected upon and returned to also by virtue of future case law applications.

The limit is in fact represented by the fact that the Italian legislator has blocked, prevented that work of reconciliation and balance of the values involved, which are called into question from time to time. That work is essential and it can be done. The environment risks becoming a value, a right, a tyrant; a right that – if the economy and politics are unable to manage this moment of ecological transition correctly and effectively, will risk worrying and burdening Italian economic growth, as well as prompting many companies that do not know or do not want to adequately respect the environment to move their establishments elsewhere causing a huge economic damage.

To ensure that this reform has a good effect on the entire socio-economic dimension of Italy, it is necessary to hope that the Constitutional Court will still be able to carry out comparative assessments between economic, work and health needs.

REFERENCES

Bartolucci, Luca. 2021. "Il più recente cammino delle generazioni future nel diritto costituzionale." *Osservatorio costituzionale* 4:212–30.

Bin, Roberto. 1992. *Diritti e argomenti. Il bilanciamento degli interessi della giurisprudenza costituzionale*. Milano: Giuffrè.

Checchetti, Marcello. 2022. "Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione." *Corti Supreme e Salute* 1:127–54.

Cecchetti, Marcello. 2021. "La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune." *Forum di Quaderni costituzionali* 3:285–314.

Ceddia, Alessandra, Bruna Graziano, Marco Mezzi, et al. 2020. "Ambiente e diritti umani nei ricorsi CEDU nn. 54414/2013 – 54264/2015." *Ambiente Diritto. Rivista Trimestrale di Diritto Pubblico* 3:9–22.

Cerrato, Raffaele. 2020. "L'ambiente «bene» da tutelare." *Ambiente Diritto. Rivista Trimestrale di Diritto Pubblico* 3:216–24.

Cerbo, Pasquale. 2008. "I nuovi principi del «Codice dell'Ambiente»." *Urbanistica e Appalti*, 533–40.

Corriero, Valeria. 2016. "The Social-Environmental Function of Property and the EU «Polluter Pays» Principle: The Compatibility between Italian and European Law." *The Italian Law Journal* 2:479–507.

Corriero, Valeria. 2020. "Sviluppo ecologico e strumenti negoziali di valorizzazione dei «beni culturali, paesaggistici e ambientali»". *Rivista quadrimestrale di Diritto dell'Ambiente* 1:106–20.

Corso, Maria. 2019. "La storia infinita: la sentenza della Corte Edu sui risvolti ambientali e giuslavoristici della vicenda Ilva." *Rivista giuridica del lavoro e della previdenza sociale* 3/2:405–409.

De Leonardis, Francesco. 2021. "La transizione ecologica come modello di sviluppo di sistema: spunti sul ruolo delle amministrazioni." *Diritto Amministrativo* 4:779–812.

Kortenkamp, Katherine, and Collen Moore. 2019. "Ecocentrism and anthropocentrism: moral reasoning about ecological commons dilemmas." *Journal of Environmental Psychology* 21, no. 3:261–72.

Leonardi, Roberto. 2019. "L'oggettivizzazione della responsabilità in tema di bonifiche ambientali e l'affermazione dell'ambiente come bene inviolabile." *Rivista giuridica dell'edilizia* 6, no. 1:1548–566.

Lo Sapio, Germana. 2018. "La responsabilità per danno ambientale e la chimera della calcolabilità del diritto." *Urbanistica e appalti* 1:40–44.

Mengoni, Luigi. 1996. *Ermeneutica e dogmatica giuridica*. Milano: Saggi.

Merusi, Fabio. 1975. "Art. 9." In *Commentario della Costituzione*, edited by Giuseppe Branca, 445ff. Bologna–Roma: N. Zanichelli–Soc. ed. del Foro italiano.

Moramarco, Loretta. 2017. "«Chi inquina paga»: pluralità e limiti degli strumenti attuativi." *Il Diritto dell'agricoltura* 1:175–94.

Nascimiento, Leonardo, et al. 2022. "Twenty years of climate change policy: G20 coverage and gaps." *Climate policy*,158–74.

Predieri, Alberto. 1981. "Paesaggio." In *Enciclopedia del diritto*. Vol. XXXI, 503ff. Milano: Giuffrè.

Salanitro, Ugo. 2008. "I principi generali nel codice dell'ambiente." In *Valori della persona e modelli di tutela contro i rischi ambientali e genotossic*, edited by Francesco Alcaro, Concettina Fenga, Enrico Moscati, et al., 373–86. Firenze: University Press.

Salanitro, Ugo. 2020. "Il principio «chi inquina paga»: «responsibility» e «liability»." *Giornale di diritto amministrativo* 1:33–37.

Sciascia, Massimiano. 2021. "Riforma «in itinere» degli artt. 9 e 41 della costituzione: l'«habitat» umano quale bene collettivo unitario." *Amministrativ@mente* 3:465–76.

Tollefson, Jeff. 2017. "Trump pulls United States out of Paris climate agreement." *Nature* 546.

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THE FORMATION OF POLICE LAW IN THE SYSTEM OF SPECIAL ADMINISTRATIVE LAW OF UKRAINE

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Abstract. The article deals with the investigation of the formation of police law in the legal system of Ukraine and its meaningful content. The separation of police law is considered controversial in Ukrainian science, so its research also requires analysis of the relationship with related parts of the legal array, in particular, general administrative law, administrative tort law, administrative procedure and more.
The material of the article is represented by highlighting issues that need to be addressed during the formation of special administrative law in Ukraine in general and the problems of the formation of police law in particular. The study also outlines the already developed positions and scholarly prerequisites for the formation of a sub-branch of police law. Nevertheless, there is no generally accepted understanding of what is police activity in the Ukrainian doctrine, which relations should be attributed to police-law ones, which authorities are referred to the police. The article attempts to answer these questions, and also a particular structure of police law as a sub-branch of modern administrative law of Ukraine is proposed. Specifically, it is a set of norms that define and regulate the formation of authorities that ensure public safety, law and order; tasks and powers of police authorities; grounds and procedure for application of police measures, procedures; rights and responsibilities of citizens in the field of police activities.

Keywords: police law, police, police activity, police science, special administrative law, Ukraine

INTRODUCTION

Legal reform, which is currently underway in modern Ukraine, has probably affected most of all branches of law, including administrative law. The field of administrative law has been supplemented by new institutions, existing

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ones have been renewed, and changes continue almost daily. In light of the foregoing, the law 'On Administrative Procedure' was recently adopted and signed, the draft of which has been discussed for the last twenty years, but it was adopted by the parliament only in November 2021. Thus, a new institute of administrative law was formed – the institute of administrative procedure. So, it is obvious that the update of the content of administrative legislation is accompanied by changes in the formal grouping of legal provisions in administrative and legal institutions and sub-branches. The changes concern partially the systematization of general administrative law, at the same time, it affects more the systematization of special administrative law.

The issue that the authors try to address in this article concerns the legislation governing the police administrative activities of special public authorities to ensure public order and public safety. In European countries this part of administrative law is called police law and is one of the fundamental parts of special administrative law. In the Ukrainian scientific literature the separation of police law is considered controversial, this issue is still being discussed and debated on scholarly sites.

Therefore, the purpose of this article is to summarize the doctrinal positions on the formation of police law in the legal system of Ukraine, its content, relationship with related parts of the legal framework, highlight problems, and suggest ways to eliminate them.

1. FORMATION OF A NEW STRUCTURE OF SPECIAL ADMINISTRATIVE LAW

It is predominant to highlight that the issue of reforming the system of administrative law, as its internal structure, signifies both common non-controversial issues and controversial ones, on which the scholarly community has yet to discuss and develop joint decisions.

Regarding the obvious issues, it should be recalled that the Soviet approach to the sphere as one that regulates public administration, led to the approach to the formation of its structure. The so-called "administrative law" consisted of two parts: the general part of administrative law and the special part of administrative law. The structure of a special part of administrative law traditionally included the following four parts: public administration in the field of economic activity of the state, public administration in the field of socio-humanitarian activities of the state, public administration in the field of administrative and political activities and intersectoral administration [Vlasov, Yevtikhiyev, and Studenikin 1950, 19]. This division has been preserved in the structure of administrative law in particular, in the Russian Federation to this day [Kuzyakin and Kuzyakin 2015, 33].

However, the change in the paradigm of Ukrainian administrative law, due to changes in approaches to understanding the challenges facing the sphere, as well as the subject of its regulation [Averyanov 2010, 88–89; Kolomoyets and Kolpakov 2017, 71–78] found an absolute flaw in the approach to the definition of parts of special administrative law as areas of public administration. This issue is obvious and there are no open discussions on it.

At the same time, other issues related to the content of general, and especially special administrative law, continue to be controversial and debatable. The first is the question of what should constitute the structure of special administrative law. Obviously, Ukrainian special law should be separate sets of legislation that "depend on general administrative law" [Halun'ko 2020, 32], which means they are applied based on the provisions of general administrative law, as is customary in European legal systems.

Nevertheless, is it possible to establish objective criteria for the allocation of a separate part of legislation in a special administrative law, whether a subbranch or an institution?

Obviously it is the following: 1) the existence of a separate subject of social reality, which is regulated by administrative law and 2) relative separation of legislation.

Though unfortunately, current legislation of Ukraine in all spheres of public life, which falls under the regulatory influence of administrative law, is sufficiently developed, and the legal regulation of various spheres is carried out unevenly. Accordingly, the allocation of certain parts of special administrative law in some cases encounters the issue of their disproportion, as well as the lack of basic laws that could be the basis for the development of a particular institution of special administrative law. The latest textbooks on administrative law emphasize that the content of special administrative law is administrative and commercial law, municipal law, police law, service law, administrative tort law, administrative and construction law, administrative and telecommunications law, nuclear law, social security law, environmental law, etc. [Hrytsenko, Mel'nyk, and Pukhtets'ka 2018, 72–78]. It is pointed out that this list is not exhaustive, and the development of public relations will lead to the emergence of new structural elements of special administrative law. However, in some cases, in addition to general and special administrative law, there is also a special administrative law [Halun'ko 2020, 31]. At the same time, general and special administrative law is considered in accordance with the European traditional understanding, and special administrative law includes issues of public administration in certain areas of public relations (so this part reflects the traditional Soviet approach).

2. ISSUES OF THE FORMATION OF POLICE LAW IN UKRAINE

In view of the above criteria for the allocation in special administrative law of certain parts of the legislation, issues with the separation of the sub-branch of police law should not arise.

Firstly, the existence of a specific subject of regulation is obvious – it is to ensure public safety and order. These relations determine the settlement of a specific way of influencing human behavior – the use of coercive measures.

Secondly, Ukraine has developed a separate group of laws that constitute a detached group of legislation: the laws 'On the National Police' No. 580–VIII, 'On the National Guard' No. 876–VII, 'On the Security Service of Ukraine,' 'On the pre-trial detention' No. 3352–XII, 'On the State Border Guard Service of Ukraine' No. 661–IV, 'On the State Bureau of Investigation' No. 794–VIII, 'On the Military Law Enforcement Service in the Armed Forces of Ukraine' No. 3099–III, 'On Operational investigative activities' No. 2135–XII, 'On the Bureau of Economic Security of Ukraine' no. 1150–IX, Criminal Enforcement Code of Ukraine, as well as Regulations on the Judicial Protection Service, Decision of the High Council of Justice No. 1051/0/15–19. They contain provisions relating to the regulation of the application of special coercive measures to ensure public safety and order.

However, the issue of separation, and more specifically the content of police law, remains problematic and debatable. There are several reasons for this.

The first issue is the frequent inseparability and indistinguishability of police law as a stage in the development of administrative law and an element of the modern legal system. Research is usually devoted to highlighting the historical view of police law [Kurko, Bilenchuk, and Yarmolyuk 2015; Solomakha 2015a], the sequence of formation of certain structural elements of administrative law [Hrytsenko 2008], the impact of police law on the formation of modern administrative law [Hryshyna 2018], etc. Even the substantiation of the possibility of reviving police law as a sub-branch of administrative law is carried out mainly through the prism of the historical approach [Loshyts'kyy 2002, 96–98; Melnyk 2011, 33–36].

Nevertheless, of course, the system of rules, which was called police law 100 or 200 years ago, was very different from what police law is today in the modern legal system of any state. Understanding this has led Ukrainian researchers to recognize the existence of "new police law" and "classical police law" [Solomakha 2015b, 291]. Of course, this fact must be taken into account when borrowing and interpreting the works of prominent police luminaries of the 19th and 20th centuries. Their work gives us an idea of what police law was, how administrative law developed and why it is currently exactly as we see it. And the modern science of police law should undoubtedly be revealed

through the content of modern legislation, as well as modern legal relations, which will help to develop and resist the relevant sub-branch within its clear boundaries.

The second reason is the fear of the term "police law." In the very combination of words it seems that there is a contradiction. After all, law is definitely freedom. The police are an inevitable restriction of freedom, force and coercion. Police state is a concept with a negative connotation, is the opposite of the concept of "rule of law" and means a state with excessive role and influence of the police, excessive regulation of all the details of public life [Kholod 2009, 60]. This negative connotation is also reinforced by the historical memory of Ukraine being part of a totalitarian regime, where the police functions of the state prevailed over all others.

Notwithstanding, we support scholars who argue that "the police in a democratic society in themselves not only profess the values of the law, but also protect them" [Rymarenko 2003, 9]. Its main purpose is to protect the rights and freedoms of citizens. According to the 'European Code of Police Ethics' (Recommendation of the Committee of Ministers to member states on the European Code of Police Ethics), the subject of police activity is to ensure the rule of law. According to the provisions of the national law 'On the National Police,' the tasks of the police are to provide police services in the areas of public safety and order; protection of human rights and freedoms, as well as the interests of society and the state; crime prevention; providing services to help people in need.

Therefore, this second reason is insignificant, one that can be eliminated if the research and approaches are based on the tasks, principles and goals of police activities in a democratic society and the rule of law.

The third issue that needs to be addressed is the lack of doctrinal research on the issue. In the national doctrine there is no clear generally accepted understanding of what is police activity, which relations should be attributed to police law, which authorities are referred to the police in a broad and narrow sense. Unfortunately, Ukrainian administrative and legal science cannot give an unambiguous clear answer to any of these questions.

3. SCHOLARLY PRECONDITIONS FOR THE FORMATION OF A SUB-BRANCH OF POLICE LAW

The substantiation of the existence of a sub-branch of police law in the structure of special administrative law involves coordination on several issues. These issues should be considered in an expert scholarly environment and become the subject of scholarly discussion, and as a result agreed.

The first question is the question of the content of the concept of 'police'. Interpretation of this concept was given by scholars in the sphere from

different periods of its development. However, currently in Ukrainian science there is a wide and narrow interpretation of it.

In a narrow sense, the police is a unit of public administration designed to ensure and protect public order and public safety [Melnyk 2011, 34] by supervising and taking measures of administrative coercion [Loshyts'kyy 2012, 71]. In a broad sense, the police unite in one system all supervisory and control authorities [Rymarenko, Kondrat'yev, and Solovey 2003, 22], so the rules of police law regulate relations not only in the field of public order, but cover a wider sphere of social reality and regulate relations in such spheres of security as state, ecological, sanitary, etc. [Yarmysh 2003, 562].

In our opinion, the generalized concept of "police" should include only those authorities that not only exercise supervision, but also apply coercive measures. After all, this concept should not just exist and denote any defined set of authorities, but a qualitatively separate set. We are confident that the ability to interfere in the rights and freedoms of citizens and apply measures of administrative coercion is certainly a qualitative feature that separates the police from all other control and supervisory authorities. Expanding the range of subjects and including in this list various state inspectorates that supervise and control, apply measures of administrative responsibility for non-compliance with the established norms will blur the concept of "police," and thus will not clearly define the subject, structure and content of police law.

For example, the recently established State Service of Ukraine for Food Safety and Consumer Protection, which combines phytosanitary inspection, consumer service, sanitary inspection, and veterinary control has no authority to enforce coercion. Similar conclusions apply to the State Environmental Inspectorate, the State Inspectorate for Architecture and Urban Development and other similar authorities. That is why there are doubts about the usefulness of a broad approach to the interpretation of the concept of "police" in terms of the needs of law enforcement, lawmaking and ultimately the development of the field of administrative law and its part of police law.

The second unresolved issue is the one of correlation between administrative tort and police law. There is a position in the scholarly literature that police law determines the composition of administrative offenses and responsibility for their commission, as well as proceedings in cases of administrative offenses [ibid.].

In our opinion, such an approach would further expand the boundaries of police law. Administrative tort law in Ukraine has its own structure and content, its source is a separate piece of legislation: the Code of Ukraine on Administrative Offenses, which regulates the types of administrative offenses and the procedure for bringing to administrative responsibility. In addition, the authorities that are subject to administrative prosecution are not only the police, but also local governments and courts. Therefore, it is not necessary to

combine and join tort law and administrative relations for the application of coercive measures.

The only area where police law can regulate public relations close to those governed by tort law is the application of measures to ensure proceedings in cases of administrative offenses. Such measures are part of administrative proceedings, but are similar to police measures and are used as coercive measures. In particular, these are such as administrative detention, personal inspection, seizure of things and driver's license, etc. (Articles 261–266 of the Code of Ukraine on Administrative Offenses). Therefore, the question of the relationship between police law and administrative tort law has yet to be evaluated and discussed, however, we believe that structurally they should be different groups of rules and regulations.

The third issue that needs to be harmonized in the scholarly community is the question of the relationship of police law as a sub-branch of administrative law with such concepts as "police activity," "police administrative activity," "police science." The fact is that the latter terms are justified and widely used by researchers of scientific and educational institutions of the Ministry of Internal Affairs. Departments in higher education institutions that prepare specialists in law enforcement work under such names, study subjects for students and cadets, open scientific journals and hold conferences.

However, we are convinced that the establishment of the priority and rule of law over the organizational and operational component of all authorities of public administration should be more than declarative. Such an assertion is intended to shift the law and legal regulators to all police activities. Obviously, this should be reflected in the names of academic disciplines and their content, in the issues of scholarly conferences and symposiums, in general, in approaches to assessing the phenomena of social reality.

Contemporary Ukrainian investigations represent an attempt to substantiate the position that public relations, which should be governed by the rules of police law, should be studied within the police science. Accordingly, it is argued that police science is the science of police law [Shvets 2021, 37], which should be reflected in the education process of higher education. However, historically, police science has been developing in the context of the development of the theory of state and law under the influence of political and legal ideas of the classics of German philosophy of law [Horozhanin 2003, 537]. Therefore, if such a name is used as police activity, there will be a risk of returning to a broad interpretation of the police as a set of all state activities and further uncertainty of the subject of police law. To confirm this thesis, we present the columns of the journal 'Ukrainian Police Studies: Theory, Legislation, Practice', which in addition to public security and pre-trial investigation covers issues of operational and investigative and detective activities, prevention of criminal and administrative offenses, psychological support of police, police administrative and other services to individuals and legal entities, etc.

Regarding the relationship between police law and police activity, there is also no common ground. Most scholars accept and support the view that police activity should be seen as a special type of public administration activity aimed at maintaining public order, ensuring public (and any other) security associated with the use of state coercion [Kovalenko, Rymarenko, and Olefir 2012, 115; Kobzar 2015, 66]. However, some papers argue that police activity is not limited to administrative activities, as there are also police activity of pre-trial investigation authorities, police activity of operational and investigative units and security police activity [Boyko 2018, 120].

At the same time, we believe that police activity is a concept that has the right to exist in the same way as police law. However, they have different things to denote. Police activity refers to public relations in the field of public order and security, and police law is a set of legal rules governing such relations. Police activity and police law should be correlated in the same way as the concept of "public administration" (an element of public reality) and the concept of "administrative law" (its regulator).

4. THE STRUCTURE OF POLICE LAW AS A SUB-BRANCH OF ADMINISTRATIVE LAW

The structure of modern police law in Ukraine has not yet been developed and agreed upon, it has not even been proposed for public discussion. However, it is obvious that the structure of police law should be determined by the subject of regulation.

Discussions on the mentioned above allowed the authors to conclude that the structure of police law as a sub-branch of special administrative law should include the following sets of rules: 1) which determine and regulate the formation of authorities that ensure public safety and law and order; 2) tasks and powers of police authorities; 3) grounds and procedure for applying police measures, procedures; 4) rights and responsibilities of citizens in the field of police activity.

The system of legislation on the application of police measures is based, in particular, on the provisions of Chapter II of the Constitution of Ukraine, which enshrine the basic constitutional rights, freedoms and responsibilities of man and citizen. We are talking about the provisions of Article 27 of the Constitution: "No one shall be arbitrarily deprived of his life. It is the duty of the state to protect human life." Also the protection of human dignity is guaranteed by Article 28 of the Constitution: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The provisions of Article 29 of the Constitution stipulate that everyone has the right to liberty and security of person. Everyone is also guaranteed the inviolability of the home, although the possibility of breaking into the home or other property

of a person established by the provisions of Article 30 of the Constitution is not ruled out in urgent cases. Finally, the state protects the property rights of citizens, which is also provided by the constitutional provisions of Article 41 of the Constitution, which stipulates that the right to private property is inviolable.

It should be noted that at the level of Ukrainian laws, the legal grounds for the use of police coercive measures by law enforcement officers are enshrined in the hypotheses of only certain acts – the laws 'On National Police,' 'On National Guard,' 'On Pre-trial Detention,' 'On Military Law Enforcement Service in the Armed Forces of Ukraine' as well as in the Criminal Executive Code of Ukraine. Despite the fact that these laws largely require mutual coherence, they have largely consolidated the powers of the police, including in this area, which allows them to exercise their powers to protect public order, the implementation of regime measures in places of deprivation freedom and pretrial detention. Thus, the regulation of powers to apply coercive measures is carried out exclusively or mainly by these laws. The rest of the laws, although they give the right to use coercion, are blanket norms, which refer to the above three normative acts, mainly to the Law on the National Police, to clarify the legal grounds for each measure. Special attention should be paid to the completeness of the legislative lists of police measures, as well as the grounds for their application. This follows from the constitutional provisions. In particular, Part 2 of Article 19 stipulates that public authorities and local governments, their officials are obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and Laws of Ukraine.

Also, a small number of legal norms governing the activities of law enforcement authorities on the application of coercive measures are contained in government acts, departmental regulations, in particular, acts of the Ministry of Internal Affairs of Ukraine, the State Border Service of Ukraine, the High Council of Justice. However, the regulation of police measures in acts of this level is the subject of close attention of representatives of various branches of legal science and receive critical remarks, despite the fact that they relate only to establishing the order of application of a measure and not its legal basis.

CONCLUSIONS

Thus, the current primary stage of the formation of police law as a subbranch of administrative law of Ukraine poses a task to the scholarly community to adopt certain approaches and develop common positions on the following issues.

1) Clear division of police law as a stage of development of administrative law and an element of the modern legal system of Ukraine. This issue should be applied not formalist, but a functional approach to the content of modern

legislation, as well as modern legal relations in the field of public safety and order.

2) Perceptions and research in the field of police law should be carried out through the prism of the tasks, principles and goals of police activity in a democratic society and the rule of law. Otherwise, Ukrainian scholars, lawmakers and other actors will be held hostage to prejudices and suggestions due to the experience of Ukraine's stay in the Soviet police state.

3) Police activity should be investigated and studied through the prism of its normative regulation, which means through police law, that should be reflected in the names of disciplines and textbooks, in the issues of scholarly conferences, in general in approaches to assessing the phenomena of social reality. And such an emphasis in both science and law enforcement will contribute to the establishment of the rule of law over the organizational and operational component of the police.

REFERENCES

Averyanov, Vadim. 2010. "Lyudynotsentrysts'ka ideolohiya yak osnova reformuvannya ukrayins'koho administratyvnoho prava v umovakh intehratsiynoho protsesu." *Derzhava ta rehiony*. *Seriya Pravo* 2:87–92.

Boyko, Ivan. 2018. "Osnovni vydy politseys'koyi diyal'nosti v Ukrayini." *Naukovyy visnyk publichnoho ta pryvatnoho prava* 3 (1):117–24.

Halun'ko, Valeriy, ed. 2020. *Administratyvne pravo Ukraïny. Povnyy kurs*. Kyyiv: Akademiya administratyvno-pravovykh nauk.

Horozhanin, Aleksandr. 2003. "Politseyistyka." In *Mizhnarodna politseys'ka entsyklopediya: ponyatiynyy aparat, kontseptual'ni pidkhody, teoriya ta praktyka*. Book 1: *Teoretyko-metodolohichni ta kontseptual'ni zasady politseys'koho prava ta politseys'koyi deontolohiyi*, edited by Yuriy Rymarenko, Yaroslav Kondrat'yev, and Yuriy Shemshuchenko. Kyyiv: InYure.

Hryshyna, Nataliya. 2018. "Vplyv politseys'koho prava na formuvannya administratyvnoho prava." *Visnyk Kharkivs'koho natsional'noho universytetu imeni V. N. Karazina*. *Seriya Pravo* 25:42–44.

Hrytsenko, Ivan, Roman Mel'nyk, Alla Pukhtets'ka, et al. 2018. *Zahal'ne administratyvne pravo*. Kyyiv: Yurinkom Inter.

Hrytsenko, Ivan. 2008. "Osnovni napryamky istorychnoho rozvytku vchennya pro systemu administratyvnoho prava (vid politseys'koho do administratyvnoho prava)." *Naukovyy visnyk L'vivs'koho derzhavnoho universytetu vnutrishnikh sprav* 2:1–11.

Kholod, Yuriy. 2009. "Politseys'ka derzhava yak osoblyva forma orhanizatsiyi publichnoyi politychnoyi vlady v period absolyutyzmu." *Pravo i bezpeka* 3:60–63.

Kobzar, Oleksandr. 2015. *Politseys'ka diyal'nist' v Ukrayini: administratyvno-pravovyy aspekt*. Kharkiv: Dnipropetrovs'k: Panov.

Kolomoyets, Tetyana, and Valeriy Kolpakov. 2017. "Suchasna paradyhma administratyvnoho prava: heneza i ponyattya." *Pravo Ukrayiny* 5:71–79.

Kovalenko, Valentyn, Yuriy Rymarenko, and Viktor Olefir, ed. 2012. *Administratyvna (politseys'ka) diyal'nist' orhaniv vnutrishnikh sprav. Zahal'na chastyna.* Kyyiv: Dyrekt Layn.

Kurko, Mykola, Petro Bilenchuk, and Anastasiya Yarmolyuk. 2015. “Nauka politseys’koho prava v Ukrayins’komu derzhavotvorenni: vytoky, vikhy, istoriohrafiya, suchasnyy stan i shlyakhy priorytetnoho rozvytku.” *Nashe pravo* 4:17–22.

Kuzyakin, Sergey, and Yuriy Kuzyakin. 2015. *Administrativnoye pravo Rossiyskoy Federatsii.* Odintsovo: ANOO VO “Odintsovskiy gumanitarnyy universitet.”

Loshyts’kyy, Mykhailo. 2002. “Reabilitatsiya politseys’koho prava.” *Pravo Ukrayiny* 7:95–99.

Loshyts’kyy, Mykhailo. 2012. “Politseys’ke pravo v systemi prava Ukrayiny.” *Publichne pravo* 3 (7):71–75.

Melnyk, Roman. 2011. “Politseys’ke pravo v Ukrayini: notatky do naukovoyi dyskusiyi.” *Yuryst Ukrayiny* 3 (16):32–37.

Rymarenko, Yuriy. 2003. “Politsiya i politseys’ka diyal’nist’ u tsyvilizatsiynomu vymiri.” In *Mizhnarodna politseys’ka entsyklopediya: ponyatiynyy aparat, kontseptual’ni pidkhody, teoriya ta praktyka*. Book 1: *Teoretyko-metodolohichni ta kontseptual’ni zasady politseys’koho prava ta politseys’koyi deontolohiyi*, edited by Yuriy Rymarenko, Yaroslav Kondrat’yev, and Yuriy Shemshuchenko, 7–13. Kyyiv: InYure.

Rymarenko, Yuriy, Yaroslav Kondrat’yev, and Yuriy Solovey. 2003. “Vstup.” In *Mizhnarodna politseys’ka entsyklopediya: ponyatiynyy aparat, kontseptual’ni pidkhody, teoriya ta praktyka*. Book 1: *Teoretyko-metodolohichni ta kontseptual’ni zasady politseys’koho prava ta politseys’koyi deontolohiyi*, edited by Yuriy Rymarenko, Yaroslav Kondrat’yev, and Yuriy Shemshuchenko, 17–26. Kyyiv: InYure.

Shvets, Dmytro. 2021. “Suchasna politseyistyka yak naukovyy ta navchal’nyy napryam u diyal’nosti MVS Ukrayiny.” *Problemy suchasnoyi politseyistyky* 37–41.

Solomakha, Artem. 2015a. “Kyyivs’ka universytet·s’ka shkola politseys’koho prava.” *Nashe pravo* 5:49–58.

Solomakha, Artem 2015b. “Retrospektyva ta perspektyvy politseys’koho prava v Ukrayini.” *Administratyvne pravo i protses* 1 (11):283–95.

Vlasov, Valerian, Ivan Yevtikhiyev, and Semen Studenikin. 1950. *Sovetskoye administrativnoye pravo*. Moskva: Gosyurizdat.

Yarmysh, Oleksandr. 2003. “Politseys’ke pravo.” In *Mizhnarodna politseys’ka entsyklopediya: ponyatiynyy aparat, kontseptual’ni pidkhody, teoriya ta praktyka.* Book 1: *Teoretyko-metodolohichni ta kontseptual’ni zasady politseys’koho prava ta politseys’koyi deontolohiyi*, edited by Yuriy Rymarenko, Yaroslav Kondrat’yev, and Yuriy Shemshuchenko, 561–62. Kyyiv: InYure.

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THE SUSPENSION OF THE LIMITATION PERIOD FOR A TAX OBLIGATION FROM THE PERSPECTIVE OF THE PRINCIPLE OF THE CITIZENS' TRUST IN THE STATE AND ITS LAWS

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Abstract. This study is devoted to the issue of the suspension the limitation period for a tax obligation. Pursuant to Article 70(6)(1) of the Act of 29 August 1997, the Tax Ordinance, the course of the limitation period for a tax obligation does not begin, and, in the event it has begun, is suspended, on the day on which proceedings in a case of a fiscal offence or fiscal petty offence are initiated, of which the taxpayer has been notified, if a suspicion that the offence or petty offence has been committed is connected with failure to fulfil this obligation. It is worth considering whether this regulation is consistent with the principle of citizens' trust in the State and its Laws, as expressed in Article 2 of the Constitution of the Republic of Poland, and consequently with Article 32(1) of the Constitution. The main research intention is to describe what impact the above-mentioned legal regulation has for determining the extent of the effect the tax regulation in question on the principle of the citizens' trust in the State and its Laws. It should be noted that the failure to inform about the existence of a condition for suspension expressed in the analysed provision may result in the fact that, as a consequence of a misconception on the part of the taxpayer, decisions taken by him or her in connection with the disposing of property will also be incorrect.

Keywords: tax obligation, course of a period, statute of limitation, principle of trust

INTRODUCTION

This study is devoted to the issue of the suspension the limitation period for a tax obligation. Pursuant to article 70(6)(1) of the Act of 29 August 1997, the Tax Ordinance,[1] the course of the limitation period for a tax liability does not begin, and, in the event it has begun, is suspended, on the day on which proceedings in a case of a fiscal offence or fiscal petty offence are initiated, of which the taxpayer has been notified, if a suspicion that the offence or petty

[1] Journal of Laws of 2021, item 72 as amended.

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offence has been committed is connected with failure to fulfil this obligation. It is worth considering whether this regulation is consistent with the principle of citizens' trust in the State and its Laws, as expressed in Article 2 of the Constitution of the Republic of Poland, and consequently with Article 32(1) of the Constitution.[2]

The mere notification of the taxpayer of the commencement of proceedings for a fiscal offence or fiscal petty offence constitutes therefore a condition for suspending the course of the limitation period for a tax obligation if a suspicion that an offence or a petty offence has been committed is connected with failure to fulfil this obligation. In legal scholarship, one may encounter the view that the structure of the provision of Article 70(6)(1) of the Tax Ordinance does not provide taxpayers with measures which would prevent them from instrumental use of this provision by tax authorities. As a result, it is the administrative courts reviewing complaints against decisions of the tax administration that will decide whether the application of Article 70(6)(1) of the Tax Ordinance in a given legal and tax situation did not constitute an abuse of power [Wojtuń 2017, 115]. As a rule, the institution of the statute of limitations for a tax obligation should be subject to the values protected by the Constitution of the Republic of Poland. As a result, a taxpayer has the right to expect that the expiry of a tax obligation will occur within a reasonable time. This assumption is based on the thesis that a taxpayer should know when his or her tax obligation expired. Thus, if the time limit for a tax obligation is extended for any reason, it is reasonable that the taxpayer should also know about it. For example, informing a taxpayer of being charged is linked to the notification of the suspension of the limitation period, since at that moment the taxpayer has knowledge of the ongoing penal-fiscal proceedings. However, one should consider suspending the course of the limitation period for a tax obligation as a consequence of imitating proceedings for a tax offence or tax petty offence when, in connection with court proceedings, a judgment acquitting the defendant or accused of the charge of a tax offence or tax petty offence has been issued or discontinuance of such proceedings as a result of court proceedings conducted. It should be emphasised that the provision of Article 70(6)(1) of the Tax Ordinance defines the day of the suspension of the course of limitation period in such a way that this day is the commencement of proceedings in a case of a fiscal offence or petty offence. Moreover, it applies only to such cases in which the suspicion that a fiscal offence or petty offence has been committed is connected with failure to fulfil an obligation whose limitation is running. In the context of the principle of citizens' trust in the state and its laws, what seems to be important are the legal effects of the suspension of the limitation period for a tax obligation in a situation

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

where the court proceedings were discontinued or the defendant or accused was acquitted.

In scholarship on tax law, the view has become quite common that it affects the running of the limitation period initiation of proceedings in the case (issuance of a decision to initiate investigation) and not against the person though, in theory, the purpose of the proceedings in the case is the detection of the perpetrator, Article 70(6)(1) of the Tax Ordinance actually assumes occurrence of a suspect.

Therefore, a taxpayer, having confidence in the general principle of tax law – the five-year limitation period for a tax obligation, calculated from the end of the calendar year in which the tax obligation arose, may dispose of his financial and property resources in the conviction that he or she is not under an obligation to pay tax arrears [Banaszak 2011, 10–12].

In view of the above, one should consider whether the actions undertaken by the legislator led to the creation a properly functioning institution of the suspension of the tax obligation limitation period. The main research intention is to describe what impact the above-mentioned legal regulations have on the principle of citizens' trust in the State and its Laws. It is worth noting that the failure to inform about the occurrence of a condition for suspension expressed in the analysed provision, may cause that, as a result of wrong conviction of the taxpayer, decisions taken by him or her related to the disposition of property will be therefore also incorrect. In addition, it should be pointed out to what extent and on what basis the legislator assumed that the developed legal solutions would determine a well-functioning system of suspension of the period of limitation for a tax obligation.

1. THE PRINCIPLE OF THE CITIZENS' TRUST IN THE STATE AND ITS LAWS

At the outset, it should be noted that principle mentioned in the title of this article has its source in Article 2 of the Constitution of the Republic of Poland. It is a pillar for the formulation of a number of conditions that should be enforced by the state authorities so that this principle is not just an empty declaration of the legislator. Among these conditions, the issue of the citizens' trust in acts issued by the public administration has an important place [Celińska–Grzegorczyk 2010, 61]. Interestingly, legal scholarship points out that the principle of citizens' trust in the State and its Laws stems from the idea of the rule of law, even before the entry into force of the Basic Law [Łętowska 2012, 299]. However, it was developed primarily in the case law of the Constitutional Tribunal [Potrzeszcz 2007, 223–24]. The content of the principle of trust in the state and its laws they create include ensuring the legal security of the individual related to legal certainty. "The practice of tax

authorities leading to the passage of the limitation period is at the discretion of the tax authority and is not subject to any judicial review, and it jeopardizes the objectives of the European Union, including the principle of effectiveness. This implies a breach of the principle of sincere cooperation expressed in Article 4(3) of the Treaty on European Union, as well as the principle of legal certainty, the principle of legitimate expectations, restricts the exercise of the right to property in a disproportionate and unacceptable manner, thus violating Article 17 of the EU Charter of Fundamental Rights in conjunction with Article 52(1) of the Charter of Fundamental Rights and Article 21(1) and Article 64 of the Constitution in conjunction with Article 31(3) of the Constitution of the Republic of Poland."[3]

The principle of enhancing trust in state authorities expressed in Article 8 of the Code of Administrative Procedure is in a way a reflection of the constitutional principle of a democratic state of law. The principle of conducting proceedings in a way that inspires or increases the trust of the individual in the public authorities aims to eliminate such procedural situations which may surprise the participants of the proceedings [Borkowski 2020, 145]. As S. Rozmaryn rightly notes, this principle constitutes a framework which covers the entire proceedings. Starting from the assumption that the strength of the State and the effectiveness of the State and its actions are determined by the citizens' trust in public authority, the legislator has made it the point of reference for the remaining principles [Rozmaryn 1961, 903]. What follows form this principle is, *inter alia*, the duty to respect the principle of equality of citizens before the law, a reliable explanation of the circumstances of a given case and the intention to convince the parties of the rightness of the decisions taken [Kmiecik 2019, 65].

When explaining the issue of the citizens' trust in the state and its laws, one should also reflect upon the issue of equality before the law. The constitutional principles, which directly bind a public administration body and is subject to self-application in the process of law application by the body, includes the principle of equality before the law. Legal scholarship emphasises that Article 32(1) of the Constitution of the Republic of Poland is the basis for reconstruction of the principle of law of the second degree, which is indicated by the systematic nature of the Fundamental Act, as well as the close relationship of equality with justice and freedom, as well as human dignity as the most significant constitutional value. The obligation of equal treatment should therefore be understood as a principle of system construction, which concerns the application of other constitutional norms and manifests itself in the form of an interpretative rule. The consequence of the application of the principle under analysis is an order, lying with the bodies applying the law, to reject the result

[3] Judgment of the Provincial Administrative Court in Wrocław of 22 July 2019, ref. no. I SA/Wr 366/19, Lex no. 2740672.

of an interpretation that would result in a violation of equality [Ziółkowski 2015, 103]. Therefore, from Article 32(1) of the Constitution of the Republic of Poland one should derive the obligation of equal treatment of entities in a similar situation and, at the same time, the prohibition of differentiation in this treatment without an argument finding proper justification in a provision of at least statutory rank. It should be pointed out that justice requires that legal differentiation of entities be in correct relation to differences in their factual situation as addressees of certain legal norms.

In the case law of the Constitutional Tribunal the view has become established that "equality in the constitutional sense is not of an abstract and absolute nature, in accordance with the generally accepted assumption, it does not mean identity of rights of all individuals. Equality (the right to equal treatment) always operates in a certain situational context, it must be referred to prohibitions or orders, or granting rights to certain individuals (groups of individuals) in comparison to the status of other individuals (groups). Equality does not mean the same factual and legal situation of everyone, but it consists in equal entitlement to various rights […]. Article 32(1) of the Constitution refers here both to the application of the law (all are equal before the law), as well as lawmaking (the right to equal treatment by public authorities, including the legislative authority)" [Zubik 2008, 184]. It should therefore be concluded that arguments in favour of a possible derogation from the principle of equality must result from other values which justify a different treatment. Undoubtedly, one of such principles is the one expressed in Article 2 of the Constitution of the Republic of Poland. Although the two principles in questions overlap to a significant extent, differentiation between subjects of law is possible, provided that it complies with the principle of a democratic state of law. As a result, citizens' lack of trust in the State is and its Laws, in principle, the result of a breach of the law by public administrative authorities, in particular of equality.

It is worth emphasising that the consequences of the principle of citizen's trust in the state and its Laws also concern the creation of tax law. According to the Constitutional Tribunal, "the far-reaching freedom of the legislator in shaping the substantive content of tax law is, however, in a way balanced by the existence of the duty on the part of the legislator to respect (the procedural aspects of) the principle of a democratic state of law."[4] The Tribunal has repeatedly expressed its views on the principle of decent legislation in the area of tax law as a manifestation of the general principle of citizens' trust in the State and its Laws. Thus, "tax legislation must always be […] carefully assessed from the point of view of compliance with… procedural requirements. Since its effects for the citizens take on a specific financial dimension and are

[4] Judgment of the Constitutional Tribunal of 24 May 1994, ref. no. K 1/94, Lex no. 25098.

often connected with the depletion of their income, the legislator must form new tax regulations taking into account the fact that taxpayers – assuming the stability of previous regulations – have planned certain economic actions and their various interests may be pending. Obviously, an absolute nature cannot be ascribed to the protection of these interests, as the volatility of the law is an element which citizens must take into account. In any case, in situations where the provisions of law set a certain time horizon for planning and carrying out a certain financial or economic undertaking, the rules of the game cannot be changed before the expiry of the period or deadline envisaged by the legislator. If an undertaking began based on trust in the law, and the law provided that it would be carried out over a certain period of time, then – apart from special situations – a citizen should be confident that he or she will able to use that period of time safely. The commencement of a financial or economic undertaking normally entails an initial outlay, and a sudden change of such an undertaking could expose a citizen to serious losses."[5]

Pursuant to Article 121(1) of the Tax Ordinance, tax proceedings should be conducted in a manner that inspires confidence in tax authorities. There is no doubt, that this principle rule has not only normative value, but also content going beyond the legal framework. The aim of the legislator was to protect taxpayers against negative consequences of mistakes made by tax authorities. It is important that that the implementation of this principle should take place without the need for the taxpayer to intervene. This means that the authority conducting the proceedings should *ex officio* ensure that this principle is respected at any time during the conduct of a tax case. In legal scholarship one can find the opinion that the principle in question still has a form of a postulate only. This is supposed to result, *inter alia*, from the conflict of mutually exclusive legal norms, which cannot *de iure* create a coherent tax law system. However, the legislator intended this principle to be not only an abstract postulate, but a legal norm the application of which should have a specific dimension in the course of tax proceedings. At the same time, it is important that a balance is maintained in the relationship between the taxpayer and the tax authority [Mariański 2021, 679–81]. Significantly, Poland's accession to the European Union resulted in the implementation of sources of European law into the Polish legal system. It has therefore become necessary to implement solutions of Community law. Pursuant to Article 19 of the Treaty on European Union,[6] the Court of Justice of the European Union guarantees respect for the law in the interpretation and application of Treaties. The CJEU, in particular through its preliminary ruling, interprets the provisions of European Union law. Consequently, the practice of tax authorities is also increasingly

[5] Judgement of the Constitutional Tribunal of 25 November 1997, ref. no. K 26/97, Lex no. 31034.

[6] Treaty on European Union, O.J. EU C of 2010, No. 83.

influenced by CJEU rulings. This Court has repeatedly pointed out the correct relationship between a taxpayer and a tax authority, emphasising the extent to which a taxpayer may expect the CJEU case law to have an impact on his or her tax and legal situation. Over the years, the Court has, *inter alia*, pointed out, that the providing incorrect information must not burden a taxpayer if he or she has already used it. This applies in particular to a party to tax proceedings who acted in good faith and in trust as to the content of the tax decision received.[7] In view of the examples referred to, it is therefore reasonable to conclude that a violation of the principle of conducting proceedings in a manner inspiring trust in tax authorities is an independent condition for the annulment of a tax decision. Moreover, one should conclude that since it is a norm of a general nature, its violation will also occur in the case of violation of other norms that should be observed in the course of resolving a tax case. As a rule, all elements of the legal relationship are subject to assessment if the proceedings conducted in a confidence-inspiring manner are to be called substantively accurate [Dzwonkowski 2020, 856–59]. It is also worth emphasising that the assessment of a tax authority contrary to the will of a taxpayer does not prove a violation of the principle of conducting proceedings in a manner inspiring trust in tax authorities. Undoubtedly, however, not infrequently the legal ties connecting a taxpayer with a tax authority become complicated and then the principle of the citizens' confidence in the State is significant from the point of view of the existence of a tax obligation. In conclusion, the principle of deepening trust as a principle of procedural law requires, first of all, the authority to comply with the principle of operation on the basis and within the limits of the law – it is addressed to the authority which is to observe the law, not to correct it. The principle of trust in the state and its laws is addressed it is, however – as is clear from the jurisprudence of the Constitutional Tribunal – to the legislator himself.

2. THE SUSPENSION OF THE LIMITATION PERIOD FOR A TAX LIABILITY

When analysing the question of the statute of limitations of a tax liability, it is necessary to address the issue of the failure to deliver to a taxpayer a decision on the commencement of preparatory proceedings in the case of a tax offence. The prevailing view in the case law is that there are no legal grounds for adopting the view that it may have any procedural effects in tax proceedings.[8] It is worth noting that the purpose of the statute of limitations in tax law

[7] Judgment of CJEU of 27 September 2012, ref. no. C–392/11, Lex no. 1219340.

[8] Judgment of the Supreme Administrative Court of 1 October 2012, ref. no. II FSK 302/11, Lex no. 1227213.

is to ensure to the taxpayer that a tax liability will expire after a certain period of time. Therefore, the indication of clear conditions for suspending or interrupting the course of the limitation period is important, as they have a real impact on the time when a tax obligation is due and the tax authorities can demand its enforcement. Undoubtedly, the derivation of the condition in question from Article 70(6)(1) of the Tax Ordinance was dictated by securing the fiscal interests of the State. Legal scholarship points out that the condition for the suspension the limitation period of a tax liability is the commencement of proceedings for a fiscal offence or petty offence, which leads to the conclusion that it is not necessary to initiate such proceedings against a person. Therefore, one may conclude that the suspension of the limitation period for a tax liability constitutes a kind of additional obligation for the taxpayer. At the same time, the legislator did not take into account a regulation that would allow a party to tax proceedings to exercise his or her rights by appealing against this suspension as of the date of commencement of criminal proceedings or proceedings for a fiscal offence or petty offence [Banaszak 2011, 15–16]. It should be noted that the provision of Article 70(6)(1) of the Tax Ordinance leads nonetheless to negative legal consequences for a taxpayer; the rational legislator did not provide him or her with a legal remedy that could secure his or her legal and tax interest. In this context, it should be emphasised that the possibility of appealing against court or administrative rulings constitutes an important aspect of the principle of citizens' trust in the state and its laws. As an aside, it is worth mentioning that it follows from the provisions of Article 102 of the Penal Code[9] and Article 44(5) of the Fiscal Penal Code[10] that the suspension of the limitation period for punish ability of a criminal offence or a fiscal offence may take place at the moment of initiating criminal or fiscal penal proceedings against a person. This means that this institution can be applied only at the *in personam* stage, as opposed to the model expressed in the Tax Ordinance. The difference between these legal regulations once again calls into question the application of the principle of citizens' trust in the State in practice [Kulik 2016, 155–60]. In the case of tax proceedings, in order to suspend the limitation period of for a tax obligation, it is only necessary to initiate preparatory proceedings in the case, whereas in criminal or penal fiscal proceedings, it is necessary for these proceedings to enter the *in personam* stage. Therefore, it seems that as a result Article 70(6)(1) of the Tax Ordinance creates uncertainty for its addressees as to the content of their rights and, moreover, gives consent to its free interpretation by tax authorities. In this way, there is a completely unjustified differentiation of the position of a party to tax proceedings, consisting in the fact that he or she is not informed

[9] Act of 6 June 1997, the Penal Code, Journal of Laws of 2021, item 1023.

[10] Act of 10 September 1999, the Fiscal Penal Code, Journal of Laws of 2021, item 408 as amended.

of the occurrence of an event leading to the suspension of the limitation period for a tax liability. The conclusion seems to be clear. Taxpayers to whom this regulation applies are in a worse legal and fiscal position than entities with respect to whom at least the conditions of Article 70(1–4) and (6(2)) of the Tax Ordinance apply. *De lege lata*, there is no actual mechanism enabling a taxpayer to obtain information about pending proceedings for a tax offence or petty offence [Serafiński 2020, D5].

Important for the analysed issue is the judgment of the Constitutional Tribunal of 17 July 2012 in ref. no. P 30/11,[11] which explicitly pointed out that Article 70(6)(1) of the Tax Ordinance, in the wording introduced by Article 1(58) of the Act of 12 September 2002 amending the Tax Ordinance Act and certain other acts,[12] to the extent to which it leads to suspension of the running of the limitation period of a tax liability in connection with initiation of criminal proceedings or proceedings for a fiscal offence or petty offence, about which the taxpayer was not informed not later than within the time limit expressed in Article 70(1) of the Tax Ordinance, is contrary to the principle of the citizen's trust in the State and its Laws. Significantly, the view has become established in the case law of the administrative courts[13] that the above remark of the Tribunal applies to the legal situation from 1 September 2005 to 14 October 2013.

After this ruling of the Constitutional Court, the tax authorities significantly changed their previous position, informing taxpayers about the suspension of the limitation period in connection with initiated criminal proceedings. In addition, the tax authorities began to initiate criminal proceedings against taxpayers for the existence of the condition of the suspension of the running of the limitation period [Serafiński 2016, C2]. Changes which are essential for the issue in question were introduced by the resolution of the Supreme Administrative Court of 18 March 2019 in case ref. no. I FPS 3/18, which adopted two theses. "To effectively fulfil the duty arising from Article 70c of the Tax Ordinance of 29 August 1997 […] the notification referred to in this provision should be delivered to the attorney who was appointed in control or tax proceedings, even if this notification is made by a tax authority before which no proceedings with the participation of the party's attorney are pending. Failure to comply with the above obligation should be treated as failure to fulfil the substantive law effect provided for in Article 70(6)(1) of the Tax Ordinance."[14]

[11] Lex no. 1171372.

[12] Act of 12 September 2002 amending the Tax Ordinance Act and certain other acts, Journal of Laws of 2007, item 1650 as amended.

[13] See decision of the Supreme Administrative Court of 24 March 2011, ref. no. I FSK 302/1, Lex no. 783577; judgment of the Supreme Administrative Court of 18 September 2012, ref. no. 1775/11 and the judgement of the Supreme Administrative Court of 4 October 2012, ref. no. II FSK 314/11, CBOSA.

[14] Lex no. 2633666.

Although this position does not raise any doubts, one may reflect on the view of this Court, which concerns the legal situation prior to 15 October 2013, i.e. the date of entry into force of Article 70c. The Supreme Administrative Court stated that the above-cited decision of the Court is "a negative interpretative judgment with complex effects. The complexity of the effects of such a judgment lies in the fact that within the scope not indicated in the operative part, the controlled provision is not deemed to be contrary to the Constitution of the Republic of Poland; such effect occurs only in relation to the scope indicated in the operative part of the ruling."[15] Therefore, the Supreme Administrative Court assumed that the ruling of the Tribunal does not in any way change the content of the legal norm resulting from Article 70(6)(1) of the Tax Ordinance [Czeszejko-Sochacki, Garlicki, and Trzciński 1999, 214]. It should be noted that under the *tempus regit actum* rule, administrative courts adjudicate based on the case file as well as on the factual and legal situation existing on the day the controlled decision was issued. It may be assumed that the content of the justification of the analysed resolution of the Supreme Administrative Court is a result of the fact that although the vagueness of the provision of Article 70(6)(1) of the Tax Ordinance was far-reaching, the legislator did not decide to deprive the analysed provision of its binding force. At this point it is worthwhile to devote some attention to this issue. Bearing in mind the manner of the expiry of a tax obligation the legislator has provided for two methods causing termination of the legal and fiscal bond between the taxpayer and the tax creditor. The first method assumes voluntary payment of the tax by the taxpayer or the occurrence of other events provided for in tax acts, which lead to the taxpayer's fulfilment of his or her tax obligation and satisfaction of the tax creditor. Alternatively, a tax obligation expires as a result of the occurrence of other events provided for by the legislator, such as the limitation for a tax liability. The expiry of a tax liability as a result of a limitation is ineffective, as it does not satisfy the financial claims of the tax creditor. The limitation produces specific substantive legal effects as a result of the passage of time. The essence of the statute of limitations is that a tax liability expires after a certain period of time, even though it has not been settled. As a result, the relationship of obligation between the tax debtor and the tax creditor ceases to exist. This means that with the expiry of the limitation period, the tax obligation expires and it does not matter whether the debtor invokes it [Adamiak, Zubrzycki, Borkowski, et al. 2017, 370]. It should be added that the limitation a tax liability applies not only to the principal amount due, but to all monetary claims of the tax creditor, including those that arose as interest for late payment. Of key importance is the fact that the provision of Article 70 of the Tax Ordinance concerns existing tax obligations. Therefore, the taxpayer must

[15] Ibid.

know the amount and date of payment of the tax. As a rule, the beginning and end date of the limitation period for a tax obligation is determined by the date of payment of the tax to which this obligation is related. An exception is the suspension and interruption of the limitation period, which affect the final date of the limitation period [ibid., 371]. As indicated above, the legal event that causes the suspension of the limitation period for a tax obligation pursuant to Article 70(6)(1) of the Tax Ordinance is the commencement of proceedings in a case of a fiscal offence or petty offence. Therefore, the suspension of the limitation period of a tax liability under Article 70(6)(1) of the Tax Ordinance takes place on the day of the issuance of the decision to commence preparatory proceedings in the case of a fiscal offence or petty offence. It should be added that the date of commencement of criminal proceedings and proceedings for a fiscal offence or petty offence. is the date of issuance of the decision on the commencement of an investigation. Thus, proceeding to the conclusion, bearing in mind the resolution of the Supreme Administrative Court discussed above, it should be pointed out that the Court made a pro-constitutional interpretation of the law, stating that until the provision of Article 70c of the Tax Ordinance is introduced, the basis for notifying taxpayers of the suspension of the limitation period referred to in Article 70(6)(1) of the Tax Ordinance was the principle of the citizens' trust in the State and its Laws. Independently of the introduced Article 70c of the Tax Ordinance, it seems that the principle of the citizens' trust in the State and its Laws requires that a taxpayer should be aware whether his or her tax obligation is time-barred or not. It should be assumed that the legislator introduced a legal structure, the essence of which is to link the commencement of the limitation period for a tax liability with the date of initiation of proceedings in the case, and not against a specific person. Thus, the legislator deprived the taxpayer of the possibility of a trial responding to cases of excessive length of fiscal penal proceedings. It is worth noting that even if the taxpayer finds that the proceedings in the case of a tax offense or a tax offense are grossly lengthy, he will not be able to counteract it, despite the fact that this circumstance has a significant impact on his legal interests. "Article 70(6)(1) of the Tax Ordinance, in so far as it provides for the running of the limitation period for the obligation tax does not begin, and the started one is suspended, on the day of initiating proceedings in the case, and not against the person, violates the principle of citizens' trust in the state and and its Laws. It makes an objective legal category in the form of a limitation period."[16]

[16] The position of the Human Rights Defender on the constitutional complaint concerning Article 70(6)(1) of the Tax Ordinance, https://www.rpo.gov.pl/sites/default/files/Stanowisko%20RPO%20ws.%20skargi%20konstytucyjnej%20dotycz%C4%85cej%20art.%2070%20ust.%206%20pkt%201%20Ordynacji%20podatkowej%2C%2017.01.2020.pdf [accessed: 04.03.2022].

CONCLUSIONS

The issues addressed in this article are evidently exemplified in practice. The legal solutions adopted in Article 70(6)(1) of the Tax Ordinance support the thesis about the complex nature of the concept of the suspension of the limitation period for a tax obligation. The explanation of its essence is simpler if one refers directly to the mechanism of the statute of limitations. This institution concerns existing tax obligations, i.e. the case in which the amount and date of payment of the tax are known to the party to the tax proceedings. Thus, the taxpayer's obligation to make a public contribution is concretised and updated. The five-year period specified in Article 70(1) of the Tax Ordinance, due to its substantive nature, cannot be restored. It cannot be postponed either. Due to the suspension of the limitation period for a tax obligation, the period does not run. As a result, the five-year limitation period of a tax obligation is extended by the period during which it was suspended. Pursuant to Article 70(6)(1) of the Tax Ordinance, the course of the limitation period of a tax obligation is suspended on the day on which criminal proceedings or proceedings for a fiscal offence or petty offence are initiated. This article proves that the regulation in question violates the principle of protecting the citizens' trust in the State and its Laws expressed in Article 2 of the Constitution of the Republic of Poland and consequently Article 32(1) of the Constitution.

The principle of the protection of the citizens' trust in the State and its Laws made by it is one of the most significant derivatives resulting from the principle of a democratic State of law. "In accordance with the principle of trust in the State and its Laws created by it, arising from Article 2 of the Constitution, also referred to as the principle of loyalty of the state towards citizens, the law should provide security for individuals and enable them to decide on their conduct, with the sense of knowing the legal consequences of the actions taken and the premises of action of state bodies, which will not be arbitrarily changed by the legislator. Its essence is the prohibition of setting legal «traps» for citizens, of making empty promises, or of abruptly withdrawing from promises made or established rules of conduct."[17] In this context, it is closely linked to the principle expressed in Article 32(1) of the Polish Constitution. The key subjective right in the form of the right to equal treatment arise from the principle of equality It requires identical treatment of all addressees of legal norms who are in the same or similar legally relevant situation. There is an established view in the case law that if "the lawmaker differentiates between subjects of law who share a common essential feature, it introduces a derogation from the principle of equality. The differentiation of legal entities characterised by a common essential feature is permissible

[17] Judgment of the Constitutional Tribunal of 8 April 2014, ref. no. SK 22/11, Lex no. 1477520.

(it does not violate the principle of equality but the *sine qua non* condition is a clearly formulated criterion on the basis of which the differentiation is made, No differentiation may be made according to an arbitrary criterion or no criterion at all. The criterion must be relevant, i.e. it must be directly related to the purpose and essential content of the provisions in which the controlled norm is included and must serve the purpose of achieving this purpose and content. The differentiation introduced must therefore be reasonably justified, and the criterion of differentiation must be in appropriate proportion to the importance of the interests that are violated as a result of unequal treatment of similar entities. In addition it must be related to constitutional principles, values and norms which justify different treatment of similar entities. Any derogation from the requirement of equal treatment of similar entities must always be based on sufficiently convincing arguments."[18] Taking the above into account, it should therefore be assumed that, on the one hand, a situation in which a taxpayer considers it impossible to suspend the limitation period for a tax obligation and, as a result, to extend the five-year period, which does not constitute a constitutionally protected right. On the other hand, the analysed case may constitute a trap for a taxpayer, since, by failing to fulfil his or her tax obligation on time, he or she cannot predict the suspension of the limitation period as a result of the commencement of preparatory proceedings for a fiscal offence or petty offence. Although liability for fiscal offences and petty offence is based on completely different principles than tax liability, it cannot be assumed that informing a taxpayer about the commencement of proceedings for a fiscal offence or petty offence would constitute interference in the course of such proceedings [Mastalski 2019, 454]. *De lege lata*, it would seem that Article 70c of the Tax Ordinance should be treated as a necessity to remove doubts concerning the determination of the moment of suspension of the limitation period for a tax liability. However, Article 70(6)(1) of the Tax Ordinance still remains in force, which constitutes a trap for a taxpayer. The analysed regulation creates solutions in which tax authorities have the possibility to abuse their position towards a party to tax proceedings. As a consequence, it may lead to wrong decisions being taken by the obliged party on the disposal of his or her property.

To sum up, the adopted solution is of a nature which is primarily inconsistent, allowing tax authorities to continue to use the institution mentioned in the title of this article in an instrumental manner. It is worth noting that the introduced tax mechanism does not give the possibility of application of the statute of limitations even when the accusation or charge was wrong at the moment of a given procedural act, which is ultimately decided by the court in a ruling acquitting of a tax offence (petty offence) or discontinuing the proceedings

[18] Judgment of the Supreme Court of 17 September 2020, ref. no. II PK 6/19, Lex no. 3063122.

[Eichstaedt 2020, 1327–330]. Therefore, it should be concluded that the institution of limitation of a tax obligation loses its significance. As a result of suspension of the limitation period, the tax obligation does not expire with the lapse of the 5-year period counted from the end of the calendar year in which the tax obligation arose, but it may still be effectively enforced, also after completion of preparatory proceedings in a case for a fiscal offence or petty offence. The key assumption for this institution should be that a taxpayer has the right to expect that the expiry of the limitation period will result in the expiry of any outstanding tax obligations. Suspension of the limitation period extends this time-limit by the period of suspension and thus *de facto* changes the legal and factual situation of the obliged person. There is no doubt that a state of uncertainty does not correlate with the principle of citizens' trust in the State and its Laws. What is unacceptable is a situation in which each commencement of penal fiscal proceedings, even in the absence of any substantive or procedural grounds, would result in the suspension of the limitation period of the tax obligation. Therefore, it seems that *de lege ferenda* changes should be postulated in the direction that the suspension of the period should not take place if only the proceedings were initiated in the case about which the taxpayer is not notified and also when these proceedings did not provide any grounds to charge anyone. As rightly noted by A. Chorążwska and L. Wilk "in a democratic a legal state that respects the principle of legal security of an individual, it should there is a «rule of mirror image», sanctioning a direct functional relationship the institution of interruption of the limitation period for a tax liability and the institution of extension the punishability of a tax tort related to failure to perform this obligation tax. It is unacceptable for the same facts to be assessed differently by the legislator on the basis of various areas of law. Meanwhile, if we accept that same initiation of penal fiscal proceedings regarding the failure to fulfill a tax obligation with only the taxpayer notifying about the pending proceedings in the in rem phase before after the basic deadline of the tax liability expires, it gives the right to recognize that the limitation period for this obligation was interrupted, it means consent to such action of the state" [Chorążewska and Wilk 2016, 151–52].

REFERENCES

Adamiak, Barbara, Janusz Zubrzycki, Janusz Borkowski, et al. 2017. *Ordynacja podatkowa – Komentarz* 2017. Wrocław: Oficyna Wydawnicza UNIMEX.

Banaszak, Bogusław. 2011. "O konstytucyjności ustawowej regulacji zawieszenia przedawnienia zobowiązań podatkowych." *Zeszyty Naukowe Sądownictwa Administracyjnego* 1:9–17.

Borkowski, Janusz. 2020. "Aspekty podmiotowe regulacji prawa procesowego." In *System Prawa Administracyjnego*. Vol. 9: *Prawo procesowe administracyjne*, edited by Roman Hauser, Zygmunt K. Niewiadomski, and Andrzej Wróbel, 123–58. Warszawa: C.H. Beck.

Celińska-Grzegorczyk, Katarzyna. 2010. "Zasada pogłębiania zaufania obywateli do organów państwa w orzecznictwie sądów administracyjnych." In *Kodyfikacja postępowania administracyjnego na 50-lecie K.P.A.*, edited by Janusz Niczyporuk, 59–66. Lublin: Wydawnictwo WSPA.

Chorążewska Anna, and Leszek Wilk. 2016. "Przedawnienie karalności przestępstw skarbowych oraz zobowiązań podatkowych." *Prokuratura i Prawo* 2:151–52.

Czeszejko-Sochacki, Leszek Garlicki, and Janusz Trzciński. 1999. *Komentarz do Ustawy o Trybunale Konstytucyjnym: z dnia 1 sierpnia 1997 roku*. Warszawa: Wydawnictwo Sejmowe.

Dzwonkowski, Henryk. 2020. *Ordynacja podatkowa. Komentarz 2020*. Warszawa: C.H. Beck.

Eichstaedt, Krzysztof. 2020. "Dział VII. Postępowanie przygotowawcze." In *Kodeks postępowania karnego Komentarz*. Vol. 1: Art. 1–424, edited by Dariusz Świecki, 1175–366. Warszawa: Wolters Kluwer.

Kmiecik, Zbigniew. 2019. *Postępowanie administracyjne, postępowanie egzekucyjne w administracji i postępowanie sądowoadministracyjne.* Warszawa: Wolters Kluwer.

Kulik, Piotr. 2016. "Czy każde zawiadomienie organu skarbowego o zawieszeniu terminu przedawnienia zobowiązania podatkowego z powodu wszczęcia postępowania karnoskarbowego skutecznie zawiesza ten termin? Interpretacja art. 70 § 6 pkt 1 i art. 70c ustawy Ordynacja podatkowa w świetle orzecznictwa sądów administracyjnych." *Palestra* 7–8:154–66.

Łętowska, Ewa. 2012. "Lex retro non agit i zaufanie do państwa." In *Rzeźbienie państwa prawa. 20 lat później. Ewa Łętowska w rozmowie z Krzysztofem Sobczakiem*, edited by Ewa Łętowska, and Krzysztof Sobczak, 286–308. Warszawa: Wolters Kluwer.

Mariański, Adam. 2021. *Ordynacja podatkowa. Komentarz 2021*. Warszawa: C.H. Beck.

Mastalski, Ryszard. 2019. *Prawo podatkowe.* Warszawa: C.H. Beck.

Potrzeszcz, Jadwiga. 2007. *Idea prawa w orzecznictwie Trybunału Konstytucyjnego.* Lublin: Towarzystwo Naukowe KUL.

Rozmaryn, Stefan. 1961. "O zasadach ogólnych kodeksu postępowania administracyjnego. Charakter prawny i znaczenie zasad ogólnych k.p.a." *Państwo i Prawo* 12:887–905.

Serafiński, Wojciech. 2016. "Instytucja przedawnienia stała się fikcyjna." *Dziennik Gazeta Prawna* 244:C5.

Serafiński, Wojciech. 2020. "Paradoks prawotwórczego wyroku w sprawie przedawnienia zobowiązań podatkowych." *Dziennik Gazeta Prawna* 33:D5.

Wojtuń, Maciej. 2017. "Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego na skutek wszczęcia postępowania karnoskarbowego." *Glosa. Prawo Gospodarcze w orzeczeniach i komentarzach* 2:104–16.

Ziółkowski, Michał. 2015. "Zasada równości w prawie." *Państwo i Prawo* 5:94–108.

Zubik, Marek. 2008. *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów.* Warszawa: C.H. Beck.

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TELEMEDICINE IN THE PAST AND NOW – POLISH REGULATORY FRAMEWORK AND THE SCOPE OF CIVIL AND CRIMINAL LIABILITY OF THE MEDICAL STAFF

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Abstract. The development of telemedicine prompts us to focus on legal aspects related to the provision of ICT services by physician, as well as criminal liability for causing exposure to immediate risk of loss of life or health, as well as civil liability in the event of damage, excluding issues related to the provision of services by persons performing other medical professions (e.g. nurses, midwives, laboratory diagnosticians, pharmacists). Although telemedicine has become a permanent part of the scenario of providing services, the provisions of law refer to the discussed issue in a fragmentary manner. At the same time, the specificity of services implies a wide risk of the guarantor's criminal liability for exposing the patient to the immediate risk of loss of life or health. The above is directly related to the omission of personal doctor-patient contact, which increases the probability of making a diagnostic or therapeutic error. Before the entry into force on 12 December 2015 of the Act of 9 October 2015 amending the Act on the information system in health care [...], only individual legal regulations related to the use of ICT to provide health services, as well as documents on the principles of medical ethics and deontology. Currently, there are no doubts that the provision of health services with the use of ICT is permissible and in accordance with the applicable law. The pandemic period contributed to the introduction of provisions regulating the principles of providing health services with the use of ICT in strictly defined areas, including, inter alia, primary health care.

Keywords: telemedicine, ICT in medicine, new technologies in treatment, legal aspects of telemedicine, medical law

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INTRODUCTION

New technologies currently support most areas of life, including undoubtedly the provision of health services. The above is clearly visible in the implementation of medical activities with the use of information and communications technology.[1] Telemedicine on many levels replaces the classic diagnostic and therapeutic process that implies personal contact between the doctor and the medical staff.

In the literature it is argued that, depending on individual preferences, telemedicine can be seen as an alternative to the standard procedure for providing health care services in the same geographical location, including physical contact, for a form of information exchange between a doctor and a patient, or as a collective category of new medical procedures, that use computer science and telecommunications in medicine [Glanowski 2015, 978–82]. It should be emphasized that telemedicine is an inherent component of the concept of e-health, which is associated with the use of technologies for medicine in the health sector [Sarnacka 2016, 268].

The discussed topic is extremely extensive, hence the authors of the study focused on the legal aspects related to the provision of ICT services by physician, as well as criminal liability for causing exposure to immediate risk of loss of life or health, as well as civil liability in the event of damage, excluding issues related to the provision of services by persons performing other medical professions (e.g. nurses, midwives, laboratory diagnosticians, pharmacists).

The aim of the study is to show that although telemedicine has become a permanent part of the scenario of providing services, the provisions of law refer to the discussed issue in a fragmentary manner. At the same time, the specificity of services implies a wide risk of the guarantor's criminal liability for exposing the patient to the immediate risk of loss of life or health. The above is directly related to the omission of personal doctor-patient contact, which increases the probability of making a diagnostic or therapeutic error.

1. ADMISSIBILITY OF PROVIDING HEALTH SERVICES WITH THE USE OF ICT MEDIA

Before the entry into force on December 12, 2015 of the Act of 9 October 2015, amending the Act on the information system in health care [...],[2] to use ICT to grant healthcare services, only individual legal regulations related. An example is, *inter alia*, Article 3(d) of the "cross-border" directive,[3] which

[1] Hereinafter: ICT.

[2] Journal of Laws item 1991 as amended.

[3] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on

refers to the implementation of telemedicine services, stating that "[...] In the case of telemedicine, healthcare is considered to be provided in the Member State in which the healthcare provider is established."

Direct possibility of the use of ICT tools in the treatment process was also provided for in the Code of Medical Ethics,[4] whose Article 9 states that a physician may undertake treatment only after prior examination of the patient. The exceptions are situations where medical advice can only be provided remotely.

Although the CME is not a normative act, it is emphasized in the literature that "ethical norms may be incorporated into the legal system by means of legal acts. The act on medical chambers made such an incorporation of the standards of the Code of Medical Ethics. The norms of this Code specified the content of the legal norms contained in the Act on medical chambers [...]" [Safjan 2011, 28]. It follows that the application of the provisions of CME in the context of providing health services without personal contact with the patient is justified in exceptional situations, the assessment of which depends each time on the individual assessment of the doctor.

Although the subject of telemedicine was the subject of insufficient legal regulations, these issues were already analyzed in the literature of the previous decade, including in the context of teleconsultation of acute poisoning [Zajdel, Krakowiak, and Zajdel 2010].

According to the amended Article 42(1) of the Act of 5 December 1996 on the professions of doctor and dentist,[5] "A doctor adjudicates about the health of a specific person after prior, personal examination or examination via teleinformatic systems or communication systems." The use of the word "adjudicates" in the content of the quoted provision raised many doubts as to the scope of the regulation in question. Bearing in mind the purposeful and functional interpretation, this word should be identified with the assessment of health condition and the possibility of making a diagnosis – i.e. understanding the verb "adjudicates" in the material sense [Glanowski 2015, 978–82].

Scientists rightly note that the interpretation of the verb in question on the basis of Article 42(1) PDD in a way leading to the conclusion that the hypothesis of the norm constructed by this provision, which includes the provision of health services, other than the determination of a person's health condition, goes beyond its possible linguistic meaning [Kaczan 2017, 93–105].

Before the amendment to the provisions of the Act on the professions of doctor and dentist, the judicature contained statements that the use of telemedicine tools should not be identified with healthcare services. In the judgment

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the application of patients' rights in cross-border healthcare, Official Journal of the European Union L 88/45.

[4] Hereinafter: CME.

[5] Journal of Laws of 2020, item 514 as amended [hereinafter: PDD].

of 23 June 2015,[6] the Provincial Administrative Court in Krakow emphasized that: "Telemedicine services provided via the Internet are in fact providing advice, lectures and provide guidelines on how to perform exercises, their assessment and monitoring, consultations in the field of health education. These activities cannot be considered medical care […]." Bearing in mind the current wording of Article 42(1) PDD it should be assumed that the use of teleinformatic means of communication during the provision of health services, as well as non-therapeutic activities undertaken by a doctor, undoubtedly constitute the performance of medical care.

In the opinion of the authors, the conceptual difference between the terms "personal contact" and "direct contact" should be emphasized. Using the ICT to establish contact between the doctor and the patient does not avoid direct contact, but only personal contact understood as a meeting of natural persons at the same place and time. Proper understanding of the concept of "direct contact" has significant consequences under the Act of 25 June 1999 on cash benefits from social insurance in the event of sickness and maternity.[7] Pursuant to Article 55(4)(1) of the aforementioned Act, "adjudication on temporary incapacity to work due to illness, hospital stay [...] or the need to personally care for a sick family member takes place after direct examination of the health state of the insured or sick family member."

Direct examination cannot be identified with a personal examination carried out as a result of physical contact between the doctor and the patient, but only with the need to assess the state of health immediately before making the decision to issue a certificate of incapacity for work. The exception allowing the use of ICT media in the process of deciding on the patient's health condition is Article 11(1) of the Act of 19 August 1994 on mental health protection,[8] according to which "a decision about the health condition of a person with mental disorders, an opinion or a referral to another doctor or psychologist or medical entity may be issued by a doctor only on the basis of a prior personal examination of that person."

From the literal wording of Article 11(1) MHP there is a need for a personal examination to assess the patient's health or to issue a referral for further treatment. The possibility of using ICT media is also provided for in Article 3(1) of the Act of 15 April 2011 on medical activity,[9] according to which "medical activity consists in providing health services. These services may be provided through ICT systems." There is no doubt that "remote" health services have grown in popularity with the outbreak of the COVID-19 pandemic. In the context of services provided in this period, the concept of telemedicine

[6] Ref. no. I SA/Kr 721/15, Lex no. 1813436.
[7] Journal of Laws of 2020, item 870 as amended.
[8] Journal of Laws of 2020, item 685 as amended [hereinafter: MHP].
[9] Journal of Laws of 2020, item 295 as amended [hereinafter: MA].

visit and telemedicine advice should be clearly distinguished. In the authors' opinion, the telemedicine visit should be identified with any medical service provided remotely in connection with an illness, health problem, disease other than related to SARS-CoV-2. On the other hand, telemedicine advice should be equated with a service provided through ICT systems or other communication systems in connection with suspected SARS-CoV-2 infection or falling ill with COVID-19.

Pursuant to Article 7(4) of the Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and emerging crisis situations:[10] "A physician and a dentist [...] may provide health care services in connection with counteracting COVID-19 through the ICT system made available by the unit subordinate to the minister competent for health matters competent in the field of healthcare information systems, hereinafter referred to as «telemedicine advice» [...]." The duty of the doctor providing telemedicine advice is to keep medical records in the form of a telemedicine advice card, which must be kept for 30 days from the date of cancellation of an epidemic threat or state of an epidemic (Article 7(7) and (9) of u.COVID). It should also be noted that the possibility of giving witness telemedicine advice excludes taking medical actions aimed at issuing an opinion, decision or certificate.

The physician performing the telemedicine visit is obliged to keep medical documentation in accordance with the rules set out in the Regulation of the Minister of Health of 6 April 2020 on the types, scope and templates of medical documentation and the method of its processing[11] to archive it for the period specified in Article 29(1)(1–4) of the Act of 6 November 2008 on the rights of patients and the Patient Rights Ombudsman.[12] Thus, the recording of audio and video during video consultations does not replace medical documentation, the scope and principles of which are specified in the above-mentioned regulation.

It should be noted that all regulations relating to the provision of health services with the use of ICT refer to services financed from public funds. The above does not preclude the appropriate application of these provisions to commercial services.

Currently, the very use of ICT has been envisaged in both primary and specialized healthcare. Tele-services in primary health care are provided on the basis of the regulation of the Minister of Health of 24 September 2013 on guaranteed benefits in the field of primary health care and ordinance No. 177/2019/DSOZ of the President of the National Health Fund of 30 December

[10] Journal of Laws of 2020, item 1842 as amended [hereinafter: u.COVID].
[11] Journal of Laws item 666 as amended.
[12] Journal of Laws of 2020, item 849 as amended [hereinafter: PR].

2019 on the conditions conclusion and implementation of contracts for the provision of healthcare services in the field of primary health care.

In turn, services in the area of specialist healthcare are provided on the basis of the Regulation of the Minister of Health of 6 November 2013 on guaranteed benefits in the field of outpatient specialist care and ordinance No. 182/2019/DSOZ of the President of the National Health Fund of 31 December 2019 conditions for concluding and implementing contracts for the provision of healthcare services such as outpatient specialist care. As a rule, the services covered by the contract with the National Health Fund must be provided personally by persons with appropriate qualifications.

The exception from the rule are services related to the performance of computed tomography and magnetic resonance imaging (para. 9(2)), which may be provided with the use of ICT tools. Based on para. 4(3)(e, g) and (4)(d, e) of the Regulation of the Minister of Health of 6 November 2013 on guaranteed services in the field of therapeutic rehabilitation,[13] public funds finance, *inter alia*, the services of hybrid cardiac telemedicine rehabilitation and cardiological hybrid telemedicine rehabilitation after myocardial infarction, implemented in a center or day ward or in stationary conditions.

Pursuant to the Regulation of the Minister of Health of 6 April 2020, amending the regulation on guaranteed services in the field of outpatient specialist care,[14] on 3 April 2020, added the possibility of a physician from a dialysis center to provide healthcare services with the use of ICT systems or communication systems. This applies to the following areas: peritoneal dialysis, hemodialysis with a 24-hour emergency and hemodiafiltration. On 17 March 2020, the Regulation of the Minister of Health of 16 March 2020, amending the regulation on guaranteed benefits in the field of psychiatric care and addiction treatment,[15] entered into force. The newly added para. 3a made it possible to provide psychiatric care inpatient, outpatient and daily services with the use of ICT systems, provided that the availability of the personnel required for their implementation at the place of provision of services is ensured.

Pursuant to the ordinance No. 78/2020/DSOZ of the President of the National Health Fund of June 2, 2020 amending the ordinance on the terms of concluding and execution contracts for the provision of healthcare services such as psychiatric care and addiction treatment, points 33 and 34 were added in para. 18(1) to the ordinance No. 7/2020/DSOZ of the President of the National Health Fund of 16/01/2020 on the terms of concluding and execution contracts for the provision of healthcare services such as psychiatric care and addiction treatment.

[13] Journal of Laws of 2021, item 265.
[14] Journal of Laws item 612.
[15] Journal of Laws item 456.

Evidence of the provision of services with the use of ICT systems is the recording of the communication tool used in the individual internal medical documentation of the services recipient, and additionally, during the medical session, recording the hours and minutes of its start and end. At the same time the para. 4 was amended in para. 18 of the ordinance No. 7/2020/DSOZ, indicating that in the case of the provision of services: individual psychotherapy session, family psychotherapy session, group psychotherapy session and psychosocial support session, the service provider is obliged to record in the individual internal documentation of the services recipient the hour and the minute of starting and end the session.

The specificity of telemedical visit, their number and importance have led to the creation of standards or procedures as part of their implementation. The basis for introducing the standards is Article 22(5) MA, according to which "the minister competent for health may define, by way of a regulation, organizational standards of health care in selected fields of medicine or in specific entities performing therapeutic activities, guided by the need to ensure adequate quality of health services."

An entity performing medical activities is required to apply organizational standards of healthcare when providing health services, if they have been defined pursuant to Article 22(5) MA for the field of medicine covered by the scope of health services provided by this entity performing medical activities or for the type of medical activity performed by such entity.

The standards of conduct in the field of providing "telemedicine" services are set out in the Regulation of the Minister of Health of 11 April 2019 on organizational standards of healthcare in the field of radiology and imaging diagnostics performed via ICT systems. On 29 August 2020, the organizational standards of the telemedicine advice at primary health care[16] entered into force. It should be noted that the use of the word "telemedicine advice" in the regulation should be considered incorrect, because the specificity of services provided in primary health care is associated with a wide range of activities, including those not related to SARS-CoV-2 and COVID-19 infection. In addition, the use of ICT media in the treatment process has a direct impact on taking into account the criteria of financial and organizational effectiveness, and thus reducing health care costs [Noel, Vogel, Erdos, et al. 2005].

[16] Journal of Laws item 1395.

2. A DOCTOR'S CRIMINAL LIABILITY WHEN PROVIDING MEDICAL SERVICES AT A DISTANCE

Human life and health are of such a significant value that the Act of 6 June 1997, the Criminal Code,[17] apart from liability for infringement of these goods, also establishes liability for their exposure to danger. Therefore, criminal law protection appears already at the stage preceding the occurrence of a specific effect, which is directly related to the passive subject of the crime whose law order has been violated [Zoll 2017, 525–27].

Pursuant to the wording of Article 160(1) CC, whoever kills a human on his demand and under the influence of compassion for him, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Article 160(2) CC specifies the qualified type, according to which, if the perpetrator has a duty to take care of the person exposed to danger, he is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Article 160(3) CC defines criminal liability for committed without intent para. 1 or 2. In the event of without intent the perpetrator is liable to a fine, the restriction of liberty or imprisonment for up to one year.

It should be emphasized that while the perpetrator of a common crime specified in Article 160(1) CC [Zoll 2017] can be anyone, so the perpetrator of the qualified type under Article 160(2) CC, can only be a guarantor who was obliged to take care of a person exposed to danger, and this is undoubtedly such as are medical professionals.

Pursuant to Article 4 PDD, a doctor is obliged to exercise their profession in accordance with the indications of current medical knowledge and with due diligence. For the physician – the guarantor, the above is an obligation to take measures to prevent the emergence of a specific threat to life or health, as well as the obligation to take all actions aimed at reducing the degree of danger that already existed at the time of the implementation of health services [Zoll 2017].

The jurisprudence emphasizes that the effect referred to in Article 160(1–3) CC is not only to cause a threat in a situation in which before the perpetrator's behavior no danger threatened the aggrieved party, but this effect will also take place when the perpetrator with his behavior increases the threat to the already occurring danger. In particular, this will apply to situations where the perpetrator is obliged to prevent the danger, fails to fulfill his obligation, which was confirmed in the judgment of the Supreme Court in the judgment of 10 August 2000.[18]

[17] Journal of Laws of 2020, item 1444 as amended [hereinafter: CC].
[18] Ref. no. WA 23/00, Lex no. 532395.

In the context of liability related to the provision of health services with the use of ITC, the position of the judicature plays a significant role, e.g. the judgment of the Court of Appeal in Łódź of 10 September 2015[19] according to which the crime stipulated in Article 160(1) CC, is a criminal offense and consists in causing a state of immediate danger to a person of losing their life or causing serious damage to their health. A similar position was taken by the Supreme Court in its judgment of 5 April 2013,[20] stressing that as a result of the offense under Article 160(2) and (3) CC, it is not only to cause a situation in which the patient is, without being previously in a position that poses a direct threat to his life or health, but also maintaining (not reversing or reducing) the already existing level of this dangers at the time when the duty of the doctor-guarantor was fulfilled. Moreover, the offense is committed from the moment of exposure to danger, even if the exposed person has not suffered any harm.

The above is confirmed in the literature where it is emphasized that as a result of the crime under Article 160 CC is to cause a threat not only in a situation where no danger threatened the aggrieved before the perpetrator's behavior, but also when the perpetrator's behavior increases the threat to the immediate danger that already exists [Bielski 2005, 119].

In the case of criminal liability for omission, it is irrelevant whether, as a result of failure to provide a health service, the guarantor-doctor caused the patient to be in a situation that posed a direct threat to life or health, even though he was not in such a state previously, or the guarantor, as a result of the omission to provide a health service, intensifies the course and development of disease processes in the patient by his inaction in such a way that they began to directly threaten his life or health.[21]

Although the most common cause of negative effects on life and health are diagnostic and therapeutic errors, the specificity of providing health services "at a distance" implies the possibility of their occurrence due to organizational errors [Kunert 2019, 164]. In the authors' opinion, organizational errors may be related, *inter alia*, to improper preparation of facilities to provide services with the use of ICT, including the lack of appropriate IT equipment, as well as providing services in the mode of remote work at home and on the basis of private IT equipment belonging to a physician. The responsibility specified in Article 160(1–3) CC, applies in particular to primary care physicians who are undoubtedly guarantors of patient safety [Wąsik 2018, 43], and are the only specialists obliged to apply organizational standards issued by executive regulation.

[19] Ref. no. II AKa 162/15, Lex no. 1808686.

[20] Ref. no. IV KK 43/13, Lex no. 1318212.

[21] This is also the way in which the judgment of the Supreme Court of 5 November 2002, ref. no. IV KKN 347/99, Lex no. 74394.

Thus, the element of exposure may occur not only in connection with the failure to properly assess the patient's health condition, but also with the waiver of a personal visit, cancellation of a telemedicine visit in violation of the standard rules, as well as the provision of services to patients who have been excluded from the group entitled to receive ICT care services.

In the context of criminal liability, the content of Article 24 of the Act of 28 October 2020 deserves attention, on amending certain acts in connection with counteracting crisis situations related to the occurrence of COVID-19,[22] according to which it does not commit an offense referred to, inter alia, in Article 160(3) CC, whoever, during the period of announcing the state of epidemic threat or state of epidemic, providing health services on the basis of PDD as part of the prevention, diagnosis or treatment of COVID-19 and acting in special circumstances, committed a prohibited act, unless the result was the result of gross failure to exercise caution required in the given circumstances.

The consequence of the medical incident may be the occurrence of damage to the health of the patient or even his death. Then the prosecutor conducting the investigation should apply the cumulative qualification of Article 160(2) CC or Article 160(3) CC with one of classifying provisions of law: involuntary manslaughter Article 155 CC), grievous bodily harm (Article 156(1)(1) and (2) CC), other bodily harm (Article 157(1) CC).

The legislator defined Involuntary manslaughter in Article 155 CC, pursuant to whoever kills a human on his demand and under the influence of compassion for him, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Grievous bodily harm in Article 156 CC it may consist of depriving a person of their sight, hearing, speech or the ability to procreate. The second form of causing serious inflicts on another person a crippling injury, an incurable or prolonged illness, a potentially fatal illness, a permanent mental illness, a permanent total or significant incapacity to perform a profession, or a permanent serious bodily disfigurement or deformation. The perpetrator of this act is subject to the penalty of deprivation of liberty for a period not shorter than 3 years. Other bodily harm in Article 157(1) CC consists in causing a violation of the activities of an organ of the body or an impairment of health, other than those specified in Article 156(1) CC, but lasting more than 7 days and the perpetrator is liable to imprisonment for between three months and five years.

3. CIVIL LIABILITY FOR THE RESULTING DAMAGE

While criminal liability has been excluded in some situations of providing health services in connection with COVID-19, the provisions on civil liability

[22] Journal of Laws item 2112.

will apply in any situation of damage occurring during the provision of health services, including that provided remotely.

The scope of responsibility will, however, be implied by the contribution of the aggrieved party, the consequences of the perpetrator's behavior, as well as the diligence of the guarantor. Provision of health services with the use of ICT involves additional risk related to the quality and efficiency of the equipment and the quality of the internet connection.

This does not exempt the entity performing medical activities from providing such devices that will be capable of safe use, required in a given situation and circumstances, which can be expected from the guarantor of the protection of human health and life.[23]

The fact of concluding a treatment contract, which is concluded between the patient and the entity providing medical services with the use of ICT, is also important.

The treatment agreement, as a consensus agreement, is intended to fulfill the obligation of providing a health service, towards an activity that will be used to prevent, preserve, save, restore or improve health, and other medical activities resulting from the treatment process. Assigning responsibility for damage caused in the treatment process also depends on the way in which medical activities are performed. The general rule is that it is the medical entity that will be borne by the entity that concluded the treatment contract with the patient.

In the case of an oral treatment agreement, its content should be read with the PDD and PR. The main responsibilities and powers of the parties should be defined. Despite the fact that the patient concludes a treatment contract most often with a healthcare clinic or hospital, they mainly come into contact with a doctor. The doctor's duties are defined, inter alia, in Article 4 PDD, according to which a doctor is obliged to practice in accordance with the indications of current medical knowledge available to him about methods and means of preventing, diagnosing and treating diseases, with the principles of professional ethics and with due diligence; in Article 30 PDD, imposing the obligation on the doctor to provide medical assistance in any case when delay in providing it could result in a risk of loss of life, serious injury or serious health impairment, and in other urgent cases; in Article 31 PDD in the scope of providing the patient or his statutory representative with accessible information about his health condition, diagnosis, proposed and possible diagnostic and treatment methods, foreseeable consequences of their application or omission, treatment results and prognosis; in Article 36 PDD as an obligation to respect the intimacy and personal dignity of the patient; in Article 40 PDD,

[23] E.g. judgment of the Supreme Court of 22 August 1980, ref. no. IV CR 299/80, unpublished; see also judgment of the Supreme Court of 11 May 1983, ref. no. IV CR 118/83, OSNCP 1983, No. 12, item 201.

imposing an obligation to keep confidential information related to the patient, obtained in relation with the exercise of the profession; and in Article 41 PDD Law, pursuant to which the doctor was obliged to keep individual medical records of the patient.

The counterparts of the above obligations are the patient's rights resulting from the PR, in particular a very broad right to health services (Article 6 and 7 PR), the right to health services provided with due diligence (Article 8 PR), the right to information (Article 9–12 PR), the right to report adverse effects of medicinal products (Article 12a PR), the patient's right to confidentiality of information related to him (Article 13 PR), the patient's right to consent to the provision of health services and to refuse such consent (Article 15–17 PR), the right to respect their intimacy and dignity, the treatment of pain and the presence of a relative (Article 20 and 21 PR), the right to access medical records (Article 23 PR), the patient's right to object to a doctor's opinion or decision (Article 31 PR), the patient's right to respect for private and family life, including the right to contact other persons and to additional care (Article 33 and 34 PR), the right to pastoral care (Article 36 and 37 PR), the patient's right to keep valuables in deposit (Article 39 PR).

With regard to tort and contractual liability, the provisions on due diligence apply to the latter, referred to in Article 355 of the Act of 23 April 1964 the Civil Code[24] which is tightly correlated with the patient's rights, as defined in Article 8 PR. In the case of a treatment agreement concluded in a written or documentary form (most often concluded between the patient and private entities conducting medical activities), apart from the provisions of PR, the scope of liability will result from the content of the agreement. Within the scope of the treatment agreement, the liability of the entity performing medical activities will be based on qualified due diligence (Article 355(2) CiC), and in the event of a personal injury, this liability will result from contractual provisions.

Such an entity performs its obligation with use of services performed by medical personnel, on the basis of a pre-existing legal relationship between them, such as an employment contract or the so-called contract, i.e. a civil law contract.

The above will be significant in relation to the regulation concerning the indemnity as a substitute, i.e. for the act of another.

Compensation for the damage in the situation described above is the result of a legal relationship between the person causing the damage and the person entrusting the activity. In Article 429 and 430 CiC, the Polish legislator regulated the above circumstance.

[24] Journal of Laws of 2022, item 1740 [hereinafter: CiC].

In the case of telemedicine advice, it is the entity performing the medical activity that is obliged to act diligently in the given relationships, and this is certainly the provision of means of communication and equipment that guarantees the possibility of adjudicating on the patient's health condition.

However, the provisions of the Telecommunications Law relating to the fulfillment of obligations by the operator of the public telecommunications network are irrelevant for this relationship.

Failure to execute or improper execution of the contract between him and the entity performing medical activities may be the basis for the entity performing medical activities to submit a recourse claim in the event of liability for damages. A recourse claim against tort is based on the provisions of Article 441(2) and (3) CiC.

In order to confirm the above, it should be noted that despite the previous legal status, on which the two above-mentioned judgments of the Supreme Court also in the current legal status in jurisprudence[25] in cases where defective, malfunctioning, undesirable operation or outdated diagnostic equipment became the basis for further actions of medical personnel in relation to the patient, as a result of which the damage occurred, also the organizational fault of the entity performing the medical activity is accepted as the basis for liability. This was also confirmed by the CJEU in a judgment of the 21 December 2011[26] in a case where a medical facility was responsible for burns to a patient due to a malfunction of the heat regulation system in a heated mattress. The responsible entity, Besançon Teaching Hospital argued that liability for the damage should be borne by the manufacturer of the product in accordance with Directive 85/374/EEC.[27] The CJEU confirmed that the responsibility of the hospital, as a provider of medical services, does not arise from the aforementioned directive. Liability for damages may be assigned to such an entity under the domestic law of a Member State, even if no fault can be attributed to it, which is not contrary to the provisions of the Directive, provided that the aggrieved party or the aforementioned service provider remain able to hold the producer liable on the basis of this directive, if the conditions set out in it are met. This judgment correlates very well with Polish jurisprudence, aiming at the guarantee and protection of the weaker entity in a dispute for compensation, i.e. the injured patient.

Although the legal relationship between the doctor and the entity performing medical activities is important for assigning the basis of liability, it is not

[25] E.g. judgment of the Court of Appeal of Gdańsk of 23 October 2013, ref. no. I ACa 866/11, unpublished.

[26] Ref. no. C–495/10, ZOTSiS 2011, No. 12C, sec. I–14155.

[27] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7.8.1985, p. 29.

of great importance when assessing the extent of the victim's contribution or when examining the scope and degree of careful action.

From the point of view of pursuing the claim by the injured party, it is important to assign the fault to a specific perpetrator of the damage. In the case of entities performing medical activities, when such a person who has inflicted damage cannot be clearly identified, the structure of organizational fault may apply. However, these concepts will apply to the use of ICT, insofar as it is possible to prove an organizational error of the entity performing the medical activity, manifested in its negligence in terms of organization, safety, hygiene and care of the patient.

With regard to the ICT, such an organizational error could consist in the insufficient quality of the Internet connection used for video advice. It should be noted that the nature of the liability of the telecommunications operator will be decided by the increased assessment of the nature of conducting this activity in accordance with Article 355(2) CiC. In addition to professionalism, the control model is probably also the quality of the telecommunications service provided, which includes data transmission speed, uninterrupted connection, no transmission disruptions, etc. The detailed scope of duties is usually specified in the contract of the provision of a telecommunications service and in the regulations that define the conditions and quality of the service offered. Additionally, on the part of the entity to whom the telecommunications service is to be provided, there is usually an obligation to obtain appropriate technical equipment necessary to receive the service in the declared quality by the telecommunications service provider. All these variables will be taken into account to assess whether the telecommunications service provider has performed the service properly. It will be relevant, in particular, when there is a loss to the patient in connection with the service provided. Failure to meet the hardware requirements of the entity performing medical activities may be considered as contributing to the damage.

CONSCLUSIONS

On December 12, 2015, the Act of 9 October 2015 amending the Act on the information system in the health care and some other acts,[28] entered into force, the content of which amended, inter alia, the then wording of Article 2 of PPD by adding section 4 in the following wording: "A doctor, dentist may perform the activities referred to in sec. 1 and 2, also via ICT systems or communication systems." For the activities specified in Article 2(1) and (2) include health services consisting, in particular, in examining the state of health, diagnosing and preventing diseases, treating and rehabilitating patients, providing medical advice, as well as issuing medical opinions and certificates, in the case of

[28] Journal of Laws item 1991 [hereinafter: the Act of 9 October 2015].

dentists, on the implementation of the above-mentioned services in the field of dental diseases, the oral cavity, the facial part of the skull and adjacent areas. Pursuant to the Act of 9 October 2015, the content of Article 42(1) PPD has amended wording: "A doctor decides on the health condition of a specific person after prior, personal examination or examination via ICT systems or communication systems."

Before the entry into force on 12 December 2015 of the Act of 9 October 2015 amending the Act on the information system in health care [...], only individual legal regulations related to the use of ICT to provide health services, as well as documents on the principles of medical ethics and deontology. Currently, there are no doubts that the provision of health services with the use of ICT is permissible and in accordance with the applicable law. The pandemic period contributed to the introduction of provisions regulating the principles of providing health services with the use of ICT in strictly defined areas, including, inter alia, primary health care.

Before the COVID-19 pandemic, binding standards of conduct in the provision of "telemedicine" services were defined, for example, in the Ordinance of 11 April 2019 of the Minister of Health on organizational standards in the field of radiology and imaging diagnostics performed via ICT systems.[29] The necessity to limit personal contact at the doctor-patient level, forced by the development of the pandemic, resulted in the introduction of the organizational standard of teleportation in primary health care,[30] which came into force on 29 August 2020 .

Omitting personal contact for the purpose of providing health services is now permissible and often replaces the classic contact of the patient with a person performing a medical profession. Despite this, no provisions have been created that would directly refer to the civil and criminal liability of people who use ICT tools to provide health services. Thus, the basis of civil liability and criminal responsibility for the consequences of actions and omissions of persons providing health services with the use of ICT tools are the general rules resulting from the provisions of the Civil Code and the Criminal Code. The lack of regulations that would limit or, in strictly defined situations, exclude liability for damages resulting from the provision of remote services, implies an increased risk of liability for the so-called "Malpractice" or failure to exercise the due care. The above is important considering the fact that medical services provided remotely carry a natural risk that increases the possibility of committing an error, which results from the lack of personal contact with the patient. Thus, it seems necessary to introduce regulations that would clarify the scope of responsibility of persons providing health services with the use of ICT media.

[29] Journal of Laws item 834.

[30] Journal of Laws item 1395 as amended.

REFERENCES

Bielski, Marek. 2005. "Prawnokarne przypisanie skutku w postaci konkretnego narażenia na niebezpieczeństwo – uwagi na marginesie postanowienia Sądu Najwyższego z dnia 3 czerwca 2004 r., V KK 37/04." *Przegląd Sądowy* 4:119–33.

Glanowski, Grzegorz. 2015. "Telemedycyna w świetle ustawy o zawodach lekarza i lekarza dentysty." *Monitor Prawniczy* 18:978–82.

Kaczan, Damian. 2017. "Telemedycyna w prawie polskim i kilka uwag na tle prawa unijnego." *Zeszyty Prawnicze* 1:93–105.

Kunert, Ireneusz. 2019. "Błąd organizacyjny w działaniach służby zdrowia jako przedmiot spraw o tzw. błędy medyczne z perspektywy praktyki prokuratorskiej." *Prokuratura i Prawo* 7–8:164–80.

Noel, Helen, Donna Vogel, Joseph Erdos, et al. 2005. "Home Telehealth Reduces Healthcare Costs." *Telemedicine Journal and e-Health* 10, no. 2:170–83. https://doi.org/10.1089/tmj.2004.10.170

Sarnacka, Emilia. 2016. "Telemedycyna i e-Recepta – nowe wyzwania legislacyjne." In *Nowe procedury medyczne a prawo*, edited by Jacek Sobczak, and Magdalena Reshef, 127–32. Toruń: Adam Marszałek.

Safjan, Marek. 2011. *Prawo wobec medycyny i biotechnologii. Zbiór orzeczeń z komentarzami*. Warszawa: Wolters Kluwer.

Wąsik, Damian. 2018. "Błędy w sztuce lekarskiej w praktyce lekarza medycyny rodzinnej – aspekty prawnokarne i prawnomedyczne." *Prokuratura i Prawo* 5:43–61.

Zajdel, Radosław, Anna Krakowiak, and Justyna Zajdel. 2010. "Analiza podstaw legalności telekonsultacji i telediagnostyki w codziennej praktyce klinicznej. Czy wolno konsultować przez telefon?" *Medycyna Pracy* 61, no. 4:155–63.

Zoll, Andrzej. 2017. In *Kodeks karny. Część szczególna.* Vol. 2. Part 1: *Komentarz do art. 117–211a*, edited by Włodzimierz Wróbel, 525–27. Kraków: Wolters Kluwer.

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CRIMINAL-LAW PROTECTION DUE TO RELIGION (ARTICLE 194 OF THE PENAL CODE)

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Abstract. The article analyses the problem of the offence of religious discrimination under Article 194 of the Polish Penal Code. The author presented in the first part of the article the process of formation of "crimes against freedom of conscience and religion" in the criminal codes of 1932, 1969 and 1997, then discussed the object of protection related to the offence of "religious discrimination" in the light of Article 192 of the Penal Code of 1969. From this perspective, she analysed the object of protection, offender, objective aspects and subjective aspects of the applicable Article 194 of the Polish Penal Code of 1997.

Keywords: crimes against freedom of conscience and religion, religious discrimination, religious beliefs, criminal-law protection of freedom of religion

Freedom of conscience and religion, considered as one of the foundations of democratic society in the modern world [Sobczak and Gołda-Sobczak 2012, 28], requires special protection at the levels of international and domestic law, including criminal law. It is stressed that on an international scale this protection is provided by normative acts forming the set of human rights *par excellence*, formulating both universal and regional standards of this protection [Chrzczonowicz 2003, 116]. On the other hand, the legal systems of European countries contain internal regulations ensuring the protection of religion, churches and religious denominations [Kędzierski 2007, 71]. The subject of this protection are religions (denominations) legally existing in a given country [ibid.]. In Poland, "the regulations in the field of freedom of religion, enabling its full implementation and securing its proper execution, are contained in the Constitution of 2 April 1997, in the Act on guarantees of freedom of conscience and religion of 17 May 1989,[1] vast legislation on relations between the State and churches and other religious associations, and in the Penal Code of 1997" [Chrzczonowicz 2003, 116].

[1] Journal of Laws of 2000, No. 26, item 319.

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Freedom of conscience and religion[2] are goods protected under Article 53 of the Constitution of the Republic of Poland. It is rightly assumed that "the freedom of religion positively defined in Article 53(2) in the Constitution (including the freedom to profess or to adopt a religion of one's own choice and to manifest one's religion individually with others, publicly or privately, by worship, prayer, participation in rites, practising and teaching, and the possession of temples and other places of worship) must correspond, inter alia, to the freedom of expression referred to in Article 54(1), and the freedom of artistic creation, scientific research and the publication of its results, as formulated in Article 73, the freedom to teach and the freedom to use cultural goods" [Warylewski 2005, 369].

Freedom of thought, conscience and religion is, in its religious dimension, one of the most fundamental elements that contribute to shaping the identity of believers and their worldview.[3] It constitutes also a value for religiously indifferent people.

1. CRIMES AGAINST FREEDOM OF CONSCIENCE AND RELIGION IN THE POLISH CRIMINAL LAW – HISTORICAL OUTLINE

At the beginning it should be mentioned that when Poland lost its independence as a result of the Third Partition (1795), Polish territories were governed by the legislation of the occupiers. As W. Makowski explains, in the then district legislation the core offences against religion were offences "against the order of human coexistence, in particular – against the institutions of collective life, among which religion and religious associations occupy an outstanding place" [Makowski 1924, 194]. Generally speaking, in the regulations contained in the German and Austrian Codes, criminalisation was applied to acts that included behaviour consisting in "an offence against God's faith in general." The Russian code, on the other hand, regulated this issue differently, assuming the protection of faith in God "understood as it is understood by the Christian church" [ibid., 197].

After Poland regained independence in 1918, the decision of the legislative Sejm, headed by Marshal Józef Piłsudski, was to pass two legal acts of the highest rank, i.e. the Constitution of 17 March 1921 (March Constitution)[4] and then the Constitution of 27 April 1935 (April Constitution).[5] Both of these acts

[2] For more on the understanding of freedom of conscience and religion, see Article 2 of the Act on guarantees of freedom of conscience and religion of 17 May 1989. See Sobczak and Gołda-Sobczak 2012, 29 and the literature referred to therein; Maciaszek 2006, 210–34; Misztal 2003, 59–70; Paprzycki 2021.

[3] Judgment of the ECtHR of 26 June 2001, Saniewski v. Poland, Lex no. 40319/98.

[4] Constitution of 17 March 1921, Journal of Laws No. 44, item 267 as amended.

[5] Constitution of 27 April 1935, Journal of Laws No. 30, item 227 as amended.

contained legal regulations, including those relating to freedom of conscience and religion, as well as equality of all regardless of their religion. Of these, the wording of Article 114 of the March Constitution draws particular attention. Namely, this provision states: "the Roman Catholic denomination, being the religion of the overwhelming majority of the nation, occupies in the state the chief position among the authorized denominations."

The beginning of the development of regulations on crimes against freedom of conscience and religion dates back to the Polish Penal Code of 1932.[6] In Chapter XXVI, this code penalised behaviour directed against religious feelings. Although it did not accept crimes related to religious intolerance and discrimination [Wojciechowska 2001, 71], it did not describe or use the very concept of "crimes against freedom of conscience and religion." Following J. Makarewicz, it is assumed that this Code did not provide for the protection of civil liberties in the area of religious belief, but rather for the protection of the interest of the community against attacks on religion.[7] Chapter XXVI, entitled "Crimes against religious feelings," contained three provisions whose constituent elements included behaviour consisting in: 1) blaspheming God (Article 172), 2) public defamation or mockery of legally recognised religious associations, their dogmas, beliefs and rites as well as sites intended for conducting religious rites (Article 173), 3) mischievous disturbance of a religious act performed by a legally recognised religious denomination (Article 174).

With the change of the Polish political system after the Second World War, the penal legislation underwent infamous changes. The decision-makers of the time strived to adapt the criminal law to the reforms aimed at laicisation, especially at the legal level [Mojak 1989, 26]. Their goal was to deprive society of religious beliefs and values. First, in 1946, the Decree on particularly dangerous crimes in the period of national reconstruction, called the Small Penal Code,[8] was introduced, subsequently replaced in 1949 by the Decree on the protection of freedom of conscience and religion.[9] The latter repealed the legal force of the provisions of Chapter XXVI of the Penal Code of 1932 concerning offences against religious feelings and the provisions of the Decree of 1946.

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[6] Decree of the President of the Republic of Poland 11 July 1932, the Penal Code, Journal of Laws No. 60, item 571 as amended.

[7] As cited in: Wojciechowska 2012, 546.

[8] Journal of Laws No. 30, item 192 as amended.

[9] Journal of Laws No. 45, item 959. "Article 8 of the Decree criminalized not only the accomplished and attempted offence, but also the preparation of an abuse of freedom of religion and conscience for the purposes hostile to the political system of the Republic of Poland," while Article 9 of the Decree stated that: "whoever, by abusing freedom of religion in order to get personal or other gain, exploits human credulity by spreading false news or misleads others by fraudulent or deceptive acts." The utmost hypocrisy was the provision of Article 2 of the Decree: "whoever restricts a citizen in his rights due to his religious affiliation, religious beliefs or non-religion shall be punished by imprisonment for up to 5 years" [Wąsek 2003, 207–208].

A. Wąsek rightly wrote: "It is symptomatic that the decree of 5 August 1949 repealing the provisions of Chapter XXVI of 1932 «Crimes against religious feelings» was entitled «Crimes against freedom of conscience and religion. Indeed, a truly Orwellian title»" [Wąsek 1995, 27; Idem 2003, 207]. According to this author, "at the time of the adoption of the Decree on the protection of freedom of conscience and religion, state authorities of all levels and various degrees of competence applied to a large scale not only the restriction, but even the deprivation of civil public and social rights due to citizen's religious affiliation (even if concealed) with the Catholic Church. The communist state used to promote and implement in its activities the Marxist materialistic ideology. In the name of this ideology, the war on religion was declared, including primarily against the Catholic Church. The communist state wanted to fully subjugate its citizens also in the spiritual sphere. In the Stalinist period, during the «growing class struggle», as the Communist party propaganda of that time used to euphemistically define the intensification of terror in internal politics, the fight against the Catholic Church was waged on various levels: political, economic, legal" [Idem 1995, 28].

The decree of 5 August 1949, as A. Grześkowiak put it, was one of the instruments of the massive attack on the Church. In the decree, as A. Grześkowiak writes, "the protection of religious feelings of believers was also guaranteed, which was in fact only an appearance, because the provision prohibiting to offend these feelings was formulated in such a way that in practice it was almost impossible to seek this protection. This direction was strengthened by the interpretation of this norm, which used to be applied also under the relevant provision of the Criminal Code of 1969, and even persisted, especially in practice and under the rule of the Criminal Code of 1997, which unfortunately took over the general model of this crime from the norms of the Criminal Code of 1969" [Grześkowiak 2004, 81].

The Penal Code of 19 April 1969[10] – introductory provisions of the Penal Code – repealed the Decree of 1949. Nevertheless, most of the provisions contained in the Decree, with some mitigation of penal sanctions, were

[10] Act of 19 April 1969, the Penal Code, Journal of Laws No. 13, item 94 as amended. The Criminal Code contained the following types of crimes in Chapter XXVIII "Crimes against freedom of conscience and religion": Article 192 – restriction of civil rights due to citizen's religious affiliation or lack thereof; Article 193(1) – insulting, mocking or humiliating for reasons of non-religion or religious affiliation; Article 193(2) – assault and battery for reasons of non-religion or religious affiliation; Article 194 – abuse of freedom of conscience and religion; Article 195 – exploiting other people's religious beliefs; Article 196 – forcing to undertake or refrain from undertaking religious activities or participation in a religious rite; Article 197(2) disturbance of funeral rites or corpse desecration; Article 197(2) – looting of human corpse; Article 198 – offending one's religious feelings.

incorporated by the Penal Code of 1969 into Chapter XXVIII "Offences against freedom of conscience and religion."[11]

The structure of the language used by the lawmakers in the title of the chapter "Offences against freedom of conscience and religion" was aptly assessed by A. Wąsek: "many other concepts in the field of politics, morality and law have been linguistically distorted in the communist state" [Wąsek 1995, 27]. This distortion of the language used in the title of the chapter of the Penal Code resulted from the relationship between the State, society and the Church. Therefore, we should share the view expressed by J. Krukowski that "in the period of the People's Republic of Poland, when the State used to impose on society a materialistic worldview, the criminality of acts related to the protection of freedom of conscience and religion was used to combat the Church and discriminate against believers. Although the State declared the equality of citizens regardless of their attitude to religion, it in fact did provide for special protection for non-religion. The protection of the right to freedom of conscience and religion was limited by the overriding principle that it was to serve the interests of the socialist state, which imposed an atheistic ideology on society" [Krukowski 2008, 263].

Overcoming this linguistic distortion of "freedom of conscience and religion" towards giving the criminal provisions the correct meaning, consistent with the actual protection of rights and freedoms, took place after 1987, when the reformers' work on a comprehensive reform of the Polish criminal law began."[12] The systemic changes of the state system initiated in 1989 resulted in a reform of criminal law in order to adjust it to the requirements of a democratic state ruled by law and international human rights standards [Krukowski 2008, 263]. These efforts were crowned by the adoption of the Act of 6 June 1997, the Penal Code.[13]

The Act gave the correct meaning to the title "Offences against freedom of conscience and religion" in Chapter XXVIII. There was also a change in the place of this chapter in the structure of the Special Part of the Penal

[11] For more detail, see Bafia, Mioduski, and Siewierski 1987, 200.

[12] For more detail, see Wąsek 1993, 59ff. At this point, it must be stated after A. Wąsek that: "The change in the repressive attitude of the communist party and government bodies towards the Catholic Church was gradual, as the communist state began to disbelieve in the possibility of achieving full ideological and political control over society. When the powerful Solidarity movement was launched, subsequently banned under the Martial Law of 12 XII 1981, the communist party changed its attitude to a more amicable one, as an appreciation of the stabilising role of the Church in the country and also probably to shorten the front line against political opponents. The result was the adoption of the Act of 17 May 1989 on the attitude of the State to the Catholic Church in the Polish People's Republic (Journal of Laws No. 29, item 154). This Act repealed the provisions of Article 194 and Article 195 PC," see Wąsek 1995, 29 and the Author's comment referred to in footnote 7.

[13] Journal of Laws No. 88, item 553 as amended [hereinafter: PC].

Code, which demonstrated the significance of "freedom of conscience and religion" as the highest-level legal good [Fredrich-Michalska and Stachurska-Marcińczak 1997, 195]. The Code "took over" several types of offences from the Penal Code of 1969,[14] but introduced changes to their definition to point to the different axiology underlying the Code [ibid.]. At the same time, for reasons of axiological nature, the Code also lacked several types of offences, including those that had been repealed previously (Articles 194 and 195 PC) [ibid.] by the Act of 17 May 1989 on the relationship of the State to the Catholic Church in the Republic of Poland.[15] At the same time, the authors of the Penal Code of 1997 considered it reasonable to ignore the offences under Article 196 of the Penal Code of 1969 (forcing a person to perform religious practices) recognizing that the behaviour that meets the definition of this crime would now be punished under Article 191 of the Penal Code of 1997 as forcing to a certain action, inaction or forbearing [Wojciechowska 2012, 547; Kozłowska-Kalisz and Kucharska-Derwisz 2006, 220–21]. Similar changes concern previous Article 193(1), the equivalent of which is now Article 119 and Article 257 PC, and previous Article 197 PC, which is currently Article 262 PC. In both cases, these crimes, as offences affecting a legal good other than the freedom of conscience and religion, were included in the group of offences against public order.

It should also be added that following the Penal Code of 1932, also the Penal Code of 1997 introduces a provision that penalises mischievous disturbance of public performance of a religious act of a legally recognized or religious denomination or association (Article 195(1) PC) [Fredrich-Michalska and Stachurska-Marcińczak 1997, 195]. A variation of this type of crime, punishable by the same penalty, is mischievous disturbance of funeral ceremonies or rites (Article195(2) PC) [ibid.].

In the light of the above, the first item in the catalogue of "crimes against freedom of conscience and religion" in the current legislation (like it was in the Criminal Code of 1969) is the crime of "religious discrimination," which has its well-established position in Polish criminal law (although historically not always in a positive sense[16]). This offence is currently one of those crime types in which the concept of freedom of religion and belief as a generic object of protection has been described in the proper sense. The degree of this protection is an indicator of democratisation of social life [Krukowski 2008, 263].

[14] The Penal Code of 1997, changing the structure of the provisions contained in Chapter XXVIII of the Penal Code of 1969, took the following crime types from Article 192 PC: – the offence of restricting the rights of a citizen for reasons of non-religion or religious affiliation, the currently applicable equivalent of which is Article 194 PC and Article 198 PC; – the offence of insulting one's religious feelings, currently having its equivalent in Article 196 PC.

[15] Journal of Laws No. 29, item 154 as amended.

[16] Journal of Laws No. 45, item 959.

2. EVOLUTION OF THE CRIME OF "RELIGIOUS DISCRIMINATION"

2.1. In the light of the Penal Code of 1969[17]

The beginnings of this crime date back to the provision contained in Article 2 of the Decree on the protection of freedom of conscience and religion whose wording was replicated in Article 192 of the Penal Code of 1969.

Article 192 PC read as follows: "Whoever restricts a citizen in his/her rights due to his/her religious affiliation or lack thereof shall be punishable by imprisonment of up to 5 years." This provision in Chapter XXVIII of the Penal Code of 1969 opened the catalogue of criminal acts against freedom of conscience and religion (Articles 192 to 198 PC).

The provision did not define the concept of citizen's right. Such a definition was not provided for in the Penal Code either. This issue was addressed by other legal sciences and the literature, which defined citizen's rights not only as the fundamental rights set out in the Constitution, but also those guaranteed by civil, administrative, labour and other branches of law [Mojak 1989].

The protection of freedom of conscience and religion was guaranteed, paradoxically, by the Constitution of the Polish People's Republic that was in force under the totalitarian regime.[18] Its regulations stated that: "The Church and other religious societies and organizations shall freely exercise their religious functions. Citizens shall not be prevented from taking part in religious activities and rites. No one may be compelled to participate in religious activities or rites (Article 82(1) of the Constitution)" [Świda 1978, 557].

Paradoxically, the direct object of protection under Article192 of the Penal Code was the equality of all citizens regardless of their attitude to religious matters, their right to participate in state, political, economic and cultural life, regardless of their religion or non-religious status [Chybiński, Gutekunst, and Świda 1975, 236]. It was also assumed that the criminal-law protection covered the denominations legally operating in the Polish People's Republic

[17] The construction of the provision on the restriction of rights of a person due to religion or lack of religious affiliation was regulated in Article 192 PC and taken from Article 2 of the Decree of 5 August 1949 on the protection of freedom of conscience and religion. It should be noted that the Decree on the protection of freedom of conscience and religion of 5 August 1949, Journal of Laws No. 45, item 334, repealed the Decree of 13 June 1946, the Decree on particularly dangerous crimes in the period of national reconstruction, called the Small Penal Code, Journal of Laws No. 30, item 192 as amended. For more detail on this matter, see Kędzierski 2007, 78–80; Sobczak 2017, 1183; Janyga 2017, 637; Wąsek 1995, 27.

[18] Constitution of the Republic of Poland of 22 July 1952, Journal of Laws of 1997, No. 33, item 232 as amended; the translation of the Constitution into English is available at http://libr.sejm.gov.pl/tek01/txt/kpol/e1976.html [accessed: 13.09.2021]. Journal of Laws of 1976, No. 7, item 36 as amended.

[Bafia, Mioduski, and Siewierski 1987, 201].[19] It is worth noting that some authors of this period, when interpreting this provision, in the first place in their comments mentioned "denominational or religious affiliation" [Bafia, Mioduski, and Siewierski 1987, 200; Chybiński, Gutekunst, and Świda 1975, 236], despite the fact that the Penal Code in the provision of Article 192 placed "non-religion" as first item, and "religious affiliation" only in the second place [Sobczak 2007, 1183].

2.2. In the light of the Penal Code of 1997

Article 194 PC reads: "Whoever restricts another person in exercising the rights vested in the latter, for the reason of this person's affiliation to a certain faith or their religious indifference shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years." The protection covers freedom from religious discrimination, i.e. a discrimination based on a person's attitude to religion, in both internal and external aspects thereof [Janyga 2010, 144].

This provision protects freedom of religion in the sense of the right to maintain religious convictions [Kozłowska-Kalisz and Kucharska-Derwisz 2006, 220]. "Convictions" in the context of religion are understood as beliefs and convictions other than religious beliefs, but concerning the same sphere of problems, i.e. the origin, structure and purpose of the existence of the individual, mankind and the entire world [Łopatka 1995, 13]. These convictions may concern adherence to a particular religion or not adhering to any religion, and therefore include the right to hold a particular religious or non-religious worldview [Kozłowska-Kalisz and Kucharska-Derwisz 2006, 222]. This right, boiling down to the freedom to choose a religious world-view, is correlated with the freedom from all forms of pressure to adopt or renounce one's chosen view on faith and religion [ibid.]. The term "freedom" encompasses both the freedom "to" (positive liberty), i.e. to hold certain convictions concerning religion, and the freedom "from" (negative liberty), i.e. from any interference or imposition in this regard [ibid.]. From this understanding of freedom stems the principle of equality in terms of "the equality of all people, expressed in the fact that they have the same right to participate in social life (political, cultural or economic life) regardless of whether they belong to a particular religious group or not" [Hypś 2015, 970].

[19] Regarding the object of protection of freedom of conscience and religion, important remarks were noted by A. Wąsek: "Crimes against freedom of conscience and religion are associated by many with acts that were criminalised during the period of the Polish People's Republic as part of the campaign against the Catholic Church, the bastion of independence and resistance to the communist party and administrative apparatus of the totalitarian state" [Wąsek 1995, 27].

According to J. Krukowski, the term "discrimination" means different treatment of people who are in the same situation, with no rational basis for such differentiation. Such different treatment of people violates the fundamental principle of equality resulting from human dignity vested in every human being (Article 30). Therefore, the Constitution of the Republic of Poland of 1997 provides for the prohibition of discrimination in political, social or economic life for any reason whatsoever (Article 32(1)). This prohibition also includes discrimination because of religious beliefs [Krukowski 2008, 264].

As N. Kłączyńska put it, the religious criterion of discrimination has been "privileged" (in comparison with other types of offences) in a two-stage way: 1) it is listed in a closed catalogue of the criteria for which discrimination in its particular manifestations is prohibited (Articles 118 PC – extermination; 119 PC – violence and unlawful threat; 256 PC – propagation of fascism and totalitarianism; 257 PC – insulting a group or a person); 2) it is generally prohibited [Kłączyńska 2005, 176].

On the objective side, Article 194 of the Criminal Code uses the criterion of "restricting" a given person in exercising this person's rights [Wojciechowska 2004, 722]. The quite general formulation of the scope of the characteristics of the causative action raises controversy among scholars in the field. According to A. Wąsek, the types of offences under Article 194 of the project Penal Code of 1994 does not fully correspond to the requirements stemming from the principle of *nullum crimen, nulla poena sine lege certa* to precisely define the characteristics of the prohibited act [Wąsek and Wąsek-Wiaderek 2003, 211],[20] and due to the wide range of conduct criminalized by law – to the principle of *ultima ratio* of criminal policy [Janyga 2017, 641–42]. The "restricting in rights" may involve both action and omission. The set of restrictions may also include hindering or preventing the use of the catalogue of rights vested in the victim [Hypś 2015, 970].

S. Hypś rightly assumes that the restriction may also involve the failure to grant certain rights if the victim is entitled to obtain them [ibid.]. In view of this, commentators are unanimous that the scope of the rights that may be restricted covers "all kinds of rights, and thus both human and civil rights, including those constitutionally guaranteed, as well as other rights stemming from both administrative law (e. in the establishment and operation of schools, the practice of a particular profession or public service), the establishment of associations (where the relationship to religion is a prerequisite for refusing certain benefits or concluding certain civil-law contracts), labour law

[20] The authors considered as pointless in legislative terms (and therefore not used in modern penal codes) to define a criminal act e.g. in the following manner: "whoever restricts a person in their rights because of their political views, nationality or statelessness." According to the authors, the scope of criminalisation of restricting persons in their rights is sufficient, for example through the use of violence or unlawful threat (Article 191 PC).

(possibility of taking up employment, promotion, amount of remuneration), financial law (access to loans and other banking and financial services, grants, etc.), economic law (possibilities to carry out certain production, commercial or service activities, refusal to grant a licence), educational law (in the event of unequal treatment of pupils at school, preventing access to higher education for religious reasons), copyright law and any other laws" [Sobczak 2017, 1185] and even acceptable customs [Hypś 2015, 970].[21]

The offender under Article 194 PC can be whoever meets the general conditions relating to criminal liability. The literature rightly points out that the very nature of this crime implies that, although of a universal nature, it can only be committed by a person who holds a certain degree of power allowing to exclude or limit access to the exercise of rights [Paprzycki 2021]. For example, it is even pointed out that, in the first place, they will be holders of public functions, especially in central or local government bodies. There are also possible "restrictions of rights in schools, not only in public ones, due to the subordination of students to teachers and school authorities. A possible situation is also discrimination due to professional dependence in the private sector, for example between an employer and an employee, where the possible pressure results, for example, from the economic strength of the former" [ibid.]. On the other hand, "a refusal of admission to a religious organization because of candidate's failure to meet the required criteria, e.g. admitting a declared atheist to a religious association of a theistic nature" [ibid.], or the introduction of a religious criterion in the case of activities carried out by churches and religious associations, do not constitute discrimination [Sobczak 2017, 1185].

As regards subjective aspects, the act described in Article 194 PC may only be committed intentionally. The motivation of the perpetrator of criminal behaviour is precisely the religious affiliation of a particular person or the lack of such affiliation.[22] Due to this particular offender's motivation (contained in the statutory criteria of the offence), the offence can only be committed with direct intent (*dolus directus*). Since the criterion of "restriction" does not specify the conduct of the offender in more detail, it is quite complicated to take as a basis for qualifying the conduct of the offender and to prove the motives for his or her action (or omission) in the sphere of proof, as it entails the need to objectively establish the circumstances of a subjective nature [Kłączyńska

[21] Similarly also e.g. Chybiński, Gutekunst, and Świda 1975, 236; Wojciechowska 2004, 722; Bojarski, Giezek, and Sienkiewicz 2004, 457.

[22] J. Wojciechowska defines religious affiliation as "membership in a particular religious community recognized by the State, whose dogmas, beliefs or rites are not contrary to public order or public morals. They are defined by the religious community itself and can have a more or less formalized character." On the other hand, according to this author, "the concept of non-religion means, from a formal point of view, the lack of membership in any religious community, and from the point of view of beliefs an atheistic worldview" [Wojciechowska 2001, 78].

2005, 197–98] and the offender usually conceals the true intentions behind his or her action [Krukowski 2008, 264].

As a side note, it should be added that the situation is different when the provision of Article 194 PC contradicts other provisions. Thus, when the offender's conduct consisting in restricting rights due to someone's religious affiliation or lack thereof is at the same time combined with the use of violence or unlawful threats against the person affected or because of his/her national, ethnic, racial, political, religious affiliation or lack thereof, then Article 119(1) PC (violence and unlawful threat) excludes the application of Article 194 PC in accordance with the principle of consumption of cumulative provisions [Hypś 2015, 972; Wojciechowska 2012, 596]. On the other hand, where the criteria of the offence under Article 257 PC (insulting a group or a person) are all met at the same time, the behaviour of the perpetrator should be qualified cumulatively, i.e. under Article 194 and Article 257 PC (insulting a group or a person). The cumulative qualification under Article 194 PC and Article 231 PC (abuse of office) may take place where the religious discrimination was committed by a public officer.[23]

It is generally accepted that punishable discrimination under Article 194 PC is an offence characterised by its results and is committed when there has already been a restriction on the exercise of the victim's rights [Wojciechowska 2004, 722; Krajewski 2008, 66].

The offence of religious discrimination is punishable by a fine, restriction of liberty or imprisonment for up to 2 years. Under the current legislation, due to a regulation alternative to the sanctions provided for in the provision, it is possible to apply the directive set forth in Article 58(1) PC (choice of punishment) and Article 59 PC (renouncing the imposition of a punishment), in the latter case provided that the conditions specified in the provision are met.

CONCLUSIONS

In conclusion, it must be said that the State is obliged to provide "everyone" with protection in the sphere of values declared by this person. In the context of the issue of protection due to religion under Article 194 PC, such guarantees are secured through criminal law norms by the Polish state and it seems that it does so effectively. This can be evidenced by the negligible number of such crimes recorded by law enforcement agencies. On the other hand, the proceedings initiated and offences detected under Article 194 of the Criminal Code for the years 2006–2020 are as follows:[24]

[23] This position was first put forward by Wąsek 1995, 31.

[24] For more detail, see also Krajewski 2008, 77.

YEAR	Proceedings initiated	Offences detected
2020	2	0
2019	2	2
2018	1	0
2017	3	0
2016	6	0
2015	2	0
2014	4	0
2013	4	0
2012	1	3
2011	4	1
2010	1	2
2009	2	0
2008	5	0
2007	7	0
2006	4	1

Source:https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-5/63489,Dyskryminacja-wyznaniowa-art-194.html [accessed: 10.09.2021].

In view of the above, it should be stated that the norm of Article 194 PC significantly contributes to limiting the behaviour consisting in violating someone else's religious beliefs or the right not to profess any religion.

REFERENCES

Bafia, Jerzy, Kryspin Mioduski, and Mieczysław Siewierski. 1987. *Kodeks karny. Komentarz*. Warszawa: Wydawnictwo Prawnicze.

Bojarski, Marek, Jacek Giezek, and Zofia Sienkiewicz. 2004. *Prawo karne materialne. Część ogólna i szczególna*. Edited by Marek Bojarski. 2nd edition. Warszawa: LexisNexis.

Chrzczonowicz, Piotr. 2003. "Karnoprawna ochrona wolności sumienia i wyznania." In *Społeczeństwo inwigilowane w państwie prawa (?). Granice ingerencji w sferę jednostki. Materiały z Konferencji naukowej, Toruń 25–27 marca 2003*, edited by Piotr Chrzczonowicz, Violetta Kwiatkowska-Durul, and Krzysztof Skowroński, 115–29. Toruń: Wydawnictwo UMK.

Chybiński, Olgierd, Włodzimierz Gutekunst, and Witold Świda. 1975. *Prawo karne. Część szczególna*. Edited by Witold Świda. Wrocław: PWN.

Grześkowiak, Alicja. 2004. "Prawo karne instrumentem walki z kościołem w latach 1944–1956." In *Represje wobec osób duchownych i konsekrowanych w PRL w latach 1944–1989*, edited by Alicja Grześkowiak, 47–98. Lublin: Wydawnictwo KUL.

Fredrich-Michalska, Irena, and Barbara Stachurska-Marcińczak, ed. 1997. *Nowe kodeksy karne – z 1997 r. z uzasadnieniami. Kodeks karny. Kodeks postępowania karnego. Kodeks karny wykonawczy.* Warszawa: Wydawnictwo Prawnicze.

Hypś, Sławomir. 2015. "Rozdział XXIV. Przestępstwa przeciwko wolności sumienia i wyznania. Komentarz do art. 194 k.k. (Ograniczenie w prawach)." In *Kodeks karny. Komentarz,* edited by Alicja Grześkowiak, and Krzysztof Wiak, 3rd edition, 967–78. Warszawa: C.H. Beck.

Janyga, Wojciech. 2010. *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznania*. Warszawa: Wydawnictwo Sejmowe.

Janyga, Wojciech. 2017. "Część szczególna. Rozdział XXIV. Przestępstwa przeciwko wolności sumienia i wyznania Komentarz do art. 194." In *Kodeks karny. Komentarz*, edited by Michał Królikowski, and Robert Zawłocki, 635–56. Warszawa: C.H. Beck.

Kędzierski, Jacek. 2007. "Przestępstwa przeciwko religiom i wyznaniom w polskim prawie karnym – de lege ferenda." *Palestra* 7–8:71–82.

Kłączyńska, Natalia. 2005. *Dyskryminacja religijna a prawnokarna ochrona wolności sumienia i wyznania*. Wrocław: Wydawnictwo UWr.

Kozłowska-Kalisz, Patrycja and Marzena Kucharska-Derwisz. 2006. "Przestępstwa przeciwko wolności sumienia i wyznania." In *Prawnokarne aspekty wolności,* edited by Marek Mozgawa, 209–31. Warszawa–Kraków: Wolters Kluwer-Zakamycze.

Krajewski, Radosław. 2008. "Ochrona wolności sumienia i wyznania w świetle Kodeksu karnego z 1997 r." *Przegląd Sądowy* 3:64–77.

Krukowski, Józef. 2008. *Polskie prawo wyznaniowe*. 4th edition. Warszawa: LexisNexis.

Łopatka, Adam. 1995. *Prawo do wolności myśli, sumienia i religii.* Warszawa: Fundacja Promocji Prawa Europejskiego.

Maciaszek, Anna. 2006. "Ochrona prawa do wolności religii w wypowiedziach Jana Pawła II." In *Zagadnienia prawa karnego na tle nauczania Jana Pawła II,* edited by Alicja Grześkowiak, 210–34. Lublin: Wydawnictwo KUL.

Makowski, Wacław. 1924. *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austriackiego, niemieckiego i rosyjskiego, obowiązującego w Polsce*. Warszawa: Nakładem Księgarni F. Hoesicka.

Misztal, Henryk. 2003. "Rozdział III. Idea wolności religijnej." In *Prawo wyznaniowe*, edited by Henryk Misztal, and Piotr Stanisz, 2nd edition, 59–74. Lublin: Wydawnictwo KUL.

Mojak, Ryszard. 1989. *Problematyka wolności sumienia i wyznania w Polsce Ludowej.* Warszawa: Wydawnictwo Towarzystwa Krzewienia Kultury Prawnej.

Paprzycki, Rafał. 2021. "Prawna ochrona wolności sumienia i wyznania. Rozdział III. Wolność sumienia i wyznania". Legalis el.

Sobczak, Jacek, and Maria Gołda-Sobczak. 2012. "Wolność sumienia i wyznania jako prawa człowieka." *Annales Universitatis Mariae Curie-Skłodowska*, sectio K, 19, no. 1:27–65.

Sobczak, Jacek. 2017. "Część szczególna. Rozdział XXIV. Przestępstwa przeciwko wolności sumienia i wyznania Komentarz do art. 194." In *Kodeks karny. Komentarz*, edited by Ryszard A. Stefański, 3rd edition, 1164–227. Warszawa: C.H. Beck.

Świda, Witold. 1978. *Prawo karne*. Warszawa: PWN.

Warylewski, Jarosław. 2005. "Pasja czy obraza uczuć religijnych? Spór wokół art. 196 kodeksu karnego." In *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, edited by Leszek Leszczyński, Edward Skrętowicz, and Zbigniew Hołda, 367–81. Lublin: Wydawnictwo UMCS.

Wąsek, Andrzej, and Małgorzata Wąsek-Wiaderek. 2003. "Rozdział XI. Ochrona uczuć religijnych w prawie karnym." In *Prawo wyznaniowe*, edited by Henryk Misztal, and Piotr Stanisz, 2nd edition, 207–30. Lublin: Wydawnictwo KUL.

Wąsek, Andrzej. 1993. "Projekt kodeksu karnego a międzynarodowe standardy praw człowieka." In *Problemy reformy prawa karnego*, 59–78. Lublin: Wydawnictwo UMCS.

Wąsek, Andrzej. 1995. "Przestępstwa przeciwko przekonaniom religijnym de lege lata i de lege ferenda." *Państwo i Prawo* 7:27–41.

Wąsek, Andrzej. 2003. "Rozdział XI. Ochrona uczuć religijnych w prawie karnym." In *Prawo wyznaniowe*, edited by Henryk Misztal, and Piotr Stanisz, 2nd edition, 207–30. Lublin: Wydawnictwo KUL.

Wojciechowska, Janina. 2001. "Rozdział XXIV. Przestępstwa przeciwko wolności sumienia i wyznania." In Barbara Kunicka-Michalska, and Janina Wojciechowska, *Przestępstwa przeciwko wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Rozdziały XXIII, XXIV, XXV, XXVII Kodeksu karnego. Komentarz*, 71–88. Warszawa: C.H. Beck.

Wojciechowska, Janina. 2004. "Część szczególna. Rozdział XXIV. Przestępstwa przeciwko wolności sumienia i wyznania. Komentarz do art. 194." In *Kodeks karny. Część szczególna. Komentarz,* vol. 1, edited by Andrzej Wąsek, 718–33. Warszawa: C.H. Beck.

Wojciechowska, Janina. 2012. "Rozdział III. Przestępstwa przeciwko wolności sumienia i wyznania. § 18. Wprowadzenie. I. Uwagi ogólne." In *System prawa karnego*. Vol. 10: *Przestępstwa przeciwko dobrom indywidualnym*, edited by Jarosław Warylewski, 545–61. Warszawa: C.H. Beck – Instytut Nauk Prawnych PAN.

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SYSTEMS OF EXECUTING THE PENALTY OF IMPRISONMENT PURSUANT TO ARTICLE 81 OF THE EXECUTIVE PENAL CODE OF 1997

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Abstract. This article characterises the systems of executing the penalty of imprisonment as stipulated in Article 81 of the Executive Penal Code of 1997. The article examines the differences in the systems of executing the penalty of imprisonment in relation to the categories of convicts to whom individual systems are addressed and in relation to the principles used to select correctional measures. The diversity of the systems of executing the penalty of imprisonment corresponds to the principle of individualisation in dealing with convicts, which meets the needs related to the execution of the penalty of imprisonment.

Keywords: systems of executing the penalty of imprisonment, convict, correctional measures

INTRODUCTION

The community of convicts sentenced to imprisonment is highly diverse [Pierzchała 2007, 101–108]. This is due to a number of determinants, such as personality-related factors, life experience and criminal experience [Nawój-Śleszyński and Łuczak 2017; Kuć 2007]. To guarantee that the objectives of imprisonment will be successfully achieved, the legislator has divided correctional facilities into prisons for: juvenile offenders, first-time convicts, penitentiary recidivists and those serving a sentence in a military prison (Article 69 of the Executive Penal Code[1]). Such facilities can be organised as: closed prisons, semi-open prisons and open prisons (Article 70 EPC). Furthermore, in Article 81 EPC, the legislator has identified the following imprisonment execution systems: correctional programme-based system, therapy-based system and regular system [Lelental 2020, 383–84; Dąbkiewicz 2020, 287–90; Hołda, Hołda, Migdał, et al. 2021, 220–23; Lachowski 2021; Postulski 2017].

[1] Act of 6 June 1997, the Executive Penal Code, Journal of Laws of 2021, item 53 [hereinafter: EPC].

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Convicts are referred to specific kinds and types of correctional facilities and sentence execution systems in accordance with the individualisation principle (Article 67(2) EPC) [Nawój-Śleszyński 2014, 113–36] to maximise the effectiveness of the penalty [Szymanowski 2009, 174], especially in the preventive aspect (Article 67(1) EPC). This institutional individualisation supplemented by the classification of convicts (Article 82 EPC and para. 52 of the Regulation on the organisational rules for execution of prison sentences)[2] builds the foundation for appropriate application of correctional measures (Article 67(3) EPC), i.e. employment and teaching, cultural and educational activities, sports activities, contacts with the family and the outside world, therapy, rewards and disciplinary punishments, in order to prepare convicts to return to the free society after serving the sentence in the best way possible.

The purpose of the article is to present the characteristics of particular prison sentence execution systems provided for under Article 81 EPC while taking into account the legislator's assumptions regarding the effectiveness of the correctional measures applied within those systems.

1. THE CORRECTIONAL PROGRAMME-BASED SYSTEM

The correctional programme-based system is compulsory (Article 95(1) EPC) for juvenile convicts and voluntary for adult convicts, who choose whether or not to agree to participate in the development and implementation of the correctional programme after being presented its draft version [Szymanowska 2001–2002, 53–100]. The correctional programme-based system is rehabilitative by nature. It offers the broadest possibilities of achieving the objectives of the imprisonment. It focusses on correctional measures, mainly teaching, cultural and educational activities, sports activities, community activities and contacts with people from outside the prison.[3] Individual correctional programmes define the actions required to prepare the convicts to return to the society. Each programme is developed with the participation of the convict. As S. Pawela emphasises, the underlying concept behind the system is "the belief that a prison sentence should invoke a psychological reaction, be a stimulus influencing the will of a person who has committed a crime voluntarily and as such may also voluntarily decide to change for the better" [Pawela 2003, 219]. The assumption of the convict's collaboration in the preparation of the programme and their full mobilisation in the implementation of

[2] Journal of Laws of 2016, item 2231.

[3] For more see: Regulation of the Prime Minister dated 28 December 2016 on cooperation between entities in the execution of penalties, penal measures, compensatory measures, security measures, preventive measures and forfeiture, and on social control over their execution, Journal of Laws item 2305.

the programme's activities is consistent with the general rules of correctional activities [Pindel 2009, 114], the effectiveness of which depends on mutual understanding and cooperation between the individual at the receiving end of the activities and the individuals managing the programme (in this case – the staff of the correctional facility). It must be stressed that this is not an easy task in the prison environment since the compulsory nature of the sentence leads to a natural reaction of protest, rebellion, discouragement, resignation. Overcoming such reactions is the prerequisite for taking any further actions allowing the convict to change for the better. An aspect significant in this case is that the convict needs to realise that it was a mistake to commit the crime. It is an important element of the rehabilitation process, the maximum effect of which is full internalisation of the norms of appropriate, lawful conduct by the convict as this guarantees proper functioning in the society, and especially prevents the commission of other crimes. This fully conforms to the assumed objectives of a prison sentence, which the legislator defines as instilling in the convict the will to cooperate in developing socially desired attitudes, especially the sense of responsibility and the need to observe the law and thus to refrain from reoffending (Article 67(1) EPC).

A draft individual correctional programme is based in particular on the results of personal background examination and on an analysis of the records from interviews with the convict and other notes about the individual (para. 14(1) of the Regulation on correctional programmes in correctional facilities and pre-trial detention centres).[4] The same Regulation states that an individual correctional programme must be preceded by a diagnosis including: description and explanation of the reasons why the convict did not obey the law or the reasons for social maladaptation, description of the convict's functioning in social contacts, description of the basic problems of the convict (para. 14(2) of the Regulation). Development of an individual correctional programme requires defining: the scope of the correctional activities, the objectives of the correctional activities which are attainable considering the possibilities of the correctional facility, the resulting detailed tasks imposed on the convict, task implementation deadlines and the criteria for determining if the convict has completed the tasks specified in the individual programme (para. 14(3) of the Regulation). In accordance with Article 95(2) EPC, correctional programmes define especially: the types of employment and teaching for the convicts, their contacts with their families and loved ones, the way of spending free time, their ability to fulfil their obligations and other undertakings as required to be ready to return to the society. The correctional programme-based system may also use therapy measures, such as aggression management [Linowski and Wysocki 2005; Linowski, Stańczyk, Wysocki, et al. 2004, 66–85; Machel

[4] Journal of Laws of 2013, item 1067 as amended.

2006, 229–34]. The very fact that a convict agrees to serve their sentence in the correctional programme-based system does not mean that they cannot quit. Likewise, refusal to participate in the development of an individual correctional programme is not final and does not shut the door to that system for the convict. In both cases, the convict may change their mind, i.e. either quit the correctional programme-based system while it is in progress or decide to join it while serving the sentence.

In accordance with the Statement of Grounds for the government's Executive Penal Code bill, the correctional programme-based system is particularly oriented towards rehabilitation of the convict.[5] Correctional programmes, as per the Statement of Grounds, will define not only the correctional measures or therapy types but also various activities (e.g. external contacts, free time) oriented towards preparing the convict to leave the prison.[6]

Implementation of the programmes prepared for convicts serving prison sentences in the correctional programme-based system is subject to periodic evaluations, which may lead to programme modifications (Article 95(3) EPC). This means that every programme should be adapted to the changing circumstances, e.g. the job qualifications, the employment potential and the education gained by the convict, and to their health. As S. Pawela emphasises, the "Act intends for the correctional measures in the discussed system of penalty execution to be dynamic. An incentive and privilege scheme should stimulate positive attitudes in the convicts and encourage other convicts to follow suit, while at the same time eliminating those convicts who resist the correctional process from the system" [Pawela 2003, 220–21]. Periodic evaluations guarantee that the correctional programmes will duly account for all current conditions and circumstances of the convict.

In accordance with the Statement of Grounds of the government Executive Penal Code bill, "Important elements of serving a prison sentence should include: activities of the convicts [...], contact with the outside world, especially the family, a correctional programme and therapy. Rehabilitation (compulsory for juvenile convicts) will no longer be an obligation for adult convicts, becoming their right instead. Subjectivation of convicts is one of the major factors of stimulating their activity and sense of responsibility."[7]

The functioning of the correctional programme-based system has been studied on multiple occasions. According to a study by E. Kircio, the main reason for convicts expressing willingness to take part in a correctional programme is the desire to change their prior conduct (70% of respondents). The

[5] See *Uzasadnienie rządowego projektu nowego kodeksu karnego wykonawczego*, in: *Kodeksy karne z 1997 r. z uzasadnieniami*, Departament Kadr i Szkolenia Ministerstwa Sprawiedliwości, Warszawa 1998, p. 549.

[6] Ibid.

[7] Ibid., p. 528–29.

possibility of probation comes second (30%), with an easier sentence mentioned last (10%); 12% of the respondents stated that they wanted to have a job in prison, abandon the life of crime and understand their past mistakes [Kircio 2001, 187]. Different results are presented by A. Szymanowska, who carried out studies involving juvenile convicts (a group for whom the correctional programme-based system is compulsory as they serve their sentence), adult first offenders and penitentiary recidivists. According to her studies, almost half of juvenile convicts do not see any advantages of the correctional programme-based system, and those who have recognised them usually mentioned: a possibility of furlough (14.7%), probation (12.9%), better conditions of serving the sentence (9.8%), the possibility of learning (9.2%) and attending cultural and educational activities (6.1%). Just like juvenile convicts, adult first offenders believed that the system gives them a chance at furlough (33.3%), a job (23.6%), probation (12.9%), learning (8.6%), rewards (6.4%), change of lifestyle. According to studies involving recidivists, the advantages they noticed where: better conditions of serving the sentence (52.8%), a possibility of having a job (27.8%), better treatment by prison guards, including frequent contact with the supervisor (25%) [Szymanowska 2003, 188]. In the summary of her study results, A. Szymanowska emphasises that "Juvenile convicts saw the correctional programme-based system primarily as imposing limitations and forcing them to perform the tasks defined in the programme and to submit to supervision. In contrast, those who accepted this system of serving the sentence, saw it mainly as an opportunity to contact the outside world more often and more freely, and a chance at leaving the prison sooner" [ibid., 189]. Studies by M. Bramska and M. Kiryluk show that "there is a high percentage of convicts who did not actively participate in defining the individual correctional programmes – it is particularly high in the group of juvenile convicts. The commitment of the convicts to the rehabilitation process remains at an unsatisfactory level. The functioning not aware of the objectives that have been set and the tasks they should complete to achieve them" [Bramska and Kiryluk 2002, 48].

The correctional programme-based system was designed in the Executive Penal Code as an offer extended to the convict, which can be either taken or rejected. As B. Stańdo-Kawecka emphasises, "Giving the convicts a right to choose a system that is particularly rehabilitation-oriented recognises them as independent individuals in the process of serving the sentence and is a significant factor increasing the likelihood of positive results of rehabilitation" [Stańdo-Kawecka 2000, 128–29]. There are also opinions critical of the way the correctional programme-based system is used. S. Lelental claims that "the correctional practice has distorted the notion of a correctional programme-based system. This is mainly due to 'top-down instructions' to refer convicts to that system rather than allowing them to choose it of their own will" [Lelental 2001, 249].

2. THERAPY-BASED SYSTEM

Under Article 96 of the EPC, the therapy-based system is addressed to: convicts with non-psychotic mental disorders, also convicted of the crimes under Articles 197 through 203 EPC committed in connection with disrupted sexual preferences, to mentally retarded convicts, convicts addicted to alcohol, other intoxicants or psychotropic substances, physically disabled convicts requiring specialist treatment (especially psychological care, medical care or physical therapy) [Konikowska-Kuczyńska 2015; Kwieciński 2013; Kwieciński 2017; Krajewski and Stańdo-Kawecka 2011; Nawój-Śleszyński 2009, 64–69]. Pursuant to Article 96(3) EPC, where this is advised for medical and correctional reasons, other convicts can serve their sentence in the therapeutic facility too, provided that they agree to this. Existence of the circumstances identified in Article 96(1) EPC does not automatically mean that the convict will serve the sentence in the therapy-based system. This happens only if the health of the convict suggests that they require specialist treatment, such as psychological or medical care or physical therapy. Convicts are referred to the therapy-based system based on court judgements.[8] Pursuant to Article 62 of the Penal Code,[9] the court may, while issuing a prison sentence, specify both the type of the correctional facility and the therapy-based system for serving the sentence. A convict may also be referred to the therapy-based system by the penitentiary committee (Article 76(1)(2) EPC).

The essence of the therapy-based system is to use therapeutic measures and psycho-correctional measures and to adapt standard correctional methods to individual needs. In the therapy-based system, the prison sentence is served primarily in a therapeutic facility of appropriate specialty (Article 96(4) EPC) by convicts: (a) with mental disorders or mental retardation, (b) addicted to alcohol, (c) addicted to intoxicants or psychotropic substances, (d) physically disabled (para. 15 of the Regulation on correctional programmes in correctional facilities and pre-trial detention centres).[10] The same Regulation states that the therapy-based system involves especially: individual and group therapy, dominance of therapeutic measures over other correctional measures, integration of therapeutic measures with other activities in the correctional facility (para. 18(1) of the Regulation).

Just as in individual correctional programmes in the correctional programme-based system, the individual therapy programme in the therapy-based system is also preceded by a diagnosis, which includes: (a) description of the

[8] Judgment of the District Court in Gliwice, IV Criminal Department, of 10 November 2016, ref. no. IV K 143/16, unpublished; judgment of the District Court in Częstochowa, II Criminal Department, of 2 July 2016, ref. no. II K 161/18, unpublished.

[9] Act of 6 June 1997, the Penal Code, Journal of Laws of 2020, item 144 as amended.

[10] Journal of Laws of 2013, item 1067 as amended.

cause of the disorders, (b) description of the impaired cognitive and emotional processes and disturbance in behaviour, (c) characteristics of the current psychophysical condition, (d) description of the problem underlying the referral to the therapy-based system, (e), description of individual problems of the convict, (f) assessment of the convict's motivation for participation in the individual therapy programme, (g) identification of positive personality traits and behaviour of the convict (para. 21(1) of the Regulation). It is a practice of the therapy-based system to have the individual therapy programme specify the types and forms of the specialist measures applied to the convict, especially in terms of psychological care, medical care and physical therapy, as well as any other form of therapy. Where possible, an individual therapy programme is developed with the participation of the convict (para. 21(4) of the Regulation). Article 97(1) EPC defines the general therapy rules for convicts serving a sentence in the therapy-based system, i.e.: the need to prevent the pathological personality traits from deepening, to restore mental balance and to shape the ability to live in a community and prepare the convicts to live on their own. The execution of the penalty is adapted to the medical treatment, job and learning needs and to the hygiene and sanitary requirements. Where health reasons so require, employment is organised in a sheltered environment (Article 97(2) EPC). Individual therapy programmes are revised as needed (para. 21(5) of the Regulation).

For a convict who has served part of the prison sentence in a therapeutic facility and in respect of whom the therapy team has completed the therapy, recommendations are developed – to be implemented while the person serves the remaining part of the sentence (para. 55 of the Regulation on the organisational rules for execution of prison sentences).[11] In principle, the therapy-based system is applied to a convict for a specific time during which the convict requires specialist measures. When the specialist care is no longer needed, the convict is transferred to another penalty execution system – either regular or rehabilitation-based (Article 97(3) EPC).

The literature emphasises that therapy brings good results in terms of rehabilitation of convicts [Bartnik 2001, 712]. Nonetheless, there are also observations that "Only in the case of some convicts, can we expect that the very fact of successful completion of an addiction therapy will help to significantly reduce the probability of recidivism. Many convicts also need other activities, in particular broad restructuring of the cognitive sphere which includes the cognitive distortions, attitudes and behavioural patterns which they display and which contribute to the commission of crimes" [Dubiel and Majcherczyk 2006, 67–68]. Furthermore, emphasis is put on the need for new therapy forms

[11] Journal of Laws of 2016, item 2231.

to actually achieve the objectives of the specialist measures taken with regard to convicts [Witeska 2005, 117–19].

Analyses of the functioning of the therapy-based system unanimously conclude that such a system is needed in the organisation of the execution of imprisonment and they emphasise its humanitarian dimension [Konikowska-Kuczyńska 2009, 353] and its justifiability from the perspective of human rights [Gordon 2008, 697].

3. REGULAR SYSTEM

The regular system is applied to the remaining convicts who did not qualify for serving a sentence in the correctional programme-based system or the therapy-based system, as well as to adult convicts who were transferred from the correctional programme-based system because they failed to abide by the requirements laid down in the individual correctional programme (Article 95(4) EPC). Furthermore, the regular system applies to convicts transferred from the therapy-based system after fulfilling the conditions referred to in Article 97 EPC if they do not agree to participate in the development and implementation of an individual correctional programme. Article 98 EPC states that in the regular system, the convict can make use of the possibilities of employment, learning, cultural and educational activities and sports activities available in the correctional facility. Such a regulation emphasises the rule whereby the fact that the convict did not choose the correctional programme-based system does not deprive them of the possibility of using various positive correctional measures.[12]

Studies show that the regular system is often chosen by recidivists because "many of them have lost faith that completion of the tasks specified in the individual programme may help prepare them to leave the correctional facility. This is why they choose to serve their prison sentence in the regular system" [Bramska and Kiryluk 2002, 40].

Pursuant to Article 71 EPC, the Minister of Justice may, by way of a regulation, define a penalty execution system different than that specified in Article 81 of the Penal Code, based especially on the need to explore new correctional measures and methods that may be applied to the convicts.

[12] See *Uzasadnienie rządowego projektu nowego kodeksu karnego wykonawczego*, p. 550.

CONCLUSIONS

The statutory differentiation between the systems of serving a prison sentence offers an opportunity to account for the differences between convicts in terms of age, addiction to alcohol, intoxicants or psychotropic substances, mental and physical fitness, motivation to make an individual effort towards attainment of the objectives of the imprisonment.

The correctional programme-based system is in principle oriented towards implementation of the individual correctional programme, with the convict's participation in preparation of the draft programme and full commitment to its implementation. In the therapy-based system, the focus is on eliminating the problem underlying the convict's referral to that system (mainly addiction to alcohol or drugs), hence the dominance of therapy over other correctional measures. In contrast, the regular system is addressed to convicts who fail to meet the criteria for referral to the rehabilitation-based system or the therapy-based system. The systems differ as to the organisation of the correctional measures applied to the convicts.

The system that best implements on those assumptions and reflect the principles that the legislator has adopted in the EPC (especially: the principle of individualisation, the voluntary nature of rehabilitation, cooperation with the society) is the correctional programme-based system. It offers the broadest possibilities in terms of rehabilitation of convicts (by influencing the sphere of values, attitudes, behaviour) to help them properly re-adapt to life in the free society. However, it must be emphasised that effective achievement of the assumptions made with respect to the use of the systems depends not only on legislative solutions but also on the organisational and financial possibilities of the prison system connected with providing enough supervisors to supervise the convicts, giving jobs to convicts, and providing the financial resources to make use of other correction measures.

REFERENCES

Bartnik, Adriana S. 2001. "Postępowanie z narkomanami." In *Więziennictwo. Nowe wyzwania*, edited by Brunon Hołyst, Wiesław Ambrozik, and Piotr Stępniak, 708–12. Warszawa–Poznań–Kalisz: Uniwersytet Adama Mickiewicza w Poznaniu, Centralny Ośrodek Szkolenia Służby Więziennej.

Bramska, Mieczysława, and Małgorzata Kiryluk. 2002. "Realizacja systemu programowanego oddziaływania w toku wykonywania kary pozbawienia wolności." *Przegląd Więziennictwa Polskiego* 37:41–48.

Dąbkiewicz, Krzysztof. 2020. *Kodeks karny wykonawczy. Komentarz*. Warszawa: LexisNexis.

Dubiel, Kajetan, and Andrzej Majcherczyk. 2006. "Polski system terapii uzależnionych od narkotyków." *Przegląd Więziennictwa Polskiego* 52–53:51–72.

Gordon, Maria. 2008. "Chorzy psychicznie w warunkach izolacji więziennej – wybrane problem." In *Misja Służby Więziennej a jej zadania wobec aktualnej polityki karnej i oczekiwań społecznych. IV Polski Kongres Penitencjarny*, edited by Wiesław Ambrozik, Henryk Machel, and Piotr Stępniak, 697–707. Warszawa: Uniwersytet Adama Mickiewicza w Poznaniu, Uniwersytet Gdański, Wyższa Szkoła Pedagogiki Resocjalizacyjnej w Warszawie „Pedagogium", Centralny Zarząd Służby Więziennej.

Hołda, Zbigniew, Joanna Hołda, Jerzy Migdał, et al. 2021. *Prawo karne wykonawcze.* Warszawa: Wolters Kluwer.

Kircio, Emilian. 2001. "Ocena nowych uregulowań w kodeksie karnym wykonawczym przez skazanych (Ustawa z dnia 6 czerwca 1997 r.)." In *Więziennictwo. Nowe wyzwania*, edited by Brunon Hołyst, Wiesław Ambrozik, and Piotr Stępniak, 186–89. Warszawa–Poznań–Kalisz: Uniwersytet Adama Mickiewicza w Poznaniu, Centralny Ośrodek Szkolenia Służby Więziennej.

Konikowska-Kuczyńska, Justyna. 2009. "Postępowanie ze skazanymi w ramach systemu terapeutycznego." In *X lat obowiązywania kodeksu karnego wykonawczego*, edited by Stefan Lelental, and Grażyna B. Szczygieł, 353–60. Białystok: Temida 2.

Konikowska-Kuczyńska, Justyna. 2015. *Wykonywanie kary pozbawienia wolności w systemie terapeutycznym wobec skazanych uzależnionych od środków odurzających lub substancji psychotropowych*. Warszawa: C.H. Beck.

Krajewski, Krzysztof, and Barbara Stańdo-Kawecka, ed. 2011. *Problemy penologii i praw człowieka na początku XXI stulecia. Księga poświęcona pamięci Profesora Zbigniewa Hołdy.* Warszawa: Wolters Kluwer.

Kuć, Małgorzata. 2007. *Indywidualizacja wykonania kary pozbawienia wolności.* Lublin: Towarzystwo Naukowe KUL.

Kwieciński, Adam, ed. 2013. *Postępowanie z wybranymi grupami skazanych w polskim systemie penitencjarnym. Aspekty prawne.* Warszawa: C.H. Beck.

Kwieciński, Adam. 2017. *Wykonywanie kary pozbawienia wolności w systemie terapeutycznym.* Warszawa: C.H. Beck.

Lachowski, Jerzy. 2021. *Kodeks karny wykonawczy. Komentarz.* Warszawa: C.H. Beck.

Lelental, Stefan. 2001. *Kodeks karny wykonawczy. Komentarz.* Warszawa: C.H. Beck.

Lelental, Stefan. 2020. *Kodeks karny wykonawczy. Komentarz.* Warszawa: C.H. Beck.

Linowski, Krzysztof, and Izydor Wysocki. 2006. *Oddziaływania psychokorekcyjne na skazanych agresywnych w warunkach penitencjarnych.* Ostrowiec Świętokrzyski: Stowarzyszenie na rzecz Rozwoju Wyższej Szkoły Biznesu i Przedsiębiorczości w Ostrowcu Św.

Linowski, Krzysztof, Iwona Stańczyk, Izydor Wysocki, et al. 2004. "Realizacja programu «Leczenie z przemocy» w Areszcie Śledczym w Radomiu." *Przegląd Więziennictwa Polskiego* 42:66–85.

Machel, Henryk. 2006. *Sens i bezsens resocjalizacji penitencjarnej – casus polski. Studium penitencjarno-pedagogiczne.* Kraków: Oficyna Wydawnicza „Impuls".

Nawój-Śleszyński, Aldona. 2009. "Wykonywanie kary pozbawienia wolności w systemie terapeutycznym w świetle zasad indywidualnego oddziaływania." *Przegląd Więziennictwa Polskiego* 2:64–69.

Nawój-Śleszyński, Aldona. 2014. "Indywidualizacja wykonywania kary pozbawienia wolności w kontekście zmian Kodeksu karnego wykonawczego w latach 2009–2014." In *Zmiany w prawie karnym wykonawczym w latach 2009–2014,* edited by Adam Kwieciński, 113–36. Warszawa: C.H. Beck.

Nawój-Śleszyński, Aldona, and Joanna Łuczak. 2017. *Wybrane problemy indywidualizacji wykonywania kary pozbawienia wolności*. Łódź: Akademia Prawa.

Pawela, Stanisław. 2003. *Prawo karne wykonawcze. Zarys wykładu*. Kraków: Zakamycze.

Pierzchała, Kazimierz. 2007. "Przyczynek do charakterystyki osób pozbawionych wolności." *Przegląd Więziennictwa Polskiego* 54:101–108.

Pindel, Edyta. 2009. "W kierunku efektywności oddziaływań penitencjarnych. Resocjalizacja w polskich zakładach karnych." *Probacja* 2:11–118.

Postulski, Kazimierz. 2017. *Kodeks karny wykonawczy. Komentarz*. Warszawa: Wolters Kluwer.

Stańdo-Kawecka, Barbara. 2000. *Prawne podstawy resocjalizacji.* Kraków: Zakamycze.

Szymanowska, Aleksandra. 2001–2002. "Więźniowie młodociani poddani systemowi programowanego oddziaływania na podstawie badań psychologiczno-kryminologicznych." *Archiwum Kryminologii* XVI:53–100.

Szymanowska, Aleksandra. 2003. *Więzienie i co dalej.* Warszawa: Wydawnictwo Akademickie „Żak".

Szymanowski, Teodor. 2009. "Nowe unormowania dotyczące wykonywania kary pozbawienia wolności w przepisach KKW i w praktyce." In *X lat obowiązywania kodeksu karnego wykonawczego*, edited by Stefan Lelental, and Grażyna B. Szczygieł, 161–81. Białystok: Temida 2.

Witeska, Ewa. 2005. "Program terapii Lacana jako forma resocjalizacji." *Przegląd Więziennictwa Polskiego* 47–48:117–19.

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AUTONOMOUS TERRITORY IN THE LIGHT OF INTERNATIONAL LAW

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Abstract. The essence of autonomy involves independence perceived in relation to other entities, that occurs in domestic and international law. In the latter case, it is related to a complex state that acts either as a federal state or a diversified state. In the first and second case, it refers to an area that may be an integral part of the above-mentioned types of states, or may extend to a territory not included in the state on which it is dependent. This status may be enjoyed by colonial areas, and territorial autonomy may be a form of their decolonization. A separate category of geopolitical units accommodates territories that are also not part of a given state, but are associated with it and enjoy the status falling within the sphere of territorial autonomy. The above-mentioned categories of territorial units, with limited treaty powers, cannot therefore be considered as states in the international legal sense, but at most as creations of a quasi-state nature, because full treaty capacity, in addition to sovereignty, is the criterion of subjectivity in international law.

Keywords: autonomy, federal state, complex state, diversified state, sovereignty, autonomous territory, associated state, treaty capacity

INTRODUCTION

The study addresses the concept and essence of territorial units other than states since the concept of the exclusive legal and international subjectivity of the state is now obsolete. The question then arises: what are these territorial units other than states, and how are they formed?

The above has also been raised at diploma seminars at the Faculty of Law and Administration and triggered questions from year four and year five full-time and part-time students about the classification of states in the context of international law, as well as the types of territorial units that are not states. Thus, the following discussion may provide a teaching aid and an answer to these questions.

When answering them, it should be emphasized that although there is no positive norm cataloging actors under international law, practice shows that states, by regulating mutual relations, may expand the circle of subjects of that

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law as seen in Article 3 of the Vienna Convention on the Law of Treaties of 23 May 1969[1] (headed: "International agreements not within the scope of the present Convention") which also covers entities other than states [Antonowicz 2015, 22–24; Brownlie 1998, 98; Menkes 2014, 335ff; Mielnik 2008, 51ff]. Nevertheless, the ability of states, as basic subjects and creators of international law, to establish additional categories of subjects of this law is limited. This is due to the fact that international legal norms, by their nature, are adjusted first of all to the relations between organized sovereign communities and then to other entities, including those that are autonomous.

Given that this study deals with an autonomous-type territorial unit, it calls for an explanation of concepts that are fundamental for this discussion, i.e. the terms "territory" and "autonomy." The first one, derived from Latin, is used in various meanings since this word itself has multiple meanings. One time it may be understood as a certain area distinguished due to its economic, geographic or linguistic, national, religious or natural features, another time it is a certain space in which public authority is exercised.

Nowadays, the center of gravity of statehood rests on the territorial element. Thus, it may be concluded that a territory is a specific section of the earth's surface in which states and territorial units operate. These units are not states under international law but have a specific status in the international legal space (in the light of the Charter of United Nations – overseas territories), such as: international zones, non-self-governing territories, no man's land or neutralized zones.

On the other hand, "autonomy," derived from Greek, means independence, and when understood in relation to other entities, it indicates separate properties or a separate function it performs in society. It is noticeable, inter alia, in the sphere of constitutional law, where it means guarantees of powers given by states to a specific creation to independently regulate its internal affairs within the framework specified by the law of a given state [Banaszak 2001, 535].

Turning to the international sphere, it should be noted that the concept in question refers to an organized community and the area inhabited by it, which is either an integral part of the state, or a part not formally included in the state to which it belongs and has certain systemic differences. Together, both concepts constitute a phrase that functions in the intra-state space which is because there are territories with the status of autonomy or with a status defined by another synonymous term [Antonowicz 2012, 43]. This makes it necessary to distinguish the essence of autonomy from the status of ordinary administrative units of the state due to internal affairs of a given territory, which may be the responsibility of the authorities of the autonomous area, unlike foreign affairs, which are, in principle, the competence of the central authorities of the

[1] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331–439.

home state. However, this does not exclude the fact that the internal affairs of such a territory may be the domain of the central authorities, while the powers in the foreign sphere may be vested in the authorities of the autonomy, which therefore raises the question of whether this territory may be considered a subject of international law.

1. GEOPOLITICAL UNITS WITH THE STATUS OF AUTONOMY

In order to answer the question from the last section, it is necessary to characterize the essence of an autonomous territory in the context of international law, taking into account the different scope of its autonomy, which sometimes results from this territory being an integral part of a given state, and sometimes a part outside the state with which it is legally and politically interrelated. We must consider whether in addition to the aforementioned category of a territory there are still other types of areas with an autonomous status.

The legal analysis of the concept discussed here should start with an observation that international space accommodates alternatively states and other territorial units that are not states. States, on the other hand, appear in two forms: as uniform and indivisible structures, i.e. as unitary states (for example: the Republic of Poland) and as complex states for which the division criterion is the ratio of its constituent parts to the entire country.

A complex state may be either a federal state, in other words a confederation state (consisting of two or more geopolitical units, formally equal to one another and which are this state's integral parts) or a diversified state, albeit essentially uniform, also having one or more autonomous territories associated with it, sometimes defined as state fragments which are constitutionally distinct. Therefore, when highlighting the differences between the above-mentioned forms of a complex state, reference should be made to the opinion of L. Antonowicz, who emphasizes that these differences essentially boil down to the fact that a federal state has a symmetrical structure, while a diversified one – asymmetric [Antonowicz 2015, 61].

In the light of international law, constituent parts which usually have specific powers in the foreign sphere are an important element of the federal state, as seen in the example of Switzerland or the Federal Republic of Germany.

The first of them, i.e. Switzerland, is a federal state with a cantonal structure. Its cantons, as laid down in the Swiss Constitution of 1999,[2] have cantonal constitutions and legislative bodies, and the relations between them and the federation are governed by the principle that powers not expressly granted to the Confederation are cantonal competences, including: the right to enter

[2] Federal Constitution of the Swiss Confederation of 18 April 1999, https://www.fedlex.admin.ch/eli/cc/1999/404/en [accessed: 28.03.2021].

into agreements with other states in economic, neighborly or political matters, provided that they do not contain provisions detrimental to the Confederation as a whole or other cantons [Antonowicz 2012, 45; Berezowski 1966, 128; Favez 1982, 85ff; Shaw 2011, 157; Sutor 2019, 116–17]. The second example is the Federal Republic of Germany composed of federal states (Länder) which, under the 1946 Federal Basic Law, have the right to conclude, upon the consent of federal authorities, international agreements within the scope of their internal (national) competence [Berezowski 1966, 128; Krasuski 2001, 118ff; Schulze 1999, 125ff; Peaslee 1956, 35], but without prejudice to the Federation as a whole.

Given the above, it may be emphasized that although constituent parts of a federal state have certain foreign competences, in practice this power is insignificant. It is the federal state that is a subject of international law. The component state, even if under domestic law it does have legitimation to conclude international agreements, does so only as an organ of the federal state, and not as a separate subject of international law.

Components of a diversified state which have certain rights in the foreign sphere may also participate in foreign trade. However, a question then arises: what is their nature in foreign space? It must be said that they operate apart from the home state, which gives them a dual legal status. They act as quasi-separate entities before third countries, while they are bound by constitutional rules before the home state, whereby their status is similar to autonomy [Antonowicz 2015, 87].

In international practice, the above solution occurred in the past in the case of the British Commonwealth of Nations, which in the interwar period of the last century was an institutionalized form of cooperation between the states of the former British Empire. One time they participated actively in international relations a whole and on other occasions as its constituent parts (dominions). This applied, inter alia, to Australia, India, Canada or New Zealand, which are, for example, original members of the League of Nations [Berezowski 1966, 130; Klafkowski 1964, 338–43; Jennings and Watts 1992, 256; Gelberg 1958, 312–19; Shaw 2011, 157].[3]

Another example is the former Union of Soviet Socialist Republics (USSR). Between 1944–1991, its union republics had the status of constituent units of the union and at the same time they had a general competence

[3] The functioning of the British Commonwealth of Nations was regulated by the Statute of Westminster of 11 December 1931, confirming the provisions of the Imperial Conference of 1926 with regard to the definition of the relations of Great Britain and the dominions as the British Commonwealth of Nations, and from 1949 the Commonwealth of Nations. It should be noted that the parliaments of the dominions had legislative powers. Currently, members of the Commonwealth of Nations are also overseas territories and associated states. See also Grabowska 2014.

in foreign affairs. However, two of them: Belarus and Ukraine could act on the international forum in a broader scope than the other union republics and were, inter alia, original members of the United Nations [Antonowicz 2012, 46; Banaszak 1999, 157; Sutor 2019, 116–17].[4] Nevertheless, the USSR's constituent parts did not have the right to maintain separate diplomatic relations with other countries, which was the domain of the Union's central authorities [Antonowicz 2015, 87].

The ultimate 1991 collapse of the USSR as a subject of international law transformed its union republics into sovereign states, and Russia became the legal continuator of the former Soviet Union under the name Russian Federation by adopting a new Constitution in 1993. Pursuant to this Constitution, the Federation consists of republics, territories, autonomous regions or autonomous areas as equal entities, but with a diversified degree of autonomy, making the territorial system a structure of a diversified state [Antonowicz 1992, 21ff; Miller 1991–1992, 31; Müllerson 1994, 140–45].

When discussing the issue of autonomous territory, we cannot ignore territorial units that constitute an autonomous part of a country but are located outside such country and which in international relations act separately and alongside their home states, for example the Aland Islands, the Faroe Islands and Greenland [Olafson 1982, 29ff; Seyersted 1982, 23ff; Słaboszyński 2002, 450–51].

The first of them, located in the northern part of the Baltic Sea, at the entrance to the Gulf of Bothnia, granted to Finland in 1921 by the decision of the Council of the League of Nations, constitute its autonomous province outside the home state. Since 1957 they have been participating in the work of the Plenary of the Nordic Council. At the same time, by a 1994 referendum the residents of the islands agreed to join the European Union with Finland as their home state.

In turn, the Faroe Islands (Faroese Islands), located in the Norwegian Sea, between Great Britain, Iceland and Norway, an external territory of the Kingdom of Denmark, have been exercising their autonomy since 1948. At the same time, they have had their own representation in the Nordic Council since 1969 [Słaboszyński 2002, 451].

Finally, Greenland. A part of Denmark since 1953, with extensive autonomy, and since 1984, like the Faroe Islands, with its own representatives in the Nordic Council. Since 1985 it has been enjoying the status of an overseas territory associated with the European Union [Antonowicz 2012, 88].

Another example is Macao and Hong Kong, territorial units located on the South China Sea. They were transformed into special administrative regions under the Portuguese-Chinese Agreement of 1994 and the Anglo-Chinese

[4] It needs to be noted that in 1948–1949 Ukraine was a non-permanent member of the US Security Council.

Agreement of 1987, respectively, with certain autonomy and law, and a socio-economic system for the next half a century [ibid., 47].

In addition to the above-mentioned types of autonomous territories that constitute parts of a given state, there are autonomous areas that are also not part of a state but which are associated with it. However, this is not a legal obstacle for such an entity to achieve the status of a state under international law. When it comes to associations, such a territory becomes a geopolitical unit whose status corresponds, in fact, to territorial autonomy. These include: the Cook Islands, the Niue Island [Crawford 1979, 372–74],[5] the Northern Mariana Islands, Puerto Rico or the Netherlands Antilles.

The first of them, i.e. the Cook Islands and Niue Island, located in the southern part of Oceania–Polynesia, are entities associated with New Zealand, have independence in internal affairs, while their foreign policy as well as defense is the exclusive competence of the New Zealand authorities.

The next large territorial units, i.e. the Northern Mariana Islands and Puerto Rico, are territories associated with the United States. The Northern Mariana Islands, located in the eastern part of the Pacific, became a United Nations trust territory under the American administration after World War II. In 1986 it became a territory associated with the United States. Puerto Rico, located in the in Greater Antilles archipelago on the Atlantic Ocean and the Caribbean Sea, has had internal autonomy since 1952 and a status of an entity-state associated with the USA. When it comes to these archipelagos, foreign affairs as well as defense and finance remain the exclusive domain of the US Congress [ibid.].[6]

[5] It should be emphasized that the Cook Islands have the right to declare independence at any time. They have had autonomy since 1965, they also belong to some specialized organizations of the United Nations: the Food and Agriculture Organization (FAO), the International Civil Aviation Organization (ICAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) or the World Health Organization (WHO). Niue Island, on the other hand, has been autonomous since 1974.

[6] At this point, it should be noted that the legal status of Puerto Rico has been under discussion for many years. Among other things, in November 2020, in a non-binding referendum, nearly 55% of the island's inhabitants voted in favor of recognizing the island either as a US state, or in favor of independence, or in favor of the current legal status, which was reflected in draft legal acts of 2021: the Puerto Rico Statehood Admission Act and the Puerto Rico Self-Determination Act. Source: Słabisz 2021.

CONCLUSIONS

When formulating conclusions, it should be stated that autonomy in the legal sense means a situation where a state guarantees a specific entity the right to certain independence in regulating its internal relations under the law and system of a given state. This involves, for example, the right to appoint local organs with competence to adopt normative implementing acts, though limited to internal affairs of a given part of the territory of the state. Moving on to the international legal sphere, it should be noted that the concept in question is defined here as an autonomous territory, referring to a geopolitical entity that is not sovereign, but at the same time is either an integral part of a federal state or a diversified state, or possibly stays outside a given state, or is associated with it, or, finally, dependent on it.

In the latter case, it is about colonial areas (also known as dependencies), and autonomy may take the form of decolonization, leading to their reaching statehood in the international legal sense or integration with a neighboring state, and finally association with a specific state, becoming an entity with a status that falls within the concept of an autonomous territory.

The examples of the status of various geopolitical units raise questions about their contemporary raison d'être and the possibility of their participation in the international sphere. Taking into account the increase in social and national awareness of the populations of autonomous areas, which boils down to, inter alia, rejecting the presumption that their current status satisfies self-determination, and at the same time bearing in mind that the degree of their development depends largely on external technical and organizational assistance that stabilizes their further economic and political development, it should be assumed that, despite this, efforts should be made for the populations of autonomous territories to achieve independence, and a transitional status of autonomy may be a stage leading to this.

As for the second issue, it should be stated that if it is examined in the light of treaty capacity, such a possibility exists, although it is limited in practice to non-political agreements, and the affirmation of a positive answer may be sought in, for example, the 1982 UN Convention on the Law of the Sea[7] which lays down that apart from states, non-sovereign geopolitical units that fall within the concept of territorial autonomy may also be parties to it.

[7] Cf. Journal of Laws of 2002, No. 59, item 543; see also Przyborowska–Klimczak 2006, 414–15.

REFERENCES

Antonowicz, Lech. 1992. “Rozpad ZSRR ze stanowiska prawa międzynarodowego.” *Państwo i Prawo* 9:21–45.

Antonowicz, Lech. 2012. *Rzecz o państwach i prawie międzynarodowym*. Lublin: Wyższa Szkoła Ekonomii i Innowacji w Lublinie.

Antonowicz, Lech. 2015. *Podręcznik prawa międzynarodowego.* Warszawa: Wolters Kluwer.

Banaszak, Bogusław. 1999. *Prawo konstytucyjne*. Warszawa: C.H. Beck.

Banaszak, Bogusław. 2001. “Autonomia.” In *Wielka Encyklopedia PWN*, vol. 2, 535–36. Warszawa: PWN.

Berezowski, Cezary. 1966. *Prawo międzynarodowe publiczne*. Part 2. Warszawa: PWN.

Brownlie, Ian. 1998. *Principles of Public International Law.* Oxford: Oxford University Press.

Crawford, James. 1979. *Creation of State in International Law*. Oxford: Oxford University Press.

Favez, Jean–Claude, ed. 1982. *Nouvelle histoire de la Suisse et des Suisses*. Vol 1. Lausanne: Payot Lausanne.

Gelberg, Ludwik, ed. 1958. *Prawo międzynarodowe publiczne i historia dyplomatyczna: wybór dokumentów.* Vol. 2. Warszawa: PWN.

Grabowska, Genowefa. 2014. “Liga Narodów.” In *Wielka Encyklopedia Prawa*. Vol. 4: *Prawo Międzynarodowe Publiczne*, edited by Janusz Symonides, 211. Warszawa: Fundacja Ubi Societas Ibi Ius.

Jennings, Robert, and Arthur Watts, eds. 1992. *Oppenheim's International Law.* London: Longman.

Klafkowski, Alfons. 1964. *Prawo międzynarodowe publiczne.* Warszawa: PWN.

Krasuski, Jerzy. 2001. *Historia Niemiec*. Wrocław: Ossolineum.

Menkes, Jerzy. 2014. “Podmiotowość prawnomiędzynarodowa.” In *Wielka Encyklopedia Prawa*. Vol. 4: *Prawo Międzynarodowe Publiczne*, edited by Janusz Symonides, 335. Warszawa: Fundacja Ubi Societas Ibi Ius.

Mielnik, Barbara. 2008. *Kształtowanie się pozapaństwowej podmiotowości w prawie międzynarodowym.* Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Miller, Robert. 1991–1992. “Soviet Union. The implosion of superpower.” *Asia-Pacific Defence Reporter* 18, no. 6–7:49–52.

Müllerson, Rein. 1994. *International Law, Rights and Politics.* London: Routledge.

Olafson, Árni. 1982. “International Status of Faroe Islands.” *Nordic Journal of International Law* 51, 1:29–38.

Peaslee, Amos J. 1956. *Constitutions of Nations.* The Hague: Martinus Nijhoff.

Przyborowska-Klimczak, Anna. 2006. *Prawo międzynarodowe publiczne. Wybór dokumentów.* Lublin: Lubelskie Wydawnictwa Prawnicze.

Schulze, Hagen. 1999. *Niemcy. Nowa historia.* Kraków: Wydawnictwo Literackie.

Seyersted, Finn. 1982. “The Åland autonomy and International Law.” *Nordic Journal of International Law* 51, 1:23–28.

Shaw, Malcolm N. 2011. *Prawo międzynarodowe.* Warszawa: Książka i Wiedza.

Słabisz, Aleksandra. 2021. “Portoryko. Nietypowy stan karaibskiej wyspy.” https://www.rp.pl/swiat/art206141-portoryko-nietypowy-stan-karaibskiej-wyspy [accessed: 29.03.2021].

Słaboszyński, Tadeusz. 2002. “Grenlandia.” In *Wielka Encyklopedia PWN*, vol. 10, 450–54. Warszawa: PWN.

Sutor, Julian. 2019. *Prawo dyplomatyczne i konsularne*. Warszawa: Wolters Kluwer.

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CHRISTIAN VALUES IN THE DIGITAL SOCIETY. INITIATIVES SEEKING COMMUNION BETWEEN THE DIGITAL AGE AND RELIGION

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Abstract. The scenario we find ourselves in worldwide is that of a globalized world. However, the fact that this phenomenon is taking place in general, based on the continuous increase in the interconnection between the different nations of the world in the economic, political, social and technological fields, makes more evident the inequalities that exist between the different States that make up our world. It is very interesting to analyse how an institution as old as the Catholic Church has been facing the challenges that adapting to the current model of society undoubtedly entails for a traditional institution.
Today our society has been completely transformed and the digital era has burst onto the scene. The Catholic Church has not been oblivious to the changes that our society is experiencing, and so we will make a brief analysis of the most significant changes that have taken place in the way in which the Catholic Church tries to carry out its pastoral function. We will analyse how the Catholic Church is implementing new tools to adapt to the changes that are constantly taking place in our society.

Keywords: digital era, Church, evangelization, society

According to encyclical letter *Laudato si'*, of the Holy Father Francisco, on care for the common home:[1] "the urgent challenge of protecting our common home includes the concern to unite the entire human family in the search for sustainable and integral development, for we know that things can change." Then he adds, "humanity still has the capacity to collaborate to build our common home. I wish to acknowledge, encourage and thank all those who, in the most varied sectors of human activity, are working to ensure the protection of the home we share." He also adds that, the attitudes that obstruct the paths to a solution, even among believers, range from denial of the problem to indifference, comfortable resignation or blind trust in technical solutions (LS 13). We need a new universal solidarity. As the Bishops of South Africa said, the talents and involvement of all are needed to repair the damage caused by human

[1] Franciscus PP., Litterae encyclicae *Laudato si'* de communi domo colenda (24.05.2015), AAS 107 (2015), p. 847-945 [hereinafter: LS], no. 17.

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abuse to God's creation.[2] We can all collaborate as God's instruments for the care of creation, each one from his or her own culture, experience, initiatives and capacities.

With respect to the importance of technology and its advances, following the line set forth by Pope Francis in *Laudato si'* (LS 102), technology has remedied innumerable ills that have harmed and limited human beings. We cannot fail to appreciate and be grateful for technical progress, especially in medicine, engineering and communications, and how can we fail to recognize all the efforts of many scientists and technicians who have provided alternatives for sustainable development?

The answer that holy father Francisco gives is that, "well-oriented technoscience can not only produce truly valuable things to improve the quality of human life, from useful domestic objects to large means of transportation, bridges, buildings and public places. It is also capable of producing beauty and of making the human being immersed in the material world «jump» into the realm of beauty." There are precious pictorial and musical works achieved with the use of new technical instruments. Thus, in the intention of beauty of the technical producer and in the contemplator of such beauty, the leap is made to a certain properly human fullness."[3]

Pope Francis says, that it is right to rejoice in the face of these advances, and to be enthusiastic about the vast possibilities that these constant novelties open up for us, because "science and technology are a marvelous product of human creativity given to us by God"[4].

It should be considered that, "classical religious texts can offer meaning for all ages, they have a motivating force that always opens new horizons [...] Is it reasonable and cultured to relegate them to obscurity, just because they have arisen in the context of a religious belief?[5] In reality, it is naive to think that ethical principles can be presented in a purely abstract way (LS 199),

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[2] Southern African Catholic Bishops' Conference, Pastoral Statement on the Environmental Crisis (05.09.1999).

[3] Franciscus PP., Litterae encyclicae *Lumen fidei* (29.06.2022), AAS 105 (2013), p. 555–96, no. 34: "The light of faith, united to the truth of love, is not alien to the material world, because love is always lived in body and soul; the light of faith is an incarnate light, coming from the luminous life of Jesus. It illuminates even matter, trusts in its ordering, knows that in it a way of harmony and ever wider understanding opens up. The gaze of science thus benefits from faith: faith invites the scientist to be open to reality in all its inexhaustible richness. Faith awakens the critical sense, insofar as it does not allow research to be satisfied with its formulas and helps it to realize that nature is not reduced to them. By inviting us to marvel at the mystery of creation, faith broadens the horizons of reason to better illuminate the world that is presented to the studies of science" – the underline is added.

[4] Ioannes Paulus PP. II, Allocutio Hirosimae, ad mathematicarum et naturalium scientiarum cultores habita (25.02.1981), AAS 73 (1981), p. 420–28, no. 3.

[5] Idem, Adhortatio apostolica *Evangelii gaudium* de Evangelio Nuntiando nostra aetate (24.11.2013), p. 1019–138, no. 256.

detached from any context, and the fact that they appear in religious language does not detract from their value in public debate. The ethical principles that reason is capable of perceiving can always reappear in different guises and expressed in different languages, including religious ones."

We start from the premise that since the 20th century, the phenomenon of globalisation has developed, based on the continuous increase in the interconnection between the different nations of the world in the economic, political, social and technological spheres. It is very interesting to analyse how an institution as old as the Catholic Church has been facing the challenges that adapting to the current model of society undoubtedly entails for a traditional institution.

The technological factor has undergone exponential development in recent years. The development of the internet has made it possible to purchase a product manufactured anywhere in the world without leaving home, and even the way of communicating through new digital platforms has completely changed the paradigm in the field of information communication and we are in some way subjected to the empire of the digital.

To live this historical moment of the birth of a new culture means for the Church to accept the challenge of inculturation, which she carries out in a double movement: to assimilate the positive aspects of this culture while purifying the negative ones; and to contribute to it the originality of her own human and spiritual richness. If we continue reading we may read the following: The Church is entering the complex world of the Internet in a decisive and growing way in various languages. It is emerging as an "Agent of meaning" that offers frames of reference for understanding the world. It also carries out a work of archiving and of archiving and codifying the cultural heritage of other epochs in these new formats [Ruiz 2022].

One of the most representative examples of the importance of the digitisation of information in order to make the exchange of information at a global level more fluid is that the Vatican archive has begun to be digitized.

It is significant, to say the least, that the Vatican archive has begun to be digitised, so that information that has remained within the Vatican walls for centuries can now be made accessible on the web.[6] Traditionally, the archives held in the Vatican archives have been understood as secrets inaccessible to third parties. Now, without a doubt, the Church is being brought closer to society by, among other things, this initiative to digitise its archives and make them available on the Internet. Authoritative voices in the Holy See assure that practically all documents will be available for consultation.

[6] See "The «secrets» of the world, on the web" in the documentary heritage of the Holy See (the documentary heritage of the Holy See), Religious values, 2014, digital magazine: https://www.valoresreligiosos.com.ar [accessed: 11.05.2022].

As the Argentinian Cardinal Jorge Mejía, former director of the Secret Library and Archives, explains, "in principle, no text is excluded." However, the aforementioned cardinal specifies that "the only exception could be the documents of the Apostolic Penitentiary, which deals with cases of conscience, for obvious reasons of discretion and respect for individuals."

There is also, as in any archive, a time constraint (i.e. the time between the events and the access to the documents for them to be effectively part of history). In the case of the Vatican, the gap is usually around 75 years. And the practice is that they are opened per papacy. Currently, access goes up to 1939, i.e. until the end of the pontificate of Pius XI.[7]

1. THE CATHOLIC CHURCH DOES NOT TURN ITS BACK ON NEW TECHNOLOGIES

There are many small initiatives that seek a communion between the digital age and religion. Even Pope Francis has taken advantage of an innovative space like the TED Talks to embrace disruption. "It would be good if the growth of technological projects also corresponded to greater equality and social inclusion," he said via videoconference in one such talk last year [García 2018].

The Catholic Church is no stranger to social reality. On the 47th World Communications Day, Pope Benedict XVI addressed the Christian community with the following words: "The ability to use the new languages of communication is a requirement not so much for the sake of fashion but above all to allow the Gospel to take on forms of expression that will touch the hearts and souls of all." The Holy Father had encouraged such initiatives as they complement the practice and propagation of the Good News [Haedgel 2015].

Mobile applications enable Church representatives to address a wider public, especially young people. Pope Benedict XVI encouraged such initiatives as they complement the practice and spread of the good news.[8]

Just as the current Pope maintains a close relationship with the faithful, the mobile app revolution in churches around the world reconciles young people with religion and creates a bond between believers.

The church has always been a social network and what it is doing today is simply adapting its mode of operation to the expectations of the world and to the new challenges of communication. We can note that the Vatican has a portal open to everyone with the creation of the Vatican website.[9] In this website,

[7] Ibid.

[8] Read in Message of His Holiness Benedict XVI for the twenty-eighth world youth day, from the Vatican, October 2012.

[9] See https://www.vatican.va/content/vatican/es.html [accessed: 11.05.2022].

we can have access to: 1) information about the history of the Vatican and the successive popes; 2) links to prayers; 3) the Holy Father's own work; access to news related to the Catholic Church; 4) photographs, among much more content.

It is clear that the possibility for everyone to access these resources brings the Church much closer to the faithful.

In 2008 the US site Life Church had launched a mobile application for reading the Bible. For millions of readers around the world, a wildly successful free Bible app, YouVersion, is changing how, where and when they read the Bible.[10]

Built by LifeChurch.tv, one of the nation's largest and most technologically advanced evangelical churches, YouVersion is part of what the church calls its "digital missions." They include a platform for online church services and prepackaged worship videos that the church distributes free. A digital tithing system and an interactive children's Bible are in the works. The app is now the most widely used app in the world, with versions in over 600 languages and an audio book. Available for Android, iOS and Windows Phone, this is now the fifth edition and has been downloaded more than 140 million times.

It was in March 2010 that the Messe Info app was launched in France,[11] where you can find mass schedules as well as the major Christian feasts. Then, in November 2010, the reference site of the Catholic Church launched its mobile application: Eglise Info, which allows you to follow the Church's news live. Since then, more and more churches have decided to go online.

The African continent, which has a dense Christian population, is characterised by sometimes delicate dealings and difficult communication. The Church plays a major role on the continent.[12]

Thanks to the smartphone revolution and the creation of mobile applications by the Church in Africa [Mourdoukoutas 2017],[13] they have made it

[10] See "In the Beginning Was the Word; Now the Word Is on an App" published in The New York Times Journal, July 2013.

[11] See https://messes.info [accessed: 11.05.2022].

[12] As we can read at Historical figures throughout the executive summary are courtesy of Todd M. Johnson of the Center for the Study of Global Christianity at Gordon-Conwell Theological Seminary in South Hamilton, Mass. Johnson is co-editor of the Atlas of Global Christianity, Edinburgh University Press, 2009: "Today, only about a quarter of all Christians live in Europe (26%). A plurality – more than a third – now are in the Americas (37%). About one in every four Christians lives in sub-Saharan Africa (24%), and about one-in-eight is found in Asia and the Pacific (13%)."

[13] In the same article we can read the following: "Challenges. The greatest obstacle to digitizing Africa is financial. Despite the price of smartphones dropping to under $100 in 2015, that amount is still high for Africa's poor, and the added cost of data plans is often prohibitive. Remote areas in Africa face additional challenges, as it is often difficult to connect these regions to the Internet due to poor infrastructure and lack of funding. Investors are hesitant to finance Internet cable expansion into rural areas, since the profit margin is lower than in urban areas."

possible to create a communication link between parishes and parishioners. See the paradigmatic example of Nigeria (an African country where the majority of Christians are concentrated), where certain virtual communities have more than ten thousand members.[14]

These mobile applications, in addition to motivating parishioners to pray, make it easier for priests to provide them with spiritual guidance. The latter pastoral and evangelising function is facilitated by the anonymous nature of the web.[15]

While supporting the pastoral and evangelising function of the Catholic Church, these applications allow for the administration and census of the population in a continent where government is sometimes ineffective.[16] In these places, churches provide the faithful with social assistance and various services.

2. FROM CHRISTIAN APPS AND OTHER PROPOSALS BASED ON THE TOOLS ENABLED BY THE DEVELOPMENT OF THE TECHNOLOGY

2.1. App called La Quête

One of the first approaches to new technologies was carried out by a French startup that created an app called La Quête. Romain Husson, one of its two founders, says that the initiative arose with the aim of providing an extra source of funding for Catholic churches so that they would not depend exclusively on the masses [García 2018]. "For the faithful, all they have to do is

[14] As we can read in "Global Christianity – A Report on the Size and Distribution of the World's Christian Population," published in December 2011 in the journal: https://www.pewresearch.org/religion/2011/12/19/global-christianity-exec/ [accessed: 11.05.2022]. We must pay attention to another publication, vid. Catholic Social Teaching, Historical Overview and Application to the Challenges of Africa, published in https://repository.globethics.net/bitstream/handle/20.500.12424/166575/Catholic%20Social%20Teaching%2C%20Historical%20Overview%20and%20Application%20to%20the%20Challenges%20of%20Africa.pdf?sequence=1&isAllowed=y [accessed: 11.05.2022]. What we want to point out is that: "It is glaring that times and situations have tremendously changed in the Nigerian society. What is abundantly clear to the hierarchy in Nigeria today is the obvious fact that Catholic Church is losing members in droves to other religious groups, and must do something expedient to win them back to the fold. There are too many frontal challenges suffocating the progress of the Church, the African Christian Churches, the non-Christian believers and Islam. The worst is the attack it gets from the Moslem nationals."

[15] Congregation for the Evangelization of Peoples, Pastoral Guide for diocesan priests in churches dependent on the congregation for the evangelization of peoples, Rome, June 1989.

[16] See https://repository.globethics.net/bitstream/handle/20.500.12424/166575/Catholic%20Social%20Teaching%2C%20Historical%20Overview%20and%20Application%20to%20the%20Challenges%20of%20Africa.pdf?sequence=1&isAllowed=y [accessed: 11.05.2022].

download the application free of charge, transmit their bank details and register their parish manually or by geolocation. Then give the amount you want and the payment will be made at the end of each month," he adds.

2.2. Electronic brush

Also, as an initiative of a Catholic church in the capital of France, aware of its windling cash collection, they implemented an electronic brush for the faithful to contribute between two and 10 euros by means of their contactless cards. "A whole generation is using fewer and fewer notes and coins. They attend mass, but they don't have the facilities to donate anything" [ibid.] argues this pioneering diocese as the main reason for the inclusion of this contactless payment method. Today, the installation of machines that allow donations to be made by contactless cards in most Christian churches has become commonplace.

2.3. Free WIFI network access available

The use of technology is intimately linked to the possibility of internet access. In Spain, we can identify an initiative put into practice in the church of San Antón (Madrid, Spain), which has an open wifi available to everyone.

The director of the church, aware that we live in an age where mobile phones are indispensable and everyone has one, said: "We want to open a line of communication, through Whatsapp, for example, for those who live far from home and want to talk to their countries of origin. It's a way of ensuring that no one is isolated," he noted.

With regard to the electronic resources that can be found on the web, we highlight those listed on the website [Hutchings 2010], see the following: 1) Bailey, Brian, and Terry Storch, The Blogging Church: Sharing the Story of Your Church Through Blogs (San Francisco: Jossey-Bass, 2007); 2) Barzilai, Gad, and Karine Barzilai-Nahon, "Cultured Technology: Internet & Religious Fundamentalism." The Information Society 21(1) (2005); 3) Campbell, Heidi, Exploring Religious Community Online: We Are One in the Network (Oxford: Peter Lang, 2005); 4) "Spiritualising the Internet: Uncovering Discourses and Narratives of Religious Internet Usage," Online: Heidelberg Journal of Religions on the Internet 01(1) (2005); 5) When Religion Meets New Media (Abingdon: Routledge, 2010); 6) Castells, Manuel, The Internet Galaxy: Reflections on the Internet, Business and Society (Oxford: Oxford University Press, 2001); 7) Church of England Board for Social Responsibility, Cybernauts Awake! Ethical and Spiritual Implications of Computers, Information Technology and the Internet (London: Church House 1999); 8) Dawson, Lorne L. and Douglas E. Cowan (eds.), Religion Online: Finding Faith on the Internet (London: Routledge, 2004); 9) and Jenna Hennebry, "New Religions

and the Internet: Recruiting in a New Public Space," Journal of Computer-Mediated Communication 14(1) (1999); 10) Doney, Malcolm, "Computer Church," Church Times, May 14 2004. http://www.churchtimes.co.uk/content.asp?id=10102 [accessed: 10.20.2010]; 11) Estes, Douglas, SimChurch: Being the Church in the Virtual World (Grand Rapids: Zondervan, 2009); 12) Friesen, Dwight, Thy Kingdom Connected (Grand Rapids: Baker Books, 2009); 13) Goodmanson, Drew, "The Truth About Church Websites and Social Networking," Christian Computing Magazine (July 2009) http://www.ccmag.com/2009_07/ccmag2009_07.pdf [accessed: 10.05.2010]; 14) Grunewald, Bobby, "Why Church Online?" Life-Church.tv: Swerve, 13-08-2009. http://swerve.lifechurch.tv/2009/08/13/why-church-online/ [accessed: 10.05.2010]; 15) Hadden, Jeffrey K. and Douglas E. Cowan (eds.), Religion on the Internet: Research Prospects and Promises (London: JAI Press, 2000); 16) and Douglas E. Cowan, "The Promised Land or Electronic Chaos? Toward Understanding Religion on the Internet," in Hadden and Cowan (eds), Religion on the Internet: Research Prospects and Promises (London: JAI Press, 2000); 17) Hansen, Lauren, "What Happened to Second Life?" BBC News Magazine, 20-11-2009. http://news.bbc.co.uk/1/hi/8367957.stm [accessed: 10.05.2010]; 18) Helland, Christopher, "Online-Religion/Religion-Online and Virtual Communitas," in Hadden and Cowan (eds), Religion on the Internet: Research Prospects and Promises (London: JAI Press, 2000); 19) Among others mentioned in the referred web page. All of them have an open URL.

2.4. Proposal that confessions can be made via an ipad

There are other initiatives that have to do with bringing the Catholic Church closer to the digital age, such as the proposal that confessions can be made via an ipad. In the words of Adrián Gutiérrez, director of the church of San Antón (Madrid, Spain), the aim is to provide new solutions through innovation, and the project of making confessions with an ipad "is a way of making them accessible to people who, for example, have hearing problems. You can write down your sins and, in this way, it is not necessary for everyone to know what you want to confess," he explains.[17]

Of course, this proposal has the disadvantage that the absolute confidentiality of the confession is not guaranteed. We must be aware that the benefits of new technologies are associated with the possibility of cyber-attacks that can steal data. This is undoubtedly a very delicate issue that must be considered in order to be able to facilitate this type of confession for the faithful.

[17] Ibid. and also consulted at https://repository.globethics.net/ [accessed: 11.05.2022].

2.5. To broadcast their trades via streaming so that they can be seen anywhere in the world

Unfortunately, it is becoming increasingly common for citizens not to attend mass regularly.[18] It is for this reason that, in order that the Word of God can be heard by as many people as possible, projects of this kind are born. That is the reason why the NGO "Mensajeros de la Paz (Messengers of Peace)"[19] decided to broadcast its services by streaming so that they can be seen anywhere in the world.

3. CRITICAL STANCE OF CHURCH SECTORS TOWARDS THE USE OF TECHNOLOGY AND THE POSSIBLE BREAKDOWN OF THE ECCLESIAL COMMUNITY

Despite the fact that the Catholic Church has always stood out throughout its history for adapting to the environment in which it operates without renouncing its dogmas of faith. This capacity for mutation has allowed it to survive.

It is also true that there are sectors of the Church that have their misgivings about the profound transformation brought about by the irruption of technology into the life of the Catholic Church [González 2018].

Some sectors of the Church fear that the possibility of praying from home and in front of a mobile phone could, on the contrary, destroy the ecclesial community. Faced with the option that everything can be done remotely, this more traditionalist sector maintains that the faithful might even stop feeling the need to go to church. Attending mass, meeting and talking with church members – all these Christian customs could be replaced by new technologies.

CONCLUSIONS

Finally, and as a sort of summary, we may conclude after reading this article, that the determined will of our most recent Holy Fathers to ensure that the Catholic Church does not develop behind the back of the tremendous technological evolution that has taken place in recent years, has been reflected in the development and implementation of numerous digital resources, which in any case, manage to bring the Catholic Church closer to the faithful, as well as to accommodate the changes that occur in reality.

[18] According to Spanish CIS barometer data, almost 60% of those who consider themselves Catholics stated that they hardly ever attend Mass.

[19] NGOs represented mainly in the church of San Antón (Madrid, Spain).

However, we must not lose sight of the fact that the significant economic differences between Europe and Africa necessarily translate into greater difficulty for African countries to guarantee access to technological means to bring the faithful closer to the Catholic Church. This is without prejudice to the exponential development that has taken place in the involvement of the Catholic Church with new technologies.

REFERENCES

García, Jorge G. 2018. "La Iglesia se está actualizando (tecnológicamente)." https://elpais.com/retina/2018/02/22/innovacion/1519310085_710108.html [accessed: 11.05.2022].

González, David. 2018. "Las Iglesia se abre a las nuevas tecnologías: de los cepillos electrónicos a las Apps cristianas." https://elcierredigital.com/masmedia/355626135/iglesia-tecnologia.html [accessed: 11.05.2022].

Haedgel, Maylis. 2015. "Religión y tecnología: cuando la iglesia se aplica." https://www.lejournalinternational.fr/Religion-y-tecnologia-cuando-la-iglesia-se-aplica_a2955.html [accessed: 11.05.2022].

Hutchings, Timothy. 2010. "The Internet and the Church: An Introduction." https://doi.org/10.1177/0014524610377955 [accessed: 11.05.2022].

Mourdoukoutas, Eleni. 2017. "Africa's digital rise hooked on innovation." https://www.un.org/africarenewal/magazine/may-july-2017/africa%E2%80%99s-digital-rise-hooked-innovation [accessed: 11.05.2022].

Ruiz, Lucio A. 2022. "La Iglesia en la era digital." https://es.catholic.net/op/articulos/20752/cat/156/la-iglesia-en-la-era-digital.html#modal [accessed: 11.05.2022].

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ROMAN LAW AS AN IDEA BASIS FOR PUNISHING IN THE CONDITIONS OF THE SLOVAK REPUBLIC*

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Abstract. In the presented paper, the author focuses on the study and description of the influence of Roman law, or its ideological bases, on the legal regulation of punishment through the Criminal Code in the conditions of the Slovak Republic. Author then pays special attention to the legacy of Roman law and its identification in the institutes which form the basis of the punishment mechanism, as well as the importance of this legal system for the individual basic principles on which punishment is subject in the conditions of the Slovak Republic. Finally, the author also deals with the method of punishing the so-called concurrence of criminal offenses (as a form of multiple crime), in comparison with the basic approaches that were created in the given sphere by the legal system of Roman law.

Keywords: Roman law, punishment, basic principles of punishment, Criminal law of the Slovak Republic

INTRODUCTION

Among all branches of law, criminal law is perceived as having the most severe sanctions, or one that interferes with the rights of individuals by perhaps the most. This is conditioned and caused precisely by the fact that criminal law undoubtedly protects the most important interests in society, whether we are talking about the interests of individuals, legal entities, the state or the European Communities.

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It is then indisputable that if such a system is to work, it is important that the penal framework itself is set up properly. Although we have no doubt that it is the criminal policy of a state (and thus the approach of the legislator to sanctioning) that reflects the living conditions of a given society as well as the historical memory of which state, it would be wrong for us to look at these in the way that we would not consider the importance of Roman law for the given sphere of criminal law.

We believe that what we perceive as the basic research goal of the presented paper, that it is the significance of Roman law for the system of punishment in the conditions of the Slovak Republic that is observable, both within the individual institutes and within the ideological basis itself. In the following text, we will therefore address the specific areas in which aspects of Roman law could be identifiable.

1. GENERAL ON THE IMPORTANCE OF ROMAN LAW FOR THE REGULATION OF SANCTIONING IN THE SLOVAK REPUBLIC

If we are to characterize the basic pillars on which punishment has been imposed under the conditions of the Roman law system, such pillars would undoubtedly be an emphasis on the punishment itself and its deterrent function [Aláč 2020, 137]. In this way, the punishment affected not only the person who committed the violation of objective law, but also to other persons, whereby the imposition of punishment undoubtedly fulfilled not only the repressive function but also the preventive function (both individual and general). Already within the given framework, it is then possible to perceive certain parallels that have become part of the regulation under Act no. 300/2005 Coll. Criminal Code as amended[1] – especially in relation to the preventive function, but with the intentions of the rule of law.

The approach of the Roman law system is then linked to the fact that the imposition of the punishment (as well as the court proceedings themselves) was relatively rapid, whereas the same effectiveness is also seen in relation to the execution of such a punishment. The preventive function in terms of general prevention was fulfilled not only by the public serving a punishment,[2] but also the cruelty of punishment itself (which is not possible in the conditions of a democratic state with regard to the prohibition of torture, cruel and inhuman treatment, or with regard to the acceptance of the principle of humanism – as the perpetrator must also be treated as a human being with a framework of

[1] Hereinafter: Criminal Code or CC.

[2] However, a certain exception, which, of course, has not been reflected in the legal systems of states based on the Roman law system, is that members of the upper classes have been allowed to commit suicide in private instead of serving their punishment in public.

fundamental rights and freedoms). The type of punishment itself then depended on the person's social status, with the lower the person's status, the stricter the penalties [ibid., 138]. Looking at the time of Ancient Rome, "[...] the basic punishments were execution, exile, corporal punishment, imprisonment and fine" [Ivor et al. 2006, 341].

A primary insight into modern legal systems (with emphasis on the legal system of the Slovak Republic) gives us a certain basic answer regarding the influence of Roman law on their very content. The effect itself can be differentiated into two lines. On the one hand, it is above all the basic principles of punishment, abstractable from Roman criminal law, which still apply today (or whose derivatives are identifiable), on the other hand, it is an absolute departure from the differentiation of the type of punishment (penalty) from the social status of the person. In this context, it can be stated that while the types of penalties are determined in general[3] (in an exhaustive manner, considering the framework of the principle *nulla poena sine lege*), the actual choice of the type of punishment (and its imposition) depends on the judicial individualisation (taking into account the circumstances of the particular case). On the other hand, legal individualization expresses a certain framework, practically the lower and upper limit of the rate within which a given punishment can be imposed. Such an approach avoids the arbitrariness of the court (if the punishments are set to be absolutely indeterminate), on the other hand, it is possible to take into account the seriousness of the conduct of a person and impose an appropriate punishment (taking into account its type and degree).

Principles of imposition of punishments (penalties) in the conditions of the Slovak Republic. The principles governing the imposition of punishments are, by their very nature, categories which, in the circumstances of substantive criminal law, do not act as institutes *sui generis*, however, rather than aspects that influence and create the sentencing process as certain limits in the implementation of the work of courts and judges. From a practical point of view, they represent a concrete reflection of the protective function of criminal law in the legislative text. The link between theory and practice is extremely important, as principles, if we perceive them as rules of punishment, will only be applicable in application practice if they will be sufficiently abstract, which

[3] In the conditions of the Slovak Republic, a certain exception is the sphere of punishment of juvenile offenders (i.e. persons who have reached the age of 14 but have not exceeded the age of 18), as the legislator narrows the range of types of penalties that can be imposed in relation to them. This is mainly due to the fact that in the case of juveniles, the basic intention is not to punish the perpetrator himself, not at all to make the punishment defamatory, but to have an interest in resocializing such a person. In the above, it is then possible to observe the importance of the fact that a imprisonment can be imposed on a juvenile offender only in the most serious cases, if the imposition of another type of punishment is not relevant with regard to the criminal activity.

in our opinion is met in the conditions of calculation of Section 34 of the Criminal Code.

The first of the principles of punishing under Section 34(1) is, in essence, the purpose of the punishment, it encompasses several sub-principles, the specific combination of which undoubtedly depends on the committed act. From the text "A penalty serves the purpose of protecting the society from the perpetrator of crime by preventing him from continuing to commit crime, and creating conditions for his re-education with a view to making him lead a regular life and, at the same time, discouraging other persons from committing crime; moreover, a penalty expresses moral condemnation of the offender by the society." It is possible to derive not only individual repression (which has its limits in our view also in the principle of personality), as well as individual and general prevention. In a democratic society, repression of the perpetrator cannot be perceived as the only purpose of the imposed punishment (based on the starting points of restorative justice), this goes "hand in hand" with an interest in protecting society, or with the education of the perpetrator. It is under the elements of the offender's education that the legislator's interest in the implementation of the resocialization process is noticeable, although from our point of view, it is the line of combination of individual repression and prevention that represents perhaps the most demanding effect of punishment [Mencerová, Tobiášová, Turayová, et al. 2015, 294], with the most questionable result of the implementation. Unlike protective measures (in comparison with the provisions of Section 35(1) CC), punishment is a category of sanctions that expresses the moral condemnation of the perpetrator by society. However, it is the principle mentioned above that states that, in the end, the condemnation is not absolute but relative to the act committed.

Another of the principles of punishing is the so-called the principle of the lawfulness of punishment, which ultimately constitutes a fundamental principle of substantive criminal law. It expresses one of the lines of generally perceived legality in the conditions of the Criminal Code (as a reflection of the principle of legality contained in Article 49[4] Constitutional Act no. 460/1992 Coll. Constitution of the Slovak Republic as amended), and that the type of punishment and the sentence may be based only on the definition set by the legislator (*nulla poena sine lege*). The principle of individualization of punishment is immanently connected with the principle of legality, while in the literature [ibid., 296] we find the opinion that a punishment that is not individualized is not legal. We dare to disagree with the above in such a general definition (without further specification), as the legality of the punishment (in the intentions of paragraph 2) does not have to be conditioned by the principle of

[4] The provision: "Only the law shall lay down which conduct constitutes a criminal act, and what punishment, or other forms of deprivation of rights, or property, may be imposed for its commitment."

individualisation of the punishment.[5] However, this does not deny that these are not interacting sets, whose correct definition can be a more demanding process in practice than the decision about the guilt of the perpetrator alone [Jelínek et al. 2019, 452]. It is the principle of individualisation of the punishment (together with the personality of the punishment) that represents the category which is perhaps most reflected in the application practice and which influences the type and scope of the punishment imposed. We encounter primarily the level of judicial individualization of punishment, as the line of legal individualization (which follows from the legislative text, including mechanisms affecting the movement of the upper and lower limits of the penalty of imprisonment, primarily with the intentions of Section 38(2) CC, the institute of extraordinary punishment reduction or the application of the principle of sharpening the criminal rate may also be included here) has a more general character, as it is affected by the wording of the Criminal Code. Peculiarities of the case (with regard to the manner of committing the act and its consequence, fault, motivation, perpetrator, his circumstances and the possibility of his correction) come into consideration precisely in the process of judicial individualisation. We see the purpose of judicial individualisation not only in terms of setting the basis of proportionality of punishment, but e.g. also with regard to whether any of the alternative punishments is possible (and we do not consider this to be a marginal question). Within the above, the meaning of provisions of Section 34(5) CC cannot by overlooked, for the individualization of punishment in relation to the developmental stages of crime, or to forms of criminal cooperation.

From our point of view, personality of punishment (in accordance with the provisions of Section 34(3) CC) represents one of the most problematic principles of imposing punishments. We believe that, although it is of undeniable importance also with regard to the formation of individualisation of punishment (also an impact on the very legality of punishment), the very formulation of the given principle in the Criminal Code has a certain logical inaccuracy. While the first part of the provision "Punishment should only punish the offender [...]" is to be a rule, according to which the punishment should punish only the person of the perpetrator (while from a practical point of view it is absolutely impossible in most cases), a visible problem from the point of view of implementation, the legislator tried to suppress by the second part of the provision "[…] so as to ensure the least possible impact on his family and those close to him." We see the problem precisely in the vagueness of the

[5] Based on a kind of legality in the narrower sense, in line with the principle of *nulla poena sine lege*, on the contrary, legality in the broadest sense may, in the event of non-compliance with the individualisation of the punishment, constitute an element of disproportionate punishment, which may ultimately constitute a ground in the appeal proceedings for annulling all or part of the decision (in connection with the punishment).

connection "the least possible impact." In our opinion, this should be seen as a starting point for the sentencing process, but not an absolute limit from which there is no possibility of deviation.[6] It is indisputable that in a specific situation the punishment imposed (practically regardless of the chosen type and degree) will in some way, whether explicit or implicit, affect other persons in the environment of the offender (as defined by the legislator). However, the interest of the legislator is clearly stated, so that such an impact is as small as possible, although the assessment of the above is in the hands of the subjective opinion of the judge (or court).

Practically the last, but no less important, principle of imposing punishments in the sense of the Criminal Code is the principle of independence (paragraph 6) and the principle of exclusion of mutual applicability (paragraph 7). This is a relatively clear rule in which the court's discretion is weakened, the exception is the process of imposing several types of punishment side by side, especially in circumstances where several offenses have been committed (for example, in parallel), whereas the imposition of several types of punishment next to each other (respecting the exceptions within the meaning of paragraph 7) is the most addressive in terms of the purpose of the punishment and best reflects all areas of the offender (with regard to the wording of Section 31(2) CC). From the practical point of view, all types of punishments in terms of the wording of Section 32 CC must be perceived as separate punishments, with the exception of the penalty of loss of honorary titles and decorations and the penalty of loss of military and other rank (however, this does not follow from the principles of imposing penalties in the sense of Section 34 CC, but from the own conditions and preconditions under which the given penalties can be imposed, practically as secondary punishments). In terms of positive regulation of the principles of imposing penalties, we would like to draw attention to the wording of Section 34(4) CC, second sentence, as this was amended with the wording "[…] unless this Act provides otherwise" with effect from 1st August 2019, in connection with the adjustment of the conditions under which a punishment of house arrest may be imposed.[7]

As part of the acceptance of direct criminal liability of legal persons into the legal order of the Slovak Republic, the legislator amended (among other things) under Act no. 91/2016 Coll. on Criminal Liability of Legal Persons and on Amendments to Certain Acts, as amended[8] not only some different

[6] The above is a frequent ground of appeal in application, but in the incorrect perception of the principle as an absolute criterion, not as a basis for the discretion of the court.

[7] According to the *de lege lata legislation*, a house arrest punishment may be imposed in accordance with Section 53(2) CC "[...] for an offense with an upper limit of the penalty provided by [...] Criminal Code not exceeding ten years, but at least at the lower limit of the penalty of imprisonment established by [...] Criminal Code [...]."

[8] Hereinafter: CLLP Act.

types of penalties (with regard to Section 10 CLLP Act), as well as some principles concerning the punishment of legal entities, in the sense of Section 11 CLLP Act. Given the fact that the purpose of this paper is to focus on the impact of Roman law on these institutes, we will not go into detail on the level of penalties in relation to legal persons.

2. PUNISHMENT OF CONCURRENCE OF CRIMINAL OFFENSES

The second basic line that will be addressed in the present paper is the issue of punishing concurrence of crimes, as concurrence is punished on the basis of principles based on Roman law (at least with regard to connotations). The punishment of concurrence of crimes can be perceived as a fundamental substantive effect. As criminal law is based on the premise that in relation to the question of the offender's guilt and punishment, all provisions of the Criminal Code should be based on, the offender's criminal liability is inferred in relation to all converging crimes. In this case, however, a separate penalty is not imposed for each of the converging crimes, but a cumulative penalty or an accumulative penalty, depending on the circumstances of the particular case. In the context of concurrence punishment, certain basic principles generally apply (cumulative, absorption and sharpening principles), the specific use of which depends on the certain legislation.

First of all, with regard to the principles relating to the punishment of concurrence, criminal law theory distinguishes between three basic principles – the cumulative principle, the absorption principle and the sharpening principle. The specific concept of their use and their application framework is then determined by the Criminal Code (supplemented by constant application practice). In the case of the cumulative principle (or the addition principle), it is practically the case that the offender is punished separately for each of the crimes he has committed (in parallel), subsequently, the individual penalties imposed are added up (in the context of which this is a manifestation of the rule of Roman law *quot delicta tot poenae*). This principle primarily pursues the preventive side and the primary consideration is retribution against the offender. However, the penalties imposed in this way (usually disproportionate penalties) lose their real meaning due to their length, whereas even a correction by the maximum length of the punishment which may result from the application of the addition principle does not solve the fundamental problem of that principle. The second basic principle is the absorption principle (*poena maior absorbet minorem*), through which the emphasis is expressed not on the seriousness of the offenses but on the person of the offender. In essence, it is a procedure in which the most severe of the punishments absorbs the punishments more leniently (which would be possible if the offender were punished for each of the offenses separately). It takes three forms in legislation – the

absorption of criminal offenses, the absorption of criminal rates and the absorption of penalties [Mencerová, Tobiášová, Turayová, et al. 2015, 261]. The last of the principles of punishment of concurrence is the so-called sharpening principle (*poena maior cum exasperation*), which is a certain complementary to the cumulation and absorption principle (as it removes the excessive rigidity of the cumulative principle and, conversely, tightens the application framework of the absorption principle). In essence, in the case of the application of the sharpening principle, the most severe punishment (relating to one of the converging offenses) is further tightened, precisely because it is a crime committed in parallel. In applying the principle of sharpening, it is possible for the punishment to be imposed above the upper limit of the most severe punishment.[9]

The Criminal Code in cases of concurrence punishment is governed primarily by the principle of absorption (as it is based on the penalty rate of the converging crime, the most severe criminal offense), this is complemented in certain aspects by elements of the principle of cumulation and sharpening.

The principle of absorption manifests itself in the context of the punishment of concurrence in the sense that the punishment (whether cumulated or accumulated) is imposed according to the provision that applies to the most serious criminal offense. The most serious criminal offense is considered to be the one with the highest rate of imprisonment (or a criminal offense that alternatively allows the imposition of a life sentence), if the upper limits of the converging offenses are the same, the more severe offense is the one whose lower limit of the imprisonment is higher. However, if both the upper and lower limits of the imprisonment are the same, a more severe offense is considered to be one in which the imposition of alternative types of punishment is not possible (where a smaller number of such alternative sanctions is possible). At the same time, the Criminal Code stipulates that if the lower limits of the penalties of imprisonment are different, is the lower limit of the punishment (both cumulated and accumulated) the highest of them. From the point of view of determining the punishment, it is then true that the upper and lower limits of the imprisonment are the highest for converging offenses (in line with the principle that stricter penalty limits absorb more lenient).[10]

The elements of the cumulative principle are manifested primarily on a horizontal level, as the imposition of several types of penalties is possible in the context of concurrent penalties. As follows from Section 41(1) CC, in

[9] With regard to the application of the principle of sharpening there is only one case in which a punishment may be imposed even above the upper limit of the penalty of imprisonment.

[10] This means that in the case of concurrence of offenses with a penalty of 2 to 10 years and 3 to 8 years, the penalty for imposing a cumulative or accumulative penalty will be a penalty of 3 to 10 years. However, a new rate is not created in this way, this provides a framework for concurrence penalties.

addition to the punishment admissible in the sense of the most severe criminal offense "[…] possibly as part of a cumulative punishment [note of the author – but also in the context of a accumulative punishment, as it is imposed according to the principles for the imposition of a cumulative punishment] to impose another type of punishment, if its imposition would be justified by one of the converging offenses […]," while it is necessary to take into account the wording of Section 34(7) CC, which provides for penalties that cannot be imposed side by side. It must also be observed that, as far as possible, if only a imprisonment is imposed in respect of one of the converging offenses, the offender cannot be punished as the only punishment other than imprisonment. If there is a cumulation of types of penalties, this fact should be taken into account in relation to the imposition of such several types of penalties.

As mentioned, the absorption principle is in some cases modified by the sharpening principle in the case of concurrence penalties. The conditions for the application of the sharpening principle in relation to the imposition of a cumulative or acumulative penalty are cumulatively defined within Section 41(3) CC, the basic premise is that the use of the principle of sharpening is only possible in the case of concurrence of criminal offenses committed by several offenses (which is expressed by the legislator as "committed by two or more acts"). The principle of sharpening applies in the case of multiple concurrence, provided that the court imposes a cumulative or accumulative punishment for two or more intentional offenses, at least one of which is a crime (more serious than the offense). Applying the principle of sharpening, the upper limit of the punishment of imprisonment of the most severe criminal offense is increased by one third[11] (the basis for the calculation is the very upper limit of the most severe criminal offense, not the difference between the upper and lower limits of the imprisonment, as is the case with the calculation of the ratio of aggravating and mitigating circumstances within the meaning of Section 38 CC), while, provided that the conditions for the application of the principle of sharpening set out above are met, this is a mandatory court procedure.

CONCLUSIONS

Conclusions can be drawn both at the general level and at the specific level. First of all, within the general level, it can be stated that the influence of Roman law is undoubtedly noticeable in the sphere of punishment, even with regard to the legal order of the Slovak Republic. This is then linked to specific

[11] Assuming that the upper limit of the imprisonment of the most severe criminal offense would be 10 years, after applying the sharpening principle (an increase of one third), the new rate would be 13 years and 4 months.

conclusions, where it can be stated that the influence of Roman law is observable in the creation of the basic principles of punishing (within the meaning of Section 34 CC), however, it should also be noted that not in relation to all of them. It is precisely some of the principles (such as the principle of humanism) that are more the result of the democratic establishment of states or the democratization of criminal law in the legal systems of modern European states.

The second specific conclusion is the statement in relation to the punishment of concurrence. It is undeniable that punishing concurrence of offenses only through the principle of cumulation (where a separate penalty would be imposed for each offense committed) would be unsustainable, it is precisely the drafting of the principle of absorption or sharpening (which represents a certain compromise in relation to the punishment of concurrence) that completes the overall framework of this question. We believe that without the foundations laid down by Roman law, it would not have been possible to conceive the starting points properly in relation to this issue.

It can then be comprehensively stated that, after a basic view, it is indisputable that the setting of punishment in the conditions of the Slovak Republic is influenced by the starting points of the legal system of Roman law, primarily as an ideological basis, although in some issues it is possible to identify a broader impact (such an issue is undoubtedly the fundamental principle of criminal law *nulla poena sine lege*, which limits the issue of punishment itself in practically all legal systems of modern European states).

REFERENCES

Aláč, Michal. 2020. "Vplyv rímskeho práva na trestanie." In *Rímsko-kánonické východiská slovenského a európskeho verejného práva. Zborník z konferencie Katedry rímskeho a cirkevného práva uskutočnenej 25. septembra 2020 na Právnickej fakulte Trnavskej univerzity v Trnave v rámci medzinárodného vedeckého kongresu Trnavské právnické dni*, edited by Vojtech Vladár, 137–50. Praha: Leges.

Ivor, Jaroslav, et al. 2006. *Trestné právo hmotné 1 všeobecná časť*. 1st edition. Bratislava: Iura Edition.

Jelínek, Jiří, et al. 2019. *Trestní právo hmotné. Obecná část. Zvláštní část.* 7th updated and supplemented edition. Praha: Leges.

Mencerová, Ingrid, Lýdia Tobiášová, Yvetta Turayová, et al. 2015. *Trestné právo hmotné všeobecná časť*. 2nd updated and revised edition. Šamorín: Heuréka.

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THE ASSIGNMENT OF RECEIVABLES AND THE CHANGE OF PARTIES TO A CONTRACT IN THE POLISH LAW IN THE PROJECT OF THE NEW CIVIL CODE

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Abstract. This article presents the draft of the new Polish Civil Code with the focus on the transfer of receivables and the change of parties to a contract, a doctrine which has been unknown to the Polish law so far. The relevant considerations are preceded by an introduction to the origins of the work of the Codification Committee and the presentation of the sources of comparative studies. Next, there is a short discussion of the current regulations of assignment followed by detailed proposals of solutions provided in the new Civil Code with regard to the assignment of receivables and the change of parties to a contract, e.g. the effects of the contractual clause prohibiting the assignment of receivables, the rules for the transfer of future receivables and its definition, assignment in bulk and multiple transfer.

Keywords: change of a subject in a contractual relationship, assignment of receivables, change of parties to a contract, the Polish contract law, Codification Committee

INTRODUCTION

In November 2008, the President of the Civil Law Codification Committee at the Justice Minister of the Republic of Poland, Professor Zbigniew Radwański, authorised by the Presidium of the Codification Committee, appointed the Civil Law Codification Committee team composed of Professor Zbigniew Radwański, Jan Mojak , and Jacek Widło, with an aim to prepare a draft of the new Civil Code focusing on the change of subjects in contractual relationships.

The revisions approved by the Codification Committee in 2009 included the drafts of amended or entirely new provisions of the Civil Code, numbered

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from 1 to 26, and focused on such doctrines of the law of obligations as the transfer of receivables, cessio legis, debt takeover and the contractual change of parties to an obligation.

Following the study of the draft provisions of Book II of the new Polish Civil Code as of 2015, the Codification Committee of that term departed, to some extent, from the solutions adopted by the Codification Committee in 2009.

This study attempts to evaluate the current stage of work on the review of the civil law provisions, focusing on the contractual change of parties to an obligation.

Practical experience, trade needs and the analysis of model solutions (Draft Common Frame of Reference (DCRF), UNIDROIT of 2004 and 2010) as well as foreign codes indicate that it is necessary to update provisions on the transfer of receivables and introduce a new doctrine – the change of parties in a contractual obligation – to the Polish law.

The proposals of individual solutions and new provisions were based on a broad spectrum of national and foreign reference literature, comparative analyses of foreign systems and model studies focusing on the transfer of receivables and the change of the debtor, in particular the ones referred to above, such as the Draft Common Frame of Reference (DCRF),[1] the Principles of European Contract Law (PECL) [Lando and Beale 2000],[2] the UNIDROIT Principles of International Commercial Contracts of 2004 and 2010,[3] the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) and the UN Convention on International Factoring.

[1] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCRF) Full Edition, prepared by the Study Group on European Civil Code and the Research Group on EC Private Law (Acquis Group), edited by Christian Von Bar and Eric Clive, vol. 1 (Sellier 2009). Following the European Parliament resolution of 03 September 2008 on the common frame of reference for European contract law, O.J. C 295 E/31, the Draft Common Frame of Reference is a guiding recommendation (a collection of non-binding guidelines) for the internal legislator in designing civil law, which should be taken into account when designing provisions. More information of the unification of private law, in particular contract law, can be found in: Lando 2003, 123–33; Weatherill 2004b, 633–60; Brouwer and Hage 2006, 7; Weatherhill 2004a, 23–32; Von Bar 2005, 17–26; Staudenmayer 2005, 95–104; Röttinger 2006, 807–27.

[2] The Polish text of the Principles (Part I and II) in the Translation of M.A. Zachariasiewicz and J. Bełdowski, in: "Kwartalnik Prawa Prywatnego" 3 (2004), p. 815ff. The text of Part III of the Principles in the translation of J. Bełdowski and A. Kozioł, in: "Kwartalnik Prawa Prywatnego" 3 (2006), p. 860ff.

[3] The updated UNIDROIT Principles of 2010, Rome 2010 and UNIDROIT Principles of 2016, do not change the rules for the transfer of receivables or the change of parties in a contractual relationship in principle: http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 [accessed: 01.02.2022].

1. THE CHANGE OF PARTIES TO A CONTRACT AND THE TRANSFER OF RECEIVABLES IN MODEL REGULATIONS

The change of parties to a contract has not been the subject of analysis in Polish legal literature and jurisdiction so far, except for the fact that the problem has been noted.[4]

The change of parties to a contract would mean that one legal act could change the status of the party to a contract, both as a creditor and debtor. In different legal systems, such as the Polish system so far, this effect could be achieved by a separate act of the transfer of receivables and a separate act of the change of the debtor so that it becomes the same subject. As a result of such an act (a set of activities), the person taking over by way of singular succession inter vivos would assume the general legal situation of the party in the legal relationship while the contents of the obligation would remain the same. The premises and validity as well as effectiveness of this act would have to be verified and assessed separately for each of these activities. Currently, such a change would require two agreements between the seller and the buyer of receivables and between the person taking over the debt and the so-far debtor with the consent of the creditor (or, respectively, the debtor). Both activities could be combined into one. Obviously, such agreements are needed in the relationship of rent, lease, the supply of energy, gas, heat and water, etc. By way of exception, the law provides for the subject to assume the rights of the party to a contract (e.g. the owner of a farm assumes the relationship of contracting and replaces the producer (Article 625, sentence 1 of the Civil Code[5]), but this relationship is a consequence of the law, not a legal act of parties.

This would, in fact, be a set of legal activities, including at least two. The evaluation of their effectiveness should be separate for each of them. The international doctrine, first in Germany, noticed the possibility of formulating a singular concept of the change of parties to a contract under one act (*uno actu*) [Nörr and Scheyhing 1983, 8; Möschel 2012, 1667ff].[6] The legal relationship of obligation creased to be seen as the one where subjects could not be changed a long time ago, which is why the possibility of creating one legal figure, the change of parties to a contract, was noticed. Quite often in the

[4] Except for the publication of P. Drapała [Drapała 2016, 261], which discusses this legal situation. The existence of the problem was mentioned in individual statements which pointed to the fact that Polish law does not provide for the principle of the complex change of parties to an obligation [Czachórski 1999, 329; Radwański 2008, 363; Kurowski 2010]. For legislation, see the judgment of the Supreme Court of 13 January 2004, ref. no. V CKN 97/03, OSNC 2005, No. 2, item 34, the resolution of the Supreme Court of 17 May 2012, ref. no. I CSK 315/11.

[5] Act of 24 April 1964, the Civil Code, Journal of Laws of 2020, item 1740 as amended [hereinafter: CC].

[6] Information on the Austrian law can be found in: Mader 1997, 528–29.

law, a subject – the buyer assumes the general legal situation of the seller (the sale of inheritance, the sale of an enterprise, the purchase of a property which is related to the entry into the relationship of lease). In order for this act to be effective, the other party in the relationship must consent to it [Drapała 2016, 267]. This consent may be conditional, it does not need to be given simultaneously (for the same act). The law should regulate the act of giving and the admissibility of the consent "for the future" as well as the effects of the absence of such a consent. The premises, validity, effectiveness and causal nature of the contractual change of parties to a contract would be analysed as a whole, not for the individual stages of these acts, which is the case at present.

The change of parties to a contract, the assignment of a contract or the acquisition of a contract are known both in Germanic (Germany, Austria and Switzerland) and Roman legal systems [ibid., 265].[7]

In most legislations it is not regulated by legal norms. The regulation of the change of parties to a contract can be found in the Italian Civil Code (Articles 1406–1410), the Portuguese Civil Code (Articles 424–427), the Dutch Civil Code (Article 6. 159) and the Hungarian Civil Code (Article 6:208–6:211) [ibid., 266].[8]

The change of parties to a contract and the assignment of receivables was also regulated in model regulations.

Book III, Chapter 5, of DCRF regulates the assignment of receivables and the change of parties to a contract. Also, the assignment of receivables and the change of parties is regulated in a separate section of another document – Chapter 9 of the UNIDROIT Principles.

Both regulations treat the transfer of receivables as a contractual legal act transferring receivables from the seller to the buyer without the need to obtain the debtor's consent (Article 9.1.1 and 9.1.7. of UNIDROIT, III 5: 102. (3) of DCRF).

The trade in financial instruments for which a register entry is required is excluded from the scope of the regulations of Book III, Chapter 5 of DCRF (III 5: 101. (2) of DCRF). The provisions concerning security rights regulated in Book IX have priority over the aforementioned provisions on assignment.

The UNIDROIT Principles also exclude the rights transferred in the course of transferring a business from the scope of assignment (Article 9.1.2. of Unidroit).

DCRF emphasises the possibility of assigning future receivables (rights) and assignment in bulk. The evaluation of the sufficient identification of the future right (future receivables) and the disposing effect is moved to the moment when the receivables arise (III. – 5: 106 of DCRF, Article 9.1.5 of Unidroit on

[7] And the reference literature cited there.

[8] See the Hungarian regulation cited therein, in footnote 15, p. 265. Its discussion will be excluded as it may be found in the above-mentioned publication.

the transfer of future receivables, Article 9.1.6 of Unidroit on assignment in bulk). The admissibility of the assignment of a part of receivables (monetary in principle) was also regulated and the conditions for the assignment of non-monetary receivables were defined (including assignability in part III. – 5: 107 of DCRF, Article 9.1.4 of UNiDROIT).

As for the effects of the contractual prohibition to sell receivables (pactum de non cedendo), it was expressly stated as a rule that this reservation does not influence the exclusion of the transferability of the receivables it applies to (II. – 5: 108 of DCRF), but in the Unidroit Principles it concerns monetary receivables only and non-monetary principles if the buyer acted in good faith (the assignee did not know and could not have known about *pactum de non cedendo* – Article 9.1.9 of Unidroit). The regulations and special effects of the contractual prohibition of the assignment of receivables, in particular the mechanism of protecting the debtor who completes performance despite the fact that assignment was a breach of the contractual prohibition were also indicated.

DCRF and the Unidroit Principles also specify in detail and according to norms (under the law) the scope of the assignor's liability towards the assignee in assignment and for what circumstances the assignor is liable with regard to the receivables transferred (in particular, the fact that the receivables exist, the assignor is entitled to them, they were not subject to assignment or a securing act for the benefit of a third party – III. – 5: 112 of DCRF, Article 9.1.15 of Unidroit).

DCRF defines in detail the effects of the transfer of receivables (including future receivables), multiple assignment (multiple assignment of the same receivables giving legal effects, in principle, to the first act of assignment (III. – 5: 114). It proclaims the principle of the transfer of accessory rights (III. – 5: 115 of DCRF) and the rights securing the performance of the rights assigned (Article 9.1.14 [b] of Unidroit) together with the receivables assigned.

Model laws also indicate that the system of the debtor's defences includes the principle that assignment may not deteriorate the status of the obliged party, which means that the debtor, in principle, may invoke against the assignee all the defences that the debtor might have invoked against the assignor, in particular the right of the set-off of mutual receivables against the assignor, which may be exercised in the relationship with the buyer of receivables (III. –5: 116 of DCRF, Article 9.1.13 of Unidroit). The debtor, acting in good faith, is protected and the debtor's performance to the seller (assignor) is effective so long as the debtor has not received a notice of assignment (reliable information III. – 5: 119 of DCRF). The debtor has a right to obtain the confirmation of the transfer made from the so-far creditor (assignor – III. – 5: 119 of DCRF, Article 9.1.12 of Unidroit). In the case of multiple transfers of the same receivables, the debtor is released if the payment is made to the assignee whose

assignment was first notified to the debtor (III. – 5: 121 [1] of DCRF, Article 9.1.11 of Unidroit).

A novel solution is the possibility of monetary performance in any place in the EU and, at the same time, charging the increased costs incurred by the debtor to the assignor, which is a new concept in the Polish law (III. – 5: 117 of DCRF).

Both model laws provide for the possibility of changing a party to a contractual obligation which makes it possible to transfer the rights of the party to the contract upon a third party with the consent of the other party that has been the party to this contract so far (III. – 5: 301 [1] of DCRF, Article 9.3.1, Article 9.3.3 of Unidroit).[9] The consent of the other party may be given in advance (III. – 5: 302 [1] and [2] of DCRF, Article 9.3.4 of Unidroit).

2. THE TRANSFER OF RECEIVABLES AS REGULATED BY THE POLISH LAW TODAY

Until now, the Polish law has not regulated the possibility of changing a party to a contractual obligation by a single legal act. To achieve the desired legal effect in a reciprocal agreement, it was necessary to transfer rights (the assignment of receivables – Article 509ff CC) by a separate act and change the debtor by another act (the successive change of a debtor – Article 519ff CC[10]).

The provisions on the transfer of receivables can be found in a separate section of regulations. Currently, the Polish law provisions do not regulate the transfer of future receivables or the change of a party to an obligation at all, although the judicature and the doctrine permit the trade in future receivables postulating its normative regulation. Such regulation has been implemented in other legal systems and model laws.

Under the Polish law, the transfer of receivables (assignment) is a contract concluded by the existing creditor (assignor) with a third person (assignee) under which the assignee acquires a claim from the assignor. In fact, the transfer does not require the debtor's participation or consent (Article 509(1) CC).[11] The creditor may transfer any claim upon a third person, unless it is against the law, the nature of the obligation or a contractual stipulation (*pactum de non*

[9] More detailed references to model regulations will be made when the change of parties to a contract is recommended in the draft of the Polish Civil Code.

[10] For the English translation of Articles 509–525 CC, see https://supertrans2014.files.wordpress.com/2014/06/the-civil-code.pdf [accessed: 01.02.2022]. The regulations are also cited in the footnotes.

[11] Article 509(1): A creditor can, without the debtor's consent, transfer a claim to a third party (assignment) unless the same is contrary to the law, a contractual stipulation or the nature of the obligation. Article 509(2): The assignment of a claim transfers to the assignee all the rights related to the claim, especially a claim foroutstanding interest.

cedendo). Contractual stipulations may exclude the effectiveness of a transfer (restrict the transferability of a claim).

The subject of a transfer is a claim, also the one resulting from mutual obligations. The scope of the assignment of receivables may be broad and, in fact, lead to the situation in which "the assignee acquires the legal status of a seller[12] as a result of a specific obligation."

As regards other kinds of rights which can be transferred under the regulations on the assignment of receivables, it has been stated that in order to transfer rights on non-material goods, the provisions on the transfer of receivables should be applied.[13] The following arguments support this view. An assignment seems to be a model procedure for the transfer of any rights *in rem*, not just one category – relative rights of receivables. In the legal systems that permit disposing acts (Germany), positive legislation provides for the transfer of receivables (assignment) as a model doctrine implementing the transfer of rights in rem upon third persons by way of legal acts. Pursuant to para. 413 of the German Civil Code (and the doctrine), the provisions on assignment[14] should be applied in order to transfer rights on non-material goods. There is a similar reference in the Lithuanian law (Article 7.110 of the Lithuanian Civil Code).

Providing a historical interpretation of the Polish regulations it must be mentioned that the above issue was regulated directly in the Code of Obligations. Pursuant to Article 176 of the Code of Obligations "the provisions on the transfer of receivables are applied, respectively, in order to transfer any kind of rights to third persons unless there are any specific regulations that apply in this respect" [Widło 2002a, 178].

A claim may be transferred by a contract with a dual effect (obligation and disposition, e.g. a contract of sale) or a distinctive dispositive contract. No special form is needed to make the transfer valid – if a claim is confirmed by a writ, the contract of transfer should also be in a written form reserved *ad probationem*.

In its Article 510(1) CC accepts, as a rule, the French system of obligation contracts with a dual effect (obligation and disposition) [Mojak 1990, 13]. The effect of disposition may be excluded by a specific provision or the will of the parties. In such a situation, a contract of obligation will not have a dispositive

[12] This definition of an assignment is a continuation of the pre-war legislative thought and a direct reference to Article 170(1) of the Code of Obligations which provided that "the buyer acquires the rights of the creditor at the moment of concluding the contract of the transfer of receivables" [Mojak 1990, 154].

[13] See, in particular, Łętowska 1980, 902.

[14] Pursuant to para. 413 BGB, an assignment may be applied to the transfer of rights in rem other than receivables unless specific regulations provide otherwise. Following this regulation, assignment provisions may be applied to the transfer of rights on non-material goods, corporate provisions or some transferrable family rights [Medicus 2015, 322–23ff].

effect, which may be achieved by an additional distinctive contract of disposition [Zawada 1990, 29, 33]. An assignment, which has already been mentioned, is a causative legal act in the Polish law [ibid., 54, 55].

The statutory consequence of an assignment involves the transfer of a claim from the seller to the buyer. Together with the claim, the assignee obtains all the rights related to it, in particular claims for outstanding interest. The debtor's legal situation may deteriorate as a result of an assignment – the debtor may raise against the assignee any defences it had against the assignor at the moment of becoming aware of the transfer (Article 513(1) CC).[15] As a rule, an assignment is effective at the moment of concluding the contract of the transfer of a claim, which is made *solo consensus*.[16] No consent or notification of the debtor is needed for the transfer to be effective [Mojak 1990, 156].

Pursuant to Article 516 CC "The assignor of a claim is liable towards the assignee for being entitled to the claim. The assignor is liable for the debtor's solvency at the time of assignment only to the extent that he accepts such liability."

3. JUSTIFICATION OF THE NEED OF CHANGE

The Polish law has not regulated a number of issues related to receivables so far. It does not regulate the change of a party to a contract, either. A decision has been made to re-write the Civil Code so that it may include the existing achievements of science and judicature. The shortcoming of the current legal situation is the absence of regulations on the assignment of future receivables whose disposition is different from the assignment of existing receivables with respect to the way of identification, the moment of disposition or the impact of the assignor's bankruptcy upon the assignment effectiveness. The issue of a global assignment has not been solved either, despite the fact that it is permitted in practice. Finally, both the comparative analysis and the needs of economic trade indicate that it is necessary to strengthen the status of the buyer of the claim increasing its protection, just like the status of third persons at the cost of the assignor's position.

In its work, the Codification Committee adopted an assumption that although the regulations on the transfer of receivables in force so far represented

[15] Article 513(1): A debtor is entitled to all defenses against the assignee of the claims which it had against the assignor at the time it learned of the assignment. Article 513(2): A debtor can set off any claim it may have against the assignor against the assigned claim even though it became due and payable only after the debtor received notice of the assignment. This does not, however, apply where the claim against the assignor became due and payable after the claim which is the subject of the assignment.

[16] This is not changed by the fact that performing the service into the hands of the assignee is effective until the moment when the debtor is notified of the transfer.

a high juridical level, they needed to be updated to satisfy the needs of contemporary trade. This applies, in particular, to the following areas: 1) special regulation of the disposal of future receivables; 2) codification and clarification of the admissibility of assignment in bulk; 3) regulation of the legal consequences of abandoning the written form of the contract of transfer for evidence purposes; 4) new provisions on the contractual prohibition or restriction of assignment (*pactum de non cedendo*); 5) extension of the system of guarantees and assurances for the assignor (Article 516 CC, which is still in force); and 6) ineffectiveness of the changes of receivables for the assignee if made without the assignee's consent, after the transfer. Additionally, the new doctrine that requires regulation in the Polish law is the change of parties to a contractual obligation, in particular with regard to professional trade.

4. THE AMENDMENTS REGARDING THE ASSIGNMENT OF RECEIVABLES AND THE CHANGE OF PARTIES TO A CONTRACT PROPOSED BY THE CODIFICATION COMMITTEE

This part of the article is devoted to the changes and legislative proposals included in the draft of the new Polish Civil Code and their evaluation.

4.1. The problem of the fragmentation (decodification) of regulations on the transfer of receivables in the current draft of Book II of the Civil Code

The provisions on the transfer of receivables might be included in one section of the draft of the new Civil Code, e.g. a separate section of Chapter 4 of Book II of the draft Civil Code. This is the solution applied so far in foreign legislations or model regulations (DCRF or UNIDROIT).

It should be noted that the structure of Book II – "Obligations" – of the draft of the Polish Civil Code in its current form – does not provide for a compact section including the provisions on the transfer of receivables. The current draft of Book II of the Polish Civil Code does not regulate important issues concerning the transfer of receivables, such as those related to the needs of trade or those whose regulation is a consequence of the comparative analysis of other systems or model laws. Some provisions initially designed were entirely removed (e.g. the effects of *pactum de non cedendo*, the transfer of future receivables, assignment in bulk), some were included in the provisions on the execution of obligations, e.g. Article 144,[17] Article 149–153,[18] Article 154 of the draft of Book II "Obligations."

[17] [The transfer of a part of receivables] If a part of receivables is transferred, the seller is liable before the debtor for the costs incurred due to performance.

[18] Article 149. [Performance to the seller of receivables] As long as the seller or the buyer has

There are two major arguments in favour of including the provisions on the transfer of receivables in one title of the draft of Chapter 4 of Book II of the Draft Civil Code.

Firstly, including these provisions in various parts of the draft of Book II of the Civil Code, extremely difficult in terms of analysis and application, results in a certain decodification of the rules following from them and impedes their perception, not just for ordinary users of the Code, but even for professional lawyers. They should also be seen from the perspective of a separate system of the transfer of rights, which includes the transfer of receivables,[19] and the circumstances that assignment leads to the change of the subject in an obligation and sometimes even to the configuration of many subjects on one side of the obligation (in the transfer of receivables resulting from mutual obligations). In the current version of the draft of Book II of the Civil Code, Chapter IV is entitled "The change of the debtor and parties in an obligation," but the change of the creditor was ignored. It is not known why the change of the creditor in an obligation was not taken into account. Is it possible that this classical principle of the law of obligations is not equivalent to others and hence does not deserve to be treated similarly to the change of the debtor or parties to an obligation?

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not informed the debtor about the transfer in a written form, the performance to the seller is effective with regard to the buyer, unless the debtor knew about the transfer at the moment of performance. This provision applies, respectively, to other legal acts performed between the debtor and the seller. Article 150. [Performance to the buyer] If the debtor, who was notified of the transfer in a written document provided by the seller, performed to the buyer of receivables, the seller may invoke, with regard to the debtor, the invalidity of the transfer only when the debtor was not aware of it at the moment of performance. This provision applies, respectively, to the legal acts between the debtor and the buyer of receivables which satisfy the creditor. Article 151. [Multiple transfer] Para. 1. If the seller concluded several contracts of transfer for the same receivables, performance to the seller indicated in the earliest notice of the transfer received releases the debtor form the obligation, unless the debtor was not aware of the earlier transfer at the moment of performance. The provision of Article 154(2) (the debtor was unaware of the creditor) applies accordingly. Para. 2. The rights of the buyer following from the receivables have precedence over the rights of creditors – sellers of receivables if the contract of transfer was concluded before the transferred receivables, existing or future, were assumed. This also applies to the situation when the bankruptcy of the seller of receivables, including the liquidation of assets, was announced, unless specific regulations provide otherwise. Article 152. [Defences of the debtor against the seller] Para. 1. The debtor is entitled to all the defences against the buyer of receivables that the debtor had against the seller at the moment of transfer. Para. 2. The debtor may set off the receivables that the debtor is entitled to with regard to the seller against the receivables transferred, unless they were acquired after the notice of transfer or their due date falls later than the due date for the receivables that are the subject of transfer.

[19] Which, so far, has been the model, just like the mechanism of transferring rights for the transfer of other rights than receivables, see Liebeskind 1938, 1908ff, also see Article 176 of the Code of Obligations.

Secondly, the designed provisions about the change of parties refer to the provisions on the transfer of receivables.[20] Thus, following editorial rules and the rules of correct legislation, one editorial unit should include provisions about the transfer so that the scope of reference within referring provisions is known regardless of the comments on the transfer of receivables and the change of parties to a contract that can be found below. To put it simply, a reader of the draft Civil Code, when reading the contents of the document or analyzing its structure, will not find a group of provisions concerning the transfer of receivables. He or she must analyse the entire legal act and search for them, provision by provision.

4.2. The problem of *pactum de non cedendo*

We propose that the Polish law adopt the effectiveness of the transfer of receivables made against the contractual prohibition of the sale of receivables.[21] This applies both to monetary and non-monetary receivables.

The way of resolving the effects of the contractual stipulation prohibiting such a disposal of receivables when the disposal made with a breach of the prohibition is considered effective should be considered proper, with the reservation of some exceptions. This issue should be regulated in the Civil Code in the way proposed in the draft provision formulated by the Codification Committee, which has the following wording "The transfer of receivables made against the contractual prohibition is effective. This does not apply to the case when the buyer knew or should have known about the prohibition of the transfer of receivables, except for those when the debtor gave its consent to the transfer. The seller of receivables is liable before the debtor for the damage resulting from the breach of the contractual prohibition of transfer."

The above proposal is a compromise with regard to resolving the problem of the breach of the contractual prohibition to sell receivables by the assignor (*pactum de non cedendo*). The Supreme Court judicial decisions[22] as well as the comparative analysis indicate towards the trend of limiting the effectiveness of *pactum de non cedendo* already in the context of the current regulatory environment. It seems that the dominant trend is to treat the transfer of receivables which breaches the prohibition of the disposal of receivables as

[20] Following Article 31 of the draft [Consent to the change of parties], the change of parties in a legal relationship following from a contract is effective if the other party consents to it. The regulations on the transfer and take-over of the debt are applied accordingly.

[21] The effects of pactum de non cedendo following the views held so far are discussed in: Mojak 2004, 41; Łętowska 1980, 903 and, extensively, in: Krzykowski 2012 and the reference literature cited therein.

[22] See, e.g. judgment of the Supreme Court of 5 April 2006, ref. no. I CSK 189/05, OSP 2007, No. 5, item 63; resolution of the Supreme Court of 6 July 2005, ref. no. III CZP 40/05, OSNC 2006, No. 5, item 84.

effective, although there are less or more far-reaching exceptions from this rule. When the final proposal was being prepared, some model solutions were considered. Out of them, the clearest juridical solution seems to be included in Article 9.1.9 of the UNIDROIT Principles of International Commercial Contracts of 2004 and 2010. The proposal aims to achieve the same results as the regulation of *pactum de non cedendo* included in Article III. 5. 108 of DCRF, which, in a very extensive and casuistic way, regulates the breach of the contractual prohibition of the transfer of receivables.

Hence, in the conclusion, we propose that the effectiveness of the transfer of receivables made against the contractual prohibition of transfer be adopted. At the same time, we adopt as a rule that there arises an obligation of compensation for the assignor to the debtor for the breach of the contractual clause on the prohibition of the disposal of receivables. An exception from the rule of the effectiveness of the transfer made against the contractual prohibition will occur when the buyer knows or should know about the prohibition of the transfer of receivables. Such an act performed *in fraudem legis* to the detriment of the debtor will be ineffective with regard to the debtor. The sanction of the ineffectiveness of the transfer with regard to the debtor will not be applied, however, if the debtor gives its consent to the transfer, even after it occurs. This new solution would be a qualitative change that would require to be emphasised by regulation.

4.3. The transfer of future receivables

The transfer of future receivables was determined in the initial version of Article 11 of the draft Civil Code concerning the change of the subject in an obligation. Following this proposal, which is recommended here, the regulation would take the following wording:

"Article 11(1). The subject of the transfer may be the receivables that do not exist at the moment of concluding the contract of transfer but will arise as a result of the legal relationship that exists or may arise in the future (the transfer of future receivables)."

"Article 11(2). The transfer of future receivables upon the buyer occurs at the moment it arises if it is sufficiently identified; it has an effect from the moment of concluding the contract of transfer, unless the parties agreed otherwise."

We propose the general prerequisites and rules for the transfer of future receivables be defined. According to the project, the differences related to the assignment of future receivables will be emphasised by regulation in individual provisions (e.g. Article 8(1), Article 11 of the draft) while the provisions of the transfer of existing receivables at the moment of concluding the contract of transfer should apply to the remaining scope of the transfer of future receivables.

The most fundamental problem is an attempt to define future receivables. There is no uniform definition of the concept of future receivables. The division and classification of the categories of future receivables has not been agreed upon, either. Most often, future receivables are determined by indicating a list of receivables included in this group [Zawada 2005, 343ff; Idem 1992, 1, 17]. Sometimes, attempts are made to define the concept of future receivables. And, for example, J. Kuropatwiński defines future receivables as "the situation of the subject of the civil law preceding the moment when receivables arise for this subject, but this situation includes both the hope for the arising of receivables supported by experience only and the cases when some regulatory prerequisites for the arising of receivables have already been satisfied, but because of the absence of the remaining prerequisites, the receivables have not arisen yet" [Kuropatwiński 2007, 53].[23] In the light of the above definition, the concept of future receivables involves both the possibility of disposing of future receivables under the already existing legal relationship and disposing of "the hope for the arising of receivables," also referred to as the future receivables "in the strict sense – also under a non-existent legal relationship at the moment of concluding the contract of transfer."[24]

Hence, we propose that a legal definition of future receivables be introduced in Article 11(1) of the draft Civil Code. Future receivables are those that do not exist at the moment when the contract of transfer is concluded and are based on the legal relationship that exists or may arise in the future.

The above definition seems to be the most accurate. There is no equivalent of it in model regulations. The approach in which future receivables may be the subject of a transfer without an attempt to define them does not specify or determine a priori the scope of the transfer of future receivables. The proposed approach outlines the "contours" of the concept of future receivables and the scope of transfer of this category of receivables. At the same time, the wording of the regulation does not finally determine the approach to future receivables, which should be done by jurisprudence and the doctrine. The contours outlined only determine that these are the receivables that do not exist at the moment of concluding the contract of transfer. In this way, other issues shall be resolved by the doctrine, jurisprudence and the practice of trade.

[23] On the origins and solutions in individual legal systems, 134 and the following pages.

[24] More information on the concept of future receivables can be found in: Mojak 2001, 18; Kuropatwiński 1998, 9, 19. A. Szpunar does not include conditional receivables and receivables with a due date in the portfolio of future receivables [Szpunar 1998, 137], also see Pazdan 2002, 122–23.

In German[25] and Swiss jurisprudence (decisions from 1915[26] and 1931[27]), the transfer of future receivables was admitted regardless of the fact whether there was a relationship of obligation at the moment of the transfer, which became its source. The Austrian jurisprudence adopted the admissibility of the assignment of future receivables in 1968[28] irrespective of the fact whether the contract of transfer identified the debtor and the legal basis of the receivables sold if at least it indicated the criteria that enabled the identification of receivables and their recognition at the moment of arising (materialisation of the disposing effect) [Kuropatwiński 2007, 141; Zawada 1990, 35ff].

So far, the Italian and French law favoured the approach of assigning the prospects of receivables or future receivables for which there was a legal trace of existence but rather excluded the possibility of assigning the hope for the arising of receivables. But the Italian legislator in the provision of Article 3 of Act 52/91 directly determined the admissibility of the transfer of future receivables from the contracts that had not been concluded yet at the moment of transfer [Kuropatwiński 2007, 142].

The position of the Polish doctrine and jurisprudence boils down to the general rule that the assignment of future receivables is admissible [Grabowski 2000, 565]. What needs to be resolved is the following: whether the provisions on the transfer shall be applied directly or by way of analogy to the transfer of future receivables, the effect of the transfer of future receivables, the admissibility of the transfer of the sheer hope for receivables, i.e. the receivables for which there is no legal relationship yet that could give rise to them.

A part of the Polish doctrine (K. Zawada) and the most recent jurisprudence of the Supreme Court[29] indicate that, already on the basis of *legis latae*, the transfer of future receivables in their strict sense (the hope for the receivables to arise – also those that will arise from a legal relationship to be established in the future) is admissible. What needs to be done is the fulfilment of some conditions related to the identification of the receivables assigned at the moment of its establishment, following the principle that the subject of disposal should be a specific right, individually identified [Zawada 2014, 1333ff]. Assuming that future receivables are transferred upon the buyer only at the moment when they arise (disposing effect), the subject of the transfer

[25] Rulings of the Reich Court (RZG), 1932, 2174, Juristische Wochenschrift (JW.), RZG 1968, 238, Neue Juristische Wochenschrift 1968, 2078.

[26] BGE (Swiss Federal Trybunal) 25, vol. II, 322.

[27] BGE ((Swiss Federal Trybunal) 41, vol. II, 134.

[28] Decisions of 31 July 1969 [Honsell and Heidinger 1998, 498].

[29] See the resolutions of the Supreme Court: of 19 September 1997, ref. no. III CZP 45/97, OSNC 1998, No. 2, item 22, of 30 January 2003, ref. no. V CKN 345/01, OSNC 2004, No. 4, item 65, of 25 June 2014, ref. no. IV CSK 614/13, of 26 June 2015, ref. no. I CSK 642/14, of 25 June 2014, ref. no. IV CSK 614/13, of 17 March 2016, ref. no. V CSK 379/15, of 15 February 2018, ref. no. I CSK 472/17, of 17 March 2017, ref. no. III CSK 129/16.

may include such future receivables for which the contract of transfer, which was concluded, contains the data that enables the identification of the relevant receivables, when they arise, as the ones included in the contract of transfer concluded earlier [Mojak 1990, 16; Grabowski 2000, 565].[30] The rule is that the data which enables the sufficient identification of future receivables includes: the title to the arising receivables and the persons of the debtor and the creditor (the legal relationship which serves as the basis for the receivables assigned). For future receivables in the strict sense (the hope for receivables to arise), it would be sufficient to refer to such data as the type of contract which is to become the basis for the future receivables, their subject and the group of people to which the debtor should belong, but this data should be analysed separately for each case [Zawada 2014, 1031ff].

Article 11:102 of the Principles of the European Contract Law determined these issues in a similar way indicating directly the admissibility of the transfer of future receivables under the existing contract or the contract that will be concluded in the future. Article 9.1.5. of UNIDROIT (the Principles of International Commercial Contracts of 2004 and 2010) provides that it can be presumed that future receivables were transferred at the moment of the contract conclusion provided that they may be identified at the moment of arising as the receivables which make the subject of the transfer (see almost identical Article 8(1), Clause b, of the United Nations Convention on the Assignment of Receivables in International Trade and Article 5, Clause a, of the UNIDROIT Convention on International Factoring).

The above mentioned model regulations and conventions define the concept of future receivables in a similar way to the draft Civil Code.

In should be assumed that the provisions on the transfer of receivables apply directly to the transfer of future receivables, unless the provisions include separate regulations on the disposal of future receivables.

The proposed Article 11(1) offers a suggestion of how to define future receivables. But Article 11(2) includes the proposals of defining the disposing effect of the assignment of future receivables. In the case of future receivables, the disposing effect would occur at the moment the receivables would arise, but with retroactive force (*ex tunc*) from the moment when the assignment contract was concluded. This would make it possible to avoid legal problems related to, among others, announcing the bankruptcy of the assignor after the date of the assignment contract conclusion and before the arising of the receivables assigned or the seizure of the assignor's assets under enforcement proceedings. The moment of entering into the assignment contract would determine in the condition of receivables and the entity entitled to them. The legal acts performed later would have no impact on it. As a result of this regulation,

[30] The Supreme Court in its resolution of 19 September 1997, ref. no. III CZP 45/97, OSN IC 1998, No. 2, item 22. See Zawada 2014, 1028ff; Widło 2002b, 67ff.

the resolution of the issue of "one legal second" (*eine juristische Sekunde*), i.e. in whose assets the assigned future receivables arise – the assignor's assets or "promptly" in the assignee's assets – would lose relevance. This rule is also strengthened by the regulation of Article 14(2) of the draft prepared by the team.[31] Solving the problem of the effectiveness of future receivables is an equivalent of Article III. 5. 106 of DCRF and 11: 202 of PECL.

4.4. Assignment in bulk

Article 12 of the initial draft of the Civil Code of 2009 included the proposal of regulating assignment in bulk and, in line with the designed regulation, we recommend the following: "A collection of receivables may be the subject of transfer without the need to identify them individually. The transfer of individual debts from this collection upon the buyer occurs at the moment when they arise, if they may be identified as the subject of transfer."

In general, it is allowed to apply assignment in bulk in trade, which is defined as the transfer of several existing or future debts by way of one contract (one legal act). Its application in some segments of trade plays an important role as without the admissibility of assignment in bulk as well as the assignment in bulk of collections of future receivables, factoring would be impossible.[32] The proposed regulation determines the admissibility of assignment in bulk. It defines the minimum legal prerequisites that must be met in order for assignment in bulk to be effective. This regulation transposes Article III. 5. 106 of DCRF and Article 9.1.6. of UNIDROIT (The Principles of International Commercial Contracts of 2004 and 2010) onto the Polish law. Thus, it is proposed to proclaim the admissibility of the assignment of groups (collections) of receivables. The possibility of their identification is moved to the moment when a specific debt from this collection arises, when the disposing effect, i.e. the transfer of this debt upon the buyer, occurs. This also applies to future receivables. It is sufficient that the debt is identifiable at the moment of disposing. There is no need to perform any additional legal acts that would specify – *a posteriori* (after the conclusion of the assignment contract) – future receivables or the receivables that exist as the subject of the transfer. It is also assumed that the transfer of individual receivables included in the assignment in bulk, may be extended in time. The evaluation whether a specific debt was included in the transfer is done individually for each debt alone, and

[31] Article 14(2). The rights of a buyer following from receivables shall take precedence over the rights of creditors – the sellers of receivables if the contract of transfer was made before the transferred receivables, existing or future ones, were assumed. This shall also apply to the situation when the bankruptcy of the seller of receivables, including the liquidation of assets, was announced, unless specific regulations provide otherwise.

[32] See extensive deliberations on the subject by Katner 2011, 421ff and an extensive list of reference literature, both Polish and foreign, cited therein.

a valid moment of evaluation is the moment when the debt arises. The requirement of "identifiability" of a specific debt as a subject of assignment in bulk means that there should be no doubts whether the debt was the subject of the transfer (at the moment when the disposing effect occurred). Precise rules for the identification of receivables will be shaped by legislation and the doctrine (e.g. the need to indicate the debtor or groups of debtors; the admissibility of the assignment of all current and future receivables with regard to a specific entity or groups of entities with the indication of estimated amounts.

4.5. The transfer of a part of receivables

It is proposed that the transfer of a part of receivables be regulated in Article 13 of the initial draft of the Civil Code of 2009 and acquire the following wording of Article 13(1) and (2): Divisible receivables may be transferred in part. In such a case, the seller of the receivables is responsible before the debtor for the additional costs that might arise in connection with it. Partial transfer may not lead to the deterioration of the debtor's situation. If the receivables referred to in para. 1 are secured, the parties may divide the security or award the buyer the claim for the division of the security identifying the rules for division, unless specific regulations provide otherwise. In the absence of a different contract, securities remain with the part of the receivables that the seller is entitled to."

The assignment of a part of receivables would be, in principle, admissible if the receivables are divisible and the divisibility of the receivables would determine the divisibility of the performance. Secondly, the transfer of a part of receivables may not lead to the deterioration of the debtor's situation. This is the fundamental, unwritten rule of the transfer of receivables (*Zessionsrecht*) applied so far. If the transfer of receivables entailes additional costs, the assignor is responsible for them before the debtor. A true novelty would be the precise regulation of the problem of the existing securities of receivables. The Polish legal system has not regulated the case of the transfer of a part of receivables so far.

4.6. The change of parties to a contract

Undoubtedly, the draft Civil Code should regulate the principle of the change of parties to an obligation (contract). The current draft (as of the end of 2015) includes such a proposal in two provisions, i.e. Articles 30 and 31[33]

[33] Following the draft of Article 30 [The change of parties to a contract]: A party to a legal relationship following from a contract may transfer its rights and obligations upon a third party with the effect that this person becomes a party in this relationship in its place. Article 31 [The consent to the change of parties]: The change of parties in a legal relationship following from a contract is effective when the other party consents to it. The regulations on the transfer and take-over of a debt are applied accordingly.

proposed by the Codification Committee of 2009. We postulate, in particular, slightly more extensive regulation.

This principle needs to be introduced. It is only right that the admissibility of the change of parties to a contract depends on the consent of the other party.

The proposed regulations concern a new doctrine, so far unknown to the Polish law – the change of parties to a contract, also referred to as "the assignment of a contract" (*uno actu*) [Bełdowski and Kozioł 2006, 854; Wieczorek 2005, 11]. Our recommendation and proposal introduces rules and is the equivalent of Article III 5:301 and Article III 5:302 of DCRF[34] and Article 12: 201 of PECL. It also defines legal effects in a similar way to the provisions of Article 9.3.1. to Article 9.3.7 of the UNIDROIT Principles of International Commercial Contracts of 2010, which are identical to the UNIDROIT Principles of 2004 in this respect. It should be assumed that this kind of a synthetic approach is sufficient to regulate the transfer of receivables and the change of the debtor with one legal act, which leads to the change of a party, usually in mutual contracts.

In accordance with the proposed rule, currently following from Article 30 of the draft, a party to a contract may transfer upon a third person the rights and obligations following from the contract with the effect that this person becomes a party in this relationship in its place. The consent of the other party is required to change the party to a contract. This rule can also be found in the current draft of Book II of the draft of the new Civil Code. The change of parties becomes effective when the other party to the contract gives its consent to it. The analysis of the model solutions, such as DCRF or the UNIDROIT Principles, indicates that, at least in professional relations (DCRF is not limited to professional relations), the consent to the change of parties to a contract may be given in advance, which is important for the other party and makes a qualitative change in its position in the obligation – with regard to the future, planned subject changes (replacing a party to a contract with another subject[35]).

The variant of the consent given in advance (*pro futuro*) should also be regulated, just like the conditional consent of the other party to a contract, which is related to the arising of a special accession to a debt. This kind of solutions regarding the new principle would require normative regulation.

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[34] III. – 5:301: Scope. This Section applies only to transfers by agreement. III. – 5:302: Transfer of contractual position: (1) A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship. (2) The consent of the other party may be given in advance. In such a case the transfer takes effect only when that party is given notice of it. (3) To the extent that the substitution of the third person involves a transfer of rights, the provisions of Section 1 of this Chapter on the assignment of rights apply; to the extent that obligations are transferred, the provisions of Section.

[35] Which, in turn, would be an important novelty in contractual law and in the construction of the legal relationship of liability – admissible in model solutions.

The proposed wording of Article 25(3) of the draft of 2009 includes the following rule: "If the other party to a contract gives its consent to the change of parties to a contract provided that the party to the contract so far will be co-responsible for the execution of the contract, it is liable jointly with the one assuming the rights and obligations of the party to the contract, unless the parties decide otherwise."

Following the UNIDROIT Principles of International Commercial Contracts of 2004 and 2010, we propose that a party to a contract may be changed with the consent of the other party and, at the same time, retain its role of a joint co-debtor it has had so far. This possibility may be excluded by the provision of the contract concerning the change of parties to the contract which allows the assignment of the contract, but only with the releasing effect. In this situation, consent to the change of parties to the contract may be only unconditional and leads to – if it is given – the releasing change of the party to the contract. The proposed regulation – which is consistent with the DCRF and PECL model and the UNIDROIT Principles of International Commercial Contracts of 2004 and 2010 – refers to the provisions on the transfer of receivables and the change of the debtor[36] in the specific regulations of individual effects.

The change of parties to a contract and the consent of the other party to the withdrawal of the so-far party from the legal relationship would require a written (electronic) form. Such an important interference with the structure of the subject of the obligation requires a formal legal act, especially that it also entails the change of the debtor.

The main effect of the change of parties to the contract is a new subject assuming the rights and obligations of the party, which releases the party to the contract so far (releasing change of parties to a contract, not collective accession to a debt, which would be an exception for thus formulated rule). In order to achieve this effect, the other party to the contract must give its consent in writing. The change of parties to the contract becomes effective if the other party gives its consent to the withdrawal of the party to the contract so far from the legal relationship. In the conclusion, we propose that the consent to the change of parties be possible also in advance, but only if it is given by the party which is an entrepreneur (professional relations).

If the other party to a contract, which is also an entrepreneur, gave its consent in advance, the change of parties would be effective upon the notification of a third party or the person's confirmation of the change of parties.[37]

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[36] Which is why, as explained above, the regulations of the transfer of receivables should be included in one, separate section of the draft of the Polish Civil Code.

[37] This article includes the conclusions and recommendations presented on 22 September 2016 at the 6th National Meeting of Civil Lawyers "Contract Law," Międzyzdroje, University of Szczecin, Law and Administration Faculty, 21–23 September 2016, extended by the presenta-

REFERENCES

Bełdowski, Jarosław, and Agata Kozioł. 2006. "Europejskie Prawo Umów, Wprowadzenie." *Kwartalnik Prawa Prywatnego* 15, no. 3:847–59.

Brouwer, Bob, and Jaap Hage. 2006. "Basic Concepts of European Private Law." *Maastricht Faculty of Law Working Paper* 7:4–33.

Czachórski, Witold. 1999. *Zobowiązania. Zarys wykładu.* Warszawa: LexisNexis.

Drapała, Przemysław. 2016. *Przejęcie długu, przejęcie praw i obowiązków z umowy (zmiana stron umowy).* Warszawa: C.H. Beck.

Grabowski, Paweł. 2000. "Przelew wierzytelności przyszłych." *Monitor Prawniczy* 9:561–72.

Honsell, Heinrich, and Albert Heidinger. 1998. *Praxiskommmentar zum ABGB.* Vol. 2. Wien: [No information about Publisher].

Katner, Przemysław. 2011. *Przeniesienie wierzytelności w umowie factoring.* Warszawa: Wolters Kluwer.

Krzykowski, Artur. 2012. *Umowne zakazy przelewu wierzytelności (pacta de non cedendo) w obrocie krajowym i międzynarodowym.* Warszawa: C.H. Beck.

Kuropatwiński, Jarosław. 1998. "Cesja wierzytelności przyszłych." *Przegląd Prawa Handlowego* 9:9–23.

Kuropatwiński, Jarosław. 2007. *Umowne rozporządzenie wierzytelnością przyszłą.* Toruń–Bydgoszcz: Dom Organizatora.

Kurowski, Witold. 2010. "Przekształcenia podmiotowe stosunku zobowiązaniowego. Uwagi na tle Zasad Europejskiego Prawa Umów (PECL) z uwzględnieniem projektu Common Frame of Reference (DCRF)." In *Zaciąganie i wykonywanie zobowiązań. Materiały III Ogólnopolskiego Zjazdu Cywilistów*, edited by Edward Gniewek, Katarzyna Górska, and Piotr Machnikowski, 201–13. Warszawa: C.H. Beck.

Lando, Ole, and Hugh Beale, ed. 2000. *Principles of European Contract Law*. Parts I and II *Combined and Revised.* The Hague–London–Boston: Kluwer Law International.

Lando, Ole. 2003. "Moving from Harmonisation to Unification. Principles of European Contract Law and Unidroit Principles." *Uniform Law Review* 8, no. 1–2:123–33.

Łętowska, Ewa. 1980. In *System Prawa Cywilnego.* Vol. 3. Part 1: *Prawo zobowiązań – część ogólna*, 902. Wrocław: Ossolineum.

Liebeskind, Adolf. 1938. In *Encyklopedia Podręczna Prawa Prywatnego*, issue XXXI, IV, 1908. Warszawa: Nakładem Instytutu Wydawniczego "Bibljoteka Polska."

Mader, Peter. 1997. In *Praxiskommentarzum ABGB samt Nebengesetzen*, vol. 7, 528–29. Wien: [No information about Publisher].

Medicus, Dieter. 2015. *Schuldrecht I, Allgemeiner Teil. 21. Auflage.* München: C.H. Beck.

Mojak, Jan. 1990. Przelew wierzytelności w polskim prawie cywilnym. Lublin: Wydawnictwo UMCS.

Mojak, Jan. 2001. *Obrót wierzytelnościami.* Warszawa: LexisNexis.

Mojak, Jan. 2004. *Obrót wierzytelnościami.* 2nd edition. Warszawa: LexisNexis.

Möschel, Wernhard. 2012. In *Münchener Kommentarzum Bürgerlichen Gesetzbuch*, vol. 2, 1667. München: C.H. Beck.

Nörr, Wolfgnang, and Knut R. Scheyhing. 1983. *Sukcessionen. Zession. Vertragsübernahme. Schuldübernahme. Schuldbeitritt.* Tübingen: Mohr.

tion of Polish regulations, an extensive comparison and in-depth argumentation in favour of the solutions proposed in the draft Civil Code.

Pazdan, Maksymilian. 2002. "Przelew wierzytelności na zabezpieczenie." *Kwartalnik Prawa Prywatnego* 1:115–40.

Radwański, Zbigniew. 2008. *Zobowiązania. Część ogólna.* Warszawa: C.H. Beck.

Röttinger, Moritz. 2006. "Towards a European Code Napoleon/ABGB/BGB? Recent EC Activities for a European Contract Law." *European Law Journal* 12, no. 6:807–27.

Staudenmayer, Dirk. 2005. "The Way Forward in European Contract Law." *European Review of Private Law* 2:95–104.

Szpunar, Adam. 1998. "Glosa do uchwały Sądu Najwyższego z 19 września 1997 r., III CZP 45/97." *Orzecznictwo Sądów Polskich* No. 7–8, item 137.

Von Bar, Christian. 2005. "Working Together on a Common Frame of Reference." *Juridica international* X:17–26.

Weatherill, Stephen. 2004a. "European Contract Law: Taking the Heat Out of Questions of Competence." *European Business Law Review* 15:23–32.

Weatherill, Stephen. 2004b. "Why Object to the Harmonisation of private law by the EC?" *European Review of Private Law* 5:633–60.

Widło, Jacek. 2002a. *Rozporządzanie przedsiębiorstwem.* Kraków: Zakamycze.

Widło, Jacek. 2002b. "Umowa przelewu wierzytelności. Zagadnienia wybrane." *Nowy Przegląd Notarialny* 1:58–73.

Wieczorek, Emilia. 2005. *Zasady europejskiego prawa umów.* Gdańsk: ODDK – Ośrodek Doradztwa i Doskonalenia Kadr.

Zawada, Kazimierz. 1990. *Umowa przelewu wierzytelności.* Kraków: Wydawnictwo Uniwersytetu Jagielońskiego.

Zawada, Kazimierz. 1992. "Umowy przenoszące wierzytelności." *Rejent* 1:17.

Zawada, Kazimierz. 2005. "O przelewie wierzytelności przyszłych." In *Księga pamiątkowa ku czci Sędziego S. Rudnickiego,* 338–51. Warszawa: LexisNexis.

Zawada, Kazimierz. 2014. "Przelew wierzytelności." In *System Prawa Prywatnego*. Vol. 6: *Prawo zobowiązań*, edited by Adam Olejniczak, 1025–1072. Warszawa: C.H. Beck.

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THE LIMITATIONS OF EXTERNAL MANIFESTATIONS OF FREEDOM OF RELIGION AND STATE SECURITY. PANDEMIC CRISIS, STATE AND CATHOLIC CHURCH IN SLOVAKIA*

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Abstract. The paper focuses on research of the relationship between the State and the Catholic Church in an emergency such as the current pandemic health crisis, affecting human rights, including the fundamental right to religious freedom. In such a situation, constructive relations based on mutual respect of subjects, who are also aware of their place in a democratic society, are very important. We will illustrate the study of these relations and their development in the article in the conditions of the Slovak Republic. The article deals mainly with the period during the so-called first wave of the Covid-19 pandemic in Slovakia. Although other waves of the pandemic have already passed, it seems that restrictions on religious freedom have not been sufficiently analyzed.

Keywords: religious freedom, pandemic crisis, restrictions, State, Covid-19

1. ONE EXTRAORDINARY SITUATION IN THE FIELD OF STATE-CHURCH RELATIONS

Freedom of thought, conscience and religion are the trinity of freedoms that can be called the basis of all human rights and freedoms.[1] Concerning religion, any restriction on the internal forum is unthinkable, but it is possible to restrict the outward expression of religious freedom in certain circumstances. The Covid-19 pandemic has also presented us with a serious challenge in human rights protection area in the context of protecting the health of the popu-

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[1] See more Sobczyk 2020.

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lation. There has been much debate about the appropriateness of measures, including restrictions on association and participation in worships and other pastoral activities, to prevent the spread of infection. Naturally, the questions of the appropriateness of restrictions on the gathering of people at religious services and other public events were most prominently discussed before the visit of Pope Francis to Slovakia. Which stems from the extraordinary nature of the event. Nevertheless, we are concentrating primarily on the first, initial phase of the pandemic. We are also looking at the social manifestations, which makes us more of a socio-legal survey.

The Slovak Republic, especially practicing Catholics, awaited the pastoral visit of Pope Francis (September 12–15, 2021) a lot. As in the previous period, the state's policy concerning the protection of the population's health, among other factors, widely discussed the conditions for possible participation of a more significant number of believers.

The most common condition is the so-called "full vaccination" for those who wanted to participate in mass meetings and events with the Pope Francis. According to President of the Conference of Slovak Bishops Stanislav Zvolenský, this decision has been perceived in the spirit of Demands that the state leadership imposed to ensure as many people as possible are able to participate in meetings with the Pope. "We have been informed that, from a security point of view and in terms of technical possibilities, this is the only real way of not radically limiting the number of participants," said the Archbishop of Bratislava. He claims that it is important for them to have decided and what they are up to so that they can continue with further preparations for the Pope's visit. He asks everyone to understand the information in good wills and ask the followers for prayers.[2]

At the heart of the social debate, on the one hand, Pope Francis' example comes to the fore in his approach to vaccination against Covid-19 [Moravčíková 2021, 3–12], and, on the other hand, his openness to everyone, without distinction. Fatigue from anti-pandemic measures is fully manifested in the society. Efforts to maintain a scientific approach, to unify the society and to solve crisis situations in practice are essential. Sensitivity is needed in all efforts to restrict certain freedoms, not excluding external manifestations of religious freedom.

[2] See https://bratislavskykraj.sk/stretnutia-s-papezom-sa-budu-moct-zucastnit-len-plne-zaockovani/ [accessed: 21.07.2021]; https://www.abuba.sk/abuba/node/1131 [accessed: 03.09.2021].

2. REACTION OF CHURCHES IN THE SLOVAK REPUBLIC AT THE BEGINNING OF THE PANDEMIC

Like the whole world, the citizens of the Slovak Republic were surprised by a contagious coronavirus pandemic at the beginning of 2020. To slow down its spread, it was necessary to take unprecedented measures in a democratic society, which interfered with the restriction of the basic human rights and freedoms of citizens living in a democratic society. These measures also included significant interference with the right to exercise religious freedom.

On the day of the first confirmed case of coronavirus infection in the Slovak Republic on March 6, 2020, the President of the Conference of Bishops of Slovakia, Archbishop Stanislav Zvolenský, on behalf of all bishops of the conference, recommended to Catholic priests and believers to regularly follow and respect the instructions and at the same time cooperated with the relevant representatives of the public administration.[3] Already in this first recommendation, the Catholic Church came up with a declaration of its own restrictions, which were drawn on the experience of countries that had previously been affected by the pandemic. Restrictions included not organizing pilgrimage trips to Slovakia or abroad, restrictions on all social events except liturgical celebrations, abolition of the obligation of believers to attend Sunday services, increased observance of sanitary measures by priests, non-use of shrines, books, rosaries and other common objects in churches by believers, including handshake at the sign of peace in the liturgy. The recommendation also states that the overflow of temple spaces and the sacrament of reconciliation should be avoided – confession, that it should be served only in a confession with a grid to be covered by a translucent barrier. Finally, the bishops call for peace, non-concern, and assistance to those in need. They especially emphasize the memory of the sick and health workers.[4] Church leaders, aware of the health risk for believers, have taken a remarkably quick, active, and responsible attitude, without passively waiting for state action.

Further measures followed in quick succession. In particular, the administration of Holy Communion by hand, which was first introduced in the Bratislava Archdiocese, and the recommendation that elderly and sick believers should not take part in worship as a precaution.[5]

[3] See https://www.tkkbs.sk/view.php?cisloclanku=20200306031 [accessed: 06.03.2020].
[4] Ibid.
[5] See https://www.tkkbs.sk/view.php?cisloclanku=20200307001 [accessed: 07.03.2020].

3. REACTION OF CHURCHES TO THE ADOPTED RESTRICTIVE MEASURES OF THE STATE

Very soon after the first case, the state took strict measures to prevent the spread of the epidemic, including a ban on the public celebration of services. The decree was adopted by the Catholic bishops with pain, but with a peaceful and rational assessment of the situation. In the adopted opinion, they state that the Prime Minister of the Slovak Republic, Peter Pellegrini, informed them of the decision that, with effect from 10 March to 23 March 2020, public services may not be held in the territory of the Slovak Republic. Bishops further call on priests and believers to obey this ban.[6] The response to the ban on public celebrations was the broadcasting of Holy Mass through the Catholic mass media.[7]

Adopting this unprecedented ban in a time of a free democratic society was not entirely without problems. In its first reaction, the Orthodox Church did not accept the ban on public services and declared that it would continue to celebrate public services, receive from one chalice and kiss icons.[8] After the storm that this attitude provoked in the Slovak media and the prime minister's convention, the representatives of the Orthodox Church withdrew and also began to respect the regulation. The fact that the order of the public ban on worship was not easily adopted even in the environment of the majority Catholic Church testifies to the fact that the Chief Hygienist justified his stance on the website of the Conference of Bishops of Slovakia[9] and the spokesman of the bishops had to return to the subject in an unconventional personal call to the spiritual church.[10] Other registered churches and religious societies took measures constructively, without major media outlets.

4. STATE-CHURCH RELATIONS DURING A PANDEMIC CRISIS

After the initial shock from the onset of the epidemic and the measures taken, civic and religious leaders focused on the adoption and application of measures taken on a daily basis by the Public Health Office following the decisions of the crisis staff at the time of declaring a state of emergency in the Slovak Republic on 15 March 2020.[11] From the legal point of view, the fact

[6] See https://www.tkkbs.sk/view.php?cisloclanku=20200310023 [accessed: 10.03.2020].
[7] See https://www.tkkbs.sk/view.php?cisloclanku=20200310022 [accessed: 10.03.2020].
[8] See https://svetkrestanstva.postoj.sk/52474/pravoslavna-cirkev-bude-nadalej-vykonavat-boh-osluzby [accessed: 03.09.2021].
[9] See https://www.tkkbs.sk/view.php?cisloclanku=20200311032 [accessed: 11.03.2020].
[10] See https://www.tkkbs.sk/view.php?cisloclanku=20200311034 [accessed: 15.03.2020].
[11] See https://www.slov-lex.sk/-/vyhlasenie-nudzoveho-stavu?inheritRedirect=true&redirect=%2Fdomov [accessed: 15.03.2020].

that measures to restrict religious freedom were taken before the declaration of a state of emergency may be interesting, and if the church decided to defend itself against them, it would have strong legal arguments in its favor, but decided to follow the path of cooperation. Pandemic threats were relevant not only to believers but to all citizens of the state. Church leaders thus continued to call for peace, respect for measures, and at the same time, Catholic communities were engaged in concrete help in coping with the crisis.[12] In many religious communities in Slovakia, they started sewing veils.[13]

The beginning of the onset of the epidemic in the Slovak Republic coincided with a change of the government after the end of the parliamentary elections, which took place just before the announcement of the first confirmed case. This change in society has raised concerns about how the new government will handle its accession and whether the epidemic will spiral out of control. In this atmosphere, the President of the Conference of Bishops of Slovakia sent congratulations to the new government on its appointment,[14] in which he denied them to work successfully for the benefit of all citizens of the Slovak Republic and at the same time thanked the outgoing cabinet.

However, the application of the measures did not happen without problems in the Slovak catholic parishes. Some of the priests with believers failed to respect the prohibition of the public celebration of religious services, which had to be addressed by some dioceses' bishops by issuing warning opinions.[15]

Significant and challenging was the decision to extend the restrictions adopted until further notice,[16] which meant that the most important Christian holidays of Easter would not be celebrated during public services. During the epidemic, this was the most serious intervention in the practice of religious freedom, which was adopted in a society-wide atmosphere of mutual solidarity. By decision of the state authorities, public catering facilities, accommodation, sports and cultural centers, educational institutions of all types were closed, many plants were either closed or worked in the form of a home office. During the Easter holidays, the Government of the Slovak Republic approved a curfew and gathering,[17] which was controlled by security forces. The celebration of Easter by believers in Slovakia and in the world was marked by the impossibility of celebrating public worship. In this situation, the public media also brought live broadcasts of services from the Vatican, where they were served by Pope Francis, either in the empty Basilica of St. Peter, in its

[12] See https://www.tkkbs.sk/view.php?cisloclanku=20200317013 [accessed: 13.05.2020].
[13] See https://www.tkkbs.sk/view.php?cisloclanku=20200319020 [accessed: 19.03.2020].
[14] See https://www.tkkbs.sk/view.php?cisloclanku=20200331001 [accessed: 21.03.2020].
[15] See https://www.tkkbs.sk/view.php?cisloclanku=20200322002 [accessed: 22.03.2020].
[16] See https://www.tkkbs.sk/view.php?cisloclanku=20200328010 [accessed: 28.03.2020].
[17] See https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/72 [accessed: 25.04.2020].

courtyard, or in the House of St. Maty, where the Pope is lives.[18] The bishops returned to the subject of the celebration of Easter, saying that its celebration without believers was painful and very strange.[19] However, in the statement, they emphasized the possibility of broadcasting services via television, radio and the Internet, without any criticism of the regulations adopted.

5. GRADUAL LIBERATION OF MEASURES TO PREVENT THE SPREAD OF THE PANDEMIC CRISIS

In the week after the end of Easter, when it became clear that the spread of the epidemic in the Slovak Republic had slowed down significantly and new cases of infection and death were low compared to other countries, the bishops began to suggest the need to consider tightening restrictions rights to religious freedom, as this has also begun to be considered abroad in countries with a much more serious situation.[20] They continued these signals without direct criticism from state officials in Slovakia, drawing attention to the easing of measures abroad, especially in Germany and Austria.[21] During this period, the Catholic Church in Slovakia, as well as the Slovak Republic, through the Ministry of Foreign Affairs, showed solidarity with Italy. The Catholic Church sent a financial donation of 200,000 euros[22] to the Italian Bishops' Conference, and the state sent protective medical devices worth 300,000 euros.[23] This symbolic gesture was also a manifestation of the good situation in the Slovak Republic, a manifestation of good relations between the Catholic Church and the state in Slovakia, but also another reminder that it is necessary to consider easing strict restrictive measures related to the ban on public celebrations. As the measures remained in force, Slovak bishops began to draw attention to the fact that bishops in some countries abroad were protesting against the restrictive measures of the local governments, without directly criticizing the government in Slovakia.[24] At this time, the public debate on the easing of measures had already begun, to which the church had already responded directly, as believers increasingly eagerly awaited the resumption of public celebrations and began to criticize church leaders not speaking out against further restrictions.[25] The reaction showed that the church was conducting intensive negotiations with responsible experts from the state on the timing and form of relaxation of

[18] See https://www.tkkbs.sk/view.php?cisloclanku=20200410008 [accessed: 10.04.2020].
[19] See https://www.tkkbs.sk/view.php?cisloclanku=20200417022 [accessed: 14.04.2020].
[20] See https://www.tkkbs.sk/view.php?cisloclanku=20200418006 [accessed: 18.04.2020].
[21] See https://www.tkkbs.sk/view.php?cisloclanku=20200422033 [accessed: 26.04.2020].
[22] See https://www.tkkbs.sk/view.php?cisloclanku=20200423041 [accessed: 26.04.2020].
[23] See https://www.tkkbs.sk/view.php?cisloclanku=20200424021 [accessed: 26.04.2020].
[24] See https://www.tkkbs.sk/view.php?cisloclanku=20200427032 [accessed: 30.05.2020].
[25] See https://www.tkkbs.sk/view.php?cisloclanku=20200501001 [accessed: 30.05.2020].

measures, without entering into the public debate and criticism of the government on this issue. This reaction was in line with the way the Catholic Church had so far negotiated with the state, trying to maintain a constructive stance. On May 4, 2020, Prime Minister Igor Matovič announced that from May 6, 2020, public services in Slovakia would be resumed in compliance with strict hygienic measures.[26] The Church welcomed this decision[27] and issued a statement on how to comply with the guidelines of the Public Health Office, which were to be issued additionally.[28] This fact indicated that the regulation was adopted in agreement with the church, which was also beneficial for the state, as the church had to ensure its observance in practice. The Public Health measure[29] was issued on the second day after the announcement of the release of the restrictions. The Chief Hygienist of the Slovak Republic, Ján Mikas, also provided an explanatory opinion on it.[30] In the opinion, he emphasizes the specific regulations that must be observed so that the public celebration of services does not pose a health risk. From the public discussion, the most sensitive perception was the possibility of attending services for people over 60 years of age.[31] Finally, the adopted opinion recommended that special services be set aside for these people. In the context of the inter-church discussion, the most important issue proved to be respecting the administration of Holy Communion in the hand and not in the mouth, to which the spokesman of the conference of bishops had to respond several times.[32] Otherwise, euphoric moods prevailed among the clergy and believers within the church,[33] which was underlined by the further good development of the epidemiological situation in Slovakia, further gradual relaxation of measures in all areas of public life and gradual normalization of everyday life.

However, the bishops did not fully succumb to this atmosphere and continued to call for caution,[34] while maintaining and adhering to the restrictions that resulted from the measures taken by state institutions, as well as the bishops' conference itself. At the same time, they began to address the social consequences that the health crisis was already bringing and would bring in the future in the form of an economic downturn due to the downturn in the

[26] See https://www.tkkbs.sk/view.php?cisloclanku=20200504030 [accessed: 30.05.2020].
[27] See https://www.tkkbs.sk/view.php?cisloclanku=20200504032 [accessed: 30.05.2020].
[28] See https://www.tkkbs.sk/view.php?cisloclanku=20200504033 [accessed: 30.05.2020].
[29] See http://www.uvzsr.sk/docs/info/covid19/opatrenia_hromadne_podujatia_bohosluzby.pdf [accessed: 30.05.2020].
[30] See https://www.tkkbs.sk/view.php?cisloclanku=20200505037 [accessed: 30.05.2020].
[31] See https://rajtakova.blog.sme.sk/c/534847/preco-im-rovno-nepoviete-ze-su-nesposobili.html [accessed: 30.05.2020].
[32] See https://www.tkkbs.sk/view.php?cisloclanku=20200507032 [accessed: 30.05.2020].
[33] See https://www.tkkbs.sk/view.php?cisloclanku=20200511028 [accessed: 02.06.2020].
[34] See https://www.tkkbs.sk/view.php?cisloclanku=20200513023 [accessed: 02.06.2020].

world economy.[35] Several organizations established by the church, or its members, helped mitigate social impacts during the epidemic and began to feel an increased interest in their services.[36] However, despite the improvement of the situation, new restrictive measures concerning the conduct of public pilgrimages were also adopted,[37] with the participation of more than 1000 participants. In this context, for the second time in its centuries-old history, the Levoča Pilgrimage, the largest mass pilgrimage of Catholic believers in Slovakia, was abolished for the year 2020.[38]

CONCLUSIONS

In the illustrative case of a serious health crisis, we examined the relationship of the state, which is not tied to any ideology, or religion and the church, when it was in the public interest to cooperate, for serious reasons of health protection, especially the most vulnerable groups. While respecting mutual autonomy, it can be stated that this cooperation was beneficial not only for both entities, but for the whole society. Promoting the non-exclusion of believers from public life, their active participation in solving the problems of society is important in the long run for creating the preconditions for better solutions to serious problems now and in the future.

In this context, the public debate in Slovakia raised the question of whether a practicing believer can be a minister of health. It was mainly a question of abortion, but also other cultural and ethical issues, which have been part of the social debate for several years. An interesting answer to this question was provided by the seemingly insignificant event of the unveiling of a memorial plaque to the Greek Catholic bishops Pavol Peter Gojdic, who was tortured for his faith under the former communist regime. This tribute to the bishop – martyr was organized by the Jewish religious community together with the Greek Catholic Church in Slovakia. On this occasion, Igor Rintel, President of the Central Union of Jewish Religious Communities in Slovakia, said: "There are a lot of historical events that brought the Jews to suffering. Therefore, we are sensitive to the lawlessness, treading upon human rights and the persecution of the people of the ideological and religious reasons. Bishop Gojdič was by state power persecuted in that time, when the communist regime once again took aim at the Jews and saw the origin of evil in them (for example, a process with Slánským). Bishop Gojdič, however, paid

[35] See https://www.tkkbs.sk/view.php?cisloclanku=20200516007 [accessed: 02.06.2020].
[36] See https://www.tkkbs.sk/view.php?cisloclanku=20200519051 [accessed 2020 June 2].
[37] See https://www.tkkbs.sk/view.php?cisloclanku=20200519052 [accessed: 02.06.2020].
[38] See http://ik.levoca.eu/marianska-put-v-levoci-v-roku-2020-nebude/ [accessed: 30.05.2020].

the highest price for their religion and for steadfastness of their faith – his life."[39] From the point of view of the past is dangerous to judge and condemn a man based only on his religious beliefs and for this reason disqualify him from performing public functions. A historic statement was made at the event as well: The Chairman of the National Council of the Slovak Republic, on the occasion of the 70th anniversary of the abolition of the Greek Catholic Church in former Czechoslovakia and on the occasion of the 60th anniversary of the martyrdom of its bishop, Pavol Peter Gojdic in prison, expressed to the Greek Catholic Church in Slovakia, represented by its highest representatives, an official apology for its illegal and undemocratic outlaw status. He added that a successful future and recognition awaits only those nations that can deal with the dark chapters of their past, build on the good and clearly name the evil.[40] Paradoxically, at the same time, the Catholic Church was being ridiculed on a public television show at the same time.[41] The preservation of the democratic character of the state cannot be based on the suppression of personal beliefs, but about learning mutual tolerance, an open, yet respectful discussion, and equivalent to conditions in which every citizen should be able to freely develop their strengths and use them for the benefit of the whole country. And such opportunities are the manifestation of the intercultural dialogue which can overcome years of building the gap between individuals, culturally, ethnically, and religiously different components of the society [Moravčíková 2014]. Undoubtedly, the forthcoming visit of Pope Francis to Slovakia will be another impetus for the development of the best traditions and approaches to a better life together for all.

REFERENCES

Moravčíková, Michaela. 2014. *Ľudské práva, kultúra a náboženstvo*. Praha: Leges.

Moravčíková, Michaela. 2021. "Žijeme v čase «Kairos»." *Viera a život* 3:3–12.

Sobczyk, Pawel, ed. 2020. *Prawna ochrona wolności sumienia i religii. Stan de lege lata oraz postulaty de lege ferenda*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.

[39] See https://www.tkkbs.sk/view.php?cisloclanku=20200522028 [accessed: 10.06.2020].

[40] See https://www.tkkbs.sk/view.php?cisloclanku=20200525046 [accessed: 10.06.2020].

[41] See https://slovenskydohovorzarodinu.sk/clanky/dokedy-budeme-toto-trpiet-ziadame-o-verejne-ospravedlnenie/ [accessed: 07.09.2020].

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CONSTITUTIONAL FOUNDATIONS OF THE MARKET ECONOMY. ADMINISTRATIVE LAW ISSUES OF ECONOMIC FREEDOM

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Abstract. The subject of analysis of this article is the public-legal construction of economic freedom in the context of its basic function which is the realisation of a constitutionally regulated economic system. The detailed objective is to undertake a reconstruction of the freedom of economic activity in the light of theory and public law, to which the freedom in question first of all belongs. The object of research will be its subjective and objective scope. The basic research methods will be the dogmatic and historical-legal method.

Keywords: Constitution of the Republic of Poland, economic system, economic freedom, restriction of rights and freedoms, Entrepreneurs' Law

INTRODUCTION

When defining the economic system of the Republic of Poland, the constitutional legislator indicated, *inter alia*, freedom of economic activity as one of the basic principles of that system. Alongside this principle lie several others, but freedom is of fundamental importance also with respect to them. Thus, for instance, private property can be fully functioning and enjoyed only by entities which are free within the meaning of the legal system.[1] The remaining principles

[1] Article 1(4) of the Act of 29 December 1989 on amending the Constitution of the People's Republic of Poland (Journal of Laws No. 75, item 444), the existing provisions of the Constitution were amended, introducing new content to Article 6: The Republic of Poland guarantees freedom of economic activity regardless of the form of ownership; restriction of this freedom may be effected only by statute.

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of the Polish economic system, for the functioning of which the freedom of entities constituting that system is indispensable, should be understood in a similar light. However, freedom, in this case understood as the freedom to undertake and carry out economic activity, is not an unlimited principle. The first limitation stems from the principle of a democratic state of law, which indicates the primacy of legal norms and the obligation of entities undertaking and conducting business activity to abide by these norms. Thus formulated legal norms should first of all be understood as general rules binding entrepreneurs. At the same time, the constitutional legislator introduces a norm, pursuant to which restrictions on economic freedom may be introduced by way of «ordinary» laws. However, such limitations must result from the need to protect the public interest.

In the authors' conviction, the freedom of economic activity is, without deprecating other constitutional components of a given economic system, in particular private property, of fundamental significance for the functioning of the economic system. The ownership right constitutes the object of protection of other regulations of the Constitution. In turn, economic freedom has been regulated in a positive way only in Article 20 of the Constitution of the Polish Republic.[2] Other regulations of the Constitution provide for the scope of its permissible limitation (e.g. Article 22, Article 17(2)). Hence, its special role in shaping the economic system. In market economy conditions, its correct reconstruction is a *sine qua non* condition for the proper functioning of the market economy. Therefore, it is justified to undertake research in this field. The aim of the article is to reconstruct the freedom of economic activity in the light of theory and public law, to which this freedom belongs in the first place. The subject of the research will be its objective and subjective scope. In order to realise the thus defined object of research, appropriate research methods have been adopted, which are to lead to the achievement of correct analysis results. In the first place the dogmatic method will be applied. Based on this method, the norms of public law, mainly of a material legal nature, will be analysed. To the extent required for the fulfilment of the aim of research undertaken in the article, the historical-legal method has been used. However, owing to numerous transformations of regulations, as well as of the socio-economic sphere, the historical-legal analysis indicates universal features of economic freedom, also in periods when it was not directly expressed in the system of law.

1. CONSTITUTIONAL DEFINITION OF THE ECONOMIC SYSTEM

While determining the political system of the Republic of Poland, the Constitutional legislator singled out the economic system[3] as one of the political

[2] Journal of Laws No. 78, item 483 as amended.

[3] Of primary importance in the scope of the analysed topic is Article 20 of the Constitution,

foundations of the State. The constitutionally determined economic system is a consequence of the previously adopted model of the market economy based on the principle of freedom of economic activity. The adopted solutions were in essence a return to the functioning of the economic system in the interwar period, which was founded on the principles of a market economy with particular emphasis on the principle of economic freedom and protection of property rights. Notwithstanding the fact that the provisions of the Constitution of 1921 referred only in a very general way to the foundations of the economic system,[4] its development was provided for by the provisions of the Industrial Law.[5] Pursuant to the disposition of Article 3 of the Industrial Law, the conduct of economic activity was free and allowed to everyone, and limitations to this freedom could stem only from statutory provisions. Therefore, already in that period, the overriding value of the economic system was the principle of freedom, the restriction of which could take place only in cases specified in statutory provisions. With the change of the political system in the second half of the 1940s, solutions characteristic of a centrally planned economy were adopted, with state ownership of entities undertaking and conducting economic activity being dominant.[6] In that economic system the principle of freedom was abandoned in favour of the broadly understood regulatory function of the state, the restriction of ownership rights through nationalization processes and the domination of economic activity carried out by the state in the form of state-owned enterprises. It was not until the reforms of 1981–1982[7] and the reforms of 1988[8] that the legal foundations of the economic system proper to the market economy, for which freedom is a fundamental value, were gradually restored [Szydło 2005, 1ff].

in the text we will also refer to other provisions of the Constitution that relate to the analysed research problem.

[4] Act of 17 March 1921, the Constitution of the Republic of Poland, Journal of Laws No. 44, item 267, particularly the provisions of Article 3 (statutory definition of duties), Article 99 (protection of the right to property) and Article 101 (freedom of choice of gainful occupation).

[5] Regulation the President of the Republic of Poland of 7 June 1927 on Industrial Law, Journal of Laws No. 53, item 468 as amended.

[6] See the provisions of the decree of 1 October 1947 on the Planned National Economy, Journal of Laws No. 64, item 373 and the decree of 26 October 1950 on State Enterprises (original text Journal of Laws No. 49, item 439).

[7] Acts reforming the economic system include: Act of 25 September 1981 on State Enterprises (original text Journal of Laws No. 24, item 122); Act of 26 February 1982 on Social and Economic Planning (original text Journal of Laws No. 7, item 51) and Act of 26 February 1982, the Banking Law (Journal of Laws No. 7, item 56).

[8] The first legal act to be mentioned is the Act of 23 December 1988 on Economic Activity (original text Journal of Laws No. 41, item 324).

2. JURIDICAL CONSTRUCTION OF THE FREEDOM OF ECONOMIC ACTIVITY

The subjective substrate of the constitutional principle of freedom of economic activity is an open category. It covers all entities known to the system of Polish law. Therefore, they include natural persons, legal persons, and so-called entities without corporate status. However, the above determination does not limit the field of discussion regarding at least two issues. The first one, necessitating elaboration in the context of the subjective substrate, is the problem of the positive participation of public entities freely undertaking and performing economic activity.

State subjectivity in the sphere of economic activity is identified with the State Treasury and its organizational units. The State Treasury, as a public legal person of a special kind, constitutes the material and organizational basis for undertaking economic activity by the state [Radwański 2007, 190–92]. However, there is no legal possibility for the State Treasury to undertake economic activity directly. Admittedly, systemic regulations, including the Constitution of the Republic of Poland itself, do not expressly stipulate the above prohibition, but the legal status and systemic position speak in favour of denying the State Treasury legal capacity in the sphere of the direct undertaking and performance of economic activity. The above view has its basis in Article 218 of the Constitution, which indicates the need for statutory definition of the organization of the Treasury and the manner of management of Treasury assets. Therefore, the legislator currently defines the issues related to the conduct of Treasury business activity in the acts in question.[9] On the other hand, there are no doubts about the legally permissible possibility of the undertaking and carrying out of economic activity by state enterprises, the so-called state companies and other state legal persons established to manage the property of the Treasury.[10] For the purposes of this article, following a functional and subjective criterion, the group of the above-mentioned entities will be referred to using the working term [Jakimowicz 2013, 51] – state enterprises.[11] The entities indicated above base their legal capacity in the sphere of economic activity on constitutional grounds other than economic freedom.

[9] See e.g. Act of 19 October 1991 on the Management of Agricultural Property of the State Treasury (Journal of Laws of 2020, item 2243); Act of 16 December 2016 on the Principles of State Property Management (Journal of Laws of 2020, item 735); also Act of 25 September 1981 on State Enterprises (Journal of Laws of 2020, item 1644 as amended).

[10] The topic of economic activity of local government units was intentionally omitted in the article. The scope of this issue, due to its complexity requires a separate study. It should be emphasized, however, that some issues raised in the question of the subject and object scope of freedom of economic activity will also refer to the subject matter excluded from the study.

[11] More broadly see Grzegorczyk 2012, 15ff.

The constitutional basis for undertaking economic activity by public enterprises is primarily Article 2 and 20 of the Constitution of the Republic of Poland. In the case of public enterprises established on the basis of state property, such basis will also be Article 218 of the Constitution. The norm contained in the above provisions indicates the need to take into account social justice in the state's activities and, in the dimension of a market economy, the need to realize the objectives of social policy. Therefore, the state is responsible for shaping the social order, including the economic dimension. The undertaking of economic activity by public enterprises is one of the direct forms of the state's influence on the social order [Ogonowski 2012, 223]. The engaging in economic activity by public enterprises is of a purely instrumental nature and serves the effective implementation of tasks arising from Article 2 and 20 of the Constitution. This represents a signum specificum of economic activity undertaken by public enterprises. It results from the fact that the basic aim of undertaking economic activity, in the case of entrepreneurs other than public ones, is profit-oriented.

Another systemic basis for undertaking economic activity by public enterprises is the principle of subsidiarity. The said principle has not been explicitly articulated in the provisions of the Constitution. An expressis verbis reference to this principle is found in the preamble to the Constitution. Regardless of the discrepancies in the assessment of the legal nature of the preamble, it should be stated that the entire constitutional regulation rests on this principle. According to the principle of subsidiarity, the state should undertake tasks that exceed the realization capabilities of smaller organizational communities. Subsidiarity directs the activity of public enterprises towards types of economic activity which for organizational and economic reasons are not of interest to other entrepreneurs [Szydło 2004, 58–59].

The constitutional grounds for the participation of public entrepreneurs in the market economy may also be sought in the institution of legal monopoly [ibid., 59–61]. Legal monopoly implies a situation in which on the relevant market, economic activity of a given type is carried out by only one entrepreneur. The notion of monopoly is not reserved in terms of entities exclusively for public entrepreneurs. It may also be established for the benefit of a private entity [Strzyczkowski 2009, 269]. According to the requirements of the Polish Constitution, the establishment of a monopoly is effected by way of a statute.[12] In view of the fact that a monopoly by its very nature leads to the restriction of economic freedom, its introduction should be interpreted in the light of Article 22. The establishment of a legal monopoly will thus enjoy the presumption of constitutionality, if not only the formal and legal requirement for its introduction, but also the material

[12] Article 216(3) of the Constitution of the Republic of Poland, the establishment of a state monopoly of a commercial nature must take into account the requirements set out in this respect by the provisions of Article 37 of the Treaty on the Functioning of the European Union (O.J. 2004, No. 90, item 864.2 as amended).

and legal requirement in the form of an important public interest, is met. In turn, the notion of an important public interest should be interpreted in the light of the material and legal premises for delimitation indicated in Article 31(3) of the Constitution of the Republic of Poland, as well as the principle of proportionality of interference in constitutionally protected rights and freedoms.[13]

Public enterprises undertake economic activity in sectors deemed to be strategic, often of an infrastructural nature, e.g. the power industry, telecommunications. The prerequisites for recognizing a given type of activity as crucial for the state include: special significance for the economic interests of the state, and significant impact on the stability and security of the infrastructure necessary for the proper functioning of the economy. The types of economic activity recognized as strategic are based on a relatively stable catalogue. The number of entities performing strategic activity may change, depending on the needs for implementation.[14] In countries with market economies, there is a visible reduction in the participation of public entrepreneurs in economic activity.[15] It is a continuous and dynamic process, which formerly expressed itself in the phenomenon of ownership transformations, and nowadays in the privatization of performing public tasks.

The second issue which arises in the light of the subjective scope of the constitutional principle of freedom of economic activity is the possibility for collective entities to invoke the freedom in question, particularly in the context of the source of the origin of that freedom. Economic freedom, in fact, derives from an inherent and inalienable natural right, which is the personal freedom of an individual. The personal freedom of the individual is in turn rooted in human dignity [Chmaj 2002, 73ff]. Free will is therefore a fundamental prerequisite for the choice to take up and pursue an economic activity.

The origin of freedom of economic activity as a value rooted in human dignity is most fully exposed in the case of natural persons taking up and pursuing an economic activity [Powałowski 2008, 39]. It seems, however, that the view that the remaining legal entities, i.e. legal persons and the so-called entities without corporate personality, are not beneficiaries of the freedom of economic activity[16] in the legal sense is too far-reaching. The dignity of the human person, as the source of economic freedom, is not completely lost in the case of conducting economic activity in the above-mentioned forms. In the case of these entities, the legal-natural element results from the fact that these entities are created by individuals who are entitled to inalienable dignity. Thus, the source of the freedom of economic activity of legal persons and entities without corporate personality is

[13] More broadly on this subject see Zakolska 2011.

[14] See the Act of 16 December 2016 on the Principles of State Property Management, Journal of Laws of 2020, item 735.

[15] The basis for such state action is the provision of Article 218 of the Constitution.

[16] Cf. e.g. Szydło 2005, 9–10.

the dignity of the individuals constituting those entities (a derivative source). The acknowledgement that private law entities undertaking economic activity are entitled to economic freedom derived from the individuals constituting them is also supported by the acknowledgement of these entities as social creations within the so-called realist theory [Zoll 1931, 163ff]. It is also assumed in the literature that private law entities are entitled to public subjective rights [Jakimowicz 1999, 43], which encompass the freedom of economic activity.

The second problematic issue within the juridical construction of the freedom of economic activity is its material scope, which determines the limits of self-realization of entitled entities. The material scope of economic freedom includes a bundle of entitlements the exercise of which gives rise to the freedom to engage in, exercise, and terminate economic activity [Waligórski 1998, 88]. It is therefore important to emphasize that freedom of economic activity includes subjective self-realization in the full scope of economic activity. The obligation to take this into account lies both with the legislator and with the authorities applying the law. The organs of economic administration within the framework of operative interpretation should be guided by topoi of interpretation, which lead to the realization of the freedom of economic activity both at the stage of its commencement and execution, as well as its termination. Two interpretation rules, *in dubio pro libertate and exceptiones non sunt extendendae*, are fundamental in this respect. Correct application of these rules of interpretation of the norms regulating economic activity leads to practical implementation of the constitutional principle of freedom of economic activity and its subjective elements.

The consideration by the legislator, as well as by the economic administration bodies, of the subjective scope of economic activity at the stage of undertaking, performing, as well as terminating economic activity, results from two basic theoretical and legal assumptions. Firstly, freedom of economic activity constitutes a category of public subjective rights of a negative nature. On the one hand, the legislator is, therefore, obliged to refrain from adopting detailed solutions within the subject scope, which would lead to limiting the freedom in question beyond the delimitation standard determined by Article 22 and 31(3) of the Constitution of the Republic of Poland. On the other hand, entrepreneurs who are entitled to certain rights within the subjective scope have a claim to their protection. The content of the claim is the demand for exercising the right within the subjective scope of the freedom of economic activity in a specific shape determined by the legal regulations. The claim in question may have either a substantive or procedural character [Opałek 1957, 20]. The nature of the claim is determined by the type of norm from which the claims arise. This therefore strengthens the legal position of the entitled entrepreneur with regard to the realization of the subjective scope [Tomaszewska 2012, 113].

The second theoretical and legal assumption which influences the activity of the legislator, as well as the bodies applying the law, primarily the bodies of

economic administration, is the assumption that the freedom of economic activity is a principle of law. A principle of law should be treated as a legally binding constitutional norm, which has been recognized as being of particular social importance, as it expresses fundamental values [Zieliński 1997, 68]. In the context of the above, the legislator is obliged to shape the subjective scope of the freedom of economic activity in a manner leading to the realization of the freedom in question. In turn, the bodies interpreting the law are obliged to interpret the provisions shaping the subjective scope in accordance with the interpretation topoi referred to above. Only the synergy of actions of the legislator and the bodies applying the law may positively affect the materialization of the subjective scope of the freedom of economic activity.

The material scope of the freedom of economic activity includes, *inter alia*, elements such as the freedom to choose the organizational and legal form of economic activity undertaken, the freedom to compete, to invest, to set prices, to conclude contracts, to advertise.[17] A comprehensive definition of the material scope exceeds the analytical efforts of academia and is not practically relevant [Kołacz 2008, 81]. This results from the diverse nature of business endeavours. Depending on the type of economic activity, entrepreneurs take a number of actions resulting from its nature, based on individual entitlements. Consequently, one can speak only of a certain general construction of the subjective scope, which *in concreto* is supplemented by further powers. It should also be noted that today we are dealing with new types of economic activity which do not follow the traditional division into service or production activities. The dynamics of economic reality therefore exceeds the regulatory possibilities of the legislator in the framework of defining the material scope of the freedom of economic activity. In such cases, the entrepreneur will be entitled to directly invoke the freedom of economic activity as a general principle of law, even if the material scope in relation to a certain type of economic activity has not been regulated.

The substrate of the objective scope is not of an absolute nature. Exercise of the subjective rights always takes place in compliance with the conditions provided for by law. The limitation of the subjective scope constitutes a restriction of economic freedom mainly at the stage of undertaking, execution, and termination of activity by an entrepreneur. Such limitations are not of a general nature.[18] They apply only to those entrepreneurs who exercise particular rights. Restrictions take place owing to the characteristics of the entity conducting business activity, e.g. freedom of competition has been restricted by the requirement to obtain the consent of the President of the Office of Competition and Consumer

[17] Cf. Kołacz 2008, 80.

[18] An exception in this respect is the undertaking and conduct of economic activity prohibited by statute, in accordance with the disposition of Article 42 of the Constitution. Criminal law provisions qualifying a given type of economic activity as prohibited restrict economic freedom in this respect.

Protection for concentrations between entrepreneurs who achieved a certain annual turnover in the year preceding the intention to merge. Restrictions are also of a material nature owing to the type of business activity pursued, e.g. restriction of the freedom to choose the organizational and legal form for banking or insurance activities.

Within the scope of each of the juridical features of freedom of economic activity, there are basic elements without which the given feature cannot exist, and additional elements which may be modified by the legislator without affecting the essence of the given feature.[19] Modification of features that are substantively irrelevant may be effected only by means of a law and only for reasons of important public interest. It is also necessary to take into account the principle of proportionality of interference in constitutional protected freedoms. Pointing to the Constitution as the basic legal act serving as the basis for the protection of economic freedom, reference should also be made to the provisions regulating the legal grounds for the introduction of one of the states of emergency.[20] Statutory provisions introducing one of the states of emergency may introduce limitations to human and civil liberties and rights during the duration of particular states of emergency. In connection with the above limitations of freedoms and rights, the act introducing a state of emergency may define the grounds, scope, and principles of compensation for property losses, which may be directed, among others, to entrepreneurs. Among the prerequisites for the introduction of a state of emergency, the constitutional legislator points to identical prerequisites that have been included in the provision constituting the basis for restricting economic freedom (Article 22 of the Constitution) and in the provisions constituting the basis for restricting rights and freedoms (Article 31(3) of the Constitution).

CONCLUSIONS

The adoption by the legislator of the constitutional freedom of economic activity as an element of the adopted economic system, in the light of the above considerations, permits the formulation of the following conclusions:

1) Freedom to conduct an economic activity is a value rooted in human dignity and applies to natural persons and other legal forms in which natural persons take up and pursue an economic activity.

2) Freedom of economic activity, which is an element of human freedom, must be qualified as a principle of law.

3) Freedom of economic activity constitutes a category of public subjective rights.

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[19] Cf. judgment of the Constitutional Tribunal of 12 January 2000, ref. no. P. 11/98, "Orzecznictwo Trybunału Konstytucyjnego. Zbiór urzędowy" 2001, No. 1, item 3.

[20] Provisions of Chapter XI of the Constitution.

4) The restriction of the freedom of economic activity indicated in the provision of Article 22 of the Constitution must take into account the dispositions of Article 31(3) and Article 32(2) of the Constitution. Economic freedom is also a value which anchors the legal system, both horizontally and vertically. It follows from the above that the freedom in question is one of the key issues in the area of public economic law. It is one of, if not the most important of, the categories of this discipline of law. Consequently, research in this area is a constant element of analytical efforts. The evaluation of research results should provide a basis for the legislator in making laws, and for the bodies applying the law with guidelines on decoding the content of economic freedom during operative interpretation.

It should be borne in mind, however, that the correctness of the realisation of assumptions concerning the constitutional freedom of economic activity remains in the hands of the ordinary legislature. Numerous regulations of positive law, in particular in the scope of substantive law, influence the realisation of the freedom in question «in action». Strengthening economic freedom in the system of law is a fundamental obligation of the legislator and the bodies applying the law. However, there is still a noticeable tendency to adopt detailed solutions, which take as their point of reference Article 22 of the Constitution, i.e. the scope of delimitation of economic freedom, rather than Article 20, which provides for freedom in a positive manner. In this context, it should be stressed that economic freedom is not a right given unconditionally. Without proper care for the level of its detailed regulation, it will remain a value only «in books».

REFERENCES

Chmaj, Marek. 2002. "Godność człowieka jako źródło jego wolności i praw." In *Konstytucyjne wolności i prawa w Polsce. Zasady ogólne*, vol. 1, edited by Marek Chmaj, et al., 27–33. Kraków: Wolters Kluwer.

Grzegorczyk, Filip. 2012. *Przedsiębiorstwo publiczne kontrolowane przez państwo*. Warszawa: Wolters Kluwer.

Jakimowicz, Wojciech. 1999. "O publicznych prawach podmiotowych." *Państwo i Prawo* 1:36–50.

Jakimowicz, Wojciech. 2013. "Przestrzeń prawna wolności zabudowy." In *Przestrzeń w prawie administracyjnym*, edited by Jan Zimmermann, 46–76. Warszawa: C.H. Beck.

Kołacz, Jacek. 2008. "Swobody cząstkowe a swoboda działalności gospodarczej." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2:79–93.

Ogonowski, Andrzej. 2012. "Konstytucyjna wolność działalności gospodarczej w orzecznictwie Trybunału Konstytucyjnego." *Przegląd Prawa Konstytucyjnego* 1:213–35.

Opałek, Kazimierz. 1957. *Prawo podmiotowe.* Warszawa: Państwowe Wydawnictwo Naukowe.

Powałowski, Andrzej. 2008. *Publicznoprawny status osoby fizycznej wykonującej działalność gospodarczą w Polsce.* Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.

Radwański, Zbigniew. 2007. *Prawo cywilne – część ogólna*. Warszawa: C.H. Beck.

Strzyczkowski, Kazimierz. 2009. *Prawo gospodarcze publiczne*. Warszawa: LexisNexis.

Szydło, Marek. 2004. "Konstytucyjne podstawy udziału państwa w działalności gospodarczej." *Przegląd Sejmowy* 6:48–54.

Szydło, Marek. 2005. *Swoboda działalności gospodarczej*. Warszawa: C.H. Beck.

Tomaszewska, Katarzyna. 2012. "Znaczenie i zakres ochrony publicznych praw podmiotowych a ochrona interesu jednostki." *Folia Iuridica Wratislaviensi*s 1:113–34.

Waligórski, Marek. 1998. "Reglamentacja działalności gospodarczej a ochrona praw jednostki." In *Rola materialnego prawa administracyjnego a ochrona praw jednostki,* edited by Zbigniew Leoński, 69–95. Poznań: Wyższa Szkoła Bankowa w Poznaniu.

Zakolska, Joanna. 2011. *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego.* Warszawa: Wydawnictwo Sejmowe.

Zieliński, Maciej. 1997. "Konstytucyjne zasady prawa." In *Charakter i struktura norm konstytucyjnych*, edited by Janusz Trzciński, 58–77. Warszawa: Wydawnictwo Sejmowe.

Zoll, Fryderyk. 1931. *Prawo cywilne*. Vol. 1. Poznań: Wojewódzki Instytut Wydawniczy w Poznaniu.

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UNKNOWN MANUSCRIPT OF BLESSED BISHOP HRYHORIY KHOMYSHYN "TWO KINGDOMS": DOCUMENT, HISTORY, MESSAGE*

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Abstract. The appearance in print in 2016 of an unknown manuscript of the notes of Blessed Bishop Hryhoriy Khomyshyn, a Greek Catholic ordinary of Stanyslaviv, aroused enormous interest in various academic and church circles. The materials contained in the document provide a lot of new information about the Greek Catholic Church in the Second Polish Republic, the situation of the Ukrainian population, and the relationship between the Stanyslaviv bishop and the metropolitan of Lviv, Archbishop Andrey Sheptytsky. The article presents the history of the discovery of the manuscript, its fate after World War II, as well as the main themes discussed by the author in the document.

Keywords: Hryhoriy Khomyshyn, Greek Catholic Church, Two Kingdoms, Stanyslaviv, Lviv

1. DISCOVERY OF THE UNKNOWN NOTES OF BLESSED BISHOP HRYHORIY KHOMYSHYN

The publication of an unknown manuscript of Blessed Bishop Hryhoriy Khomyshyn[1], a Greek Catholic ordinary of Stanyslaviv, entitled "Two Kingdoms" [Pełechatyj and Osadczy 2016, 400] caused considerable agitation in the public discourse space. The book appeared in the publishing series the Ucrainicum Library of the Centre for East European Research of the Ucrainicum Centre of the Catholic University of Lublin.[2]

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[1] Bishop Hryhoriy Khomyshyn (1867–1945), ordinary of the Greek Catholic diocese of Stanyslaviv, blessed of the Catholic Church, martyr for the faith. More biographical information on the bishop's life and activities can be found later in this article. See also: Kubasik 2020.

[2] Publications from the series the Ucrainicum Library appear at the Centre for East European

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The very presentation of the publication, which took place on 12 September 2016 in the Lviv Metropolitan Curia, caused great emotions and agitation.[3] The fact that one of the co-editors of the publication suffered the consequences related to his involvement in the work on the preparation and printing of the book is an eloquent testimony to the presence of extra-substantive reactions in the situation that arose around the edition of the valuable source for the history of the Church.[4]

The agitation and emotions associated with the printing of the unknown document can be partially understood due to the circumstances of the publication of the text and its content. It should be noted that the document was written by the hierarch of the Church revered as the blessed of the Catholic Church, in the case of whom all formal procedures had been carried out, that is the entire epistolary output of the candidate for canonisation had been analysed. The manuscript of the "Two Kingdoms" appeared 15 years after the bishop's beatification and had been unknown to the researchers of the bishop's legacy. The content of the document also made a great impression, especially the part of it where the author analyses the activities of Archbishop Andrey Sheptytsky, the Greek Catholic Metropolitan of Lviv[5] as well as the bishop's attitude to the phenomenon of Ukrainian nationalism.

Research of the Ucrainicum Centre of the Faculty of Theology of the Catholic University of Lublin. See Osadczy 2018b, 149.

[3] Information on this subject appeared in the Polish media, and had wide repercussions in social life in Poland. More on this topic: Lviv: a row over the promotion of Bishop Khomyshyn's diaries. Insults hurled at a Polish bishop, https://kresy.pl/wydarzenia/lwow-awantura-na-promocji-pamietnikow-bpa-chomyszyna-polski-biskup-obrzucony-obelgami/ [accessed: 27.02.2021].

[4] After the book "Two Kingdoms" appeared in print, Father Ihor Pełechatyj was dismissed from the post of editor-in-chief of the diocesan journal of the Ivano-Frankivsk metropolis "Nowa Zorja" and dismissed from the function of director of the publishing house of the same name. He was even threatened with a church court, about which he himself wrote in a letter to the Catholic archbishops in Ukraine and the apostolic nuncio in that country, mentioning the "planned court case" against him and the "restoration in the Ukrainian Greek Catholic Church of the medieval methods of fighting the dissimilarity of views when the innocent were judged on the basis of hatred and blind revenge, and books were burned at the stake." See: *List otwarty ojca Ihora Pełęchatego – Redaktora i wydawcy wspomnień bł. Grzegorza Chomyszyna*, https://kresy.pl/wydarzenia/list-otwarty-ojca-ihora-pelehatyjego-redaktora-i-wydawcy-wspomnien-bl-grzegorza-chomyszyna/ [accessed: 27.02. 2021]. See Osadczy 2017, 429–30.

[5] Archbishop Andrey Sheptytsky, Order of Saint Basil the Great (1865–1944), the Greek Catholic metropolitan in Lviv, Servant of God. Born in an aristocratic family, grandson of A. Fredro, a clergyman, he devoted himself to work for the Greek Catholic Church. In 1888 he started his novitiate at Fathers Basilians in Dobromil. As a Basilian monk, he was educated in theology, philosophy, and law, he was promoted to an archimandrite, and in 1892 he was ordained a priest. In 1899 he was appointed the bishop of Stanyslaviv, and in 1900 he became the archbishop and metropolitan of Lviv. Combining the clerical function with political responsibility for the social life of the Ruthenian population, he contributed to raising the status of the Lviv Archdiocese and the entire Greek Catholic Church. In 1908 he was granted the authority of former Kiev

The fate of the manuscript was related by Father Ihor Pełechatyj,[6] a priest of the diocese of Ivano-Frankivsk (Stanyslaviv),[7] who edited the Ukrainian

metropolitans by St. Pope Pius X, which largely influenced his further pastoral activity. Striving to convert Russia by spreading the ecclesiastical union on its territory, he constantly followed the way of unifying the religious life of Galician Uniates in the spirit of regaining the original ritual purity, following the tradition of the Orthodox Church. He contributed to the development of monastic life in the Greek Catholic Church and the expansion of educational structures. During the intensification of the Polish-Ruthenian confrontation in Galicia, he acted as the political leader of the Ruthenians. During First World War, in 1914, he was interned by the Russian occupation authorities for his political activities aimed at disintegrating Russia. At the same time, he wrote a submissive letter to the Tsar, hoping for the possibility of carrying out missionary work in Russia. After the revolution of 1917, he was released from exile, and while in Russia, he led to the formation of the structures of the Greek Catholic Church there. He was hostile towards the sovereignty of the Polish state over the territories of former Eastern Galicia. During his stay in the Holy See, European countries and in America, he acted as an advocate of the independence of Ukraine. He could return to Poland after submitting a declaration of loyalty. As a shepherd of the Greek Catholic Church in Eastern Lesser Poland, he contributed significantly to the expansion of its assets, development of Catholic organisations and the press. Along with this, he downplayed the phenomenon of nationalism spreading among the Ukrainian population, during his pontificate a significant number of priests collaborated with nationalist militias. Several acts of public condemnation of acts of political terror did not translate into consistent activities directed against radicalism and extreme nationalism. During the German aggression against the USSR in 1941, he expressed his support for the occupiers, counting on the possibility of carrying out missions in the conquered Soviet territories. He wrote a congratulatory letter to A. Hitler after the Germans seized Kiev in July 1941. He supported the so-called Ukrainian government proclaimed by Bandera's faction of the Organisation of Ukrainian Nationalists. He expressed his support for the formation of the 14th SS Galizien division from Ukrainians. He did not condemn the genocide of Poles committed by nationalist militias, as requested by Archbishop Bolesław Twardowski, the Roman Catholic metropolitan of Lviv. Together with this, he contributed to the rescue of about 150 Jews, placing them in Uniate monasteries. By himself he maned hierarchs in the occupied territories of the USSR, which caused reservations on the part of the Vatican. He welcomed the entry of the Red Army into Eastern Lesser Poland and on this occasion, he sent a congratulatory letter to J. Stalin. He hoped that the annexation of Lesser Poland would favour the Uniate mission in the rest of the Soviet state. He died on 1 November 1944 in Lviv. The funeral was attended by Soviet soldiers. He rested in the crypt of the Cathedral of St. Jura. The beatification process of Archbishop Sheptytsky has aroused considerable controversy. The primate of Poland, Stefan Wyszyński, twice vetoed the beatification proceedings. Despite his involvement in saving Jews, he was not included among the Righteous Among the Nations due to his collaboration with the Nazis. In 2015, Pope Francis recognised the heroic virtues of the Servant of God A. Sheptytsky [Krasowski 1996, 279–89; Osadczy 2019a, 763–79; Kubasik 1999; Osadczy 2019b, 126–57].

[6] Father Ihor Pełechatyj, a Greek Catholic priest of the Ivano-Frankivsk (Stanyslaviv) diocese, editor of the "Nowa Zoria" journal and director of the diocesan publishing house, dismissed in 2016 after the publication of the book "Two Kingdoms." Postulator of the beatification process of Blessed Bishop Hryhoriy Khomyshyn. Populariser and publisher of Bishop Khomyshyn's works [Osadczy 2017, 427–32].

[7] The Stanyslaviv diocese of the Greek Catholic Church was established in 1885 by the bull of Pope Leo XIII De universo Dominico. The first bishop was Bishop Julian Pełesz. The new diocese was separated from the territory of the Greek Catholic Archdiocese of Lviv [Osadczy 1999, 40].

text and assisted in rewriting and preparing the document for printing. The depositary of the document who led to its printing was Father Doroteusz Szymczij, Order of Saint Basil the Great,[8] one of the oldest clergymen in the Ukrainian Greek Catholic Church. When he was over 100 years old, he began to solicit the publication of the manuscript of the blessed martyr bishop, asking Father Pełechatyj for help in this matter. He revealed to him the fate of the document, the secrets of its miraculous salvation and survival.

After a stormy reaction to the publication of Bishop Khomyshyn's book in the Ukrainian Greek Catholic Church and the repression against the priest who led to the publication of the manuscript in print, as well as allegations of the possibility of falsification of the document, Father Szymczij prepared an explanation about the fate of the document. A photocopy of this confirmation was included in the Polish edition of the book "Two Kingdoms." The Basilian stated that he kept the manuscript at the request of his religious confrere, Bishop Sofronius Dmyterka, Order of Saint Basil the Great,[9] the ordi-

[8] Father Doroteusz Szymczij, Order of Saint Basil the Great (1915–2016), as a boy, from 1928 he studied at the Basilian monastery in Buczacz at the Mission Institute. In 1932, he joined the Order of Basilian Fathers in Krechów, and in 1937 he took perpetual vows in the monastery in Dobromil. He began his theological studies on 1 September 1939 in the monastery in Lavrov, continued in Olomouc and at the Charles University in Prague. In 1942 he was ordained a priest. Until 1946, he worked as a catechist in a junior high school in Krystynopol and was the administrator of the parish in Wielkie Mosty. After the liquidation of the Uniate Church in 1946, he left for Slovakia, and then moved to Brazil, where he worked with the Uniate population until 1961. Transferred to Argentina, he worked there until 1985, serving in 1970–1979 as a provincial of the vice-province of the Immaculate Conception of the Blessed Virgin Mary. Later, he was transferred to Rome in 1985 and looked after the students of St. Jehoshaphat College. In connection with the legalisation of the Greek Catholic Church in Ukraine, from 1992, he continued his work on the spiritual formation of alumni at the seminary in Ivano-Frankivsk (Stanyslaviv) and Buczacz. Until his death, he stayed in the monastery in Buczacz, where he had begun his spiritual formation in his childhood. He was the author of over 20 books [Grim 2015, 32–34].

[9] Bishop Sofroniusz Dmyterko, Order of Saint Basil the Great (1917–2008), ordinary of Stanyslaviv (Ivano-Frankivsk). He came from a family of a Greek Catholic clergyman. In 1932 he started the novitiate at Fathers Basilians in Krechów near Żółkiew. During the war he was in the territory of Bohemia, and there he was ordained a priest in Prague in 1942. Persecuted by the Nazi authorities, he was sent to Moravia to a coal mine. After 1943, he worked in the Basilian monasteries in Pogoń, Hoszów and Buczacz. In the years 1944–1954 he was serving a sentence for the so-called "Anti-Soviet activity." Then he worked as an illegal priest in the Podkarpacie region of the USSR. In 1968 he was consecrated bishop when acting underground. For his religious activities, he was again sentenced to 2 years in prison in 1974. Being employed as a worker, e.g. as a stoker, Bishop Dmyterko was active in the underground pastoral ministry, he catechised young people. He ordained 65 priests in secret. On 16 January 1991, he received confirmation of the bishop's dignity as a legal hierarch from Pope John Paul II and was officially nominated the bishop of Ivano-Frankivsk (Stanyslaviv). Due to his illness, he resigned from his office in 1997. In his pastoral work he closely cooperated with the Latin Church and was an ardent supporter of Polish-Ukrainian reconciliation [Osadczy 2009, 103].

nary of Ivano-Frankivsk (Stanyslaviv). According to the bishop's account, for many years the custodian of the manuscript was Sister Bonifacja Horbiańska, a sister servant who in the 1940s worked in Stanyslaviv in the residence of Bishop Khomyshyn and witnessed his arrest by MGB officers.[10] According to her words, some of the bishop's documents were burned in the courtyard of the residence. She managed to extract the manuscript from the burning fire and kept it until the legalisation of the Greek Catholic Church. She handed the document to the bishop ordinary, who at the end of his life gave the valuable manuscript to Father Szymczij. The monk further explained: "[...] in the month of September 2013, feeling my impotence, I familiarised my clerical pupil, professional Catholic editor, Father Ihor Pełachatyj from Ivano-Frankivsk, with the content of this manuscript, so that he examined and organised it. He made exact copies of all the pages and photographed them all. Then Father Ihor typed the text on the computer and asked me to review it, which I slowly did. I thank the Sacred Heart of Jesus that the testament of Blessed Hryhoriy was executed and that this very valuable script is finally printed, and Greek Catholics and all people interested can finally read it" [Pełechatyj and Osadczy 2017, 424–25].

Currently, the document is stored in the Archives of the "Nasza Przeszłość" journal, about which Father Pełechatyj wrote in an open letter to the hierarchs: "During the presentation [of the book "Two Kingdoms" – W.O.], bishop Marian Buczek said that the manuscript of the book "Two Kingdoms" by Bishop Khomyshyn was deposited in the archives of the important historical journal "Nasza Przeszłość" in Krakow at the end of June this year [2016 – W.O.], its authenticity has been confirmed by experts and any interested researcher can read it in the presence of the depositary.[11]

2. DOCUMENT DESCRIPTION

The document, which caused such a stir and emotions, impresses with its appearance, which is a kind of metaphor for the majesty and suffering of the author of the notes, martyr for faith, Blessed Bishop Hryhoriy Khomyshyn. A fairly bulky tome consists of loose sheets covered with two hard dark brown covers and tied with two black linen ropes passing through the covers. The edges of the cover and the margins of the pages are burned, but the text itself has not experienced any damage. On the inside of the cover in the lower left-hand corner there is an embossed oval stamp of purple colour, 2x3 cm with the

[10] Russian: Ministerstwo Gosudarstwiennoj Biezopasnosti, the Ministry of State Security (1946–1953, continuation of the NKVD) [Dzwonkowski 1998, 18].

[11] See *List otwarty dotyczący książki „Dwa królestwa" Hryhorija Chomyszyna*, http://www.mysl-polska.pl/1075 [accessed: 27.02.2021].

inscription "M. Łozowski bookbinder from Stanyslaviv" [Pełechatyj 2017, 31–32].

The text is written in blue ink on rigid, slightly yellowed sheets, 340x210 mm in size and takes up 2/3 of the paper's surface. The margin on the left side is free from entries and is intended for author's notes and details. The pages are numbered in the upper left corner of the sheet [ibid., 32]. The manuscript begins on page 55 and ends on page 508. However, the first 54 pages are missing. Most likely, they burned down while the bishop's documents were being burned.

The name "Two Kingdoms" comes from the author. The text shows that this text is a continuation of the work "Two Kingdoms," which was prepared before the Second World War. Bishop Khomyshyn mentions that this is the fifth part of this work, so the previous four must have appeared earlier, but their fate is unknown [Pełechatyj and Osadczy 2017, 416]. On the basis of the text of the manuscript, we can approximately recreate the concept of the previous parts of the work. Most likely, the inspiration for choosing the title of the work was St. Augustine's work "The City of God."[12] This hypothesis is also confirmed by the confrontation of the service to the world and the Lord, which appears on the basis of the assessment of Metropolitan A. Sheptytsky's activities – and the service to the Lord [ibid., 416]. In the text of the notes there is a mention of the second part of "Two Kingdoms," which referred to renunciation, asceticism, as one of the features of the Kingdom of God [ibid., 402, 372]. In the fourth part of the book, as mentioned in the text of the manuscript, there would be reflections on attacks on priests, insults experienced by the bishop himself [ibid., 395]. This part also included the author's comments on the celibacy of priests in the Greek Catholic Church [ibid., 374–75]. There is no information on the content of other parts of the lost work. However, it can be concluded that they contained Bishop Khomyshyn's considerations on spirituality and ecclesiology, and focused strictly on the matters of the clergy. This thesis is also supported by the author's explanation at the end of the fifth part of "Two Kingdoms" that he is continuing the work written before the Second World War, which he intended to close in four parts, due to the "ritual reform imposed" by Metropolitan A. Sheptytsky.[13] In addition to matters

[12] The work of St. Augustine (354–430), Bishop of Hippo, the Father of the Church "De civitate Dei" explains the historiosophy of the history of the world through the prism of the struggle between the "City of God" and the "Earthly City." In the Earthly City selfishness and love of the temporality reign, in the City of God the love of God and eternity [Stöckl and Weingärtner 1930, 139–40, 151–51].

[13] It concerns Archbishop Sheptytsky's attempts to carry out a broad liturgical reform in the Greek Catholic Church, aimed at unifying the rite in the spirit of adopting the only binding models reflecting the spirit of the Christian East. The Congregation of Eastern Churches dealt with the resulting polemic about the actions of the metropolitan, reserving arbitrary decisions on ritual matters for itself. During the occupation, Archbishop Sheptytsky, lured by the vision of

directly related to church life, this work also includes a large part of social, historiosophical, ideological and political considerations, etc.

The author divided the text into individual parts. Due to the lack of the beginning of the document to page 239 (more than half of the content), the name of the first chapters of the work is unknown. The chapter entitled: "4. Metropolitan Andrey Sheptytsky – a Byzantineist on the background of Russophilism" starts on page 240. It can therefore be concluded that before p. 55 – the first extant page of the manuscript – there were two previous chapters and the beginning of the third containing their titles. Chapter "5. Phantasmagoria" begins on p. 375, then, on p. 401 a rather short chapter: "6. The act of God". The next chapter is "7. Restitution" beginning on p. 419. As the ending there is a part of the text entitled "8. My justification".

The manuscript is a handwritten text written by Bishop Khomyshyn himself. The document is written in the correct literary Ukrainian language with minimal influences of Galician regionalisms. The text of the notes includes a fragment printed in Polish containing the statements of the Stanyslaviv ordinary for the Polish Catholic Agency on pp. 315–316 [Pełechatyj and Osadczy 2016, 271–74]. These are the author's deliberations on religious, cultural and social topics related to the person and activity of the Archbishop Sheptytsky. The text includes the bishops' correspondence containing the position on national and social matters, the bishops' messages on matters important to the author, and large passages from press articles. The entire pastoral letter of Bishop Khomyshyn "On Byzantineism" of 23 March 1931 was incorporated into the manuscript, which at that time caused great confusion in the Roman Curia and Pope Pius XI's personal discontent. At the request of Rome, the letter was withdrawn as it was not timely [Kubasik 2020, 161–62].

All the mentioned additions are integrated with the bishop's uniform and logical deliberations, they justify the theses and present a broad background of the discussed issue.

3. BLESSED BISHOP HRYHORIY KHOMYSHYN – THE AUTHOR OF THE DOCUMENT

The interest that the manuscript "Two Kingdoms" aroused is primarily related to the person of its author, Blessed Bishop Hryhoriy Khomyshyn, a martyr for the faith, as well as the shepherd who at the times of performing his

missionary activity in the areas inhabited by the Orthodox population, intensified his activity towards ritual unification bringing the Greek Catholic and Orthodox Churches closer together. On 19 May 1941, under the Soviet occupation, his pastoral letter "On rites" appeared, which was publicly read only in territories under the German occupation on 21 May 1942 [Korolewśkyj 2014, 404–406]. See *Andrej Szeptyćkyj, Łyst-Poslannia 1939–1944*, Lviv 1991, p. 149–61.

service become famous for bold and uncompromising views and was seen already by his contemporaries as a great bishop , "[...] who shares the fate of great men: while alive – the envy and jealousy of little people – but history has already written the name of Bishop Khomyshyn in golden letters. A real bishop – because he is aware of the goal."[14]

Hryhoriy Khomyshyn was born on 25 March 1867 in the village Hadynkivtsi near Husiatyna in Podolia in a peasant family. He attended a junior high school in Tarnopol, after which he entered the Lviv Theological Seminary in 1888 and studied theology at the University of Lviv. After ordination on 19 May 1893, he became a vicar at the Greek Catholic cathedral in Stanyslaviv. As a Uniate priest, he continued his spiritual formation in Vienna at "Augustineum." In the capital of the Danube monarchy, he looked after the Greek Catholic subjects of Emperor Franz Joseph who belonged to the former Vienna parish of St. Barbara [Osadczy 2018a, 145].

After returning to Galicia, the young priest with a doctoral degree was noticed by Metropolitan Andrey Sheptytsky and took the position of the rector of the Lviv Greek Catholic seminary. However, he did not stay in Lviv for too long, because after two years he was recognised as a good candidate for the shepherd of the Stanyslaviv Diocese. It should be noted that it was the youngest Uniate bishopric in Galicia, established only in 1885, and Khomyshyn became its fourth ordinary since its founding. On 19 June 1904, the new Stanyslaviv ordinary was consecrated by Archbishop Sheptytsky, assisted by the Latin Archbishop of Lviv Józef Bilczewski, the Armenian Catholic hierarch Archbishop Józef Teodorowicz and the Greek Catholic ordinary of Przemyśl, bishop Konstanty Czechowicz. A large field for pastoral cultivation was opening up before the young 38-year-old shepherd [ibid., 146]. The territories of the diocese, a large part of which included mountainous areas inhabited by the Hutsul population, were distinguished in terms of religiousness by neglect, and the Christianity of the faithful was often only nominal. When A. Sheptytsky was the bishop of Stanyslaviv, he emphasised this in his 1900 pastoral letter "To my beloved Hutsuls."[15] The new shepherd decided to break with the traditional system of religious life, which consisted in integrating priestly families into the social fabric of the Ruthenian and Greek Catholic population as a kind of enlightened elite class, burdened with family and communal obligations. The clergy who inherited priesthood from generation to generation, like crafts passed from father to son, grew into the routine of communal life. Some priestly families had been "residing" in mountainous areas for several hundred years. On the other hand, the bishop needed – as he himself recalled

[14] See *Książęta Kościoła katolickiego w Polsce*, Lviv 1926, card: "Ks. dr. Grzegorz Chomyszyn grecko-katolicki biskup stanisławowski."

[15] See *Twory Mytropołyta Andreja Szeptyćkogo. Pastyrśki posłannia do duchowenstwa i wirnych stanysławiwśkoji eparchii (1899–1904)*, Lviv 1935, p. 114–55.

– an "army of missionaries" who, on the shepherd's orders needed to undertake work in every corner of the diocese, without having the duties of breadwinners, to devote themselves entirely to pastoral work. That is why his move towards celibacy of priests in the diocese was so revolutionary and shocking. This was perceived by the national circles as a blow to national life, the destruction of the patriarchal order sanctified by many centuries of tradition, on which the order in Ruthenian society was based [Osadczy 2018a, 147].

In order to educate priests for the needs of the diocese in Stanyslaviv, a theological seminary was established by the Bishop. Under his ordinance, Uniate priests had to go on a mandatory yearlong retreat. Bishop Khomyshyn attached great importance to the development of the activities of religious orders and congregations, not very present at that time in the Greek Catholic pastoral ministry. Thanks to his efforts, as well as material support, Basilians and Basilian sisters, Redemptorists, Studite monks and nuns, sister servants, Daughters of Charity of Saint Vincent de Paul, Sisters of Saint Joseph, Spouse of the Blessed Virgin Mary, Myrrh-bearing Sisters joined evangelisation work of in the land of Stanyslaviv. Thanks to the bishop's efforts, more than 50 orphanages and nurseries, a small seminary, and a teachers' seminary were established in the diocese [ibid.].

Bishop Hryhoriy himself, like a good shepherd, continued to visit his flock, preaching parish missions even in the most distant corners of the diocese. He went on 100 two-week missions personally, and in his old age, on 25 more accompanied by priest-assistants. In order to deepen the piety of the faithful, as well as to shape a Christian civic and social attitude, he founded popular magazines "Nowa Zorya" and "Pravda", he organised over 300 parish reading rooms "Skala" (Opoka) [ibid.].

Bishop Khomyszyn was arrested in 1945 by the NKVD as part of the destruction of the Greek Catholic Church. At the age of 78, he was tried in the Lukyanov prison in Kiev. Subjected to torture, he died a martyr's death in a prison hospital on 28 December 1945. Until the end of his days, he kept his peace of mind and prayed almost constantly. His resting place has remained unknown to this day [Kubasik 2020, 111].

The hierarch, who died in the aura of sanctity, was venerated among the faithful as a martyr shepherd. On 14 September 1995, on the personal initiative of Pope John Paul II, Bishop Sofroniusz Dmytreko, the ordinary of Stanyslaviv (Ivano-Frankivsk) began pre-beatification proceedings to collect materials testifying to the sanctity of late Bishop Khomyshyn. On 16 February and 18 March 1996, the Congregation for the Causes of Saints agreed to start the beatification process. The case of the Servant of God, G. Khomyshyn, was prepared for the beatification ceremony on 27 June 2001 in Lviv, chaired by Pope John Paul II, during which a group of 28 martyrs and followers of the Greek Catholic Church were canonised. The special representative of the

Congregation for the Causes of Saints, Mons. Roberto Sarno, who came to Lviv in order to coordinate the beatification preparation, stated that the documentation of beatification of the Servant of God G. Khomyshyn had been impeccably prepared, its completeness was outstanding and it did not arouse any objections [Pełechatyj 2019, 15–16].

4. THE MAIN THEMES OF THE DOCUMENT

The document, which evoked so much emotion and intrigue, concisely and clearly presented the basic cross-section of the author's worldview profile, the directions of his pastoral activity during his tenure as the Stanyslaviv bishop. It should be remembered here that Bishop Khomyshyn differed from the contemporary Greek Catholic episcopate in his very diverse approach to church, cultural and national matters. From the mid-nineteenth century, the Greek Catholic Church's tendency to distance itself from the Latin Church was growing, and the clergy merged with political national circles, which also resulted in the politicisation of the clergy, largely on the basis of the confrontation with Poles.

Contrary to the general mood, Bishop Khomyshyn advocated a more decisive integration of Greek Catholics with universal Catholicism, which at the turn of the 19th and 20th centuries took up an active ideological struggle against the progressive global secularisation of political life. According to the Bishop of Stanyslaviv, pious practices that proved successful in the Latin Church and that could bring salutary effects to the sluggish, conservative life of Galician Ruthenians should enter the religious life of the Uniates. During First World War, he introduced the Gregorian calendar in his diocese and celibacy among the diocesan clergy. In addition, however, he favoured the promotion of Eucharistic, Marian, the Sacred Heart of Jesus, rosary, etc. services [ibid., 11].

The bishop also had a very clear position on social, national and political matters. Throughout the nineteenth century, the community of Galician Ruthenians was split in its identity, looking for a definition of its nationality. The currents defining Halyts Ruthenia and Hungarian Ruthenia as part of a larger East Slavic cultural and civilisation community, which they themselves called the "Ruthenian world,"[16] and the political personification of which was

[16] The term "Ruthenian world," having a political overtone in pan-Slavic Russian rhetoric, was something obvious and natural among Galician Ruthenians looking for their cultural and civilisational base in Russia, opposing the increased Polish influence in the country. One of the arousers of the Ruthenian national movement in Galicia, writer, politician and religious activist, Father Jan Naumowicz presented the national credo in such a way that he announced that "[...] Halytskyi, Hungarian, Kievan, Moscow, Tobolsk Ruthenias and others, in terms of ethnography, history, lexicography, literature and rituals, are the same Ruthenia [...] We cannot cut

Russia clashed with the national current which declared itself completely different from Russia. Bp. Khomyshyn described himself as a strong supporter of the national option, he firmly rejected any ties with Russia, emphasising first of all civilisation and religious differences. Such radicalism reflected the attitude of some representatives of the Galician elite, forced to exaggerate their anti-Russian moods – in the cultural and national sense – due to the rather strong Russophile sentiment in society. In the milieu of the Greek Catholic clergy, this issue caused particular stubbornness, and at times even turned into hostility. During First World War, the Russophile option in the Greek Catholic Church was eliminated from social life, including physically.[17]

Standing on Ukrainian national and cultural positions, Bishop Khomyshyn, at the same time, rejected all political radicalisms, especially the sentiments of extreme nationalism on an anti-Christian basis, which spread in the 1920s. When the Greek Catholic clergy turned a blind eye to these disturbing phenomena, or even actively sympathised with the nationalist option[18] the ordinary of Stanyslaviv strongly condemned "perverted nationalism," which he also announced in his pastoral letter to the faithful, which was published as a separate brochure.[19]

The reality of social life of the Ukrainian population in Eastern Lesser Poland, which surrounded the Bishop, was characterised by ethical-moral relativism, neo-pagan radicalism, as well as superficial, ritual religiousness. Although the contents of "Two Kingdoms" refers to religious issues, it is largely devoted to the Christian principles of social life, sources of inspiration for Ukrainian culture and the threat posed by nationalist ideology. A special place in the records was occupied by the figure of Metropolitan Archbishop Sheptytsky, and his activities both on the religious and national-social planes.

The text of the surviving part of the document begins with several sentences ending the unpreserved chapter describing the wartime destruction of the Sheptytsky family property. Another particle of the notes contains reflections on the political situation of Ukrainians during the struggle for independence, with remarks on the distortions and neglect of this period. The author introduces the metaphor of the Old Testament strong hunter Nimrod, who exercised despotic, usurper rule, contrary to God's will. Using the term "nimrodism" he describes the trends in the development of Ukrainian political

ourselves off our brothers and linguistic, literature and national ties with the entire Ruthenian world with the Chinese wall." Cited in: Osadczy 2007, 88.

[17] A large number of Russophile priests were sent by the Austrian authorities to the Thalerhof and Teresin camps, where many of them died tragically. It is estimated that over 350 clergymen were arrested on charges of pro-Russian sympathies. See Tarnawski 1920, 10.

[18] More on this topic see Kulińska 2009, 13–68.

[19] A translation into Polish appeared in the monthly "Nasza Przyszłość" 1933, vol. 29 and 30. The reissue of the Polish version of the pastoral letter was published in: Chomyszyn 2008, 13–39.

history, especially pointing to the period of the struggle for independence during the world war and to nationalist tendencies in the interwar period. Bishop Khomyshyn is critical of the passive attitude of Archbishop Sheptytsky towards the progressing dangerous trends in social and political life. In this part of the notes, there are many threads concerning individual phenomena of religious life in Eastern Lesser Poland, the development of the religious press, the role of religious orders, and internal disputes between various options in the environment of the Greek Catholic Church. Critical remarks on the secular roots of Ukrainian culture, the anti-religious attitude of its leading representatives, as well as the silence or silent consent of the Church influential centres, including the metropolitan, to the cult of secular cultural and political activists resounds quite strongly. Much space in the notes is occupied by the characteristics of Father Hryhoriy Kostelnyk,[20] one of the leaders of the so-called "Eastern" option among Greek Catholic intellectuals, an advocate of getting close to the liturgical tradition and spirituality of the Orthodox Church.

The smaller chapters cover narrower issues relating to the general topic of the notes. "Metropolitan Andrey Sheptytsky – a Byzantineist on the background of Russophilism" concerns the personality-psychological and cultural-worldview characteristics of Archbishop Sheptytsky. It also contains a broader polemic with so-called Byzantineism, as well as the pastoral letter of Bishop Khomyshyn "On Byzantineism," which caused such a stir in the Holy See. The author also undertakes a critical assessment of the Roman eastern policy implemented in that period.

The chapter "Phantasmagoria" is a continuation of the polemic with the activity of Archbishop Sheptytsky, accusing him of relativism in national matters and total subordination to the ideas of the conversion of Russia. The title "phantasmagoria" refers to the views and intentions of the head of the Uniate Church in Eastern Lesser Poland.

The chapter "The act of God" points to deep crisis phenomena in the Uniate Church and the responsibility of the Lviv Metropolitan for them. The next chapter, "Restitution" presents remedial measures that would be able to remedy the situation among Greek Catholics living in the Polish state. The Blessed Bishop draws attention to the salutary importance of internal

[20] Hryhoriy Kostelnyk (1886–1948), a Greek Catholic clergyman born in Rusky Krstura in Vojvodina, educated in Zagreb, Lviv and Swiss Friborg, where he obtained a doctorate in theology. He was ordained a priest in 1913 and as a clergyman he worked as a catechist in Ukrainian secondary schools in Lviv, and also as a lecturer at a Greek Catholic seminary. He was at the head of the intellectual community in the Greek Catholic Church striving to bring its rituals closer to the Orthodox Church. He enjoyed special support from the metropolitan Szeptycki. After the Soviet occupation of Eastern Lesser Poland in 1944, he became involved in the work on the liquidation of the ecclesiastical union and headed the Initiative Group for the unification of the Greek Catholic Church with the Russian Orthodox Church. He was treacherously murdered by nationalist terrorists in Lviv [Osadczy 2002, 967–68].

conversion, "spiritual renewal," catechesis, and proper formation of priests. It also refers to the issue of the Polish-Ukrainian agreement, showing a lot of prejudice against Poles. As remedial measures, he proposes radical means in the liturgical and political life of the Uniate Church, including getting closer to the practices of the Latin Church, the introduction of priestly celibacy and the Julian calendar among Greek Catholics from Lesser Poland.

The last several-page chapter "My justification" serves as a summary and conclusion of the whole work. The author summarises the activities of Archbishop Sheptytsky in the ritual and ecclesiastical field and assesses them as harmful to the Church. At the same time, he points out that he is not guided by any personal motives, animosities or prejudices. Bishop Khomyshyn was convinced that his deliberations could have a good effect on the global improvement of the condition of the Church.

5. THE IMPORTANCE OF THE DOCUMENT AND ITS MESSAGE

The miraculously found document is a historic testimony of its time. It illustrates the option of the supporters of so-called "Latinisation" trend in the dispute with "Orientalists," which has continued in one form or another to this day. These views of Bishop Khomyshyn are not arbitrary, and do not resolve the discussion at the root of which lies a deeper civilisational discrepancy that for many centuries has shaped the religious identity of the faithful Uniates, deriving their tradition from the Brest Union.

On the other hand, the teachings of the hierarch condemning radicalism, moral distortions, pagan ethics in national life and social activity have a universal overtone. Relying on Christian messages and ethics derived from the teachings of the Church, the hierarch is opposed to the nationalist trends prevailing in Ukrainian society. He does not hesitate to proclaim the truth that did not fit the necessity of the present moment, the prosperity and the purposefulness of the political calculations of the radicalised society very superficially influenced by Christianity. During his lifetime, he lived to see insults and offensive libels from various shades of Ukrainian political currents: from communists to nationalists, as well as liberals, socialists and clericals of the dominant option in the Greek Catholic Church. Nationalist militants sentenced the bishop to death for this attitude several times, which he himself mentioned in his notes.[21]

Finding the document at the present time, a time of widespread increase in the ideology of nationalism in Ukrainian society and unprecedented tensions in Polish-Ukrainian relations in the area of the policy of remembrance

[21] Bishop Khomyshyn wrote that on 26 April 1932, one of the bishops informed him that his assassination was being planned by nationalist terrorists [Pełechatyj and Osadczy 2017, 91].

and the interpretation of historical legacy, has the features of a providential event, a kind of sign. Immediately after the publication of Bishop Khomyshyn's manuscript "Two Kingdoms" this social dimension could be seen in the form of a sharp reaction from circles professing nationalist ideology in Ukraine. Soon after that, the voice of Catholic shepherds appeared, who recognised in the work of the blessed author an extraordinary sign in the lives of Christians in Ukraine and Poland. A letter of thanks to the Rector of the Catholic University of Lublin and the author of these words came from the Conference of (Roman Catholic) Bishops of Ukraine, signed by Father Archbishop Mieczysław Mokrzycki, Metropolitan of Lviv, Chairman of the Conference. "The publication of this book has become an important event in religious life in Ukraine. Catholics of both Christian traditions got acquainted with the remarkable text of the blessed martyr who, being an ardent patriot of Ukraine, acted as a spokesman for Polish-Ukrainian reconciliation. He warned his faithful against radicalism and «heresy of nationalism». It sounds very valid this year [2016 – W.O.], when our nations have come closer to getting to know their difficult history. The warning literally repeats the words of the Primate of Poland from a few days ago, who exhorted the faithful to love and avoid nationalist ideology. The voice of the Ukrainian bishop from the pages of the published book is in line with the symphony of Christian science, the resonance of which is special in this Extraordinary Year of the Jubilee of Mercy"[22] – the bishops of Ukraine wrote.

On the occasion of the publication of the Polish translation of the book "Two Kingdoms", the introductory letter was written by Cardinal Marian Jaworski, retired archbishop of Lviv, a long-time friend of St. John Paul II. He wrote, inter alia: "I am glad that the book – the testament of this Blessed Bishop – will also reach the Polish reader. It is an extraordinary document of fidelity to God, the Catholic Church, and humanism in international relations. The words of the Blessed are very timely now, when Ukraine is looking for the right way out of a difficult historical situation. Her Prophet, Blessed Bishop Hryhoriy Khomyshyn encourages us to follow the hard path of faith uninterrupted by the influences of godless ideologies taking various forms."[23]

The voice of the shepherds from Poland and Ukraine on the importance of the teaching of the Ukrainian martyr for the faith has sensitised wide social circles in both countries. The printing of the "Two Kingdoms" manuscript aroused renewed interest in the person of its author. It is evidenced by the fact that the Polish Parliament on 23 March 2017, on the eve of the jubilee

[22] A letter to habilitated doctor Włodzimierz Osadczy from Archbishop Mieczysław Mokrzycki, Chairman of the Ukrainian Bishops' Conference of 25 November 2016. The author's archive. The letter printed in: Pełechatyj and Osadczy 2016, 12.

[23] A Letter from Cardinal Marian Jaworski, retired Metropolitan of Lviv, Cracow, on 13 March 2017, in: Pełechatyj and Osadczy 2016, 11.

of the blessed martyr of the twentieth century, adopted a resolution, which said: "The Polish Parliament on the 150th anniversary of the birth of Blessed Bishop Hryhoriy Khomyshyn – Greek Catholic Ordinary of Stanyslaviv, citizen of the second Polish Republic, martyr of the communist regime, constant advocate of Polish-Ukrainian reconciliation is paying tribute to the Prophet of Ukraine, who was a tireless preacher of European values rooted in the traditions of Christianity and Latin civilisation. He warned his nation against criminal ideologies calling for hatred and destroying the centuries-old heritage of tolerance established in the lands of the First Republic. The figure of the blessed bishop should become a symbol of Polish-Ukrainian reconciliation based on the historical and spiritual heritage of the community of both nations founded on the undeniable foundations of morality and truth."[24]

REFERENCES

Chomyszyn, Grzegorz. 2008. "Problem Ukraiński." In *Materiały i studia z dziejów stosunków polsko-ukraińskich*, edited by Bogumił Grott, 13–39. Kraków: Księgarnia Akademicka.

Dzwonkowski, Roman. 1998. *Losy duchowieństwa katolickiego w ZSSR 1917–1939. Martyrologium.* Lublin: Towarzystwo Naukowe KUL.

Grim, Jeronim. 2015. "100-litnij juwilej o. Dorteja Szymczija, CzSWW." *Misionar Preswiatogo Sercia Isusowogo* 270, no. 9:32–34.

Korolewśkyj, Kyryło. 2014. *Mytropolyt Andrej Szeptyćkyj (1865–1944)*. Lviv: „Swiczado".

Krasowski, Krzysztof. 1996. *Biskupi katoliccy II Rzeczypospolitej. Słownik biograficzny.* Poznań: "Bene Nati".

Kubasik, Adam. 1999. *Arcybiskupa Andrzeja Szeptyckiego wizja ukraińskiego narodu, państwa i Cerkwi.* Lviv–Kraków: Wydawnictwo Bł. Jakuba Strzemię Archidiecezji Lwowskiej ob. łac.

Kubasik, Adam. 2020. *Ukraiński Prorok. Społeczno-polityczna i religijna działalność biskupa Grzegorza Chomyszyna (1867–1945). Troska o wieczne i doczesne dobro narodu ukraińskiego*. Wrocław: Wydawnictwo Papieskiego Wydziału Teologicznego we Wrocławiu.

Kulińska, Lucyna. 2009. "Antypolska działalność duchowieństwa greckokatolickiego w II Rzeczpospolitej." In *Polityczne, religijne i kulturalne aspekty sprawy polskiej na Kresach Wschodnich*, edited by Bogumił Grott, 13–67. Kraków: Księgarnia Akademicka.

Osadczy, Włodzimierz. 1999. *Kościół i Cerkiew na wspólnej drodze. Concordia 1863.* Lublin: Wydawnictwo KUL.

Osadczy, Włodzimierz. 2002. "Kostelnyk Hawryjił." In *Encyklopedia Katolicka,* vol. 9, 967–68. Lublin: Towarzystwo Naukowe KUL.

Osadczy, Włodzimierz. 2007. *Święta Ruś. Rozwój i oddziaływanie idei prawosławia w Galicji.* Lublin: Wydawnictwo UMCS.

Osadczy, Włodzimierz. 2009. *Władyka Markijan. Wywiad-rzeka z księdzem biskupem Marcjanem Trofimiakiem ordynariuszem diecezji łuckiej na Ukrainie.* Lublin–Łuck: Wydawnictwo KUL.

[24] See *uchwała Sejmu Rzeczypospolitej Polskiej z dnia 23 marca 2017 r. w sprawie uczczenia pamięci błogosławionego biskupa Grzegorza Chomyszyna w 150. rocznicę jego urodzin,* "Monitor Polski. Dziennik Urzędowy Rzeczypospolitej Polskiej" of 4 April 2017, item 319.

Osadczy, Włodzimierz. 2017. "Posłowie." In *Błogosławiony Męczennik Grzegorz Chomyszyn Biskup Stanisławowski. Dwa Królestwa*, edited by Ihor Pełechatyj, and Włodzimierz Osadczy, 423–36. Kraków: Wydawnictwo AA.

Osadczy, Włodzimierz. 2018a. "Bp Grzegorz Chomyszyn – prorok zapomniany." *Pastores. Kwartalnik Poświęcony Formacji Kapłańskiej* 78, no. 1:145–55.

Osadczy, Włodzimierz. 2018b. "Ośrodek Badań Wschodnioeuropejskich Centrum Ucrainicum." In *Encyklopedia 100-lecia KUL*, 148–49. Lublin: Wydawnictwo KUL.

Osadczy, Włodzimierz. 2019a. "La metropolia greco-cattolica do Halyc-Leopoli durante l'occupazione tedesca 1941–1944." In *La Chiesa cattolica in Europa centro-orientale di fronte al Nazionalsocialismo 1933–1945*, edited by Jan Mikrut, 763–79. Verona: Il Segno dei Gabrielli editori.

Osadczy, Włodzimierz. 2019b. *Unia Triplex. Unia Brzeska w tradycji polskiej, rosyjskiej i ukraińskiej*. Radzymin–Warszawa: Wydawnictwo Von Borowiecky.

Pełechatyj, Ihor. 2017. "Przedmowa." In *Błogosławiony Męczennik Grzegorz Chomyszyn Biskup Stanisławowski. Dwa Królestwa*, edited by Ihor Pełechatyj, and Włodzimierz Osadczy, 15–34. Kraków: Wydawnictwo AA.

Pełechatyj, Ihor. 2019. "Błażennyj Swiaszczennomuczenyk Grygorij Chomyszyn, jepyskop Stanysławiwśkyj – architektor i budiwnyczyj suspilnogo ta miżnacionalnogo porozuminnia w Gałyczyni u I-j połowyni XX stolittia." In *Jepyskop Grygorij Chomyszyn*, 5–56. Iwano–Frankiwśk: Ukrajińska Probłema.

Pełechatyj, Ihor, and Włodzimierz Osadczy, eds. 2016. *Błażennyj Swiaszczennomuczenyk Grygorij Chomyszyn. Dwa Carstwa.* Lublin: Biblioteka Ucrainicum.

Pełechatyj, Ihor, and Włodzimierz Osadczy, eds. 2017. *Błogosławiony Męczennik Grzegorz Chomyszyn, Dwa Królestwa.* Kraków: Wydawnictwo AA.

Stöckl, Albert, and Jerzy Weingärtner. 1930. *Historia filozofii w zarysie.* Kraków: Wydawnictwo Księży Jezuitów.

Tarnawski, Mieczysław [K. M. St.]. 1920. *Cerkiew unicka we wschodniej Małopolsce w czasie inwazji rosyjskiej (1914–1917). Fakty i refleksje.* Lviv: [No information about Publisher].

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DELIMITATION OF OFFENCES UNDER ARTICLE 243 AND ARTICLE 239(1) OF THE POLISH CRIMINAL CODE – CONSIDERATIONS IN THE CONTEXT OF THE JUDGMENT OF THE COURT OF APPEAL IN SZCZECIN OF 12 JANUARY 2016, II AKA 151/15

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Abstract. The paper addresses the problem of delineating the offence of facilitating the escape of a person deprived of liberty on the basis of a court decision or a legal order issued by another state authority (Article 243 of the Criminal Code) and the offence of assistance in avoiding criminal liability (Article 239(1) of the Criminal Code). The author claims that assistance provided after the escape should be considered an offence under Article 239(1) of the Criminal Code. He also draws attention to the problems occurring in practice with regard to the differentiation of these types of offences. His analysis also leads him to formulate postulates for the law as it should stand (*de lege ferenda*).

Keywords: offence of assistance in avoiding criminal liability, offence of facilitating an escape of a person legally deprived of liberty, Criminal Code

1. THE SUBJECT-MATTER AND PURPOSE OF THE STUDY AND THE RESEARCH METHODS USED

This article addresses the problem of demarcating the criminal offence of facilitating the escape of a person deprived of liberty under a court decision or a legal order issued by another state authority (Article 243 of the Polish Criminal Code[1]) and the offence of providing assistance in avoiding criminal liability (Article 239(1) CC). This is a demarcation both in dogmatic terms (distinguishing between types of offences) and in practical terms (the question of the correct legal classification of the facts of a case).

[1] Act of 6 June 1997, the Criminal Code, Journal of Laws of 2022, item 1138 [hereinafter: CC].

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The aim of the study is to analyse the relationship between the provisions in question and to discuss the constituent elements of the offence under Article 243 CC that are relevant to the object of this study and to draw attention to the need for a thorough examination of the facts of the case and the correct interpretation of the provisions in question. Irregularities in the application of Article 239(1) CC and Article 243 CC may have far-reaching consequences, including the destruction of the objectives of the criminal proceedings, in particular the objective of holding the offender criminally liable (Article 2(1) of the Polish Code of Criminal Procedure[2]). Suffice it to say that the mistake made by the court a quo whose judgment was subject to review by the Court of Appeal in Szczecin in the title case II AKa 151/15, resulted (in view of the specific procedural arrangements – see further remarks herein) in acquitting the perpetrators, although they had committed criminal prohibited acts. The issues which will be discussed below are therefore important, as they concern the real problem of the application of law. An important role in achieving the intended objective is played by a precise description of what is meant by "escape" as referred to in Article 243 CC and the determination of the moment when the offence of self-release under 242(1) CC is committed.

The main means of achieving this objective is to use the dogmatic legal method, with particular use of the linguistic interpretation of the provisions. The dogmatic analysis is accompanied by a reference to judicial decisions taken with regard to the legislation in question.

It should also be pointed out at this point that this study does not constitute a commentary on the title judgment. The judgment is merely a starting point for considerations within the scope outlined above, but it is not the only subject of my interest. The most important interpretation problems and mistakes appearing in practice will be discussed on its example.

2. FACTS OF THE CASE WITH REGARD TO WHICH THE JUDGEMENT OF THE COURT OF APPEAL IN SZCZECIN OF 12 JANUARY 2016, REF. NO. II AKA 151/15,[3] WAS ISSUED

By judgment of the Regional Court in Szczecin of 10 April 2015 (ref. no. III K 261/13)[4] the accused D.J. was found guilty of the following: "on an un-

[2] Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2021, item 534 as amended [hereinafter: CCP].

[3] Lex no. 2149584.

[4] It should be noted that it was a judgment issued after re-examination of the case. This was so because in the judgment of 21 November 2013, ref. no. II AKa 188/13, the Court of Appeal in Szczecin rescinded the judgment of the Regional Court in Szczecin of 13 May 2013, ref. no. III K 214/08 and remitted the case for re-examination, see http://orzeczenia.ms.gov.pl/content/u$0142atwia$0142$0020ucieczk$0119/155500000001006_II_AKa_000188_2013_Uz_2013-11-

specified date in July 2006, in the town of S., acting for the purpose of gaining a financial benefit, he facilitated the escape of W. R. imprisoned under a court decision, in such a way that he provided the said person with a forged passport issued in the name of another person, receiving PLN 3,000 as remuneration for this act," while accused N.J. was found guilty of the following: "in the period from 6 June 2006 to July 2006, having been convicted under an aggregate sentence issued by the District Court in Szczecin [...], *inter alia* for acts under Article 13(1) CC in conjunction with Article 279(1) CC and Article 242 CC to 3 years' imprisonment, which he served in the period [...], he facilitated the escape of W.R, imprisoned under a court decision, in such a way that, after the above-mentioned person fled on 6 June 2006, he rented to the above-mentioned person a flat in the town of S., located at [...] Street, where the latter then hid from the Police." These acts were qualified under Article 243 CC.

The Court of Appeal in Szczecin, in its verdict of 12 January 2016, as a result of appeals filed by the defence counsels, acquitted the defendants of the commission of these acts. In the grounds for the judgment it was indicated that: "These actions committed by D.J., which consisted in providing W.R. with a forged passport, were obviously undertaken after his escape from a prison, namely when W.R. had already moved into the rented flat and was planning to travel to the town of B. in order to commit a robbery at a jeweller's shop there. It was therefore not a question of facilitating his escape from prison, but possibly assisting him to avoid criminal liability to the full extent, i.e. the act defined in Article 239(1) CC, possibly also including the offence under Article 270(1) CC. However, changes toward this direction were not admissible, neither was the issuance of a cassation judgment, therefore D.J. was acquitted." The Court of Appeal further stated that: "In the case of N.J., the very description of the act points to activities undertaken after the escape (in this case the evidence had not been duly analysed properly bringing the indictment) and although the Regional Court hearing the case again made factual findings in the light of which the possibility to assume that the defendant had met the criteria of the offence pursuant to Article 243 CC could not be excluded, it would necessitate a change in the description of the act, but first of all we cannot lose sight of the factual findings made during the first examination of the case. These were limited to pointing out that immediately after the escape, W.R. contacted N.J., who, knowing that W.R. was hiding, rented for him a flat at [...] Street. It is therefore the nature of the findings according to which the behaviour of N.J. also constituted assistance in avoiding criminal liability within the meaning of Article 239(1) CC. The act the accused was charged of would require changing the description and legal qualification, which in the

21_001 [accessed: 06.02.2022]. However, the judgment of the Court of Appeal in Szczecin of 21 November 2013 does not contain findings on the wrong qualification of the acts attributed to the accused under Article 243 CC.

current circumstances of the case would not be possible to achieve, therefore also N.J. was acquitted of this act."

3. LEGAL-DOGMATIC CONSIDERATIONS

Article 243 CC criminalises the unlawful release of a person deprived of liberty under a court's ruling or a legal order issued by another state authority or assistance to that person in their escape. The same chapter of the Criminal Code ("Offences against justice") describes the offence of assistance in avoiding criminal liability, which involves obstructing or thwarting criminal proceedings by assisting the perpetrator of a criminal offence or fiscal offence in avoiding criminal liability, which may consist, in particular, in hiding the offender, covering up the traces of a criminal offence or a fiscal offence or serving a sentence instead of a convicted person.

It should be noted that a person who facilitates the escape of a person legally deprived of liberty can thus obstruct or thwart criminal proceedings by assisting the offender in avoiding criminal liability (e.g. helping a person sentenced to imprisonment or a person held in pre-trial detention to escape from a penitentiary). In such situations, there are a number of different legal assessments of the same act which, however, will not lead to its cumulative legal classification, since, to that extent, Article 243 CC must be regarded as a *lex specialis* to Article 239(1) CC (apparent concurrence of provisions).[5]

It should be pointed out, however, that the multiplicity of legal assessments will not occur at all when assistance to avoid criminal liability is provided only after the person deprived of his liberty has escaped. This is the problem of delimitation of the type of criminal offence described in Article 243 CC, which was faced by the Court of Appeal in Szczecin in the case which is the background to this study. This question should be addressed.

Article 243 CC uses the word "escape." What does it mean? According to the dictionary meaning of the word, "escape" as a noun means the act of running, fleeing from somewhere, from something, getting out, finding a shelter, while the verb "to escape" means to go out of a place by running (mainly due to the fear of being chased), to quickly leave, get out, flee from a guarded place [Doroszewski]. As one can see, the general language does not give an unambiguous answer to the question what the facilitating of an escape would involve.

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[5] As proposed by: Szamrej 1977, 113; Stefański 2003, 41; Kunicka–Michalska 2010, 358; Poniatowski 2019, 244; the following authors were of different opinion, based on the Criminal Code 1932 (the wording of the provisions in question were similar to those of the Criminal Code of 1997): Makarewicz 1938, 400–401; Nisenson and Siewierski 1949, 131; Siewierski 1965, 196; Glaser and Mogilnicki 1934, 502; Wolter 1961, 52–53.

Thus, the normative context must be taken into account. Three elements will be important here. First of all, Article 243 CC refers to facilitating an escape of "a person deprived of liberty." Secondly, the facilitating of an escape was located next to another perpetration action, namely the unlawful release of a person lawfully deprived of liberty. And thirdly, Article 243 CC is preceded by Article 242 CC, in which § 1 provides for a penalty for the unlawful self-release of a person lawfully deprived of liberty.

As regards the first element, in accordance with the interpretation directive of terminological consequence [Morawski 2010, 119–20], the "deprivation of liberty" referred to in Article 243 CC should be understood as a concept interpreted in the context of Article 242 CC, and therefore as actual deprivation of liberty, i.e. a situation in which a specific person cannot change the place of their residence according to their will [Kunicka-Michalska 2010, 337; Wiak 2018, 1195; Wojtaszczyk, Wróbel, and Zontek 2018, 733–34; Poniatowski 2019, 73–78]. In fact, such deprivation of liberty must have a basis in a judicial decision (e.g. a judgment sentencing to imprisonment or a decision on the application of pre-trial detention) or a legal order issued by a state authority other than court (e.g. detention by the police of a person suspected of committing a crime).

As regards the second and third elements, it should be noted that the offence of facilitating an escape was located by the legislature next to acts resulting in the unlawful release of a person lawfully deprived of liberty, and thus in the context of self-release of such a person and release of this person by another one. The pointing out that the perpetrator allegedly facilitates the escape of a person deprived of liberty and the mentioned location of the offence of facilitating the escape in the structure of the chapter of the Criminal Code and the particular section allows us to assume that the "escape" should be understood as a self-release of a person legally deprived of liberty, and consequently to recognize that "facilitating the escape" means facilitating the self-release of such a person.[6]

Upon regaining liberty (self-releasing), the possibility of facilitating the escape within the meaning of Article 243 CC ends [Makowski 1937, 488; Stefański 2003, 39; Hansen 1982, 33; Wysoczyńska 2014, 151; Poniatowski 2019, 244–45]. The provision of assistance to a person who has already

[6] More specifically, "facilitating the escape" means the undertaking by the perpetrator of any conduct which may facilitate the release of a person lawfully deprived of liberty, with the exception, however, of conduct which must be qualified as the release of that person, i.e. a conduct which directly and spontaneously contributes to the restoration of his or her liberty (that reservation is necessary since Article 243 CC defines two acts). Unlike the release of a person lawfully deprived of liberty, where the role (in terms of effort made) of that person is little or none, in the case of facilitating escape, that person plays a central role, while the perpetrator of the offence under Article 243 CC only assists him/her in the implementation of his/her intention of self-release.

released himself/herself should therefore not be qualified under that provision. Such conduct may be treated in specific circumstances as assisting a perpetrator to avoid criminal liability under Article 239(1) CC. In judgment of 26 November 1934 (ref. no. 3 K. 1202/34),[7] the Supreme Court assumed that: "An «escape» within the meaning of Article 151 CC [Criminal Code of 1932, which is equivalent to Article 243 of the current Criminal Code – author's footnote] is the getting out of the supervision of persons assigned to execute a judicial decision or order of public authority by slipping out of a closed area or authority of the persons exercising the supervision over the inmate, the purpose of which action is to avoid the direct danger of loss of liberty until the reaction of the authorities has become ineffective and the need for issuing new orders have arisen in order to capture the fugitive. [...] while «facilitating the escape» consists in assisting a prisoner who escapes, in any form whatsoever, until immediate danger of loss of the liberty that has been regained is avoided, that is to say, avoiding pursuit prompted by immediate escape from a place of confinement or from the custody of the guards or public order and security authorities." This ruling is correlated with the concept, adopted herein, that the regaining of liberty by a perpetrator of self-release (the commission of this offence) occurs when the fugitive gets out of captivity (e.g. from a prison or a police arrest) or of the supervision of persons watching him/her (the guards, e.g. while escorting a detained person for a detention hearing from a police car to a court building), and, where the direct striving towards the self-release (an attempt) has been noticed and the pursuit has started, the moment when the offence is committed will be the moment when the immediate danger of capturing the offender ceases. This is so because if a fugitive has escaped from a guarded place but has been immediately subject to a pursuit, it cannot be assumed that the fugitive has already regained his or her liberty, since the change of whereabouts is determined solely by the need to avoid being captured. However, once the pursuit, even a short one, is avoided, the offender regains the liberty he/she was previously deprived of. Of course, the fugitive's behaviour will depend to a large extent on the way in which the pursuit is conducted, but the desire to avoid it will no longer be a determinant of the choice of the offender's place of stay. It then can be said that offender's freedom is kind of restricted.

It can therefore be seen that the most important issue in the context of the correct application of substantive criminal law in a case at the boundary between Article 239 CC and Article 243 CC is the determination whether liberty of the fugitive had already been regained when the aid was being provided to them, or not.

[7] "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 3 (1935), p. 694–95.

4. ANALYSIS OF THE JUDICIAL DECISIONS

At this point, we have to go back to the judgment of the Court of Appeal in Szczecin referred to in the title hereof. In the case of both acts classified by the court of first instance under Article 243 CC, the perpetrators provided assistance to the fugitive after he regained his freedom, i.e. after committing the offence of self-release. Providing the fugitive with a forged passport by defendant D.J. and renting an apartment for him by defendant N.J. could not therefore be regarded as facilitating the escape within the meaning of Article 243 CC. These acts should have been qualified as the offence of assistance in avoiding criminal liability under Article 239(1) CC. However, due to the procedural arrangement (the appeal was only brought in favour of the defendants), the Court of Appeal had to acquit the defendants of the charges (prohibition of *reformationis in peius*). The decision contained in the judgment of the Court of Appeal in Szczecin of 12 January 2016 should therefore be regarded as correct.

The proper distinction between the offence of facilitating an escape and the offence of providing assistance in avoiding criminal liability encounters difficulties in practice. In the case considered by the Regional Court in Szczecin (ref. no. III K 242/12; it was related to the title-referred decision of the Court of Appeal in Szczecin), the public prosecutor accused T.S. of "having facilitated, in the period from 6 June 2006 to the beginning of July 2006 in the town of S., the escape of W.R., deprived of liberty under a court decision, in such a way that he provided him with money for maintenance and rent of the apartment where the said person was hiding, i.e. an act under Article 243 CC." In the judgment of 20 January 2014,[8] the Regional Court in Szczecin, while not sharing the view of the public prosecutor with regard to the legal qualification of the act charged against the defendant, found (correctly) T.S. guilty of the act of having, "in the period from 6 June 2006 to the beginning of July 2006 in the town of S., obstructed criminal proceedings in the case of his brother-in-law W.R, who had been sentenced to 2 years and 6 months of imprisonment by the judgement of the District Court in Stargard Szczeciński [...] and subsequently, during his imprisonment, liberated himself which helped him avoid responsibility, by hiding W.R. and providing him with money for living expenses, i.e. by committing the offence under Article 239(1) CC in conjunction with Article 239(2) CC" and discontinued the proceedings related to this act pursuant to 414(1) CCP in conjunction with Article 17(1)(4) CCP. Due to the fact, that the defendant who assisted the fugitive was his close family member, the correct legal classification of the act resulted in discontinuance of proceedings

[8] Not published; its content is contained in the judgment of the Court of Appeal in Szczecin of 15 May 2014, ref. no. II Aka 59/14, Legalis no. 2180368.

in the described scope (this type of regulation is not contained in Article 243 CC, which the prosecutor requested the court to apply).

In another case, the District Court in Grudziądz, by its judgment of 23 November 2017[9] found the defendant, K.G. guilty that "on 10 October 2015 from 20:52 to 20:55 in the town of G., deliberately acting towards self-release by B.Ś., R.B. and M.P. from [...] in the town of G., where they served custodial sentences, he facilitated their escape by picking them up immediately after their self-release, at [...] Street in the town of G. and carried them to the town of O., i.e. guilty of the commission of the offence under 243 CC." Attention should be drawn to the internal contradiction of the act attributed to the accused (at the same time it is said that he intended B.Ś., R.B. and M.P. to liberate themselves, and helped them immediately after their self-release) and to the erroneous legal qualification. If, according to the court, B.Ś., R.B. and M.P. have already committed the offence of self-release, which, as stated above, the appropriate qualification of the K.G.'s act would be Article 239(1) CC. It cannot be ruled out that, in fact, the persons concerned have not yet recovered their liberty (within the meaning as above), the factual findings made in the substantiation for the judgment do not, however, provide an unambiguous answer to this question. Even if freedom has not actually been regained, the description of the act (specifically the words: "after their self-release") excludes a qualification under Article 243 CC.

An incorrect decision can also be found in the judgment of the Regional Court in Warsaw of 7 April 2017.[10] In that ruling, the court found the defendant guilty of the fact that "from 23 May 2013 to 30 May 2013 in the town of P. at [...] Street and in the town of S., he facilitated K.O.'s escape from the [...] Centre of [...] in the town of P. where he was kept pursuant to the decision of the District Court for Warsaw-Wola in Warsaw [...] and the decision of the Regional Court in Warsaw [...], in such a way that, after throwing over a rope making it possible to cross the fence and after K.O. thus left the medical facility, he drove him in his car to the town of W. and then provided him with necessary food in the town of S., where K.O. stayed until 30 May 2013." This act was qualified only under Article 243 CC. If we assume that the mentioned conduct of the perpetrator constituted a single act (due to the temporal compactness and continuity of throwing the rope over the fence, transporting him by car and the subsequent provision of food, attack on the same legal good, i.e. the proper functioning of the justice system, and, probably, because we cannot

[9] Ref. no. II K 4/17, Legalis no. 2018828.

[10] Ref. no. XVIII K 136/15, not published. The content of this ruling is contained in the judgment of the Court of Appeal in Warsaw of 8 May 2018, ref. no. II Aka 440/17, http://orzeczenia.ms.gov.pl/content/$N/154500000001006_II_AKa_000440_2017_Uz_2018-05-08_002 [accessed: 06.02.2022].

be sure of this – a premeditated intention),[11] then it should be concluded that the described situation was an actual concurrence of the provisions of Article 243 CC and Article 239(1) CC, which should result in a cumulative qualification of the act (actual proper concurrence of provisions) and – in the light of Article 11(3) CC – imposing a penalty on the basis of Article 239(1) CC. The escape was facilitated by throwing a rope to allow crossing the fence or (which seems doubtful, though we do not know the detailed circumstances of the case) transporting the fugitive to another locality. Providing food certainly constituted "merely" the assistance in avoiding criminal liability.

In one of the cases examined by the District Court in Chełm,[12] the prosecutor accused the defendant that the latter: "acting together and in agreement with B.T. in the town of D., on 14 September 2012, attempted to facilitate the escape of M.T.K., after his self-release following his detention by Border Guard officers in such a way that he intended to take him by car from the town of D. to the town of N., but failed to achieve his goal because M.T.K. was captured again." This act was qualified by the prosecutor as an attempted offence under Article 243 CC. By a decision of 5 June 2014, the District Court in Chełm discontinued the criminal proceedings, as it assumed that the act of the defendant did not contain the elements of a prohibited act (Article 17(1)(2) CCP). However, it should be noted that the court did not consider the issue of erroneous legal qualification at all, as the reason for the discontinuance of the proceedings was the determination that the defendant could not be attributed with the intention to commit the offence under Article 243 CC.

5. SUMMARY AND CONCLUSIONS

Summarizing the above considerations, it should be noted that the separation of the discussed types of offences in practice is difficult. In some cases, prosecutors and courts incorrectly classify an act related to providing assistance to a person who committed self-release. It seems that the reason for such a state of affairs is the small number of cases concerning the facilitating of an escape[13] and the related lack of Supreme Court's statements on this is-

[11] This type of criteria for the unity of the act are cited in the context of the sociological approach to the act [Mozgawa 2020, 413–14].

[12] Ref. no. VII K 310/13, not published (the case analysed by the author as part of file research).

[13] In the period 1999–2018 there were a total of 111 final convictions under Article 243 CC (author's calculations based on: Ministerstwo Sprawiedliwości, *Prawomocne skazania osób dorosłych w latach 1946–2018*, 3rd edition, https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/download,2779,8.html [accessed: 06.02.2022]. At this point, it should be kept in mind that this provision penalises not only the facilitating of an escape of a person deprived of liberty but also releasing that person.

sue. An example of an accurate assessment of the facts is the decision contained in the judgment of the Court of Appeal in Szczecin indicated in the title hereof. Hopefully, the comments made in the article will contribute to the understanding of the title issue and the correct application of the provisions of the Criminal Code.

Regardless of what has been said above, it is worth considering a reformulation of Article 239 or Article 243 CC in such a way that there is no doubt about the mutual relationship between these two regulations. For example, one can propose to add to Article 239 its section 4 which reads as follows: "The provision of § 1 shall not apply if the act meets the criteria of another prohibited act." This "other prohibited act" may be, in particular, the offence under Article 243 CC.[14] Such a clause of statutory subsidiarity would certainly induce courts adjudicating in factual states located between the "ordinary" assistance in avoiding criminal liability and the facilitating of an escape to the correct subsumption of established facts under the appropriate provision.

By the way, it should be added that the discrepancy between the sanctions provided for in the two provisions is worth noting. It is difficult to understand why assistance in the avoidance of criminal liability consisting in the facilitating of an escape (self-release) is punishable by a custodial sentence of between one month and three years, while other assistance (including concealing a perpetrator who has already committed a self-release), aimed at obstructing or thwarting the criminal proceedings, entails a custodial sentence of between 3 months and 5 years. It is worth noting that the types of offences in question were punishable under the Criminal Code of 1969[15] by up to 5 years imprisonment (Article 252(1) and Article 257(1) CC of 1969). The differences regarded only the lower limit of the penalty range. Interestingly, the provision on facilitating an escape was stricter in this regard (6 months versus 3 months for another type of assistance in avoiding criminal liability). Thus, it is reasonable to postulate that sanctions for these offences be equated. The multitude of possible facts to be considered under the provisions in question and the consequent social harmfulness of acts committed by the offenders rather speaks for "upward harmonization," i.e. harmonization with the sanction provided for in Article 239(1) CC. At the same time, however, it would be worth placing in Article 243 CC a regulation similar to that contained in Article 239(2) or, which is perhaps more reasonable, in Article 239(3) CC. If the escape has been facilitated by the person closest to the fugitive, that person should be subject to less strict liability, as in the case of any other type of assistance in

[14] Some cases of dealing in stolen goods (receiving) should also be considered as a specific variety of assistance in avoiding criminal liability. Also making false statements or using violence or unlawful threats to influence e.g. a witness or expert witness may meet the criteria of assistance in avoiding criminal liability.

[15] Act of 19 April 1969, the Criminal Code, Journal of Laws No. 13, item 94 as amended.

avoiding criminal liability. Such solutions are provided for in Italian law and Spanish law, for example.[16]

REFERENCES

Doroszewski, Witold, ed. *Słownik języka polskiego*. https://sjp.pwn.pl/doroszewski/ucieczka;5510261.html,https://sjp.pwn.pl/doroszewski/uciec;5510259.html [accessed: 06.02.2022].

Glaser, Stefan, and Aleksander Mogilnicki. 1934. *Kodeks karny. Komentarz*. Kraków: Księgarnia Powszechna.

Hansen, Edgar. 1982. *Przestępstwa więźniów w okresie izolacji penitencjarnej*. Warszawa: Państwowe Wydawnictwo Naukowe.

Kunicka-Michalska, Barbara. 2010. "Komentarz do art. 242 i 243 k.k." In *Kodeks karny. Część szczególna*. Vol. 2: *Komentarz do artykułów 222–316*, edited by Andrzej Wąsek, and Robert Zawłocki, 328–60. Warszawa: C.H. Beck.

Makarewicz, Juliusz. 1938. *Kodeks karny z komentarzem*. Lwów: Wydawnictwo Zakładu Narodowego im. Ossolińskich.

Makowski, Wacław. 1937. *Kodeks karny. Komentarz*. Warszawa: Nakładem Księgarni F. Hoesicka.

Morawski, Lech. 2010. *Zasady wykładni prawa*. 2nd edition. Toruń: Towarzystwo Naukowe Organizacji i Kierowania. „Dom Organizatora".

Mozgawa, Marek. 2020. "Zbieg przepisów ustawy i zbieg przestępstw." In *Prawo karne materialne. Część ogólna*, edited by Marek Mozgawa, 412–33. Warszawa: Wolters Kluwer.

Nisenson, Jerzy, and Mieczysław Siewierski. 1949. *Kodeks karny i Prawo o wykroczeniach*. Łódź: Wydawnictwo Prawnicze i Naukowe.

Poniatowski, Piotr. 2019. *Przestępstwa uwolnienia osoby prawnie pozbawionej wolności (art. 242 i 243 k.k.)*. Warszawa: Wolters Kluwer.

Siewierski, Mieczysław. 1965. *Kodeks karny i Prawo o wykroczeniach. Komentarz*. Warszawa: Wydawnictwo Prawnicze.

Stefański, Ryszard A. 2003. "Przestępstwo uwolnienia osoby pozbawionej wolności (art. 243 k.k.)." *Prokuratura i Prawo* 2:32–41.

Szamrej, Józef. 1977. *Przestępstwo poplecznictwa w polskim prawie karnym*. Warszawa: Wydawnictwo Prawnicze.

Wiak, Krzysztof. 2018. "Komentarz do art. 242 k.k." In *Kodeks karny. Komentarz,* edited by Alicja Grześkowiak, and Krzysztof Wiak, 1194–197. Warszawa: C.H. Beck.

[16] In accordance with Article 386(1) of the Italian Penal Code (Codice Penale) of 1930, a person who procures or facilitates an escape of a person lawfully arrested or detained for an offence shall be punishable by a term of imprisonment of between 6 months and 5 years. On the other hand, under paragraph 4 of that Article, the penalty should be mitigated when the offender is a close relative of the person deprived of liberty. As regards Spanish criminal law, the offence relevant from the discussed point of view is set out in Article 470 of the Spanish Penal Code (*Código Penal*) of 1995. A sentence of imprisonment of between 6 months and a year and a fine of between 12 and 24 months shall be imposed on the person who allows a convicted, imprisoned or detained person to escape, either from the place where the person is deprived of his/her liberty and while being escorted. If the offence was committed by a person referred to in Article 454 of the Spanish Penal Code (i.e. a person who is closest to the offender), the person is subject to a fine of between 3 and 6 months (Article 470(3) of the Spanish Penal Code).

Wojtaszczyk, Adam, Włodzimierz Wróbel, and Witold Zontek. 2018. "Samouwolnienie i ucieczka z więzienia." In *System Prawa Karnego.* Vol. 8: *Przestępstwa przeciwko państwu i dobrom zbiorowym*, edited by Lech Gardocki. 2nd edition, 731–43. Warszawa: C.H. Beck.

Wolter, Władysław. 1961. *Reguły wyłączania wielości ocen w prawie karnym.* Warszawa: Państwowe Wydawnictwo Naukowe.

Wysoczyńska, Małgorzata. 2014. *Utrudnianie postępowania karnego. Wybrane zagadnienia teorii i praktyki*. Warszawa: C.H. Beck.

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PURSUIT OF CLAIMS AGAINST CONSUMERS ON THE GROUNDS OF A PROMISSORY NOTE – COMMENTS ON THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JUDGMENT OF 13 SEPTEMBER 2018 IN CASE C–176/17

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Abstract. It seems that the extraordinary appeal is the only appropriate measure to revoke an order for payment to ensure compliance with the principle of a democratic state ruled by law and implementing the rules of social justice. Taking into account the position of the Constitutional Tribunal based on Article 76 of the Constitution, in accordance with the CJEU's interpretation of Directive 31/13 in the case C–176/17 and expressed in its ruling of 11 July 2011, P 1/10, the Supreme Court's judicature stresses that, "the consumer has a weaker procedural position because he is in a dispute with a professional entity." Therefore, in addition to the provisions of the Code of Civil Procedure, the court conducting promissory note proceedings against consumers must also apply provisions aimed at consumer protection of its own motion. Thus, by disregarding other factors and limiting itself only to the formal verification of whether the submitted promissory note has been duly completed and its contents and truthfulness do not give rise to any doubts, the adjudicating court does not fulfill its obligation under Article 76 of the Polish Constitution in connection with the provisions of Article 7(1) of Directive 93/13. Meanwhile, it should of its own motion examine whether the provisions agreed between the parties are just and fair.

Keywords: consumer, writ of payment proceedings, consumer protection, promissory note, extraordinary appeal

INTRODUCTION

This study analyzes the impact of EU law on Polish procedural rules in the field of consumer protection in civil cases for issuing an order for payment on the basis of a promissory note.

The judgment of the Court of Justice of the European Union in the case C–176/17[1] is the fundamental subject of this analysis. This judgment deserves

[1] Judgment of the Court of Justice of the European Union of 13 September 2018, C–176/17, Profi Credit Polska S.A. in Bielsko-Biala v Mariusz Wawrzosek, EU:C:2018:711 [hereinafter:

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to be discussed in more detail, as the implications of the views expressed in its justification are far reaching in issues of key importance from the point of view of pursuing claims made against consumers under promissory notes.

1. GENERAL REMARKS

The Polish Constitution provides that public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. In its jurisprudence, the Constitutional Tribunal assumes that this provision "imposes an obligation on public authorities to protect consumers against activities posing a threat to their health, privacy, safety and against unfair market practices."[2] Moreover, it indicates that the protection of consumer rights included in Article 76 of the Constitution of the Republic of Poland is determined by the conclusion that, "the consumer is the weaker party to the legal relationship. Thus, it requires protection and therefore certain rights that would lead to at least a relative equalization of the positions of the parties involved."[3] Meanwhile, the purpose of consumer protection is not so much to favor consumers, but rather to create legal solutions that make it possible to implement the principle of equality of all parties to civil law relations.[4] Thus, Article 76 of the Constitution of the Republic of Poland expresses the constitutional principle obliging state authorities, including general jurisdiction courts, to take measures to protect consumers against dishonest market practices.[5]

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the judgment C–176/17].

[2] See judgments of the Constitutional Tribunal of: 13 September 2011, ref. no. K 8/09, OTK–A 2011, No. 7, item 72; 11 Jul 2011, ref. no. P 1/10, OTK–A 2011, No. 6, item 53; 2 December 2008, ref. no. K 37/07, OTK–A 2008, No. 10, item 172; judgment of the Supreme Court of 27 October 2021, ref. no. I NSNc 180/21, OSNKN 2022, No. 1, item 3; judgment of the Supreme Court of 1 December 2021, ref. no. I NSNc 535/21, Lex no. 326360113; judgments of the Constitutional Tribunal of: 28 September 2005, ref. no. K 38/04, OTK–A 2005, No. 8, item 92; 21 April 2004, ref. no. K 33/03, OTK–A 2004, No. 4, item 31; judgment of the Supreme Court of 24 November 2021, ref. no. I NSNc 153/21, Lex no. 3283396; judgments of the Constitutional Tribunal of 26 September 2000, ref. no. P 11/99, OTK 2000, No. 6, item 187; 12 January 2000, ref. no. 11/98, Journal of Laws No. 3, item 46; 10 October 2000, ref. no. P 8/99, OTK 2000, No. 6, item 190; judgment of the Supreme Court of 28 October 2020, ref. no. I NSNc 22/20, OSNKN 2021, No. 1, item 4.

[3] Ref. no. P 1/10.

[4] See judgments of the Constitutional Tribunal: ref. no. P 1/10 and of 15 March 2011, P 7/09, Journal of Laws No. 72, item 388 and the case law cited therein.

[5] See judgments of the Constitutional Tribunal: ref. no. K 33/03; ref. no. K 38/04; ref. no. K 8/09.

2. CONSUMER PROTECTION IN THE EU

We cannot forget that pursuant to Article 9 of the Polish Constitution, consumer protection is also rooted in the Treaty on the Functioning of the European Union.[6] According to the TFEU, consumer protection must be taken into account when defining and implementing other Union policies, as consumer protection policy aims to improve the quality of life of all citizens of the European Union.

Pursuant to Article 169 of the TFEU, "the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests" [Mikłaszewicz 2016, 1719]. According to the principles currently expressed in Article 169(2)(a) and in conjunction with Article 114 TFEU, the Union has adopted one of the important consumer protection instruments, namely Directive of 5 April 1993 on Unfair Terms in Consumer Contracts.[7] Its purpose is to approximate the laws of Member States relating to unfair contractual terms in consumer contracts. The preamble to this directive expressly states that the courts or administrative authorities of Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.

Pursuant to the requirements of the TFEU, consumer protection requirements must be taken into account when defining and implementing other Union policies, as the purpose of consumer protection policies is to improve the quality of life of all citizens of the European Union. This is why Article 38 of the Charter of Fundamental Rights (CFR) also references consumer protection. It provides that different European Union policies shall ensure high level of protection in this field.[8]

Article 7(1) of Directive 93/13 is particularly important for this study. It states that Member States shall ensure that, in the interests of both consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. Judicial proceedings involving consumers seem particularly relevant in applying the principles outlined in this article. One of the most important issues is that procedural rules should be shaped in line with the principles of equivalence and effectiveness. In accordance with the principle of effectiveness, Member States are required to provide adequate and effective means "to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." This is particularly important due to the nature

[6] O.J. EU C 202 of 7 June 2016, p. 47.
[7] Hereinafter: Directive 93/13.
[8] O.J. EU C 326 of 2012, p. 391.

and importance of wider public interest, namely protecting consumers finding themselves in weaker positions than contractors.

The Supreme Court's resolution of 19 October 2017[9] states that proceedings involving consumers to whom EU rules apply have a "community value," which obliges national courts to take account of Directive 93/13 and the CJEU's interpretation of this directive in a way that ensures the effectiveness of protection granted to consumers by Community law.

3. POSITION OF THE COURT OF JUSTICE OF THE EU

One of the most key issues to highlight in this study is that pursuant to Article 6(1) of Directive 93/13, Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. On the other hand, according to Article 3(1) of the same Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

It should be stressed that the state of facts of case C–176/17, which the CJEU looked into, is similar to the states of facts of many cases brought forward by loan institutions against natural persons who have concluded a loan agreement with them.

In case C–176/17, the lender concluded a consumer credit agreement with collateral in the form of a promissory note, the value of which was not determined. Since the borrower did not repay the loan, the financial institution asked the court for an order for payment on the basis of the promissory note for an amount corresponding to the remaining amount due. The lawsuit documentation featured only the filled out and signed promissory note and loan agreement termination documents. However, the agreement itself was not submitted. This form of collateral was typical of the contracts concluded by the lender at that time.

The court adjudicating the case raised doubts as to the fairness of the contractual clauses contained in the loan agreement and asked the CJEU for a preliminary ruling on the compatibility of Polish provisions on the order for payment procedure. Particularly, Article 485(2) and the following articles of the Code of Civil Procedure,[10] which restrict the competences of the national

[9] Ref. no. III CZP 42/17, OSNC 2018, No. 7–8, item 70.

[10] Article 485 has been amended twice: the amendment of 4 July 2019 and pursuant to Article 1(1)(a) and (b) of the Act of 19 July 2019 amending certain acts to minimize payment gridlocks,

court solely to reviewing the validity of a promissory note obligation in order to preserve the formal terms of a promissory note, disregarding their relationship with the relevant provisions of Directive 93/13.

In its judgment of 13 September 2018, C–176/17, when assessing the procedural position of the consumer in the dispute with the loaner who was vindicating payment on the basis of a promissory note for an amount representing the sum of the outstanding consumer credit collateralized by that promissory note, the CJEU focused on whether the provisions of Polish procedural law complied with the standards set out in the Directive on Unfair Terms in Consumer Contracts.

The Court of Justice ruled that Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation permitting the issue of an order for payment founded on a valid promissory note that secures a claim arising from a consumer credit agreement, where the court dealing with the application for an order for payment does not have the power to examine whether the terms of that agreement are unfair and if the rules for exercising the right to lodge an objection against such an order do not allow the consumer to keep the rights he derives from the Directive.

Therefore, it ruled that the national court is bound to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair and, by doing so, to compensate for the imbalance existing between the consumer and the seller. That is so only if the national court has available to it the legal and factual elements necessary to perform such a task.[11]

As noted by the CJEU, adequate and effective means that are to guarantee consumers the right to an effective remedy must include the possibility of taking action or lodging an objection under reasonable procedural conditions so that the exercise of their rights is not subject to external conditions, in particular time limits or costs, which reduce the consumer's ability to exercise their rights guaranteed by Directive 93/13.[12] The Court pointed out that although Polish rules governing the writ of payment procedure give the defendant the right to challenge the order for payment by lodging objections, exercising that power is subject to the fulfillment of exceptionally restrictive conditions such as a short period of two weeks, the requirements for a letter containing allegations against the defendant-consumer and the high costs of court fees, three times higher than those borne by the claimant-seller.[13]

Journal of Laws item 1649.

[11] See the judgment C–176/17.

[12] Ibid., point 63; similarly judgment of the Court of Justice of the European Union of 21 April 2016, Radlinger and Radlingerová, C–377/14, EU:C:2016:283, point 46.

[13] Article 19(2)(1) and (4) of the Act of 28 July 2005 on court costs in civil cases, Journal of Laws of 2020, item 755 as amended; see the judgment C–176/17, points 64–68.

It stressed that consumers are the weaker party to the dispute with sellers, suppliers or traders and that it is therefore in the public interest to protect their rights. In that regard, the Court referred to the opinion of the Advocate General, Juliane Kokott, of 26 April 2018. The Advocate stated that the opinion of the referring court should consist in determining whether the procedural rules on the lodging of objections laid down by national law do not give rise to a significant risk that the consumers concerned would not take the legal action required.[14] Moreover, the Advocate pointed out that "the purpose of Directive 93/13/EEC is to prevent the use of unfair terms in contracts concluded between a seller or supplier and a consumer. The consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms." She stressed that, "national law must guarantee effective judicial protection for consumers by making it possible for them to bring legal proceedings against the disputed contract under reasonable procedural conditions, so that the exercise of their rights is not subject to conditions, in particular time limits or costs, which make it excessively difficult or practically impossible to exercise the rights guaranteed by the Unfair Contract Terms Directive." Referring to the CJEU's settled case-law, she stated that "the national court shall assess, of its own motion, whether a contractual term falling under the scope of the Directive on Unfair Terms in Consumer Contracts is unfair." In her opinion, "a procedure such as the Polish procedure is incompatible with the Unfair Contract Terms Directive in so far as it makes it excessively difficult for the consumer to lodge an objection to an order for payment issued on the basis of a promissory note by permitting the courts to assess the unfairness only when a corresponding complaint has been made by the consumer, by requiring the consumer to adduce the facts and evidence which enable the court to make this assessment within two weeks of service of the order for payment, and by prejudicing the consumer as far as his bearing of court costs is concerned."

The abovementioned arguments in the Advocate General's opinion determined the CJEU's final position. It held that, "Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits issue of an order for payment founded on a valid promissory note that secures a claim arising from a consumer credit agreement, where the court dealing with an application for an order for payment does not have the power to examine whether the terms of that agreement are unfair, if the detailed rules for exercising the right to lodge an objection

[14] Opinion of the Advocate General of 26 April 2018, C–176/17, Profi Credit Polska S.A. in Bielsko-Biala.

against such an order do not enable observance of the rights which the consumer derives from that directive to be ensured."[15]

It is settled case-law of the CJEU that the obligation to examine *ex officio* the unfairness of certain terms and the presence of mandatory information in a credit agreement constitutes a procedural rule placed on judicial authorities.[16] Thus, when national courts apply domestic law, they are bound to interpret it, as much as possible, in light of the wording and the purpose of the relevant directive in order to achieve the result sought by the directive.[17] On the other hand, where it is not possible to interpret and apply national provisions in accordance with the requirements of Directive 93/13, national courts are obliged to examine of their own motion whether the provisions agreed between the parties are unfair and, where necessary, to leave out any national legislation or case-law precluding such an examination.[18]

The CJEU's judgment was welcomed as reflecting the essence, objectives and values of European consumer law, which is not about favoring the consumer, but about ensuring a level playing field between the two parties to the transaction: the seller/supplier and the consumer [Jagielska and Markiewicz 2020, 39–46].

Against the background of the current procedural regulation, the issue of appealing against an order for payment issued in payment order proceedings or in writ of payment proceedings is regulated by Article 480(2) of the Code of Civil Procedure.[19] Subject literature indicates that although the introduction of the new provision does not affect the framework of those proceedings, it "reveals the shortcomings of the regulations" indicating the need to refer to relevant provisions, i.e. in the case of payment order procedures to the amended Article 493 (1), according to which the defendant may lodge objections against the order for payment. In the case of writ of payment proceedings, judicial bodies shall refer to Article 505 (1), which provides for the possibility of objecting to the order for payment [Zembrzuski 2020]. The issue of possible omission of late claims and evidence and their admission by the court is now governed by the general provisions on proceedings before the court of first instance, in particular Article 2053 and Article 20512 of the Code of Civil Procedure [Góra-Błaszczykowska 2020]. According to the contents of Article

[15] See the judgment C–176/17, point 71.

[16] Judgment C–377/14, point 77.

[17] See judgment of 7 November 2019, P., C–419/18 and C–483/18, EU:C:2019:930, points 74 and 75, and judgment C–377/14, point 79.

[18] See judgment C–419/18 and C–483/18, point 76, similarly judgments: of 4 June 2009, Pannon GSM, C–243/08, EU:C:2009:350, points 32, 34, 35; of 14 June 2012, Banco Español de Crédito, C–618/10, EU:C:2012:349, point 42 and the case-law cited therein; as well as of 18 February 2016, Finanmadrid EFC, C–49/14, EU:C:2016:98, point 46.

[19] The existing Article 493(1)(sentence 1) and Article 503(1)(sentence 1) of the Code of Civil Procedure have been transferred to the new Article 4803(1) of the Code of Civil Procedure.

2053(2) of the Code, the defendant may, at the stage of the exchange of preparatory letters, be required to provide all the claims and evidence relevant to the outcome of the case, under the pain of losing the right to submit them in the course of further proceedings. The amendment of the provisions of the Polish civil procedure, as regards to the defendant's procedural position in the case for payment of a promissory note, has therefore been mitigated in the context of the requirements of the pleas against the order for payment [Białecki 2020; Stelmach 2020, 49–66]. This confirms the correctness of the Court of Justice's contention that Article 7(1) of Directive 93/13 must be interpreted in a way so that a national court, acting of its own motion and in accordance with national procedural rules, shall be able to effectively verify the potentially unfair nature of the terms of a consumer credit agreement. However, the legislator's interference in this regard seems indispensable in order to achieve the full effectiveness of EU consumer protection rules.

In the case at hand – that is in case C–176/17 – the Court of Justice pointed out that, "There is a significant risk that the consumers concerned will not lodge the objection required, be it because of the particularly short period prescribed for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because they are unaware of or do not appreciate the extent of their rights, or indeed because of the limited content of the application for the order for payment lodged by the seller or supplier, and thus the incomplete nature of the information available to them."

The Court of Justice stated that it is for the national court to only exclude the use of an unfair term so that it cannot have a binding effect on the consumer. However, that court is not entitled to change the content of that term. In order to do so, the national court is required to assess of its own motion the unfairness of a contractual term falling within the scope of Directive 93/13 and, in making that assessment, to eliminate the inequality existing between the consumer and the seller where that court has the factual and legal elements necessary for that purpose at its disposal. The Court of Justice has pointed out that the full effectiveness of the protection provided for by the Directive requires that the national court, which of its own motion finds that a contractual term is unfair, can draw all the consequences from that finding without waiting for the consumer informed of his rights to make a declaration seeking the annulment of that term. It is therefore clear from the case-law of the Court of Justice of the European Union that the court must act of its own motion in such a way as to ensure the protection of consumers' rights.[20]

[20] See judgments: C–618/10, point 54; of 14 March 2013, Aziz, C–415/11, EU:C:2013:164, point 58; of 18 February 2016, Finanmadrid EFC, C–34/14, EU:C:2016:98, point 52; judgment C–377/14, point 46.

Summing up, it should be noted that the CJEU has rightly observed that Polish procedural rules on writ of payment proceedings do not fully protect consumers' interests against unfair terms in consumer contracts. Until an order has been issued, the court judging the case may not even have read the contents of the contract in question. Moreover, the conditions for appealing against the order are very restrictive and unfavorable for the consumer compared to the conditions under which the seller or supplier files a claim.

It must therefore be held that the court carrying out the payment order proceeding against the consumer shall apply of its own motion provisions aimed at protecting the consumer, in addition to the provisions of the Code of Civil Procedure. Thus, although the CJEU ruled in Joined Cases C–419/18 and C–483/18 that the rules of Directive 93/13 do not preclude national provisions permitting the borrower to issue a blank promissory note in order to secure the payment arising from a consumer loan agreement, the national court shall, if it finds serious doubts as to the merits of an application based on such a promissory note, examine of its own motion whether the provisions agreed between the parties are unfair.[21]

In its judgment of 7 November 2019 (joined cases C–419/18 and C–483/18)[22], the Court of Justice of the EU stated that the national court was required to make its own findings as to the facts of the case. In that context, the court may require the parties to produce the documents necessary to establish the content of the consumer agreement and to review it. This also applies to proceedings in which national law would allow a judgment to be given without presenting contract documents to the court, e.g. on the basis of a promissory note in the Polish model of writ of payment proceedings. The common opinion on the subject is that under Polish law, when a court recognizes of its own motion the abusiveness of a contractual clause, it does so as a result of a legal assessment of that clause. This means that the court always *ex officio* applies substantive law to the established factual state, which also includes provisions on the unlawful nature of contractual provisions [Kostwiński 2019, 1227–231; Nowak 2001, 1187; Weitz 2019]. Moreover, the court examines the abusiveness as well as the admissibility of issuing an order for payment only on the basis of statements contained in the statement of claim [Markiewicz 2010, 112–14].

Against the background of the abovementioned cases, the Tribunal also stated that the court is obliged to disregard national provisions and jurisprudence, which prevent the *ex officio* review of provisions of consumer contracts. This also applies to situations where, according to national regulations, an order awarding execution of a contractual obligation from the consumer

[21] Judgment of the Court of Justice of 7 November 2019, C–419/18, Profi Credit Polska S.A. in Bielsko Biala v Bogumila Wlostowska and Others, Lex no. 2735813.

[22] Profi Credit Polska S.A. in Bielsko Biala and Profi Credit Polska S.A. based in Bielsko-Biala against Bogumila Wlostowska and others, EU:C:2019:930, points 66–67.

may only be ordered on the basis of a promissory note and domestic regulations allow for the control of the basic relationship only on the basis of a motion filed by a promissory note debtor (points 73–76 of the CJEU judgment of 7 November 2019).

The consequence of the CJEU ruling in case C–176/17 is the obligation to assume that, due to the principle of primacy of EU law and the obligation to apply Directive 93/13 directly, the provisions of domestic law do not prohibit adjudicating courts from examining the basic relationship between the promissory note issuer and creditor before issuing an order for payment in writ of payment proceedings.

4. CONSEQUENCES OF THE CJEU'S RULING IN CASE C–176/17 ON JUDICIAL PRACTICE

Indicating grounds for possible revocation of abusive contract clauses seems like an important issue in the context of all the court cases that ended with a final order for payment or a default judgment and in which the court did not take into account the abusiveness of the contractual clauses [Jagielska and Markiewicz 2020, 39–46].

In its statement of 22 October 2009, in the case I UZ 64/09, Poland's Supreme Court expressed that, "The inconsistency of the final judgment with Community law, including the European Court of Justice's interpretation, may not constitute grounds for reopening civil proceedings."[23]

In turn, the Supreme Administrative Court answered (by its decision of 10 February 2017, I FSK 1541/16) the question it had asked in the resolution of 16 October 2017, I FPS 1/17.[24] The Court said that, "a preliminary ruling of the Court of Justice of the European Union may constitute the basis for resuming a case, which is mentioned in Article 272(3) of the Act of 30 August 2002, the Law on Proceedings before Administrative Courts,[25] even if the party asking for the reopening of the case has not been served on the ruling" [Kastelik–Smaza 2018, 44–51; Górski 2017, Maliński 2018]. However, the question arises whether it is appropriate to interpret Article 272(3) of the Law that broadly, or whether there are more convenient options to provide legal protection for individuals deriving their powers from EU regulations?

The legal doctrine has also expressed the view that Article 401 of the Code of Civil Procedure should be properly applied due to the principle of

[23] Compare judgment of the ECJ of 16 March 2006 in case C–234/04 Rosmarie Kapferer v Schlank & Schick GmbH, ECR ETS 2006, p. I–2585 [Łukańko 2011, 586–92; Grzegorczyk 2010, 73].

[24] ONSAiWSA 2018, No. 1, item. 1, p. 9.

[25] Journal of Laws of 2017, item 1369.

equivalence and be the basis for the resumption of proceedings in a situation where the Court of Justice has ruled on the invalidity of an act of EU law, which or whose provision was the basis for adjudication by a Polish court [Łukańko 2011, 591–92; Weitz 2013, 1404; Jagielska and Markiewicz 2020, 39–46].

However, it seems that extraordinary appeal still remains the most suitable tool, as practice and the recent judgments of the Supreme Court have shown.[26]

The purpose of the institution of extraordinary appeal, introduced in 2018, is to eliminate legally valid judgments violating powers, freedom, human and civil rights specified in the Constitution of the Republic of Poland, or grossly violating the law through incorrect interpretation or application (Article 89 et seq. of the Supreme Court Act).[27] The constructive assumption of the extraordinary appeal is therefore to define its premises in such a way that it serves to eliminate defective court judgments of fundamental importance – i.e. those deemed defective from the point of view of a democratic state implementing the principles of social justice.[28]

Extraordinary appeal is inadmissible if the judgment may be revoked or changed under other extraordinary means of appeal (Article 89(1) uSN). The substantive scope of an extraordinary appeal has also been specified. Such appeals may be brought up only when it is necessary to ensure compliance of common and military courts' final judgments with the principle of a democratic state governed by law and implementing the rules of social justice (Article 89(1) in principio of the uSN) and only if it can be additionally based on at least one of the three grounds specified in Article 89(1)(1–3) uSN. The first ground is violation of the powers, freedoms and human and civil rights set out in the Constitution of the Republic of Poland. The second is a gross, and therefore not every but only particularly serious, infringement of the law due to its incorrect interpretation or application. The third ground for appeal is the obvious contradiction of the essential findings of the court with any evidence gathered in the case in question. The necessity to ensure compliance with the principle of a democratic state ruled by law emerges "provided that" there are specific grounds for an extraordinary appeal.

On the basis of the available case law in this regard, the Supreme Court has so far examined two extraordinary appeals.[29]

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[26] Judgment of the Supreme Court of 28 October 2020, ref. no. I NSNc 22/20, OSNKN 2021, No. 1, item 4.

[27] Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2019, item 825 as amended [hereinafter: uSN].

[28] See judgment of the Supreme Court of 3 April 2019, ref. no. I NSNk 2/19, unpublished.

[29] Ref. no. I NSNc 22/20 and the judgment of the Supreme Court of 25 November 2020, ref. no. I NSNc 57/20, Lex no. 3093105.

In the judgment of 28 October 2020, NSNc 22/20, the Supreme Court recognized Article 76 of the Polish Constitution as an admissible model for reviewing judgments pursuant to Article 89(1)(1) uSN. Thus, it allowed for the assessment of compliance of a promissory note payment order with this provision. When assessing the scope of violation of the constitutional principle of consumer protection in the writ proceedings conducted on the basis of a blank promissory note issued by the consumer and then supplemented by the creditor, the Supreme Court decided that the District Court violated the constitutional principle of consumer protection resulting from the Polish Constitution by issuing a payment order in the writ proceeding and by not ensuring the consumer protection against unfair market practices as required by Directive 93/13. Moreover, it pointed out that, "When issuing the order for payment on the basis of a blank promissory note, the court did not take into account the fact that it served to secure a consumer debt, and thus did not take into account the protection against unfair market practices due to persons bound by a consumer loan agreement." It then added, "balancing the reasons which, in light of the Constitution, support maintaining a legally valid order for payment in force issued in breach of Article 76 of the Polish Constitution in connection with Article 7(1) of Directive 93/13 and reasons supporting the repeal of this order in general, arising, in light of the Constitutional Tribunal's jurisprudence, from the integrally understood principle of a democratic state governed by law, implementing the rules of social justice" it unambiguously stated that "revoking this order for payment is a proportionate measure and allows to ensure compliance of jurisdictional decisions with Article 2 of the Constitution of the Republic of Poland." The Court stressed that, "the premise for such a conclusion is the fact that the acceptance of the jurisprudence of issuing an order for payment against the consumer on the basis of the content of the promissory note presented by the seller/supplier alone, without controlling the content of the contract on the basis of which it was issued, could lead to a mechanism of circumvention of Directive 93/13 and endanger the collective interests of consumers."[30] A similar argumentation underlies the judgment in another extraordinary appeal brought forward by the Public Prosecutor General.[31]

[30] Ref. no. I NSNc 22/20.
[31] Ref. no. I NSNc 57/20.

REFERENCES

Białecki, Marcin. 2020. "Art. 205(12)." In *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, edited by Tadeusz Zembrzuski, vol. 1–2, 536–37. Warszawa: Wolters Kluwer.

Góra-Błaszczykowska, Agnieszka, ed. 2020. *Kodeks postępowania cywilnego*. Vol. I B: *Komentarz do art. 425–729*. Warszawa: C.H. Beck.

Górski, Marcin. 2017. "Orzeczenie prejudycjalne Trybunału Sprawiedliwości Unii Europejskiej jako podstawa wznowienia postępowania. Glosa do uchwały NSA z dnia 16 października 2017 r., I FPS 1/17." Lex el.

Grzegorczyk, Paweł. 2010. "Wznowienie postępowania cywilnego wskutek sprzeczności wykładni przyjętej przez sąd krajowy z wykładnią Europejskiego Trybunału Sprawiedliwości." *Radca Prawn*y 5:73.

Jagielska, Monika, and Krystian Markiewicz. 2020. "Kontrola nieuczciwych postanowień umownych a spory konsumenckie rozstrzygane w postępowaniach charakterystycznych. Glosa do wyroku TS z dnia 13 września 2018 r., C–176/17 oraz do postanowienia TS z dnia 28 listopada 2018 r., C–632/17." *Europejski Przegląd Sądowy* 8:39–46.

Kastelik-Smaza, Agnieszka. 2018. "Wznowienie postępowania sądowoadministracyjnego w związku z orzeczeniem prejudycjalnym Trybunału Sprawiedliwości. Glosa do uchwały Naczelnego Sądu Administracyjnego z 16.10.2017 r., I FPS 1/17." *Europejski Przegląd Sądowy* 5:44–51.

Kostwiński, Marcin. 2019. In *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, edited by Tadeusz Zembrzuski, vol. 1–2, 1227–231. Warszawa: Wolters Kluwer.

Łukańko, Bernard. 2011. "Zapewnienie skuteczności orzeczeniom Trybunału Sprawiedliwości Unii Europejskiej w polskiej procedurze cywilnej." In *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym*, edited by Andrzej Wróbel, 586–92. Warszawa: Wolters Kluwer.

Maliński, Marek. 2018. "Wznowienie postępowania sądowoadministracyjnego, prawomocne orzeczenie sądu administracyjnego, Trybunał Sprawiedliwości Unii Europejskiego. Glosa do uchwały NSA z dnia 16 października 2017 r., I FPS 1/17." *Orzecznictwo Sądów Polskic*h 5:53.

Markiewicz, Krystian. 2010. In *Dowody w postępowaniu cywilnym*, edited by Łukasz Błaszczak, Krystian Markiewicz, and Ewa Rudkowska-Ząbczyk, 112–14. Warszawa: C.H. Beck.

Mikłaszewicz, Piotr. 2016. In *Konstytucja RP.* Vol. 1: *Komentarz do art. 1–86*, edited by Marek Safjan, and Leszek Bosek, 1719. Warszawa: C.H. Beck.

Nowak, Andrzej. 2001. "Uprzywilejowanie wierzytelności bankowych w postępowaniu nakazowym." *Monitor Prawniczy* 23:1187.

Stelmach, Bartosz. 2020. "Dochodzenie roszczeń z weksla przeciwko konsumentom. Uwagi na kanwie wyroku Trybunału Sprawiedliwości Unii Europejskiej z 13.09.2018 r., w sprawie C–176/17 «Profi Credit Polska przeciwko Mariuszowi Wawrzoskowi»." *Przegląd Sądowy* 9:49–66.

Weitz, Karol. 2013. In *System Prawa Procesowego Cywilnego*. Vol. 3: *Środki zaskarżenia*, edited by Jacek Gudowski, 1404. Warszawa: Wolters Kluwer.

Weitz, Karol. 2019. "Wpływ prawa Unii Europejskiej na krajowe prawo procesowe cywilne." *Kwartalnik Prawa Prywatnego* 2:297–333.

Zembrzyski, Radeusz, ed. 2020. *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian.* Vol. 2. Warszawa: Wolters Kluwer.

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HUMAN RIGHTS AND CHRISTIAN VALUES IN A DIGITAL SOCIETY. SELECTED ISSUES

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Abstract. The subject of this study is the analysis of the contact between Christian values and human rights or the concept of human rights in the context of the dynamic development of IT technology and the shaping of not only global but digital society. The new organization of society is characterized by a multiplicity of value systems which interpenetrate each other. In the area of Western culture, the human rights system occupies a central place, which has become a kind of new decalogue. The aim of this study is an attempt to define the place of traditional Christian values in a digital society. The research hypothesis was the statement that Christian values are not only timeless, but also universal and perfectly fit into the functioning of the digital society. The study uses the method of legal and dogmatic analysis of legal provisions and judgments as well as the analysis of cases of conflicts between Christian values and human rights. In my conclusions, I state that the confrontation of these two systems of values leads to the need to rebuild the organization of Christians. An ideal model may be the diaspora life of people who not only preach but also practice these values.

Keywords: Christian values, human rights, value conflict, digital society, diaspora

INTRODUCTION

The subject of this study is the analysis of the interface between Christian values and human rights, or the concept of human rights, in the context of the dynamic development of IT technologies and the formation of a digital society. While following the media message, especially social media, one gets the impression that these two systems have diverged. Moreover, it seems that between Christian values and human rights there has been indifference, and even a progressive process of marginalization of Christian values. Undoubtedly, the human rights system plays a leading role in the media coverage. There is an attitude of *désintéressement* in relation to Christian values or to present hem in the negative light. There are different opinions being often expressed, that according to which, the Christian values limit personal freedom, and they are a sign of backwardness [Lemieszek 2013, 198; Szczyrba 1996, 189–98].

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1. AN ATTEMPT TO DEFINE BASIC CONCEPTS

At the beginning of my study, it is necessary to define the basic essential concepts. The basic concept which needs to be defined first is "Christian values." This concept is most often perceived through the prism of its metaphysical meaning without being related to the analysis of its designate. From this point of view, it should be stated, at the very beginning, that it is not easy to clearly define what Christian values are in connection with a specific catalog of these values. In common understanding, it is assumed that Christian values include those which are included in the so-called traditional values related to the Church as an institution or, more broadly, with Christianity. But it must be remembered that the individual Christian religions in their assumptions differ as to the understanding of these values and to their catalog.

The very concept of "value" belongs to philosophical concepts. According to Plato, values reflect the transcendent prototypes existing in the world of ideas. The first principle and ultimate goal and value is good [Laskowski 1986, 284]. In turn, for St. Thomas Aquinas, God is the highest good, he is the first cause and ultimate goal of existence. A human being strives for this good through his or her actions. The act is the essence of being. While striving to achieve the good who is God, through his or her actions, a human being should be guided and leaded by the values which result from revelation, and which are written on the pages of the Holy Scriptures [Sieńkowski 2019, 236–42]. Today we talk about the values defined in the teaching of the Church's Magisterium.

Thus, the source of values or laws in the Catholic Church is God himself (*lex Dei*) and the natural law (*ius naturale*). For this reason, it is directed not only to Christians, but to all people. Hence, in the church doctrine one can meet the statement that Christian values are universal values and not only institutional values [Atkin and Evans 1999, 28–31].

What, then, are these specific Christian values which should guide all people? John Paul II, in his message to the participants of the European Scientific Congress in 2002, mentioned the following Christian values: the dignity of the person; the sanctity of human life; the central role of the family based on marriage; education; freedom of thought, speech and expression of one's own views and religion; protection of the rights of individuals and the right of social groups; cooperation of all for the common good; work understood as a personal and social good; political power understood as service which is subjected to law and reason [Skorowski 1998, 117–29]. In fact, all these values flow directly or indirectly from the Scriptures.[1] Among the above values,

[1] John Paul II, Christian values as the spiritual foundation of Europe. Papal message to the participants of the European Scientific Congress on *Towards a European Constitution?*,

there is one more which should be the most important for all Christianity. It is the so-called the meta-value which is salvation.

Another concept which also needs clarification is "human rights." Undoubtedly, this concept has replaced another concept which was fundamental to Christianity, namely – "natural law." Many articles and monographs have been written on the subject of human rights, and numerous domestic and foreign conferences have been organized. Therefore, it is not possible to read everything what has been written about human rights or to cite even the most important scientific or popular science studies in one footnote. Individual human rights are enshrined in numerous declarations and international conventions. Moreover, they have been plugged into many modern constitutions, including the second chapter of the Polish Constitution.

It cannot be ignored, however, that human rights, especially their content and catalog, are constantly evolving. Various attempts are being made to systematize human rights. A fairly common division of human rights is that of civil and political rights, then, the economic, social, and cultural rights.[2] In turn, K. Vasak, a French lawyer of Czech origin, divided human rights into three categories or generations, i.e., civil rights and liberties, equality rights, and finally collective rights. Nowadays, there is talk of the fourth or even fifth category of human rights related to problems resulting from the robotization of work,[3] the introduction of autonomous vehicles, or putting this in other words, these are rights related to the development of artificial intelligence and its impact on human life.

2. THE SOURCE OF HUMAN RIGHTS

It is widely accepted that the source of human rights is the inherent dignity of a human being. Human dignity as a source of human rights is also determined by the Polish legislator in the Article 30 of the Constitution of the Republic of Poland, in which it is decided 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." The very concept of "human dignity" has not been defined or clarified by the constitution-maker, legislator, constitutionalists, or jurisprudence. M. Granat argues that this concept is in

"L'Osservatore Romano" 10–11 (2002). See Wołosiuk 2011, 185–88.

[2] This division is justified in two different UN documents from 1966, i.e., the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[3] The fourth category of human rights includes the rights of social minorities, which are: religious, ethnic, or sexual. See Stępniak 2019, 97–121.

fact pre-legal and pre-juridical. It is also not a constitutional right because it belongs to the world of values [Granat 2013, 27–33].

Human rights, therefore, do not come from any human legislation, nor do natural rights. Most of the signatories of the Universal Declaration of Human Rights assumed that they are universal, inalienable, and that every human being is entitled to it, regardless of race, colour, gender, property status and religion.

It should also be pointed out that in the latest doctrine of the last decade, one can encounter a different approach to the sources or origins of human rights. According to some experts, human dignity results from the psychophysical structure of each person and the biochemical and cognitive-neuronal processes taking place in the human brain [Kociołek-Pęksa and Menkes 2018, 125–26; Sitek 2018, 399–411].

Apart from this quite innovative approach to the issue of human dignity, a certain novum is the new systematization of human rights based on the concept of human needs developed by A. Maslow. Indeed, human's needs ultimately result from his or her inherent dignity, or from the natural law resulting from the nature of human being himself or herself created by God. Therefore, it can be assumed that the specificity of human needs derives from the nature or dignity of the human being. His specific needs, such as freedom, the desire to live or property, result precisely from the fact that he or she is ontically a human being [Sitek 2016, 38–43]. Moreover, it is precisely these specific needs, especially freedom, awareness, and the will to live, which distinguish human being from other beings.[4]

3. CONTEMPORARY DILEMMAS RELATED TO HUMAN RIGHTS

Human rights as a concept are related to the events of the nineteenth and twentieth centuries, the period of two great wars, and earlier the period of colonization and the brutal subjugation of countries and continents conquered by selected European countries. The conquered nations wanted freedom and independence. In this context, the concept of individual freedom, the protection of which consists in limiting excessive human interference and control by state organs, has been more strongly emphasized. Freedom understood in this way has its constitutional guarantees.

[4] The Roman lawyer Ulpian was already considering the need to distinguish human being from animals. Ulp. L. 1 inst. (D. 1.1.1.3): "Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri."

Today, the biggest problem related to human rights is the appropriation of this concept and making it an ideology and an instrument of political, ideological and, above all, economic struggle. T. Mazowiecki warned against such a threat already in 1978, when he wrote: "Therefore, no one can claim the right to ideological exclusivity in this area, no one can appropriate it, he can only testify to his understanding of human rights and his commitment to their implementation" [Mazowiecki 1978, 102].

Meanwhile, human rights became susceptible to appropriation by various ideologies, in particular ideologies bound by a common denominator, which is liberalism [Machaj 2010, 27–41]. Human freedom, which is a fundamental value and a human right, has become the foundation for all philosophical trends or liberal ideologies, beginning with John Lock.[5] Freedom is undoubtedly a manifestation and expression of human dignity, and it is a criterion which definitely distinguishes him or her from all other beings. At the same time, this natural human freedom, along with the entire package of human rights, may be appropriated and used for the purposes of a specific ideology. Since ancient times, there are examples of referring to the idea of freedom in order to achieve specific political goals. Hence, M. Piechowiak rightly emphasizes that understanding the concept of "human rights" always requires taking into account the historical, social, political, cultural, ideological, and currently technological context of the emergence and development of the contemporary concept of human rights and their protection [Piechowiak 1997, 9–10].

Nowadays, it is possible to point to philosophical, political, or economic trends which build their entire axiology and action based on the need to defend the individual. On this occasion, the main mentors of philosophical currents point to the dangers of, *inter alia*, the system of Christian values limiting the freedom of an individual, for example according to them, such a right is the right of every human being to life from conception to natural death. Due to the pluralism of philosophical trends referring to the concept of human rights, especially freedom interpreted in a different way, Immanuel Wallerstein in his analysis of the current situation and his futuristic vision of the world speaks of the enormous chaos of the value system [Wallerstein 2010, 24–40; Turowski 2007, 77–86].

[5] One cannot speak of one stream of liberal philosophy. In addition to the so-called classical liberalism there are many other types of liberalism, including: social, modern, or radical liberalism. Hence, the principles of liberal thinking include the acceptance of the pluralism of values and final goals which occur in contemporary societies [Sepczyńska 2008, 22–23; Blau and Moncada 2005, 1–5].

4. CHRISTIAN VALUES AND HUMAN RIGHTS

Both systems, human rights, and Christian values, are undoubtedly an instrument of creating a specific morality. Those systems have an impact on human behavior and entire social groups. They are also political ideals. Both systems of values contain a specific catalog of values, including individual freedom.

It should be noted, however, that the system of Christian values most often stands in opposition to the values proclaimed by various political and philosophical trends, by the media, or economic concepts, which make a specific interpellation of individual human rights, especially freedom, in terms of their own immediate needs. It is human rights, not Christian values, which are today the values typical of a digital society which communicates with the use of IT technology. Some experts speak of a postmodern or fluid society [Bauman 2012, 69].

Typical Christian values are replaced by values which are difficult to assign to specific ideologies. There is also no universality of the digital society value system, including human rights. Z. Bauman writes about an ethical vacuum, which is filled by numerous competing forces, each of which demands the exclusive right to interpret the applicable ethical principles, including human rights. In this context, it is difficult to talk about the universalism of human rights, not only because of the numerous violations which are done on all continents, but also because of their different interpretations, for example, by China [Kajtoch 2008, 199–204], Russia [Kuźniak and Ingelevič-Citak 2019, 431–44] or Muslim states [Michałowska 2008, 9–98]. Besides, the Council of Europe treats all violations of human rights differently, for example in relation to Russia, in a more moderate form, also because of political and economic reasons [Dynia 2020, 35–50].

Such organizations and institutions as Amnesty International or the European Court of Human Rights, and not religious or political centers, have become centers of interpretation or, perhaps, reinterpretation of the content of individual human rights, especially those relating to human freedom. The guidelines formulated by these institutions are incorporated and presented by the media, politics, and courts which resolve possible conflicts between different values, adjudicating on the principles of broadly understood freedom.

The relativity of human rights and the lack of universality are even more evident in their relationship to the business world. The entire modern economy is based on the four fundamental freedoms, which are: the movement of people, capital, goods, and services. A human economic activity is linked through the concept of the social market economy [Bernatt 2009, 5ff]. Besides, in in the Article 20 of the Constitution of the Republic of Poland, it was decided that "A social market economy, based on the freedom of economic activity,

private ownership, and solidarity, dialogue, and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland." The concept of the social market economy adopted by the constitutional activist assumes the maintenance of high economic growth, low inflation rate, low unemployment rate, while ensuring decent working conditions, the social security system, and the provision of high-quality public goods. Just like the concept of economy, it assumes a high level of protection of human dignity, including his or her freedom.[6]

Despite such a concept of the economy, in a way which is almost imperceptible through the advertising and promotion system, the human freedom is actually limited. Ubiquitous advertising determines a person to choose specific products, services and, consequently, change his or her thinking and system of values [Hostyński 2020, 127–42]. An example of this phenomenon is advertising of abortion or contraceptive products, based on the freedom of choice. Such concept will always lead to the negation of Christian values. The same applies to the promotion of euthanasia, showing it as a good solution for the sick and the elderly.

The antagonism between Christian values and human rights is also noticeable in the views of contemporary philosophers. Ch. Villa-Vicencio, professor emeritus at the University of Cape Town, says the link between Christian values or Christianity as such and human rights is ambiguous. According to this thinker, Christianity has for centuries promoted religious intolerance and the persecution of those who did not recognize the system of Christian values. He further argues that many Christian values today are dismissed as contrary to a human rights culture and moral decency. It cannot be denied that many human rights have their roots in the Bible. They were analyzed especially in those periods when the Church tried to make corrections and strive to build a more humane society. According to this philosopher, the emergence of the concept of human rights in Western culture is, among others, the result of the interaction of Christianity with various social and cultural forces. Hence, it cannot be denied that Christian values enrich the concept of human rights [Villa-Vicencio 2000, 579–600].

Christian values, despite the existing discrepancies, are characterized by a certain stability and universality, regardless of which Christian denominations we are talking about. For this reason, these values are not very susceptible to the dynamics of changes caused by economic, political, and nowadays mainly technological changes in the IT area.

[6] The concept of a social market economy was implemented by L. Erhard, the German Minister of Economy in the government of K. Adenauer [Zeidler 2017, 75–88].

5. THE PROCESS OF ELIMINATING CHRISTIAN VALUES IN A DIGITAL SOCIETY

The dominant instrument creating the value system in the digital society is undoubtedly business and the related advertising of products and services, which was already mentioned above. Going further, it should be said that more and more business activities are moving to the virtual world, and at the same time newer types of business are being created in this world, especially in the area of games and gambling. A new kind of society is emerging, known as a digital society. This is where people make their dreams come true by purchasing clothes, food, or services. In the virtual world, seemingly universal or global, there has been an exceptional fragmentation of values, so much so that one cannot speak of a single or particular system [Sitek and Such-Pyrgiel 2018, 201–15].

An example of an ideological clash between Christian values and the Internet media is the exertion of as much pressure as possible to leave the church. Articles, interviews, and statements of various ideologues appearing in social media create the impression that the acts of apostasy were mass-produced. Meanwhile, at the end of 2021, there were only 1,334 such situation [Glanc 2021]. In relation to the number of the faithful in Poland, it is not even one per mille. However, this information is described in various ways and duplicated many times in order to induce scale-up phenomena. For example, a statement by a famous person who is an idol for his or her followers is quoted. In addition, to facilitate and encourage people to leave the church, Google Play recently launched the application "AppOstazja" (AppOstasy), the purpose of which is to facilitate the withdrawal from the Catholic Church. This duplicated information, however, does not say that, according to the canon 751 of the Code of Canon Law and the General Decree of the Polish Bishops' Conference of 7th October 2015 on leaving the Church and returning to the community of the Church, the apostasy may only be made in writing form and in person appearing in order to submit a declaration of withdrawal from the Catholic Church [Fabiańczyk 2017, 53–66]. In addition to manipulating false information about apostasy, statistical data are also manipulated. Often an argument proving the increase in withdrawals from the Church is the decrease in the number of participants in the Sunday mass. Providing these data along with information about apostasy, may give the impression that abandoning participation in the Sunday Mass is recognized as the equivalent to apostasy. Anyone reading such news, unaware of the manipulation mechanisms, may become convinced that one also needs to escape from the Church.[7]

[7] See *W Google Play pojawiła się AppOstazja. Pomoże wypisać się z Kościoła*, https://www.dobreprogramy.pl/w-google-play-pojawila-sie-appostazja-pomoze-wypisac-sie-z-

In view of the above discourse, the question arises whether Christian values are slowly passing into the history of humankind, or should other ways of implementation be sought for them?

6. HUMAN RIGHTS AND CHRISTIANITY

The concept of human rights, used in isolation from Christian values, as well as from their foundation in historical conditions, in the social and political context, allow to derive, *inter alia*, claims about the barbarity of individual nations or people living in certain periods, about the lack of tolerance, backwardness or darkness. It should be noted that the above phenomenon is accompanied by the use of contemporary evaluation categories to past events. Here you can cite numerous examples of publications on human rights violations in ancient Rome [Robinson 1998, 325–34]. However, many reliable publications indicate that the concept of human rights was unknown at that time [Bauman 2012, 8ff]. One can only speak of some manifestations of humanitarianism, such as *humanistas* or philanthropy = *indulgentia* [Kupiszewski 1988, 178–83; Tuori and Giltaij 2015, 39–63].

In addition, there are numerous legal and social institutions which have become the foundation for modern thinking about human being. It is impossible to ignore the institution of slavery, which in fact was something extremely shameful in the history of humankind. However, it should be taken into account that the entire society of that time based its economy on slave labor. Roman society was therefore not unique. Nevertheless, it is in Roman law that we find a number of descriptions of specific stories or legal provisions which in some way protected slaves, *inter alia*, against the negative behavior of their owners. For example – when there was a doubt about a person's status, the dispute was always settled in favor of freedom. Even a special official was appointed – *adsertor libertatis*, whose task was to support people striving for full freedom [Brunt 1998, 139–50]. Most importantly, the Romans believed that all people are born free. The division of people into free and slaves came from human law, or to use modern terminology from positive law.[8]

Another example of the lack of a responsible methodology for formulating judgments about past human rights abuses, without taking into account political and social conditions, is the issue of schools with a program for the assimilation of Indian youth in Canada. This program was carried out from 1831 to 1998 largely by various churches, including the Catholic Church. During the

kosciola,6731616458726080a [accessed: 30.01.2022].

[8] Florent. L. 9 inst. (D. 1.5.4 pr. –1): pr. *Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. 1. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.*

implementation of this program, there were quite a number of violations of human rights in the modern sense. In the media, especially in social media, the Catholic Church, which has not shown sufficient empathy towards its pupils, has been assigned the main responsibility for this type of negative activity. The fact that it was a program planned and controlled by the Canadian authorities implementing the ideology of colonialism against indigenous peoples was largely ignored in the media.[9] Although the Prime Minister of Canada apologized to the Indians for these actions by the state, the most interesting cases for the media were the violations of human rights by only the educators of the Catholic Church. Such an incorrect approach to this story, from the point of view of the methodology of thinking, raises not only a negative assessment of the Catholic Church as an institution, but also alienates many recipients of this information from the entire system of values proclaimed by the church. As a result, in Canada as well as in the United States, there were numerous arson attacks on churches and the destruction of objects of worship of the Catholic Church. This negative assessment in no way reached the Canadian state authorities.

Many argue that the human rights system is a kind of utopia. Jimmy Carter, the president of the United States in 1977–1981, stated that human rights should be the rational guide of foreign policy of all countries. Meanwhile, it was the United States which showed a lack of respect for human rights in the 1960s and 1970s, waging a rather cruel war in Vietnam or creating a new model of economy based on consumptionism. Many European countries still had their colonies in Africa or Asia in the 1960s.[10] In turn, the Soviet Union, referring to the concept of human rights and the need to liberate Asian and African countries from colonialism, spreading the ideas of revolutions based on Marxist ideology, created new armed conflicts combined with discrimination, sometimes with the extermination of part of the local population, including in Angola, Afghanistan, in former Zaire or in Cuba [Moyn 2012, 4–10].

According to Jurgen Habermas, human rights constitute a kind of realistic utopia, as they do not lead to the building of collective happiness, but to the achievement of the ideal goal of a just society, incorporating this belief into modern constitutions [Habermas 2014, 37]. According to this philosopher, a realistic concept of human rights can only be developed when all people are simultaneously guaranteed the implementation of all categories of human rights. This intention, however, is a kind of utopia, and therefore an impossible assumption [Raczyński 2017, 67].

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[9] Honouring the Truth, Reconciling for the Future. Summary of the Final Report of the Truth and Reconciliation Commission od Canada, Ottawa 2015, p. 37ff.

[10] Algeria gained independence in 1962. Mauritania 1960, Togo in 1960. So did Nigeria and Cameroon. The most recent independence was Namibia in 1995 and Angola in 1975 [Betts and Betts 2004, 5ff].

7. A PRACTICAL CLASH OF CHRISTIAN VALUES WITH THE HUMAN RIGHTS SYSTEM

Nowadays, politics, economics and various ideologies related to new ICT technologies have the greatest impact on the interpretation of the content of human rights under specific, immediate needs. These factors also determine their hierarchy when it is necessary to weigh them – to decided about the hierarchy of their importance. Thus, it becomes impossible to respect human rights in a sustainable way. The principle of proportionality applied in practice allows for a stronger emphasis of one law over another in the event of a conflict between them [Wiśniewski 2019, 57–70]. It is accepted without any justification that human rights are headed by the freedom of the individual. Such practical and theoretical determinants of the process of applying human rights consequently lead to their appropriation by the user, as mentioned earlier. The effect of these actions is then translated into far-reaching legislative changes. Hence, it is extremely important to analyze the ways in which Christian values are replaced by the values which are hidden under the name of human rights.

One of the basic Christian values is helping other people in need, which is also an element of human rights, including in the law of equal treatment or equal opportunities. It is enough to mention the parable of the Good Samaritans (Lk 10: 30–37). Nowadays, the Church provides help to the needy in various ways, including through Caritas. The media do not provide much information about the activities of Caritas, as it is the case with the huge help of this institution for emigrants from Belarus and Ukraine to Poland.

The situation is different with the Great Orchestra of Christmas Charity, which is powered by a media machine which mainly uses social media. Moreover, this action is supported by numerous social and political organizations. As a consequence, a huge number of young people, as well as the elderly participate in this action. Hence, the average Pole, especially the young generation, connected and associate charity with this initiative and not with Caritas.[11]

Other activities of Christian organizations in the field of human rights are also gradually being eliminated. An example is the action against priest – Fr. J. Stryczek, the creator of the "Szlachetna Paczka," the event organized on the occasion of Christmas for many years. As a consequence, the lack of a leader meant that this entire action was largely marginalized. The Easter campaign of Caritas selling candles to cover works carried out by this organization is of less and less social importance.

[11] Among the non-profit organizations which receive the most funds from the 1%tax deduction, Caritas ranks only third. See: *Największe organizacje pożytku publicznego*, Forbes, publication from 24.03.2014, https://www.forbes.pl/finanse/najwieksze-organizacje-pozytku-publicznego/wstbzp2 [accessed: 13.02.2022].

How, then, is the Church to be present in a digital society? It is with the help of social media that contemporary idols and heroes are created. These are no longer saints living in asceticism, practicing the truths of faith, especially the evangelical ones. They are journalists, media figures, athletes, or actors. The system of Christian values is irrelevant in this case. The creators of these ideals or values are no longer any body of people who have a life full of traditional values behind them, but people who are often connected with the business world, and their lives are far from any ideals of traditional society or Christian values. The announcement of a saints of Catholic or Orthodox church is no longer a great event for society. But sometimes, it is an occasion for violent presumptive attacks against those carried to the altars. On this occasion, it is impossible not to point to St. John Paul II, who is also being slandered in our homeland only on the basis of various presumptions.

8. FINAL CONCLUSIONS – WHAT NEXT WITH CHRISTIAN VALUES?

The above analysis of the contemporary philosophical, ideological, political, and economic borderline of human rights and Christian values does not seem to be optimistic. There are more and more areas of Christianity's activity to date, including charity or education is perfectly carried out by non-religious organizations. Social media and the latest IT technologies are used for this. The IT society, living largely in cyberspace, benefits from an extended sphere of freedom. New technologies used in medicine effectively improve the quality of human life and give rise to the belief that human beings are immortal. Under these circumstances, what can Christianity bring to the information society?

K. Rahner, a German theologian, who died in 1984, wrote that the future of Christianity is living in communes or in the diaspora. In this new perspective, it will be difficult to speak of the Church as an institution, how it is understood today. Of course, the structure headed by the Pope will remain. The role of lay people will increase significantly, as it is the case, for example, in the neocatechumenate. Being a member of such a community or being a Christian will no longer be the result of traditional attachment to rites and behavior, but an individual and deliberate decision.

Thus, the era of ideological, political, and even social domination of the Christian religion is passing away. What remains is the pure mission of Christ, which is changeless and timeless. Earlier, I wrote about the Christian metavalue, which is the salvation of human being. It is a value which cannot be given to a person by any other ideology, economic or political force.

From this perspective, however, another doubt arises from the sociological point of view, namely what is the level of demand for this value in modern human being? Looking only briefly at social media, one can quite definitely

say that the topic of human salvation or eternal life in another dimension does not actually appear there. Hence, it is necessary to look for an answer to the following question, does the modern human being, embedded in the digital society, have such a need?

The answer to the above question prompts us to conclude that the future life of Christians dispersed in the diaspora, i.e., in local communes, is inevitable in the near future. At the same time, Christians must function in the world using the latest technologies, including social media, to communicate with themselves and with the outside world. By implementing Christian values, Christians, as a rule, will also implement essential principles of human rights, without political, ideological, or economic overlay.

Living in communes or communities will allow to establish real, and not only virtual, interpersonal bonds. Freedom, especially internal freedom, will become essential. The vision of the life of Christians in the Diaspora is already being realized because Christians are in the minority among non-Christians. The Christian majority in Poland, Slovakia or Italy are exceptions to this rule [Bokwa 1999, 133–42]. Despite being in the majority, however, Christians there no longer have any influence on shaping social or economic policy. This is how Christians have lived for centuries in many African and Asian countries.

Living in scattered communities requires Christians to completely change their attitudes as believers. Their lives must be authentic according to the values in which they believe and which they proclaim. Priests, who lead a transparent life towards the members of their community and the society referred as the digital society, will remain an example and at the same time the keystone of these communities.

REFERENCES

Atkin, Brian, and Katrine Evans. 1999. *Human rights and the common good: Christian perspectives*. Auckland: Victoria University Press.

Bauman, Richard. 2012. *Human rights in ancient Rome*. London–New York: Routledge.

Bauman, Zygmunt. 2012. *Etyka ponowoczesności.* Translated by Janina Bauman, and Joanna Tokarska-Bakir. Warszawa: Aletheia.

Bernatt, Maciej. 2009. *Społeczna odpowiedzialność biznesu. Wymiar konstytucyjny i międzynarodowy*. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego.

Betts, Raymond, and Raymond F. Betts. 2004. *Decolonization*. London: Routledge.

Blau, Judith. R., and Alberto Moncada. 2005. *Human rights: Beyond the liberal vision.* New York: Rowman & Littlefield.

Bokwa, Ignacy. 1999. "«Kościół musi być jeden»: Karl Rahner o zjednoczeniu chrześcijan." *Studia Theologica Varsaviensia* 37, no. 1:133–42.

Brunt, Peter Astbury. 1998. "Marcus Aurelius and slavery." *Bulletin of the Institute of Classical Studies. Supplement* 139–150.

Dynia, Elżbieta. 2020. "Zasada demokracji, praworządności i poszanowania praw człowieka jako warunek członkostwa w Radzie Europy." *Stosunki Międzynarodowe* 56, no. 4:35–50.

Fabiańczyk, Adam. 2017. "Wystąpienie z Kościoła formalnym aktem według prawa kościelnego." *Kościół i Prawo* 6, no. 2:53–66.

Glanc, Marta. 2021. "Na liczniku Apostazji już ponad tysiąc osób. W tydzień z Kościoła wystąpiło 77 osób." https://kobieta.onet.pl/wiadomosci/na-liczniku-apostazji-juz-ponad-tysiac-osob-w-tydzien-z-kosciola-wystapilo-77-osob/gk7g4vy [accessed: 03.02.2022].

Granat, Mirosław. 2013. "Godność człowieka jako źródło wolności i praw człowieka i obywatela (uwagi na tle art. 30 Konstytucji RP)." *Studia Prawnicze KUL* 2:27–33.

Habermas, Jürgen. 2014. "Wizja godności człowieka i realistyczna utopia praw człowieka." In Jürgen Habermas, *Rzecz o kondycji i ustroju Europy.* Translated by Andrzej Maciej Kaniowski, 13–115. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Hostyński, Lesław. 2020. "Konsumpcyjna absolutyzacja wolności." *Przegląd Filozoficzny – Nowa Seria* 2:127–42.

Kajtoch, Roman. 2008. "Prawa człowieka w Chinach." *Krakowskie Studia Międzynarodowe* 2:199–204.

Kociołek-Pęksa, Anna, and Jerzy Menkes. 2018. "Aksjologia praw człowieka. O przesłankach i determinantach współczesnego dyskursu w filozofii prawa międzynarodowego." *Zeszyty Naukowe SGSP* 2:119–34.

Kupiszewski, Henryk. 1988. *Prawo rzymskie a współczesność.* Warszawa: PWN.

Kuźniak, Brigida, and Milena Ingelevič-Citak. 2019. "Rosja wobec regulacji międzynarodowoprawnych z zakresu praw i wolności człowieka." In *Prawa człowieka wobec wezwań współczesnego świata*, edited by Agnieszka Czubik, Dominika Dziwisz, and Ewa Szczepankiewicz-Rudzka, 431–44. Kraków: Księgarnia Akademicka.

Laskowski, Jerzy. 1986. "Podstawowa wartość życia społecznego." *Prawo Kanoniczne* 1–2:283–93.

Lemieszek, Magdalena. 2013. "Wiara chrześcijańska a wolność człowieka." *Studia nad Rodziną* 1:197–216.

Machaj, Łukasz. 2010. "Liberalizm a prawa człowieka." *Studia Erasmiana Wratislaviensia* 4:27–41.

Mazowiecki, Tadeusz. 1978. "Chrześcijaństwo a prawo człowieka." *Więź* 2:102–104.

Michałowska, Grażyna. 2008. "Kulturowe uwarunkowania praw człowieka." *Stosunki Międzynarodowe* 37, no. 1–2:9–98.

Moyn, Samuel. 2012. *The last utopia: human rights in history.* Harvard: University Press.

Piechowiak, Marek. 1997. "Pojęcie praw człowieka." In *Podstawowe prawa jednostki i ich sądowa ochrona*, edited by Leszek Wiśniewski, 7–37. Warszawa: Wydawnictwo Sejmowe.

Raczyński, Mikołaj. 2017. "Realistyczna utopia praw człowieka Jürgena Habermasa." *Tekstoteka Filozoficzna* 6:63–72.

Robinson, Olivia F. 1998. "Crime and punishment and human rights in ancient Rome." In *Le Monde Antique et les Droits de l'Homme. Proceedings of SIHDA 1996. Centre de Droit Comparée et d'Histoire du Droit*, edited by Huguette Jones, 325–34. Glasgow: University of Glasgow.

Sepczyńska, Dorota. 2008. *Katolicyzm a liberalizm. Szkic z filozofii społecznej*. Kraków: Wydawnictwo Nomos.

Sieńkowski, Marcin. 2019. "Koncepcja dobra najwyższego w ujęciu Tomasza z Akwinu i Immanuela Kanta." *Nurt SVD* 1:236–52.

Sitek, Magdalena. 2016. *Prawa (potrzeby) człowieka w ponowoczesności.* Warszawa: C.H. Beck.

Sitek, Magdalena, and Małgorzata Such-Pyrgiel. 2018. "Wpływ cyberkultury na prawa człowieka." *Journal of Modern Science* 39, no. 4:201–15.

Sitek, Magdalena. 2018. "Treść praw człowieka w dobie globalnych determinantów egzogennych." *Teka Komisji Prawniczej PAN Oddział w Lublinie* 11, no. 2:399–411.

Skorowski, Henryk. 1998. "Prawa człowieka w nauczaniu społecznym Jana Pawła II." *Saeculum Christianym* 5, no. 2:117–29.

Stępniak, Kamil. 2019. "Koncepcja jurydyzacji czwartej generacji praw człowieka w międzynarodowym systemie ochrony." *Przegląd Sejmowy* 2:97–121.

Szczyrba, Sławomir. 1996. "Czy religia jest obecna w życiu społecznym? Kilka uwag w związku z zagadnieniem praw człowieka." *Łódzkie Studia Teologiczne* 5, no. 1:189–98.

Tuori, Kaius Tapani, and Jacob Giltaij. 2015. "Human rights in antiquity?: Revisiting anachronism and Roman law, Revisiting the origins of human rights." In *Foundations: Antiquity to the Enlightenment.* Part I, edited by Pamela Slotte, and Mila Halme-Tuomisaari, 39–63. Cambridge: University Press.

Turowski, Mariusz. 2007. "Liberalizm – między ideologią a metapolityką." *Studia Philosophica Wratislaviensia* 2, no. 1:77–86.

Villa-Vicencio, Charles. 2000. "Christianity and human rights." *Journal of Law and Religion* 14, no. 2:579–600.

Wallerstein, Immanuel. 2010. *After liberalism*. New York: ReadHowYouWant. Com.

Wiśniewski, Adam. 2019. "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka." *Gdańskie Studia Prawnicze* 42, no. 2:57–70.

Wołosiuk, Beata. 2011. "Wartości chrześcijańskie w wychowywaniu dzieci w młodszym wieku szkolnym." *Paedagogia Christiana* 27, no. 1:185–202.

Zeidler, Kaamil. 2017. "W sprawie wykładni i treści ideowych art. 20 konstytucji RP z 1997 roku." *Gdańskie Studia Prawnicze* 37:75–88.

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ADMISSIBILITY OF REVOCATION BY A PARTY OF THEIR DECLARATION TO WAIVE THE RIGHT TO APPEAL

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Abstract. The Code of Administrative Procedure was substantially amended in 2017. Introduction of the right to waive the right to appeal to Article 127a, Code of Administrative Procedure, is one such major change. Such a waiver is momentous, since it not only obstructs appealing but also prevents the option of complaining against a decision to courts. The new regulation, intended to accelerate administrative proceedings and enforceability of decisions, gives rise to serious doubts, chiefly concerning a party's option of withdrawing their declaration to waive the right to appeal. In spite of the legislator's intention signalled in the substantiation of the amendment, both judicial decisions and the doctrine rightly accept the possibility of withdrawing a declaration to waive the right to appeal until the last day of the term for appeals.

Keywords: appeal, administrative decision, waiver of appeal

INTRODUCTION

In administrative proceedings, a party dissatisfied with a decision of a first-instance authority can appeal against that decision. The case is then considered by a higher-instance authority as a result. This arises from the constitutional principle of two-tier administrative proceedings, expressed as the party's right to having their case handled and resolved twice by two different authorities in order to supervise the resolutions they issue.[1]

This principle guarantees realisation of rights and interests of parties to and other participants in proceedings.[2] Thus, it serves the citizen first and foremost [Smarż 2018, 378–86]. A party eager for a positive resolution may, however, strive for the fastest possible enforceability of a decision. This is fostered by

[1] Judgment of the Supreme Administrative Court of 7 February 2008, ref. no. II GSK 382/07, Legalis no. 114623.
[2] Judgment of the Constitutional Court of 8 April 2014, ref. no. SK 22/11, Legalis no. 815933.

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the institution of waiver of the right to appeal[3] under Article 127a(1) of the Code of Administrative Procedure,[4] intended to reduce the time of proceedings and realise the so-called "economics of trials."[5]

The waiver of the right to appeal by all parties to proceedings results in finality and validity of an administrative decision [Adamiak and Borkowski 2021]. In the event, an administrative decision becomes final not after some time or following an appeal procedure by a second-instance authority, but by force of a party's declaration the law endows with certain legal effects. This means an administrative decision issued by the first instance in compliance with Article 130(4) CAP, is enforceable prior to the deadline for appeals and cannot be reviewed [Kędziora 2017].[6]

When introducing this institution, the legislator has failed to resolve the essential issue of permissibility of revoking a declaration to waive the right to appeal. The statement of reasons in the amended law that introduces the regulation does say it should be assumed effective revocation is impossible due to the effects triggered by a waiver of appeal, that is, a decision becoming final and enforceable and a party waiving their appeal being unable to complain against such decision to the administrative court.

Nonetheless, some judicial decisions allow revocation of a declaration to waive the right to appeal. Differences occur in the doctrine as well. The issue cannot be ignored, therefore.

A theoretical and legal analysis of some amendments to the CAP is undertaken in order to answer the question, is a party eligible for the right to withdraw their declaration of a waiver of their right to present an appeal. The discussion is grounded in current judicial decisions and specialist literature.

1. NATURE OF THE RIGHT TO WAIVE THE APPEAL

The right to appeal is grounded in the principle of the party's full faculty to dispose. This means it is up to a party's will to resort to this right or not by failing to appeal or declaring their will to waive the right to appeal [Adamiak and Borkowski 2021]. It needs to be weighed what legal consequences arise from a party's declaration of will in this respect.

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[3] Waiver of the right to appeal also applies to a request to have a case reconsidered under Article 127(3) of the Code of Administrative Procedure.

[4] This is a rather new regulation introduced to the Code of Administrative Procedure by force of the Act Amending the Code of Administrative Procedure and Certain Other Acts of 7 April 2017, Journal of Laws item 935 [hereinafter: CAP].

[5] The substantiation of the government draft Act Amending the Code of Administrative Procedure and Certain Other Acts, p. 56–58 (Print No. 1183), http://orka.sejm.gov.pl/Druki8ka.nsf/0/F3388D1AB00B1313C125809D004C3C8E/%24File/1183.pdf [accessed: 04.07.2017].

[6] See also Article 130(4) CAP in fine.

Legal consequences of a waiver of the right to appeal have long been sources of scientific controversy. I. Wajnes believes, for instance, the essence of recourse as a legal remedy, that is, protection that can only be not resorted to but cannot be waived, suggests a negative answer to the question whether a party may revoke such a waiver by exercising the remedy by its deadline [Wajnes 1939, 115]. Any exceptions can only be provided for expressly by positive law [Kmieciak 2011, 105]. This is upheld by the Constitutional Court by pointing out any party has the right to complain against decisions and resolutions issued by the first instance. The Constitution in the second sentence of its Article 78 allows certain exceptions to this rule, however. They should be laid down in an act of parliament. The Constitution fails to specify the nature of these exceptions, without indicating either subjective or objective scope within which such exceptions are acceptable. This doesn't mean, though, the legislator enjoys full, untrammelled liberty at cataloguing these exceptions. First and foremost, they cannot lead to violations of other constitutional norms. In addition, they cannot void the general principle itself, which, in the framework of ordinary legislation, would in fact become an exception to the rule of single-tier proceedings introduced by a variety of trial regulations.[7] The Constitutional Court also points out the exceptions should arise from special circumstances. The Constitution says exceptions to the right to complaint must be stipulated by law, therefore, they cannot be presumed.

Thus, the amended Article 127a CAP, referring to the case in question, can be said to fulfil this requirement as it is substantiated by the party's decision in this respect.

W. Dawidowicz finds a waiver of appeal should be treated like any other declaration of a party made as part of proceedings, which can be modified or supplemented at any time [Dawidowicz 1962, 216]. Such a declaration only expresses a party's intention at a given time and cannot restrict or change the right to submit an appeal that accrues to parties by force of the Code. A different position is presented by E. Iserzon, who claims a party is not entitled to appeal if they waive their right to appeal on delivery of a decision [Iserzon 1937, 174].

Doubts regarding the amendment are also raised by J. Zimmermann, who describes Article 127a CAP, as "an astonishing regulation" [Zimmermann 2017, 15]. The author stresses a waiver of the right to appeal is made "to a public administrative authority that has issued a decision." The question arises, therefore, if the waiver "to an authority" means a relevant declaration should be presented to the same authority or whether the meaning of this expression is far more profound and denotes e.g. the range of entities in relation to which the decision has become final. Z. Kmieciak, in turn, admits the

[7] Judgment of the Constitutional Court of 12 June 2002, ref. no. P 13/01, the Constitutional Court ZU 4A/2002, item 42.

possibility of revocation of a party's declaration by citing the party's right to dispose of their trial entitlements [Kmieciak 2018, 105]. It should be noted, however, the party's right to dispose of their trial entitlements may argue for the regulation of Article 127a CAP, yet it fails to explain principles of this institution. In addition, the existing, though quite modest views of the doctrine seem to give priority to the functional interpretation and ignore, or even fail to perceive, imperfections of Article 127a CAP.

It should be emphasised that, prior to introducing the regulation providing for the right to waive the appeal, judicial decisions[8] had expressed the position that even if a party declares they will not appeal, or waive this right, a decision does not become final before the deadline for appeal measures. A party could of course appeal voluntarily, yet an authority receiving such a declaration could not have the decision enforced. What is more, such a declaration failed to produce a legal effect of preventing a party from submitting an appeal or request to reconsider the case by the appropriate date. Such a declaration, therefore, did not block a complaint to an administrative court [Sadkowski 2017]. The law did not link legal consequences of a party's declaration to waive their right to appeal. As a result, waiver of the right to appeal was a legal act a party could revoke by filing an appeal until the deadline for appeals. Thus, a party's waiver of their right to appeal was revocable. A party could effectively revoke their waiver of the right to appeal within the statutory time for appealing.

The current situation is completely different due to the contents of Article 127a CAP, according to which a party may waive their right to appeal to a public authority that has issued a decision within the time limit for appealing. As a public administrative authority receives a declaration to waive the right to appeal from the last remaining party to proceedings, a decision becomes final and enforceable. This provision identifies effects of a waiver of the right to appeal, namely, finality and enforceability.

2. CONDITIONS OF A WAIVER OF THE RIGHT TO APPEAL

The right to waive the right to appeal is subject to several conditions. It is first of all restricted subjectively to parties. As a substantive right to demand another consideration and resolution of a case, it does not accrue to entities as parties. The waiver of the right to appeal is therefore decided solely by will of a party that is not objectively restricted by the type of resolution contained in a decision of a first-instance authority. This right can therefore relate to both

[8] Judgment of the Supreme Administrative Court of 21 February 2006, ref. no. I OSK 542/05, Legalis no. 275738.

a decision resolving in favour and against a party, both decisions creating and not creating party rights.

A waiver of the right to appeal is a party's procedural act. A declaration to waive the right to appeal should be submitted to a public administrative authority which has issued the decision, not to any such authority. The law stipulates such a declaration becomes effective on delivery to the authority, which affirms the declaration needs to be made in writing. This is also implied by the substantiation of the draft law.

The right is subject to the condition of the time limit for appealing. The declaration should be filed "within the time limit for appealing," which is expected to allow a party to review the decision after it is delivered or published.

The option of waiving the appeal is the resignation by a party to proceedings from another instance and judicial review of a decision issued by a public administrative authority. Thus, the declaration can be found correctly filed, and therefore effective, insofar as it has been submitted intentionally, especially if an entity exercising the right knows and understands effects of filing such declaration.

This is corroborated by the doctrine [Wróbel 2020, 680; Adamiak 2017b, 687], which stresses the declaration must be unambiguous and indubitable, as well as autonomous and completely free. Therefore, persuading a party to waive their right to appeal is unacceptable. An authority should instruct a party in detail on effects and importance of such a waiver, particularly that such a waiver finally deprives the party of the right to trial.[9] An administrative authority is not allowed, however, to assess reasons for a waiver of the right to appeal, in particular, whether it is in the interest of the waiving party.[10]

Due to the above, an administrative authority informing a party of their procedural right under Article 127a(1) and (2) CAP, should not limit themselves to citing contents of that provision only but should also instruct a party in detail on the importance of the act of waiving and underscore its irreversibility, which should mean in practice the authority should identify, clearly and understandably, specific effects of a waiver of the right to appeal. The authority is also obliged to gather evidence as to whether and how a party has been notified of these effects.[11]

The duty can be carried out by including in the decision instructions on the right to waive the appeal and legal consequences, including finality and

[9] Judgment of the Regional Administrative Court in Cracow of 29 April 2019, ref. no. III SA/Kr 168/19, Legalis no. 1918773; judgment of the Regional Administrative Court in Warsaw of 28 May 2019, ref. no. IV SA/Wa 793/19, Legalis no. 2320624, and judgment of the Regional Administrative Court in Wrocław of 8 July 2020, ref. no. IV SA/Wr 261/20, Legalis no. 2417892.

[10] Ref. no. IV SA/Wa 793/19.

[11] Judgment of the Regional Administrative Court in Warsaw of 25 October 2018, ref. no. IV SA/Wa 1296/18, Legalis no. 2311620.

enforceability of the decision. This arises from Article 107(1)(7) CAP, which obliges a public administrative authority of the first instance to instruct a party in its decision about the party's right to waive the appeal and legal effects of such waiver under Article 127a(2) CAP. Including in the decision defective instructions on the right to appeal or legal effects of a waiver of appeal, or filing a suit with general courts or a complaint with administrative courts cannot harm a party that follows such instructions (Article 112 CAP).[12]

3. EFFECTS OF A WAIVER OF APPEAL

Contents of Article 127a(2) CAP, imply a decision shall become final and enforceable as of delivery to a public administrative authority of a declaration to waive the right to appeal by the last party to proceedings.

The legislation stipulates, therefore, such decision cannot be appealed in administrative proceedings or complained to an administrative court (the attribute of enforceability), nor can a request to reconsider the case be filed (the attribute of finality).

Considering the literal wording of the said provision, it should be assumed appealing after an effective waiver of the right to appeal causes inadmissibility of appealing and thus of instigating appeal proceedings that would lead to a decision by force of Article 138 CAP. An appeal authority should then resolve by force of Article 134 CAP.[13] If there are a number of parties, a waiver of the right to appeal becomes effective at the date the last party to the proceedings submits their declaration to the public administrative authority that has issued the given decision. This excludes opposability in administrative proceedings and acceptability of executing an obligation imposed by the decision not only voluntarily but also by way of compulsory administrative enforcement.[14] A party who has presented their declaration of waiver of the right to appeal could possibly prevent the legal effects under Article 127a(2) CAP, as long as at least one party has not submitted the declaration provided for thereunder and thus before the decision of a first-instance authority has become final. In the event, legal effects of a declaration can be evaded by appeal of a party who has waived their right to appeal before.

Where parties waive the right to appeal effectively, the decision such a waiver relates to cannot be complained to administrative courts (Article

[12] Cf. e.g. judgment of the Regional Administrative Court in Warsaw of 8 April 2021, ref. no. IV SA/Wa 26/21, Legalis no. 2582559 and the judgment of the Regional Administrative Court in Warsaw decision of 25 March 2021, ref. no. VII SA/Wa 318/21, Legalis no. 2561103.

[13] Judgment of the Regional Administrative Court in Szczecin of 18 March 2021, ref. no. II SA/Sz 807/20, Legalis no. 2561299.

[14] Ref. no. IV SA/Wa 793/19.

16(3) CAP).[15] This is due both to effectiveness of the decision and to the fact the parties have failed to exhaust administrative complaint measures in relation to the same decision, which is absolutely prerequisite to filing complaints with administrative courts.

4. POSSIBILITY OF WITHDRAWING A DECLARATION TO WAIVE THE RIGHT TO APPEAL

The Code of Administrative Procedure fails to clearly resolve admissibility of revoking a declaration to waive the right to appeal. The substantiation of the draft 2017 amendment does emphasise, in connection with effects of the waiver of the right to appeal, "it should be assumed an effective withdrawal of a declaration in this respect is impossible. Such a declaration, if correctly filed, is immovable once delivered to the authority by a party or, if there are more parties to proceedings, by all parties."[16]

In spite of that substantiation, there are judicial decisions that allow the option of revoking a declaration to waive the right to appeal. Differences in this regard are voiced by the doctrine as well.

The judicial decisions assume the option of withdrawing a party's declaration to waive the right to appeal should be accepted if the effects contemplated by Article 127a(2) CAP, have not taken place, that is, if a decision has not become final and enforceable and a letter revoking the waiver is delivered by the deadline for appeal (set to a given party).[17] In practice, this will be the case if there are more parties to a case and only some waive their right to appeal, since exercise of this right by one party (or some parties) cannot affect the legal positions of the remaining parties. This means a decision is not final until the deadline for appeal by the remaining parties or until those parties waive their rights and an entity who has waived their right to appeal before can revoke such a declaration effectively. A declaration contemplated by Article 127a(1) CAP, could be revoked within 14 days of decision delivery to a given party. An appeal should be submitted by the same date and may contain a declaration to revoke the waiver of the right to appeal. A declaration to waive the

[15] Decision of the Regional Administrative Court in Lublin of 17 June 2020, ref. no. III SA/Lu 124/20, Legalis no. 2492662.

[16] The substantiation of the government draft do Act Amending the Code of Administrative Procedure and Certain Other Acts, p. 57–58 (Print No. 1183) and judgment of the Regional Administrative Court in Białystok of 13 September 2018, ref. no. II SA/Bk 409/18, Legalis no. 1827451.

[17] Ref. no. IV SA/WA 793/19; judgment of the Regional Administrative Court in Bydgoszcz of 14 December 2018, ref. no. II SA/SA/Bd 1173/18, Legalis no. 1876645, and judgment of the Regional Administrative Court in Warsaw of 6 August 2019, ref. no. VII SA/Wa 162/19, Legalis no. 2521565.

right to appeal cannot be revoked after such date or after occurrences that result in a decision becoming final and enforceable. If there is only one party to proceedings, on the other hand, their effective waiver of the right to appeal by force of Article 127a(1) CAP, makes the decision instantly final and enforceable. Thus, the party is not allowed to revoke their earlier declaration of will.[18]

Meanwhile, the doctrine of administrative law finds resignation from a subjective right unacceptable in principle [Zimmermann 2014, 319; Kmieciak 2011, 105]. With reference to the institution of waiver of the right to appeal, it is claimed a party may change their mind and exercise their subjective right until the last day of the time for appeals. J. Zimmermann allows a party has an unlimited right to change their mind until the deadline for appeals [Idem 2017, 15–16].[19] Since allowing the waiver of the right to appeal impinges on the very essence of the public subjective rights of citizens, any doubts as to exercise of this right should be resolved to the benefit of parties.

This can be juxtaposed with the position of K. Glibowski, who refers to the draft law substantiation and finds revocation of a declaration to waive the right to appeal inadmissible [Glibowski 2021]. In this connection, the need is recognised for a greater emphasis on exhaustive instructions to parties on the importance and irreversibility of the waiver [Piątek 2019, 54–55].

Other positions are compromises. For example, B. Adamiak does not question admissibility of a waiver and effectiveness of its revocation (on general Civil Code principles) while stressing the principle of the faculty to dispose [Adamiak 2017a, 168–70]. That author accepts pursuit of a party's claim should depend on their will yet believes effective withdrawal of a declaration should depend on fulfilment of the conditions under Article 61 of the Civil Code, that is, parallel submission of a declaration to waive the right to appeal and a revocation of the same declaration [Adamiak and Borkowski 2021]. If this condition is not met, B. Adamiak underlines, the Code of Administrative Procedure allows no such revocation as a matter of principle. Applicability of regulations concerning defective declarations of will is assumed here [ibid.]. If the will is defective, then the Civil Code's provisions on defective statements of will must apply (Chapter IV). It should be assumed then defects of a statement, e.g. conditions excluding a conscious decision and expression of will when misled by information from staff of a public administrative authority, a party has the right to evade effects of their declaration to waive

[18] Judgment of the Supreme Administrative Court of 29 August 2019, ref. no. II OSK 873/19, Legalis no. 2248674; decision of the Supreme Administrative Court of 16 February 2021, ref. no. III OSK 3180/21, Legalis no. 2540690, and judgment of the Regional Administrative Court in Kielce of 2 December 2020, ref. no. II SA/Ke 926/20, Legalis no. 2509087.

[19] Judgment of the Regional Administrative Court in Gdansk of 17 October 2018, ref. no. II SA/Gd 421/18, Legalis no. 1842487 and judgment of the Regional Administrative Court in Gliwice of 8 June 2020, ref. no. II SA/Gl 175/20, Legalis no. 2392985.

the right to appeal. This may apply to undoubted cases of a party's defective will that gives rise to adverse effects to the same party. As the Regional Administrative Court in Warsaw has stressed,an error of a legal act under the Civil Code should be understood broadly as a conception of an act which is non-conforming with reality, with such nonconformity relative not only to facts but also to law.

The option of revoking a declaration to waive the right to appeal by the remaining parties delivering their declarations to waive the right to appeal is also accepted by R. Kędziora [Kędziora 2017]. A similar view is offered by P. Gołaszewski [Gołaszewski 2017a, 915–16], who believes a party's revocation of a declaration to waive the right to appeal should be admissible in general [Idem 2017b, 155 ff][20] (in spite of what the legislator assumed in the substantiation of the 2017 amendments to the CAP), with admissibility of such a revocation dependent on how many parties there are to proceedings. Until a formally (Article 63 CAP) and substantially (in respect of contents) effective declaration to waive the right to appeal is presented to the authority by the last remaining party, with the consequent finality, validity, and enforceability of the decision (Articles 127a and 130(4) CAP), such declaration may be revoked, therefore. The Supreme Administrative Court finds likewise in its judgement of 29 August 2019[21] and decision of 16 February 2021.[22]

A. Wróbel adopts a similar position by acknowledging once the declaration is filed by the last party, the decision becomes final and effective. It acquires the attribute of enforceability as well (Article 130(4) CAP *in fine*). Only if a declaration to waive the right to appeal is received by the authority earlier than such declaration by the last remaining party to proceedings would the provision not be effective. The CAP has not prohibited withdrawal of this declaration, only specifying effects of submission of such declaration to the authority by the last party to proceedings. A waiver of the right to appeal is a unilateral act. It can be assumed, therefore, consent of a public administrative authority to the withdrawal (revocation) of a waiver is not required if a letter revoking the waiver is filed before the deadline for appeals. This must take place, however, prior to the effects under Article 127a(2) CAP [Wróbel 2020].

The admissibility of a declaration to waive the right to appeal is likewise accepted by W. Piątek, who rightly notes withdrawal of the waiver deprives such waiver of its legal effects in full. Thus, a party may withdraw their

[20] This arises from the general rules of revocability of parties' procedural acts, according to which a party may revoke a procedural act as long as such act has not achieved its (intended) legal (procedural) effect.

[21] Ref. no. II OSK 873/19.

[22] Ref. no. III OSK 3180/21.

declaration to waive the right to appeal effectively if a letter withdrawing such waiver is filed prior to the deadline for appeals [Piątek 2019, 54–55].[23]

The doctrine's view of the inadmissibility of revoking a declaration to waive the right to appeal, with the effect provided for by Article 127a(2) CAP, namely, a decision gaining the attributes of finality and effectiveness, being the key argument for such a firm position, is not approved by the Regional Administrative Court in Wrocław,[24] especially as some proponents of the doctrine are critical of Article 127a(2) CAP, claiming a waiver of a public subjective right, namely, the individual right to complain against decisions and resolutions issued by the first instance derived from Article 78 of the Polish Constitution [Zimmermann 2017, 12–16]. The Wrocław court supports the view a party who has effectively waived their right to appeal can withdraw such waiver by making an appropriate declaration to withdraw the waiver and submit an appeal against a decision.

CONLUSIONS

The option of waiving the right to appeal, introduced to the Code of Administrative Procedure, is an institution implying far-reaching effects. The possibility of waiving the right to appeal prevents a party from filing an appeal (finality) or a complaint with an administrative court (effectiveness).

Given such far-reaching consequences of this institution, the foregoing analysis is intended to answer the question, does a party have the right to withdraw their declaration of waiving their right to appeal.

An institution expected to accelerate proceedings gives rise to grave doubts about exercise of rights of parties to administrative proceedings. A party a decision is addressed to may be deprived of one of the fundamental human rights, i.e., the right to complain against a decision, and consequently the right to trial, by waiving their right to appeal as a result of their own, not necessarily conscious decisions or ignorance of law.

In my opinion, a party has the right to change their mind and exercise their subjective right until the very end of the term for filing an appeal. The admission of a waiver of the right to appeal undermines the very essence of the citizen's public subjective right, therefore, any doubts regarding the way this entitlement is exercised that arise as part of proceedings should be decided in favour of a party.

[23] Judgment of the Regional Administrative Court in Bydgoszcz of 14 December 2018, ref. no. II SA/Bd 1173/18, Legalis no. 1876645.

[24] Ref. no. IV SA/Wr 261/20.

In view of the above and despite the legislator's intention expressed in the substantiation, admissibility should be supported of withdrawing a declaration to waive the right to appeal until the last date of the period for appealing.

REFERENCES

Adamiak, Barbara. 2017a. "Granice rozporządzalności sprawą przez organ administracji publicznej." In *System Prawa Wdministracyjnego*, vol. 9, edited by Roman Hauser, Zygmunt Niewiadomski, and Andrzej Wróbel, 168–70. Warszawa: C.H. Beck.

Adamiak, Barbara. 2017b. "Odwołania." In Barbara Adamiak, and Janusz Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, 668–742. Warszawa: C.H. Beck.

Adamiak, Barbara, and Janusz Borkowski. 2021. "Komentarz do art. 127a." In *Kodeks postępowania administracyjnego. Komentarz*. Warszawa: C.H. Beck. Legalis el.

Dawidowicz, Wacław. 1962. *Ogólne postępowanie administracyjne. Zarys systemu*. Warszawa: Państwowe Wydawnictwo Naukowe.

Glibowski, Krzysztof. 2021. "Komentarz do art. 127a." In *Kodeks postępowania administracyjnego. Komentarz*, edited by Roman Hauser, and Marek Wierzbowski. Warszawa: C.H. Beck. Legalis el.

Gołaszewski, Piotr. 2017a. "Nowelizacja Kodeksu postępowania administracyjnego oraz Prawa o postępowaniu przed sądami administracyjnymi z 7.4.2017 r. (cz. III)." *Monitor Prawniczy* 17:910–16. Legalis el.

Gołaszewski, Piotr. 2017b. *Sporządzanie środków zaskarżenia w postępowaniu administracyjnym i sądowoadministracyjnym*. Warszawa: C.H. Beck.

Iserzon, Emanuel. 1937. *Postępowanie administracyjne. Komentarz*. Kraków: Księgarnia Powszechna.

Kędziora, Robert. 2017. *Kodeks postępowania administracyjnego. Komentarz*. Warszawa: C.H. Beck. Legalis el.

Kmieciak, Zbigniew. 2011. *Odwołania w postępowaniu administracyjnym*. Warszawa: Wolters Kluwer.

Kmieciak, Zbigniew. 2018. "Oblicza nowelizacji Kodeksu postępowania administracyjnego (w odpowiedzi prof. Janowi Zimmermannowi)." *Państwo i Prawo* 2:97–110.

Piątek, Wojciech. 2019. "Zrzeczenie się odwołania w ogólnym postępowaniu administracyjnym." *Zeszyty Naukowe Sądownictwa Administracyjnego* 5:44–58.

Sadkowski, Łukasz. 2017. *Zmiany w kodeksie postępowania administracyjnego*. Warszawa: C.H. Beck. Legalis el.

Smarż, Joanna. 2018. "Zasada dwuinstancyjności postępowania w świetle nowelizacji Kodeksu postępowania administracyjnego." In *Prawo administracyjne dziś i jutro*, edited by Jacek Jagielski, and Marek Wierzbowski, 378–86. Warszawa: Wolters Kluwer.

Wajnes, Izaak. 1939. *Ochrona praw i interesów jednostki w postępowaniu administracyjnym.* Wilno: [No information about Publisher].

Wróbel, Andrzej. 2020. "Odwołania." In Małgorzata Jaśkowska, Andrzej Wróbel, and Martyna Wilbrandt-Gotowicz, *Kodeks postępowania administracyjnego. Komentarz*, 820. Warszawa: Wolters Kluwer.

Zimmermann, Jan. 2014. *Prawo administracyjne.* Warszawa: Wolters Kluwer.

Zimmermann, Jan. 2017. "Kilka refleksji o nowelizacji kodeksu postępowania administracyjnego." *Państwo i Prawo* 8:3–24.

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THE PROBLEM OF THE TAX-LEGAL UNIFICATION OF THE EFFECTS OF EMPLOYEE'S CREATIVE ACTIVITY

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Abstract. Provision of work covers various activities of an employee, the performance of which may lead to a result that is subject to copyright protection. This applies both to the performance of work under the classic employment relationship and the "academic employment contract," containing elements characteristic for the performance of duties in the sphere of higher education and science. In both cases, the issues related to the creation and acquisition of economic copyrights to employee works are regulated by the provisions of the Act on copyright and related rights. In practice, however, a far-reaching (and incomprehensible) differentiation of tax-legal consequences can be observed in this respect, which becomes the source of numerous controversies in the context of law application. Problems are particularly visible in the area of calculating 50% (the so-called lump-sum) tax deductible costs. It should be emphasized at the same time that emerging interpretation difficulties result not only from the content of tax regulations. Their source is the provisions of the Law on higher education and science. The general (long-awaited) interpretation of the Minister of Finance sustained the legal dualism in the scope of the issue. The duality of the presented interpretation results from different treatment of employment contracts of academic teachers. It is pointed out that in order for the remuneration of academic teachers to be regarded as a royalty, a work must be created within the meaning of copyright law, but at the same time arguments are presented referring to non-statutory premises, which do not have normative overtones in the analysed case (e.g. prestige of the profession of academic teacher, which has features characteristic for liberal professions). The aim of the article is to outline the tax-legal consequences of the divergences and views persisting for a long time with regard to the treatment of employee's works arising within the framework of employment relationship and to propose an appropriate interpretation direction supported by the Authors. For this purpose the dogmatic and historical-legal methods was used.

Keywords: academic employment contract, academic staff, employment contract, flat rate deductible costs

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INTRODUCTION

The relationship of employment is a bond of special social and economic significance. It is characterised not only by specific (statutorily defined) features, but it also determines the establishment of a defined set of rights and obligations between the employee and the employer. The relationship of employment arises regardless of the name given to the contract entered into.[1] The provision of work includes various activities on part of the employee, the performance of which may lead to a result covered by copyright protection. This applies both to the performance of work as part of a classic employment relationship and an "academic employment contract," containing elements typical of the performance of duties in the sphere of higher education and science. In both cases, the issues related to the creation and acquisition of economic copyrights to employee works are regulated by the provisions of the Act on copyright and related rights.[2] In practice, however, a far-reaching differentiation of tax-legal consequences can be observed in this respect.

As a rule, taxation through personal income tax covers any income understood as a surplus of the sum of revenues over the costs of earning them in a given tax year.[3] Of course, the law defines various methods of determining costs, which unfortunately give rise to numerous disputes between taxpayers and taxation authorities. This also applies to the rules relating to academic teachers performing their duties under an employment relationship. Problems concern both to the manner and scope of application of 50% of the so-called lump-sum costs. It should be noted at the same time that interpretation difficulties stem not only from the content of tax regulations. They are also rooted in the reform of higher education and the introduction of new regulations under the so-called Act 2.0.[4]

[1] See e.g. judgment of the Supreme Court of 7 April 1999, ref. no. I PKN 642/98, Lex no. 40166; judgment of the Regional Court in Rzeszów of 4 February 2020, ref. no. IV U 1548/19, Lex no. 2781453; judgment of the Appellate Court in Warsaw of 12 December 2017, ref. no. III AUa 696/16, Lex no. 2658583.

[2] Article 12 of the Act of 4 February 1994 on copyright and related rights, Journal of Laws of 2018, items 1191 and 1293 [hereinafter: the Act on copyright and related rights].

[3] Article 9 and Article 22 of the Act of 26 July 1991 on personal income tax, Journal of Laws of 2018, item 1426 as amended [hereinafter: APIT].

[4] Act of 20 July 2018, the Law on Higher Education and Science, Journal of Laws item 1668 [hereinafter: LHES]; Act of 3 July 2018, the Introductory provisions for the Law on Higher Education and Science, Journal of Laws item 1668.

1. ESSENCE AND LEGAL NATURE OF EMPLOYMENT RELATIONSHIP

To illustrate the numerous doubts that arise with regard to issues related to the tax-law assessment of the creative effects of providing work under employment contracts, it is necessary to refer to such essential issues as the nature and normative limits of the construct of employment relationship. As defined in the provisions of the Labour Code, the employment relationship is of a bilateral and reciprocal nature, except that the latter feature is modified by asymmetrical distribution of the business risk burden (it is primarily the responsibility of the employer and it concerns, *inter alia*, personal, technical, economic and social aspects) [Tomaszewska 2020; Jackowiak 2009, 28; Goździewicz and Zieliński 2017].

The employment relationship is part of a broader concept of employment, which also applies to performance of work for a consideration (e.g. under civil-law contracts). To be able to speak strictly about hiring under an employment relationship, the catalogue of all statutory features should be met [Tomaszewska 2020].[5] When referring to the essential content of the relationship between the employee and the employer, it should be noted that by entering into an employment relationship, the employee agrees to perform work of a specific type for the employer and under employer's supervision and at the place and time designated by the employer, while the employer agrees to employ the employee for a consideration. The concluded contract should specify the type of work to be performed by the employee under the employer's management.[6] This means that the employer is entitled to issue binding instructions to the employee (as long as they are lawful and the valid contract between the parties), in particular as to the manner, place and time of

[5] See judgment of the Supreme Court of 11 September 2013, ref. no. II PK 372/12, Lex no. 1474905; judgment of the Supreme Court of 10 May 2018, ref. no. I PK 60/17, Lex no. 2486218; judgment of the Supreme Court of 19 March 2013, ref. no. I PK 223/12, Lex no. 1415490.

[6] The type (or types) of work means a set of activities to be the responsibility of the employee. Where several types of subordinated work are performed for the same employer, it must be presumed that the parties are linked with one employment relationship (judgment of the Supreme Court of 14 February 2002, ref. no. I PKN 876/00, Lex no. 82595). Sometimes, however, the agreement concluded by the parties is of a mixed nature. The case-law states that a predominant set of characteristics must then be established (judgment of the Supreme Court of 14 September 1998, ref. no. I PKN 334/98, Lex no. 37685) and, if they are equal in terms of intensity, account must be taken of the parties' mutual intention and goal, the manner in which the obligation is to be fulfilled and, as an auxiliary question, its name (judgment of the Supreme Court of 18 June 1998, ref. no. I PKN 191/98, Lex no. 36702, judgment of the Supreme Court of 2 September 1998, ref. no. I PKN 293/98, Lex no. 37269).

personal performance of work[7] by the employee [Jaśkowski 2021].[8] A parallel (in relation to the obligation to perform work by an employee) obligation of the employer is the obligation to employ the employee for a consideration. In this way, the employee's obligation to perform work for the employer also becomes his/her right [ibid.] (thus a claim to allow him/her to perform work arises).[9]

However, the Labour Code is not the only regulation which governs the entirety of employee relations in a universal manner. There is a number of internal official regulations which, while maintaining the application (either *mutatis mutandis* or directly) of the provisions of the labour law, modify the content of the employment relationship to a different extent. Regulations of this nature undoubtedly include provisions of the LHES [Baran 2020]. The Law on Higher Education and Science refers, in matters not regulated therein, to direct application of the provisions of the Labour Code both in relation to academic teachers and employees who are not academic teachers (Article 147 LHES). This applies when the matter concerning the employment relationship is not regulated in the LHES, or the regulation is not sufficiently detailed [ibid.]. The intended scope of this study prevents a detailed, comprehensive analysis of all the derogations introduced by the LHES (especially with regard to termination of the employment relationship). Nevertheless, in order to show the essence of the "academic" employment relationship, it is necessary to juxtapose the structural features of the "classic" employment contract regulated by the provisions of the Labour Code and the "academic" employment contract.

In general, it can be stated that the basic (dominant) form of performing work under the employment relationship, which is also provided for in the LHES, is the employment contract (Article 25 of the Labour Code and Article 117 LHES). The regulation of the LHES (as provisions of *lex specialis*) formulate specific peculiarities as compared with the Labour Code. Firstly, the LHES does not provide for the possibility to conclude with academic staff a contract for a trial period, stating explicitly that only a contract for a definite or indefinite period may be concluded. Secondly, as far as academic staff are concerned, among various additional categories of fixed-term employment contracts regulated by the Labour Code, only an employment contract for replacing an employee during his/her justified absence from work may be used (Article 251(4)(1) the Labour Code). Thirdly, the LHES introduces modifications (with provisions of a *ius cogens* nature) to the permissible duration of fixed-term contracts. It has been pointed out that if the first employment

[7] Judgement of the Supreme Court of 28 October 1998, ref. no. I PKN 416/98, Lex no. 35429

[8] Judgment of the Appellate Court in Łódź of 7 May 2019, ref. no. III AUa 851/18, Lex no. 2701123.

[9] Article 22(1) of the Labour Code in conjunction with Article 471 of the Civil Code.

contract with an academic staff member in a given higher education institution is concluded for a definite period, it may be for a period of up to four years. Therefore, the restrictions from the Labour Code on the total duration of fixed-term contracts do not apply (Article 117(2)(2) and (4) in conjunction with Article 251(1–3) of the Labour Code). Similarly, the regulations referred to above will not apply to academic staff employed for a definite period, for whom the higher education institution is not the place of primary employment, or who are paid retirement benefits (Article 117(4) LHES).

Despite these distinctions, the LHES does not, however, regulate the form and essential nature of the content of the employment contract with an academic teacher. The rules of the Polish Labour Code will apply directly in this matter. The "academic" employment contract should therefore specify the parties to the legal relationship, the type of contract, the date of its conclusion, working conditions and pay, in particular the type of work, the place of work, the remuneration for work corresponding to the type of work, with an indication of the components of remuneration, the work time length, the date of commencement of work (Article 29(1) of the Labour Code in conjunction with Article 117 LHES). For full-time employment, it should also indicate whether the institution is the employee's primary place of work (Article 120 LHES). As regards the form of the legal act, there is a requirement to make the contract in writing (Article 29(2) of the Labour Code in conjunction with Article 147(1) LHES). In the event of failure to keep a written form, the institution, before allowing the employee to work, confirms to the employee in writing the arrangements concerning the parties to the contract, the type of contract and terms thereof. Furthermore, the institution should inform the employee in writing, not later than seven days after the conclusion of the contract, about the terms and conditions of employment and about the rights and obligations of the employee (Article 29(3) of the Labour Code in conjunction with Article 147 LHES).

It can be therefore observed that generally the essence of the employment relationship (both "classical" and "academic" one) remains unchanged. This conclusion is reinforced by the fact that the provisions of the Labour Code directly apply to the general framework of the construction of employment relationship. The above finding therefore also applies to the outline of the *essentialia negotii* of the "academic" employment contract.

2. RESULT OF CREATIVE WORK OF THE EMPLOYEE AND COPYRIGHT REGULATIONS

Unless otherwise provided for in law or the employment contract, the employer whose employee created a work as a result of the performance of his/her duties in the employment relationship, acquires, upon acceptance of the

work, the copyright to the extent as outlined by the purpose of the employment contract and the mutual intention of the parties. Unless otherwise provided for in the employment contract, upon acceptance of the work, the employer also acquires ownership of the object on which the work is fixed/recorded (Article 12(1–3) of the Act on copyright and related rights). In the absence of a different definition of the words: employee, employer or employment relationship, the meaning given to them by the legislature in the provisions of the Labour Code is adopted [Ożegalska-Trybalska 2021].

For the employee's work to be created, the activities leading to its creation should take place at the employer's cost, within employer's organisational structure, and with the use of employer's technical equipment and personnel. Moreover, it is essential that the creation of the work is within the scope of the employee's responsibilities (duties) under the existing employment relationship.[10] Regardless of the strong relationship between the creation of a specific creative work and the performance of services under the employment relationship, the result of creative activity should, first of all, meet the conditions that allow it to be considered a work within the meaning of copyright law. A copyrightable work is considered to be any manifestation of creative activity of an individual nature, established in any form, regardless of its value, purpose and manner of expression (Article 1(1) of the Act on copyright and related rights). Only the manner of expression may be protected. Discoveries, ideas, procedures, methods and principles of operation and mathematical concepts are not protected (Article 1(21) of the Act on copyright and related rights). To recognize a work as the object of copyright, it is necessary to establish the work – even if it has an incomplete form (Article 1(3) of the Act on copyright and related rights). A work is a result of the intellectual activity of the author, so the effect of the creativity of the person (creator) should be externalized.[11] Summing up, it is therefore necessary to cumulatively meet the following conditions. First, the result of the activity should have a creative nature. Second, it should be of an individual nature.[12] Above all, however, it must be established (regardless of the form).

Considering the copyright-law context presented, it was inevitable that ambiguities would arise regarding the legal nature of the products of activity

[10] As in: judgment of the Appellate Court in Warsaw of 20 June 2018, ref. no. V ACa 18/17, Lex no. 2519434 and judgment of the Appellate Court in Poznań of 11 July 2013, ref. no. I ACa 600/13, Lex no. 1375828.

[11] This feature of a copyrightable work is also referred to as "novelty," "originality" (as in: judgment of the Supreme Court of 15 November 2002, ref. no. II CKN 1289/00, Lex no. 78613; judgment of the Supreme Court of 22 June 2010, ref. no. IV CSK 359/09, Lex no. 694269; judgment of the Supreme Court of 25 January 2006, ref. no. I CK 281/05, Lex no. 181263).

[12] As in e.g. judgment of the Appellate Court in Warsaw of 18 February 2009, ref. no. I ACa 809/08, Lex no. 1120180; judgment of the Supreme Administrative Court in Warsaw of 11 July 2018, ref. no. II FSK 1845/16, Lex no. 2528581.

undertaken as part of the "academic" employment relationship. According to the LHES, university staff members are divided into a group of academic teachers and employees who are not academic teachers [Zieliński 2019].[13] Academic teachers may be employed in the following staff groups: teaching, research, research and teaching staff. Basic duties of academic teachers include conducting scientific activity and educating and raising students. However, this list does not cover all the tasks of an academic teacher. Moreover, the academic teacher is required to participate in organisational work for the university and to continuously improve their professional competence (Articles 112–115 LHES). The provisions of the Act on copyright and related rights provide that the performance of duties of academic teacher constitutes creative activity of an individual character, as referred to in the Act on copyright and related rights (Article 116(7) LHES). Using linguistic interpretation, it should therefore be understood that the performance (process of activities being undertaken) of all duties of an academic teacher is an individual creative activity within the meaning of the copyright regulations. However, it does not follow from the normative whole of the regulations that a *sui generis* creative product is made (which would be subject to copyright protection, regardless of whether the requirement of meeting the constitutive features of a copyrightable work is met or not). There is no regulation which would indicate the legislature's departure from the legal definition to which the LHES directly refers, i.e. the definition of "work" contained in legal regulations on copyright. Therefore, it would be correct to accept the use in the process of interpretation of the legal definition included in the provisions of copyright law. According to the rules of correct legislation, the legislature, wishing to depart from this principle, should have given a different meaning of this concept (creative work of an academic teacher) and define its scope of reference,[14] or directly introduce a separate category of works created under the "academic" employment relationship.

3. TAXATION OF REVENUE EARNED UNDER AN EMPLOYMENT CONTRACT

According to the Act on personal income tax, the tax deductible costs are expenses incurred to generate income or preserve or secure the source of revenue.[15] For taxpayers hired under an employment relationship (or related relationships), cost limits were generally provided, the amount of which depended

[13] Similarly in the Law of Higher Education of 2005.

[14] See para. 147(1)(4) of the Regulation of the Council of Ministers of 20 June 2002 on the "Rules of legislative technique," Journal of Laws of 2016, item 283.

[15] See Article 22(1) APIT. This rule does not cover the costs listed in Article 23 APIT.

on two criteria: the number of employers and the conditions of access to the workplace (the taxpayer's place of residence). Four cost categories were established on the basis of these two factors [Pomorski 2019, 382]. This does not exclude that, in certain cases, workers employed under a contract of employment will be able to benefit from the increased 50% of tax-deductible cost.

For persons who earn revenues from the performance of services under contract work agreements and specific-task contracts, the tax-deductible costs of earning certain revenues are usually set at 20% of the revenue generated.[16] These costs are calculated from the revenue less pension and sickness insurance contributions deducted by the payer in a given month.[17]

For certain revenues, the Act allows for the setting of flat-rate costs. Where authors use or dispose of copyright and related rights within the meaning of separate legislation, 50% of the tax deductible cost of the revenue generated shall apply. This applies to the revenue from the exercise by authors of copyright and by performing artists of related rights "within the meaning of separate legislation" or from disposing them (Article 22(9)(3) APIT). The total tax-deductible costs for a given tax year may not exceed the upper limit of the first range of the tax scale (Article 22(9a) APIT). This rule also applies to revenues generated by creative activities (Article 22(9a) APIT).

Under the Act, 50% of the tax-deductible costs of generating certain revenues from the exercise by authors of copyright and performing artists of related rights concern the revenues generated by: (1) creative activities in the fields of architecture, interior design, landscape architecture, civil engineering, urban planning, literature, fine arts, industrial design, music, photography, audio and audiovisual creation, computer software, computer games, theatre, costume design, scenic design, directing, choreography, art of lutherie, folk art and journalism; (2) artistic activities in the fields of acting, stage, dance and circus art and in conducting, vocal and instrumental arts; (3) audio and audiovisual production; (4) opinion journalism activities; (5) museum activities in the fields of exhibition, science, popularization, education and publishing; (6) conservation and restoration of cultural property activities; (7) derivative right to produce a derivative work in the form of translation;[18] (8) research-and-development, scientific, scientific-and-didactic, research, research-and-didactic activities and didactic activities carried out in a university.

Undoubtedly, this broad catalogue of activities can be implemented in various legal forms, which determine the exercise of a specific activity. At the same time, within the meaning of the Tax Act (Article 22(9)(3) APIT), the provisions of the Act of 4 February 1994 on copyright and related rights are "separate provisions." As previously stated, the object of copyright is any

[16] From the titles listed in Article 13(2), (4), (6), and (8) APIT.
[17] According to Article 22(9)(4) APIT.
[18] Referred to in Article 2(2) of the Act on copyright and related rights.

expression of creative activity of an individual nature, established in any form, regardless of value, purpose and method of expression. In particular, these include works expressed in words, graphic characters (e. literary, journalistic, scientific, cartographic), artwork, photographic, lutherie, industrial design, architectural, architectural-urban and urban-planning, musical and verbal-musical, stage, stage-musical, choreographic and pantomime, or audiovisual works.

In view of the above, questions arise as to the category and manner of applying tax deductible costs in a situation where the revenue related to a copyrightable work was generated under an employment relationship (contract of employment). In such a situation it becomes necessary to clearly demonstrate the circumstances justifying the application of 50% tax deductible costs. It seems that this includes confirmation of the fact of creation of a specific work, transfer of copyright (or granting a licence) and the amount of remuneration generated. The content of the concluded employment contract is important here. In the judicial-administrative case-law an opinion is presented that where creative work is provided under an employment relationship, it is necessary to prove the link between the consideration (royalty) and the work of creative character performed and to document that the job was actually performed – i.e. that a copyrightable work was created.[19] In this respect, it becomes necessary to keep appropriate records of creative work, which will also be controlled and accepted by the employer.

Thus, in order to benefit from the increased 50% of tax-deductible costs, it is necessary to clearly separate that part of the remuneration which is due for the disposal of author's copyright to the work. The employer pays the due remuneration as a result of acceptance of the work and associated economic rights, and therefore the amount of this royalty payment must be clearly specified in the documents regulating the content of the employment relationship. This means that a clear distinction should be made between the part of the remuneration related to the transfer of copyright to the employer or the use of these rights (royalty) and the part of the remuneration being an equivalent for performing other duties of the employee. Such a sequence of provisions should be contained in the employment contract or in documents closely related to it. After all, they directly shape the content of the legal relationship between the employer and the employee who is the author of a specific work.[20]

In that regard it cannot be considered sufficient any calculations or *post factum* certificates if it cannot be established from the employment contract whether and what copyrightable works resulted from the work done and the

[19] See judgement of the Regional Administrative Court of Białystok of 19 August 2020, ref. no. I SA/Bk 158/20, Lex no. 3048856.

[20] Judgement of the Supreme Administrative Court of 12 November 2020, ref. no. II FSK 2082/20, Lex no. 3082251.

specific value of the total amount of remuneration for the work in that part to be considered as remuneration for creative work. In practice, employers quite often make a percentage-defined separation of the royalty from the total value of the remuneration. The employer defines them as a percentage of the employee's total working time.

Such certificates (calculations) can only illustrate the proportion of the working time allocated to creative work and the working time to be spent on other employee's duties. The tax statute requires revenue to be linked to the acquisition and disposal of copyright, not to the working time allocated to acquiring those rights. It is therefore clear that the remuneration to which the 50% tax-deductible cost may be applied must be payable to the employee not only for the performance of his/her creative work, but also for the transfer to the employer of the copyright in the work created by the employee.[21] Therefore, the records kept must make it possible to determine what copyrightable works have been created and what royalty is to be paid for it.[22]

Such a position appears to be well established in the case-law of administrative courts. A quite uniform view is presented that in order to apply the increased tax-deductible costs, it is necessary to divide the remuneration into the part relating to the performance of employee duties and the part determining the royalty for the use of copyright. It is firmly stressed that it is not sufficient merely to distinguish the part of the working time allocated to creative work, since this does not make it possible to determine whether the copyrightable work was created at all and whether the royalty was paid for its exploitation. This value (or the manner of its calculation) should be clearly and precisely specified in the documents governing the content of the employment relationship.[23]

As a side note it may be mentioned that in judicial-administrative case-law one can come across the view that in the case of a work contract there is no legal justification for the requirement to distinguish the royalty for the transfer of copyright and for the drawing up detailed documentation (records) of the works created.[24] This seems to be too far-reaching. Although it is rightly pointed out that this is not required by the Act on personal income tax, and

[21] Judgement of the Administrative Supreme Court of 17 April 2019, ref. no. II FSK 1339/17, Lex no. 2676390.

[22] Judgement of the Administrative Supreme Court of 24 February 2021, ref. no. II FSK 2933/20, Lex no. 3156609.

[23] See e.g. judgement of the Administrative Supreme Court of 7 February 2019, ref. no. II FSK 422/17, Lex no. 2642709; judgement of the Administrative Supreme Court of 11 March 2015, ref. no. II FSK 459/13, Lex no. 1675471; judgement of the Administrative Supreme Court of 12 March 2010, ref. no. II FSK 1791/08, Lex no. 595971 and judgement of the Administrative Supreme Court of 16 September 2010, ref. no. II FSK 839/09, Lex no. 745894.

[24] See judgement of the Regional Administrative Court of Białystok of 19 August 2020, ref. no. I SA/Bk 158/20, Lex no. 3048856.

the same objection can indeed be raised against the employment contract and, above all, this contradicts the content of copyright law and the arguments referred to above.

4. FISCAL EFFECTS OF THE EMPLOYMENT CONTRACT IN THE LIGHT OF THE ACT ON PERSONAL INCOME TAX

The practical doubts arising from the taxation of the creative activity of academic teachers stem from the fact that the copyright regulations do not correspond, in the systemic terms, to the solutions adopted in the regulations on the organisation of higher education. As already mentioned, in the light of the LHES, research and teaching staff members are classified as academic teachers (Article 112 in conjunction with Article 114 in conjunction with Article 115(1)(3) and Article 115(2) LHES). Their basic duties include conducting research activities, educating students or participation in the training of doctoral students. In addition, an academic teacher is obliged to participate in organisational work for the university and to improve his/her professional competence on a regular basis (Article 115(1) LHES). Even in this respect there is an obvious difficulty in the effective application of the rule expressed in the LHES, according to which the performance of the duties of an academic teacher as a whole is a creative activity of an individual nature, as referred to in the copyright law.

Regardless of the above, it should be noted that the character of academic teacher's work means that the structure of his/her remuneration may take a relatively complex legal form. In the context of copyright and the aforementioned rule of the LHES, there may be different types of consideration paid, related to the scope of professional duties. Academic teachers employed by a university may earn the following revenue: 1) base pay, 2) supplementary base pay, 3) pro-quality base pay, 4) overtime pay, 5) additional responsibility allowance, 6) seniority allowances, 7) additional pay for the function of thesis supervisor, 8) remuneration associated with the issuance of an opinion on the academic degree, 9) remuneration for work in selection committees, 10) other types of allowance, 11) severance payments, 12) reimbursements of travel expenses for business purposes, 13) remuneration for the period of justified absence from work, 14) allowance for unused annual leave, 15) holiday allowance, 16) awards.

The contradiction between the rules of copyright law and the LHES makes the legal classification of these elements of remuneration, and thus the proper application of tax solutions regarding the tax-deductible costs, extremely difficult. Despite the LHES being effective for quite a short period of time, the competent tax authorities has already received quite a number of requests for interpretation. In the light of the individual tax interpretations issued, in the

cases referred to above, it is possible to apply 50% of deductible costs of generation of revenue paid to academic teachers employed under contracts of employment.[25]

At the same time, it should be noted that in the opinion of the taxation authorities which issued the individual interpretations, the 50% tax-deductible costs are not applicable to all revenue due for the period of excused absence from work. It should be pointed out that pursuant to the LHES, a full-time employed academic teacher who is under 65 years of age is entitled to a paid health leave (Article 131(1) to (5) LHES). The leave is granted to carry out prescribed medical treatment in a situation where the employee's state of health requires refraining from work. No gainful employment may be undertaken during the leave. The health leave shall be granted on the basis of a medical certificate attesting that the state of patient's health requires refraining from work, and specifying the prescribed treatment and the period needed for it. This means that the academic staff member's state of health requires abstaining from work. Consequently, the employee is paid remuneration for the period during which he/she does not perform duties as an academic staff member. He/she refrains from work and thus does not perform creative activity of an individual character as referred to in the Act on copyright and related rights. Therefore, there are no grounds for applying the 50% tax-deductible costs when the academic teacher is on health leave.

It should be noted that the aforementioned exclusion does not apply to other forms of leave, such as sabbatical leave or annual leave. In these cases, the university, when calculating and paying personal income tax, will be able to apply the 50% tax deductible costs to remuneration components paid to academic staff.

In view of the controversy which arose in practice, the Minister of Finance decided to issue a general interpretation.[26] He pointed out that with respect to the analysis of application of the 50% tax-deductible costs, the LHES constitutes a *lex specialis*. In view of the above, the conclusion was formulated that in accordance with the APIT, the 50% tax-deductible costs apply to the entire remuneration of the academic teacher.

The Minister listed the prerequisites that are necessary to treat remuneration as a royalty and to apply the 50% tax-deductible costs to it: (1) the creation

[25] See individual interpretation, Director of the National Revenue Administration, of 13 July 2020, ref. no. 0113-KDWPT.4011.20.2020.3.MG, Lex no. 548424; individual interpretation, Director of the National Revenue Administration, of 8 July 2020, ref. no. 0112-KDIL2-1.4011.373.2020.2.KF, Lex no. 547949; and individual interpretation, Director of the National Revenue Administration, of 10 July 2020, ref. no. 0114-KDIP3-2.4011.359.2020.1.JK3, Lex no. 548325.

[26] General Interpretation of the Minister of Finance No. DD3.8201.1.2018 of 15 September 2020 on application of the 50% tax-deductible costs to author's remuneration, Official Journal of the Minister of Finance of 2020, item 107.

of a copyrightable work, allowing the author's enjoyment of copyright and enabling property rights to the work to be disposed of, (2) the existence of objective evidence proving the creation of the copyrightable work.

Importantly, the interpretation states that the requirement that the royalty be clearly separated does not apply to works created by academic teachers. This is in clear contradiction with the wording of the copyright law and the previous line of judicial-administrative case-law.

As regards documenting the creation of works, it was pointed out that the employer and the employee may keep a record of works created, including works for which an advance payment of royalties is applied and separately for works already created by the employee. In these records, the employer may also confirm the acceptance of the work concerned, or any other moment that determines the transfer of copyright to the employer. The employer and the employee may also document the creation of the work in the form of a declaration. The obligation to make such declarations may arise from the employment contract or other internal regulations of the institution. The declaration should indicate what specific work has been created (or is being created) because a declaration about the mere performance of creative work will be considered insufficient.

The interpretation has stressed that the provision of the LHES constitutes a separate regulation, taking into account the realities of the operation of a higher education institution as the basic entity of the system of higher education and science, and the specific nature of work of academic teachers. The Minister of Finance indicated that the profession of academic teacher, despite its legal framework, is a profession similar to so-called liberal professions. A notable part of responsibilities typical for academic teachers and also taken into account in evaluation of their work performance is a result of creative invention and freely conducted research and publication activities. However, it has not been substantiated which regulations are the basis for the limitation of the basic principles of employment relationship with regard to academic teachers. Neither the LHES nor the Labour Code contain such regulations. No further justification is provided for the presented legal concept of the position of the academic teacher as an individual practising a liberal profession. Moreover, the interpretation implicitly equates creating an author's publication with a lecture or seminar. The Minister of Finance has pointed out that the statutory scope of duties of academic teachers requires them to take independent actions to create copyrightable works in all areas of their professional activities, and in this regard he listed: teaching materials, syllabuses, lectures, seminars, articles, monographs, etc. It seems that such an approach may be misleading and may lead to conclusions contradictory to the copyright law and the LHES.

Referring to the provisions concerning various forms of leave of an academic employee, the interpretation indicates that during the period when an academic teacher does not perform the academic teacher's duties and does not carry out creative activity of an individual character (a health leave), the 50% tax-deductible costs may not be applied.

5. FINAL REMARKS

Basing on the copyright law rules and the views expressed in the decisions of administrative courts referred to herein (issued in the context of applying the 50% tax-deductible costs), one may attempt to formulate a catalogue of conditions for applying employee's copyright-related costs. For the purposes of this study, the following conditions may be listed:

1) the result of work performed by the employee is copyrightable, and thus meets the prerequisites of a coprightable work specified in the Act on copyright and related rights,

2) the employee is an author within the meaning of the aforementioned act and the revenue is generated by the employee as a result of the author's exercise or disposal of such rights,

3) the legal relationship between the employee and the employer involves a differentiation of the remuneration due to the employee for the part related to the exploitation of the copyright and the part related to the performance of typical employee duties and the employer keeps relevant documentation in this respect, e.g. keeps detailed records of the transferred copyrightable works,

4) the determination of the value of the royalty or the procedures for its calculation should be clearly and precisely specified in the documents which govern the content of the employment relationship during its validity,

5) for the 50% tax-deductible costs to be applied, the revenue must be obtained from the types of activity specified in the APIT.

However, this catalogue refers only to "classic" employment contracts. The entry into force of the LHES has introduced a specific legal dualism. It results from different treatment of employment contracts of academic teachers. This situation is perpetuated by interpretations of taxation authorities. Of particular importance is the general interpretation of the Minister of Finance. Although it states that for the remuneration of an academic teacher to be recognised as an royalty a work must have been created, the comparison of the profession of academic teacher with the so-called liberal professions may raise questions. What is the significance of the mentioned prerequisites – i.e. working conditions of academic teachers and specificity of liberal professions – in the light of copyright law or tax law regulations? In fact, the general interpretation appears to be inconsistent. On the one hand, it correctly refers to the constitutive features of the result (a work) that should arise as a result of the activities

undertaken by an academic teacher. On the other hand, reference is made to extra-statutory premises, which do not have normative overtones in the case under analysis. The adopted course of thought is not only misleading for the addressees of the interpretation, but it seems to be based to a large extent on assumptions that are wrong from the factual point of view. From the perspective of the content of the copyright law, the quoted tax interpretations directly lead to different fiscal consequences of concluded employment contracts, actually creating in this respect legal dualism. In the current state of affairs, a kind of "stalemate" situation has arisen. This is due to the fact that alongside generally outlined legal norms, a systemically inconsistent tax interpretation appeared. Unfortunately, due to the fact that it was issued by a superior of tax authorities, it will be widely applied in practice, clearly conflicting with the letter of copyright law.

REFERENCES

Baran, Krzysztof. 2020. "Komentarz do wybranych przepisów ustawy – Prawo o szkolnictwie wyższym i nauce." In *Akademickie prawo zatrudnienia. Komentarz*, edited by Krzysztof Baran. Lex el.

Goździewicz, Grzegorz, and Tadeusz Zieliński. 2017. "Komentarz do art. 22 Kodeksu pracy." In *Kodeks pracy. Komentarz*, edited by Ludwik Florek. Lex el.

Jackowiak, Urszula. 2009. "Komentarz do art. 22 Kodeksu pracy." In Urszula Jackowiak, Waldemar Uziak, and Alina Wypych-Żywicka, *Prawo pracy*. Lex el.

Jaśkowski, Kazimierz. 2021. "Komentarz do art. 22 Kodeksu pracy." In Eliza Maniewska, and Kazimierz Jaśkowski, *Komentarz aktualizowany do Kodeksu pracy*. Lex el.

Ożegalska-Trybalska, Justyna. 2021. "Komentarz do ustawy o prawie autorskim i prawach pokrewnych." In *Ustawy autorskie. Komentarze*, vol. 1, edited by Ryszard Markiewicz. Lex el.

Pomorski, Piotr. 2019. "Podatek dochodowy od osób fizycznych." In *Prawo podatkowe*, edited by Paweł Smoleń, and Wanda Wójtowicz. Lex el.

Tomaszewska, Monika. 2020. "Komentarz do art. 22 Kodeksu pracy." In *Kodeks pracy. Komentarz*. Vol. 1: Art. 1–113, edited by Krzysztof Baran. Lex el.

Zieliński, Jan M. 2019. "Komentarz do art. 112." In *Prawo o szkolnictwie wyższym i nauce. Komentarz*, edited by Hubert Izdebski. Lex el.

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DEVELOPMENT OF ADMINISTRATIVE SCIENCES IN THE 19TH CENTURY

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Abstract. The basic conditions for the development of modern administrative sciences arose with the emergence of the constitutional state with its guarantees of respect for the rights of the individual, the functional and organizational division of public authorities and the mechanisms for controlling the legality of the functioning of the state apparatus. The concept of the constitutional state was derived directly from the ideology of the Enlightenment, based on the social contract theory, the doctrine of the law of nature and the theory of the division and control of public authorities. It was implemented at the earliest in revolutionary France, and during the nineteenth century it was embraced by all – except Russia – European countries, which by the end of this century adopted the construct of a constitutional state of law.

Keywords: administrative law, administrative science, history of administration

INTRODUCTION

The basic conditions for the development of modern administrative sciences arose with the emergence of the constitutional state with its guarantees of respect for the rights of the individual, the functional and organizational division of public authorities and the mechanisms for controlling the legality of the functioning of the state apparatus. The concept of the constitutional state was derived directly from the ideology of the Enlightenment, based on the social contract theory, the doctrine of the law of nature and the theory of the division and control of public authorities. It was implemented at the earliest in revolutionary France, and during the nineteenth century it was embraced by all – except Russia – European countries, which by the end of this century adopted the construct of a constitutional state of law.[1]

[1] A. Dziadzio distinguishes thirteen elements of a constitutional state ruled by law: 1) primacy of the constitution and laws, 2) binding of the state apparatus by laws passed by the parliament, 3) the judicial-constitutional protection of the legality of laws, 4) sovereignty of the nation, 5) separation of powers, 6) independence of the judiciary, 7) independence of courts,

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With the emergence of the constitutional state, the need arose to define its functions and scope of influence, especially in internal relations, and to regulate by law the relationship between the citizen and the administrative bodies of the state. In the first half of the nineteenth century, views on public administration and the role of administrative law were strongly influenced by liberal doctrines, which strove to limit the influence of the state on citizens' lives as much as possible. This was the result of both a reaction to the arbitrariness of the police state of the earlier century, and the conviction of the need to ensure the widest possible autonomy for the individual, especially in the area of economic relations (*laissez-faire, laissez-passer*). As a consequence, the interest of administrative sciences scholars of that period focused, above all, on the issues of the organisation and forms of action of administrative structures, on their mutual relations, and on questions of order and protection of the state in internal relations. As a result, the science of administrative law was clearly overshadowed by the science of constitutional law, and both were often treated combined as the science of political law or public law [Zimmerman 1959, 10–15; Izdebski 1997, 84–97].

It was not until the second half of the 19th century that, due to rapidly developing demographic, economic and urban processes, the need arose for the establishment and expansion of many new public services, as well as for the detailed regulation of various areas of social life, especially in the economic and social spheres. This led not only to a significant increase in administrative legislation, but also to a re-evaluation of the tasks and objectives set for the state's public administration. The protective and order-enforcement functions clearly began to give way to distributive functions, turning into state interventionism. This new administrative policy of the state was characterised by an emphasis on public interest at the cost of limiting the subjective rights of the individual. This tendency was counterbalanced by the simultaneous expansion of local government institutions, activating society in the field of public affairs management to a previously unseen extent. At the same time, the complication of social and economic relations and the increase in the administrative activity of the state entailed the necessity of developing new theoretical constructs and formulating new concepts regarding the functions of state power, providing an impulse for an interest in administrative-law problems, and fostering development of the theory of administrative law as an independent scientific discipline [Jeżewski 2004, 59–61; Gromadzka-Grzegorzewska 1985, 21; Malec and Malec 2000, 117].

8) catalogue of civil rights and freedoms, 9) the judicial-constitutional protection of fundamental rights of citizens, 10) civil liability of the state for illegal actions of its officers, 11) secular character of the state, 12) local-government structure of the state, 13) administrative judiciary [Dziadzio 2005, 177–85].

The most important achievement of the constitutional state, in terms of the issues in question, has been to subordinate public administration to the rule of law and to make administrative law a system of rules that are bilaterally binding. In accordance with the principle of legality, the application of the constitution superior to all national legislation, led not only to the separation of the legislative and executive functions of the state, but, above all, to the subordination of the entire administrative apparatus to the law. The administration of the constitutional state was supposed to act on the basis and within the limits of the law. In terms of administrative law, the principle of legality meant that the law in force was binding not only on the addressees of administrative decisions, but also on the authorities of the state administration.[2]

The dynamic development of administrative regulation of the constitutional state led to the emergence of classical areas of administrative law at the end of the 19th century, encompassing the political system law, including law on officials, the administrative substantive law, and the administrative procedure. The establishment of the latter was closely linked to the institution of the administrative judiciary and the establishment of legal rules for intra-administrative proceedings [Izdebski 1997, 64–65].

As in the previous era, France and Germany remained the forerunners of modern administrative sciences in the 19th century. For political reasons (the fragmentation of German states), these trends had previously appeared in France, where traditionally the focus was on practical issues of continuously systematized administrative law, then included into theoretical constructions. In Germany, until the second half of the 19th century, administrative law issues were overshadowed by the interest in the science of administration and its close relationship with the concept of the rule of law (*Rechtsstaat*). Thus, as Wojciech Witkowski notes, "[...] the characteristic feature of the German science – still valid to date – has become the desire to create an administrative theory, in which administrative law is recognized only as one of the branches of law, regulating the public administration system and its effect on third parties, characterized by superiority, expressed in the form of an administrative

[2] J. Malec attributes the following six essential features to administrative law, functioning in a constitutional state governed by the rule of law: 1) the administration should act under and within the framework of legal provisions established through legislative procedures by the constitutional organs of representation of the nation – parliaments; 2) the rules of administrative law must be of a bilaterally binding nature, i.e. they must bind both citizens and state administration bodies; 3) the statutory specification of the scope and forms of administrative interference in the sphere of rights of citizens; 4) the principle of scrutiny of the legislative body of the superior administrative apparatus of the State using the instruments of constitutional and parliamentary accountability of ministers; 5) the lack of codification of administrative law, resulting from the wide scope of regulation and permanent development of relations in this area of law; 6) administrative judiciary as an instrument for citizens to review unlawful administrative decisions [Malec 2003, 103].

act" [Witkowski 2007, 57]. For these reasons, France can be considered the homeland of modern science of administrative law, while German countries may be considered the homeland of the science of administration.

The development of modern administrative sciences in France can be divided into two periods. In the first one, covering the first eight decades of the nineteenth century, the primary aim of French legal scholars was to seek to scientifically systematise the existing rules of administrative law and then to give it doctrinal features. This tendency stemmed both from the tradition of French police science, deprived of abstract theoretical concepts, and from reliance on the abundant judicature of the Council of State and the case law of administrative courts, the main source of French administrative law of the period, because of the weakness of parliamentary legislation. It gave the French doctrine its characteristic practical dimension, but also restricted it in principle to the science of administrative law, with a vivid deficiency on the part of the science of administration. The most prominent representatives of the French science of administrative law of this period were: Charles–Jean Bonin, Louis–Antoine Macarel, Louis Marie Cormenin de la Haye, Francois–Rodolphe Dareste, Anselme–Polycarpe Batbie, Joseph Marie baron de Garando, Georges Dufour, Leon Aucoc, Thomas Ducrocq and Antoine Fransois Vivien [Bonin 1808; Macarel 1852; Cormenin de la Haye 1840; Dareste 1862; Batbie 1868; Idem 1976a; Idem 1976b; de Gerando 1842; Dufour 1848–1854; Aucoc 1869–1870; Ducrocq 1887–1905; Vivien 1859]. All these scholars tried to determine the principles of the system of French administrative law, but they faced difficulties in defining firm and immutable criteria which, in view of the diversity and variability of administrative rules, would be of a quite stable nature.[3]

A new stage in the development of administrative sciences in France was opened by the work of Eduard Laferrier, a professor at the Paris School of Political Science. The breakthrough came in 1888, when his fundamental study "Treatise of Administrative Jurisdiction and Litigation" [Laferrier 1888; Idem 1854–1858; Idem 1851–1852] was published. Assuming that the source of administrative law is primarily the case law of the administrative courts, Laferrier's thesis was that French administrative law is the law of the administrative court, and that all the criteria for the construction and division of the institutions of this law boil down in practice to the issue of the jurisdiction of

[3] For example, Dufour discussed administrative law matters in alphabetical order, and Cormenin adopted alphabetical order to classify administrative courts case law. Others, such as Dareste, referred to the civil law models (the Napoleonic Code), dividing administrative law institutions according to the criteria of *personae*, *res*, *actiones*. Similarly, Batbie described administrative law institutions using a diagram: the subject of the right, the object of the right, the way in which the proceedings were conducted. By contrast, Macarel used as the basis for the division of administrative law the manner in which the general needs of society: material, intellectual, internal and external security are met [Gromadzka-Grzegorzewska 1985, 26].

administrative courts. Applying the method of analysing individual grounds for challenging particular forms of public administration activity before administrative courts, Laferrier was the first to classify types of administrative disputes before the Council of State. This made it possible to formulate the basic doctrinal tenets of administrative law, and consequently gave the science of administrative law the value of a fully scientific discipline. As part of this doctrine, the basic elements of the French theory of administrative law were devised, such as the concept of public services, the classification of administrative acts or the judicial review of the administration. Emphasising the importance of Laferrier's work in the process of laying scientific foundations for the administrative law system, J. Langrod stated that: "[...] just as there would probably not have been such a development of our science in the nineteenth century without the police scientists of the eighteenth century, so again, without Laferrier's impulse and intuition, our science in the middle of the twentieth century would perhaps still have persisted in the stage of collecting documentation of existing solutions, without effective attempts to develop an actual theory of administrative law" [Langrod 1948, 77].

Although Laferrier did not establish his own school of administrative law, his work was continued by prominent scholars such as Maurice Hauriou, the author of "Principles of Public Law" from 1910, Leon Duguit – "General Transformations of Public Law" from 1913, or Henri Fayol, the forerunner of the theory of organization and management in public administration, with his "General and Industrial Management" from 1917 [Hauriou 1910; Duguit 1913; Fayol 1917].

An undeniable achievement of the French legal and administrative literature of the 19th century was the distinction between the terms "administration" and "police" and the indication of the place of administrative law in the general system of positive law. When distinguishing between legislative, judicial and executive powers, the French police scientists divided the latter into governmental and administrative powers. In this approach, public administration also included the police treated only as a specialised part of the administrative apparatus set up to protect the order and internal security of the state. Due to its functions, the police were divided by French scholars in the field into administrative (*police administrative*) and judicial (*police judiciaire*), subordinating the latter to the judicial bodies. The first was to act through negative measures to prevent law infringements and the second was to act towards restoring the infringed law. The concept of administration in the subjective sense means all public services of the State, their structure and the internal construction of executive and managing bodies of the State and, in the material sense, the scope of its regulatory functions. Hence, a clear distinction in French literature between the science of administration and the science of administrative law. Administrative bodies were divided as follows: 1) due to

functions – into active, advisory and judicial bodies, 2) due to the nature of the activities – into administrative and police bodies (while maintaining the division of the latter into administrative police and judicial police).[4]

The place of administrative law in the general system of law was defined by French lawyers by dividing all positive law into public law and private law, then by dividing the former into internal law and international law. Within internal public law, they distinguished constitutional law and administrative law. In the latter, they distinguished three groups of provisions: 1) concerning the organisation of public administration (systemic administrative law), 2) governing relations between administrations and citizens (substantive administrative law), 3) defining the procedure for resolving disputes between the administration and citizens arising in connection with the administrative activities of the State (formal administrative law).[5]

Following the findings of M. Gromadzka-Grzegorzewska and W. Witkowski, one can conclude that the characteristic features of the French science of administrative law in the nineteenth century were the following: 1) it was confined to the French domestic law because of the conviction of the national nature of the law, reflecting specific political, social and customary conditions, and hence the comparison between domestic and foreign institutions was considered to be irrelevant; 2) they concentrated research efforts almost exclusively on issues of administrative law, with a clear deficiency on the part of the issues of the science of administration; 3) they rejected the comparative method in favour of the legal dogmatic method, but broadly understood: not only as a study of positive law but above all as an analysis of the case-law of the Council of State, thus making administrative law a separate discipline of study; 4) particular emphasis on the issue of administrative judiciary – almost all the works of scholars in the first half of the 19th century boiled down to this issue. Other questions of administrative law were treated as ancillary, clarifying or complementary to the primary issue of administrative justice; 5) the practical dimension of research on administrative law issues, understood as the flexible formulation of concepts and theoretical constructions – the vague concepts of public services, public utilities, infringed interest. As a result, the institutions of administrative law used to be presented not so much as they could be seen in the light of the provisions of positive law as they were formulated in the practice of the authorities or courts [Gromadzka-Grzegorzewska 1985, 27–29; Witkowski 2007, 56].[6]

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[4] A summary of the achievements of the French science of administrative law of the 19th century has been presented in: Langrod 1961.

[5] This classification remains valid also in the contemporary French science of administrative law [Debbasch 1966, 9–13; Rivero 1977, 14–21; de Laubadere 1982, 11–22].

[6] It is worth noting here that the impact of the administrative law theory on administrative practice in France was negligible until the mid-20th century. This resulted both from the Napoleonic

The development of German administrative sciences in the first half of the 19tth century was definitely much slower than in France. This was due to the political fragmentation of Germany, which prevented the creation of a nationwide theory of administrative law, as well as the instability of the constantly reformed administrative structures of individual German states. For this reason, the interests of German scholars of this period focused mainly on the science of administration, using in this respect the rich legacy of German police scientists of the previous century.[7]

The forerunner of modern science of administration in Germany was the professor at the universities of Tübingen and Heidelberg, Robert von Mohl (1799–1875). In his fundamental two-volume work, "Police science according to the principles of the constitutional state," published between 1832 and 1834, he contrasted the police state with the theory of the state ruled by law (*Rechtsstaat*), which combined cameralist-police elements with liberal ideas [von Mohl 1832–1834].[8] While not questioning the dominant role of the state in the sphere of administrative governance of the state, von Mohl placed particular emphasis on the legalism of the state apparatus and the pragmatism of the operation of public administration, aimed at respecting the individual interests of citizens. Hence, he strongly emphasised such issues as constitutionalism, local government, the hierarchical nature of sources of law, or – most importantly – a bilaterally binding system of administrative law norms. These ideas were not popularised in Germany until the second half of the 19th century, becoming elements of German legal positivism [Gromadzka-Grzegorzewska 1985, 33; Witkowski 2007, 57].

Lorenz von Stein (1815–1890), professor at the University of Vienna, is widely regarded as the founder of the German science of administration. In his fundamental "Science of Administration," published in eight volumes between 1865 and 1884, he presented a systematic description of all state activities, which he considered as administration (*Verwaltung*) [von Stein 1865–1884; Idem 1876]. In his understanding, administration encompassed all (excluding legislation) spheres of state activity (*Vohlziehende Gewalt*), i.e. along internal administration also the judiciary and finance. As a consequence of such a broadly defined concept of administration, the study of

tradition of the approach to public administration without its formal and legal aspects – i.e. only as a centralised and bureaucratic executive apparatus, strictly subordinated to the political will of the government, excluding the wider involvement of local authorities, and from the one-sided creation of theoretical structures of administrative law – i.e. only from the point of view of judicial review. The issue is discussed in more detail by: David 1965, 214–24.

[7] Examples include the works by: von Mohl 1829; von Pozl 1856; von Ronne 1856; Behr 1868; Zimmermann 1845.

[8] The most prominent works of this author see: von Mohl 1862; Idem 1859, known from the translation into Polish by Professor A. Białecki 1864. This paper uses a reprinted edition of that work with notes made by: Bosiacki and von Mohl 2003.

administration according to Stein is a study of state activity whose task is not only to describe the individual branches of public administration, but above all to point out those elements which are common to them. Clearly influenced by liberal and social ideas, Stein put forward a thesis that the modern state should not only be a state governed by the rule of law, but also a social state, in which the interests of the state and society would coincide. As a result, abandoning the police-science concept of treating the police as the entirety of the state's activities towards social life, he introduced a distinction of the police into: the security police (*Sichercheitspolizei*), whose task is to maintain legal order in the state, and administrative police (*Verwaltungspolizei*), whose aim is to anticipate and eliminate threats hindering social development (where there are no such threats, there is no police) [Izdebski 2000, 217; Baszkiewicz and Ryszka 1973, 381].

Stein was able to smoothly combine research on administration with research on administrative law, defining the latter as a system of legal norms on the basis of which the internal administration of the state is performed. He was the first one in the German area to use, following French scholars, a method of scientifically structured description according to sectors of administrative law. He presented in detail the legislation defining the structure and forms of administrative activities in different areas of life and then grouped them into three branches of administrative law, divided according to the criterion of the spheres of activity of the executive power into: 1) norms governing the activities of the public administration with regard to the individual, 2) to economic life and 3. to social life. Stein's indisputable achievement was to indicate the functions of the public administration in a modern state ruled by law and its natural development trends [Langrod 1961, 27; Gromadzka-Grzegorzewska 1985, 36; Leoński 2000, 4]. This way of thinking was continued by such Stein's successors as Georg Meyer, Edgar Lonning, Theodor Inama von Sternegg and Ludwik Gumplowicz [Meyer 1883–1886; Lonning 1884; von Sternegg 1870; Gumplowicz 1881].

The final emergence of the science of administration as an independent field of knowledge in the Austro-German area took place at the beginning of the 19th century. It was owing to three scientists – Ignaz Jastrow, Fritz Stier-Somlo and Max Weber. The first of them, in his work entitled "Social Policy and the Science of Administration," published in 1902, justified the separateness of the science of administration from the science of administrative law due to different aims and research problems [Jastrow 1902]. According to Jastrow, the aim of the study of administration should be to create an ideal administration model, and its subject should be two basic problems: how the state is managed and how to manage the state. Jastrow's thought was creatively developed by Stier-Somlo in his treatise from 1917 entitled "The Future of the Science of Administration" [Stier-Somlo 1917, 37–75]. He introduced the

concept of "administrative knowledge" (*Verwaltungwissenschaft*), comprising three independent administrative disciplines: science of administration, administrative law science and administrative policy. In this triad, the science of administration was to be a critical descriptive science, presenting the institutions and organization of administration, both in theoretical and practical terms [Leoński 2000, 5–6; Witkowski 2007, 58].

The emergence of the science of administration as a separate discipline in Germany was complemented in the early 20th century by the work of Max Weber (1864–1920), a sociologist not directly associated with the administrative sciences.[9] His contribution was the creation of a model bureaucratic system as a basis for the organization and functioning of the modern public administration of the state. Weber's basic thesis was that the modern state requires an administrative apparatus based on organizationally and factually specialized structures and operating rationally and effectively. Only such an administrative apparatus can guarantee social order, in which the fundamental rights of citizens will be respected. According to Weber, the key features of such a system are: 1) the professional nature of the public administration along with fixed remuneration for the staff, 2) specialization in the handling of certain categories of cases and the associated horizontal and vertical division of labour, defined by positive law, 3) hierarchical structure and 4) the existence of formal and uniform general rules of operation of all administrative structures, ruling out arbitrariness of administration bodies towards citizens [Weber 2002, 693–726]. A special role in such apparatus is played by professional officials who carry out their functions "impersonally," only implementing strict dispositions of positive law. The Weber's administrative model was, by definition, emotionally neutral, i.e. it defined only a certain type of organization of the administration, and did not prejudge its possible flaws, which may occur in a particular administrative structure. This model, although not without criticism, remains valid to modern times [Olbromski 2007; Malec 2007; Hausner 2007; Jabłoński 2007; Rubisz 2007].

The emergence of the German theory of administrative law took place in the second half of the 19th century. It was rooted in the departure in the study of administrative law from the descriptive method and its replacement by the formal and dogmatic method, widely used in the disciplines of German private law. This approach to the study of public law in Germany was first applied by Paul Laband in his fundamental work "Das Staatsrecht des Deutsche Reiches" [Laband 1879]. The application of the formal-dogmatic method reduced the research problem of administrative law exclusively to the analysis

[9] The fundamental work by Max Weber see: Weber 1956, published by Johannes Winckelmann, and encompassing in a new systematic edition the Weber's manuscripts published insuccessve parts since 1920. This edition, translated by Dorota Lachowska, bears the title: "Gospodarka i społeczeństwo. Zarys socjologii rozumiejącej" [Weber 2002].

of the rules in force, leaving aside the assessment of their rationale and function. This was the way the foundations were laid for the development of legal positivism, which characterised Austrian and Prussian public-law literature at the turn of the 20th century. The decisive factor inspiring the emergence of this direction of research in administrative sciences was the fact that the German science of public law was largely influenced in the second half of the nineteenth century by the civil-law school of the Pandectists. "The influence of the Pandectists," wrote Francis Longchaps de Berier, "the application of their concepts and their way of thinking to public law, the imaginative and creative application thereof gave rise to the great dogmatic construction and the famous legal method which prevailed in public law in the last decades of the nineteenth and the beginning of the twentieth century" [Longchamps de Berier 1968, 26].

This new, positivist approach to research in administrative sciences was promoted in Germany by the creator of the Prussian model of local government and administrative judiciary Rudolf Gneist (1816–1895). Although in his works he focused almost exclusively on the issues of local government and administrative judiciary, which were essential elements of his concept of the state ruled by law, it is widely recognized that he made great contribution to the methodology of administrative sciences [Gneist 1872; Idem 1871; Idem 1879; Idem 1882]. Unlike other authors of this period, he did not perform systematic descriptive analyses, nor did he develop abstract deliberations on institutions of administrative law, but all his works were based on the normative material of the applicable law and adherence to the positivist principle that "all philosophical considerations in the law and state sciences result mainly from insufficient knowledge of the facts" [Gromadzka-Grzegorzewska 1985, 36]. Unlike Stein, Gneist saw the science of administration in a narrower sense, without the judiciary. Moreover, he argued that the state becomes a state ruled by law only when it has both the conditions for the correct formulation of the state's will and the conditions for the correct implementation of that will. For the study of administrative law in Germany, Gneist's works became an impulse to deepen and expand the research base, especially towards studies on the guarantees of the legal situation of an individual vis-à-vis the public administration [Maciąg 1998, 120–22; Weber1968, 89–91].

The first attempts to create a system of administrative law in Germany were made by F.F. Mayer and O. von Sarvey [Mayer 1862; von Sarvey 1880; Idem 1884]. However, it was only in 1895 that the first study on administrative law based entirely on the formal-dogmatic method was developed. It was Otto Mayer's two-volume manual "Deutsches Verwaltungsrecht," written on the basis of his lectures at the University of Leipzig [Mayer 1895–1896].[10]

[10] Equally important, for giving German scholars an opportunity to learn about the French "regime administratiff," was the study by Mayer 1886.

Mayer's contribution was to create basic theoretical constructs of the general pat of administrative law, made on the basis of similar civil-law constructs, adapted to the needs of public law. They were based on both the legislative material of the applicable administrative law and the case law of administrative courts, but always analysed by him in terms of their general legal structure. Mayer clearly separated the science of administration from administrative law, excluding the latter from the sphere of management. For this reason, Mayer's work has played the same groundbreaking role in German administrative law science as Eduard Laferrier's earlier work in France, and his achievements in this field have become, as M. Gromadzka-Grzegorzewska noted, "[…] a bridge linking the period of the formation and crystallization of German administrative sciences with the period of their full development" [Gromadzka-Grzegorzewska 1985, 38].

The system of German administrative law created by Mayer became a classic example of the application of the formal-dogmatic method in the science of administrative law, especially in its general part (the method of systematized description continues to be used in the detailed part of administrative law). This model was followed by almost all of Mayer's successors, such as Fritz Fleiner, Walter Jellinek, Karl Korman, Ernst Bernatzik, Rudolf Hermann von Hernritt, or Josef von Ulbrich [Fleiner 1911; Jellinek 1927; Korman 1911; Idem 1914; Bernatzik 1896; von Hernritt 1909; Idem 1921; Idem 1925; von Ulbrich 1903–1904].

CONCLUSIONS

To sum up, it should be said that German administrative thought in the 19th and 20th centuries was characterised by an unprecedented diversity of research approaches and interests, and an abundance of published literature on the subject. This made it the second, next to the French, mainstream of European administrative thought, constituting a point of reference for all the legal and administrative literature in other countries. An unquestionable achievement of the German scholars became the separation of science of administration and science of administrative law into independent research fields, differing in terms of their subjects and research methods. The interest of German science of administration in the issue of guaranteeing subjective individual rights within the public law resulted in creation of the construct of a constitutional state ruled by law, complemented at the end of the 19th century by modern concepts of local government and administrative judiciary. However, no uniform concept of the science of administration has been developed in the German literature. Some authors, such as Stein, saw it in a broad sense, while others, such as Gneist, in a narrower sense. However, regardless of these differences, all German authors of that era were unanimous that the science of

administration covered not only governmental but also social activity in the field of internal governance of the state. On the other hand, the distinguishing feature of the German science of administrative law was primarily the use – following the civil-law model – of a formal and dogmatic method limited to both the analysis of positive law and the creation of theoretical constructions. Nevertheless, M. Gromadzka-Gorzewska is right when stating that "[...] a common feature of the German legal-administrative literature was a certain chaos, confusion, lack of firm roots in a uniform systemic basis, and hence the resulting hectic search for models whether in the police scientists, in French authors, or in the English administrative practice" [Gromadzka-Gorzewska 1985, 38].

REFERENCES

Aucoc, Leon. 1869–1870. *Conferences sur l'administration et le droit administrative*. Vol. I–III. Paris: H. Dunod.

Baszkiewicz, Jan, and Franciszek Ryszka. 1973. *Historia doktryn politycznych i prawnych.* Warszawa: Wydawnictwo Naukowe PWN.

Batbie, Anselme P. 1868. *Traite theorique et pratique du droit public et administrative.* 8 volumes. Paris: Cotillon.

Batbie, Anselme P. 1876a. *Introduction generale au droit public et administrative.* Paris: Cotillon.

Batbie, Anselme P. 1876b. *Precis du cours de droit public et administrative.* Paris: Cotillon.

Behr, Josef. 1868. *Allgemeine Polizei-Wissenschaftslehre oder pragmatische Theorie der Polizei – Gesetzgebung und Verwaltung*. Vol. I–II. Bamberg: Diffen Verlag.

Bernatzik, Edmund. 1896. *Rechtssprechung und materielle Rechtskraft.* Wien: Manz'sche k.k. Verlag.

Białecki, Antoni. 1864. Roberta von Mohla *Encyklopedia umiejętności politycznych*. Warszawa: S. Orgelbrand.

Bonin, Charles J. 1808. *Principes de droit administratif public.* Paris: H. Dunod.

Bosiacki, Adam, and Robert von Mohl. 2003. *Encyklopedia umiejętności politycznych*. Vol. I–II. Warszawa: Liber.

Cormenin de la Haye, Louis. M. 1840. *Droit administrative*. Paris: Pagnerre.

Dareste, Fransois R. 1862. *La justice administratif en France*. Paris: August Durand.

David, Rene. 1965. *Prawo francuskie. Podstawowe zagadnienia*. Warszawa: PWN.

De Gerando, Joseph M. 1842. *Institutes de droit administrative.* Vol. I–III. Paris: Chez Neve.

De Laubadere, Andre. 1982. *Manuel de droit administrative*. Paris: L.G.D.J.

Debbasch, Charles. 1966. *Institutions administratives*. Paris: R. Pichon et A. Durand.

Ducrocq, Thomas. 1887–1905. *Cours de droit administratif et de legislation francaise des finances*. Vol. I–VII. Paris: Ernest Thorin.

Dufour, Georges. 1848–1854. *Traite general de droit administratif appliqué.* Vol. I–VII. Paris: Delamotte Aine.

Duguit, Leon. 1913. *Les transformations du droit public.* Paris: Armand Collin.

Dziadzio, Andrzej. 2005. "Koncepcja państwa prawa w XIX wieku – idea i rzeczywistość." *Czasopismo Prawno-Historyczne* LVII, no. 1:177–85.

Fayol, Henri. 1917. *Administration industrielle et generale.* Paris: H. Dunod et E. Pinat.

Fleiner, Fritz. 1911. *Institutionen des Deutschen Verwaltungsrechts.* Heidelberg: Mohr Verlag.
Gneist, Rudolf. 1871. *Verwaltungsjustitz*. Leipzig: J. Springer Verlag.
Gneist, Rudolf. 1872. *Der Rechtsstaat.* Leipzig: J. Springer Verlag.
Gneist, Rudolf. 1879. *Der Rechtsstaat und die Verwaltundsgerichte in Deutschland.* Berlin: Wissenschaftliche Buchgesetschaft Verlag.
Gneist, Rudolf. 1882. *Englische Verfassungsgeschiechte.* Berlin: J. Springer Verlag.
Gromadzka-Grzegorzewska, Maria. 1985. *Narodziny polskich nauk administracyjnych.* Warszawa: Wydawnictwo Uniwersytetu Warszawskiego.
Gumplowicz, Ludwik. 1881. *Rechtsstaat und Socjalizmus.* Innsbruck: Wagner Verlag.
Hauriou, Maurice. 1910. *Principes du droit public.* Paris: Dalloz.
Hausner, Jerzy. 2007. "Od idealnej biurokracji do zarządzania publicznego." In *Biurokracja. Fenomen władzy politycznej w strukturach administracyjnych*, edited by Krzysztof Zuba, 17–35. Toruń: Adam Marszałek.
Izdebski, Hubert. 1997. *Historia administracji*. Warszawa: Liber.
Izdebski, Hubert. 2000. "Z dziejów terminu społeczeństwo obywatelskie." In *Prawo i ład społeczny. Księga Jubileuszowa dedykowana Profesor Annie Turskiej*, 208–31. Warszawa: Wydawnictwo Wydziału Prawa i Administracji Uniwersytetu Warszawskiego.
Jabłoński, Andrzej. W. 2007. "Racjonalność, pluralizm i biurokracja; dylematy teorii państwa w XX w." In *Biurokracja. Fenomen władzy politycznej w strukturach administracyjnych*, edited by Krzysztof Zuba, 36–54. Toruń: Adam Marszałek.
Jastrow, Ignatz. 1902. *Sozialpolitik und Verwaltungswissenschaft. Aufsatze und Abhandlungen*. Vol. I. Berlin: J. Springer Verlag.
Jellinek, Walter. 1927. *Verwaltungsrecht.* Kiel: J. Springer Verlag.
Jeżewski, Jerzy. 2004. *Dekoncentracja terytorialna administracji jako zasada prawa administracyjnego we Francji*. Wrocław: Kolonia Limited.
Korman, Karl. 1911. *Grundzuge eines allgemeinen Teils des offentlichen Rechts*. Berlin: J. Springer Verlag.
Korman, Karl. 1914. *Worterbuch des deutschen Staats und Verwaltungsrecht*. Berlin: J. Springer Verlag.
Laband, Paul. 1879. *Das Staatsrecht des Deutsche Reiches*. Vol. I–II. Tubingen: Laub Verlag.
Laferrier, Eduard. 1851–1852. *Histoire des principles, des institutions et des lois pendant la revolution francaise depuis 1789 jusqu a 1804*. Paris: Cotillon.
Laferrier, Eduard. 1854–1858. *Cours de droit public et administrative*. Vol. I–II. Paris: Cotillon.
Laferrier, Eduard. 1888. *Traite de la juridiction administratif et des recours contentieux.* Vol. I–II. Paris: Berger–Levrault.
Langrod, Jerzy. 1948. *Instytucje prawa administracyjnego. Zarys części ogólnej*. Vol. I. Kraków: Towarzystwo Naukowe KUL.
Langrod, Jerzy. 1961. "La science de l'administration publique en France aux XIX e. et XX e. siecles." *Revue Administrative* 3:22–46.
Leoński, Zbigniew. 2000. *Nauka administracji.* Warszawa: C.H. Beck.
Longchamps de Berier, Franciszek. 1968. *Współczesne kierunki w nauce prawa administracyjnego na zachodzie Europy.* Wrocław: Ossolineum.
Lonning, Edgar. 1884. *Lehrbuch des Deutsche Verwaltungsrechts.* Leipzig: Laub Verlag.
Macarel, Louis. Antoine. 1852. *Cours d'administration et de droit administrative.* Vol. I–II. Paris: Librairie de Jurisprudence de Plon Freres.
Maciąg, Zbigniew. 1998. *Kształtowanie zasad państwa demokratycznego, prawnego i socjalnego w Niemczech do 1949 r.* Białystok: Temida 2.

Malec, Dorota, and Jerzy. Malec. 2000. *Historia administracji i myśli administracyjnej*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.
Malec, Jerzy. 2003. "Narodziny polskiego prawa administracyjnego." In *Studia z dziejów administracji nowożytnej*, 103–42. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.
Malec, Jerzy. 2007. "Historyczne modele rozwoju biurokracji." In *Biurokracja. Fenomen władzy politycznej w strukturach administracyjnych*, edited by Krzysztof Zuba, 55–72. Toruń: Adam Marszałek.
Mayer, Felix F. 1862. *Grundsatze des Verwaltungsrechts*. Tubingen: Laub Verlag.
Mayer, Otto. 1886. *Theorie des franzosischen Verwaltungsrecht*. Leipzig: De Gruyter Verlag.
Mayer, Otto. 1895–1896. *Deutsches Verwaltungsrecht.* Vol. I–II. Leipzig: Dunkler und Humblot Verlag.
Meyer, Georg. 1883–1886. *Lehrbuch des deutsche Verwaltungsrechts*. Vol. I–II. Leipzig: Dunkler und Humblot Verlag.
Olbromski, Cezary J. 2007. "Klasyczny model biurokracji Maxa Webera." In *Biurokracja. Fenomen władzy politycznej w strukturach administracyjnych*, edited by Krzysztof Zuba, 73–92. Toruń: Adam Marszałek.
Rivero, Jean. 1977. *Droit administrative*. Paris: Dalloz.
Rubisz, Lech. 2007. "Biurokracja a państwo." In *Biurokracja. Fenomen władzy politycznej w strukturach administracyjnych*, edited by Krzysztof Zuba, 93–106. Toruń: Adam Marszałek.
Stier-Somlo, Fritz. 1917. *Die Zukunft der Verwaltungswissenschaft, Verwaltungsarchiv*. Vol. XXV. Berlin: A. Marcus und E. Weber Verlag.
Vivien, Antoine F. 1859. *Etudes du droit administrative*. Vol. I–II. Paris: Cotillon.
Von Hernritt, Rudolf H. 1909. *Handbuch des Osterreichischen Verfassungrecht.* Tubingen: J. Springer Verlag.
Von Hernritt, Rudolf H. 1921. *Grundlehren des Verwaltungsrechts.* Tubingen: J. Springer Verlag.
Von Hernritt, Rudolf H. 1925. *Oesterreichisches Verwaltungsrecht*. Tubingen: J. Springer Verlag.
Von Mohl, Robert. 1829. *Das Staatsrecht des KonigreichsWirttenberg.* Vol. I–II. Tubingen: Laub Verlag.
Von Mohl, Robert. 1832–1834. *Die Polizei – Wissenschaft nach den Grundlagen die Rechtsstaates*. Vol. I–II. Tubingen: Laub Verlag.
Von Mohl, Robert. 1859. *Enzyklopodie der Staatswissenschaften.* Tubingen: Laub Verlag.
Von Mohl, Robert. 1862. *Staatsrecht, Volkerrecht und Politik. Monografien*. Tubingen: Laub Verlag.
Von Pozl, Josef. 1856. *Lehrbuch des Bayeririschen Verwaltungsrecht.* Munchen: Laub Verlag.
Von Ronne, Ludwig. 1856. *Staatsrecht der Preusssichen Monarchie.* Berlin: J. M Brodhaus Verlag.
Von Sarvey, Otto. 1880. *Das offentliche Recht und die Verwaltungsrechtspflag*. Freiburg: Kissinger Legacy Reprints.
Von Sarvey, Otto. 1884. *Allgemeines Verwaltungsrecht.* Freiburg: Kissinger Legacy Reprints.
Von Stein, Lorenz. 1865–1884. *Die Verwaltungslehre*. Stuttgart: Cotta Verlag.
Von Stein, Lorenz. 1876. *Handbuch der Verwaltungslehre*. Stuttgart: Cotta Verlag.
Von Sternegg, Theodor I. 1870. *Verwaltungslehre in Umrissen.* Innsbruck: Kisswinger Legacy Reprints.
Von Ulbrich, Josef. 1903–1904. *Lehrbuch des osterreichischen Verwaltungsrechts*. Wien: Manz Verlag.

Weber, Max. 1956. *Wirtschaft und Gesellschaft. Grundriss der vertehenden Soziologie.* Tubingen: Mohr Verlag.
Weber, Dietmar. 1968. *Die Lehre vom Rechtsstaat bei Otto Bahrund Rudolf von Gneist.* Bochum: C.H. Beck.
Weber, Max. 2002. *Gospodarka i społeczeństwo. Zarys socjologii rozumiejącej.* Warszawa: Wydawnictwo Naukowe PWN.
Witkowski, Wojciech. 2007. *Historia administracji w Polsce 1764–1989*. Warszawa: PWN.
Zimmerman, Marian. 1959. *Pojęcie administracji publicznej a „swobodne uznanie"*. Poznań: Poznańskie Towarzystwo Przyjaciół Nauk.
Zimmermann, Gustav. 1845. *Die Deutsche Polizei des 19 Jahrhundert*. Hannower: P. L. Schlutter Verlag.

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STABILITY FUNCTION OF BILATERAL AGREEMENTS CONCLUDED BETWEEN THE STATE AND CHURCHES AND RELIGIOUS COMMUNITIES IN SLOVAKIA IN THE FIELD OF GUARANTEEING FREEDOM OF RELIGION AND FREEDOM OF CONSCIENCE

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Abstract. By concluding treaties on respect for the principles in the Slovak legal system with the Holy See, as well as registered churches and religious communities in Slovakia, the purpose of Article 10(2) of the Charter of Fundamental Rights of the European Union (in force as EU law since 2009), according to which the protection of conscience is regulated by the Member States in their domestic legal systems (in addition, they include an international treaty or an equivalent legal norm, which is in the Slovak legal environment applies to national agreements) is described in the contribution. The new contractual concept of an agreement with the Holy See on conscientious objections is in accordance with the explanatory memorandum to this provision of the Charter and corresponds to the constitutional traditions and the development of law in the field of protection of freedom of conscience and religion in Slovakia. In its essence, in addition to compatibility with the law of the European Union, as well as the constitutional law of the Slovak Republic, it is a significant stabilizing element in the legal order of Slovakia.

Keywords: the Holy See, bilateral agreements with the Holy See, conscientious objections, freedom of religion, freedom of conscience, stability of legal system

INTRODUCTION

The question of legal stability consists of two assumptions. The first is the mutual integrity of all branches of law of a State and the second is the acceptation of all relevant law of a State by own inhabitants of a country. The second assumption means and includes the exclusion of conscientious conflict of a man concerning State law and personal conviction.

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A new special instrument providing for the last request might be also provisions or separate bilateral agreement with the Holy See on conscientious objections.[1]

1. CONSCIENTIOUS OBJECTIONS CONCEPT

The Article 7 of the Basic Treaty between the Slovak Republic and the Holy See of 2000, as well as Article 7 of the Treaty between the Slovak Republic and Registered Churches and Religious Communities of 2002, contain special bilateral rules on conscientious objection. The Basic Treaty between the Slovak Republic and the Holy See of 2000 provides: "The Slovak Republic recognizes the right of everyone to exercise conscientious objections in accordance with the religious and moral principles of the Catholic Church."[2] The 2002 Agreement between the Slovak Republic and Registered Churches and Religious Societies provides: "The Slovak Republic recognizes the right of everyone to exercise conscientious objection under the belief and morality principles of its registered church or religious society."[3]

These provisions contain an obligation for both parties to conclude specific bilateral agreements; in the first case worded as follows: "[...] The scope and conditions of exercising this right shall be determined by a special international agreement concluded between the parties […]" and in the second case as follows: "[...] The scope and conditions of exercising this right shall be determined by special agreements concluded between the Slovak Republic and registered churches and religious communities."

An attempt to fulfil the above-mentioned international and national commitments failed in 2006, as it was a politically excessive burden of social reaction and national and international crystallization of ethical issues. To date, there has not been a strong enough political will in Slovakia to deal with this international and national legal obligations. Also an attempt to use the opportunity of the recent visit of the Holy Father Francesco in Slovakia, was not fulfilled unfortunately. But this could be also an argument to say not to forget the matter.

[1] See also Moravčíková 2007; Moravčíková and Šmid 2015; Němec 2010.

[2] See also Chizzoniti 2004.

[3] The Basic agreement between the Slovak Republic and the Holy See, signed on 24 November 2000, published in the Collection of Laws of the Slovak Republic under number 326/2001 Coll. Agreement between the Slovak Republic and registered churches and religious communities, signed on 11 April 2002, published in the Collection of Laws of the Slovak Republic under number 250/2002 Coll.

2. TIME TO DEFINE CONSCIENTIOUS FREEDOM MORE PRECISELY

It seems that it is the time to define human rights protection in the area of freedom of conscience more precisely. It would be an important step for cultural and spiritual, but also legal integration of social and individual values. I allow myself to note that this area does not fall within the competence of the European Union. In addition, the state regulation of reservations in the conscience is explicitly envisaged in the basic human rights document of the European Union, its Charter of Fundamental Rights.[4]

A clear and sufficiently specific regulation of reservations in the conscience means legislative provision for the implementation of fundamental human rights. Without such implementation, in the changed conditions, the protection of freedom of conscience as a fundamental human right may, in conflict with the constitutional norms of the Slovak Republic and its international legal obligations, become fictitious and means social destabilization. This is evidenced by recent developments in several countries of the Union, especially in France, where ethically and morally sensitive issues are opposed by the population to national law and long-lasting attitudes of resistance or destruction of adoption institutions and social facilities can be expected, in Great Britain and the like.[5]

The description of the system of legal protection of freedom of conscience and freedom of religion points to a relatively complex structure and mechanism, which can be briefly characterized by several elements. At the political level, these are documents of a political nature adopted within the framework of the United Nations (Human Rights Council) as a universal protection of human rights; The Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of American States, the African Union, i.e. within the framework of regional international organizations as regional protection of human rights; the European Union and its institutions and agencies; international and national non-governmental organizations; churches and religious communities at international and national levels; states, state legislative and executive bodies, ombudsmen and the like. At the legal level, these are normative legal acts and acts of law application. Normative legal acts in this sense are multilateral universal and regional international human rights treaties; EU legal acts (legally binding Charter of Fundamental Rights

[4] Article 10 of the Charter of Fundamental Rights of the European Union (2007/C303/01) reads as follows: "1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance. 2. The right to conscientious objection shall be recognized in accordance with the national laws governing the exercise of this right."

[5] More on this issue see Šmidová 2013.

of the European Union, anti-discrimination directives); constitutions of states, constitutional legal norms; legal and by-law norms of states; but currently also bilateral international treaties concluded between states and the Holy See and bilateral national treaties concluded between states and churches and religious communities. In this sense, decisions and case law of universal and regional international bodies and courts (UN Human Rights Council, European Court of Human Rights, etc.) are considered to be acts of law; Court of Justice of the EU; the constitutional and general courts of the individual Member States; acts of national legislative and executive power.

3. REGULATION SYSTEM OF THE PROTECTION OF RELIGION RIGHTS IN SLOVAKIA

Looking back at Slovakia, we can say that the system of protection of freedom of conscience and religion contains all the above elements, which must be taken into account when solving the problem of concluding agreements on conscientious objection.[6] In terms of regional and own state conditions, the Slovak system of the legal status of churches and religious communities must also be implemented into this system. This system contains numerous groups of legal norms. These are documents of an international, transnational and national political nature; acts of international, transnational (EU) and national law application; normative legal acts, namely multilateral international human rights treaties, universal and regional, European Union law (in particular primary law, in particular the EU Charter of Fundamental Rights and EU anti-discrimination secondary law); Constitution of the SR (especially Article 24); Slovak laws (especially Act No. 308/1991 Coll. on Freedom of Religion and the Status of Churches and Religious Societies, but also several special acts according to their material scope, such as the Act on Health Care No. 576/2004 Coll.) and by-laws; the system of international and national bilateral agreements with churches and religious societies and, finally, the reception into the legal order of the Slovak Republic in a sense also part of canon law and the law of other churches and religious communities registered in the Slovak Republic.

At this point, a number of fundamental legal norms in the field of conscience protection should be mentioned as a starting point for further considerations. Article 18 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in private or in public, to manifest his religion or belief in teaching, practice, worship, observance (ceremony)." Article 18 of the

[6] See also Šmid and Moravčíková 2009.

International Covenant on Civil and Political Rights: "Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to profess or accept a religion or belief of one's choice, and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief in religious services, worship, observance and teaching." The relationship between freedom of conscience and freedom of religion is also more clearly documented by the continuation of this text, which also clearly indicates the goal of preventing conflict of conscience. No one shall be subjected to coercion which would impair his freedom to profess or accept a religion or belief of his choice. Freedom of expression of religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public security, order, health or morals, or the fundamental rights and freedoms of others. The States Parties to the present Covenant undertake to respect the freedom of parents and, where appropriate, the guardians, to ensure the religious and moral education of their children according to the conviction of the parents or guardians. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance." Article 24 of the Constitution of the Slovak Republic: "Freedom of thought, conscience, religion and belief are guaranteed. This right also includes the possibility to change one's religion or belief. Everyone has the right to be without religion. Everyone has the right to express their views in public. Everyone has the right to manifest his religion or belief freely, either alone or in community with others and in public or private, in worship, practice, practice or instruction. Churches and religious societies manage their affairs themselves, in particular they establish their bodies, appoint their clergy, ensure the teaching of religion and establish religious and other ecclesiastical institutions independently of state bodies." The conditions for the exercise of the rights under paragraphs 1 to 3 may be restricted by law only in so far as they are necessary in a democratic society to protect public order, health and morals or the rights and freedoms of others. This article of the Constitution is mentioned in its entirety, because each of its parts documents the justification of the legislative regulation of conscientious objections.[7]

[7] The Universal Declaration of Human Rights, adopted by Resolution 217A (III) of 10 December 1948, published under doc. UN A/RES/217/IIIA. International Covenant on Civil and Political Rights of 1975, published under no. 120/1976 Coll. European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, published under no. 209/1992 Coll. Art. 24 of the Constitution of the Slovak Republic of 1992, published under no. 460/1992 Coll.

4. JUDICIAL VIEW ON THE RELIGIOUS HUMAN RIGHTS MATTERS IN SLOVAKIA

The Strasbourg judicial authorities have subsumed religious expression as well as conscience and include the right to free conscience under the free expression of religion. At the same time, these authorities do not distinguish between the terms "conscience" and "conviction." The term "conviction" differs from the random "ideas" or "opinions" used in Article 10 of the ECHR and presents opinions that reach a certain degree of strength, seriousness, coherence and importance and have a recognizable formal content; speeches and actions considered must express this belief in any form directly. The term "belief" is identified with the term "faith" under Article 9 ECHR and must achieve a certain level of persuasiveness, seriousness, cohesion and importance.[8]

The expression of conviction falls under the protection of Article 9 of the Convention only if the act is an expression of conviction and is not conduct that is only influenced or inspired by conviction.[9] A "conscientious decision" within the meaning of the German Constitution (Article 4 (3)) is considered to be a very serious decision of a moral nature (including one's own orientation in the categories of good and evil) by which an individual feel intrinsically bound and to which he is in a certain situation. dependent on the grounds that he cannot oppose this decision on his own without a serious moral dilemma.[10]

Freedom of conscience and freedom of religion are considered to be one right, both legislatively and procedurally; it must, of course, be borne in mind that freedom of conscience is theoretically based on either secular or religious beliefs and moral and ethical systems. Theoretically, because it remains an open question whether it is possible to state such secular principles that are not derived in any way from religious teaching in a culture close to us. In any case, the classical (and currently valid) means of legal protection of freedom of conscience respond in practice to violations of freedom of conscience as a fundamental human right, especially in relation to religious beliefs. This could be a strong argument, especially in terms of the effectiveness of the law, in favour of such a special concretization of the legislation on protection of freedom of conscience, which responds to real and current issues of religious

[8] ECtHR, Efstratiou v. Greece, no. application 24095/94, publ. Reports 1996–VI, of 18.12.1996, paragraph 26, and Campbell and Cosans v. The United Kingdom, no. application 13590, publ. A 233, 23.5.1992, paragraph 36.

[9] ECtHR, Arrowsmith v. The United Kingdom, 1979 Human Rights Commission RE, application no. 7050/75, res 32 of 12 June 1979, report 1979.

[10] Decision of the Constitutional Federal Court of the FRG (BverfG) no. 1BvL 21/60, cit. BverfGE 12.45 of 20 December 1960, refusal of basic military service, paragraph 2, collection of court decisions of 1960.

moral and ethical nature in connection with the teaching of churches and religious communities.

The dynamics of the human rights concept means the destabilization of the classical concept of freedom of religion and freedom of conscience and the very identity of these basic human rights. In the classical conception, this right is a basic human right (also the so-called core right) with a special higher status and precedence over rights that do not have the nature of human rights, resp. emerging rights and obligations. Consequently, the right to conscientious objection arises because the principle of the inviolability of freedom of conscience prevails over the principle of the generality of the law. This right includes the public dimension of freedom of religion, in particular the application of the principles deriving from religious teaching in this dimension (science, politics, law, culture, economics, etc.) and cannot be replaced by other human rights, such as freedom of assembly, association and nature or speech. Furthermore, this right concerns the individual religious rights and institutional rights of churches and religious communities, which differ from the rights of organizations with a social or philosophical focus and the rights of their members.

The European Court of Human Rights (in the case of future decisions in the field of protection of freedom of religion and freedom of conscience also the Court of Justice of the European Union) decides in accordance with the principle of discretion of states, constantly applying those rules and principles contained in the European Convention on Human Rights and fundamental rights of the European Union. The Court also respects the competences and thus the legislation of individual Member States in these areas, including norms and the application of law, which is found mainly in decisions of constitutional or supreme courts and decides individually in accordance with them, i.e. governed by the principle of subsidiarity. There is a clear argument in this regard in the Fretté v. France case:[11] It is clear that there is no common ground on this issue, it is not possible to find uniform principles in the legal and social systems of the Contracting States in these matters where views in a democratic environment they can be reasonably and profoundly different. The Court considers it very natural that state authorities, which in a democratic society are obliged, within their competences, to take into account the interests of society as a whole, should take into account a wide range of contexts when deciding on the above issues. Due to direct and long-term contact with the life forces of their country, national authorities have a better ability than an international court to assess local needs and conditions. As a sensitive issue was discussed in this case, concerning areas where there is little penetration of common views between the member states of the Council of Europe, and in

[11] Fretté v. France, no. 36515/97, judgment of the ECtHR of 26 February 2002, paragraphs 41, 42 and 43 of the judgment.

general, the law is only in a transitional stage, much of the conclusions have to be drawn by the state; he expressed and applied this principle in the case of Soile Lautsi v. Italy,[12] decided by the Grand Chamber of the Strasbourg Court in favour of the presence of crosses in Italian public schools (explicit and clear application of the principle of discretion of the States while taking into account the circumstances of the case). According to the court, the presence of the cross in the classroom does not constitute a situation of indoctrination with regard to the school environment and no pressure on children's religious upbringing, as Italy provides for the upbringing and education of children to take into account parents' right to comply with religious and philosophical beliefs.[13] The Court acknowledged that it was, in principle, obliged to respect the decisions of the State in this area, including the place given to religion in Italy, also taking into account that such respect would not lead to any indoctrination of children. According to the court, the presence of crosses in schools falls within the competence of the member states of the Council of Europe, mainly because a unified position has not been created in Europe on this matter.

5. THE FUTURE OF JUDICIAL REASONINGS

However, it is possible to ask how the international or Union court will decide in the future as a result of the gradual convergence of the principles of the protection of freedom of conscience and freedom of religion? A contrario to the current situation, if the court finds a unified principle of the necessary majority of European states on a certain issue, it will adopt it and will decide on the merits according to it, probably even in cases where some states do not agree with it due to differing national concept. The unification of decision-making principles looks like a mandate for the transfer of competences in the area of freedom of religion and freedom of conscience from the member states of the Council of Europe and the European Union to the Central International Court of Justice in Strasbourg, resp. in Luxembourg. The decisions adopted in this way will contain and consolidate the principles applicable to all member states of the Council of Europe without distinction, and it is likely to be an irreversible process of suppressing the discretion of the states.

On the other hand, some legal confirmation of the regulation of conscientious objection is provided by Article 10 of the EU Charter of Fundamental Rights, according to which the right to conscientious objection is recognized in accordance with the national laws governing the exercise of this right. This is the first introduction of this term into the legal order of the European Union

[12] Judgment of the Grand Chamber of the ECtHR in Lautsi v. Italy, no. 30814/06 of 18 March 2011.

[13] See also Robbers 2011.

and public international law. Similarly, in the Resolution of the Parliamentary Assembly of the Council of Europe no. 1763 of 7 October 2010 stipulates that the hospital as well as the medical staff have the right to an objection of conscience and must not be penalized in any way for refusing to participate in abortions, euthanasia, embryo handling and the like. They must not be penalized in any way for participating in these matters. The Council of Europe has called on the member states to transpose this rule into their laws.

If we think about the essence of the reservation in conscience, it can be stated that the right to express religious beliefs, profess faith, or live in accordance with one's own religious beliefs has three positions: (a) the right to profess the belief in religious acts, private or public, individually or in association with others; (b) the right to the public protection of the values represented by religion and without respect to which it would not be possible to act in accordance with religious beliefs or to apply the principles of religious doctrine; (c) The right of everyone to refuse conduct which is incompatible with the principles of a particular religious teaching. The third of these positions is the key for conscientious objections. It also corresponds with the content and wording of Article 18(2) of the International Covenant on Civil and Political Rights: No one shall be subjected to coercion which would prejudice his or her freedom to profess or accept a religion or belief of his or her choice.

In accordance with these starting points, everyone should have the right (possibility, not an obligation) without negative legal consequences, a legal sanction against themselves (guarantee by the state law) to refuse a legal obligation (conscientious objection), which is contrary to with such serious principles of teaching a state-registered church or religious society that the fulfilment of it would be a violation of freedom of conscience as a fundamental human right. Conscientious objections are therefore only a matter of legally guaranteeing and stabilizing the possibility of refusing to act contrary to one's own conscience. The regulation of the right to exercise conscientious objection, on the other hand, does not address the question of correctness or inaccuracy of opinions on sensitive moral and ethical merits, such as abortions, euthanasia, same-sex unions, reproductive health, or parenting.

The law of the Slovak Republic could contractually include all reasonable principles concerning conscientious objections, both on the basis of the teachings and norms of all registered churches and religious societies, as well as those reservations not based on religion, if such exist and will be raised in preparation implementation of those contracts. Examples of principles protected by contracts could be: a) the principle of the inviolability of human life from conception to natural death. It would mainly concern healthcare professionals, healthcare institutions and patients. It would be the recommendation, prescription, distribution and administration of pharmaceuticals, the performance or cooperation of activities whose primary purpose is to cause abortion

at any stage or unnatural death; b) the principle of respect for human life and its transmission in its natural peculiarity and uniqueness. It would mainly concern health professionals, researchers, institutions, but also the general public. It would be participation in artificial or so-called. assisted insemination, genetic manipulation, eugenic procedures, embryonic human cloning, sterilization and all contraceptive activities; c) the principle of freedom in the educational process, in counselling and enlightenment. It would mainly concern teachers, parents, children, schools and the general public. This would involve teaching, recommending and preparing activities contrary to the moral principles of the Catholic Church in the field of sexual morality, as well as the teaching of the Catholic Church in the theological field; d) the principle of the protection of marriage as a union between a man and a woman, which aims to create a lasting community of life, ensuring the proper upbringing of children. It would mainly concern lawyers, clergy, adoptive and other institutions, but also the general public. It would be the performance of legal, judicial, guardianship and tutoring activities; e) the principle of the protection of the secret of confession and the entrusted secret which has been entrusted orally or in writing, subject to secrecy, to the person entrusted with pastoral care. It would apply in particular to clergy and persons engaged in similar activities. This would be an obligation to testify before criminal authorities or civil courts; f) the principle of respect for freedom of religion and the use of religious symbols. It would concern in particular the public, shops, the army, schools and other institutions. This would involve the use of religious acts and symbols in public in a negative sense and as an exception to the prohibitions laid down by law.

CONCLUSIONS

Stability of every legal system depends on a sufficient measure of the concordance of its fundamental elements. Such a measure of the concordance can be confirmed among following elements that are taken into consideration: bilateral agreements with the Holy See including the new contractual concept / draft of an agreement with the Holy See on conscientious objections (based on the internal state regulation applying the principles enacted by bilateral international agreement) – the explanatory memorandum to the EU Charter of fundamental rights – the constitutional traditions and the development of law in the field of protection of freedom of conscience and religion in Slovakia – the law of the European Union as a whole and – the constitutional law of the Slovak Republic. This is the fundament for the conclusion that bilateral treaties with the Holy See belongs into the stability building elements within Slovak legal system.

REFERENCES

Chizzoniti, Antonio. 2004. *Chiesa Cattolica ed Europa Centro-Orientale.* Milan: Vita e Pensiero Università.

Moravčíková, Michaela. 2007. *Conscientious objection.* Bratislava: Ústav pre vzťahy štátu a cirkví.

Moravčíková, Michaela, and Marek Šmid, eds. 2015. *Freedom of Conscience and Religious Freedom*. Prague: Leges.

Němec, Damián. 2010. *Konkordátní smlouvy Apoštolského stolce s postkomunistickými zeměmi (1990–2007)*. Bratislava: Ústav pre vzťahy štátu a cirkví.

Robbers, Gerhard. 2011. *Religion in Public Education. European Consortium for State and Church*. Trier: European Consortium for Church and State Research.

Šmid, Marek, and Michaela Moravčíková. 2009. *Clara pacta, boni amici: zmluvné vzťahy medzi štátom a cirkvami*. Bratislava: Ústav pre vzťahy štátu a cirkví.

Šmidová, Maria. 2013. "Caring for People with Mental Disabilities in the United Kingdom of Great Britain and Northern Ireland – in the Light of the Winterbourne View Case." *Integration*, 16th year, 3–4.

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LIMITATION OF THE RIGHT TO REQUEST THE ERASURE OF PERSONAL DATA IN THE CONTEXT OF SACRAMENTAL MATTERS AND CANONICAL STATUS IN THE CATHOLIC CHURCH IN POLAND

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Abstract. The introduction of new rules for the protection of personal data in European law has caused increased interest in the issue of respecting the rights of persons resulting from the European regulation. Among these rights are the right to request erasure of personal data and/or the right to be forgotten. Due to the specificity of churches and religious communities, the European legislator also takes into account their autonomy in terms of the possibility of applying their own detailed rules for the protection of personal data. Therefore, the Catholic Church in Poland has adapted her data protection law to the European regulation so that she can continue to carry out her mission in the modern world while retaining the possibility of applying the law on the protection of personal data, taking into consideration the Catholic doctrine regarding the sacraments and the canonical status of the faithful who belong or belonged to her. In these two aspects, the right to delete data is not vested in the faithful but is only recognized as a request for confidentiality of data that cannot be used without the consent of the competent church authority.

Keywords: personal data protection, GDPR, right to be forgotten, sacraments, canonical status

INTRODUCTION

The rights under current data protection legislation include the right to request erasure of personal data, also referred to as "the right to be forgotten." There is also a view in the literature that these are two separate rights. However, this right does not in every case operate automatically or is unconditional towards the person who claims this right regarding his/her personal data. An example of this is the inability to enforce the right to "be forgotten" in cases that involve articles in newspapers or, more broadly, in the media. This is due to the fact that the latest data protection legislation does not affect

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the way the Polish press law is applied (cf. Article 85 of the Regulation (EU) 2016/679[1]) and consequently the right to information.

Likewise, there are areas within the ecclesiastical space which by their very nature had to be excluded from the area of the right of erasure. This applies to two particular aspects of the personal data of individual believers: those that specify the sacraments the believers have received and those that otherwise contribute to determining their canonical status (cf. Article 14 of the General Decree on the protection of natural persons with regard to the processing of personal data in the Catholic Church[2]).

This seems a very important issue in terms of the relationship between the State and the Church, since the establishment of and respect for new principles flowing from the two legal orders but having their origin in the doctrine of the Church is essential for the life of the faithful and for the Church's ability to fulfil her salvific mission in the world.

1. THE RIGHT TO REQUEST ERASURE OF DATA

Both the GDPR and the Decree – two significant legal documents on personal data protection – provide for the right to request erasure of data. However, this is an issue that, in terms of Catholic Church law, is significantly different from the validity of this right on the level of European law.

1.1. In the area of civil law

Pursuant to Article 17 GDPR, it may be concluded that a natural person has the right to erasure of data, more specifically the "the right to obtain from the controller the erasure of personal data," which the controller is obliged to erase "without undue delay," when the grounds referred to in the same article apply. Namely, it concerns situations when "personal data are no longer necessary" for the purposes "for which they were collected or otherwise processed;" "the data subject withdraws consent;" "the data subject objects to the processing" and "there are no overriding legitimate grounds for processing;" "the personal data have been unlawfully processed;" "the personal data have to be erased"

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. L 2016 119/1 as amended [hereinafter: GDPR].

[2] *General Decree on the protection of natural persons with regard to the processing of personal data in the Catholic Church issued by the Polish Bishops' Conference on 13 March 2018 during the 378th Plenary Meeting in Warsaw, on the basis of can. 455 of the Code of Canon Law in connection with Article 18 of the Statute of Polish Bishops' Conference, after obtaining a special permit from the Holy See of 3 June 2017*, "Akta Konferencji Episkopatu Polski" 30 (2018), p. 31–45 [hereinafter: Decree].

in order to comply with "a legal obligation to which the controller is subject;" "the personal data have been collected in relation to the offer of information society services." The occurrence of any of these circumstances gives the data subject the right to request erasure. When exercising such a right, the person should have recourse to the rule laid down in Article 12(3) GDPR, according to which the controller is obliged to provide the person with information on the action taken in response to the request without undue delay and at most within one month of receipt of the request, although this period may be extended by two further months due to the complexity of the request or the large number of such requests received. However, the controller should notify the data subject of this fact, giving reasons for the delay [Fajgielski 2022, 299].

The right of a data subject to request the erasure of data is by no means new in the legal system. It may be regarded as the development of the already existing right to erasure, which was provided for in the EU Directive[3] replaced by GDPR, as well as in the Act on personal data protection of 1997.[4] This is in line with the assumptions of the basic law, which provides for the necessity of introducing a mechanism limiting the processing of personal data, pursuant to Article 51(4) of the Constitution [Dubis and Daćków 2015, 177]. Only as a certain novelty can one consider the information obligation on the part of the controller ("right to be forgotten"), which arises from Article 17(2). This is a significant modification introduced to the relevant provision from the superseded EU directive [Czerniawski 2018, 523–24]. For this reason, this legal basis can be considered not one right, but two rights: the right to request erasure arising from Article 17(1) and the right to be forgotten arising from Article 17(2). "The primary right is the right to obtain erasure. The second right, i.e. the right to be forgotten, is available to the data subject only if the right to erasure is exercised and only if the data concerning him/her have been made public by the controller (e.g. published on a publicly accessible website)" [ibid., 523].

1.2. In the area of canon law

The Decree also mentions the right to request the erasure of personal data (Article 14 Decree). In the article dedicated to this right, positive circumstances are mentioned first, i.e. those in which the data subject has the right to request the erasure of the data. Such right is valid when the personal data are no longer necessary and processed, the consent to their processing has been

[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, O.J. L 1995 281/31 as amended.

[4] Act of 29 August 1997 on the protection of personal data, Journal of Laws of 2016, item 922 as amended, Article 32(1)(6).

withdrawn, the personal data have been processed unlawfully (Article 14(1) Decree). In addition, if the controller has provided personal data, which it is now obliged to erase in accordance with the law, the controller has obligations similar to those set out in Article 17 GDPR.

In the second part of this article there are provisions restricting the right to request the erasure of data. Such a right does not apply in the following cases: the exercise of the right to freedom of expression and freedom of information; the fulfilment of a legal obligation; a task carried out in the public interest or in the exercise of public authority; archival, scientific or statistical purposes; the establishment, assertion or defence of claims (Article 14(3) Decree). Also, with regard to the issue under question, the last paragraph of Article 14 states in a negative way, limiting such a right by stating that "the right to request the erasure of data does not exist when the data concern the sacraments administered or otherwise refer to the canonical status of a person" (Article 14(4) Decree). However, the absence of the right to request erasure does not mean that there are no legal consequences; such a request must be recorded in the data system and the controller is obliged not to use the requested data without the consent of the local Ordinary or a superior depending on his competence (Article 14(4) Decree). For this reason, the right to request erasure is not lacking but only limited.

In this aspect it is not a novelty, because in Church law the obligation to make records of sacramental life has existed since the late Middle Ages, and thus the data sets that the Church legislator calls parish registers have a centuries-old tradition [Trojanowski 2019, 49]. Even before the General Decree entered into force, Catholic Church law provided for the possibility of making changes to the parish registers due to errors, obsolescence of previous records, etc. In the case of the sacraments, however, the right to delete such data was never recognised [Domaszk 2010, 63]. Moreover, the Instruction prepared by the Chief Inspector for Personal Data Protection and the Secretariat of the Polish Bishops' Conference in 2009 clearly stated that in the case of data recorded in the parish registers, canon law was binding, and only in matters not regulated by this law, the Personal Data Protection Act had to be applied.[5]

[5] *Protection of Personal Data in the Activity of the Catholic Church in Poland* (23 September 2009). Instruction prepared by the General Inspector for Personal Data Protection and the Secretariat of the Polish Bishops' Conference, "Akta Konferencji Episkopatu Polski" 16 (2009), p. 53–59, III/9.

2. THE CHURCH'S AUTONOMY WITH REGARD TO DATA PROTECTION LAW

The specificity of the salvific mission of the Church requires parish registers to be kept as a documentation of the most important events in the sacramental life of the individual persons belonging to the Church, as well as those who once belonged to it [Wenz 2008, 93–94]. Because of this unique nature of the Church and the need to treat personal data differently in the context of sacramental life and canonical status in general, in her activities the Church must enjoy, care for and defend autonomy to apply her own data protection law.

2.1. Legal basis in civil law

The autonomy of churches, religious associations and philosophical organisations is recognised in legal documents at the level of European and state law.

In European law, first mention must be made of the Treaty on the Functioning of the European Union, in Article 17 on relations with religious and philosophical organisations, the first paragraph stipulates that "the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."[6] As a consequence of this general law defining the functioning of the European Community, reminiscences of this law also had to appear in the GDPR. With regard to data processed by churches and religious associations, they may apply the rules they have previously done, provided that they are adapted to the European regulation (cf. Article 91(1) GDPR). However, the adaptation of these rules must not prejudice the status granted to churches under the constitutional law in force in the Member States (cf. GDPR, preamble (165)). This confirms that the GDPR respects the autonomy of the Catholic Church, as provided by state law, and does not violate these provisions.

There Polish fundamental law contains an article which provides for equal rights for churches and other religious associations, and public authorities in the Republic of Poland shall maintain impartiality in matters of religious beliefs. The relationship between the State and the churches are based on the principle of respect for their autonomy and the detailed provisions concerning the relations between the Republic of Poland and the Catholic Church are determined by international treaty concluded with the Holy See and relevant statutes.[7] It is therefore evident that the Polish Constitution adopted a model of

[6] Treaty on the Functioning of the European Union, O.J. 2012 C 326/47; Treaty establishing the European Economic Community, Rome (25 March 1957), Journal of Laws of 2004, No. 90, item 864/2 as amended.

[7] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended, Article 25(1–4).

coordinated separation, otherwise known as friendly separation. The principle of equal rights refers to the identical treatment of churches and religious associations, and not to equality on the plane of state-church relations [Tuleja 2019, 101–102]. It should be noted, however, that this principle has been restricted in two ways, firstly, by explicit constitutional regulations (cf. Article 25(4) and 25(5) of the Constitution), and secondly, legal differentiations may, and even should, be an expression of factual differences between individual churches and religious associations, due to their possession of characteristics relevant for the regulation being made [Garlicki 2016, 607–609]. Thanks to the reference in the Constitution to the agreement concluded with the Holy See and to the Act, it can be determined that the "status granted by constitutional law to churches" in the case of the Catholic Church is also contained in the Concordat of 28 July 1993 and in the Act of 17 May 1989 on the Relation of the State to the Catholic Church in the Republic of Poland (with subsequent amendments and changes).

Indeed, both documents emphasise the autonomy of the Catholic Church. The Concordat as a bilateral agreement signed by the Holy See with the highest authorities of the Polish state, on matters concerning the situation of the Church in Poland, has legal effects for both parties [Krukowski 2013, 231]. Thus, this agreement is valid in two legal orders, and at the same time it is a source of law in the ecclesiastical and state order [Idem 2000, 390]. In the 1993 Concordat there is an article in which the guarantee of the free exercise of jurisdiction by the Church is ensured: "Respecting the right to religious freedom, the State shall guarantee the Catholic Church, irrespective of rites, the free and public exercise of its mission, as well as the exercise of its jurisdiction, management and administration of its own affairs, in accordance with canon law."[8]

In a similar way, the mutual relationship between the State and the Catholic Church, on the basis of respect for autonomy in jurisdiction, is provided for in the Act of 17 May 1989 on the Relation of the State to the Catholic Church in the Republic of Poland: "The Church shall be governed in her affairs by her own law, shall freely exercise clerical and jurisdictional authority and shall manage her affairs."[9] Over the years there have been quite frequent doubts about what autonomy in terms of jurisdiction one can speak of and what scope these provisions have. Certainly, the state jurisprudence has not yet clearly delimited all areas of validity, while on the sacramental question there are clear statements in judgments and resolutions of the Supreme Court that it belongs without doubt to "her own affairs" of the Church and can therefore be governed by "her own law."[10]

[8] Concordat between the Holy See and the Republic of Poland, signed in Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

[9] Act of 17 May 1989 on the relation of the State to the Catholic Church in the Republic of Poland, Journal of Laws of 2019, item 1347 as amended.

[10] Cf. resolution of the Supreme Court of 19 December 2008, ref. no. III CZP 122/08, OSNC

2.2. Legal basis in canon law

In terms of justifying the autonomy of the Church in the application of her own data protection regulations, it will be important to demonstrate that the Catholic Church had a legal system for the protection of personal data, and therefore can maintain her legal autonomy in this matter. This is because the possibility, guaranteed in European law, for churches to continue their existing system of personal data protection meets the need to respect the constitutionally regulated state-church relations in individual member states and creates the possibility to preserve the autonomy of individual churches [Mazurkiewicz 2016, 30].

The GDPR set out the conditions to be able to apply this legal autonomy for the protection of personal data: to have its own system for the protection of natural persons in relation to the processing of personal data and to bring it in line with the GDPR (cf. Article 91(1) GDPR), the moment of entry into force of the Regulation was 24 May 2016 (cf. Article 99 GDPR). Therefore, it cannot be concluded that the Church in Poland introduced the Decree before GDPR was in force, i.e. before 25 May 2018. However, the provisions of the European Regulation explicitly refer to the date the Regulation enters into force and not to the moment it became binding, these two dates are clearly separated in the Regulation, as vacatio legis has been applied (cf. Article 99 GDPR). Therefore, it seems justified to mention in the preamble of the Decree of the Polish Bishops' Conference all the relevant provisions of the Canon Law concerning the issue of personal data protection. In addition to selected provisions of the 1983 Code of Canon Law[11] and the Code of Canons of the Eastern Churches, the motu proprio *La cura vigilantissima* of 21 March 2005 is also mentioned, as well as regulations of particular law including the Polish Bishops' Conference on the keeping of parish registers of 1947, the Instruction prepared by the Polish General Data Protection Supervisor (GIODO) and the Secretariat of the Polish Bishops' Conference, the General Decree on apostasy from the Church and on return to the community of the Church of 2015, and generally mentioned other regulations of particular law (cf. Decree, preamble).

One document that could be called comprehensive or at least a prototype creating a legal system of personal data protection was the mentioned 2009 Instruction created with the cooperation of state and church bodies. Among authors discussing this document one can find opinions that "the processing of personal data in the Catholic Church is a fact. The Church has always been a precursor of those changes which serve man. Therefore, in the protection

2009, No. 7–8, item 115; and ruling of the Supreme Court of 24 March 2004, ref. no. IV CK 108/03, OSNC 2005, No. 4, item 65.

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

of personal data the Church also sees a good that should be respected" [Przybyłowski 2012, 433].

However, it can also be stated that the Church has adopted the technique of dispersing the matter of personal data protection. However, in order to clearly and explicitly adapt the canon law in this matter, the Polish Episcopal Conference decided to issue the Decree, which is the implementation of the requirements imposed on churches and religious associations by the GDPR.

3. DOCTRINAL AND LEGAL REASONS REQUIRING A LIMITATION OF THE RIGHT "TO BE FORGOTTEN"

Because of her special mission – the continuation of Christ's salvific work – the Church must also use the means available to society as a whole in the modern world.[12] However, in her activities it must remain faithful to the doctrine which it proclaims. Therefore, even at a time when particular emphasis is being placed on the protection of personal data, the Church, taking all aspects into account, cannot consent to the application of the right to be forgotten in matters concerning the sacramental life and the canonical status of the faithful who belong or belonged to the Church (cf. Article 14(4) Decree; can. 96 CIC/83). It is therefore necessary to clarify the doctrinal and legal reasons for such a limitation of the right to be forgotten.

3.1. Sacramental character

The doctrine of the sacramental character has its foundations both in the Old Testament, where, by the custom of circumcision, man belonged to God and this sign reminded him of this fact (cf. Gen. 17:11) [Müller 2015, 682], as well as in the New Testament (cf. Gal. 6:17; 2 Cor 1:22, Eph 4:30, 2 Tim 2:19, Rev 3:12; 7:3; 13:16; 14:1–9; 20:4) in the teaching on the spiritual permanent indelible and eternal mark. This mark is imprinted by God on the soul and leaves the instalment of the Spirit in the human heart (cf. 2 Cor 1:22). The man who possesses it has a special ability to perform and receive sacred things [Bartnik 2003, 642]. The sacramental character was described by the Fathers of the Church and Old Christian writers (St Augustine and Tertullian), as well as medieval scholastics (St Thomas Aquinas). Hence, since the thirteenth century, in order to distinguish it from sanctifying grace, this intrinsic belonging of man to Christ due to baptism received is called the spiritual mark of the soul or sacramental character [Müller 2015, 651].

[12] This is not an attempt to justify the functioning of the Church in terms of the *societas perfecta* model, but only a claim that the Church fulfilling its mission in the modern world must use resources that are available to each community [Choromański 2012, 21–22].

The doctrine of sacramental character was solemnly reaffirmed at the Council of Florence and the Council of Trent. In Florence the Council Fathers taught that "Among these sacraments there are three, baptism, confirmation, and orders, which imprint an indelible sign on the soul, that is, a certain character distinctive from the others. Hence they should not be repeated in the same person."[13] The Fathers of the Council of Trent made similar statements.[14]

As a consequence of this, in the binding Code of Canon Law there are canons which mention the sacramental character which the three sacraments imprint and therefore cannot be repeated (cf. can. 845 § 1 CIC/83) and a particular definition of the capacity to receive these sacraments for those who have not received them before (cf. can. 864, 889 § 1 CIC/83).

It is therefore a dogmatic and legal justification for the impossibility of forgetting the sacraments received, the sacramental character is imprinted on the soul and cannot be removed, and as a consequence of this, the very fact of receiving such a sacrament in the Church cannot be forgotten (demanded to be erased) either, which is confirmed in the parish register, and therefore such a record cannot be removed either.

3.2. Sacramental life in general

However, only three of the seven sacraments imprint a character, so it is important to note that for the other sacraments, annotations are made in the parish registers because this has legal consequences.

The keeping of parish registers is an essential aspect of the Church's salvific service to those who are becoming or are already members of this community of the faithful. These registers document the most important events in the sacramental life of individual members of the Church. Hence the keeping of parish registers (of the baptised, the confirmed, the married and the deceased) is regulated by universal law. The register of the baptised holds a special place, even the most important. This is due to the essence of the sacrament of baptism, which imprints a sacramental character and thus changes the person ontologically both in the order of grace and in the order of law [Wenz 2008, 121].

For this reason, the universal legislator, stressing the importance of diligent maintenance of the baptismal register, imposes on the local pastor where this

[13] Council of Florence, *The Bull Exultate Deo (the Decree for the Armenians)*, https://sensusfidelium.us/the-sources-of-catholic-dogma-the-denzinger/council-of-florence-1438-1445-decree-for-the-armenians/ [accessed: 26.01.2022].

[14] "If any one saith, that, in the three sacraments, Baptism, to wit, Confirmation, and Order, there is not imprinted in the soul a character, that is, a certain spiritual and indelible Sign, on account of which they cannot be repeated; let him be anathema." Council of Trent, *Canons on the Sacraments in general*, can. IX, http://www.thecounciloftrent.com/ch7.htm [accessed: 26.01.2022].

sacrament is administered the obligation to promptly and accurately record the data of the baptised person, the godparents or witnesses and the minister, the date and place of birth and baptism (cf. can. 877 § 1 CIC/83). The same is true for the other two sacraments that imprint a sacramental character: confirmation (cf. can. 895 CIC/83) and ordination (cf. can. 1053 § 1 CIC/83).

However, not only these sacraments should be recorded in the parish registers. The second significant provision of the law concerning the parish registers is the canon which defines the duties and rights of the parish priest. Among the duties mentioned is the necessity to keep parish registers, namely, the register of the baptized, of marriages, of the deceased, and others determined by particular law established by the Episcopal Conference or the diocesan bishop (cf. can. 535 § 1 CIC/83). Among these other books, the most frequently required may include: the book of confirmation kept in the parish, the book of First Holy Communion, the book of the sick (Anointing of the sick).[15]

All these books contain information concerning the sacramental life of the faithful. The books required by the universal legislator are particularly important. Only the book of the deceased concerns canonical status, not sacramental life. The reception of the individual sacraments, and consequently the recording of this fact in the registers, influences the further spiritual life of the faithful, but also has important legal consequences. The sacrament of baptism is required for the reception of the other sacraments (cf. can. 842 § 1 CIC/83); the sacrament of Holy Orders prevents the reception of the sacrament of marriage (cf. can. 1087 CIC/83); the reception of marriage prevents a subsequent marriage as long as the marriage bond of the first union lasts (cf. can. 1085 CIC/83) and the reception of the sacraments of episcopal ordination and (in principle, except for Anglicans[16]) presbyterate in the Latin Church (cf. can. 1042, 1° CIC/83, *Anglicanorum coetibus*, VI § 1). The impossibility of re-reception of validly administered sacraments that imprint character was mentioned above.

3.3. Canonical status

Canonical status in the Church is not only determined by the sacraments. Because of the distinction between sacramental life and canonical status in the

[15] Cf. *Przepisy o prowadzeniu ksiąg parafialnych: ochrzczonych, bierzmowanych, małżeństw i zmarłych oraz ksiąg stanu dusz*, "Wiadomości Kościelne" 2/5–7 (1947), p. 92–99. See also Wenz 2008, 182–84.

[16] Benedict XVI, Apostolic Constitution *Anglicanorum coetibus* (04.11.2009), Article 6 § 1, https://www.vatican.va/content/benedict-xvi/en/apost_constitutions/documents/hf_ben-xvi_apc_20091104_anglicanorum-coetibus.html [accessed: 17.07.2021]. Also as amended by Francis, Apostolic Constitution *Anglicanorum coetibus* (19.03.2019), Article 6 § 1, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20190319_norme-anglicanorum-coetibus_it.html [accessed: 17.07.2021].

Church's data protection legislation (cf. Article 14(4) Decree), other situations that affect canonical status should be mentioned here.

Among such situations, the acts of apostasy, schism or heresy should be mentioned, since they are threatened with the penalty of excommunication, which is binding by force of the law itself (cf. can. 751, 1364 CIC/83). Similarly, the incurring by the faithful of other ecclesiastical penalties affecting their canonical status, such as suspension, the interdict, or the already mentioned excommunication (cf. can. 1331–1333 CIC/83). The act of conversion also changes the canonical status.

Among the events in the life of the Church which significantly affect canonical status, mention should also be made of the perpetual vows (cf. can. 535 § 1 CIC/83).

Nor can we overlook the extraordinary situations which can arise, however sporadically, in parish pastoral practice. Namely, the changes in parish registers concerning children already baptised before adoption;[17] the canonical status of a person who has undergone a sex change operation after baptism changes; the determination of gender in the case of hermaphroditism. These issues are also reflected in the canonical status of the faithful concerned [Trojanowski 2019, 59–64].

4. THE OBLIGATION TO RESPECT THE LAW

In pastoral practice, requests for the erasure of personal data are increasingly frequent, especially in the context of apostasies from the Church. In such situations, with the current data protection law, the faithful to whom the data pertains have the right to request the erasure of the data (cf. Article 14 Decree), however, in the case of the sacramental life and canonical status of these persons, this right is *de facto* limited to making the data confident, in such a way that they cannot be used without the consent of the local Ordinary, even by the person concerned (cf. Article 14(4) Decree). In view of this fact, it must be stated that the provisions of canon law provide for legal liability for the breach of personal data or non-compliance with data protection regulations.

4.1. Legal liability

The controllers of such personal data are in most cases parishes, sometimes dioceses or other institutions which have the capacity to keep parish registers or to collect them (e.g. a diocesan archive). They are obliged to comply with canon law in this matter. It is the responsibility of the parish priests, who in

[17] Cf. *General decree of the Polish Episcopal Conference on the preparation and modification of the act of baptism in connection with adoption*, "Akta Konferecji Episkopatu Polski" 30 (2018), p. 46–47, no. 9.

the light of the law on the protection of personal data are the representatives of the data controller, which is the parish, to keep the parish registers reliably and accurately and to take care of their proper storage (cf. can. 535 CIC/83). The lack of discipline in this matter already before the entry into force of the data protection legislation constituted a serious breach of the parish priest's duties and could be considered as a tort pursuant to can. 1378 § 2 CIC/83. In view of the current provisions on the protection of personal data in the Catholic Church in Poland, concern for the personal data contained in the parish registers has become even more important. Therefore, all the rights of data subjects must be respected, including the right to request erasure. In some cases this right can be fully exercised (e.g. deletion of personal data from parish records); in other cases it is not possible (sacraments and canonical status), these data, however, can by no means be used. Therefore, in this context, care should also be taken to store the parish registers in a suitable place so that third parties do not have access to them without a legitimate legal authorisation. Care must also be taken to ensure that there is no "personal data breach," which is defined in the Decree as "a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed" (Article 5(8) Decree). Such a breach in relation to the abuse of ecclesiastical power or the failure to fulfil a duty arising from one's office may be punishable by an ecclesiastical sanction, defined as a just penalty (cf. can. 1378 CIC/83).

4.2. Supervision

Due to the specific nature of the activities of churches and religious associations, in which doctrine and religious beliefs also influence the issue of personal data processing, the GDPR not only provides for the possibility to apply their own autonomous legal regime for the protection of personal data provided that it is "brought into line" with the European Regulation (cf. GDPR Article 91(1)), but also gives the possibility to set up an "independent supervisory authority" (cf. Article 91(2) GDPR). The literature states that such establishment of an independent supervisory authority by a church, religious association or community results in the exclusion of the jurisdiction of the national supervisory authority in relation to them, although this does not follow explicitly from this article [Litwiński 2018, 887].

In fact, the Catholic Church in Poland has decided to establish such an office, the rights and duties of which are set out in the *Decree* (cf. Article 35–40 Decree). Among its tasks are: "monitoring and ensuring compliance with data protection legislation within and in accordance with the activities of the Catholic Church and her structures" (Article 37(1)(1) Decree) and "to deal with complaints concerning compliance with the regulations established in the Church regarding the protection of personal data" (Article 37(1)(5) Decree).

And by the fact that the Church Data Protection Supervisor is independent in its action and is not subject to the instructions of other entities in the performance of its supervisory tasks, it can be concluded that it fulfils the required attributes of such a supervisory authority under European law [Fajgielski 2022, 756].

Apart from the possibility of supervision by the Church Data Protection Supervisor, canon law still applies with regard to the supervision of the keeping of books during canonical visitations both by the diocesan bishop or his delegate (cf. can. 396 CIC/83) and by the dean (cf. can. 555 § 1, 3° CIC/83); in this respect, the most recent data protection law does not change anything (cf. Article 40(1) Decree).

5. THE OBLIGATION TO OBSERVE CHURCH DISCIPLINE

It may be noted that, in view of the specific nature of churches, religious associations and philosophical organisations and communities, the European regulation respects the autonomy they enjoy in various Member States. It must therefore be concluded that respect for their autonomous rights, shown by individual churches and other organisations on an equal footing with them in law, is firmly established in both state and European law.

Therefore, one cannot rely on the right to request the erasure of personal data or even the right to be forgotten on the basis of Article 17 GDPR, because legal texts have to be read in text and context, since Article 91 grants the possibility to apply one's own legal system to the protection of personal data, this has certainly been influenced, among other things, by the impossibility of forgetting certain events, certain data, certain facts. In the Catholic Church, such issues are actually two issues defined as: sacramental life and canonical status.

On the other hand, raising various aspects concerning the impossibility for the Catholic Church in Poland to apply her own data protection rules must meet with a strong objection, since all the requirements set out in Article 91 GDPR have been met by the Catholic Church in Poland. Although it is sometimes argued in the literature that the data protection rules applied by the Church, at the time of the entry into force of the GDPR, "cannot be considered as detailed rules for the protection of individuals' data in relation to processing because they are fragmentary in nature" [Zawadzka 2018, 1114]. It is difficult not to notice the factual errors of such argumentation. In the first place, "fragmentary nature" does not exclude "detailed rules," which the author assumed *a priori*. The EU legislator did not require a comprehensive (all-encompassing) regulation contained in a single normative document [Fajgielski 2022, 754]. The author does not seem to recognise the method of dispersion of regulations, although it is also used in state law. It is enough to note how many laws had

to be amended in order to adapt them to GDPR in Polish law.[18] Secondly, it should be noted that the sources of norms on personal data protection cited by the author omit first of all the canons of the Code of Canon Law – the basic source of universal law in the Church. Therefore, other authors dealing with this issue do not approve this way of interpreting the EU law [ibid.].

Specific data protection rules were applied in the Catholic Church in Poland when the European Regulation came into force, and were later adjusted to it, resulting in a Decree issued by the Polish Bishops' Conference. These provisions regulate in detail the principles of protection of natural persons in relation to the processing of personal data, taking into account the specificity of the Church.

According to the principle *semel catholicus*, *semper catholicus*,[19] even apostasy from the Catholic Church does not result in a complete break with the Church, because it is impossible to erase the effects of baptism, which has spiritual as well as legal effects. Consequently, it is not possible to treat – as people who want to break off relations with the Church often expect – a religious community like other organisations. Withdrawal from such organisations is possible and, thanks to the right to be forgotten, there may be no trace of participation in them, but in the case of the Catholic Church this is not possible. Someone who expects such a solution is not aware that the consequences of legal actions taken may also have their consequences in the future. By way of an analogy, if a person leaves a country or even renounces its citizenship, this does not mean that they can avoid the consequences of their lawful or unlawful actions as a citizen of that country.

Therefore, the limitation of the right to request erasure in matters of sacramental life and canonical status should be considered within the category of fundamental human rights of religious freedom not only in the aspect of the individual but also in that of the community of the Church. This is to maintain public order in the Church and the good of its individual faithful, including former members.

[18] Cf. Act of 21 February 2019 on amending certain acts in connection with ensuring the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), Journal of Laws item 730.

[19] *General Decree of the Polish Bishops' Conference on the apostasy from the Church and return to the Church Community* (7 October 2015), "Akta Konferecji Episkopatu Polski" 27 (2015), p. 101–104.

CONCLUSIONS

The provisions of the European regulation recognise the autonomy of churches, religious associations and other similar communities to the extent that they have such autonomy in the individual Member States. Consequently, due to her specificity, the Catholic Church can apply her own specific data protection rules, as she has adapted them to the European regulation.

Complete adaptation is not feasible, since this would be regarded as "canonisation of civil law" (cf. can. 22 CIC/83), and this in turn opposes, especially in the matter of the sacraments, their essence, which is of divine institution (i.e. derived from divine law). Such canonisation, rather than adaptation, would also be contrary to the intention of the European Legislature, since the possibility of being guided by its own detailed rules includes the consideration of the specificity of individual churches and religious associations.

Therefore, the autonomy enjoyed by the Catholic Church also in applying her own data protection rules is far from being a privilege but stems from respect for religious freedom and for the Catholic doctrine, which does not allow the right to be forgotten in a sacramental matter or in certain aspects concerning canonical status.

REFERENCES

Bartnik, Czesław S. 2003. *Dogmatyka katolicka*. Vol. 2. Lublin: Wydawnictwo KUL.

Choromański, Andrzej. 2012. "Vaticanum II – Sobór eklezjologicznego przełomu." *Studia Theologica Varsaviensia* 50, no. 2:17–54.

Czerniawski, Michał. 2018. "Sprostowanie i usuwanie danych (art. 16–20)." In *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, edited by Edyta Bielak–Jomaa, and Dominik Lubasz, 517–54. Warszawa: Wolters Kluwer.

Domaszk, Arkadiusz. 2010. "Ochrona danych osobowych – obowiązek duszpasterski." *Prawo Kanoniczne* 53, no. 3–4:43–67.

Dubis, Wojciech, and Marta Daćków. 2015. "Prawo do bycia zapomnianym w Internecie – za życia i po śmierci?" In *Non omnis moriar: osobiste i majątkowe aspekty prawne śmierci człowieka: zagadnienia wybrane*, vol. 2, edited by Jacek Gołaczyński, et al., 174–88. Wrocław: Oficyna Prawnicza.

Fajgielski, Paweł. 2022. "Komentarz do rozporządzenia nr 2016/679 w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)." In Paweł Fajgielski, *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, 2nd edition, 750–56. Warszawa: Wolters Kluwer.

Garlicki, Leszek. 2016. *Konstytucja Rzeczypospolitej Polskiej. Komentarz.* Vol 1. 2nd edition. Edited by Marek Zubik, and Leszek Garlicki. Warszawa: Wydawnictwo Sejmowe.

Krukowski, Józef. 2000. "Konkordat jako instrument normalizacji stosunków między Kościołem a demokratycznym państwem świeckim." *Prawo Kanoniczne* 43, no. 3–4:387–402.

Krukowski, Józef. 2013. *Kościelne prawo publiczne. Prawo konkordatowe.* Lublin: Towarzystwo Naukowe KUL.

Litwiński, Paweł, ed. 2018. *Rozporządzenie UE w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i swobodnym przepływem takich danych. Komentarz.* Warszawa: C.H. Beck.

Mazurkiewicz, Piotr. 2016. "Ochrona danych osobowych w Kościołach i związkach wyznaniowych w świetle Rozporządzenia Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46 WE (ogólne rozporządzenie o ochronie danych)." In *Ochrona danych osobowych w Kościele*, edited by Stanisław Dziekoński, and Piotr Drobek, 19–34. Warszawa: Wydawnictwo UKSW.

Müller, Gerhard L. 2015. *Dogmatyka katolicka.* Kraków: Wydawnictwo WAM.

Przybyłowski, Jan. 2012. "Ochrona danych osobowych w Kościele katolickim w Polsce." *Studia Włocławskie* 14:423–37.

Trojanowski, Bartosz. 2019. "Zmiany i adnotacje w księgach metrykalnych z uwzględnieniem kwestii problematycznych w tej materii w obowiązujących przepisach o ochronie danych osobowych w Polsce." *Kościół i Prawo* 8 (21):49–71.

Tuleja, Piotr. 2019. "Art. 25. [Zasada równouprawnienia, autonomii kościołów i związków wyznananiowych oraz bezstronność państwa]." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, edited by Piotr Czarny, et al., 98–104. Warszawa: Wolters Kluwer.

Wenz, Wiesław. 2008. *Kancelaria parafialna jako przestrzeń kościelnego posługiwania. Studium kanoniczno-pastoralne.* Wrocław: Wydawnictwo Papieskiego Wydziału Teologicznego we Wrocławiu.

Zawadzka, Natalia. 2018. "Art. 91." In *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, edited by Edyta Bielak–Jomaa, and Dominik Lubasz, 1112–117. Warszawa: Wolters Kluwer.

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A TIME RELATION IN CARRIAGE AS A PREMISE FOR CARRIER LIABILITY FOR DAMAGE TO THE GOODS

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Abstract. The author analyses the premise for carrier liability for damage to the goods, the so-called "time relation in carriage." The author tires to specify the time frame, relevant from the point of view of application of provisions on carrier liability for the condition of the goods to be carried, under national and international legislation that regulates the carriage contract. The author also analyses the problem of the burden of proof in a time relation in carriage under the general rule of the burden of proof in civil law and presumptions in regulations on the carriage contract. The relevant discussion enables conclusions on the legal nature of the time relation in carriage as the case of a non-causal normative relation.

Keywords: carriage of goods, premises of liability, transit period

INTRODUCTORY REMARKS

Provisions of the national and international carriage law do not impose the burden of proving a specific reason of the damage caused by the carrier on the person entitled to seek redress for damage to the goods (total or partial loss of or damage to the goods). Such regulation is fully understandable given that the person entitled to seek redress (consignor or consignee) usually has no way of looking at the process of the shipment's travels. Therefore, the carrier is liable for the condition of the goods (cargo, load) also when the cause for the damage is not explained. Nevertheless, it is crucial to establish that the damage to the goods was made in the period between acceptance for carriage and delivery (Article 65(1) of the Polish Carriage Law,[1] Article 165(1) of the Polish Maritime Code,[2] Article 23(1) UR/CIM[3]). I once called this circumstance

[1] Act of 15 November 1984, Journal of Laws of 2020, item 8 [hereinafter: CL].
[2] Act of 18 September 2001, Journal of Laws of 2018, item 2175 as amended [hereinafter: MC].
[3] Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM) – Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 May

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"time relation in carriage" [Wesołowski 1995, 26]. It is one of the premises of carrier liability for damage to the goods. This term was accepted in the relevant literature [Szanciło 2008, 292; Idem 2013, 228; Ambrożuk 2011, 92; Stec 2005, 246] and in judicial decisions.[4] We are talking here about damage made to the goods during the broadly understood carriage period.

This time, I would like to attempt to specify precisely the framework of the transit period understood like this, relevant from the point of view of carrier liability in domestic law and under international carriage conventions. The period between accepting the shipment for carriage and its delivery to the consignee does not only mean a period of real movement of the goods, but also the period in which the shipment is in the charge of the carrier.[5] Depending on the transport branch, shipment type (full truck or break bulk load) and other circumstances (including what the parties themselves agree), this period may include the time when the goods are being secured on the means of transport, the time of loading (off-loading) or even periods before the loading and after the off-loading.

This study also aims to specify the legal character of this premise of carrier liability. When preparing this study, I performed a linguistic analysis of the laws in force and a legal comparative analysis that covered domestic legislation (Civil Code,[6] Transport Law and Maritime Code) and international conventions[7] that regulate the carriage contract in individual transport branches. I analyse relevant case law of European courts.

1. APPEPTANCE AND DELIVERY OF THE GOODS AS MEASURABLE MOMENTS FOR SPECIFYING THE TRANSIT PERIOD

Regulations of the carriage law do not define terms "acceptance" and "delivery" of the shipment.[8] They inspire numerous doubts. However, the theory

1980, Journal of Laws of 2007, No. 100 item 674 as amended.

[4] Judgment of the Supreme Court of 29 September 2004, ref. no. II CK 24/04, Lex no. 194133.

[5] The concept of charge is directly referred to in Article 18(3) of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), Journal of Laws of 2007, No. 37, item 235.

[6] Act of 23 April 1964, Journal of Laws of 2020, item 1740 as amended.

[7] The following conventions are meant here: UR CIM; Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Signing Protocol of 19 May 1956, Journal of Laws of 1962, No. 49, item 238 as amended; the Montreal Convention; the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The Hague Rules) of 25 August 1924, Journal of Laws of 1937, No. 33, item 258 amended by the Protocol of 23 February 1968, Journal of Laws of 1980, No. 14, item 48.

[8] The International Road Transport Union (IRU) has put forward their proposals for such definitions to be applied in CMR. They were as follows, respectively: "handing over of the goods for carriage to the carrier that agrees to it" and "an act by which the carrier hands over the goods

of taking the shipment in one's charge is most commonly accepted [Clarke 2009, 103; Haak 1986, 181; Loewe 1976, 361].[9] According to this concept, the essence of accepting the goods for carriage and of their handing over after the carriage is to take control over these goods, even though it is not done personally but by other persons who act on behalf of the person that takes control over the shipment [Haak 1986, 181]. The real taking possession of the shipment is secondary.[10] Accepting the goods for carriage is a two-way act that requires correlated steps from both parties of the contract. Therefore, if the consignor leaves the goods (even after the contract was executed) without the carrier's acceptance, it does not constitute a situation where carrier liability is based on laws regulating the carriage contract. In such a case we cannot talk about accepting goods for carriage [Heuer 1975, 61; Clarke 2009, 104; Putzeys 1981, 507, 523; Libouton 1987, 79].[11]

Acceptance of the shipment for carriage may be done directly onto the vehicle or in another place (e.g. in a forwarding point or in the carrier's warehouse). This depends on the transport branch and shipment type. For goods carried by rail and by road the rule is to accept shipments directly onto the vehicle. Break bulk cargo is an exception here. For air transport, shipments are as a rule accepted in the carrier's forwarding point. In carriage by sea the rule is to accept the load onto a vessel, though there are many exceptions here too. This question is irrelevant from the point of view of carrier liability. If he accepts the shipment for carriage, then he is liable according to rules laid down in transport law regulations, irrespective of the place of accepting the shipment for carriage (and its delivery after the carriage has been performed). In consequence, in the context of application of laws on carrier liability, it does not matter whether the damage occurred during the very movement of

to the consignee". It seems that including these definitions would not bring much. Apart from being clearly obvious, they are also asymmetric. While carrier's acceptance is mentioned in the context of handing things over for shipment, no such element is mentioned in reference to the consignee who accepts the goods after the carriage.

[9] This concept is particularly clear in the German case law (e.g. Oberlandesgericht (German Court of Appeal) Hamburg in its judgement of 11 March 1976, Neue juristische Wochenschrift – Rechtsprechungsreport 1976, 2077 and in a judgement of 14 May 1996, Transportrecht 1997, 101; in the Austrian case law (judgement of the Obersten Gerichtshof (Austrian Supreme Court) of 28 March 2000, European Transport Law 2003, 23; also in a judgement of 4 November 1981, Transportrecht 1982, 80 and in a judgement of 7 July 1989, Versicherungsrecht 1990, 1180) and in the Italian case law (judgement of the Corte di Cassazione of 10 February 2003, European Transport Law 2003, 776). It is also seen in Belgian judicial decisions (judgment of the Cour d'Appel d'Anvers of 1 March 1999, European Transport Law 2000, 544–551).

[10] See Messent and Glass 1995, 105 also point to this aspect.

[11] However, see judgement of the Austrian Obersten Gerichtshof of 11 December 1986, Strassengüterverkehr 1985, No. 5, 18 in which the court decided that if the carrier receives clear instructions from the consignor to leave the goods in a specific place even without the consignee present, then by doing so the carrier performs delivery of the goods.

the shipment or when it was in the charge of the carrier before the carriage or after the carriage has been performed. This problem is regulated differently only in maritime law under the Hague-Visby Rules.[12] Regulations of this convention that pertain to carrier liability for the load accepted for carriage are only applicable for damage done in the period from the time when the goods are loaded on to the time they are discharged from the ship (Article 1(e)). Therefore, they do not cover the periods of the carrier's having the shipment (load) in their charge before loading it onto the vessel and after it is discharged. Maritime carrier liability for damage done in this period results from provisions other than those laid down in the convention. However, contractual extension of principles of liability resulting from the Hague-Visby Rules for damage caused in these periods is not ruled out.[13] On the other hand, the Polish maritime code, which relies on the Hague-Visby Rules in its regulation of carrier liability for damage to the goods, refers to the moment of accepting the load for carriage and delivering it to the consignee (Article 165(1) MC), with the proviso that if the bill of lading was issued, then pursuant to Article 169(3)(1) MC the parties may stipulate separate rules for carrier liability for the period from accepting the goods for carriage to the beginning of loading them onto the vessel and from finishing the offloading to delivering the goods to the consignee.

It may happen that the goods are handed over to the carrier before the carriage contract is executed. Then we are dealing with the question of the basis of liability for damage that may occur in this period. One view in the literature claims that in such a situation too regulations relevant to a carriage contract will be applied [Helm 1966, 97]. However, this opinion is not substantiated as a rule. Often the carrier is in possession of the goods before the carriage contract is executed for reasons other than movement of goods, and all events that take place in this period should be assessed under laws relevant to such a contract (e.g. storing, warehousing or forwarding). However, even where goods are handed over before the carriage contract is executed only for the purpose of carriage, we cannot talk about failure to perform or improper performance of the carriage contract if said contract has not been executed yet. We may consider as an exception application of carriage laws in a situation where the goods are handed over solely for the purpose of carriage and the very act of handing the goods over is done just before the formal confirmation

[12] This is noted by e.g. Młynarczyk 2002, 173. Later conventions on carriage of goods by sea, that is the United Nations Convention on the Carriage of Goods by Sea of 31 March 1978 (Hamburg Rules) and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 23 September 2009 (Rotterdam Rules which did not enter into force) cover carrier liability also for periods that precede the acceptance of the load onto the vessel and periods after it is discharged.

[13] For application of international carriage conventions at the will of the parties see Wesołowski 2021, 487–99.

of the carriage contract whose terms and conditions do not raise any doubt in the light of the overall circumstances (e.g. due to on-going cooperation between the parties).

The problems with specifying the moment of accepting goods for carriage and, by analogy, of delivering the shipment after the carriage apply largely to full truck loads where the goods are loaded by the consignor. In such a case, the moment of finishing the loading and of arranging the goods on the vehicle with the carrier present is crucial for the start of carrier liability. The time during which the vehicle staff carry out securing steps (fastening, tying, securing with mats, bars, etc.) as a rule falls under the period of carrier liability. When these steps are done by the consignor himself, then the finishing of these steps is crucial here.

The case is similar for delivering the shipment to the consignee. The moment of presenting the goods for the disposal of the consignee at the place stipulated in the contract or at a different place named by a person authorized to handle the shipment and[14] the consignee's taking control over the goods is the moment of delivery by the carrier of a full truck load. The very presentation of the goods to the consignee's disposal is essential for keeping the carriage deadline, though from the point of view of finishing the period of carrier liability it is not sufficient.[15] Therefore, to be able to talk about delivery of the shipment, the consignee's behaviour must at least show an intention to proceed to unload it. We cannot forget that the consignee is not obliged before the carrier to take delivery of the goods and may refuse to accept them even after the vehicle is open (which is actually often the case; it is because only after the vehicle is open that the consignee is able to see that the goods addressed to him are not the goods he ordered or that the condition of the goods

[14] Delivery of the goods to an authorised consignee upon his consent at a different place than the destination of the goods constitutes correct performance of the contract. See Tribunal de Commerce d'Anvers in its judgement of 28 June 1971, Jurisprudence du Port d'Anvers 1971, 162. However, it must be assumed that the consignee who is not authorised to administer the goods is not allowed to make arrangements with the carrier about a different delivery place.

[15] Cf. judgment of the Cour d'Appel d'Anvers of 13 February 1986, European Transport Law 1986, 183, which recognized carrier liability for damage caused after the vehicle carrying the goods arrived and was left on the consignee's premises but before the goods were unloaded. The same court issued quite an unfortunately-worded thesis in its judgment of 1 March 1999, European Transport Law 2000, 544–51, where it held that the delivery of goods to the consignee must not be understood solely in the sense of a physical handing over of the possession of the things, but it rather means a moment of leaving the goods to the consignee's disposal. However, in the case adjudicated, the court held that the delivery did not take place when the consignee accepted the carrier's statement and visually checked the goods. The court emphasized at that that the consignee's signing the consignment note is not necessary to recognize that the delivery took place.

is not appropriate). Undoubtedly, the consignee's proceeding to unload the shipment is a sufficient condition to acknowledge that the shipment has been delivered.[16]

Accepting goods for carriage and their delivery is not conditioned on signing off for them (consignees often refuse to sing off for the shipment at the stage of proceeding unload saying that only after they finish will they know the quantity and condition of the goods). The signing off has solely an evidentiary nature.

Acceptance of goods for carriage or their delivery is not always done in one step. For shipments made up of a greater number of things, these steps are spread in time and specific vehicle manoeuvres may be made in this time, e.g. re-parking the vehicle so that the loading or unloading may be done from a convenient side. Doubts may also arise when these steps are paused (e.g. for the night). The assessment of events that take place while the vehicle is being repositioned or during a break, and in particular an answer to the question whether the carrier is liable under rules specified in laws that regulate the carriage contract for the part of the goods that is on board of his vehicle, requires that all circumstances of the case are examined.[17] Parties' behaviour must be assessed in the light of the rule of interpretation of declarations of intent, especially when it comes to retaining or taking over possession of part of the goods on board of the vehicle. It is crucial whether and by whom the goods were secured (locking the vehicle, turning alarm systems on, etc.). The fact whether the taking over of the shipment or the taking delivery of it has taken place is key here. It must be assumed that the person who sings off for the goods, as a rule expresses their intent to take the physical possession over the goods and thus, they take over the risk that comes with the goods.

The lack of the consignee's acceptance of the goods in the so-called obstacle to delivery that carries consequences specified in decisions that regulate the carriage contract (e.g. Articles 20–22 UR CIM or Articles 15–16 CMR). Therefore, the carrier is still liable for the goods under terms and conditions specified in provisions regulating the carriage contract. However, if he

[16] Cf. position of the Cour d'Appel d'Anvers included in its judgment of 13 February 1985, European Transport Law 1986, 183, in which the court claimed that the carrier is responsible for the damage to the goods for as long as these goods stay on board of his vehicle and where there are not separate contractual provisions the delivery of the goods takes place only after the actual unloading of the goods.

[17] Cf. opinion of the French Cour de Cassation in its judgment of 30 June 2004, European Transport Law 2005, 2, in which it was concluded that delivery of the goods which constitutes performance of the carriage contract means physical handing over of the goods to the consignee or to his representative who takes over the shipment. This is why if the damage to the transported device is done during a manoeuvre suggested by the consignee's employee, it needs to be assumed that this took place before the delivery of the shipment even because it was still on board of the vehicle.

chooses to exercise his right to unload the goods for account of the consignor (e.g. pursuant to Article 22(2) UR CIM or Article 16(2) CMR), the carriage is considered finished. The carrier is not liable for damage to the good caused after this moment under laws that regulate liability for damage done during the carriage. However, he may be liable for the choice of the third party keeper under separate laws.[18]

2. BURDEN OF PROOF FOR THE FACT OF THE TIME RELATION IN CARRIAGE

The distribution of the burden of proof discussed needs an explanation. This problem must be examined under the principle of distribution of the burden of proof in civil law according to which the burden of proving a specific fact rests with the person who draws legal effects from it (in the Polish law – Article 6 of the Civil Code) and must take into account evidentiary measures that result from laws that regulate the carriage contract. Therefore, in general the burden of proof in the context of the time relation in carriage rests with the entitled person, that is the consignor or the consignee, authorised to seek redress against the carrier.[19] The entitled person is most often not able to determine the damage directly after it was done. What is more, the consignee does not know the condition of the goods accepted by the carrier for carriage. The first contact with the goods usually takes place the moment delivery of them is taken from the carrier. On than moment too it is possible to observe apparent damage. Determining concealed damage is only possible later. Of course, in some situations the overall circumstances of the shipment upon its delivery allows a conclusion that the damage had a specific cause and thus had to be occur during the carriage (e.g. in the case of damage caused by traffic accidents). However, it is more often difficult to state with certainty at which point the damage occurred. The circumstances and conditions of the shipment do not rule out that the damage could have occurred even before it was handed over for carriage, e.g. during the loading. The evidence-related situation of the entitled person in such cases would be very difficult if the laws did not stipulate any relevant measures.

This is why laws that regulate the carriage contract lay down ordinary presumptions that act to the benefit of the entitled person,[20] which relate to the condition of the goods accepted for carriage (e.g. Article 781 of the Civil

[18] For the carrier's authorisation to unload the goods for the account of the sender and his liability after this moment see Wesołowski 2013, 289–94.

[19] For legitimacy of seeking redress under carriage law see Ambrożuk 2017, 85–96.

[20] In the case of a presumption that results from the bill of lading, it changes its nature to an irrebuttable presumption where the bill of lading was transferred onto a third party in good will (see Article 3(4) sentence 2 of The Hague Rules, Article 131(2) sentence 2 MC).

Code, Article 131(2) of the Maritime Code, Article 9(2) and (3) UR/CIM, Article 9(2) CMR, Article 11(2) of the Montreal Convention or Article 3(4) of the Hague-Visby Rules) or possibly to their quantity (number of pieces). The measures stipulated in individual acts of carriage law differ quite significantly in their premises and conclusions of the presumptions in question. Some of them are associated with the issuance of a transport document. However, they are similar in essence. The basis of this presumption lies in the carrier's failure to express his reservations as to the condition or possibly the quantity (number of pieces) of the shipment. Thanks to these presumptions, the proof for the circumstance that the damage was done during the carriage in practice boils down to evidencing the fact of the existence of the damage the moment the goods are handed over to the consignee.[21] This, in turn, involves the subject matter of the consignee's acts of diligence.

This term is understood as actions aiming to secure the possibility of efficient redress against the carrier.[22] This securing measures mainly boil down to checking the goods at an appropriate time and expressing one's reservations as to how the contract was performed (condition and quantity of goods) in order to prevent a presumption that the shipment is an appropriate condition after it is handed over after the carriage (Article 148(1) of the Maritime Code, Article 30(1) CMR, Article 30(1) of the Montreal Convention, Article 2(6) of the Hague-Visby Rules) and under certain legislative acts – to prevent the expiry of claims against the carrier – e.g. Article 791(1) of the Civil Code, Article 76 of the Transport Law, Article 47(1) UR CIM). The acts must be performed for partial damage. In the case of a total loss of the goods this fact results from the carrier not having confirmation of receipt by the consignee. Therefore, he does not need to perform any acts of diligence. The laws that regulate the carriage contract introduce evidentiary measures in the form presumption of a loss of shipment in a situation where the carrier is not able to deliver it within a specified time added to the period of carriage (e.g. Article 52 of the Transport Law, Article 29 UR CIM, Article 20(1) CMR).[23]

To bring about a specific effect, acts of diligence must be performed at an appropriate time. When it comes to visible (apparent) damage, the consignee's steps should be performed the latest upon taking delivery of the goods from the carrier. An apparent damage is damage that may be discovered if

[21] The questions of the burden of proof of the fact of damage to the goods during the carriage is presented by the Cour d'Appel de Mons in its judgment of 4 March 2002, Journal des Tribunaux 2003, 159–60.

[22] Cf. Górski 1983, 27ff; see also Ambrożuk 2016, 195–202.

[23] Cf. position of the Corte di Cassazione in its judgment of 26 January 1995, Diritto dei Transporti 1996, 282 and Hoge Raad in its judgment of 4 October 2002, ref. no. CO1/043HR (www.rechtspraak.nl), in which the court recognized that where the goods where delivered before the deadlines specified in Article 20(1) CMR the goods were delivered with delay, not lost, even though the goods had been stolen before that time and then recovered.

due diligence is exercised before the goods are taken delivery of.[24] Where the consignee himself unloads the goods, the damage is understood to be damage that may be discovered if due diligence was exercised before unloading.[25]

Reservations about not apparent defects or damage should be reported to the carrier usually within 7 days (3 days for transport by sea, 14 days for transport by air) from the date of taking delivery of the shipment from the carrier.[26] This basically means damage that could be observed only after the goods were unpacked. When it comes to container freight services, the consignee is not obliged to check the content of the container when he takes delivery of it from the carrier. This is why damage in shipments transported in containers must be as a rule considered as not apparent damage (concealed damage).[27]

The disputed issue is the degree to which the reservations reported are specific and detailed. The dominant view is that reservations should not be limited to words such as "damage" or "partial loss" [Basedow 1997; Clarke 2009, 202; Loewe 1976, 226; Putzeys 1981, 553–53; Rodière 1971, 322]. The reservations aim to allow the carrier to take measures, relatively as soon as possible, to explain the circumstances and reasons for the occurrence of the damage, its type and size, and thus also circumstances other than the time relation in carriage, relevant for carrier liability. This position is confirmed in the case law, especially in decisions of French[28] and Belgian[29] courts. On the other hand, there is also a view that even if the reservation is limited only to pointing

[24] The case is seen differently by the Cour d'Appel de Paris in its judgment of 24 January 2001 Bulletin des Transport et de la Logistique 2001, 192, where it held that the moment of unpacking the goods is the decisive moment for recognizing the damage as apparent or concealed. Such a stance has no grounds as the packaging itself is an element of the shipment and the unpacking of the goods happens usually after the goods are taken delivery of and after the vehicle has left.

[25] A practice of drafting a "protocol at the door of the carriage" has developed in rail transport for damage noticed during the unloading. Such a protocol is written after a formal taking delivery of the shipment, where there is a presumption that the damage identified in the protocol was done after the goods were handed over. Evidentiary force of such a protocol is similar to a protocol drafted before the goods are handed over. Cf. Górski 1983, 282.

[26] These reservations must be reported to the carrier. Presenting reservations to the forwarder is not sufficient. Cf. position of the French Cour d'Appel de Paris in its judgment of 24 January 2001, Bulletin des Transport et de la Logistique 2001, 192. However, it must be assumed that if the forwarder to whom the damage was reported does not pass these reservations to the carrier, he may be liable before the principal for failure to take actions required to secure the rights of the principal or a person named by them to the carrier (in the Polish law – Article 798 of the Civil Code).

[27] Whether the damage is visible (apparent) or concealed would be determined by all circumstances of a given shipment and in particular the nature of the goods and how they are packaged, see Messent and Glass 1995, 218–19 and views quoted there.

[28] Cf. e.g. Judgment of the Cour d'Appel Toulouseof 12 April 1994, Bulletin des Transport 1994, 714; Cour d'Appel Rouen of 9 February 1993, Bulletin des Transport 1993, 201; Cour d'Appel Aix-en-Provence of 22 Februaru 1979, Bulletin des Transport 1979, 387.

[29] Cf. judgment of the Cour de Cassation of 7 June 1974, European Transport Law 1975, 68–74.

to the fact of the damage (that is, it even fails to specify its type generally), but heralds a more detailed identification of its nature and this identification does take place (e.g. in the form of photos or a protocol), then the presumption of agreement of the conditions of the goods with the content of the consignment note does not take place.[30]

As follows from the laws quoted above (Article 148(1) MC, Article 30(1) CMR, Article 31(1) of the Montreal Convention, Article 2(6) of The Hague-Visby Rules), failure to perform acts of diligence causes the emergence of a legal presumption that upon handing the shipment over to the consignee it was in an appropriate condition (or possibly – in a condition described in the transport document). This presumption may be challenged with contrary evidence. This means that even though the consignee failed to perform acts of diligence, the claim in substantive terms does exist, but in order for it to be effectively pursued, it is necessary to take the practically difficult evidence that rebuts the presumption of the good condition of the shipment upon taking delivery of the goods [Messent and Glass 1995, 218; Clarke 2009, 205; Haak 1986, 191].[31] However, some laws prescribe a more far-reaching measure, that is expiry of claims due from the carrier for damage caused to the carried goods (cf. Article 791(1) of the Civil Code, Article 76 of the Transport Law, Article 47(1) UR CIM, see also Article 31(4) of the Montreal Convention).

The question of demonstrating the time relation in carriage gets complicated in a situation where the damage is concealed (it could not be observed when the shipment was being handed over to the consignee despite he exercised due diligence) and is noted only after the goods are taken delivery of from the carrier. While laws that regulate the carriage contract order that reservations about the condition of the shipment be reported in a strictly defined time in such a situation, such a report, done naturally after taking delivery of the goods, is not evidence for the time relation in carriage discussed here. We cannot rule out that the damage was caused after the goods were handed over to the consignee, especially that on reporting the reservation the goods are often at a different place that the place of delivery.[32] The role of reporting

[30] See judgment of the Oberlandesgericht Hamburg of 27 January 2004, Transportrecht 2004, 215–17. Cf. also judgment of the Tribunal de Commerce d'Anvers of 1 April 1980, European Transport Law 1980, 461–71, in which the court declared correct the consignee's behaviour where he made a note in the consignment note on receipt of the goods saying "unable to check now, will inform you later" and then phoned the carrier to inform him about the essence of the damage. However, the court assessed the entire circumstances of the case and assumed the reservations were reported by the consignee in a correct manner as may be seen in the fact that the carrier started to look for the lost parts of the shipment in his warehouses.

[31] See judgment of the Cour d'Appel de Bruxelles of 7 February 1992, European Transport Law 1994, 286 and the earlier judgment of 21 January 1987, European Transport Law 1987, 745.

[32] Cf. position of the French Cour de Cassation included in its judgment of 22 September 1983, Bulletindes arras de la Cour de Cassation, no. 243, 211–12.

reservations is limited solely to preventing the emergence of presumption of the condition of the goods, in agreement with the description included in the consignment note. It does not prejudge the fact that the damage was caused during the carriage.

Therefore, a question about the distribution of the burden of proof for the circumstance discussed arises. It would seem that the only appropriate response to this question, based on a general rule of the burden of proof, is a conclusion that in the case of concealed damage observed sometime after the goods were taken delivery of from the carrier, the authorised person is responsible for proving that the damage was done in the time between accepting the goods for carriage and their delivery. In fact, this is exactly how it is formulated is some provisions (Article 76(4) of the Transport Law or Article 45(2)(d) UR CIM). Nevertheless, not all acts have such a requirement (which in practice is difficult to satisfy). The CMR is an example here. Therefore, in the context of this convention we may encounter a view that reporting reservations referred to in Article 30(1) CMR within seven days equals to admitting that the damage was done during carriage. The burden of proof that concealed damage was caused during carriage was to rest with the person authorised if such damage was not reported within 7 working days from the date of delivering the goods. In this case we are dealing with an ordinary legal presumption that the condition of the goods corresponds to the description placed in the consignment note.[33]

However, this claim does not take into account the essence of the reservations about the condition of the shipment which, as has already been mentioned, do not rebut the presumption of the condition of the shipment as described in the consignment note, but only create the condition which would prevent such presumption. The lack of a presumption of compliance of the goods with the description in the consignment note does not equate – as least with regard to concealed damage – with a conclusion that the damage existed when the goods were handed over to the consignee. It is particularly visible in a situation where the concealed damage is reported within seven days (not counting Sundays and bank holidays) from the date of delivery but after performing other goods-related actions (e.g. further transport). Taking a specific

[33] The judgment of the French Cour de Cassation of 2 February 1982, European Transport Law 1983, 47 may be an example here, in which the court concluded that reporting reservations within 7 days from handing over goods that had a concealed damage means that it must be assumed that the damage was done during carriage. A similar stance was taken by the French Cour d'Appel de Paris in its judgment of 24 January 2001, Bulletin des Transport et de la Logistique 2001, 192. The court concluded that if the consignee reported a written reservation within seven days and the carrier did not "rebut" them, then it must be assumed that the damage was done during carriage and the carrier is liable for it.

presumption that the damage was caused during the carriage by a carrier to whom reservations were reported is groundless.[34]

However, it is easy to see that if we were to apply the general rule of distribution of the burden of proof in the case discussed, the situation of the authorised person would be the same, regardless of whether the reservation about the condition of the goods was reported in the period prescribed or whether such reservations were not brought forward. In the first and second case this person would have to prove that the damage was caused during carriage. While in the first case the proof would intend to rebut the presumption referred to in Article 30(1) CMR and in the second it would result from general rules of the burden of proof, practical consequences would be the same. This is why we should rather assume that creators of this convention intended to leave this question to the assessment of the court who should be guided by life experience and legal intuition so useful in such situations rather than rigorous application of the principle of the burden of proof. The circumstance of reporting the damage in the time period specified in Article 30(1) CMR should be crucial for the taking of evidence discussed.

3. LEGAL NATURE OF THE TIME RELATION IN CARRIAGE

Thanks to the comments above it is possible to determine the nature itself of the time relation in carriage. This relation which is a prerequisite of carrier liability for the damage to the goods is not causal, which means that it cannot be treated as a cause of the damage. It is never an element that is active in the total circumstances of the damage. What is more, it needs to be assumed that the obligation to repair the damage exists whether or not the fact that the shipment was left at a specified time in the charge of the carrier had an effect on the emergence of the damage [Clarke 2009, 198]. The carrier cannot, therefore, free himself from liability by proving that the damage was not done also if the shipment remained in the possession of another person (consignor or consignee in particular).

The civil law literature calls such a relation a normative relation [Koch 1975, 43–48; Dybowski 1981, 271]. It takes place where the law associates the obligation to repair the damage with a specific incident (circumstance) which is not, or at least does not have to be, in a causal link with the damage. The Polish law provides examples of such circumstances that determine passenger liability (Article 422 of the Civil Code), surety's liability (Article 876 of the Civil Code) or liability of a person running a hotel or similar establishment for the loss of or damage to things brought in by hotel guests (Article

[34] This is pointed to by Putzeys 1981, 658; Haak 1986, 194; Clarke 2009, 200; Messent and Glass 1995, 219.

846 of the Civil Code) [Dybowski 1981, 271; Nesterowicz 2006, 109–110]. While causal links are fully objective in a sense that they are independent of the will of the law-making body and the law-applying body, normative relations depend only on the will of the legislator (on the existence of a legal norm) [Koch 1975, 43–48].

The premise of liability discussed cannot be understood literally in reference to damage that constitutes further material consequences of the total or partial loss of or damage to the goods. Therefore, it is enough for the damage to occur directly in the goods during the carriage. On the other hand, specifying the limits of recompensing further damage that is the consequence of the total or partial loss of or damage to the goods should proceed on the basis of a concept of a causal link adopted in domestic law, relevant to a given contract, not a time relation in carriage.[35] In the transport practice such damage is rarely recompensed due to the limitations of the amount of compensation that feature in transport laws which as a rule cannot exceed a regular value of the goods understood in this way or another. Only attributing a qualified fault to the carrier (intentional fault or gross negligence or so-called unforgivable fault) opens the door to seeking full compensation.[36] However, in such a situation it is necessary to prove the specific cause of the damage that is the carrier's fault. This means that recourse must be made to the concept of the causal link in force in a given legal system, also in reference to the damage to the goods itself which may then be recompensed under the full compensation rule, at the level exceeding the limitations of the amount of compensation applicable to carriage law. The questions of the mutual relation between the time relation in carriage and the causal link deserve a separate discussion.

REFERENCES

Ambrożuk, Dorota. 2011. *Ustalenie wysokości odszkodowania w prawie przewozowym w odniesieniu do przewozu przesyłek.* Warszawa: Wolters Kluwer.

Ambrożuk, Dorota. 2016. "Charakter prawny aktów staranności odbiorcy w krajowym i międzynarodowym przewozie towarów." *Problemy Transportu i Logistyki* 4:195–202.

Ambrożuk, Dorota. 2017. "Legitymacja do dochodzenia roszczeń odszkodowawczych z umowy przewozu towarów w transporcie lądowym." In *Prawo transportowe. Ląd. Morze. Powietrze*, edited by Dominika Wetoszka, 85–96. Warszawa: C.H. Beck.

Basedow, Jurgen. 1997. "Übereinkommen internationaler Straβenverkehr." In *Münchener Kommentar zum Handelsgesetzbuch*, vol. 7, edited by Karoten Schmidt, 855–1274. München: C.H. Beck.

Clarke, Malcolm A. 2009. *International Carriage of Goods by Road*: CMR. London: Informa Law from Routledge.

[35] Similar views in Clarke 2009, 198.

[36] The question is discussed in detail in Ambrożuk 2011, 218–34.

Dybowski, Tomasz. 1981. "Naprawienie szkody." In *System Prawa Cywilnego*. Vol. 3. Part 1: *Prawo zobowiązań – cześć ogólna*, edited Zbigniew Radwański, 163–308. Wrocław: Ossolineum.

Górski, Władysław. 1983. *Umowa przewozu*. Warszawa: Wydawnictwo Prawnicze.

Haak, Krijn F. 1986. *The liability of the carrier under CMR.* The Hague: Stichting Vervoeradres.

Helm, Johann G. 1966. *Haftung für Schoen an Frachtgüter.* Karlsruhe: Verlag C.F. Muller.

Heuer, Klaus. 1975. *Die Haftung des Frachtführers nach dem Übereinkommen über den Beförderungsvertrag im internationalen Strassengüterverkehr (CMR)*. Hamburg: Deutscher Verkerhrs.

Koch, Andrzej. 1975. *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym.* Warszawa: Państwowe Wydawnictwo Naukowe.

Libouton, Jacques. 1987. "Liability of the CMR Carrier in Belgian Case Law (Arts. 17, 18, 19, 20)." In *International Carriage of Goods by Road (CMR)*, edited by Jan Theunis, 79–96. London–New York–Hamburg–Hong Kong: Lloyd's of London Press.

Loewe, Roland. 1976. "Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)." *European Transport Law* 11:311–61.

Messent, Andrew, and David A. Glass. 1995. *CMR: Contracts for the International Carriage of Goods by Road.* London: Informa.

Młynarczyk, Jerzy. 2002. *Prawo morskie*. Gdańsk: Arche.

Nesterowicz, Mirosław. 2006. *Prawo turystyczne*. Warszawa: Wolters Kluwer.

Putzeys, Jacques. 1981. *Le Contrat de Transport Router de Marchandises*. Brussels: Bruylant.

Rodière, Rene. 1971. "The Convention on Road Transport." *European Transport Law* vol. 1–6, 2–593.

Stec, Mirosław. 2005. *Umowa przewozu w transporcie towarowym.* Kraków: Zakamycze.

Szanciło, Tomasz. 2008. *Prawo przewozowe. Komentarz.* Warszawa: C.H. Beck.

Szanciło, Tomasz. 2013. *Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych*. Warszawa: C.H. Beck.

Wesołowski, Krzysztof. 1995. *Odpowiedzialność przewoźnika za szkody przy przewozie przesyłek w świetle ustawy – Prawo przewozowe.* Zielona Góra: Agencja Rozwoju Regionalnego.

Wesołowski, Krzysztof. 2013. *Umowa międzynarodowego przewozu drogowego towarów na podstawie CMR.* Warszawa: Wolters Kluwer.

Wesołowski, Krzysztof. 2021. "Application of provisions of international conventions which contain uniform rules of private law in relations that are outside the scope of application of these conventions." *Teka Komisji Prawniczej PAN Oddział w Lublinie* 14, no. 1:487–99.

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SPA AND LOCAL TOURIST FEES AS A TRIBUTES OF A CONSUMPTION NATURE*

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Abstract. With the date of liquidation of the Polish local government and the reform of the state budget system, financial supply system of parishes is based on completely different assumptions and the principle of legal and organic unity of the system of public revenues. The different types of income which influence the budgets of national councils and their design are determined uniformly for the whole country by the supreme bodies of state power. Under this system, introduced among other taxes collected for the central budget, and so central taxes and taxes levied for local budgets, which are spontaneous taxes terrain. The disputed interpretation issues arise in the subject of adopting the collection of the spa fee and the tourist (called "local") fee, due to similarities in the construction of these fees and the optional nature of recovery. The interpretation problems arise in the matter of principles, way and purposefulness of destination of the spa fee by the resort communes for the realization of their own public tasks.

Keywords: local tax, resort fee, public levies, local levy collector, tax authority, tax obligation

INTRODUCTION

Local taxes and fees assumed their current name in the statutory record in 1985. Earlier they were referred to as taxes and local fees introduced to the legal system in 1951. The taxes and fees were either obligatory (e.g. real estate tax, tax on premises, market tax) or optional (municipal tax – collected in the form of an addition to the tax on premises, tax on the disposal of housing – on premises deemed redundant due to e.g. a small number of residents,

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tax on dog ownership, tax on hunting and fishing, as well as administrative and market fees). A significant change in taxes and area fees was introduced in 1975. The law passed in that year covered with its scope such revenues of the budgets of the basic level national councils as: real estate tax, premises tax, dog ownership tax, market tax, transport means tax, climate tax and administrative fee for official actions not subject to stamp duty. In real estate and premises taxes the structure of these taxes and the rules of calculation have been significantly changed [Wołowiec and Reśko 2011, 5–7].

In the law and economic literature, the term "local government taxes" is used to encompass all tax benefits which are characterised by the fact that they constitute revenue for the municipal budget and may be to a certain extent shaped by the municipal council or the mayor. These include, apart from "local taxes and fees" provided for in the Local Taxes and Fees Act, also agricultural tax, forestry tax, income tax paid in the form of tax card, inheritance and donation tax, tax on civil law transactions and stamp duty. At the same time, the "local tax system" may include mining fee, adiacenckie fees, planning rents (fees), etc. This is a quasi-tax system, as it does not meet the basic criteria of a tax system. Nowadays, any tax system should take into account a number of tax principles, which have an economic and legal dimension. Due to the dependence of tax systems on specific socio-economic conditions and the lack of a universal system, tax principles have a historical character [Golba 2020].

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 law and economic practice is to determine how to evaluate the current construction of tourist local fees from the perspective of fiscal efficiency and the role in the system of local taxes and fees. The main objective of the article is to analyze the legal regulations that normalize the principles of collection and payment of tourism fees and their importance in the revenues of spa municipalities. Induction was used as the main research method. It consists in drawing general conclusions or establishing regularities on the basis of analysis of empirically stated 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 reports and scientific documents used in social research.

2. SPA FEE, ITS ROLE AND IMPORTANCE FOR SPA GOVERNMENT UNITS

The separate constitutional position of the health resort commune in relation to other communes is determined primarily by the specific nature of the public tasks that such a commune performs and by certain distinctness in the financing of public tasks. This applies in particular to the financing of the tasks assigned to the health resort commune by the Health Resorts Act and its entitlement to an increased participation in the State Budget revenues via the health resort subsidy. Also granting to the resort district, pursuant to Article 48 of the Act of 28 July 2005 on Health Resort Medical Care, Health Resorts and Areas of Health Resort Protection and on Health Resort Municipalities[1] the entitled to charge a spa fee for the realization of own tasks related to maintaining the health resort's therapeutic functions is a solution that deserves attention in the context of filling the financial gap that is related to performing additional tasks by the municipality [Wołowiec and Duszyński 2003, 317–20; Wołowiec 2003a, 57–59; Golba 2001]. It should be emphasized, however, that a similar right is vested in the local government units that have tourist attractions with respect to the tourist (local) fee, which, however, does not play such a role as the health resort fee because it is not earmarked for financing additional tasks. Health resort units, despite many years of efforts, have not seen such solutions in the Health Resort Act that would create for them separate financial regulations designated for execution of additional tasks, despite the fact that such solutions were already known in the past. One can mention here, for example, the solutions contained in the Act on health resorts of 1922, or entitlements to additional revenues ascribed to mining government units in the Act of 26 November 1998 on the adjustment of hard coal mining to functioning in market economy conditions and special rights and tasks of mining government units.[2]

Currently in Europe, tourist destinations very often use their powers in relation to collecting local tax, which is based on tourist or spa values, and sometimes even environmental values. This tax functions under different names and is collected for different reasons. For example, Swiss, Germans, Austrians in health resorts collect so called "kurtax" or tourist tax

[1] Journal of Laws of 2021, item 1301.
[2] Journal of Laws No. 162, item 1112 as amended.

having names: *Ortstaxe*, *Gästetaxe*, *Aufenthaltsabgabe*, *Beherbergungstaxe*, *Nächtigungtaxe*, *Kurabgabe* or *Kurbeitrag* [Hammerl 2012].

The French have a so-called residence tax called *taxe de sejour*, the Italians collect a tax called *tassa di soggiorno*, Russia collects a tax under the name *курортный сбор* [Golba 2020, 130–32], Spain collects a tourist tax under the name *habitatge d'us turistic*, and other countries – Hungary, Slovakia, the Czech Republic, Portugal – collect either a local fee or a tourist tax. There are also other names for this tax, such as hotel tax, room tax, "sun tax" (Balearic Islands), "sun tax" (Balearic Islands), "barbecue tax" (Belgium), service tax (Belgium). (Belgium), service tax (India), tax on hotels and guesthouses popularly known as plaster tax (Austria), or restaurant tax. These taxes are imposed either on natural persons or legal entities conducting tourist activities, and the revenues are usually earmarked for public tasks related to tourist services.

The tasks paid for by tourism taxes include maintenance of parks, public greenery, promenades, beaches, graduation towers, recreational areas, fountains, free recreational and sports facilities, gazebos, ponds, historic buildings, and many others. The funds obtained from tourism taxes are also used for organization of free concerts, sports and recreational events, maintenance of orchestras or music bands giving free concerts or shows. Most often the amount of the fee depends on the standard of the hotel facility, and less often it is determined on the basis of other attributes. In many places in Europe, proof of payment of a tax or tourist fee entitles one to free services or even discounts on purchases [Wołowiec 2002, 63–67; Idem 2014, 213–20]. In Poland, a tourist tax does not formally exist, which does not mean that some types of taxes or fees do not have such a character. It should be noted that the colloquial definition of some local taxes (e.g., climate fee, air tax, breathing tax) causes the idea of introduction and essence of such tax to be completely lost. The institution of a resort fee has been known in Poland and in European spas for a long time [Cienkowski and Wołowiec 2015]. For example, in Baden-Baden such a tax has been in force since 1507. In Austria, in the Bad Ischl spa it was introduced in 1842. In France, the tax was first introduced in 1910. The prototype of the health resort fee (spa fee) collected in Polish health resorts was a health resort tax established on the basis of the so-called Galician Health Resorts Act of 4 November 1891.[3] As the sources indicate, such a fee was collected primarily for the purposes of maintaining the health resort [Lewy 2019]. The solutions of the Galician Spa Act were used in the construction of the 1922 Spa Act, where, by the provisions of Article 40 of the Act, a so-called curage fund was introduced in public spas, which consisted, among other things, of curage tax and other fees established by the Spa Commission. The right to temporarily establish a health resort fund and charge fees was later extended

[3] See: *Dziennik Ustaw i Rozporządzeń Krajowych dla Królestwa Galicyi i Lodomeryi oraz w Wielkim Księstwie Krakowskim*, No. 17.

to health resorts that had conditions for obtaining the status of a public utility health resort and "accepted summer visitors for treatment and recreation."

The fee was spent on the maintenance of the spa's public facilities such as: pump rooms, parks, promenades, health paths, fountains, park gazebos, park ponds, lighting. These funds were also used to pay for: the spa orchestra, sport and recreation events, public games, unticketed artistic performances, etc. In 1951, the Act of 26 February 1951 on Territorial Taxes[4] came into force. This tax act not only did not change the legal basis for the collection of the spa tax, but omitted this fee from the specified types of taxes and local fees. At that time, it was considered that the right to collect it functioned on the basis of the Spa Act of 1922, and the municipal councils were authorized to adopt its amount and rules of collection. However, already in 1955 this act was repealed by the decree of 20 May 1955 on certain taxes and area fees,[5] which introduced new nomenclature in respect of the local tax collected in the health resorts. In Article 1(1) of the decree, among other taxes and fees collected for the budgets of the local councils, the spa fee was mentioned, establishing in Article 1(3) the right to collect it only in the health resorts. Article 33 of the decree specified the fiscal purpose of collecting the spa fee. This provision specified that the resort fee was to be collected for purposes related to the needs of the health resorts in terms of "extra-mural investments and their ongoing maintenance." Article 33 of the decree specified that current maintenance was to be understood in particular as financial outlays for health facilities, raising the sanitary condition of the health resorts, flowerbed and greenery facilities, as well as for cultural and educational purposes. This was an open catalog of tasks, since the use of the phrase "in particular" opened the possibility for the communes to spend these funds also for other spa purposes. In Article 34 of the decree it was specified that health resort fee payers would be persons coming to the health resort for rest and recreation purposes and persons providing goods or services in the health resort who are obliged to pay turnover tax, pursuant to the regulations on the unsocialised economy.

The power to set the amount of the health resort fee was granted, pursuant to Article 36 of the decree, to the competent national council. However, the council could not set higher rates than the upper limits specified in Article 35 of the decree. The upper rates of the health resort fee were differentiated with respect to employees' holiday-makers, students and children up to the age of 14. The spa fee rates for persons who paid income or turnover tax and who provided services or trade, in accordance with Article 35(1)(2) of the decree, were set at 5–10% of the set flat amount of income and turnover tax, and for persons not paying income tax the fee rate was set at 10–20% of turnover tax. By virtue of the act of 21 December 1962 on amending the decree on certain

[4] Journal of Laws No.14, item 110.
[5] Journal of Laws No. 13, item 87.

taxes and area fees[6] the provisions of the decree were amended extending the right to charge the health resort fee to climatic stations, thermal springs and sea bathing establishments. The health resort fee was also mentioned in Article 13 of the Act, in the context of the tasks that could be realised in health resorts from this fee. The provision of Article 13 specified that revenues from the resort fee were to be used for shaping environmental factors having a favourable impact on the results of preventive and curative services, and in particular for ensuring order, hygiene, aesthetics and other conditions necessary for satisfying cultural needs. In the provisions of the Spa Act of 17 June 1966,[7] however, a new solution was introduced in Article 13(2), which created the possibility for the health resort fee to cover health resort treatment facilities and other institutions that carry out holiday or tourist activities in the health resort. This power was given to the Council of Ministers, which could decide to introduce a fee for establishments and institutions in consultation with the Central Council of Trade Unions. In practice, such a fee was never established. The 1955 decree was repealed by the Act of 19 December 1975 on Certain Taxes and Territorial Fees.[8] This act fundamentally changed the legal construction of the resort fee with respect to its name, purpose of stay, localities entitled to charge the fee, statutory exemptions from the fee, the manner of determining localities in which the fee is charged, and the powers of the basic level national councils in shaping the amount of the fee and introducing exemptions from the fee. By the provision of Article 30 the legislator changed the name of the resort fee to the climatic fee. According to Article 26 of the Act, the right to charge a climate fee was given to the towns recognized as health resorts and other towns "with particularly favourable climatic and landscape properties and environmental conditions conducive to permanent and seasonal tourist traffic." The act did not specify, however, what was meant by particularly beneficial climate or landscape properties and environmental conditions. However, the use of the term "climate fee" in the law for many years associated this concept with the obligation of the resort collecting the fee to have a therapeutic climate. The colloquial understanding of the term "curative" climate was very broad and had nothing to do with the actual properties of the climate. The rationale for paying the climate fee was defined by the law in Article 26 as a leisure and health purpose, instead of the previous leisure and resort purpose [Czarnecki 2017a]. For the first time in history, under Article 26(2), persons staying in spa hospitals and other hospital-type establishments were statutorily exempted from the climate fee [Wołowiec 2013, 20–25; Idem 2016a, 64–73]. Legal solutions relating to the climate fee

[6] Journal of Laws No. 66, item 326.
[7] Journal of Laws No. 23, item 150.
[8] Journal of Laws No. 45, item 229.

survived until 1985, when the existing law was repealed by the provisions of the Local Taxes and Fees Act of 14 March 1985.[9]

The new legal regulation on local taxes and fees changed the name of the climate fee, defining it in Article 15 as a local fee. In relation to the previous regulation on the local climate fee, in Article 15 of the Act, in relation to the places authorized to charge a local fee, the word "spa" no longer appears, but the place having favorable climatic characteristics, landscape values and conditions for stay for recreation, health or tourism purposes. Another amendment to the provisions of the Local Taxes and Fees Act occurred as a result of the enactment of the new Act of 12 January 1991 on Local Taxes and Fees.[10] Among the local fees, Article 17 of the Local Taxes and Fees Act mentions the local fee, specifying that it is levied on individuals temporarily staying for recreational, health or tourist purposes in localities with favourable climatic properties, landscape values and conditions enabling people to stay for these purposes [Wołowiec 2015, 120–26].

3. FISCAL IMPORTANCE OF THE TOURISM (LOCAL) AND SPA FEE

Revenues of municipal budgets from the resort and local fees reach the value of PLN 85 million (data from 2019) annually.[11] Theoretically, these amounts are small in relation to the total budget revenues of municipalities (or related to total tax revenues), but it is a source of municipal revenues characterized by very strong growth dynamics. In the past 17 years these revenues have increased about fivefold, and only in the last decade – twice. It should also be remembered that they are collected in a relatively small group of municipalities, so a low total amount of revenues does not exclude a high significance for the budget of individual units. The local and spa fees, despite the fact that they constitute a very small percentage of the total revenue of local government budgets, sometimes arouse controversy. They are collected in localities with the status of a health resort or – in the case of the local fee – entered in the relevant list. In recent years there have been loud protests against collecting the fee in localities characterized by exceeding air pollution standards. Evidently, these disputes reflect a clash between two ways of thinking about the meaning of these fees. In one (resulting from the wording of the regulations in force in Poland), the fee is connected with some exceptional qualities of the place where the visitor stays in the municipality. But it is also possible to adopt a different approach, found in similar solutions used in systems of financing local governments of many other European countries.

[9] Journal of Laws No. 12, item 50.
[10] Journal of Laws of 2019, item 1170 as amended.
[11] Own elaboration.

In this case we are talking about a kind of tourist tax, collected, among others, because the visitors generate not only potential developmental impulses for the commune, but also real costs connected with municipal services provided in tourist destinations (waste management, street maintenance etc.). "Tourist tax" is therefore a form of fee involving additional costs borne by the local government With this reasoning, limiting the possibility of collecting the fee to only certain localities (and in particular linking it to the state of environmental protection) is not justified [Etel 2011a, 5–19; Idem 2011b, 5–18]. It seems that the following direction of transformation of the fee would be desirable: its introduction would be possible (although not obligatory, there is no reason to limit the autonomy of local authorities in this respect) in every municipality, and not only in the localities included in a special list. The opponents of such reasoning point out that the tourists or patients coming to the commune have anyway a positive influence on the development of local economy, and this translates indirectly into the increase of budget revenues. This is not necessarily a convincing argument [Swianiewicz and Łukomska 2018, 3–5]. The total revenues of spa municipalities in 2020 amounted to PLN 11.2 billion and were nominally higher by about 9% compared to 2019. The total amount of own revenues of spa gin amounted to about PLN 6.3 billion and were nominally higher than in 2019 by 2.7%. In 2020 compared to 2019, revenue from both fees was more than 35% lower.[12]

In total, these fees are collected in only 233 municipalities (less than 10 percent, see also the table). As regards per capita income, the coastal gminas are the leaders – Rewal (PLN 774) and Mielno (PLN 678). Among the 10 gminas with income exceeding PLN 300 per capita, six are coastal gminas, three are mountain gminas (all in the Sudety Mountains – Karpacz, Świeradów–Zdrój and Szklarska Poręba) and one health resort (Ciechocinek) located outside these two areas. It is interesting that much lower income is recorded by the Carpathian communes: Zakopane (just over PLN 150 per capita), Krynica–Zdrój (over PLN 250) and Solina (PLN 195). The table comparing the revenue from local and spa fees to the total own revenue is slightly different. The leader here is Ciechocinek (15% of own income). Iwonicz–Zdrój (11 percent) and Kołobrzeg, Karpacz and Horyniec–Zdrój follow with slightly more than 10 percent. In only 22 gminas, these revenues account for more than 5 percent of own income. Thus, both fees discussed here are significant for the budgets of local governments in a very narrow group of municipalities, even though the list of places for which tourism is the dominant branch of the economy is much longer. It seems that there are potential reserves here, which could be used to the benefit of satisfying the needs of local communities.

[12] Own elaboration.

4. THE STRUCTURE OF THE TOURISTIC (LOCAL) AND SPA FEES

From the point of view of the tax system, the local and health resort fees are the municipalities' own revenue. There is an interesting principle of indicating the entities authorized to charge fees – it is a list drawn up by a provincial governor in agreement with the minister of the environment. In the systematics of taxes and public fees the place of the mentioned fees is also exceptional. The very structure refers to the lump-sum tax on natural persons of a consumption nature, collected from personal income at the stage of its spending. The manner of collection indicates the indirect nature of such a levy and a certain similarity with the group of so-called tourist taxes, especially "hotel," "restaurant," "room," etc. Finally, referring directly to the provisions of the Act on local taxes and fees, the local fee can be seen as – in a sense – a concession fee imposed for the use of natural resources (treated as a special case of fees for granting rights). In principle, the introduction of this type of fees must be supported by important substantive reasons other than purely fiscal, e.g. protection of limited, partly non-renewable water and forest resources, etc. [Krupa and Wołowiec 2010, 7–35; Czarnecki 2017d, 118–20].

In the classical approach, a public charge should be considered a monetary benefit collected by a public-law entity for the benefit of the budget economy in connection with its mutual benefit (counter benefit). The public charge is a payable and individual benefit, which means that the entity paying the charge may claim a reciprocal state benefit in its favour [Gliniecka 2007, 12–13]. The fee is equivalent in nature, i.e. the consideration received by the fee payer is worth as much as the fee. If the benefit and the fee are not equivalent in this way, the fee becomes a tax. Therefore a fee, unlike a tax which is a gratuitous benefit, gives the right, or entitles to a certain benefit to its payer. In the case of the spa fee there is no place for mutual benefit. Despite the misleading name, the health resort fee is in fact a tax, because it meets all the criteria to be classified as a local tax in the nature of a public levy, the establishment, calculation and collection of which is the responsibility of the local authorities [Wołowiec 2007, 75–84; Wołowiec and Kaganek 2007, 109–20].

By virtue of the Act on health resorts, health resorts and health resort protection areas as well as health resort districts and the Act of 29 July 2005 on the amendment of certain acts in connection with changes in the division of tasks and competencies of territorial administration,[13] changes were introduced in the construction of fees charged in the resorts with favourable climatic, health and landscape conditions. Since the beginning of 2006 the local fee has been collected from natural persons staying for more than twenty-four hours for rest, training or tourist purposes, for each day of their stay in the

[13] Journal of Laws No. 175, item 1462.

resorts with beneficial climatic conditions, landscape values and conditions suitable for such purposes, as well as in the resorts located in the areas which have been granted the status of health resort protection areas under the terms defined in the Act on Health Resort Medical Care, Health Resorts and Health Resort Areas and on Health Resort Municipalities. As of 1 January 2006, as a result of the amendment to Article 17(1) of the Act, "health-care purposes" were deleted as the purpose of the stay of natural persons in the resorts entitled to charge the local fee. This narrows the circle of entities obliged to pay the fee. If a person stays in a given town for more than 24 hours only for health reasons, there are no grounds for charging a local fee.

In the resorts with favourable climatic conditions, landscape values and conditions enabling natural persons to stay for recreation, training or tourism purposes, in order to charge a local fee, the minimum conditions set out in the Regulation of the Council of Ministers of 18 December 2007[14] issued pursuant to Article 17(3) and (4) of the Act on Health Resorts and Health Resort Communities should be met. A gmina council wishing to introduce a local charge must refer the conditions laid down in the Regulation of the Council of Ministers to the specific towns in its area to determine where the local charge may be collected. Then, the municipal council, by way of a resolution, should establish a list of localities where these conditions are met [Dudar 2017; Etel, Presnarowicz, and Dudar 2008].

It should be noted that the above mentioned Ordinance came into force on 15 January 2008, and therefore the minimum conditions that the local fees must meet in order for a locality to be permitted to charge a locality fee may only apply to the resolutions on the locality fee adopted by the municipal councils after 15 January 2008. Pursuant to the Regulation of the Council of Ministers, in order to charge a local fee, a specific place must meet minimum climatic and landscape conditions and have accommodation facilities that enable natural persons to stay there for recreational, training or tourist purposes. The Ordinance indicates that the minimum climatic conditions for a place situated in the area of the zone referred to in the Act of 27 April 2001, the Environmental Protection Law (Article 87(2)),[15] in an agglomeration with a population exceeding 250,000 or in the area of one or more poviats of the same voivodeship which are not part of the agglomeration, are met if the permissible levels of certain substances in the air due to human health protection, as specified in environmental protection regulations, are maintained in the area, while for the remaining locations – if the permissible levels of electromagnetic fields, as specified in environmental protection regulations, are not exceeded. The regulation defines the minimum landscape conditions as the presence of one of the elements of the natural environment that are important

[14] Journal of Laws No. 249, item 1851.
[15] Journal of Laws No. 25, item 150.

for recreation (forests and farmland, if they cover more than 80% of the municipality, waters – sea, inland or in bathing areas, or varied relief – uplands or mountains) or one of the sightseeing qualities (e.g. peculiarities of the fauna and flora, the environment, the landscape, the landscape and the countryside). In towns and villages that meet the above criteria, the area can be defined as a place of recreational activity (e.g. peculiarities of fauna and flora, rocks, gorges, waterfalls, caves, national parks, zoological gardens, museums or even cultural events). In towns that meet the above conditions, which additionally have accommodation in hotels and other facilities where hotel services can be provided within the meaning of the provisions on tourist services, it is possible to charge a local tax [Wołowiec 2003a, 56–63; Idem 2003b, 5–29].

The spa fee may also be collected in the localities located in the areas which have been granted the status of the health resort protection area. Such status may be granted to an area that jointly meets the conditions set out in Article 34(1)(1, 2, 4 and 5) of the Act on health resort treatment, health resorts and health resort protection areas and on health resort communes. These conditions are, among others: possession of deposits of natural therapeutic raw materials with confirmed therapeutic properties, possession of a climate with therapeutic properties, possession of technical infrastructure in the field of water and sewage management, energy, in the field of collective transport, and fulfillment of certain requirements in relation to the environment specified in environmental protection regulations [Czarnecki 2017c].

A resort fee is collected from individuals staying for more than 24 hours for health, tourism, recreation or training purposes in resorts located in areas that have been granted the status of a resort, for each day of stay in such resorts. The rules for granting the status of a health resort to specific localities are regulated in the aforementioned Act on Health Resort Medical Care, Health Resorts and Health Resort Areas and Health Resort Units. A health resort is an area where health resort treatment is provided, which has been granted the status of a health resort in order to utilize and protect the natural curative resources located in its area. Such an area should have deposits of natural curative raw materials and a climate with confirmed curative properties, appropriate establishments and equipment for curative treatment, meet the requirements set out in environmental protection regulations and have technical infrastructure in the area of water and sewage management, energy management, in the area of mass transport, as well as waste management. The difference between the area recognized as a health resort (right to collect the spa fee) and the area of health resort protection (right to collect the touristic – local – fee) is the presence in the former of health resort treatment facilities and equipment [Wołowiec 2005, 165–91].

5. EXEMPTION FROM TOURISTIC (LOCAL) AND SPA FEES

The procedure for the municipality to obtain the status of a health resort is long and complicated. In order to obtain the status of a health resort for a particular area, the municipality must obtain a certificate confirming the curative properties of natural curative raw materials and the curative properties of the climate. The condition for obtaining such a certificate is that such an entity conducts scientific research on the medicinal raw materials and climate in the area of a specific municipality, which entails financial costs as well as a considerable amount of time. After obtaining the certificate, the Minister of Health applies to the Council of Ministers for granting a given area the status of a health resort. Then, by way of a regulation, the Council of Ministers grants the status of a health resort to an area, defining its name, area, borders and directions for treatment and possible contraindications to treatment in a given health resort. Moreover, the commune that intends to apply for the status of a particular area as a health resort is obliged to prepare a health resort operation and to send it to the Minister of Health in order to confirm the fulfilment of conditions that are necessary to grant the status of a health resort to a particular area. On the basis of the submitted health certificate the Minister of Health issues a decision confirming the possibility of carrying out health resort treatment in a defined area. Such decision is the basis for the adoption of the health resort statute by the commune council, defining the rules of its operation. It follows from the above regulations that obtaining the status of a health resort by the commune in the current legal state is not only time-consuming but also costly. Since 1 January 2006 health resorts have been the areas recognised as such only on the basis of the previous regulations and therefore only in the "old" health resorts it is possible, in the nearest future, to collect the health resort fee as only these areas meet the conditions to be recognised as health resorts within the meaning of the new law [Wołowiec 2004, 55–62].

The local and spa fees are not charged to the members of diplomatic representations, consular offices and other persons equal to them under the acts, agreements or international customs. The condition to apply the exemption with regard to the above mentioned persons is the principle of reciprocity allowing the members of Polish diplomatic representations and consular offices to benefit from analogous exemptions from similar fees outside Poland. Pursuant to this provision, the exemption is not applicable if the persons mentioned herein are Polish citizens and have their permanent residence in the territory of the Republic of Poland. The presented fees are also not charged to persons staying in hospitals. The local and health resort fees are not collected from blind persons and their guides. It should be assumed that every blind person is a disabled person and therefore should have an appropriate certificate

of disability or degree of disability. Legitimations documenting disability and the degree of disability are issued by competent heads of counties (para. 35 of the Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on disability identification and the degree of disability[16]).

Also the touristic (local) and spa fee payers are exempt from the local and spa fee in respect of the ownership of holiday homes located in towns where the toiristic (local) or spa (health resort) fee is collected. The legislator assumed that since certain persons pay property tax on holiday homes located in towns where the touristic and spa fee is collected, it is unreasonable to tax those persons again with additional fees. The municipality from the property tax on holiday houses gains much higher income than it would get from the local or spa tax from the owners of such buildings. The touristic and spa fees are not charged to organized groups of children and school children. It should be assumed that the above exemption will be enjoyed first and foremost by students of elementary school, junior high schools and high schools. The notion of schoolchildren certainly does not include students and students of higher education. It should be remembered that persons from whom the spa (resort) fee is collected are not charged a touristic (local) fee. Thus, the legislator indicated that in the case of overlapping the scope of subject matter of the resolutions on the spa (health resort) fee and the touristic (local) fee, the spa fee has priority – probably due to the amount of the rate. There is no doubt that the area being a health resort has at the same time favourable climatic properties, landscape values and conditions that enable the stay of persons for this purpose. However, an individual cannot be charged both fees at the same time, the resort fee will always take precedence [Czarnecki 2017b].

6. THE LOCAL AND SPA FEE AS AN EMANATION OF THE GUARANTEE OF FINANCIAL INDEPENDENCE OF THE MUNICIPALITY AND THE PRINCIPLE OF ADEQUACY IN ARTICLE 9 OF THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT

Establishing the constitutive features of the European standards securing financial independence of the commune is possible only through interpretation of the provisions arising mainly from Article 9 of the Act of the European Charter of Local Self-Government,[17] which was devoted to financial resources of local communities. As far as the issues of local finance are concerned, the ECST essentially contains eight principles formulated in the above-mentioned Article 9. They form the legal framework for the national financial legislation.

[16] Journal of Laws No. 139, item 1328.
[17] Journal of Laws No. 124, item 607 [hereinafter: ECST].

These principles emphasize the independence of local self-government, which is expressed in the right to possess the necessary financial means, adjusted to statutory tasks and competences, the use of which should be decided by local communities themselves. The system of local finance should be sufficiently flexible and diversified so that it can be adapted to the tasks and costs. The first of these principles states that local communities have the right, within the framework of national economic policy, to have their own sufficient financial resources that they can freely dispose of in the exercise of their powers [Miemiec 2005, 62–63]. Municipalities should therefore be equipped with their own financial resources. Own income best suits the nature of the local government unit. This is because the essential feature of local government is its independence which, according to the provisions of the ECST, consists in giving local communities full freedom of action in any matter that has not been excluded from their competence. The basic feature of the sources of own revenues is the freedom to dispose of the funds flowing from them. Own revenues should therefore include revenues from taxes and fees, the amount of which is set by local communities within the scope defined by law. It should be stressed that own financial resources are not only the issue of own income. Undoubtedly, it is also about financial resources which are to guarantee the implementation of expenditures made by municipalities. Thus, it follows from this first principle that municipalities have a claim to be endowed with their own financial resources, which constitute both their revenues and their expenditures. Secondly, these own financial resources of the local community must be sufficient. Again, the criteria for determining the ceiling of "adequate, sufficient" endowment of a municipality are not specified. It should only be presumed that each state should be able to measure and establish both the revenue power of a municipality, measured by its revenues obtained from specific sources, and the amount of its financial needs by establishing criteria which would make it possible to calculate the costs of tasks performed by municipalities. It appears that the basic criterion that should be taken into account is (similarly as in the case of the aforementioned provisions of the Constitution) the scope of tasks performed by the local government. It may therefore be assumed that the financial resources that local communities should possess should be sufficient to finance all their tasks. It is therefore reasonable to formulate, on the basis of this rule, a claim to be provided with financial resources enabling the execution of tasks. Third, local communities may freely dispose of these resources in the exercise of their powers. However, the freedom to dispose of resources is not absolute. It is clearly limited by the law, which defines the scope of powers. Therefore, it should be assumed that the free (independent) disposal of financial resources will always be determined by law, in all aspects of this independence, i.e. with respect to revenues, expenditures, as well as budget management.

The ECST recognises the aforementioned principles as the basic European standard with regard to local government, stating that the amount of financial resources of local communities should be adapted to the scope of powers granted to them by the Constitution or by law. The Charter's statements on the need for local governments to have sufficient financial resources and for them to be sufficiently diversified and flexible (Article 9(1–3) ECST) develop and detail the principle of the adequacy of resources to the tasks. This principle is formulated in Article 167 of the Constitution with reference to territorial self-government units that are endowed with competences serving the execution of tasks assigned to them by law (particularly, sections 1 and 4, as well as in Article 15(1–2), and Article 16(2). It also follows from the aforementioned legal acts that the financial system, on which the budgetary resources of local government units are based, should be sufficiently diversified and flexible, i.e. adjusted to changes in the level of costs of performed public tasks (Article 9(4) ECST) and ensuring revenues adequate to the delegated public tasks (Article 9(2) ECST and Article 167(1) and (4) of the Constitution). The principle of adequacy, as set out by the regulations contained in the European Charter of Local Self-Government and the Constitution, is interpreted as the necessity to dispose of such resources as will suffice to perform the tasks of the municipality [Miemiec 2005, 65].

7. THE PROBLEM OF LIABILITY OF SPA AND TOURISTIC FEE'S COLLECTORS

The role of a tax collector is to facilitate taxpayers in meeting their tax obligations. The applicable tax laws provide for the possibility to use a tax collector to collect taxes constituting the revenue of local government units, but the decision on the ordering of tax collection by a collection agency, the specification of collectors and the amount of remuneration for the collection agency are entrusted to municipal councils by way of acts of local law (resolutions). The entities on which the municipal councils impose the obligation to collect the tax by way of collection are obliged to perform this obligation. Significantly, establishing collection of the spa fee by way of a collection agency is the Municipal Council's right, resulting directly from Article 19(2) of the Act on Health Resorts and Health Resort Communities. The order of collection facilitates the collection of the spa fee but does not exclude the right of the taxpayer to pay the fee in another manner provided for in the Act of 29 August 1997, the Tax Ordinance Act,[18] i.e. in cash or in a non-cash form [Dowgier, Pietrasz, Popławski, et al. 2017]. It should be emphasized that failure to pay the locality fee into the hands of the collector does not cause any

[18] Journal of Laws of 2020, item 1325.

negative consequences for the person obliged to pay it. A person obliged to pay the resort fee may refuse to pay it to the collector, who should notify the local government tax authority about this fact, which may initiate tax proceedings against such a person. It should be remembered that the rights of a given person in respect of the obligation to pay the resort fee and the determination of the amount of the fee are protected by the provisions of the Polish Public Procurement Law and the Act on Public Procurement.[19] The taxpayer has the right to question the obligation to pay the resort fee with respect to the grounds for being subject to that obligation as well as the amount of the fee. Her rights are in this case protected by ensuring her participation in the tax proceedings in the scope of this fee before the tax authority, as well as the possibility to appeal against the decision determining this fee.

It follows from the definition of a "debt collector" that it is the provisions of the tax law that determine whether a given natural person, legal person or organisational unit without legal personality will have the status of a "debt collector" and therefore whether it performs the duties of a debt collector, whereby the provisions will indicate (define) the duties imposed on the debt collector.[20] Thus, the tax collector is not liable for the taxpayer's obligation, and his liability is limited exclusively to liability for his own actions or omissions, which arise from the provisions of the law. On the other hand, a debt collector's failure to fulfill its obligation does not abrogate the taxpayer's tax obligation. If, despite the liability of the tax collector, the tax liability of the taxpayer is settled by the taxpayer, the tax liability is extinguished. In such a case, the tax creditor will not be able to legally claim payment of the same benefit from the collector.

In practice, the tax authorities of the spa municipalities have difficulties with enforcing their obligation to collect the spa fee from the collectors. This problem results from the fact that the collectors are not liable for not collecting the fee. In view of the above, many collectors deliberately and consciously fail to collect the fee due to the municipality. In addition, it should be noted that the collectors of the spa fee are not obliged to keep a register of registrations of people using accommodation services, which would significantly both improve the organization of work for tax authorities in terms of carrying out verification and control activities on the correctness of the collection of fees, as well as provide an extensive source of statistical information on the number of tourists coming to the resorts, which could be included in the promotional material of the area [Wołowiec 2016b, 24–27].

[19] Judgment of the Provincial Administrative Court in Szczecin of 12 April 2018, ref. no. I SA/Sz 129/18, Legalis no. 1754928.

[20] Judgment of the Provincial Administrative Court in Szczecin of 18 October 2017, ref. no. I SA/Sz 754/17, Legalis no. 1691175.

The provisions of the Tax Ordinance do not impose on a tax collector the obligation to calculate the amount of tax. Moreover, a tax collector, unlike a payer, has no economic control over the taxable payment and therefore cannot reduce the payment by the amount of the tax collected. As a consequence, the tax collector is not liable for failure to collect the tax. However, if the tax is collected by a tax collector and not paid to the account of the appropriate tax authority, the tax collector is liable under Article 30(2) and Article 30(4) of the Income Tax Code. The tax collector is also liable under Article 77 of the Act of 10 September 1999, the Fiscal Penal Code[21] for failure to pay the collected tax to the tax authority by the due date. So can the liability of the tax collector for the uncollected fee be extended? This seems troublesome, because such an extension of the debt collector's liability would lead to equating his liability with the liability that under Article 30(1) of the Tax Ordinance, the payer bears. Thus, the scopes of responsibility of the debt collector and the remitter should not overlap. Application of the "withholding" tax collection technique to the payer enables him to fulfill his duties in reality. The payer has the ability to collect tax regardless of the will of the taxpayer. The tax collector has no such power. The duty to collect tax can be fulfilled by the tax collector only if the taxpayer wants to pay the tax. It would therefore be unreasonable to hold a tax collector liable for uncollected taxes. On the other hand, possible difficulties in enforcing the obligation to collect local fees from the collectors could be solved by proper organization of collection in the municipality (selection of appropriate entities as collectors, determination of appropriate remuneration for collection) [Idem 2018, 25–29].

In spa municipalities, the failure of collectors to fulfill their collection obligation is a major problem, especially with regard to the spa fee. The collectors of the fee are most often the owners of guesthouses, holiday homes, hotels, hostels, etc., who are understandably unwilling to collect them from their guests. The only solution to the inactivity of the collectors is to deprive them of this function by amending the resolution of the council and appointing new collectors. In some cases, civil law contracts are also effective, concerning the performance of additional duties not directly related to tax collection (keeping records, settling payment receipts, etc., providing information on the amounts collected), where contractual penalties are provided for failure to perform these activities. These agreements may not relate to the collector's statutory duties, i.e. collecting and paying taxes.

[21] Journal of Laws of 2021, item 408.

CONCLUSIONS

In view of the fact that the health resort commune performs the tasks related to the functioning of the health resort (as a commune) and its entire infrastructure on general principles from its own revenues, but it is also entitled to collect for their realization a health resort fee and to receive a health resort subsidy in the amount equal to the revenues from the health resort fee collected in the spa in the year preceding the base year, within the meaning of the Act on revenues of territorial self-government units.[22] In accordance with the general directive resulting from the principle of distribution of public resources in accordance with the tasks, the legislator, imposing on the health resort communes the indicated tasks, also assigned to them an additional source of their own income in the form of the health resort fee [Niezgoda 2012]. Undoubtedly, revenue from the spa fee would not be sufficient to perform all the tasks listed in Article 46 of the Spa Act, but also the revenue from the fee does not have to be used exclusively for the implementation of the tasks set out in this provision, because the spa fee is indisputably the commune's own income, which may be spent on any (arbitrary) purpose [Wołowiec 2002, 89–106].

The introduction of the health resort fee was connected with the entry into force of the Act of 28 July 2005 on health resort treatment, health resorts and health resort protection areas and on health resort communes. As it resulted from the justification of the bill, the purpose of the amendment was to ensure that the communes in the area of which health resorts would be located would receive income balancing the costs connected with obtaining by the commune the confirmation of the health resort properties. Additionally, the construction of the local fee was modified in such a way that its amount was diversified, allowing for application of a higher fee rate in the localities located in the areas which were granted the status of health resort protection areas under the principles specified in the act. Moreover, it should be stressed that in case of the local charge there was a situation, incomprehensible from the legislative point of view, where the provisions regulating this benefit were amended by two different legal acts and on two different dates. Part of the amendments to the Act on Local Taxes and Fees was introduced by the Act of 28 July 2005 on health resort treatment, health resorts and health resort protection areas and health resort districts, which entered into force on 2 October 2005, and part by the Act of 29 July 2005 on amendments to certain acts in connection with changes in the division of tasks and competences of territorial administration [Etel and Dowgier 2013, 63–70].

[22] Journal of Laws No. 203, item 1996.

REFERENCES

Cienkowski, Mirosław, and Tomasz Wołowiec. 2015. *Opłata uzdrowiskowa w systemie danin publicznych w Polsce*. Warszawa: Uczelnia Warszawska im. Marii Skłodowskiej-Curie.

Czarnecki, Sławomir. 2017a. "Niekorzystne warunki klimatyczne a dopuszczalność pobierania opłaty miejscowej – glosa do wyroku WSA w Krakowie z dnia 10 lipca 2017 r. (III SA/Kr 535/15)." *Przegląd Podatków Lokalnych i Finansów Samorządowych* 12:35–44.

Czarnecki, Sławomir. 2017b. "Opłata uzdrowiskowa w prawie polskim – rys historyczny." *Przegląd Podatków Lokalnych i Finansów Samorządowych* 8:15–20.

Czarnecki, Sławomir. 2017c. "Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia z 25 lutego 2016 r. (II FSK 3866/13)." *Biuletyn Uzdrowiskowy SGU RP* 3:65–72.

Czarnecki, Sławomir. 2017d. "Opłaty uzdrowiskowa i miejscowa – podobieństwa i różnice." *Zeszyty Naukowe WSEI* seria: *Ekonomia* 1–2:118–20.

Dowgier, Rafał, Piotr Pietrasz, Mariusz Popławski, et al. 2017. *Ordynacja podatkowa. Komentarz*. Warszawa: Wolters Kluwer.

Dudar, Grzegorz. 2017. "Komentarz do art. 17 ustawy o podatkach i opłatach lokalnych." Lex el.

Etel, Leonard. 2011a. "O potrzebie zmian w lokalnym prawie podatkowym – cz. 1." *Finanse Komunalne* 11:5–19.

Etel, Leonard. 2011b. "O potrzebie zmian w lokalnym prawie podatkowym – cz. 2." *Finanse Komunalne* 12:5–18.

Etel, Leonard, and Rafał Dowgier. 2013. *Podatki i opłaty lokalne – czas na zmiany.* Białystok: Temida 2.

Etel, Leonard, Sławomir Presnarowicz, and Grzegorz Dudar. 2008. *Podatki i opłaty lokalne. Podatek rolny. Podatek leśny. Komentarz.* Warszawa: Dom Wydawniczy ABC.

Gliniecka, Jolanta. 2007. *Opłaty publiczne w Polsce. Analiza prawna i funkcjonalna.* Bydgoszcz–Gdańsk: Oficyna Wydawnicza Branta.

Golba, Jan. 2001. "Analiza aktualnej sytuacji prawnej uzdrowisk polskich. Referat wygłoszony na Kongresie Uzdrowisk Polskich w Polanicy." *Biuletyn Informacyjny SGU RP. Jedziemy do wód w...* 3:23–30.

Golba, Jan. 2020. *Historyczne i prawne aspekty funkcjonowania uzdrowisk w Polsce.* Warszawa: C.H. Beck.

Hammerl. Robert. 2012. *Systematik der österreichischen Tourismusabgaben und ihre finanzverfassungsrechtlichen*. Grundlagen. Wien. Master thesis.

Krupa, Jan, and Tomasz Wołowiec. 2010. "Uzdrowiska Polski Wschodniej wobec wyzwań rozwojowych – turystyka zrównoważona." In *Współczesne trendy funkcjonowania uzdrowisk – klastering*, edited by Jan Krupa, and Jan Hermaniuk, 7–35. Rzeszów: Wyższa Szkoła Informatyki i Zarządzania.

Lewy, Raimond. 2019. "La taxe de séjour." https://www.paris.fr/pages/taxe-de-sejour-modalites-pour-declarer-en-ligne-7210 [accessed: 22.04.2022].

Miemiec, Wiesława. 2005. *Prawne gwarancje samodzielności finansowej gminy w zakresie dochodów publicznoprawnych.* Warszawa: Kolonia Limited.

Niezgoda, Andrzej. 2012. *Modyfikacja zakresu działania gmin uzdrowiskowych oraz posiadających status obszaru ochrony uzdrowiskowej a podział zasobów.* Warszawa: Lex Wolters Kluwer.

Swianiewicz, Paweł, and Julita Łukomska. 2018. "Wpływy z opłaty miejscowej i uzdrowiskowej. Ranking." *Wspólnota* 6:1–12.

Wołowiec, Tomasz. 2002. "Taksa kuracyjna – źródeł dochodów gmin uzdrowiskowych (rozwiązania niemiecki i austriackie)." *Biuletyn Informacyjny Stowarzyszenia Gmin Uzdrowiskowych RP* 1:89–106.

Wołowiec, Tomasz. 2003a. "Finansowe ograniczenia rozwoju polskich uzdrowisk." *Ekonomika i Organizacja Przedsiębiorstwa* 3:56–63.

Wołowiec, Tomasz. 2003b. "Sposoby rewitalizacji polskich uzdrowisk – ustawa o gminach uzdrowiskowych i inne formy aktywizacji społeczno-gospodarczej." *Folia Turistica* 14:5–29.

Wołowiec, Tomasz, and Marcin Duszyński. 2003. "Development limitations of Polish spas (legal and financial barriers)." In *Issues of tourism and health resort management*, edited by Witold Kurek, 317–26. Kraków: Uniwersytet Jagielloński.

Wołowiec, Tomasz. 2004. "Metody stymulowania konkurencyjności gospodarczej polskich gmin uzdrowiskowych." *Samorząd Terytorialny* 10:55–62.

Wołowiec, Tomasz. 2005. "Konkurencyjność polskich gmin uzdrowiskowych w warunkach integracji z Unią Europejską." *Roczniki Nauk Społecznych – Ekonomia i Zarządzanie*, vol. XXXIII, 165–91.

Wołowiec, Tomasz. 2007. "Wpływ ograniczeń administracyjno-prawnych na rozwój polskich gmin uzdrowiskowych." *Samorząd Terytorialny* 1–2:75–84.

Wołowiec, Tomasz, and Krzysztof Kaganek. 2007. "Administracyjno-prawne uwarunkowania funkcjonowania gmin uzdrowiskowych w Polsce i reaktywowania koncepcji uzdrowisk." *Folia Turistica* 18:109–20.

Wołowiec, Tomasz. 2013. "Zasadność poboru opłaty uzdrowiskowej za pobyt w szpitalach uzdrowiskowych (artykuł polemiczny)." *Przegląd Podatków Lokalnych i Finansów Samorządowych* 9:20–25.

Wołowiec, Tomasz. 2014. "Kwestie formalno-prawne poboru opłaty uzdrowiskowej w szpitalach uzdrowiskowych." In *Obrót powszechny i gospodarczy-problemy publicznoprawne i ekonomiczne*, edited by Iwona Ramus, 213–20. Kielce: Wyższa Szkoła Ekonomii, Prawa i Nauk Medycznych.

Wołowiec, Tomasz. 2015. "Pobór opłaty uzdrowiskowej – glosa do wyroku Wojewódzkiego Sądu Administracyjnego w Bydgoszczy z 27.04.2011 (I SA/Bd 76/11)." *GLOSA – Prawo Gospodarcze w orzeczeniach i komentarzach* 2:120–26.

Wołowiec, Tomasz. 2016a. "Pobyt w szpitalu uzdrowiskowym a obowiązek poboru opłaty uzdrowiskowej." *Przegląd Prawa Publicznego* 1:64–73.

Wołowiec, Tomasz. 2016b. "Zakres i specyfika odpowiedzialności inkasenta opłaty miejscowej i uzdrowiskowej." *Prawo Finansów Publicznych* 11:24–27.

Wołowiec, Tomasz, and Dariusz Reśko. 2011. *Opłata miejscowa i uzdrowiskowa. Aspekty teoretyczne i praktyczne*. Rzeszów: Wyższa Szkoła Biznesu – National-Louis University & Instytut Badań i Analiz Finansowych Wyższej Szkoły Informatyki i Zarządzania z siedzibą w Rzeszowie.

Wołowiec, Tomasz. 2018. "Zakres i specyfika odpowiedzialności inkasenta opłaty miejscowej i uzdrowiskowej." *Procedury Administracyjne i Prawne* 1:25–29.

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